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No. S271049

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

AHMED MUMIN,
Defendant and Appellant.

Fourth Appellate District, Division One, Case No. D076916
San Diego County Superior Court, Case No. SCD261780
The Honorable Kenneth K. So, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

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

Appellant Ahmed Mumin was evading arrest after he shot and killed a victim during a robbery. In an apartment complex where a full-blown search was ongoing for his capture, Mumin hid in a community room behind closed doors. When a detective tried to open one of the doors to the community room, Mumin fired his nine-millimeter handgun at the two side-by-side doors closest to the detective. Uncertain where the detective precisely stood, Mumin created a zone of death around the two doors in an effort to kill the detective and other officers he had every reason to believe were present to take him into custody. Mumin fired three times in the direction of the two doors before he was struck by return gunfire. A jury convicted Mumin of attempted murder of two detectives who stood on the other side of the two doors, among other crimes. The prosecution argued the jury could rely on the "kill zone" theory of attempted murder liability for one of the convictions.

Mumin argues the trial court erred by instructing the jury on the kill zone theory because the evidence does not support it. He further contends that under this Court's decision in *People v. Canizales* (2019) 7 Cal.5th 591, the Court of Appeal incorrectly applied the substantial evidence standard in evaluating the

propriety of giving that instruction. For the instruction to be warranted by the evidence, he suggests two standards apply: one purportedly drawn from *Canizales* that requires an appellate determination that the only reasonable inference from the evidence was that he intended to create a kill zone; and the other that asks whether there is a reasonable likelihood the jury misunderstood or misapplied the applicable law.

The arguments are incorrect. *Canizales* and this Court's settled precedent governing a trial court's decision to instruct on a permissive inference or a theory of liability indicates that such an instruction is properly given where it is supported by substantial evidence. In other words, for a kill zone instruction to be warranted, there must be substantial evidence from which a reasonable trier of fact could conclude the defendant intended to create a zone of fatal harm. *Canizales* does not support the standards of review proposed by Mumin. And, considering the concerns expressed by this Court in *Canizales*, there is no basis to justify a departure from substantial evidence review. As this Court and the high court have long recognized, the substantial evidence standard adequately protects a defendant by requiring proof of every element beyond a reasonable doubt, even where the evidence is predominantly circumstantial.

Regardless, under any standard, the trial court did not err by providing the kill zone instruction. There is only one reasonable inference from the evidence. To avoid arrest, Mumin intended to kill the detective opening the door to the community room and, because Mumin did not know that detective's precise

location, he intended to kill all the other officers he believed were on the other side of the doors closest to the detective, to ensure the detective's death. Mumin would not have intended to kill the detective at the door, only to be taken into custody by other officers. In doing so, he created a kill zone that was well defined by the contours of the two doors. Further, the second detective was well within that zone, standing only several feet away from the primary target who opened the door.

Accordingly, the judgment should be affirmed.

LEGAL BACKGROUND

In *Canizales*, this Court closely examined and more clearly defined the limits of the kill zone theory. There, the defendants fired five gunshots from a semiautomatic handgun at a primary target who was at least 100 feet away, at a neighborhood block party on a wide city street. (*Canizales*, *supra*, 7 Cal.5th at p. 611.) After the first shot was fired, the target and his companion ran down the street away from the gunfire as the five bullets went "everywhere." (*Ibid.*)

Canizales held "the kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are 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 and (2) the

alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, 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 p. 607.) Based on the substantial distance between the defendants and the victims, the weapon used, the open location of the shooting, and the fact that the victims escaped unscathed, *Canizales* concluded the instruction was insufficiently supported because a fact finder could not reasonably infer defendants intended to create a kill zone around the target. (*Id.* at pp. 611-612.) *Canizales* further held the kill zone instruction there was a legally inadequate theory that was not harmless beyond a reasonable doubt. (*Id.* at pp. 612-618.)

STATEMENT OF THE CASE AND FACTS

Mumin was charged with and convicted of special circumstance first-degree murder, two counts of premeditated attempted murder, and other crimes in connection with his robbery of a convenience store and subsequent shoot-out with law enforcement. (*People v. Mumin* (2021) 68 Cal.App.5th 36, 42; 1CT 42-49; 3CT 580-581, 585-599.) Only the attempted murder convictions are pertinent to the issues on review.

A. The evidence against Mumin

In the early morning hours of April 16, 2015, a man later identified as Mumin robbed a convenience store and shot a customer inside the store, killing him. (10RT 2011-2016, 2019-

2020.) Police tracked Mumin to an apartment complex on Winona Avenue in San Diego. (11RT 2355-2357; 12 RT 2769-2770.)

Five undercover detectives went to the Winona Avenue address. (11RT 2357; 12 RT 2770.) Sometime after midnight, one of the undercover detectives went into the complex on foot to determine the location of an apartment that was associated with one of Mumin's relatives. (11RT 2362-2363, 2400.) Six to nine uniformed officers from the special operations unit had reported to the scene. (11RT 2364, 2370.)

Around the same time, Mumin encountered his relative near the mailbox area. (13RT 2907-2908.) Mumin was carrying a backpack and asked the relative to give him a ride to "anywhere," just away from the complex. (13RT 2908-2910.) During their conversation, Mumin asked whether there were officers around the complex and said police were looking for him. (13RT 2909-2911.) While Mumin was waiting by the mailboxes, he saw the undercover detective. (12RT 2681-2682.) Mumin stood still for a couple seconds, backed away, and fled in the opposite direction into the complex. (11RT 2404-2407; 12RT 2681.) The undercover detective relayed what he had observed and regrouped with the other officers in the parking lot. (11RT 2406-2407.)

The detectives also learned a burglary in progress had been reported from inside the apartment complex. (11RT 2367.) According to a resident, the burglar had a silver handgun and pushed on several windows before he hid his backpack on the ground behind some bushes and ran away with the gun. (2CT 319-325.) At least 10 uniformed officers, including approximately

4 additional uniformed officers who reported for the burglary, went to the apartment where the burglary was reported and found the abandoned backpack. (11RT 2368, 2370.) The backpack contained, among other items, Mumin's identification card, his state benefits card, his passport, a phone, and "three rounds of 9-millimeter ammunition." (11RT 2370-2371, 2435, 2445, 2449-2450.) At that point, police began to search the complex for Mumin. (11RT 2371.) The undercover detectives put on raid vests that identified them as police, and they were accompanied by more than 12 and up to 20 uniformed officers. (11RT 2371-2373, 2376; 12RT 2774.)

In the sweep of the complex with a police helicopter overhead, the officers repeatedly and loudly declared their presence as they called residents to come outside and cleared the apartments. (11RT 2380, 2390, 2392, 2410, 2451-2453.) Body-worn camera footage capturing the shouting of officers and the sound of the police helicopter at the scene was played for the jury. (2CT 309-311 [transcript for Exhibit 57]; 12RT 2658-259, 2661-2663.)

Based on a resident's account that Mumin had fled in the direction of the complex's community room, a team was put together to search the building. (11RT 2381-2382, 2415; 12RT 2777-2778.) The building had four doors close together on the ground floor. (11RT 2380-2381, 2494.) However, the detectives did not know at the time that all four doors accessed the community room. (11RT 2381.) North of the community room was

a dumpster area partly closed off with two red doors. (12RT 2731 [Exhibit 132]; 13RT 2992-2993, 3011.)

Meanwhile, Detective James Mackay approached the building to check whether the doors to the community room were locked, apparently unaware of the new focus on the building. (See 11RT 2494-2495; 12RT 2777-2778.) Detective Luke Johnson noticed Mackay approaching the building alone and provided him cover. (12RT 2778.) Mackay stood near the right corner of the building, at the hinge side of the door farthest to the right ("Door 1"). (11RT 2382-2383, 2495-2497.) Johnson stood between 10 to 25 feet to the left of the Door 1 and "almost in front of" the door immediately to the left ("Door 2"). (12RT 2617-2618, 2779, 2787-2788; 11RT 2389-2390.)

Because he believed Door 1 led to a storage unit or some small room and did not expect anyone to be inside, Mackay did not announce his presence. (11RT 2494; 12RT 2612.) When he turned the handle of Door 1 and began to open the door a few inches, gunfire erupted from inside the room. (11RT 2383-2384, 2497; 12RT 2616, 2781.) Three rapid-fire gunshots were fired in "two different volleys." (12RT 2619-2620, 2781.) Both Mackay and Johnson moved to the right side of the building for cover. (11RT 2385-2386.) The dumpster was behind the detectives. (12RT 2731 [Exhibit 132], 2733 [Exhibit 136]; 13RT 2983 [Exhibit 188].) A surveillance camera mounted above where the shooting occurred partly captured Johnson moving to right when Mumin fired his gun at approximately 2:43 a.m. (12RT 2676, 2678, 2685-2686 [Exhibit 58].) Several officers in the background ran behind a

building for cover and out of frame. (12RT 2686 [Exhibit 58].) However, the camera was facing northeast and did not capture the rest of the firefight. (See Exhibit 188.)

In seeking cover, Mackay spun out of the way and fell back over a retaining wall onto the pavement. (11RT 2395, 2497; 12RT 2617.) Johnson moved toward Mackay and fired his gun five times into the room. (12RT 2781-2782, 2807; 13RT 3001.) Mackay also fired his gun three times into the room after he stood up and heard the third gunshot. (11RT 2497-2498; 12RT 2784; 13RT 3001.)

The detectives then heard groaning from inside. (11RT 2387, 2504.) Mumin emerged from the room, and there was no one else inside. (11RT 2387-2388, 2423; 12RT 2763.) Mumin had been struck by one of Johnson's shots and was transported to the hospital for treatment. (11RT 2388; 13RT 3004-3005.)

