THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL RAPHAEL CANIZALES, et al.,

Defendants and Appellants.

S221958

FOURTH DISTRICT COURT OF APPEAL, DIVISION TWO NO. E054056
SAN BERNARDINO SUPERIOR COURT NO. FVA1001265
Hon. Judge Steven Mapes, Presiding

CANIZALES' OPENING BRIEF ON THE MERITS

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Supreme Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL RAPHAEL CANIZALES, et. al., Defendants and Appellants.	S221958

CANIZALES' OPENING BRIEF ON THE MERITS

QUESTION PRESENTED

Was the jury properly instructed on the"kill zone" theory of attempted murder?

SUMMARY OF THE ARGUMENT

The jury was not properly instructed, and should not have been instructed, on the "kill zone" theory. CALCRIM No. 600, the instruction on the "kill zone" theory, was inapplicable as there was no evidence that a kill zone existed that Bolden inhabitated. Even if a kill zone existed, the instruction erroneously failed to require the jury to find that Bolden was in a kill zone before liability could be imposed.

The instruction also critically misled the jury by improperly suggesting that petitioner can be convicted of the specific intent to kill crime of attempted murder merely by subjecting individuals other than his intended target to a risk of fatal injury. It allowed a conviction for attempted murder when the defendant's conduct could have only established a conscious disregard for the life of the nontargeted individual not an intent to kill.

To ensure that the jury found a concurrent intent to kill the nontargeted individual, the jury should have been instructed that "[t]he kill zone theory ... does not apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. Nor does the kill zone theory apply if the evidence merely shows, in addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual." (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798.) Unless the instruction fully clarifies the need for the specific intent to kill in more comprehensive terms as the *McCloud* case indicates, there will be a risk that the jury will conclude that attempted murder liability is proper for highly dangerous conduct that would support a wanton disregard murder conviction if the victim died. The instruction lowered the prosecution's burden of proof by expanding the liability for attempted murder to include implied malice.

Further, the instruction was incomplete, argumentative, unnecessary. The technical term "kill zone" should be described in the instruction to ensure the jury understands that the concept is limited to situations where death is a near certainty not where death is

only a risk. The instruction violates the prohibition against argumentative instructions because it goes beyond merely referring to the requisite zone of risk, and instead, proceeds to describe it in provocative and inflammatory terms as a "kill zone." The "kill zone" terminology detracts from a reasoned examination of the facts and virtually compels the jury to find a broad intent to kill. It dilutes the individualized intent requirement by implying that firing into an area must invariably carry with it an intent to kill. Lastly, the instruction was unnecessary as this Court has repeatedly stated.

The defendants were prejudiced by the inapplicable, misleading, incomplete, argumentative and totally unnecessary instruction. The instruction lowered the prosecution's burden of proof, thus violating defendants constitutional rights to a fair jury trial and due process of law.

STATEMENT OF THE CASE

Defendant [1] was convicted, as charged, by a jury of the willful, deliberate and premeditated murder of Leica Cheri Cooksey in violation of Penal Code section 187, subdivision (a) (count 1) [2] and two counts of attempted willful, deliberate and premeditated murder of Travion Bolden and Denzell Pride (counts 2 and 3, respectively) in violation of Penal Code sections 664/187, subdivision (a). (2 CT 285, 288-289, 292-293.)

Defendant had also been charged and tried for street terrorism in violation of Penal Code section 186.22 subdivision (a) in count 4, but before the jury was instructed, the prosecutor moved to dismiss count 4 as well as the Penal Code section 12022.53, subdivisions (b), (c) and (e)(1) allegations on count 1 and the Penal Code section 12022.53, subdivision (b) and (e)(1) allegations on counts 2 and 3. (2 CT 265.)

The jury found the gang enhancement true in all counts. (Pen. Code, § 186.22, subd. (b).) (2 CT 287, 291, 295.) The jury, however, found not true on count 1 that a principal personally and intentionally discharged a firearm that caused the death of Ms. Cooksey. (Pen. Code, § 12022.53, subds. (d) and (e)(1).) (2 CT 286.) The jury found not true on counts 2 and 3 that a principal personally and intentionally discharged a firearm. (Pen. Code, § 12022.53,

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1. Defendant was tried with codefendant KeAndre Windfield who is a party in this petition.

2. The liability for Ms. Cooksey's death was based on the doctrine of transferred intent.

subds. (c) and (e)(1).) (2 CT 290, 294.)

On count 1, defendant was sentenced to 25 years to life, and on counts 2 and 3 to a consecutive term of life with parole with the minimum parole eligibility period of 15 years for each count. (Pen. Code, § 186.22, subd.(b)(5).)

