IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. S271049

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

AHMED MUMIN,
Defendant and Appellant.

Court of Appeal
Fourth District
Division One
Case No. D076916

San Diego County
Superior Court
Case Number
SCD261780

APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT

The Honorable Kenneth K. So, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Issues Presented

1. Did the trial court err by providing a kill zone instruction?

2. Did the Court of Appeal apply the proper standard of review under *People v. Canizales* (2019) 7 Cal.5th 591 in holding the trial court did not err in providing the kill zone instruction?

Introduction

This Court's opinion in *People v. Canizales* (2019) 7 Cal.5th 591 concerned "the evidentiary basis for applying, and instructing on, the kill zone theory for establishing the intent to kill element of attempted murder." (*Id.* at p. 602.) This case is largely about unpacking the folds within the analysis of *Canizales* for a clearer understanding of the standards that trial courts should apply to determine the propriety of a kill zone instruction in the first instance and the standards that appellate courts should apply in reviewing those determinations on appeal.

This examination of *Canizales* and its progeny brings into focus two main points. First, trial courts must be vigilant in enforcing the constraints this Court set out in strictly limiting the use of the kill zone theory to protect against the "substantial potential" for its abuse in attempted murder prosecutions. Of particular importance is the condition that a kill zone instruction is improper unless the *only* inference that can reasonably be drawn from the evidence is that the defendant acted with the requisite, specialized form of *concurrent* intent to kill.

Second, when a kill zone instruction is challenged on appeal as improper for want of sufficient supporting evidence, the

appellate court must review the challenge for what it is—a claim of instructional error—and under the review standards that apply to reviewing such claims. Those standards are designed to ensure that a trial court has properly discharged its fundamental duty to instruct the jury on the applicable law and to concomitantly refrain from instructing it on unsupported or otherwise invalid theories of guilt. Vigilant application of those standards is part and parcel of protecting against the uniquely dangerous risks posed by kill zone instructions.

Anything less risks undermining the important safeguards this Court so carefully established in *Canizales*. And reviewing these claims through the deferential lenses courts wear in addressing garden variety "sufficiency-of-the-evidence" claims, as the Court of Appeal did here, risks effectively insulating from meaningful review all manner of attempted murder convictions secured through clearly improper kill zone instructions.

Canizales is the beacon guiding the right analysis and the right result. Settled principles of appellate review take us the rest of the way, with reversal as the inevitable destination here.

Statement of the Case and Facts

Mumin was convicted of special-circumstance murder (§§ 187, subd. (a),[1] 190.2, subd. (a)(17)), burglary (§ 459), and robbery (§ 211), for allegedly shooting and killing a patron during an armed robbery of a convenience store in San Diego. (3CT 580-581, 585-587, 600.) He was further convicted of two counts of

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1 All statutory citations are to the Penal Code.

willful, deliberate, and premeditated attempted murder of a peace officer (§§ 664, subd. (e)(1) / 187, subd. (a), 189), two counts of assault with a handgun on a peace officer (§ 245, subd. (d)(2)), and two counts of handgun assault (§ 245, subd. (b)), for allegedly attempting to kill two police officers by firing three gunshots from inside a community center room at an apartment complex where he was hiding while police were searching for him. (3CT 588-599.)

On appeal, Mumin principally contended that the trial court prejudicially erred in instructing the jury on an invalid "kill zone" theory of attempted murder liability. The Court of Appeal rejected this contention in a published opinion, *People v. Mumin* (2021) 68 Cal.App.5th 36, now the subject of this Court's review.[2]

The following is a summary of the evidence at trial:

Mumin was implicated as the perpetrator in an armed robbery that led to the shooting death of a patron at an AM/PM convenience store in San Diego on the morning of April 16, 2015, and law enforcement tracked him down at an apartment complex on Winona Avenue two days later. (10RT 2019-2020, 2033-2034, 2041-2043, 2048-2050.) Law enforcement officers from various units of the San Diego Police Department conducted a search of the complex during the early morning hours of April 18th. (11RT 2355-2361, 2366, 2368, 2370, 2375-2376, 2398.) Wearing vests with "police" insignias, the officers moved through the complex in groups over a period of about an hour, conducting "call-outs" at

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[2] The assault-with-a-semiautomatic-firearm convictions were vacated as lesser included offenses of the convictions of assault on a peace officer with a semiautomatic firearm. (*Id.* at p. 63.)

apartment units—knocking on doors, announcing their presence, ordering occupants outside, and searching inside—while they looked for Mumin. (11RT 2426-2427.) A helicopter unit hovered above the complex for a portion of this time. (11RT 2390, 2392, 2474-2477; 12RT 2662-2663, 2672.)

As law enforcement was converging on the complex, Mumin pleaded unsuccessfully with a resident to give him a ride "somewhere out of [t]here." (13RT 2906-2918, 2926-2927, 2931-2932.) Stuck inside the complex, Mumin encountered one of the officers, and he ran away seemingly "startled" or "scared." (11RT 2404-2407, 2425-2426.) He had a backpack containing a handgun and some ammunition. (12RT 2715-2717, 2748-2749, 2757.)

Mumin tried unsuccessfully to break into one of the apartments, prompting a call to the police. (12RT 2757-2758, 2775-2776; 2CT 318-329.) Mumin then went to another building across a playground area from this apartment and accessed a community center room on the first floor, below apartment 208. (11RT 2435-2438, 2415, 2417, 2420, 2455; 12RT 2648, 2682-2683, 2777.) The room was accessible by four doors along the front wall. (11RT 2381; 12RT 2698-2700, 2724.) There were no windows and thus no view through this wall. (12RT 2626-2727, 2754.)

The helicopter left the scene by around 2:00 a.m. (11RT 2474-2475; 12RT 2794.) Thereafter, some of the officers conducted a call-out at the unit where the attempted break-in was reported and cleared it. (11RT 2414-2415; 12RT 2647, 2759, 2776.) A resident reported that she had seen the suspect heading towards the community room building. (11RT 2417, 2420; 12RT

2777.) Detectives James Mackay, Luke Johnson, and Marc Pitucci proceeded there. (12RT 2777-2778.)

Mackay approached the front wall of the community room to check the doors (Doors 1, 2, 3, and 4, as sequentially labeled at trial). (11RT 2381-2382, 2494-2495; 12RT 2614-2615, 2724-2726, 2778.) He started with Door 1. (12RT 2495.) Pitucci stayed back about 30 feet, while Johnson stayed back about 25 feet and off to the left. (11RT 2383, 2389-2390; 12RT 2627, 2788, 2791.) Mackay did not knock, and no one announced their presence or said anything else outside the door. (12RT 2612, 2624, 2627, 2794-2795.) It was around 2:43 a.m. (12RT 2685-2686.)

Mackay stood slightly to the right of Door 1 as a safety precaution, extended out his left arm, and touched the door handle in preparing to open the door. (11RT 2495-2497, 2500-2501; 12RT 2615-2617.) As Mackay told it, as soon as he "jiggled" the handle and the door opened slightly, a gunshot rang out and "came through" Door 1. (11RT 2497; 12RT 2616, 2624.) Mackay "spun around" to get out of the way. (11RT 2497; 12RT 2617.) He tripped over a short retaining wall to the right of Door 1 and fell onto the ground. (11RT 2497, 2501-2502.) As he was getting up, Mackay heard two more shots "from inside" the room in "[p]retty rapid fire" succession. (12RT 2618-2620.) From where he had fallen, he stood up and fired three return shots just before or after the third shot was fired from the room. (11RT 2497, 2501-2503; 12RT 2633-2635; 13RT 3003-3004.)

As Johnson described the events, he positioned himself 25 feet back and to "the left of the first door so that [he] was

standing almost in front of Door Number 2" to avoid being in the path of any gunshots that might be fired from behind Door 1. (12RT 2779.) Right after hearing the first shot erupt from the room, Johnson moved to the right of his original position, "completely out of the way to the west" of Door 1 and fired five return shots from there. (12RT 2781-2784, 2788-2789, 2791; 13RT 3003-3004.) Johnson recalled three shots being fired from the room in rapid succession and having returned fire just before or after hearing the third shot. (12RT 2781-2782, 2792.)

No one was struck by the gunfire from the room. (11RT 2504; 12RT 2620-2621, 2784.) Mumin, however, was hit by a bullet in the return fire. (11RT 2389; 12RT 2766.) He was taken into custody without further incident. (11RT 2388; 12RT 2763, 2766.) Inside the community room was a loaded 9-millimeter handgun, three cartridge casings of "hollow point" bullets fired from the gun, and additional ammunition. (12RT 2708-2723, 2748-2752, 2764; 13RT 2947-2948.) The same gun had been used in the AM/PM homicide. (13RT 2954-2959.)

Door 1 showed exterior damage from several bullet strikes but no apparent damage from gunshots fired out of the room, indicating that only the officers' return fire had struck this door. (13RT 2985-2988, 3011-3012.) Door 2 showed interior damage from two bullet strikes fired out of the room, indicating only gunfire from inside the room had struck that door. (13RT 2988-2992, 2997-2998, 3012.) The exit trajectory of the third bullet fired from the room was unknown, although investigators "assumed" one of the doors must have been ajar at one point

during the incident—presumably Door 1—and that this bullet had passed through the opening. (13RT 2995, 3009-3010.) Two of the bullets fired through Door 2 apparently terminated at a metal-door enclosure of a dumpster area across the common space, while the other bullet apparently struck the asphalt in front of the enclosure. (12RT 2703-2707; 13RT 2992-2996, 3009-3011, 3013-3014.) The order of the various shots into and from the room could not be determined. (13RT 3012-3013, 3015.)