A black and silver Sig Sauer nine-millimeter handgun was found inside the community room. (12RT 2715.) The handgun was loaded with one cartridge in the chamber and a magazine with six additional cartridges. (12RT 2717-2719.) Also found in the community room were two separate black Sig Sauer firearm magazines loaded with 12 and 9 cartridges. (12RT 2710-2715.)

In addition, three nine-millimeter Luger caliber cartridge cases were found in the community room. (12RT 2709, 2720-2721; 13RT 2957-2958.) A comparison of the three cartridge cases and the test fire from the gun found in the community room indicated they were all fired by that gun. (13RT 2957-2959.)

Mumin's three bullets struck one of the red doors to, and asphalt near, the dumpster. (12RT 2735-2736 [Exhibits 140-142], 2746 [Exhibit 169].) Bullet and copper jacket fragments were found on the ground near the dumpster. (12 RT 2703-2706 [Exhibits 99-101]; 13RT 2983 [Exhibit 188].)

The bullet holes in Door 1 and Door 2 and strike marks on the dumpster door and nearby asphalt were analyzed to determine bullet trajectories. (13RT 2984-2986, 2992.) Based on the difference in splintering between the outside and inside of the door and the hollow-point type of bullet used, all of the bullets that struck Door 1 were from the exterior to the interior of the room. (12RT 2736 [Exhibits 144-146], 2739 [Exhibit 149]; 13RT 2986-2987 [Exhibits 129, 129A].) By contrast, the two bullet holes in Door 2 had less splintering and damage on the interior, which indicated the bullets were "going from interior to exterior," at more of a perpendicular angle to the door. (13RT 2988-2989 [Exhibit 129B]; 12RT 2738 [Exhibit 147], 2739-2740 [Exhibit 151-152].) The trajectories of the two bullet holes in Door 2 indicated the bullet going through one of them, "hole K," could have made either of the two strike marks on the red door in front of the dumpster, whereas the bullet that went through the other, "hole L," made the strike mark on the asphalt before and to the left of the red door. (13RT 2992-2994, 3009.) The bullet that went through hole K was traveling at a height of about three feet and 11 inches, while the bullet that went through hole L was traveling at a height of about four feet and two inches. (13RT 2992.)

Mumin's third bullet passed through the opening in Door 1 and struck the dumpster door; the bullet traveling through hole K could have made only one of the two strike marks on the dumpster door. (13RT 2995-2996, 3009-3010.)

Photographs and diagrams of the detectives' positions relative to the dumpster and the trajectory of Mumin's bullets were admitted into evidence, showing Johnson was slightly east of Mumin's bullets from his position in front of Door 2. (12RT 2729-2734 [Exhibits 130-139]; 13RT 2998-2999 [Exhibit 189], 3006-3007 [Exhibit 191].) Mackay was slightly west of Mumin's bullet trajectories from his position in front of Door 1. (See Exhibit 191.)

Based on the trajectory of the bullets and the bloodstains found in the community room associated with those trajectories, Mumin fired his gun from two possible locations: one closer to the front of the room with Mumin standing mostly behind Door 1; and the other farther back in the room with Mumin standing slightly east of Door 2. (13RT 2998-2999 [Exhibit 189].)

B. The kill zone instruction and argument

The prosecutor requested former CALCRIM No. 600 and proposed modifications to the instruction to comport with *Canizales*.[1] (14RT 3207-3208; 15RT 3536-3537.) Defense counsel objected, arguing "I don't believe it is a kill zone case." (15RT 3537.) The court asked defense counsel for her reasoning, but counsel declined to elaborate, explaining, "I can't get into details

[1] CALCRIM No. 600 was subsequently revised in 2020 and 2021. (CALCRIM No. 600 (2021 ed.).)

of that without discussing my defense." (15RT 3537.) The court confirmed that counsel was objecting to "the kill zone language" and noted the objection for the record. (15RT 3538.) Seeking clarification on the objection, the prosecutor asked, "is it just to the giving of the kill zone language or is it to any specific language in the current instruction? Are there proposed modifications or is it just the fact it's being given?" (15RT 3538.) Defense counsel responded, "The latter." (15RT 3538.) The trial court subsequently gave a modified version of CALCRIM No. 600. (2CT 382-383; 15RT 3569-3572.)

The prosecutor argued to the jury that count 4, the attempted murder of Mackay, required the jury "to find that the defendant took a direct but ineffective step toward killing another person and he had the intent to kill." (16RT 3828.) The prosecutor explained that Mumin "must possess the intent to kill a human being," but "[i]t is not required he intend to kill a specific human being." (16RT 3828.) Based on his weapon, the number of shots, the location of gunshots, and his motive to escape after he committed murder, she argued Mumin "intended to kill whomever was opening that door," and that person was Mackay. (16RT 3828-3829; see 16RT 3837.)

The prosecutor also argued Mumin was "very aware that there are people -- specifically, law enforcement officers -- after him" at the complex, based on his behavior, his comments to his relative, and the police presence at the complex, and that Mackay was an officer. (16 RT 3829-3835.)

The prosecutor then discussed the attempted murder of Detective Johnson under the kill zone theory. (16RT 3839-3840.)

The prosecutor admitted, "I can't prove the defendant knew Detective Johnson was standing in the exact position that he was" and that Mumin was "unaware of who was outside those doors," certainly not Johnson specifically. (16RT 3840, 3871.) However, she subsequently argued, "But when he's in the dark, when he's in a room with two escape routes and he believes he's been cornered, he forms the intent to kill the officers that are trying to apprehend him. That is the only reasonable conclusion that the evidence supports." (16RT 3873.)

The prosecutor then discussed the factors the jury should consider in determining whether Mumin intended to create a kill zone:

> To find that the defendant intended to create this kill zone, you can consider a number of factors. The fact that he had a semiautomatic firearm; that he fired three shots; that he's firing from inside of the room outside; and that the detective -- the peace officer was just less than 25 feet away, slightly off-center from that person opening the door, that person he's firing the shots at.

(16RT 3840-3841.) She equated the kill zone in this case with the "fatal funnel": "the shots are fired at approximately 2:42 and 57 seconds because you can see Detective Johnson quickly go to the right, get out of frame, get out of that fatal funnel – that kill zone of fire." (16RT 3842-3843.)

The prosecutor argued Johnson, "believing that Door Number 1 went to a separate room from Door Number 2, that he unknowingly placed himself in that kill zone." (16RT 3843-3844.)

The prosecutor summed up that Mumin knew Johnson was an officer and "the defendant, when he hid himself behind those three doors, fired those three rounds through the doors, that he attempted to kill not only the officer opening the door, but every single officer who was near him, who was there to apprehend him after he was located." (16RT 3843-3844.)

The defense disputed Mumin had the intent to kill "any officer or anyone for that matter." (16RT 3857.) Instead, he was afraid and fired "two warning shots." (16RT 3857, 3863.) He contended the prosecution "assume[d]" three shots were fired. (16RT 3858.) He argued he did not have the intent to kill Mackay because his gunshots went through Door 2, and he did not have the intent to kill Johnson because he did not know Johnson was there. (16RT 3856, 3863.)

In her rebuttal, the prosecutor discussed circumstantial evidence and her burden of proof: "when you are considering circumstantial evidence, you must accept only the reasonable and reject the unreasonable. Yes, if there are two reasonable interpretations, you have to accept the one that points to innocence." (16RT 3871.)

C. The verdict and sentence

The jury convicted Mumin of first-degree murder (Pen. Code[2], §§ 187, subd. (a)) and found true the special circumstance allegations that he committed the murder during the commission of a robbery and a burglary (§190.2, subd. (a)(17)). (3CT 580-581.)

[2] Undesignated statutory references are to the Penal Code.

The jury also convicted Mumin of two counts of attempted premeditated murder on a peace officer (§§ 187, subd. (a), 189, 664, subd. (e)(1)), in addition to burglary (§ 459), robbery (§ 211), possession of a firearm by a felon (§ 29800, subd. (a)(1)), possession of ammunition by a prohibited person (§ 30305, subd. (a)(1)), two counts of assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)), and two counts of assault with a semiautomatic firearm (§ 245, subd. (b)). (3CT 585-599.) The jury found true various firearm enhancements. (§§ 1192.7, subd. (c)(23), 12022.5, subd. (a), 12022.53, subds. (b), (c), (d).) (3CT 581, 585-599.) The trial court sentenced Mumin to life imprisonment without the possibility of parole, plus an additional consecutive indeterminate term of 55 years to life and a consecutive determinate term of 41 years and 4 months. (3CT 602-610.)

D. The appeal

The Court of Appeal affirmed Mumin's judgment except for a modification not pertinent to the issues on review. (*Mumin*, *supra*, 68 Cal.App.5th at p. 63.) Mumin argued, among other claims, that the evidence did not support a jury instruction on the kill zone theory. (*Id.* at p. 42.) In rejecting this claim, the Court of Appeal noted at the outset that *Canizales*'s emphasis on "the '*only* reasonable inference' has led to a dispute … regarding the proper standard of review of a trial court's decision to instruct on this theory of liability." (*Id.* at p. 46, italics in original.) It went on to explain *Canizales* reflected "established principles of appellate review following a trial court's decision to instruct on a theory of

liability." (*Id.* at pp. 47-49.) It held its review of the trial court's decision to instruct is "governed by familiar principles of substantial evidence review." (*Id.* at p. 49, citing *People v. Nelson* (2016) 1 Cal.5th 513, 550.) On the record, the court concluded "a jury could reasonably find that Mumin intended to create a zone of fatal harm around Mackay, i.e., an area in which Mumin intended to kill everyone present to ensure Mackay's death, and that Johnson was located in that zone." (*Id.* at pp. 57-60.) Accordingly, it held the trial court did not err in giving the kill zone instruction. (*Id.* at p. 60.)