The judgment was affirmed by the Fourth District Court of Appeal, Division Two in a published opinion on 3-5-14 People v. Canzales et al. Case No. E054056 formerly 224 Cal.App.4th 440.

On 6-25-14, this Court granted defendant's Petition for Review in S217860 and ordered briefing deferred pending finality of the decision in *People v. Chiu* (2014) 59 Cal.4th 155, which held that an aider and abettor cannot be convicted of first degree premeditated murder under the natural and probable consequence doctrine of derivative liability.

On 8-13-14, this Court transferred the case back to the Court of Appeal, Fourth Appellate District, Division Two, for reconsideration in light of the decision in *People v. Chiu* (2014) 59 Cal.4th 155.

In a partially published opinion on 9-10-14 ("the Opinion") in *People v. Canzales* et al. Case No. E054056, formerly 229 Cal.App.4th 820, defendant's first degree murder conviction was reversed, but the judgment was otherwise affirmed by the Fourth District Court of Appeal, Division Two.

On 11-19-14, this Court granted defendant's Petition for Review in E054056 on the question presented.

STATEMENT OF THE FACTS

Events before the shooting

The Taco Bell encounter

Around noon on July 18, 2008, Travion Bolden ("Bolden"), who was a member of Hustla Squad and defendant (aka "White Chocolate"), who was a member of a rival gang, Ramona Blocc, were at Taco Bell in Rialto. An unidentified girl who was with defendant came up to Bolden and asked him, "Where's Denzell [Pride] at"? (2 CT 478-481; 2 RT 368, 390, 483, 511; 3 RT 672.) When defendant came up and shook Bolden's hand, Bolden knew something was wrong. Bolden thought they were trying to set Denzell Pride ("Pride") up. (2 CT 480-481.)

When Pride, who was also a member of Hustla Squad, came into the Taco Bell soon thereafter, he and defendant argued over the girl. (2 CT 480-481; 2 RT 307; 3 RT 672.) Pride indicated he wanted to fight, but defendant declined, saying he was not fighting over a girl. (2 CT 481.) Bolden did not want to join the argument and didn't have to. (2 CT 481-482.)

The West Jackson Street encounter

Later that same day, on West Jackson Street, Kennetha Small ("Small") joined Bolden and a group of girls. (1 RT 153, 156-157.) Small noticed defendant and called him over. (1 RT 157, 160.) According to Small, Bolden became agitated when he saw defendant. (3 RT 732.) A loud, heated, aggressive verbal match ensued for

about 5 to 7 minutes, with each shouting their own turf. (2 RT 375-376; 3 RT 727.) Bolden walked toward defendant; both seemed angry. Small then told defendant to leave which he did. (2 RT 375-377.)

After the encounter with defendant, Bolden ran to the 300 block of West Jackson to tell Pride what had happened. (1 RT 170-171, 174.) After Bolden told him what had happened, Pride started to run out into the street to go after defendant, and made it as far as Willow, when Pride's mother and Bolden's mother yelled at him to stop. (1 RT 175-177.) Pride told Bolden that defendant was not going to fight him; he was just scaring him. (2 CT 483.) Later Pride confirmed to Bolden that the people defendant hangs out with, i.e., Ramona Blocc gang members, do not like him. (1 RT 177, 220.)

The Superior Market encounter

After the argument on West Jackson, defendant walked to a nearby grocery store. (2 CT 482.) When defendant got to the market, he sent a boy to his apartment to get help. (3 RT 741-742.) Soon thereafter, codefendant KeAndre Windfield ("Windfield"), a member of Ramona Blocc, arrived at the market. (2 RT 414-415, 487.)

Sylvia Ayala, a police Explorer and former classmate of both defendant and Windfield, happened to be standing outside Superior Market when she observed both defendants, and then saw a car drive up and make contact with them. (2 RT 418.) Windfield approached the driver's side of the car, and said, "you roll up in a whip" meaning "you go in the car." (2 RT 418.) As the defendants

were walking away in the direction of West Jackson Street, they yelled "Jackson Street." (2 RT 422-423.) Ayala described both defendants as being "pumped up" "very crazy," doing a skipping type dance. (2 RT 424-425, 434-435.) As they walked out of sight, both defendants repeatedly shouted out "Ramona Blocc," their gang name, and threw up gang signs. (2 RT 422-424, 426, 430, 435.)

The shooting on West Jackson

The 300 block of West Jackson Street is a cul-de-sac with apartment buildings on either side, a park at one end and the intersection with Willow Avenue at the other. (1 RT 108, 112, 181 Ex. 55.) Pride and his mother lived in an apartment at 330 West Jackson which is in the middle of the block. (1 RT 182; 3 RT 574-575; Ex 55.) The street is wide; it can accommodate four cars, two parked cars on either side and two cars in traffic. The apartments are set back and have lawns, and there are curbs, grass medians, and sidewalks. (Exs. 8 and 76.) The length of the street from a manhole cover near the intersection with Willow to the cul de sac is 352 feet. (Ex. 76 [letter dated 4-22-11, paragraph 4.].) Based on a visual approximation, the street's width appears to be 125 feet, which codefendant's counsel noted is about the size of a football field. (See Exs. 55, 76; Windfield's Brief on the Merits p. 4.)