Argument

I. The trial court erred in instructing on an invalid kill zone theory of liability.

This Court's opinion in *Canizales* provides the roadmap for analyzing claims of kill zone instructional error, and its clear directions lead straight to the conclusion that the trial court erred in permitting the jury to rely on a kill zone theory.

A. The essential elements and limitations of the kill zone theory

In *Canizales*, the Court began by summarizing the essential elements of a valid kill zone theory. First, "the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used," must be "such that the *only* reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target." (*Canizales*, *supra*, 7 Cal.5th at p. 597, italics added.) Second, "the alleged attempted murder victim who was not the primary target was located within that zone of harm." (*Ibid.*) When and "*only* when" the jury finds both to be true, "such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm." (*Id.* at pp. 596-597, italics added.)

The Court cautioned that "trial courts must be extremely careful in determining when to permit the jury to rely upon the

kill zone theory," because "under the reasonable doubt standard, a jury may not find a defendant acted with the specific intent to kill everyone in the kill zone if the circumstances of the attack *would also* support a reasonable alternative inference more favorable to the defendant." (*Id.* at p. 597, italics added.) "Permitting reliance on the kill zone theory in such cases risks the jury convicting a defendant based on the kill zone theory where it would not be proper to do so." (*Ibid.*) The Court emphasized that "[a]s past cases reveal, there is a substantial potential that the kill zone theory may be improperly applied, for instance, where a defendant acts with the intent to kill a primary target but with only conscious disregard of the risk that others may be seriously injured or killed." (*Ibid.*)

In fact, this Court has "repeatedly expressed skepticism over the general utility of a kill zone instruction." (*People v. Thompkins* (2020) 50 Cal.App.5th 365, 391.) Such an instruction is "never required" and "can often lead to error," because the standard instructions on any theory of direct liability will ensure the jury makes the requisite findings without the risks. (*People v. Medina* (2019) 33 Cal.App.5th 146, 156;[3] accord *People v. McCloud* (2012) 211 Cal.App.4th 788, 802.) California is one of the few jurisdictions that even recognizes the kill zone theory,[4]

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[3] Review was granted and held here but then dismissed after *Canizales* issued. (Cal. Rules of Court, rule 8.528(b)(1).)

[4] "[T]he doctrine only exists in a few states and is utilized most prominently in California and Maryland." (Kaitlin R.

which some commentators have advocated should be abandoned given its inherently prejudicial features. (O'Donnell at p. 587; see also https://www.killthekillzone.com/kill-zone-theory.)

The analytical framework established in *Canizales* was designed to assist courts in better navigating the inherent risks. Thus, after emphasizing that permitting reliance on this theory is improper where the evidence "would also" reasonably support an inference that the defendant did *not* act with requisite intent, the Court admonished that "in future cases trial courts should reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm." (*Canizales*, *supra*, 7 Cal.5th at p. 597, italics added).

B. The origins and development of the theory

At its core, "the intent to kill element must be examined independently as to each alleged attempted murder victim," since the "transferred intent" doctrine does not apply to attempted murder. (*Canizales*, *supra*, 7 Cal.5th at p. 602, citing *People v. Bland* (2002) 28 Cal.4th 313, 327-328.) The doctrine of "concurrent intent" underlying the kill zone theory posits that in acting with the intent to kill one person (the "primary target"), a person may concurrently intend to kill one or more other people around the target by creating a "zone of harm" designed to ensure

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O'Donnell, *The Problematic Use of the Kill Zone Theory*, 11 U.C. IRVINE L. REV. 583, 608 (2020) ("O'Donnell").

the death of that person by killing everyone within the zone. (*Id.* at p. 602.) The *Canizales* Court referred to *Ford v. State* (1993) 330 Md. 682—which "first articulated" this theory—and *Bland* for classic illustrations of the concept (*id.* at pp. 602-603), like using "an explosive device devastating enough to kill everyone in the group" when the target is within the group (*People v. Perez* (2010) 50 Cal.4th 222, 232, discussing *Bland*, at pp. 329–330).

The Court cited a series of three cases where it had found the kill zone theory "irrelevant or inapplicable to the facts presented," to contrast it from theories of direct attempted murder liability based on a specific intent to kill each alleged victim. In *People v. Smith* (2005) 37 Cal.4th 733, the Court had upheld two attempted murder convictions against a defendant who just "narrowly miss[ed]" his ex-girlfriend and her infant child in firing a bullet directly at her while she was seated in a car with the baby positioned directly behind her, but based on evidence of the defendant's specific intent to kill them both. (*Canizales*, *supra*, 7 Cal.5th at pp. 603-604.)

In *People v. Stone* (2009) 46 Cal.4th 131, the Court upheld an attempted murder conviction of a defendant who had no specific target in mind when he fired a gun at a group of ten rival gang members, based on his intent to kill at least *one of them*. (*Canizales*, *supra*, 7 Cal.5th at p. 604.) The *Stone* theory concerns the "indiscriminate would-be killer" without a specific target (*Stone* at p. 140), whereas the kill zone theory is dependent on a *concurrent* intent to kill *non*-target victims, which cannot exist without a primary target. (*Canizales* at pp. 604, 608-609; see also

McCloud, *supra*, 211 Cal.App.4th at p. 802, fn. 6 [explaining these two theories "are mutually exclusive"].)

In *People v. Perez*, *supra*, 50 Cal.4th 222, the Court held that a defendant's firing of a single shot towards a group of seven police officers and a civilian could support only a single conviction of attempted murder. (*Canizales*, *supra*, 7 Cal.5th at p. 604.) The evidence did not show the defendant "knew or specifically targeted any particular individual or individuals in the group he fired upon." (*Perez*, at p. 230.) Along the way, the Court admonished that "shooting at a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder." (*Id.* at p. 224.)

Canizales traced the development of the kill zone theory as an alternative theory of liability based on the earlier articulations of the concurrent intent doctrine in *Bland*, *Stone*, *Smith*, and the Maryland case law that originally developed it. (*Canizales*, *supra*, 7 Cal.5th at pp. 604-606.) None of these cases recognized the principle annunciated in *Canizales* that this theory must be limited to cases where the *only* reasonable inference from the evidence is the defendant created a kill zone and specifically intended to kill everyone within it in order to kill the target (hereafter the "singular permissible inference rule").

The Court identified as a "helpful basis for a clear and workable test" the general inquiry of Justice Werdegar's dissenting opinion in *Smith*, which asked "'(1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that

the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm.'" (*Canizales*, *supra*, 7 Cal.5th at p. 606, quoting *Smith*, *supra*, 37 Cal.4th at pp. 755-756.) While this worked as a foundation, "the potential for the misapplication of the kill zone theory" still remained, necessitating "a more clearly defin[ed]" kill zone theory" for future cases. (*Ibid.*)

C. *Canizales's* new formulation of the theory

The singular permissible inference rule was key to shoring up the deficiencies in the prior formulation of the kill zone theory. Citing *People v. Bender* (1945) 27 Cal.2d 164, 175, the Court emphasized that "when the prosecution's theory substantially relies on circumstantial evidence, a jury must be instructed that it cannot find guilt based on circumstantial evidence when that evidence supports a reasonable conclusion that the defendant is not guilty." (*Canizales*, *supra*, 7 Cal.5th at p. 606.) In *Bender*, the Court had underscored the trial courts' general duty to inform the jury that, "to justify a conviction" based solely or primarily on circumstantial evidence, "the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." (*Bender*, at p. 175; accord *People v. Livingston* (2012) 53 Cal.4th 1145, 1167.)

But the Court went on to caution that "*even when* a jury is otherwise properly instructed on circumstantial evidence and reasonable doubt, the potential for misapplication of the kill zone theory remains troubling." (*Canizales*, 7 Cal.5th at p. 607, italics

added.) It then restated the singular permissible inference rule in terms of the two-part test adapted from *Smith*—that this theory may be properly applied "*only* when" a jury concludes that (1) "the only reasonable inference is that the defendant intended to create a zone of fatal harm," and (2) the alleged non-target victim was located within the zone of harm. (*Ibid.*)

The Court explained what should primarily drive this analysis—"the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target." (*Canizales*, *supra*, 7 Cal.5th at p. 607.) The Court reiterated that "[e]vidence that a defendant who intends to kill a primary target acted with only conscious disregard of the risk of serious injury or death for those around a primary target does not satisfy the kill zone theory." (*Ibid.*) The Court counseled that the "formulation of the kill zone theory here guards against the potential misapplication of the theory." (*Ibid.*)

The Court noted that "[p]ast appellate court opinions articulating the kill zone theory are incomplete to the extent that they do not require a jury to consider the circumstances of the offense in determining the application of the kill zone or imply that a jury need not find a defendant intended to kill everyone in the kill zone as a means of killing the primary target," and it cited a series of cases as illustrative. (*Canizales*, *supra*, 7 Cal.5th at p. 607, fn. 5.) Some of these cases already contained cautionary admonitions. (See e.g., *Medina*, *supra*, 33 Cal.App.5th at p. 155

[explaining that cases like *People v. Adams* (2008) 169 Cal.App.4th 1009 wrongly dilute the test to one where implied malice is sufficient]; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1243 [the kill zone theory "is not a one-size-fits-all shortcut" to proving the requisite mental state]; *McCloud*, *supra*, 211 Cal.App.4th at p. 798 [this is not "an exception" or "a means of somehow bypassing" the requisite mental state].) Strong as the admonitions were, they didn't go far enough. And none of these cases recognized the singular permissible inference rule.