Mumin petitioned for review and argued: (1) the Court of Appeal incorrectly applied *Canizales* by applying the substantial evidence standard on appeal and reached the wrong conclusion; and (2) the trial court's criticism of defense counsel violated his constitutional right to counsel. (Pet.) This Court granted Mumin's petition, limiting the issues to the questions presented.

ARGUMENT

I. THE PROPRIETY OF GIVING A KILL ZONE INSTRUCTION MUST BE ASSESSED UNDER THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW

Mumin argues the Court of Appeal erroneously applied the substantial evidence standard in concluding sufficient evidence supported the kill zone instruction in this case. (OBM 36-49.) However, this Court has consistently applied principles of substantial evidence review in determining whether an instruction on a permissive inference or theory of liability is warranted by the evidence. Consistent with this established precedent, *Canizales* applied the substantial evidence standard to

conclude the kill zone instruction was not supported by the evidence before it. There is no basis to depart from settled precedent and apply a different standard of review here. The substantial evidence standard comports with this Court's intent in *Canizales* to guard against misapplication of the kill zone theory, requiring proof of every element beyond a reasonable doubt.

A. The determination of whether an instruction on a permissive inference or a theory of liability is warranted by the evidence is evaluated under the substantial evidence standard

"The trial court's duty to instruct on general principles of law and defenses not inconsistent with the defendant's theory of the case arises only when there is substantial evidence to support giving such an instruction. [Citation.] Substantial evidence is evidence of reasonable, credible value." (*People v. Crew* (2003) 31 Cal.4th 822, 835; *People v. Cole* (2004) 33 Cal.4th 1158, 1206 ["A trial court must instruct the jury on every theory that is supported by substantial evidence"].) The trial court's decision is reviewed de novo. (*Cole*, *supra*, at p. 1206.)

As set forth below, whether evidence supports an instruction on a permissive inference or a theory of liability is determined under the substantial evidence standard. Because the kill zone theory is both a permissive inference regarding a defendant's intent to kill and a theory of liability (*Canizales*, 7 Cal.5th at pp. 604, 606), the same substantial evidence standard applies to whether a kill zone instruction is warranted by the evidence.

This Court has long applied the substantial evidence standard in determining whether there is sufficient evidence to

support a permissive inference instruction. A permissive inference "'allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant.'" (*People v. Gomez* (2018) 6 Cal.5th 243, 288, quoting *County Court of Ulster County, N.Y. v. Allen* (1979) 442 U.S. 140, 157.) In *People v. Saddler* (1979) 24 Cal.3d 671, this Court considered whether an instruction allowing the jury to draw adverse inferences from the defendant's failure to explain or deny the evidence against him was properly given. (*Id.* at pp. 677, fn. 4, 681.) In addition to noting the trial court's "'duty to instruct on general principles of law … raised by the evidence [citations],'" the Court recognized, "'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.'" (*Id.* at p. 681.) The Court then held "there was no support in the record for an instruction on drawing of adverse inferences from a failure to explain or deny" because "there were no facts or evidence in the People's case which defendant failed to explain that were in his particular knowledge to explain." (*Id.* at pp. 682-683.)

In *People v. Valdez* (2010) 32 Cal.4th 73, 137, and *People v. Clark* (2016) 63 Cal.4th 522, 604-605, this Court cited the same "elementary principle of law," in determining whether evidence supported instructions allowing the jury to infer the defendant's consciousness of guilt from a defendant's intimidation of witness and a defendant's authorization of third-party efforts to fabricate

evidence.[3] In *Valdez*, the Court concluded the evidence "would not have allowed a reasonable jury to find that defendant intimidated [the witness] or that [the witness's] refusal to testify was related to something defendant may have said or done" because the evidence did not indicate "why [the witness] did not wish to testify." (*Valdez*, *supra*, 32 Cal.4th at p. 138.) In *Clark*, the court concluded "the jury could infer that defendant" authorized creation of the threatening letters based on evidence the defendant admitted ownership of one letter and the second letter contained the same "distinctive calligraphic style." (*Clark*, *supra*, 63 Cal.4th at pp. 605-606.)

Saddler, *Valdez*, and *Clark* thus indicate a permissive inference instruction is warranted where the "basic fact" is supported by evidence from which a reasonable jury could make the "elemental fact" or inference (*Ulster County*, *supra*, 442 U.S. at p. 157). This reflects principles of substantial evidence review. Under that standard, this Court "'review[s] the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact *could* find the defendant guilty beyond a reasonable doubt.' [Citation.] In determining whether a

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[3] This Court has recognized that CALJIC Nos. 2.06 (instruction in *Valdez*) and 2.05 (instruction in *Clark*), relate to permissive inferences on consciousness of guilt. (See *Gomez*, *supra*, 6 Cal.5th at pp. 289 [distinguishing insufficient facts there from cases involving permissive inferences based on efforts to thwart production of evidence or fabricate false evidence].)

reasonable trier of fact could have found [defendant] guilty beyond a reasonable doubt, we presume in support of the judgment "'the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]" (*Nelson*, *supra*, 1 Cal.5th at p. 550, italics added; see *People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278.)

This Court has explicitly applied the substantial evidence standard for determining whether instructions on lying-in-wait and felony murder theories of liability were supported by the evidence. In *Nelson*, where the defendant challenged the lying-in-wait instruction, this Court held, "Whether we review Nelson's claim as asserted instruction error in giving the lying-in-wait instruction, … or insufficiency of the evidence supporting the jury's verdict, we apply essentially the same standard." (*Id.* at pp. 549-550; see also *People v. Ceja* (1993) 4 Cal.4th 1134, 1137-1139 & fn. 1 [noting "we are stating and applying the correct standard of review" in applying sufficiency of the evidence standard to determine "whether the trial court should have instructed on lying in wait"].) That standard reviews the record in the light most favorable to the judgment below for substantial evidence from which a reasonable trier of fact could find the defendant guilty under the lying-in-wait theory beyond a reasonable doubt. (*Nelson*, *supra*, 1 Cal.5th at p. 550; *Cole*, *supra*, 33 Cal.4th at p. 1206 [to determine whether sufficient evidence supported lying-in-wait instruction, "we must determine whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed murder based on a lying-in-wait theory"].)

Because there was no evidence "[defendant] arrived before the victims or waited in ambush for their arrival," the Court held "there is no factual basis" for the inference he waited until the victims were "vulnerable to surprise attack," and the jury "was presented with no evidence from which it could have chosen, beyond a reasonable doubt," the lying-in-wait scenario. (*Id.* at p. 551.)

People v. Suarez (2020) 10 Cal.5th 116, cited *Nelson* and applied the substantial evidence standard to conclude "[t]he record discloses legally sufficient evidence of [defendant]'s guilt of felony murder based on robbery." (*Id.* at pp. 167-170.) Although there was evidence showing the defendant took the victims' property to hide their identities after he had planned their murders, the Court "[v]iew[ed] all of the evidence in the light most favorable to the judgment" and held "a reasonable trier of fact could conclude that [defendant] had a concurrent intent to rob and kill [the victims] and that the robberies were not merely incidental to, or an afterthought to, the murders." (*Id.* at pp. 169-170.) The Court, therefore, concluded the trial court did not err in instructing the jury on felony murder. (*Id.* at p. 170.)

In view of this framework, the substantial evidence standard that applies to appellate review of whether sufficient evidence supports a permissive inference or theory of liability instruction equally applies to the same review of a kill zone instruction. (*Canizales*, 7 Cal.5th at pp. 604, 606.)

Mumin maintains *Saddler*, *Clark*, and several other cases by this Court and the Courts of Appeal "employ the general

instructional duties of trial courts … with no mention of or reliance on legal sufficiency standards." (OMB 39-42.) However, as discussed further below, most of the cases cited by Mumin apply principles of substantial evidence review, even if the cases do not restate the principles in their entirety. Mumin provides no authority requiring the use of specific language to indicate a court has applied the substantial evidence standard.

This Court has rejected a similar argument in the context of section 1385 dismissals: "[c]ertainly, courts need not restate the substantial evidence standard or use certain 'magic words' whenever they determine that the evidence is insufficient as a matter of law. We merely ask trial courts to make their rulings clear enough for reviewing courts to confidently conclude they viewed the evidence in the light most favorable to the prosecution and found that no reasonable trier of fact could convict." (*People v. Hatch* (2000) 22 Cal.4th 260, 273.) This reasoning applies with equal force here. (See *id.* at p. 272 ["In applying these principles, we have not distinguished between trial and appellate court determinations of legal insufficiency because both courts must apply the substantial evidence standard when making this determination"].)