Later on that same day, Bolden and Pride went outside onto the 300 block of West Jackson and they were watching all the people outside preparing for a block party that night. (1 RT 180-182.) People were outside hanging around, talking and having a good time; there was even dancing in the street. (1 RT 107, 109, 183.) The

number of people outside varied from a lot, a little more than 10, 30, to the whole block being full of people. However many people there were, they were scattered about. (1 RT 108-109, 181-182; 2 RT 400.)

Bolden and Pride said it was dark out when the defendants arrived. (1 RT 190; 3 RT 580) Bolden saw defendant, Windfield and three other males get out of the car and begin walking down Willow facing Jackson. They lined shoulder to shoulder in the middle of Willow where it intersected Jackson. (2 CT 493; 1 RT 99, 211-212, 228-230.)

Windfield pulled a gun out of his waistband, handed the gun, or attempted to hand the gun, to defendant, and said, "Bust," which means shoot. Defendant would not take the gun and/or would not shoot. Windfield took the gun back and immediately started shooting at Pride. (1 RT 200, 206, 207-210, 213, 231-232, 246-247; 2 RT 296; 2 CT 487, 490-491, 504-507.)

Pride testified that when the shots were fired, he was on West Jackson near the entrance to his apartment building. (3 RT 578-579, 581-582.) Bolden was either several car lengths away from Pride or standing next to him. (2 CT 487-489; 1 RT 185-186, 242, 246-247.) Bolden heard Windfield say, "that's the little nigga." (1 RT 206; 2 CT 486.)

Bolden testified that, when the shots were fired, Pride grabbed him and they both ran down West Jackson toward the park. (1 RT 190, 195-196; 2 CT 494.) Bolden also however explained that while Pride started running when the first shot was fired, he was too stunned and did not start running immediately. (1 RT 194, 247.) In an earlier interview, Bolden indicated something different, he said that Pride started to run before the shots were fired. (2 CT 486, 488.)

Pride was a moving target because he was running "zigzag" or serpentine. (1 RT 196, -247.) Bolden ran down the side of the street where Pride lived; whereas Pride ran down the opposite side of the street. (1 RT 247.) Windfield could not control his shots. (2 CT 491.)

Bolden said Windfield was referring to Pride when he said "get the nigga." Bolden believed that Windfield was shooting at Pride, and he watched Windfield continue to shoot at Pride as he ran. (1 RT 217; 2 RT 296.) Bolden was sure Windfield could not have been talking about him when he said to "get the nigga" because Windfield did not know him. (1 RT 206, 249.) Bolden also did not believe that Windfield was shooting at him because if he had been, Bolden, who was between Windfield and Pride, would have been shot. (1 RT 217; 2 RT 296.) Windfield shopped shooting, and all the Ramona Blocc members fled. (1 RT 101.)

Events after the shooting

Neither Bolden or Pride were hit. One shot, however, hit Leica Cooksey, a college student, who had come to the block party. (2 RT 397-402; 3 RT 708-710.) Bolden said that when Pride ran across the street, the bullet intended for Pride hit the girl. (2 CT 494.)

Bolden saw Pride later and commented that "they were tryin' to kill your ass." (2 CT 495.) When Bolden asked Pride why, Pride would not tell him; he would just say its "personal business" or its "Squad business." (2 CT 495.)

There was a lack of evidence, and the case went cold until in 2009 Meoshi Gordon told police that Windfield had admitted

committing the crime. (3 RT 641-642, 746-747.) Windfield said that he and defendant went to West Jackson, that "he" or "they" had killed a girl. (3 RT 627-633.) Windfield told Gordon that he and defendant had gone to West Jackson Street to get revenge on a Hustla Squad gang member who had killed Windfield's cousin. (3 RT 630-635.) Windfield said the guy he was shooting at ran and a girl, who got in the way, was shot. (3 RT 632-633, 644.)

Investigation

Five cartridge casings each stamped CCI .9 mm Ruger were recovered from the scene. One damaged copper-plated fired bullet was recovered from the body of Ms. Cooksey. (3 RT 719-721, 762.) A criminalist determined that the five fired cartridge casings were fired from the same firearm and the expended bullet was consistent with a CCI .9 mm Ruger. (3 RT 762-763.)

Rialto Police Department received a 911 call at 8:41 p.m. on July 18, 2008, and the first officer on the scene, Officer Gibson, arrived at 8:43 p.m. (3 RT 763.)