The Court went on to emphasize that trial courts "must exercise caution" and "tread carefully" whenever the prosecution proposes relying on this theory. (*Canizales*, *supra*, 7 Cal.5th at p. 608.) It counseled again that the theory is appropriate "*only* in those cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm." (*Ibid.*, italics added.) Given these restrictive criteria, the Court "anticipate[d] there will be relatively few cases in which the theory will be applicable and an instruction appropriate." (*Ibid.*)

The Court observed that the then-standard version of CALCRIM No. 600 failed to "adequately explain the kill zone theory." (*Canizales*, *supra*, 7 Cal.5th at p. 608, italics added.) It contained no mention of the singular permissible inference rule or the factors that the Court deemed most relevant. (See *id.* at p. 601, fn. 3.) CALCRIM No. 600 has since been revised to now expressly provide that "*the People must prove that … the only*

reasonable conclusion from the defendant's use of lethal force, is that the defendant intended to create a kill zone"—and to include the main factors relevant to determining the defendant's intent. (CALCRIM No. 600, 2021 edition, italics added.)

D. The instructional error analysis in *Canizales*

Analyzing the propriety of the kill zone instruction in *Canizales* under this new formulation, the Court was guided by a single principle: "'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.'" (*Canizales*, *supra*, 7 Cal.5th at p. 609, quoting *People v. Saddler* (1979) 24 Cal.3d 671, 681, and citing *People v. Clark* (2016) 63 Cal.4th 522, 605.)

In *Saddler*, the defendant challenged as "unsupported by the evidence" an instruction permitting the jury to draw an adverse inference based on his alleged failure to explain or deny evidence or facts against him. (*Saddler*, *supra*, 24 Cal.3d at p. 681.) The *Saddler* court invoked the general principle cited above and "the correlative duty" of trial courts "'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.'" (*Ibid.*, quoting *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10.)[5] The Court said, "[o]ur duty then is to ascertain if

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[5] This Court has recognized that trial courts have the related "duty to screen out invalid theories of conviction, either by

defendant Saddler failed to explain or deny any fact of evidence that was within the scope of relevant cross-examination." (*Id.* at p. 682.) It then analyzed the record and concluded the evidence failed to support the instruction. (*Id.* at pp. 682-683.) *Clark* considered a challenge to an instruction permitting an inference of consciousness of guilt based on the alleged procurement of false or fabricated evidence. (*Clark*, *supra*, 63 Cal.4th at p. 604.) Citing just the general principle concerning a trial court's duty to ensure the evidence supports any inference that the jury is instructed it may draw in determining the charges, the Court concluded "such evidence appeared in the record" and thus rejected the challenge. (*Id.* at pp. 605-606.)

The *Canizales* court applied the *Saddler*-*Clark* principles as the framework on review for determining the propriety of the kill zone instruction there. It concluded that substantial evidence did not support the required finding that the defendants intended to kill everyone in the alleged kill zone. (*Canizales*, *supra*, 7 Cal.5th at pp. 609-612.) The Court rejected the Attorney General's reliance on the number of shots fired, noting that this "is simply one of the evidentiary factors," it found the proximity factor insufficient "[e]ven accepting as more credible" the prosecution's evidence (*id.* at p. 611), and it noted the lack of any injury weighed against a finding of the requisite intent (*id.* at p. 610). The Court reiterated the singular permissible inference rule in this context. (*Id.* at pp. 611-612, italics added.)

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appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131).

E. The instructional error in this case

The error here is plain under the dictates of *Canizales*.

1. The absence of any evidence that Mumin was aware of the alleged non-target victim's presence precludes any application of a kill zone theory of liability.

Because the analytical basis of this theory is the *concurrent* intent doctrine, all the necessary elements revolve around the core requirement that the defendant acted with the intent to *kill* the alleged *non*-target victim(s) *in addition to* the alleged primary target(s), since killing the former is the alleged means of effectuating the death of the latter under this theory. (*Canizales*, 7 Cal.5th at pp. 597, 602, 607, 614.) And again, the theory's application is further constrained by the singular permissible inference rule. (*Id.* at pp. 597, 606, 607, 608, 611-612.)

All the cases properly applying and discussing the proper application of this theory have involved situations where the defendant was actually aware of the presence of the alleged non-target victim(s) or, at the very least, was aware of facts that would undeniably put a reasonable person on clear notice of their presence. That only makes sense when the essence of the theory is that the defendant set out to kill one or more particular people by employing means specifically designed to kill everyone else around the target(s). Thus, the "kill zone" cases have involved:

- Firing "a flurry of bullets" from "point-blank range" at the target's vehicle as he and his passengers attempted to flee (*Bland*, *supra*, 28 Cal.4th at pp. 330-331);

- Looking inside a car where the target and his passengers were sitting and then "spray[ing] the car with nearly a dozen bullets, from close range," striking all the occupants and killing two of them (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1233, 1244);

- Approaching the target and group of three other people all "standing in close proximity to one another" and then firing "as many as ten shots" at them, striking three of them (*Washington v. U.S.* (D.C. Ct.App. 2015) 111 A.3d 16, 24);

- Firing "a hail of bullets" at a vehicle in which the target was seated along with multiple other occupants (*People v. Tran* (2018) 20 Cal.App.5th 561, 566);

- Firing ten rounds from close range directly at a vehicle in which the target was one of the occupants, striking six of the seven occupants and killing three of them (*People v. Stevenson* (2018) 25 Cal.App.5th 974, 979-980, review granted and held but then dismissed after *Canizales*);

- "[C]reating a hail of bullets at close range" around the target and his companion right next to one another (*People v. Windfield* (2021) 59 Cal.App.5th 496, 517-519); and

- "[C]reating a hail of bullets at close range" around the target and her companions "within a few feet" of each other (*People v. Dominguez* (2021) 66 Cal.App.5th 163, 187).

It was the same in the *Ford* case, the genesis of California's kill zone theory: the defendant was properly held accountable for assaultive crimes against all the vehicle passengers just the same as he was for the drivers of each vehicle that he and his companions pummeled with large rocks from the roadside, because the evidence showed he "must have seen each of them in the cars" being targeted. (*Ford*, *supra*, 330 Md. at 705-707.)

In *People v. Vang* (2001) 87 Cal.App.4th 554, the court found sufficient evidence to support attempted murder convictions of all the occupants within two residences that the defendants sprayed with numerous directly-targeted shots from "high-powered, wall-piercing weapons," because the record showed they "harbored a specific intent to kill *every living being* within the residences they shot up." (*Id.* at pp. 563-564, italics added.) The fact that "they could not see all of their victims" did not change the equation *because* they acted with the "express malice to kill *as to those victims*"—i.e., "every living being" inside. (*Id.* at p. 564, italics added.) To any extent this case might suggest that knowledge or reason to know of the presence of non-target victims is unnecessary for the kill zone theory, it should be noted that *Vang* was neither prosecuted nor reviewed as a "kill zone" case and it predated *Canizales* which "more clearly defin[ed]" the test for applying the kill zone theory to protect against the "substantial potential" for misuse subsisting within the older cases. (*Canizales*, *supra*, 7 Cal.5th at pp. 597, 602, 606.)

Indeed, the only published opinion apparently applying the kill zone theory in this manner is *Adams*, *supra*, 169 Cal.App.4th 1009, where the court said the theory may apply to a defendant "who does not know the presence of" alleged non-target victims so long as the defendant "intentionally created a zone of harm and … the victims were in that zone of harm." (*Id.* at pp. 1022-1023.) But this was based on a rationale that the theory imposes liability where the defendant creates a kill zone "despite the recognition, or with acceptance of the fact, that a *natural and*

probable consequence of that act would be that anyone within that zone *could* or would die." (*Id.* at p. 1023, italics added.) As the *Medina* court pointed out, such a standard "replaces the specific intent/express malice required for an attempted murder conviction with conscious disregard for life/implied malice." (*Medina*, *supra*, 33 Cal.App.5th at p. 155.) And the *Canizales* court cited *Medina* with approval on this very point, thereby disapproving *Adams'* attenuated standard. (*Canizales*, at p. 614.)

Evidence that the defendant was aware of the presence of the alleged non-target victim(s) or, at the least, aware of facts that would undeniably put a reasonable person on clear notice of their presence, is a matter of necessity and common sense given the substantive requirements and limitations of the kill zone theory. (See e.g., *McCloud*, *supra*, 211 Cal.App.4th at p. 804, fn. 8 [defendants' barrage of gunfire outside a party at a lodge ended up striking someone inside the lodge, but the defendants could not be convicted of attempted murder as to that person because there was no evidence they "specifically targeted [him], had any reason to target him, knew that he was inside the lodge, knew where in the lodge he was located, or even knew him at all"].)