As previously discussed, *Saddler* and *Clark* applied principles of substantial evidence review. As for *Bland*, the issue there was not the propriety of giving a kill zone instruction because the theory was not presented to the jury. (*Bland*, *supra*, 28 Cal.4th at pp. 319-320 [considering transferred intent doctrine as to attempted murder].) Even so, in concluding no anomaly

results from not applying the transferred intent doctrine to attempted murder, *Bland* concluded the attempted murders there were permissible under a kill zone theory. (*Id.* at pp. 330-331.) Thus, to the extent it considered whether the record supported the kill zone theory, *Bland* applied the substantial evidence standard by concluding the jury "could reasonably also have found a concurrent intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone." (*Ibid.*)

The Court of Appeal cases cited by Mumin that address the kill zone theory also applied the substantial evidence standard. *People v. McCloud* (2012) 211 Cal.App.4th 788, 799-800, 802, held the kill zone theory was not warranted because "[t]he record does not contain substantial evidence" that the defendants intended to kill all 46 people in the area with 10 bullets to support application of the theory. (*Id.* at pp. 799-800, 802.) The court recognized the same analysis applied, in part, to the defendant's sufficiency of the evidence claim. (*Id.* at pp. 806 ["We analyzed that issue in Part I.A, *ante*, so our discussion need not be repeated"], 807 ["All of respondent's contrary arguments have already been addressed in Part I.A., *ante*"].) *People v. Cardenas* (2020) 53 Cal.App.5th 102, 114-115, applied the substantial evidence standard when it held "the record does not contain sufficient evidence from which a jury could conclude that even *a* reasonable inference—let alone the *only* reasonable inference—was that … [defendant] intended to create a kill zone in order to kill [the victim]." (Italics in original.) In *People v. Dominguez*

(2021) 66 Cal.App.5th 163, 169, 187, the Court of Appeal accepted the People's concession that the kill zone instruction there was flawed. It then applied the substantial evidence standard to conclude "the evidence was sufficient to support a finding beyond a reasonable doubt that defendants intended to kill [the victims] inside a 'kill zone'" and, therefore, the attempted murders may be retried. (*Id.* at pp. 187-188.) The court explained "it will be for the jury," once properly instructed, "to decide in the first instance which inferences are reasonable and which are not." (*Id.* at p. 188.) In doing so, the court implicitly acknowledged that it is not an appellate court's role to make such a determination on appeal.

All but one of Mumin's other cited cases not involving the kill zone theory (OBM 39) similarly applied the substantial evidence standard. As for *Gomez*, it is inapposite because it did not consider whether a challenged instruction was warranted by the evidence. (*Gomez*, *supra*, 6 Cal.5th at pp. 283-284, 290 [holding defendant's brief refusal to attend trial proceedings was irrelevant evidence and such evidence and instruction permitting inference of consciousness of guilt violated due process].)

Accordingly, the cases cited by Mumin do not support his claim that a standard other than principles of substantial evidence review applies here. Notably, Mumin does not explain what standard these respective courts did apply, if not the substantial evidence standard.

B. *Canizales* reviewed a trial court's decision to instruct on the kill zone theory for substantial evidence

Consistent with this Court's established precedent, *Canizales* applied the substantial evidence standard to determine whether the kill zone instruction was supported by the record before it. (*Canizales*, 7 Cal.5th at pp. 609-612.) The Court of Appeal, therefore, correctly applied the substantial evidence standard to conclude the kill zone instruction was properly given in this case.

1. A kill zone instruction is warranted where there is substantial evidence from which a reasonable jury could conclude a defendant intended to create a kill zone around the primary target

In broad terms, *Canizales* discussed the development of the kill zone theory in California (*id.* at pp. 602-606), explained this Court's new "formulation" for a jury conviction under the theory (*id*. at pp. 606-609), and analyzed whether the kill zone instruction was warranted there (*id*. at pp. 609-612). In *Canizales*, one of the defendants fired five bullets from a nine-millimeter handgun at their primary target who was 100 or 160 feet. (*Id.* at p. 611.) They were at a block party on a wide city street, and the victims were able to run down the street away from the gunfire after the initial gunshot. (*Ibid.*)

In analyzing whether the trial court erred by giving the kill zone instruction, this Court quoted the "elementary principle of law" cited in *Saddler* and *Clark* at the outset: "'"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."'" (*Id.* at p. 609, quoting *Saddler*, *supra*, 24 Cal.3d at p. 681 and citing *Clark*, *supra*, 63 Cal.4th at p. 605.) The Court noted no other principles of appellate review governing whether the kill zone instruction was supported by the evidence.

The Court then concluded the trial court should not have given the kill zone instruction because "a fact finder *could not* reasonably infer defendants intended to create a zone of fatal harm around [the primary target]" based on the record. (*Id.* at p. 611, italics added.) The Court noted the defendants were at a "substantial distance" away from the target at an open location that did not limit the victims' ability to escape, allowing the victims to immediately run away after the first gunshot was fired and as the bullets "were 'going everywhere.'" (*Ibid.*) The Court recognized, "whether the inference reasonably *could* be drawn in this particular case is at least informed by evidence that neither [victim] was hit by any" of the gunshots. (*Ibid.*, italics added.) Coupled with the limited number of bullets fired, this Court held the evidence "was not sufficient to support *a* reasonable inference that defendants intended to create a zone of fatal harm around a primary target." (*Id.* at pp. 610-611, italics added)

By reviewing the record for inferences that the jury reasonably could make, *Canizales* applied traditional principles of substantial evidence review. Indeed, this Court confirmed the substantial evidence standard equally applies in the kill zone context by stating, "an instruction on the kill zone theory would have been warranted in this case only if there was substantial

evidence in the record that, *if believed by the jury*, would support *a* reasonable inference that defendants intended to kill everyone within the 'kill zone.'" (*Ibid.*, italics added; see *id.* at p. 611 ["whether substantial evidence supports instruction on the kill zone theory is based on evidence regarding the circumstances of the attack"].)

Hence, in addition to citing *Saddler* and *Clark*, *Canizales* explicitly applied the substantial evidence standard in determining the kill zone instruction was not supported by the evidence. *Canizales* gave direction in similarly clear terms for prospective cases where a kill zone instruction is properly given: "In cases where *substantial evidence* exists to support a finding that the only reasonable inference is that a zone of fatal harm has been created, the jury is to consider the circumstances of the attack, including the type and extent of force used during the attack, to determine the scope of that zone and whether the alleged victim was within the zone." (*Id.* at pp. 611-612, italics added.)

2. It is the jury that must conclude the only reasonable inference from the evidence is that the defendant intended to create a kill zone around the primary target

Under the substantial evidence standard as applied in *Canizales*, an appellate court must conclude there is substantial evidence from which a jury could find that the only reasonable inference from the evidence is an intent to create a kill zone. *Canizales* did not require an appellate court to conclude for itself that the only reasonable inference from the evidence is an intent create a kill zone to uphold a kill zone instruction. Instead, that

finding is a requirement for the jury—in essence, finding an intent to create a kill zone beyond a reasonable doubt—to convict under the kill zone theory.

Mumin, however, has a different view. Citing part of the introduction in *Canizales*, he argues a kill zone instruction should not be given "where the evidence 'would also' reasonably support an inference that the defendant" did not act with the requisite intent to create a kill zone. In effect, to uphold the instruction, he argues an appellate court must conclude the only reasonable inference from the evidence is an intent to create a kill zone. (OBM 15-17, 34, 45.) Mumin disregards *Canizales*' substantial evidence analysis in finding the instruction was not warranted there. In addition, he misconstrues this Court's defined requirements for a *jury* to convict under the kill zone theory and incorrectly applies that "formulation" to an appellate court's review of the propriety of giving the instruction. In doing so, he neglects the concern that *Canizales*'s formulation was intended to address.

The decision in *Canizales* was in large part a response to the potential misapplication of the kill zone theory by the jury. The Court acknowledged the kill zone theory "looks to circumstantial evidence to support a permissive inference regarding a defendant's intent." (*Canizales*, *supra*, 7 Cal.5th at p. 606.) In such circumstances where "the prosecution's theory substantially relies on circumstantial evidence," *Canizales* reaffirmed that the jury must be instructed on circumstantial evidence and reasonable doubt: "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." (*Ibid.*) In the context of the kill zone theory, "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. (See CALCRIM No. 225.)" (*Id.* at p. 597.)

Nevertheless, *Canizales* noted 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." (*Id.* at p. 607; see *id.* at p. 597 ["As 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"].) *Canizales* suggested the potential for a jury's misapplication of the kill zone theory was, at least in part, a result of "incomplete" "[p]ast appellate court opinions" that "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, even if their description of the theory is otherwise consistent with our opinion here." (*Id.* at p. 607, fn. 5.)

In response, *Canizales* created a "formulation of the kill zone theory [that] guards against the potential misapplication of the theory, and is consistent with *Bland* and the general principles

discussed above regarding circumstantial evidence and the prosecution's burden of proving each element of an offense beyond a reasonable doubt." (*Id.* at p. 607.) *Canizales* held the kill zone theory may be applied "only when a *jury* concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are 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" and (2) the nontarget victim was located within that zone of harm. (*Ibid.*, italics added.) It explained that "[t]aken together, 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." (*Ibid.*)

Again addressing the jury's required findings, *Canizales* further held, "the jury should consider 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" in determining a defendant's "intent to create a zone of fatal harm and the scope of any such zone." (*Ibid.*) Immediately after, *Canizales* contrasted as insufficient "[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" or "subject[s] persons near the primary target to lethal risk," with

"our formulation" requiring an intent to kill everyone "in the area in which the target is located." (*Id.* at p. 607.)

The foregoing discussion demonstrates *Canizales*'s formulation of the kill zone theory was in response to the potential misapplication by the jury. Under that formulation, it is the jury that must conclude the only reasonable inference from the evidence is that the defendant intended to create a zone of fatal harm around the primary target. (*Ibid*.)

Even where *Canizales* addressed a trial court's gatekeeping role, it reiterated that the jury performs the ultimate task of determining whether a defendant's intent to create a kill zone is the "only reasonable inference" from the evidence. The Court "emphasize[d] that going forward trial courts must exercise caution when determining whether to permit the jury to rely upon the kill zone theory" because "there will be relatively few cases in which the theory will be applicable and an instruction appropriate." (*Id.* at p. 608.) It directed trial courts to "provide an instruction to the jury only in 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.*, first italics added.)