ARGUMENT

I. INSTRUCTING ON THE KILL ZONE THEORY WAS ERROR BECAUSE THE CRIME SCENE WAS NOT A KILL ZONE, OR IF A KILL ZONE DID EXIST, THERE WAS INSUFFICIENT EVIDENCE THAT THE NONTARGETED VICTIM WAS IN IT

A. Introduction

" 'The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." [Citation.] "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 [citation]." [Citation.]' (*People v. Saddler* (1979) 24 Cal.3d 671, 681....)" (*People v. Alexander* (2010) 49 Cal.4th 846, 920–921.) Accordingly, if the record contains no evidence that would support application of the kill zone theory in this case, then the trial court erred by instructing the jury on that theory.

The instruction on attempted murder included a kill zone provision addressed to the charge of the attempted murder of Bolden in Count 2. In pertinent part, the instruction was as follows:

> A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a

> particular zone of harm or "kill zone." In order to convict the defendant of the attempted murder of Trayvon [sic] Bolden, the People must prove that the defendant not only intended to kill Denzell Pride but also either intended to kill Trayvon Bolden or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Trayvon Bolden or intended to kill Denzell Pride by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder. (CALCRIM No. 600, 1 CT 233.)

There was no evidence to support the giving of the kill zone instruction and the instruction amounted to a misstatement of the specific intent to kill, which is a required element for a conviction of attempted murder.

B. Two prequisites to the application of the kill zone theory are an escalated mode of attack and victims in a defined space

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) The kill zone theory "addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can also be convicted of attempting to murder other, nontargeted, persons." (*People v. Stone* (2009) 46 Cal.4th 131, 138 ("*Stone*").)

The kill zone theory therefore yields a way in which a defendant can be guilty of the attempted murder of victims who were not the defendant's "primary target." (*People v. Bland* (2002) 28 Cal.4th 313, 330 ("*Bland*").) Under *Bland*, "a shooter may be convicted of multiple counts of attempted murder on a 'kill zone'

theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm." (*People v. Smith* (2005) 37 Cal.4th 733, 745–746 ("*Smith*").)

A defendant, however, may not be found guilty of the attempted murder of someone he does not intend to kill simply because the victim is in some undefined zone of danger. (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 393.) The Court made clear in *Smith* that a kill zone or concurrent intent analysis focuses on whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a zone of fatal harm, but also on whether the nontargeted alleged attempted murder victim inhabited the zone of harm. (*Smith, supra,* 37 Cal.4th at pp. 755-756.)

This Court in *Bland* gave examples of the force required. "For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent

to kill others concurrent with the intent to kill the primary victim." (*Id.*, at pp. 329–330, emphasis added.) This Court was concerned with a defendant who escalates the attack. "When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death." (*Id.*, at p. 330.) With an escalated mode of attack, this Court had no problem in finding a specific intent to kill the unintended target. "The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. " (*Ibid.)*

The "kill zone" by its nature, however, must have a limited geographical area. While the courts have not set any bright-line definition to the term "kill zone," what the courts have made clear is the kill zone is defined by the "nature and scope of the attack." (*Bland, supra,* 28 Cal.4th at p.329 .) A kill zone can only exist in a defined space that can be saturated with lethal force. In order to determine whether the nontargeted person is in the kill zone, the area must be defined. In order to reasonably infer that the defendant intended to kill everyone occupying that defined area, even though he was targeting only one person, the area must be saturated with lethal force. As explained below, it was error to instruct on the kill zone theory because the crime scene was a public street slightly smaller than a football field and the force used was only five shots from a semi-automatic handgun.

C. Case law supports that the kill zone must necessarily be in a

defined, limited, geographical area that is saturated with lethal force

The hallmark of a proper application of the kill zone theory is evidence of a method of killing which raises an inference that a defendant wanted to ensure the death of an intended victim by killing everyone within a prescribed area occupied by the victim. Logic demands that, in order for this inference to be supported, there be a nontargeted secondary victim(s) confined within a space with well-defined boundaries. A defined space is needed in order to reasonably infer that the defendant intended to kill everyone occupying that defined area, even though he was targeting only one person, by saturating that confined space with lethal force.

Placing a bomb on a commercial airplane in order to blow up the plane as a means of killing a specific passenger is a paradigmatic example. (See *Bland, supra,* 28 Cal.4th at pp. 329-330.) *Bland* itself dealt with victims in a confined space. In *Bland*, the driver, accompanied by two passengers, drove his vehicle to where the defendant and another man were standing, each of whom was a gang member. After a short conversation during which the driver told the defendant that he was a gang member but that his companions were not, the defendant and the other man fired a series of shots into the car, killing the driver and wounding the passengers. (*Id.*, at p. 318.) The "kill zone" was defined as the interior of the car, and the group of potential secondary victims was defined as Wilson's two companions. The evidence thus raised an inference that the defendant intended to kill everyone in the car.