Even in the *Smith* case, where the defendant was convicted of the attempted murder of his ex-girlfriend's baby under a theory of *direct* liability, the Court emphasized that the defendant saw the baby and was fully aware the baby was in the line of fire. (*Smith*, *supra*, 37 Cal.4th at pp. 742, 746-747, 748.) This factor must be at least as equally important for any prosecution based on *concurrent* intent. It's one thing to say the

defendant need not know the specific identity of a non-target victim when the defendant acts with the intent to kill, as with "a bomber who places a bomb on a commercial airplane intending to kill a primary target by ensuring the death of all passengers" or a defendant who fires a gunshot at a gathering of rival gang members with the intent to kill at least one but not caring who. (See *Stone*, *supra*, 46 Cal.4th at p. 140.) Even in those instances, "'difficulties can arise ... regarding *how many* attempted murder convictions are permissible.'" (*Canizales*, *supra*, 7 Cal.5th at p. 604, quoting *Stone* at pp. 140-141.) But it's another thing to say the defendant need not have any knowledge or awareness that *anyone else* at all is there to be convicted of the attempted murder of others who happen to be there. That's too much of a stretch for a theory that already needs to be "reign[ed] in" to avoid its substantial potential for abuse (*Thompkins*, *supra*, 50 Cal.App.5th at p. 391)—especially when the doctrinal foundation of the kill zone theory is that the defendant *intended to kill* the alleged non-target victim(s) to effectuate the target's death.

Here, it is essentially undisputed that Mumin did not know and would not have been on any clear notice that Johnson, the alleged non-target victim, was present on the scene *at all* when Mumin fired out of the room. The prosecutor expressly conceded that, before firing, Mumin "was on the other side of those doors in a pitch black room with no lights on, dark outside," with "no other sounds around, . . . unaware of who was outside those doors." (16RT 3871.) So, not only did the prosecutor admit there was no evidence Mumin knew *where* Johnson was located outside

the doors (16RT 3840 ["I can't prove the defendant knew Detective Johnson was standing in the exact position that he was"]), she admitted there was no evidence he knew *anyone* was there at all besides Mackay, the alleged primary target.

And nothing in the record suggests Mumin was or would have been aware that Johnson or anyone else was present outside the closed doors of the community room's windowless front wall when Mackay approached Door 1: the helicopter was long gone (11RT 2474-2475; 12RT 2794); the "call-outs" were over and the last one occurred at a different building 75 to 100 feet away across a playground (12RT 2648, 2764-2765); no one had made any announcements, knocked on the door, said anything, or made any other noise as Mackay approached the door (12RT 2794); and it was quiet enough that the tenant who lived directly above the community room in apartment 208 slept right through everything until the gunfire erupted (13RT 2920-2922).

With no evidence at all that Mumin had any idea Johnson or anyone else was present outside the community room besides the person trying to open the door—much less where any such other person(s) *might* be—a "kill zone" theory of liability for the attempted murder of Johnson was necessarily invalid.

2. The record fails to establish that Mumin created a "kill zone" around Mackay with the intent to kill everyone within the alleged zone.

A "*zone* of fatal harm" in any kill zone theory presupposes the presence of one or more people *in addition to* the primary target, all being within some defined area or space, the whole of

which the defendant targets with the "intent to kill *everyone*." (*Medina*, *supra*, 33 Cal.App.5th at p. 156, fn. 9, italics original; *Canizales*, *supra*, 7 Cal.5th at p. 597.) Surely, one cannot create or intend to create such a zone for such a purpose with no awareness that anyone other than the target is there.

So it is here. With no idea that Johnson or any other officer was *anywhere* outside the community room besides the person opening Door 1, Mumin necessarily could not have created or intended to create a "zone of fatal harm" within any particular area or space outside the door around Mackay, the alleged primary victim. He had to have acted with the intent to kill Johnson *concurrently with* Mackay under a kill zone theory. It simply cannot logically or fairly be said that one could do so being unaware that anyone else was present in or around the space where the defendant exacts force against the actual target.

When the defendant cannot be attributed any awareness of others present around the target, there necessarily cannot be any *non*-target victims and, without any non-target victims, there necessarily cannot be the required *primary* target, since the actual target can be "primary" only in relation to one or more non-target victims whose death is the *secondary* objective. The kill zone theory simply doesn't apply. Rather, the defendant must be prosecuted under traditional theories of direct liability for the attempted murder of the target. As for anyone else who may have been present around the target and exposed to harm by virtue of the defendant's conduct, the defendant must be prosecuted, if at all, "according to the liability which the law assigns it, but no

more." (*Bland*, *supra*, 28 Cal.4th at p. 326.) Because Mumin acted unaware that anyone other than Mackay was present outside the room, Mackay was not and could not be the "primary" target at the center of the prosecution's invalid kill zone theory.

3. None of the other relevant factors supports the existence of the requisite intent.

What happened here is nothing on the order of the destructive force seen in cases like *Bland*, *Campos*, *Washington*, *Tran*, *Stevenson*, *Windfield*, and *Dominguez* discussed above, where the defendants brazenly attempted to settle personal vendettas with their targeted victims in face-to-face encounters by tracking them down and blasting numerous rounds at and all around them while wounding or killing multiple people. *Canizales* itself involved the firing of at least five gunshots towards the alleged target and non-target victims (*id.* at p. 600), yet even that did not suffice for a kill zone theory (*id.* at p. 610). Mumin fired only three shots in "rapid succession" from behind the closed doors of the community room, and then only *in reaction* to Mackay's unannounced opening of Door 1, as Mumin had been trying to hide and *avoid* contact with anyone. (12RT 2618-2620.)

Further, the kind of "proximity" that weighs in favor permitting a kill zone instruction is the kind seen in the above illustrations where the defendants created a "zone of fatal harm" while hunting down and settling scores with their personal enemies. (*Canizales*, *supra,* 7 Cal.5th at pp. 610-611.) Even close proximity in face-to-face confrontations is not determinative, as

seen in cases like *People v. Cardenas* (2020) 53 Cal.App.5th 102, 114, and *People v. Booker* (2020) 58 Cal.App.5th 482, 499, where the defendants perpetrated their shootings up-close on public streets but the other circumstances did not support an intent to kill the alleged non-target victims. What we have here is far more attenuated than any of that: Mumin fired his single series of three rapid-succession shots from inside a room while the alleged non-target victim was standing outside the room at a location unbeknownst to him, some 25 feet back from the front wall and off to the side of the door being opened by the alleged primary target. (11RT 2383, 2389-2390; 12RT 2677, 2791.)

This also did not occur inside a structure, alleyway, cul de sac, or other place "from which victims would have limited means of escape." (*Canizales*, *supra*, 7 Cal.5th at p. 611.) The situation here was nothing like being inside the bounded walls of a restaurant, like in *Thompkins*, *supra*, 50 Cal.App.5th at p. 394, where even that was not enough. Rather, the whole situation unfolded within an unbounded space of open common areas around the community center building, within which the alleged victims could and did readily escape any harm from the gunfire. Johnson was able to initially position himself outside so as to stand clear of where he might have been vulnerable if someone were to open fire through Door 1. (12RT 2779.) Then, as soon as the gunfire erupted from inside the room, Johnson was able to and did immediately shift to the right, so that he was "completely out of the way to the west" of Door 1. (12RT 2781-2784, 2788-

2789, 2791; 13RT 3003-3004.) Given the openness of the area, Johnson was never actually exposed to a "zone of fatal harm."

What's more, the fact is *at least* two of the three shots Mumin fired were directed at Door 2, not Door 1 where the alleged primary target (Mackay) was located, and at worst the third shot exited through the open space in the doorway of Door 1 to strike a dumpster enclosure across the way. (13RT 2985-2992, 2995, 2997-2998, 3009-3012.) None of the shots had a direct line of trajectory at or through Door 1 itself, much less a direct line of trajectory to the location of Mackay behind Door 1, and none of the shots hit Mackay or anyone else outside those doors. (11RT 2504; 12RT 2620-2621, 2784.) This undermines even further any inference that Mumin was acting with an intent *to kill* Mackay—the necessary *direct* intent—much less with the intent *to kill* everyone else outside the doors as means of killing Mackay—the necessary *concurrent* intent. (See *Canizales*, *supra*, 7 Cal.5th at p. 611 ["this inquiry is at least informed by evidence that neither Pride nor Bolden was hit by any of the shots fired by Windfield"].)

4. Any reasonable inference that Mumin acted with the requisite intent must be the *only* such inference from the evidence, and it isn't.

Under *Canizales*, a kill zone theory applies if the one and only inference that may reasonably be drawn from the evidence is that Mumin "intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target" with the alleged non-target victim "located within that zone of

harm." (*Canizales*, *supra*, 7 Cal.5th at p. 597.) Even if the evidence *may* reasonably lend itself to such an interpretation, this is not the *only* reasonable conclusion. The facts quite strongly, if not unavoidably, lead to the opposite conclusion—that Mumin did not act with an intent to *kill* either Mackay or anyone else outside the doors of the community room during the incident, or at least that he did not act with an intent to kill *everyone* else outside even if he did act with an intent to kill Mackay.