Canizales encapsulated its holdings in the opinion's introduction where the Court states the formulation before stating its conclusion that insufficient evidence supported the kill zone instruction. (*Id.* at pp. 596-597.) The only arguable ambiguity in *Canizales* stems from the introduction's brief

discussion of the interplay between the kill zone theory and the reasonable doubt standard, which Mumin cites in support of his argument (OBM 16):

> 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. (See CALCRIM No. 225.) 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.

(*Canizales*, *supra*, 7 Cal.5th. at p. 597, italics added.) This potentially suggests a trial court should not give the instruction in cases where a jury could find an intent to kill everyone in the kill zone *and* there are alternative inferences that are more favorable to the defendant. This suggestion, however, is contrary to and inconsistent with the rest of the opinion. As reflected in *Canizales*'s analysis, a kill zone instruction may be given as long as a jury *could* reasonably conclude the only reasonable inference from the evidence is that the defendant intended to create a kill zone.

This conclusion does not circumvent *Canizales*'s formulation. As the Court of Appeal in this case aptly noted, "it is well established that the evidence supports a jury determination that an inference is the *only* reasonable inference if we conclude it is at least *a* reasonable inference." (*Mumin*, *supra*, 68 Cal.App.5th at p. 49, italics in original.) Stated another way, "[i]f the evidence supports a reasonable inference of the requisite intent, it necessarily follows that the jury could find it was the only

reasonable inference." (*Id.* at p. 52.) Contrary to Mumin's argument (OBM 38), reading *Canizales* "as a whole" indicates principles of substantial evidence review apply to whether the kill zone theory was properly instructed at trial.

In light of the foregoing, the Court of Appeal properly concluded its review of a trial court's decision to instruct is governed by familiar principles of substantial evidence review. (*Mumin*, *supra*, 68 Cal.App.5th at pp. 47-49.) "[T]he trial court must determine whether the evidence would support a jury determination that the only reasonable inference was that the defendant held the requisite intent." (*Id.* at p. 47, italics omitted.)

Mumin contends *Canizales* did not review for substantial evidence because it never viewed the evidence favorably to the judgment and readily rejected the People's view where inconsistent with the Court's own view. (OBM 38-39.) However, the pertinent facts, including the location and number of shots fired, were largely undisputed in *Canizales*, as they are here. (*Canizales*, *supra*, 7 Cal.5th at pp. 599, 609-610.) The question at issue was effectively whether the undisputed evidence was insufficient as a matter of law to support the kill zone instruction. (See *People v. Harris* (2014) 224 Cal.App.4th 86, 89 [legal sufficiency of undisputed evidence is a question of law reviewed de novo].) Hence, it was generally unnecessary for the Court to view the evidence in the light most favorable to the prosecution. Where there was some dispute in the evidence, *Canizales* concluded the evidence was insufficient as a matter of law, "[e]ven accepting as more credible the prosecution's

evidence" regarding the location of the parties when the shots were filed. (*Canizales*, *supra*, 7 Cal.5th at p. 611.) This was the Court viewing the evidence favorably in support of the judgment under the substantial evidence standard and not merely for argument.

Mumin also relies on *In re Rayford* (2020) 50 Cal.App.5th 754 and *In re Lisea* (2022) 73 Cal.App.5th 1041 for a contrary reading of *Canizales*. (OBM 47.) To the extent *Rayford* and *Lisea* held a reviewing court must conclude the only reasonable inference from the evidence is that a defendant intended to create a kill zone for a kill zone instruction to be supported by the evidence, they incorrectly applied *Canizales*. Because *Canizales* required a jury, not an appellate court, to conclude that the only reasonable inference from the evidence is that the defendant intended to create a zone of fatal harm, both decisions were incorrectly decided. (*Canizales*, *supra*, 7 Cal.5th at pp. 596-597.)

C. There is no basis for departing from the substantial evidence standard because it adequately addresses this Court's principal concern in *Canizales*

As noted, *Canizales* highlighted the jury's potential to misapply the kill zone theory when the prosecution substantially relies on circumstantial evidence, despite instructions on circumstantial evidence and the burden of proof. (*Canizales*, *supra*, 7 Cal.5th at pp. 606-607.) In other words, the Court's concern was with the potential a jury may convict under the kill zone theory without finding an intent to kill everyone, including the nontarget victim. In such circumstances, the kill zone theory would have relieved the prosecution of its burden of proving each

element of an offense beyond a reasonable doubt. (See *Cole*, *supra*, 33 Cal.4th at p. 1208.) Substantial evidence review in conjunction with *Canizales*'s new formulation more than adequately addresses this concern. Consequently, there is no basis to depart from this Court's settled precedent and apply a different standard of review in the kill zone context.

In *In re Winship* (1970) 397 U.S. 358, 364, the United States Supreme Court "held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Jackson v. Virginia* (1979) 443 U.S. 307, 315.) Subsequently, in *Jackson*, the high court considered a habeas corpus petitioner's claim under *Winship* of "whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." (*Id.* at pp. 312-313.) The high court recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]" (*Id.* at p. 317.) The Court declared that "the critical inquiry" after *Winship* is "to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Id.* at p. 318, fn. omitted.) This inquiry, however, "does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.]" (*Id.* at pp. 318-319, italics in original.) "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at p. 319, italics in original.)

The high court held this "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." (*Ibid.*) "The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." (*Id.* at p. 319, fn. omitted.) At the same time, the standard adequately protects against misapplications of the constitutional standard of reasonable doubt. (See *id.* at p. 320 [finding, in contrast, "no evidence" rule in *Thompson v. Louisville* (1960) 362 U.S. 199 was "simply inadequate to protect against misapplications of the constitution standard of reasonable doubt"].)

In turn, this Court has long held, "California's traditional sufficiency of the evidence standard of review [is] consistent with *Jackson*." (*People v. Towler* (1982) 31 Cal.3d 105, 117-118.) Rejecting a call for "a stricter standard of appellate review" in cases relying on circumstantial evidence, this Court explained the circumstantial evidence rule "'does no more than to instruct the jury that if a reasonable doubt is created in their minds for any reason they must acquit the defendant. But where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the

more reasonable of the two hypotheses, this court is bound by the finding of the jury.' [Citation.]" (*Ibid.*)

These same principles apply with equal measure in the context of instructing with a permissive inference such as the kill zone theory. Coupled with *Canizales*'s formulation explicitly requiring the jury to find the circumstances are such that "the only reasonable inference is that the defendant intended to create a zone of fatal harm" around the primary target, the substantial evidence standard more than adequately "protects an accused against a conviction except on 'proof beyond a reasonable doubt of every fact necessary to constitute the crime,'" including an intent to kill the nontarget victim. (*Jackson*, *supra*, 443 U.S. at p. 315; see *id.* at pp. 315-316 [noting that in cases subsequent to *Winship*, "we have never departed from this definition of the rule or from the *Winship* understanding of the central purposes it serves"].)

Consequently, even if "the appellate court may itself believe that the circumstantial evidence might be reasonably reconciled with the defendant's innocence, that alone does not warrant interference with the determination of the trier of fact." (*Towler*, *supra*, 31 Cal.3d at p. 118.) "[I]f the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt" (*Barnes v. United States* (1973) 412 U.S. 837, 843), there is no basis to require an appellate court to again conclude the defendant is guilty beyond a reasonable doubt to uphold the giving of the instruction. There is no

justification, and certainly not one apparent in *Canizales*, to apply special rules in this context.

Considering this framework, where there is a minimum threshold of substantial evidence for a jury to reasonably make the inference and the instruction is carefully crafted to correctly reflect the law, the instruction may be given. After all, a jury is presumed to understand and follow the trial court's instructions, at least absent evidence indicating to the contrary. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 205-206; *Penry v. Johnson* (2001) 532 U.S. 782, 799.) This Court has recognized "this is a "'crucial assumption'"—one that "'underl[ies] our constitutional system of trial by jury.'"" (*Gonzalez*, *supra*, at pp. 205-206.)

This Court's concern about a jury convicting based only on implied malice rather than an intent to kill as to the nontarget victim can thus be addressed, as it was here, with the explicit instruction that conscious disregard of the risk of serious injury or death is insufficient for the kill zone theory. As discussed in Argument II, the kill zone instruction in this case explicitly admonished the jury, "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 383.) The instruction accurately reflected *Canizales* by requiring the jury to find an intent to kill everyone in the kill zone, including the nontarget victim located there.

With a carefully crafted instruction that reflects this Court's formulation in *Canizales* and a substantial evidence standard that impinges upon jury discretion only to the extent necessary to guarantee the fundamental protection of due process of law, Mumin's suggestion that this is "too limited" a role for an appellate court is unfounded. (OBM 36-37.)

Mumin also argues the substantial evidence standard should not apply because it "could be construed as barring retrial and any conviction at all" upon a finding of error. (OBM 43-44.) Courts, however, are well aware and equipped at determining, after holding an instruction was not warranted, whether there is sufficient evidence in the record to support a conviction and permit retrial of the offense. (E.g., *McCloud*, *supra*, 211 Cal.App.4th at pp. 805-807 [concluding only 8 of 46 counts of attempted murder may be retried based on the evidence]; *Cardenas*, *supra*, 53 Cal.App.5th at pp. 120-121 [holding two attempted murder counts may be retried].)