In *People v. Campos* (2007) 156 Cal.App.4th 1228,

1231, 1244, after looking in the front and back seats, defendant sprayed a car containing three people with nearly a dozen bullets at close range, killing two and wounding a third. The court held that evidence supported attempted murder of the wounded victim on theory that the defendant intended to kill everyone in the car. (*Ibid.*)

Another example of a classic kill zone case is *People v. Vang* (2001) 87 Cal.App.4th 554, which affirmed convictions of 11 counts of attempted murder for using high-powered, wall-piercing weapons to spray bullets at two occupied houses -- one count for each person in the houses. Even though this case predated *Bland*, it was cited with approval by this Court in the *Bland* opinion. (See *Bland, supra*, 28 Cal.4th at p. 330.) *Vang* found the evidence supported the conclusion that the "defendants harbored a specific intent to kill every living being within the residences they shot up." (*People v. Vang, supra*, at p. 564.) This Court described *Vang* as essentially a kill zone case. (*Bland, supra*, at p. 330.)

In *People v. Adams* (2008) 169 Cal.App.4th 1009, the defendant set fire to a house with intent to kill his mother, whom he knew was inside at the time. The court held that the evidence supported the attempted murders of three other occupants of the house on the theory that defendant harbored a specific intent to kill every living being within the residence when the defendant lit fires at the front and back doors of the house. (*Id.* at pp. 1013.) In *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1391, defendant fired multiple shots at people in a doorway.

The above cases support Canizales' analysis of the kill zone as necessarily being a defined, limited, geographical area which can be saturated with lethal force. Each of the above-referenced

cases involved multiple victims in close proximity to the intended victim. Without the limitations placed on the scope of the "kill zone", this judicially created theory of liability would be both illogical and unmanageable, and would deprive a defendant of due process of law. (See Argument IV.)

D. The evidence was insufficient, as a matter of law, to support the inference that a kill zone was created, or if it did exist, that Bolden was in it

The nature and scope of the attack did not establish a kill zone. The force Windfield used, 5 shots from a semi- automatic handgun, did not establish a kill zone. The gun was not a high powered weapon. (3 RT 719-720, 762-763.) The five shots from a hand gun was not a means of mass destruction.

The crime scene was also not confined. The 300 bock of West Jackson was a cul de sac with a park at one end. It was a two lane city street that had on both sides, curbs, grass mediums, sidewalks, and apartment buildings with lawns out front, and enough space to allow for two cars to pass when cars are parked on both sides of the street . (1 RT 112, 181; Exs. 8, 76.) The length of West Jackson from the cross street Willow to the park was 352 feet and the width was estimated to be 125 feet, which total area is similar to, but smaller than, a football field. (See Ex. 76 [4-22-11 letter, paragraph 4 and Ex. 55.)

It was July 18th about 8:40 p.m. and people were scattered around the 300 block of West Jackson and were, according to Bolden, preparing for a block party. Bolden said the whole block

was filled with at least 30 people, some of them were setting up tents with food and beverage. (1 RT 108, 181-183; 2 RT 400; 3 RT 763.) Pride said there was a crowd of people partying and dancing. (3 RT 554.) Others said there were only a few people outside; there were a little more than 10 people who were scattered on both sides of the street. (1 RT 108; 2 RT 400.)

When Windfield shot, Pride was near the front of his apartment building at 330 West Jackson. Based on measurements by a detective and a defense investigator, the estimated distance from Willow, or the manhole cover on Willow, where Windfield stood, and 329 West Jackson, just across the street from Pride's apartment, was either 100 or 160 feet. (3 RT 574-575; Ex 76, letter dated 4-2-11, paragraph 1; 3 RT 715, 722.) Windfield could not control his shots. (2 CT 491.) These facts show that no "kill zone" was established around Pride based on the nature of the attack and location of it.

The facts also do not permit an inference that Bolden, the unintended victim, inhabited any assumed "kill zone" when Windfield fired the 5 shots. That is, even if a kill zone had been established, Bolden was not in it.

Bolden testified that, when the shots were fired, Pride was standing with him. (1 RT 246-247; 2 RT 288-289.) In a police interview, however, Bolden said Pride was four car lengths away from him. (2 CT 488- 489.) Pride testified he was in front of his building. (3 RT 578-579.) Bolden testified that, when the shots were fired, Pride grabbed him and they both ran down West Jackson toward the park. (1 RT 190, 195-196.) Bolden also however explained that while Pride started running when the first shot was fired, he was too stunned and did not start running immediately. (1 RT 194, 247.)