A trial court's fundamental instructional duties require it to ensure the record supports any inference on which it permits the jury to rely in determining guilt (*Saddler*, *supra*, 24 Cal.3d at p. 681), "refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues" (*ibid.*), and "screen out invalid theories of conviction" (*Guiton*, *supra*, 4 Cal.4th at p. 1131).

Because it cannot be said that Mumin's having acted with the requisite intent for the kill zone theory is the only inference reasonably drawn from the record, permitting the jury to rely on that theory violated these duties. (*Canizales*, *supra*, 7 Cal.5th at p. 597, italics added [this instruction is improper if "the circumstances of the attack *would also* support a reasonable alternative inference more favorable to the defendant"].)

II. The Court of Appeal's opinion applies an overly lenient standard of review that fails to ensure meaningful appellate review of kill zone instructional error claims.

This instructional error should be clear under *Canizales* for the reasons discussed above. The Court of Appeal's opinion reaches quite a different conclusion, but under a standard of review that short-circuits a proper analysis on appeal.

A. The opinion's rationale

While the Court of Appeal's opinion acknowledges that the record supports reasonable inferences favorable to Mumin on the questions in dispute (see e.g., *Mumin*, 68 Cal.App.5th at p. 57), it sets those aside because "they do not make an inference of intent to kill unreasonable" (*id.* at p. 58). The court's opinion turns the inquiry around and asks whether Mumin "has shown the evidence *did not* support" the requisite intent to kill under the kill zone theory. (*Id.* at p. 58, italics added.) The basis for doing so is a restrictive reading of *Canizales*, which the Court of Appeal views as leaving appellate courts with a limited role in any challenge to a kill zone instruction as lacking sufficient support. The court's opinion sees *Canizales* as requiring appellate courts to defer considerably to the outcome, in the nature of reviewing a general sufficiency-of-the-evidence challenge (*id.* at pp. 48-51)—thereby viewing "'the whole record in the light most favorable'" and "'presum[ing] in support of the judgment the existence of

every fact the trier could reasonably deduce from the evidence'" (*id.* at p. 49, quoting *People v. Nelson* (2016) 1 Cal.5th 513, 550).

Based on this review framework, the court reasons that any claim on appeal challenging a kill zone instruction as invalid for want of sufficient support necessarily must fail so long as "the evidence supports *a* reasonable inference that the defendant had the requisite intent, even if our review of the evidence indicates the opposite inference would also be reasonable." (*Mumin*, *supra*, 68 Cal.App.5th at pp. 47-48, italics added.)

The Court of Appeal's opinion draws this interpretation from two sentences in the *Canizales* opinion where the Court discusses the kill zone theory as applying only when substantial evidence supports "*a* reasonable inference" that, if believed by the jury, would support the requisite intent. (*Canizales*, *supra*, 7 Cal.5th at pp. 609, 610, italics added.) From this, the opinion deduces that this Court implicitly incorporated "familiar principles of substantial evidence review" into its analytical framework. (*Mumin*, *supra*, 68 Cal.App.5th at pp. 48-50.) The Court of Appeal then conducts its entire analysis through the deferential lenses courts wear in considering general challenges to the legal sufficiency of evidence supporting a conviction (hereafter "legal sufficiency" standards). (*Id.* at pp. 49-52, 57.)

B. Nothing in the language of *Canizales* supports invoking the framework the Court of Appeal adopts.

"[W]hen interpreting an opinion, any one sentence must be viewed in the context of the entire opinion [citation], and

language must be construed in the context of the entire opinion." (*Caliber Paving Company, Inc. v. Rexford Industrial Realty and Management, Inc.* (2020) 54 Cal.App.5th 175, 181.) Interpreted as a whole and in light of the broader purposes it sought to achieve in safeguarding against the substantial potential for abuse in instructions on the kill zone theory, *Canizales* cannot be read so narrowly as to establish a framework akin to "legal sufficiency" review for claims of kill zone instructional error.

The only principles that the *Canizales* court applied as the framework for its standard of review were those designed to ensure trial courts properly discharge their instructional duties in "[p]ermitting reliance on the kill zone theory" (*Canizales*, *supra*, 7 Cal.5th at p. 597), particularly the duty to ensure the record supports the crucial inference—that the *only* reasonable inference is the defendant acted with the requisite intent (*id.* at p. 609). We can infer that the Court incorporated related instructional duties like those to which it implicitly referred in citing *Saddler* and *Clark*—i.e., to refrain from instructing on irrelevant principles that confuse the jury or relieve it from making necessary findings and to screen out invalid theories of conviction. (*Ibid.*) But nowhere does the *Canizales* opinion cite or rely on any of the cases or legal sufficiency standards that the Court of Appeal employs in setting up its review framework.

The *Canizales* court gave no indication it was bound to limitations requiring it to view the evidence "most favorably to the judgment presuming the existence of every fact that reasonably may be deduced from the record in support of the

judgment." (See *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1290, cited by the Court of Appeal.) Rather, it readily rejected the Attorney General's view of the evidence where inconsistent with its own review. (*Canizales*, *supra*, 7 Cal.5th at pp. 610-611.) And, in the one place where it did view the evidence favorably to the prosecution, the Court apparently did so for the sake of argument, not because it was *required* to do so under any legal sufficiency standards. (*Id.* at p. 611, italics added [rejecting the proximity factor as determinative "*[e]ven accepting* as more credible the prosecution's evidence" about the distance].)

C. The *Canizales* review framework is fully consistent with similar cases adjudicating similar claims.

The annals are full of cases like *Saddler* and *Clark* where the appellate courts employ the general instructional duties of trial courts as the sole guiding principles in reviewing such issues, with no mention of or reliance on legal sufficiency standards. (See e.g., *People v. Hart* (1999) 20 Cal.4th 546, 620 [concerning an instruction permitting an adverse inference based on alleged destruction of evidence]; *People v. Alexander* (2010) 49 Cal.4th 846, 920-921 [concerning an instruction permitting reliance on a theory of aiding and abetting]; *People v. Jiminez* (2016) 246 Cal.App.4th 726, 732-733 [concerning an instruction permitting an adverse inference about a witness's reputation]; *People v. Gomez* (2018) 6 Cal.5th 243, 287-290 [concerning an instruction permitting an adverse inference from the defendant's alleged consciousness of guilt]; *People v. Grandberry* (2019) 35

Cal.App.5th 599, 604, 607-609 [concerning an instruction permitting an adverse inference from the defendant's alleged failure to deny or explain evidence against him].)

Bland itself went through the whole analysis of the propriety of the trial court's instruction on the transferred intent doctrine without any mention of or reliance on general legal sufficiency standards. (*Bland*, *supra*, 28 Cal.4th at pp. 317-333.) And in *McCloud*, *supra*, 211 Cal.App.4th 788, the court analyzed a claim of kill zone instructional error using the same general principles concerning trial courts' affirmative instructional duties, with no reliance on the legal sufficiency standards the Court of Appeal applies here. (*Id.* at p. 796.) The *only* point at which the *McCloud* court referred to such standards was when it discussed the *separate* "sufficiency of the evidence" claim that the defendant had also raised. (*Id.* at p. 805.) There, and only there, did the court invoke a review-narrowing standard requiring it to "'view the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*Ibid.*, quoting *People v. Griffin* (2004) 33 Cal.4th 1015, 1028.)

Similarly, in *Cardenas*, *supra*, 53 Cal.App.5th 102, the court analyzed a challenge to a kill zone instruction as insufficiently supported with no mention of legal sufficiency standards. (*Id.* at pp. 113-119.) Its review of that issue was sharply distinguished from its review of the distinct claim that the attempted murder convictions were generally unsupported by legally sufficient evidence. Only there did the court refer to its

"limited" role requiring that it "draw all reasonable inferences in favor of the judgment" and treat all "[m]atters of credibility of witnesses and the weight of the evidence" as being within "'the exclusive province' of the trier of fact." (*Id.* at p. 119, fn. 11, quoting *Smith*, *supra*, 37 Cal.4th at pp. 738-739.)

A different panel of the same Court of Appeal that authored the *Mumin* opinion recently recognized the same fundamental distinction in review frameworks, by first analyzing the propriety of a kill zone instruction as instructional error and then separately addressing the question "whether the attempted murder convictions are supported by substantial evidence" in determining whether the defendant could properly be retried after reversal. (*Dominguez*, *supra*, 66 Cal.App.5th at p. 187.)

D. The correct standard of review focuses on ensuring trial courts properly discharge their instructional duties based on the evidence and applicable law.

Appellate courts apply a de novo standard of review in addressing claims that a trial court's instructions erroneously permitted the jury to rely on an inapplicable and thus improper theory of guilt. (*People v. Mitchell* (2019) 7 Cal.5th 561, 579; *People v. Williams* (2018) 26 Cal.App.5th 71, 82.) In reviewing such claims of jury misinstruction, the job of the appellate court is to assess the instructions as a whole and determine whether there is a reasonable likelihood that the jury misapplied or misunderstood the applicable law. (See e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 677 [considering a claim that the instructions permitted the jury to find a torture-murder special-

circumstance allegation true without the requisite actus reus]; *People v. Holmes* (Jan. 31, 2022) __ Cal.5th __, 2022 WL 277043, *37 [considering a claim that the instructions lessened the prosecution's burden of proof on the elements of a charge]; *People v. Lewis* (2021) 72 Cal.App.5th 1, 12 [considering a claim that "the trial court erred by instructing the jury it could convict him of kidnapping to commit rape based on deception alone"].)