D. Whether there is a reasonable likelihood the jury misapplied an instruction is not the appropriate test for determining if an instruction is supported by the evidence

Mumin contends the correct standard of review for determining error 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." (OBM 41-42, 45.) The cases cited by Mumin for that principle did not consider whether a challenged instruction was warranted by the

evidence.[4] (OBM 41-42.) Mumin's proposed standard applies to whether an instruction accurately states the law and is subject to erroneous interpretation by the jury. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 905; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) That is not the instructional issue here.[5] Nor is there any indication in *Canizales* that supports application of the standard proposed by Mumin to determine whether the evidence supports a kill zone instruction.

Mumin contends the "reasonable likelihood" standard for determining whether an instruction misstated the law is essential to meaningful appellate review. (OBM 45.) He also argues the substantial evidence standard is unacceptably lenient considering the potential prejudice analysis under *Chapman v. California* (1967) 386 U.S. 18 upon a finding of instructional error. (OBM 45-47.)

Mumin again relies on an incorrect reading of *Canizales* and applies to that reading an unrelated standard of review. As discussed, *Canizales* does not require an appellate court to find no alternative inferences more favorable to a defendant exists to

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[4] *Lisea* likewise never applied the "reasonable likelihood" standard to conclude the record did not support the kill zone theory there. (*Lisea*, *supra*, 73 Cal.App.5th at pp. 1049, 1056.)

[5] Because Mumin did not raise the issue of whether the kill zone instruction in this case misstated the law in his petition for review or in his opening brief on the merits, the issue is not properly before this Court. (See *People v. Villa* (2009) 45 Cal.4th 1063, 1076 [issue not properly before the court where defendant failed to raise it in a petition for review]; *People v. Clark* (2016) 63 Cal.4th 522, 552 [argument forfeited where defendant failed to raise it in the opening brief].)

conclude the instruction is supported by the record. (*Canizales*, *supra*, 7 Cal.5th at pp. 611-612.) Further, Mumin conflates *Chapman*'s test for prejudice with an initial finding of error, which are different analyses.

In sum, the Court of Appeal here properly applied principles of substantial evidence review under *Canizales*. Mumin's arguments and authorities do not dictate otherwise.

II. UNDER ANY STANDARD OF REVIEW, THE KILL ZONE INSTRUCTION WAS APPROPRIATE AND SUPPORTED BY THE EVIDENCE IN THIS CASE

Mumin argues the evidence did not support the kill zone instruction and the error was prejudicial, requiring the reversal of both his convictions for attempted murder. (OBM 15-35, 50-61.)

Under any standard, the evidence supported the kill zone instruction. The only reasonable inference from the evidence is that Mumin intended to create a kill zone around Mackay. Further, Johnson was squarely in that zone. But even if the kill zone instruction was not supported by the evidence, it would not have prejudiced Mumin. As a preliminary matter, the prosecution relied on the kill zone theory only for the attempted murder of Johnson. Therefore, any error in instructing the kill zone theory would not have affected Mumin's conviction for the attempted murder of Mackay. As for the attempted murder of Johnson, the alleged error was harmless on the record of this case, which overwhelmingly established Mumin's intent to kill all the officers whom he had every reason to believe were on the other side of Doors 1 and 2.

A. The only reasonable inference from the evidence is that Mumin intended to create a kill zone around his target and another victim was located within that zone

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*Canizales*, *supra*, 7 Cal.5th at p. 602; *People v. Stone* (2009) 46 Cal.4th 131, 139-140.) "[T]he fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what is termed the 'kill zone.' 'The intent is concurrent ... when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." (*Bland*, *supra*, 28 Cal.4th 313, 329, citing *Ford v. State* (1993) 330 Md. 682, 625 A.2d 984, 1000, ellipsis in original.)

As previously noted, *Canizales* required a jury to find two substantive elements: (1) the circumstances of the attack are such that the only reasonable inference is that the defendant intended to create a kill zone and (2) the nontarget victim was located within that zone. (*Canizales*, *supra*, 7 Cal.5th at p. 607.)

Under any standard, the trial court did not err in giving the kill zone instruction. The only reasonable inference from the evidence is that Mumin intended to create a kill zone around Mackay. Moreover, the kill zone in this case was well-defined by the contours of the doors, and Johnson stood squarely within that zone.

The evidence established that Mumin sought to avoid being arrested after he committed murder and he was aware police were closing in on him at the complex. He told his relative as much, he fled from a detective, and the shoot-out occurred after numerous officers conducted a full-scale search for him at the complex. (11RT 2368, 2380, 2404-2407; 12RT 2678-2683, 2685; 13RT 2909-2911.) Most notably, the police helicopter overhead and the officers' repeated and loud callouts of residents to clear their apartments announced the presence of multiple officers. (11RT 2380, 2390, 2392, 2410, 2451-2453.) Mumin attempted to hide by breaking into apartments, and he discarded all personal belongings except for his loaded gun and magazines when he was unsuccessful. (2CT 319-325; 11RT 2370-2371.) In lieu of a "personal vendetta[]" (OBM 32), Mumin had a motive to kill any officer who attempted to take him into custody, not just one officer in particular.

Consequently, when Mackay partially opened Door 1, Mumin was alerted that he was about to be found and that at least one officer would enter the room. Mumin rapidly shot three bullets at Doors 1 and 2, the entrances closest to Mackay because he did not know Mackay's exact position and he needed to ensure Mackay's death. (11RT 2383-2384, 2497; 12RT 2616, 2619-2620, 2781.) Mumin fired the bullets at Door 2 at about four feet from the ground, a height that was capable of striking an officer standing on the other side of the door. (13RT 2992.) In doing so, Mumin intended to kill the multiple officers he believed to be on the other side of those doors, thereby creating a kill zone. To that

end, Mumin would not have intended to kill Mackay who was opening Door 1, only to have another officer arrest him. There is no other reasonable explanation for Mumin's three gunshots in the direction of Doors 1 and 2.

In turn, the kill zone was defined by Doors 1 and 2, based on the trajectory of Mumin's bullets and the grouping of bullet strikes on the dumpster door and nearby asphalt, an area behind the detectives. (12RT 2729-2736, 2746; 13RT 2998-2999, 3006-3007.)

Moreover, the evidence shows Johnson was well within the kill zone because he was standing 10 to 25 feet to the left of the Door 1 and almost entirely in front of Door 2, he was only slightly east of the trajectory of Mumin's bullets, and the dumpster area struck by Mumin's bullets was generally behind him. (12RT 2617-2618, 2733, 2779, 2787-2788; 11RT 2389-2390.)

The location of the shooting also limited Mackay and Johnson's ability to avoid the kill zone. The detectives were standing in an open area in front of the community room with nothing nearby to provide cover. (11RT 2377, 2493.) There was only a dumpster a considerable distance behind them and a playground some distance behind and to the left of them. (11RT 2377.) Due to the surprise nature of Mumin's attack, Mackay spun away from Door 1, causing him to fall back over a retaining wall onto the pavement, and Johnson quickly stepped to the right before they fired their guns in self-defense. (11RT 2497; 12RT 2617, 2781.) Taken together, the evidence supported a finding

that Mumin harbored the requisite intent to kill Mackay and also Johnson who was within the kill zone.

Coupled with Mumin's deliberate act of keeping only his loaded gun and two loaded magazines after he discarded all other personal belongings, a jury could reasonably infer that Mumin had the intent to use all of his bullets and would have continued shooting had he not been struck by one of the officers' gunfire. (12RT 2710-2715, 2717-2719.) """The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind."""" (*People v. Smith* (2005) 37 Cal.4th 733, 741, internal citations omitted.) That Mumin managed to fire only three gunshots, therefore, does not undercut his intent to kill. (OBM 60.) In any event, even three shots were sufficient to kill Mackay and Johnson, given the relatively small zone of the two doors.

On this record, the kill zone theory was amply supported under any standard. (OBM 34-35.) The only reasonable inference from the evidence is that Mumin intended to kill Mackay. In order to accomplish this goal, and because he did not know where Mackay stood, Mumin created a kill zone around Mackay to ensure his death. Johnson, who was standing nearby to support Mackay, was squarely within that zone.

The facts here are unlike those facts found to be insufficient in *Canizales*. As noted, the defendants in *Canizales* were at least

100 feet distance from the victims when they fired their guns, the shooting occurred on a wide city street that allowed the victims to immediately run away down the street, and the trajectory of the defendants' five bullets were "'going everywhere' and 'tingling through the gates.'" (*Canizales*, *supra*, 7 Cal.5th at p. 611.) In contrast, the zone in the present case was readily defined by the existence of the two doors. Moreover, the distance between Mumin and Mackay was much shorter than 100 feet, since Johnson was 10 to 25 feet away from Mackay and Mackay was standing at Door 1 with Door 2 immediately to his left. Further, the kill zone here was more akin to an area with a "limited means of escape" as demonstrated by Mackay falling over the retaining wall behind him and Johnson being only able to step to the right before they fired in self-defense. (*Ibid.*) And, Mumin's three bullets did not go everywhere. Instead, they had defined trajectories, with all three bullets ultimately striking the dumpster area behind the detectives. The bullet trajectories and grouping, in addition to the contours of Doors 1 and 2, clearly delineated the kill zone in this case.

The circumstances of Mumin's attack are closer to the facts of *People v. Windfield* (2021) 59 Cal.App.5th 496, 505, 517, where the defendants fired, from close range, their semiautomatic firearms multiple times at the target in an apartment courtyard. The target was hit nine times and the nontarget victim one time from the initial hail of bullets. (*Id.* at pp. 518-519.) Because the nontarget victim was "walking side by side" with the target and was similarly in close proximity to the defendants, the Court of

Appeal concluded the only reasonable inference from the evidence was that the defendants intended to create a kill zone around the target and the nontarget victim was within that zone. (*Id.* at pp. 517-518.)