The notion that Bolden and Pride ran together was contradicted by the more elaborate, and therefore, more truth inspiring statements in Bolden's police interview. (2 CT 473-514.). In that interview Bolden indicated that Pride started to run even before the shots were fired so that Bolden could not have been running with him. Bolden recounted with specificity that Windfield and his associates, "saw Denzel, 'cause he the one ... he was the first one to run!" (2 CT 486.) "Denzel already gave it away when he started runnin'. That's why everybody was lookin' like why he runnin'?" (2 CT 488.) Obviously, everybody would not be wondering why Pride ran if they had heard shots.

Bolden explained that Pride saw Windfield, and then Pride 'turns around and start runnin'." (2 CT 489.) That's when Bolden heard someone say, "that's the little nigga right there." (2 CT 489.) As Bolden elaborately details in the interview, which contradicted his brief trial testimony, Pride ran first and after "that's when the gunshots come on." (2 CT 488.) Bolden figured out it was Pride Windfield was after, and Bolden stayed as far away from Pride as possible. Bolden said, "I'm on the sidewalk runnin' ... Cause I ain't tryin' to get shot." (2 CT 494.) It is hard to imagine Bolden running with Pride when Pride was zigzagging whereas Bolden ran in a straight line. (1 RT 195-196; 2 CT 494.)

"A judgment is not supported by substantial evidence if it is based solely upon unreasonable inferences, speculation or conjecture." (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.) " '[S]peculation is not evidence, less still substantial evidence.' (Citations) " (*People v. Waidla* (2000) 22 Cal.4th 690, 735.) Indeed, "[s]ubstantial evidence does not mean any evidence, or a mere

scintilla of evidence. It is 'evidence that is reasonable, credible, and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 614.)

The credible evidence that is of solid value supports the position that Bolden was not at any point running with Pride; and therefore, he was not at any time in any assumed kill zone. Further, as explained above, no kill zone was established around Pride based on the nature and location of the attack Therefore, Canizales' conviction for the attempted murder of Bolden based on the kill zone theory should be reversed.

E. The prosecution must have relied on the kill zone theory to hold Canizales liable for the attempted

Although the prosecution proposed that Canizales could be liable as an aider and abettor to the attempted murder of Bolden outside the kill zone theory (CALCRIM Nos. 401 and 600; 1 CT 228, 233; 4 RT 851, 854), the prosecutor must have relied on the kill zone theory because there was insufficient evidence that Canizales aided and abetted the attempted murder of Bolden.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) "[T]o be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing --

which means that the person guilty of attempted murder as an aider and abettor must intend to kill." (*People v. Lee*, *supra*, 31 Cal.4th at p. 624, emphasis added.)

"The overriding rule is that an aider and abettor's liability is dependent on his or her unique mental state. If that mental state is not the same as the perpetrator's mental state, then the aider and abettor is not 'equally guilty.' " (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118, 1122.) This Court in *McCoy* reasoned that "when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own *mens rea*. If that person's *mens rea* is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id.,* at p. 1122, italics added.) "[O]nce it is proved that the` principal has caused an *actus reus*, the liability of each of the secondary parties should be assessed according to his own *mens rea*'." (*Id.,* at p. 1118.)

When the offense is a specific intent offense, "the accomplice must share the specific intent of the perpetrator; this occurs when the accomplice knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Ibid;* internal quotation marks and citations omitted.)

That Canizales would not shoot the gun is undeniable evidence that he did not intend to kill or share in any intent to kill Windfield may have had. Windfield handed the gun, or attempted to hand the gun, to petitioner, and said, "Bust," which means in effect shoot. Canizales , however, would not take the gun and/or would not

shoot. Windfield took the gun back and immediately started shooting at Pride. (1 RT 200, 207-210, 213, 231-232, 246-247; 2 RT 296; 2 CT 487, 490-491.) Therefore there was insufficient evidence that Canizales could be liable for aiding or abetting the attempted murder of Bolden outside the kill zone theory.

F. Summary

There was no substantial evidence that Windfield intended to kill everyone on that street in order to kill Pride. Rather, the evidence was that Windfield fired five shots into the street from an initial distance of 100 to 160 feet at Pride who was running away. Windfield could not control the gun and the shots went everywhere. While this evidence was clearly sufficient to support a jury finding that Windfield intended to kill Pride, it did not support a finding that he had a concurrent intent to kill anyone else. No kill zone was created, and if it had been, there was no substantial credible evidence that Bolden was in the zone, as the most detailed evidence from Bolden was in his interview when he reported that Pride, anticipating problems when he saw Windfield, started to run before the shots were fired. Nor was there any evidence that Canizales, as an alleged aider and abettor, intended to kill Bolden. In fact, the only evidence, which was Canizales' failing to shoot the gun when ordered to do so, was that he did not intend to kill Bolden. Therefore, the jury must have relied on the inapplicable kill zone theory.