Recently, in *In re Lisea* (2022) 73 Cal.App.5th 1041, the court specifically considered a defendant's claim that "there was insufficient evidence under *Canizales* to support the kill zone instruction." (*Id.* at p. 1049.) In doing so, it invoked this same general standard, reiterating that "[w]e review jury instructions to determine whether there was a reasonable likelihood that the jury applied them in a way that violated the accused's constitutional rights." (*Id.* at p. 1055.) As in *McCloud*, the only point at which the court referred to legal sufficiency standards was when it discussed the distinct question of whether the attempted murder charge could be retried after reversal for kill zone instructional error. (*Id.* at p. 1057.) *That* question invokes legal sufficiency standards because the reviewing court must *then* view everything in the light most favorable to the judgment. (See *ibid.*, citing *People v. Eroshevich* (2014) 60 Cal.4th 583, 591 [applying these standards to determine whether, "as a matter of law, the evidence was insufficient to support a conviction"].)

There is a difference. The general principles employed in *Saddler* and *Clark* are designed to ensure trial courts discharge their duty to properly instruct the jury on the applicable

principles of law based on the evidence. "Sufficiency-of-the-evidence" standards are designed to ensure appropriate deference to the judgment following an otherwise proper trial (i.e., one without prejudicial trial errors) and the only claim is that the record of evidence is legally insufficient to support the verdicts under any "hypothesis whatever." "[T]he distinction between the two, instructional error and insufficiency of the evidence, does make a difference." (*People v. Lewis*, *supra*, 72 Cal.App.5th at p. 18.) "Unlike a finding of insufficient evidence, a finding of prejudice does not bar retrial of the overturned conviction." (*People v. Navarro* (2021) 12 Cal.5th 285, 311.) An instructional error is "a trial error not implicating the Double Jeopardy Clause" and "retrial is allowed 'to rectify *trial error*.'" (*Lewis*, at pp. 18-19, quoting *Burks v. United States* (1978) 437 U.S. 1, 14.)

Reversing the judgment on the grounds of "'an appellate ruling of legal insufficiency is functionally equivalent to an acquittal and precludes a retrial.'" (*People v. Story* (2009) 45 Cal.4th 1282, 1295-1296, quoting *People v. Hatch* (2000) 22 Cal.4th 260, 272.) "When the evidence is legally insufficient, it means that 'the government's case was so lacking that it should not have even been *submitted* to the jury.'" (*Eroshevich*, *supra*, 60 Cal.4th at p. 591, quoting *Tibbs v. Florida* (1982) 457 U.S. 31, 41.) Given this significance, any dismissal of a charge under section 1385 "should not be construed as an acquittal for legal insufficiency unless the record clearly indicates the trial court applied the substantial evidence standard"—i.e., "the record must show that the court viewed the evidence in the light most

favorable to the prosecution and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt." (*Hatch*, at p. 273.) When courts apply these standards, it's because the defendant has specifically raised a general sufficiency challenge to the underlying conviction, like in *Smith*, *Vang*, and *Ford*.

More broadly, "[l]anguage used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered" (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66), and there's simply nothing in *Canizales* suggesting it employed any such legal sufficiency standards.

These are principled reasons not to engraft legal sufficiency standards—designed to assess whether an otherwise properly instructed jury could reasonably find the evidence sufficient to support a conviction on *any* valid theory of guilt—onto judicial opinions addressing instructional error claims that challenge a particular theory of guilt as invalid for want of sufficient evidentiary support. Otherwise, opinions finding "insufficient" supporting evidence on a *single* theory of guilt could be construed as barring retrial and any conviction at all, when the purpose is to assess for error as to the *particular* theory of guilt without barring retrial on some other valid theory of guilt. As we see in *Canizales* itself, the Court assessed for trial error as to the *kill zone* theory of guilt and reversed upon a finding of prejudice but clearly without any bar to retrial on *other* valid theories of guilt.

E. This review framework is necessary to ensure meaningful appellate review of kill zone instructional error claims.

Applying the proper standards in the proper context is essential to ensuring proper appellate review of these instructional error claims. For the kill zone theory, *Canizales* dictates that the theory *must* be limited to those "relatively few" cases where the *only* reasonable inference from all the evidence is that the defendant acted with the requisite intent. (*Canizales*, *supra*, 7 Cal.5th at p. 597.) Under the general de novo review standard for such instructional error claims, the task of assessing a reasonable likelihood that the jury misapplied or misunderstood the applicable law here necessarily involves considering on appeal whether the evidence "would also support a reasonable alternative inference more favorable to the defendant" because, if it does, the kill zone instruction was improper. (*Ibid.*)

This review framework is also a natural and logical predicate for the "alternative theory" prejudice analysis that follows any finding that the trial court erred in instructing the jury on a factually and/or legally unsupported theory of guilt. (See *People v. Aledamat* (2019) 8 Cal.5th 1, 7.) A key reason for the reversal of the convictions in *Canizales* under the "reasonable likelihood" framework was that even though "the jury *could* have concluded that defendants had the requisite intent to kill Bolden," it was "not clear beyond a reasonable doubt that a reasonable jury would have come to that determination" because the evidence was "conflicting." (*Canizales*, *supra*, 7 Cal.5th at p. 616.) This analysis cannot be squared with any review standard

that sets aside as immaterial from the outset any reasonable inferences "more favorable to the defendant." (*Id.* at p. 597.)

Consider this: As in *Canizales*, the instructional error might rise to the level of legal error triggering *Chapman*, which requires the prosecution to demonstrate harmlessness beyond a reasonable doubt. Consequently, "the jury might well have found factual support for what was effectively an 'implied malice' theory of attempted murder without detecting the legal error," i.e., a "legally inaccurate version of the kill zone theory," or the jury might otherwise have been misled to apply the instruction in a "legally impermissible manner." (*Canizales*, *supra*, 7 Cal.5th at pp. 613, 614.) How can the defendant be assured a meaningful review of such an error if the appellate court applies the lenient legal sufficiency standards in analyzing whether any instructional error occurred in the first place? (See *Aledamat*, *supra*, 8 Cal.5th at p. 13 ["The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt."].)

Similarly, how could a defendant be assured a meaningful review if the review framework compels the appellate court to affirm so long as the legally *required* inference is just *one* of multiple reasonable inferences that could be drawn from the evidence? One of the other inferences that the jury was permitted to draw may have been tantamount to a factually and/or legally invalid theory of guilt otherwise demanding *Chapman* scrutiny for reversible prejudice. (See *Thompkins*, 50 Cal.App.5th at pp.

400-401, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmlessness under *Chapman* requires the reviewing court to find the outcome was "'surely unattributable to the error ... no matter how inescapable the findings to support that verdict might be'"]; *People v. Sek* (2022) __ Cal.App.5th __, 2022 WL 292614, *4 [under *Chapman*, "it is not enough to show that substantial or strong evidence existed to support a conviction under the correct instructions"]; *People v. E.H.* (2022) __ Cal.App.5th __, 2022 WL 522522 ["This standard is much higher than substantial evidence review."].) Yet, under the framework that the Court of Appeal applies as the standard of review here, the judgment must be affirmed regardless.

At least two other courts have recognized that *Canizales* requires a determination on appeal of whether the *only* reasonable inference from the evidence is that the defendant acted with the requisite intent under the kill zone theory. (*In re Rayford* (2020) 50 Cal.App.5th 754, 779-780 [while the evidence supported "a reasonable inference the shooters intended to kill everyone in the zone of fatal harm," it was error to instruct on a kill zone theory because "other circumstances support[ed] a reasonable alternative inference more favorable to [the defendants]"]; *Lisea*, *supra*, 73 Cal.App.5th at pp. 1045, 1053, 1056 [finding prejudicial kill zone instructional error because, "[w]hile there was evidence supporting an intent to kill the victim, there was also evidence supporting a contrary finding"].)

This is right and the best read of *Canizales* given the foregoing analysis of the competing review frameworks and

the spirit of the Court's teachings in emphasizing the need for strict adherence to the singular permissible inference rule for the kill zone theory. This Court should reject the Court of Appeal's overly restrictive interpretation *Canizales* and its overly lenient standard of review that jettisons any kill zone instructional error claim so long as the legally *required* inference is *one* of the inferences that could reasonably be drawn from the evidence.

F. The Court of Appeal's opinion exemplifies the trouble with its overly lenient review framework.

Given the Court of Appeal's overly lenient review framework, the opinion looks only for confirmation—while viewing everything in the light most favorable to the judgment—that *one* reasonable interpretation of the evidence is that Mumin acted with the requisite intent. (*Mumin*, *supra*, 68 Cal.App.5th at pp. 57-59.) Consequently, the affirmance comes all too easily, as the opinion adopts the prosecution's theory of the case that Mumin's three shots were the "last stand of a desperate killer." (*Id.* at pp. 57-58.) As outlined above, the record surely supports inferences "more favorable" to Mumin, and he has no burden under *Canizales* to "show[] the evidence did *not* support" the inference that he acted with requisite intent. (*Id.* at p. 57.)