Mumin likewise fired his semiautomatic firearm multiple times at Mackay who was standing at close range in a courtyard. Because Mumin did not precisely know Mackay's position, he fired his bullets at Doors 1 and 2, which were side-by-side and the same proximity away from him. Door 1, therefore, stood in the place of the target, and Door 2, the nontarget victim, in terms of delineating the boundaries of the kill zone. Just as the nontarget victim in *Windfield* was located in the kill zone around the target, Johnson was behind Door 2 and located within the kill zone delineated by the doors.

Mumin suggests the location of the shooting is unlike the structure, alleyway, or cul de sac noted in *Canizales* from which victims would have a limited means of escape. He also distinguishes the courtyard here from the restaurant with "bounded walls" in *People v. Thompkins* (2020) 50 Cal.App.5th 365, 394, which was still considered an insufficiently defined zone. (OBM 33.) However, the shooting here involved a structure in that the two doors delineated the kill zone.

As for *Thompkins*, the Court of Appeal there held that "the idea that the entire restaurant was the kill zone" was untenable because the defendant had walked to the entrance and fired 10 shots in the restaurant when there were more than 10 people inside. (*Id.* at pp. 376, 394.) In addition, the prosecutor never

attempted to define the kill zone as encompassing any area smaller than the entire restaurant. (*Ibid.*) Combined with the absence of any particular target, the court concluded a kill zone instruction was unwarranted. (*Id.* at pp. 394-395.)

Here, however, the prosecutor argued the kill zone was defined by the two doors with Mackay as the target. (16RT 3838, 3840-3843) The kill zone was never defined as encompassing all of the common areas around the community room, as Mumin suggests. (OBM 33.) Further unlike the defendant in *Thompkins* who fired only 10 bullets for more than 10 people present, Mumin may only have been aware that one officer was at Door 1 and, yet, he still fired three bullets with 28 more bullets ready to be used had he not been shot himself. The limitations in *Thompkins* are thus inapposite to the facts of this case.

B. The kill zone theory does not require actual knowledge of the location or presence of the nontarget victim

Mumin maintains the trial court erred in giving the kill zone instruction for several reasons. He first contends the theory cannot be applied where the defendant was not aware of the presence of the nontarget victim, i.e., Johnson. (OBM 25-30.) He cites cases including *Ford* and *Smith*, as examples in which the kill zone instruction was upheld and the defendant was aware of the nontarget victim. (OBM 25-26, 28.) He claims *People v. Vang* (2001) 87 Cal.App.4th 554 is not authority to the contrary because it was not a kill zone case and it preceded *Canizales*'s more clearly defined formulation. (OBM 27.) He argues *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023, which held knowledge

of the nontarget victim is not required as long as that victim was in the kill zone, incorrectly applied the kill zone theory. (OBM 27-28.) He reasons that allowing a defendant who does not have "knowledge or awareness that anyone else at all is there to be convicted of the attempted murder of others who happen to be there" would be "too much of a stretch" for the theory. (OBM 29.)

None of the cases cited by Mumin holds that actual knowledge of the nontarget victim is required. Even accepting the defendants in those cases were aware of the nontarget victims, the absence of such knowledge was thus not at issue. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

As for *Vang*, this Court has "described [it] as essentially a kill zone case." (*Stone*, *supra*, 46 Cal.4th at p. 140; see also *Bland*, *supra*, 28 Cal.4th at p. 330 [discussing *Vang* after noting "California cases that have affirmed convictions requiring the intent to kill persons other than the primary target can be considered 'kill zone' cases even though they do not employ that term"].) *Canizales* also cited *Vang* for the proposition that "the number of shots fired is simply one of the evidentiary factors to consider when assessing whether the type and extent of the defendant's attack supports instruction on the kill zone theory." (*Canizales*, *supra*, 7 Cal.5th at p. 610.) *Canizales*'s formulation was at least informed by *Vang*. *Vang* is therefore instructive.

In *Vang*, the defendants targeted two rival gang members and, using an AK series assault rifle and a shotgun, fired more than 50 bullets at two homes in which numerous nontarget

victims were inside. (*Vang*, *supra*, 87 Cal.App.4th at pp. 558, 563.) *Vang* found the evidence was sufficient to support the reasonable inference "defendants harbored a specific intent to kill every living being within the residences they shot up," based on "the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons." (*Id*. at pp. 563-564.) The Court of Appeal rejected the defendants' argument that there was insufficient evidence they intended to kill the nontarget victims and explained, "[t]he fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." (*Ibid*.) The court posited the "[d]efendants' argument might have more force if only a single shot had been fired in the direction of where [the target] could be seen." (*Ibid*., fn. omitted.) However, based on the evidence there, the court held "defendants manifested a deliberate intention to unlawfully take the lives of others when they fired high-powered, wall-piercing, firearms at inhabited dwellings." (*Ibid*.)

Hence, under *Vang*, a defendant's actual knowledge of a nontarget victim's presence or location is not required where the circumstances of the attack indicate a deliberate intent to take the lives of others in a location where people may reasonably be expected to be present. Subsequently, in *Stone*, this Court recognized as an illustration of the kill zone theory "[o]ne of *Bland*'s kill zone examples [that] involved a bomber who places a bomb on a commercial airplane intending to kill a primary target but ensuring the death of all passengers. We explained that the

bomber could be convicted of the attempted murder of all the passengers." (*Stone*, *supra*, 46 Cal.4th at p. 140, citing *Bland*, *supra*, 28 Cal.4th at pp. 329-330.) This example implicitly acknowledges that, even if the bomber did not know how many passengers, if any, would be on the plane, the bomber could be convicted of their attempted murder if they in fact were on the plane.[6]

Likewise, Mumin's intent to kill was not negated simply because he could not see Johnson on the other side of Door 2 or did not have actual knowledge an officer was standing there. Mumin fired his gun towards a courtyard of an inhabited apartment complex where a full-scale police search was ongoing. He had every reason to believe there were multiple officers outside of the community room, in light of his encounter with the detective, the numerous officers that entered the complex minutes after Mumin looked out from a second-story balcony and before he made it to the community room, and the extensive and loud police callouts with the police helicopter overhead. (2CT 309-

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[6] *Canizales* referred to a modified version of this example not involving the kill zone theory, also noted in *Stone*, in which the bomber does not have a primary target. (*Canizales*, *supra*, 7 Cal.5th at p. 608 ["for example, when a terrorist places a bomb on a commercial airliner intending to kill as many people as possible without intending to kill a specific individual"]; *Stone*, *supra*, 46 Cal.4th at p. 140 ["But a terrorist who simply wants to kill as many people as possible, and does not know or care who the victims will be, can be just as guilty of attempted murder"].) The Court used the example to note "evidentiary bases, other than the kill zone theory, on which a fact finder can infer an intent to kill." (*Canizales*, at p. 608.)

311; 11RT 2380, 2390, 2392, 2410, 2451-2453; 12RT 2658-259, 2661-2663, 2678-2683, 2685.) In conjunction with Mumin's bullet trajectories at Doors 1 and 2, the two bullets Mumin fired at Door 2, piercing it, and the use of a semiautomatic gun at close range with ample more ammunition, Mumin demonstrated an intent to kill all the officers he believed were on the other side of the doors, in addition to his intent to kill Mackay. Because Johnson was in fact in the kill zone, Mumin concurrently demonstrated an intent to kill Johnson.

Mumin's belief that multiple officers were on the other side of the doors is at least as sufficient as the defendant's imputed belief that people would be inside an apartment as in *Vang* or a commercial plane as in the airplane bomb example. (See *Vang*, *supra*, 87 Cal.App.4th at p. 564 [noting additional, other evidence supported intent to specifically kill targets' relatives, and not just people generally, residing in homes].) Here, Mumin's belief that multiple officers were on the other side of the doors and the circumstances of his attack sufficiently supported the kill zone instruction. (*People v. Moses* (2020) 10 Cal.5th 893, 900 [noting guilt is determined as if facts were as defendant perceived them].) That he did not know for a fact or could not see that Johnson was there is immaterial. (*Vang*, *supra*, 87 Cal.App.4th at p. 564 [holding fact specific victim was not present "did not relieve defendants of their criminal attempt to kill him" as proof is deemed sufficient if means used and surrounding circumstances make the crime apparently possible].)

To the extent *Adams* concluded the kill zone theory "imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant's primary objective of killing a specific person or persons 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," it is inconsistent with *Canizales*. (*Adams*, *supra*, 169 Cal.App.4th at p. 1023.) Even so, *Stone*, *Vang*, and even *Canizales* to the extent it cited *Vang* for its formulation, provide sufficient authority that a defendant's absence of actual knowledge about a nontarget victim's presence does not preclude application of the kill zone theory.

In a related contention, Mumin argues that, without knowledge of a "secondary" nontarget victim that is required for a kill zone, there cannot be a "primary" target. (OBM 31-32.) Mumin's claim is again premised on a requirement that he have actual knowledge of the nontarget victim's presence or location. For the reasons discussed, he is incorrect. Further, evidence that Mackay was the primary target was overwhelming in this case. (*Canizales*, *supra*, 7 Cal.5th at p. 608.)

Upholding the kill zone instruction under these facts does not stretch the theory too far. Because the circumstances of an attack inform whether there is an intent to create a kill zone and the scope of that zone, the number of attempted murder convictions are limited by the specific facts of each case. Applicable here, Mumin's desire to avoid arrest during a police search for him, his deliberate decision to hold onto his loaded

weapon and two loaded magazines, and the location and manner of his attack demonstrated his intent to create a kill zone. In turn, his position behind the doors inside the community room, Mackay opening Door 1, the number of bullets Mumin fired, and the trajectory of his bullets limited the kill zone to the area behind Doors 1 and 2 in which Johnson was present. Consequently, only two counts of attempted murder are permitted on the facts of this case.