This case resembles *People v. Anh -Tuan Dao Pham* (2011) 192 Cal.App.4th 552. In *Anh-Tuan Dao Pham* , the court rejected the prosecution's kill zone theory of sufficiency where the

defendant repeatedly fired a .45 caliber gun into the midst of a group of people in an effort to kill two individuals who, it turned out, were not part of the group. Although the court affirmed the conviction on other grounds, it found that the concept of concurrent intent did not apply to the facts of the case. The court stated:

> We begin our analysis by rejecting the People's reliance on concurrent intent. As even the People admit in their brief, the concept of concurrent intent "applies when a defendant intends to kill a particular target, and uses a mode of attack that, by its nature and scope, shows a concurrent intent to kill persons in the vicinity of the intended target." Here, the evidence -- consisting primarily of defendant's own admissions to sheriff's deputies -- showed that defendant's "intended target[s]" were the two African–American teenagers he held responsible for damaging his mother's van. But the fact that defendant fired a gun at a group of people he thought included those teenagers, by itself, does not demonstrate that he had "a generalized intent to kill people standing in the group," as the People argue. Just because a defendant fires a gun repeatedly at a group of people does not necessarily mean the defendant can be convicted of as many counts of attempted murder as the number of bullets he fired. The question -- which is a factual one for the jury to decide -- is whether, based on the particular evidence in the case, it can be inferred that defendant had the concurrent intent to kill not only his intended target but others in the target's vicinity. *Id.*, at p. 559.)

The same can be said of the instant case. The firing of a gun toward a crowd of people is clearly reckless behavior that can be the basis for assault charges (see, e.g., *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1355-1357), but

it cannot alone provide the basis to sustain a conviction for attempted murder on a kill zone or concurrent intent theory unless there is evidence that the shooter intended to kill everyone in the group in order to ensure the death of his intended victim. That is, "to be found guilty of attempted murder, the defendant must either have intended to kill a particular individual or individuals or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means to some other end, e.g., killing some particular person." *(People v. Anzalone, supra,* 141 Cal.App.4th at p. 393.)

Since the evidence in this case was insufficient to support a finding that either defendant intended to kill Bolden, or that a kill zone existed and Bolden was in it, the finding of guilt on Count 2 must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; 99 S.Ct 2781.)

II THE KILL ZONE THEORY DID NOT APPLY BECAUSE THE SHOOTING ONLY ENDANGERED BOLDEN BY SUBJECTING HIM TO A RISK OF DEATH AND THE INSTRUCTION DID NOT EXPLAIN THAT ENDANGERMENT WAS NOT SUFFICIENT TO HOLD DEFENDANTS LIABLE FOR ATTEMPTED MURDER UNDER THE KILL ZONE THEORY

The zone of kill theory was inapplicable to hold Canizales liable for the attempted murder of Bolden because "[t]he kill zone theory ... does not apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury." (*People v. McCloud, supra*, 211 Cal.App.4th at p. 798.) The force used here did not establish that Windfield was attempting to kill Bolden in order to ensure the death of Pride. Bolden's life was endangered but that is not enough to prove attempted murder. Moreover, the instruction erroneously did not explain that the kill zone theory does not apply if the defendant merely subjects everyone in the kill zone to a lethal risk and does not care if they die. (*Id.*, at p. 798.)

A. Endangering the lives of unintended victims in the vicinity of the target shows only the mental state of implied malice which is not enough to establish liability for attempted murder under the kill zone theory and the instruction fails to explain this

"The mental state required for attempted murder

has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice -- a conscious disregard for life -- suffices. (Citations.) In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' (Citations.)" (*People v. Perez* (2010) 50 Cal.4th 222, 229-230 ("*Perez*").) Express malice, or intent to kill, requires more than knowingly placing the victim's life in danger: it requires at the least that the assailant either " ' "desire the result," ' " i.e., death, or " ' "know, to a substantial certainty, that the result will occur." ' " *(Smith, supra*, 37 Cal.4th at p. 739, quoting *People v. Davenport* (1985) 41 Cal.3d 247, 262.)

"An attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them." (*People v. Anzalone, supra*, 141 Cal.App.4th at p. 392.) Subjecting individuals to the risk of fatal injury is the mental state of implied malice murder, not attempted murder. Attempted murder requires proof of a specific intent to kill; the *mens rea* sufficient to prove murder by an act inherently dangerous, is insufficient to prove an attempt to murder. This is a critical distinction; it is important not to mistake endangerment for an intent to kill.