Notably too, in applying its overly lenient review framework, the opinion applies an overly favorable view of the kill zone law. Discussing the openness of the area outside the community room, the opinion says, "It is of lesser relevance that Johnson had a more open area beside and behind him, away from

the doors, since his exact position and surroundings were not known to Mumin." (*Mumin*, *supra*, 68 Cal.App.5th at pp. 57-58.) Again, this is of the utmost relevance. In this prosecution, Johnson played the critical role of the alleged non-target victim without whom no theory of a *concurrent* intent to kill could proceed, and Mumin's awareness of Johnson's *presence*—if not his "exact position and surroundings"— was critical to the theory.

The Court of Appeal cites *Adams* as support for the notion that awareness of Johnson's presence wasn't necessary. (*Mumin*, *supra*, 68 Cal.App.5th at p. 59, citing *Adams*, *supra*, 169 Cal.App.4th at p. 1009.) But *Canizales* effectively overruled the rationale on which *Adams's* kill zone test was based. (*Canizales*, *supra*, 7 Cal.5th at p. 607.)[6] Similarly, the Court of Appeal reasons that Johnson was within the alleged kill zone because he "was located in the area traversed by the bullets, and he *could have been* struck by them" (*Mumin* at p. 60, italics added), invoking essentially the same implied malice standards rejected in *Canizales* (*Canizales*, at p. 607, citing *Medina*, at p. 156).

Under the proper standard of review and proper view of the law, the kill zone instruction was improper in this case.

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[6] As for *People v. Cerda* (2020) 258 Cal.Rptr.3d 409, the other opinion the Court Appeal cites here (*Mumin* at p. 59), this Court has ordered it "depublished" or "not citable." (Case No. S260915.)

G. The kill zone instructional error compels reversal.

A prejudice analysis of this error—which the Court of Appeal's opinion forecloses from the outset under its review standard—compels reversal of the attempted murder convictions.

1. The prejudice analysis under *Canizales*

The *Canizales* Court found the kill zone instructional error prejudicial there because the attempted murder convictions "may have been based on the kill zone theory even though that theory was not properly applicable." (*Canizales*, *supra*, at pp. 597, 612.) The Court distinguished between an instructional error involving "an alternative theory that is improper simply because that alternative theory is not factually supported by the evidence adduced at trial," and one involving "a *legally* inadequate theory"—i.e., "'a particular theory of conviction ... is contrary to law.'" (*Id.* at pp. 612-613, quoting *Guiton*, *supra*, 4 Cal.4th at pp. 1128-1129.) Factual errors are subject to review under the *Watson* prejudice standard, while legal errors are subject to more stringent scrutiny under the *Chapman* standard. (*Canizales*, *supra*, at pp. 612-613; *Aledamat*, *supra*, 8 Cal.5th at p. 7.)

The *Canizales* Court found the error "cannot be described merely as the presentation of a factually unsupported theory," but was of a more serious nature. (*Canizales*, *supra*, 7 Cal.5th at pp. 613, 615.) Of particular concern was that the kill zone instruction did not specifically define the alleged "kill zone" at the basis of the theory of guilt, nor did it direct the jury to "consider

the evidence regarding the circumstances" of the attack in determining the defendants' intent. (*Id.* at p. 613.)

The prosecutor's closing arguments "substantially aggravated the potential for confusion." (*Canizales*, *supra*, 7 Cal.5th at p. 613.) "The prosecutor told the jury that under the kill zone theory, when a defendant is 'shooting at someone and people are within the zone that they can get killed, then [the defendant] is responsible for attempted murder as to the people who are within the zone of fire'" and argued that both Pride and Bolden were within this zone at points in time. (*Id.* at pp. 613-614.) The prosecutor's definition of the kill zone was "significantly broader than a proper understanding of the theory permits," and "essentially equated attempted murder with implied malice murder." (*Ibid.*) Thus, the argument "had the potential to mislead the jury to believe that the mere presence of a purported victim in an area in which he or she could be fatally shot is sufficient for attempted murder liability under the kill zone theory." (*Ibid.*) "So misled, the jury might well have found factual support for what was effectively an 'implied malice' theory of attempted murder without detecting the legal error." (*Ibid.*)

Thus, "there [was] a reasonable likelihood that the jury understood the kill zone instruction in a legally impermissible manner." (*Canizales*, *supra*, 7 Cal.5th at p. 614.) "The court's error in instructing on the factually unsupported kill zone theory," combined with these other prejudicial features, "could reasonably have led the jury to believe that it could find that

defendants intended to kill Bolden based on a legally inaccurate version of the kill zone theory." (*Ibid.*)

As in *People v. Green* (1980) 27 Cal.3d 1, where the jury was unequipped to detect the error in an instruction permitting conviction of kidnapping when the distance of asportation (90 feet) was insufficient as a matter of law, "the jury was provided an instruction regarding the kill zone theory but no adequate definition to enable the jury to determine whether the theory was properly applicable." (*Canizales*, 7 Cal.5th at pp. 614-615.) This was an error "of federal constitutional magnitude." (*Id.* at p. 615.)

Analyzing the record under the *Chapman* standard, the Court found that "the jury *could* have concluded that defendants had the requisite intent to kill Bolden specifically," yet there was "conflicting evidence" on this point and "other evidence leads us to conclude that it is not clear beyond a reasonable doubt that a reasonable jury would have come to that determination." (*Canizales*, *supra*, 7 Cal.5th at p. 616.) Further, while the prosecution "strenuously argued" the alternative theory that the defendants specifically targeted both Bolden and Pride, that could "not overcome the potential for confusion." (*Id.* at pp. 616-617.) Based on its review of the record, the Court held "it is not clear beyond a reasonable doubt that a reasonable jury would have returned the same verdict absent the error" and reversed the attempted murder convictions as to Bolden. (*Id.* at p. 618.)

2. The prejudicial impacts of the instruction in this case

The prosecution's version of CALCRIM No. 600 provided:

> A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of fatal harm or "kill zone."
>
> In order to convict the defendant of the attempted murder of Officer Luke Johnson, the People must prove that the defendant not only intended to kill the person opening the door, but also either intended to kill Officer Luke Johnson or any other officer outside the door attempting to apprehend him, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Officer Luke Johnson or any other officer outside the door attempting to apprehend him, or intended to kill the person opening the door by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Officer Luke Johnson.
>
> To determine whether the defendant intended to create a zone of fatal harm or "kill zone" and the scope of any such zone, consider the circumstances of the offense, such as the type of weapon used, the number of shots fired, the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target.
>
> This theory may only be used to convict the defendant of the attempted murder of Officer Luke Johnson if it is proven that the defendant intended to kill everyone in the zone of fatal harm. It is insufficient that the defendant acted with conscious disregard of the risk that others may be seriously injured or killed by his actions.

(2CT 382-383.)

First, the generic description of the concurrent intent doctrine did not define either "particular zone of fatal harm" or "kill zone." (2CT 383.) It did not even include a template definition like the one in the current version of CALCRIM No. 600, which says, "A 'kill zone' is an area in which the defendant used lethal force that was designed and intended to kill everyone in the area around the primary target." (CALCRIM No. 600 [2021 edition].) Aside from the abstract references to "zone of fatal harm" and "kill zone," the instruction simply went on to discuss these undefined terms in the context of an alleged intent "to kill the person opening the door" (Mackay) by killing Johnson or "any other officer *outside the door*." (2CT 383, italics added.)

Second, in arguing the kill zone theory to the jury, the prosecutor could only say that Mumin was "aware that there [was] a person" at Door 1, "a human being trying to get at him, trying to apprehend him." (16RT 3839-3840.) She could not say Mumin was aware anyone else was there, because no such evidence existed. As she expressly conceded, "[t]he defendant was on the other side of those doors in a pitch black room with no lights on, dark outside," with "no other sounds around, "unaware of who was outside those doors." (16RT 3871.) Nevertheless, she contended Mumin was guilty of the attempted murder of Johnson because the kill zone theory extended Mumin's liability to "anyone" and "every single officer" who was "near" Mackay attempting to apprehend him. (16RT 3840, 3843.) Coupled with the instruction that this "zone" included "any other officer outside the door," the prosecutor's arguments expanded the reach of

liability under this theory to anyone anywhere outside and regardless of whether Mumin knew or had any reason to know anyone—much less Johnson—was there besides Mackay.

As in *Canizales*, the alleged "kill zone" presented in this case was "significantly broader than a proper understanding of the theory permits." (*Cardenas*, 53 Cal.App.5th at p. 614.) Particularly with the lack of any requirement that Mumin knew or had any reason to know of anyone else's presence, the requisite intent to convict was akin to an implied malice standard resting on a *reckless indifference* to anyone else *might* be there, not an *intent to kill* everyone there. While the instruction summarized the basic factors to be considered, the potential value there was offset by the absence of the singular permissible inference rule.