C. Any error would be harmless

Even if the evidence was insufficient to support the kill zone instruction on the attempted murder of Johnson, the error would not have prejudiced Mumin because the evidence was overwhelming as to his intent to kill as many officers as possible, including Johnson, who was on the other side of Doors 1 and 2.

1. Even assuming the kill zone instruction was erroneously given, it did not affect Mumin's attempted murder of the primary target

Preliminarily, any error in instructing the jury on the kill zone theory did not affect the attempted murder of Mackay. The kill zone theory pertained only to Johnson. Modified CALCRIM No. 600 informed the jury first that Mumin was "charged in Counts Four and Five with attempted murder," the counts pertaining to Mackay and Johnson respectively, and required the People to prove Mumin "took at least one direct but ineffective step toward killing another person" and Mumin "intended to kill that person." (2CT 382, 384-385.) Regarding the kill zone theory, the instruction discussed only the attempted murder of Johnson: "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." (2CT 383.) The instruction further explained, "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 383.)

Consistent with those instructions, the prosecutor argued the kill zone theory applied only to Johnson. (16RT 3839-3840.) As for Mackay, the prosecutor argued to the jury that Mumin had the specific intent to kill the person opening Door 1 and did not rely on the kill zone theory for that offense. (16RT 3828-3829; see 16RT 3837.) Based on the instructions given and the prosecutor's argument, there is no reasonable probability the jury misapplied the instruction by relying on the kill zone theory for the attempted murder of Mackay. (*People v. Lemcke* (2021) 11 Cal.5th 644, 655, citing *People v. Mills* (2012) 55 Cal.4th 663, 677.)

Mumin argues modified CALCRIM No. 600 "provided no guidance on the determination of Count 4," and failed to inform the jury that it needed to adjudicate the charge separately and find an independent intent to kill Mackay. (OBM 60-61.) Mumin overlooks the rest of modified CALCRIM No. 600, as noted. Regardless, the kill zone instruction also required the jury to find

Mumin "intended to kill the person opening the door." (2CT 383.) Thus, the jury was never presented a theory in which Mumin did not intend to kill Mackay, who was opening Door 1, and any error as to Mackay would be harmless under any standard.

2. The alleged instructional error was at most a factual inadequacy that is reviewed under the state standard for prejudice

Even if the trial court erred in giving the kill zone instruction, the error amounted to only a "factual inadequacy" that the jury was equipped to detect. (*Canizales*, *supra*, 7 Cal.5th at pp. 612-613.) An "'instruction on an unsupported theory'" is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*Ibid.*, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) A "legally inadequate theory," however, is reviewed for prejudice under *Chapman*. (*Id.* at pp. 613, 615; *People v. Aledamat* (2019) 8 Cal.5th 1, 13 [*Chapman* standard applies where jury is instructed with both a valid and an invalid theory].)

Canizales held the kill zone instruction there was legally inadequate because it inadequately defined "kill zone" as only a "'particular zone of harm,'" it did not direct the jury to consider the circumstances of the attack to determine whether there was an intent to create a kill zone, and the prosecutor incorrectly defined the kill zone as a "'zone of fire'" or an area in which people "'can get killed.'" (*Canizales*, *supra*, 7 Cal.5th at pp. 613-614.)

By contrast, the kill zone instruction here was more specific in that it defined a kill zone as a "zone of fatal harm" and cautioned the jury that the "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 fata 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 383.) The instruction thus defined the kill zone to the jury as a zone of fatal harm in which the defendant must harbor an intent to kill everyone and not simply a conscious disregard of the risk of injury or death to others. The instruction also directed the jury to "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" to "determine whether the defendant intended to create a zone of fatal harm or 'kill zone' and the scope of any such zone." (2CT 283.)

Consistent with the instruction, the prosecutor correctly defined the kill zone as a "fatal zone" and described the zone as the "fatal funnel" behind Doors 1 and 2. (16RT 3838, 3840, 3842-3843.) She argued Mumin "attempted to kill not only the officer opening the door, but every single officer who was near him, who was there to apprehend him after he was located." (16RT 3843-3844; see 16RT 3839-3840.) She stressed that the "only reasonable conclusion to draw about what the defendant intended when he was cornered in that room with a firearm and two magazines is that when he shot in the direction of those doors, he intended to kill the person on the other side." (16RT 3872.) She reminded the jury that "if there are two reasonable

interpretations, you have to accept the one that points to innocence." (16 RT 3871.) She reiterated that Mumin formed "the intent to kill the officers that are trying to apprehend him. That is the only reasonable conclusion that the evidence supports." (16RT 3873.) Taken together, the instruction and prosecutor's argument correctly informed the jury that it must find that the only reasonable inference from the evidence is that Mumin intended to kill everyone in the kill zone before it may convict him of the attempted murder of Johnson under the kill zone theory.

Contrary to Mumin's contention (OBM 55-56), there was no reasonable likelihood that the jury understood the kill zone instruction in a legally impermissible manner and found Mumin guilty of the attempted murder of Johnson without finding he intended to kill Johnson. (*Canizales*, *supra*, 7 Cal.5th at p. 613.) For the reasons discussed previously, the prosecutor did not erroneously describe the kill zone theory when she explained that Mumin did not have to actually know Johnson was in the kill zone for the theory to apply. (OBM 54-55.) Accordingly, the appropriate standard for determining prejudice is set forth in *Watson*.

3. Under any standard, the purported error was harmless on the record of this case

Based on the record here, there is no reasonable probability the jury found Mumin guilty of the attempted murder of Johnson based solely on the alleged unsupported theory. (*Canizales*, *supra*, 7 Cal.5th at pp. 612-613.) But even under *Chapman*'s more stringent standard, the alleged error would be harmless

beyond a reasonable doubt. Under *Chapman*, a reviewing court examines "the entire cause, including the evidence, and considering all relevant circumstances" and "ask[s] 'whether it is clear beyond a reasonable doubt that a reasonable jury would have rendered the same verdict absent the error.' [Citation.]" (*Aledamat*, *supra*, 8 Cal.5th at p. 13; *Canizales*, *supra*, 7 Cal.5th at p. 615.)

Here, there was overwhelming evidence Mumin intended to kill the multiple officers he believed were outside the community room, based on the police activity involving numerous officers and loud callouts, Mumin's movements throughout the complex before he hid in the community, his decision to keep 28 bullets on him ready for use, and his firing of three bullets before he was shot himself. (*People v. Ervine* (2009) 47 Cal.4th 745, 785-786 [finding intent to kill all four officers where defendant's plan to avoid arrest "would require the killing of all officers who were present" and two patrol vehicles each with two doors opened showed defendant was aware of fourth officer despite not firing gun at fourth officer].) Although the prosecutor stated she could not prove Mumin "knew Detective Johnson was standing in the exact position that he was" and that Mumin was "unaware of who was outside those doors" (16RT 3840, 3871), her theory of the case, on the whole, was that Mumin believed more than one officer was outside when he fired his gun. (OBM 58-59.) She argued he knew he was "surrounded by law enforcement," he knew that "specifically, law enforcement officers [were] after him," he had seen groups of four and five officers, and he

"form[ed] the intent to kill the officers that are trying to apprehend him" when he was hiding in the community room. (16RT 3829, 3831, 3873.). (OBM 58-59.)

On this evidence, Mumin "simply want[ed] to kill as many people as possible." (*Stone*, *supra*, 46 Cal.4th at p. 140; see *Canizales*, *supra*, 7 Cal.5th at p. 608.) "[A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*Stone*, *supra*, at p. 140.) Because Johnson was in fact on the other side door 2, the jury would have concluded Mumin intended to kill Johnson, even absent the kill zone instruction. As in *Ervine*, Mumin needed to kill all officers he believed were present—and not just the one opening the door—to escape. Any error would be harmless under any standard.

Citing *Thompkins*, *supra*, 50 Cal.App.5th at page 400, Mumin argues the relevant prejudice analysis under *Chapman* is ""whether the guilty verdict actually rendered in this trial was surely unattributable to the error."" (OBM 57.) This Court held and *Thompkins* recognized that whether an "alternative-theory error" was harmless under *Chapman* "is not limited to a review of the verdict itself. An examination of the actual verdict may be sufficient to demonstrate harmlessness, but it is not necessary." (*Aledamat*, *supra*, 8 Cal.5th at p. 13; see *Thompkins*, *supra*, 50 Cal.App.5th at p. 401 [noting analysis of actual verdict rendered is one application of general *Chapman* standard].) Focusing on the jury's verdict is "only a specific application of the more general reasonable doubt test." (*Aledamat*, at p. 12.) "Finding

beyond a reasonable doubt that the error did not contribute to the verdict is essentially the same as finding the error harmless beyond a reasonable doubt." (*Id.* at pp. 12-13.)

Accordingly, any error would be harmless beyond a reasonable doubt in view of the prosecutor's argument and overwhelming evidence establishing Mumin's intent to kill both Mackay and Johnson.

CONCLUSION

For the foregoing reasons, the kill zone instruction was properly given in this case and the Court of Appeal applied the correct standard of review under *Canizales* in reaching that conclusion. The judgment as modified by the Court of Appeal should be affirmed.

Respectfully submitted,

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June 13, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER ON THE MERITS** uses a 13 point Century Schoolbook font and contains **15,431** words.

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June 13, 2022

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