The instruction did say this theory "may only be used to convict the defendant of the attempted murder of Officer Luke Johnson if it is proven that the defendant intended to kill everyone in the zone of fatal harm" because "[i]t is insufficient that the defendant acted with conscious disregard of the risk that others may be seriously injured or killed by his actions." However, circumstantial evidence of this nature inherently lends itself to the possibility of *multiple* reasonable inferences and, because the jury may rely upon all such inferences, *each* of them is "proven" for these evidentiary purposes. Simply telling the jury that the evidence must prove the defendant acted with the requisite intent without saying it must conclude this is the *only* inference reasonably drawn from the evidence—as the now

standard instruction under CALCRIM No. 600 dictates—cannot, by itself, ensure the requirements of *Canizales* are upheld.

The jury could still have believed it need only find the required inference was just *one* of the reasonable inferences. (See *Dominguez*, *supra*, 66 Cal.App.5th at p. 186 [where Court of Appeal accepted the Attorney General's concession that the attempted murder convictions should be reversed in part because the instructions "did not explain the People's burden to prove that the 'only' reasonable conclusion from Defendants' use of lethal force is that they intended to create a kill zone"]; *Thompkins*, *supra*, 50 Cal.App.5th at p. 399 [the failure to specifically instruct on this rule "watered down the requirement under *Canizales* that the inference of intent to kill all those in the target's vicinity must be the 'only reasonable inference'"].)

Any reliance on the general admonishments regarding the reasonable doubt standard or the use of circumstantial evidence would be misplaced. This Court made clear in *Canizales* that such admonishments are inadequate in protecting against "the potential for misapplication of the kill zone theory." (*Canizales*, *supra*, 7 Cal.5th at p. 607.) Further, the standard instructions on the proper use of circumstantial evidence deferred to the erroneous kill zone instruction, telling the jury *that* instruction explained the "required intent and/or mental state." (2CT 340.)

3. Both convictions must be reversed.

As in *Canizales*, this case involves a multitude of prejudicial features—"the presentation of a factually unsupported

theory" in combination with erroneous instructions and arguments on the law under the kill zone theory that "could reasonably have led the jury to believe that it could find that defendants intended to kill [Johnson] based on a legally inaccurate version of the kill zone theory." (*Canizales*, *supra*, 7 Cal.5th at pp. 613-614.) This triggers scrutiny under *Chapman*. (*Id.* at p. 615; *Aledamat*, 8 Cal.5th at p. 7; see *Thompkins*, 50 Cal.App.5th at 399 [applying *Chapman* review to a kill zone instruction that "described a theory of liability that was inapplicable to the facts as established at trial" and "failed to accurately describe the 'kill zone' theory as clarified by *Canizales*"]; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1201 [applying *Chapman* to an instruction that "misstated the law regarding the intent element of the attempted murder charges"].)

Because "'harmless error' review under *Chapman* 'looks to the basis on which 'the jury actually rested its verdict,' the inquiry 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" (*Thompkins*, *supra*, 50 Cal.App.5th at p. 400, quoting *Sullivan*, *supra*, 508 U.S. at p. 279.)

Here, nothing in the record negates a "reasonable likelihood" that the jury relied on the invalid kill zone theory. During deliberations, the jurors sent the court a note saying, "We all agreed that [if][7] the defendant fired at police officers intending

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[7] It appears that the jurors inadvertently omitted the word "if" from the first clause of the statement because the second clause of

to hit one or more of them, he'd be guilty of murder." (2CT 407.) The jurors asked, "Is that sufficient to determine intent to kill?" (*Ibid.*) The court responded that it was the jurors' role to "determine whether the evidence establishes an intent to kill" based on the evidence, and it referred them to CALCRIM Nos. 600 and 225. (2CT 408.) The requisite mental state for murder is quite different than the requisite mental state for *attempted* murder—which can never be based on implied malice. However, insofar as the jurors' note concerns the attempted murder charges, it does not show they found that Mumin actually *had* "fired at one or more police officers." It was simply a conditional statement asking whether that *would* be sufficient *if* they found he had. Further, any notion that an intent to hit "one *or* more" officers was sufficient to prove an intent to kill is wrong under a properly defined kill zone theory because that theory requires *both* an intent to kill the primary target *and* an intent to kill each alleged non-target victim within the alleged kill zone. And the court's response could not have clarified any misconceptions about the kill zone theory since it simply directed the jury back to the same problematic and inadequate instructions.

Unlike in *Canizales*, where the prosecution "strenuously argued" an alternative direct attempted murder theory of liability (*Canizales*, *supra*, 7 Cal.5th at p. 616-617), the prosecution here hammered the invalid kill zone theory of liability in arguing for conviction of the attempted murder charge as to Johnson—as it

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the statement, starting with "he'd [i.e., he *would*] be," shows the statement was intended as a conditional if-then statement.

had to since there was no evidence that Mumin had any idea that Johnson or anyone else was even present outside the doors.

The record supplies no basis for concluding with any degree of confidence that the verdicts were "'surely unattributable to the error.'" (*Thompkins*, *supra*, 50 Cal.App.5th at p. 400, quoting *Sullivan*, *supra*, 508 U.S. at p. 279.) The same result pertains under the *Watson* "reasonable probability" standard: "A 'reasonable probability' 'does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*'" of a better outcome. (*People v. Hardy* (2021) 65 Cal.App.5th 312, 330-331, quoting *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) "Therefore, reversal is necessary when it cannot be determined whether or not the error affected the result, as in such a case there 'exists ... at least such an equal balance of reasonable probabilities' 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Ibid.*, quoting *People v. Watson* (1956) 46 Cal.2d 818, 837.)

The "last stand of a desperate killer" theory of the case is what the prosecution argued and the Court of Appeal adopts here, but it's not a kill zone theory that truly holds water. The prosecution had to prove that Mumin intended to kill *both* Mackay and Johnson—Mackay as the primary target and Johnson concurrently to effectuate the death of Mackay. The evidence just doesn't stack up however the pieces may be arranged, given the total absence of evidence that Mumin had any idea anyone else besides Mackay was there. Yet, the evidence

firmly supports findings that he acted with at most a conscious disregard for the risk to any other officers who *might* have present when he fired his gun: he had persistently sought to *avoid* contact with any law enforcement personnel; he used a limited extent of force in firing a single series of three gunshots; his gunfire was directed at Door 2 and (possibly) an area of or space within Door 1 where Mackay was *not* standing; none of his shots struck Mackay; he could not have intended to create a kill zone that included Johnson having no awareness of Johnson's presence; and Johnson could not have been struck and was not struck based on his actual location during the gunfire. At the least, it must be said on this record that "a *reasonable chance*, more than an *abstract possibility*" exists that one or more jurors would have maintained a reasonable doubt in the absence of the error. (*People v. Hardy*, *supra*, 65 Cal.App.5th at pp. 330-331.)

The version of CALCRIM No. 600 instructing the jury on the invalid kill zone theory of liability was the only instruction the jury was given for purposes of determining Mumin's liability for attempted murder as to *both* Mackay and Johnson. This instruction was framed solely in terms of what the jury must find "[i]n order to convict the defendant of the attempted murder of *Officer Luke Johnson*." (2CT 383, italics added.) It said nothing about what the jury had to find to convict Mumin on Count 4 involving Mackay, independent of the invalid theory of *concurrent* intent for the charge involving Johnson (Count 5). Thus, the instruction provided no guidance on the determination of Count 4, much less the crucial requirement that the jury must

adjudicate this charge separately and only convict if it found Mumin had acted with an *independent* intent to kill Mackay.

Because the jury's sole frame of reference in determining both charges was the invalid kill zone theory, the prejudicial effect of the instructional error necessarily infects its determination of both charges. In fact, the jury's note during deliberations asking about the significance of finding "the defendant fired at police *officers* intending to hit *one or more of them*" indicates that they were considering and deciding these two charges collectively, as part and parcel of the invalid kill zone theory presented to them. Both convictions must be reversed.

Conclusion

Mumin respectfully requests reversal.

Dated: March 14, 2022

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
Attorney for Ahmed Mumin

Certificate of Compliance

I certify that this brief is prepared with 13-point Century Schoolbook font and contains 13,953 words.

Dated: March 14, 2022

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
Attorney for Ahmed Mumin

DECLARATION OF SERVICE

Re: ***People v. Mumin*, Supreme Court Case No. S271049**
Court of Appeal Case No. D076916

I, Raymond M. DiGuiseppe, declare that I am over the age of 18 and not a party to this case. My business address is: P.O. Box 10790, Southport, NC 28461.

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On March 14, 2022, I served the foregoing document on each of the parties listed below, by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the United States Postal Service in Southport, North Carolina, to be delivered in the ordinary course of business:

Ahmed Mumin, CDCR# BL1095
R.J.D.
480 Alta Road
San Diego, CA 92179

Electronic Service

I further declare that on the same day, I electronically served the same document on each of the entities listed below:

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San Diego County Superior Court
Appellate Defenders, Inc.
Attorney General's Office
District Attorney's Office
Sloan Ostbye (trial counsel)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on March 14, 2022.

Raymond M. DiGuiseppe	*/s/ Raymond M. DiGuiseppe*
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MUMIN**
Case Number: **S271049**
Lower Court Case Number: **D076916**

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Last Name, First Name (PNum)