"Nor does the kill zone theory apply if the evidence merely shows ... that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual." (*McCloud, supra,* 211 Cal.App.4th at p.798.) Windfield and Canizales may have had the state of mind, "I

know my conduct is dangerous to others, but I don't care if someone is hurt or killed," but that is the state of mind for implied malice murder (*People v. Olivas* (1985) 172 Cal.App.3d 984, 988), not for attempted murder.

"Consequently, the pivotal factual question on [the] attempted murder charge[] concerned... the intent element: Did defendants specifically intend to kill [Bolden]? Or rather did they, in their attempt to kill [Pride], knowingly subject [Bolden] to a risk of fatal injury and not care whether [he] lived or died? If the former, then they are guilty of the attempted murder of [Bolden]. If the latter, then they are guilty of a serious crime against [Bolden], but it is not attempted murder." (*People v. Sek* (2015) 235 Cal.App.4th 1388, 1400 [Petition for Review filed May 28, 2015 and pending S226721].) The instruction failed to explain that the state of mind for implied malice will not suffice to prove attempted murder. This omission allowed for an impermissible and overly broad interpretation of the crime of attempted murder.

B. The Opinion misinterprets the kill zone theory

The *McCloud* opinion for the first time puts a lazer - like focus on the many ways that the kill zone could be misinterpreted, such as allowing the theory to encompass individuals who are only in danger of losing their lives and to include defendants who could care less whether these individuals are killed in the course of an attack on the target. (*McCloud, supra,* 211 Cal.App.4th at p. 798.) The fundamental

problem with the Opinion is that, unlike *McCloud,* it has a flawed understanding of the kill zone concept.

The Opinion states: "In our view, *McCloud* goes too far. The language in *Bland* ... posits that the intent to kill the nontargeted person(s) *can be inferred* from the nature and scope of the attack or from the method employed. If, as *McCloud* asserts, the defendant must in fact intend to kill each attempted murder victim, there is no reason to employ the theory — the intent to kill is established without resort to the theory." (Slip Opinion [dated 9-10-14, after remand from this Court], p. 23, italics in Opinion.)

Of course, there is never any reason to employ the kill zone theory. This Court has explained that jury instructions on the kill zone theory are never required. (*People v. Stone, supra*, 46 Cal.4th at pp. 137–138; *Bland, supra,* 28 Cal.4th at p. 331, fn. 6 [the kill zone theory "is not a legal doctrine requiring special jury instructions"].) Nevertheless, if the kill zone theory is used, contrary to the Opinion, the assertion in *McCloud* is correct, that "[t]he kill zone theory ... does not operate as an exception to the mental state requirement for attempted murder or as a means of somehow bypassing that requirement." (*McCloud, supra*, 211 Cal. App.4th at p. 798.) The kill zone theory does not create intent where none existed.

The Opinion indicates erroneously that a defendant may be found guilty of the attempted murder of someone he does not intend to kill simply because the victim is in some undefined zone of danger. (Opinion p. 23.) Contrary to the Opinion, in order for a defendant to be convicted of the

attempted murder of multiple victims, the prosecution has to prove he acted with the specific intent to kill each victim. (*Smith, supra,* 37 Cal.4th at p. 739.)

The Opinion also misreads the term "unintended target." The Opinion states: "That *McCloud* overstates the theory is proven by language in other California Supreme Court opinions. In *People v. Stone* (2009) 46 Cal.4th 131, 136, 137, ..., the High Court said of *Bland,* "The evidence supported a jury finding that the defendant intended to kill the driver [of the car into which he shot] but *did not specifically target* the two who survived. [Citation.] ... We summarized the rule that applies when an intended target is killed and *unintended* targets are injured but not killed.... [¶] ... [I]f a person targets one particular person, ... a jury could find the person *also,* concurrently, intended to kill—and thus was guilty of the attempted murder of—other, *nontargeted* persons." (Some italics original, some added.)" (Opinion p. 23.)

The quote from *Stone, supra*, does not prove that *McCloud* overstates the kill zone theory. The Opinion appears to have misread the term "unintended target" as meaning "people that the defendant did not intend to kill." The Opinion appears to believe that *Bland* says that, under the kill zone theory, the defendant is "deemed" to have intended to kill even people that were "unintended targets" as long as they are in the kill zone. But inferring something is different than "deeming" it

to be the case. [3] Based on the terms used in *Stone, supra*, the intended target refers to the person the defendant is trying to kill and the unintended target is the person the defendant intends to kill as a means of killing the intended target. It is an unfortunate choice words and it would be better to refer to the parties as primary and secondary victims.

The Opinion's erroneous analysis of the kill zone theory is shown it its selection of language in *People v. Adams, supra*, 169 Cal.App.4th at p. 1023 as an example of a correct interpretation of the kill zone theory, when in fact the mental state shown in *Adams* is implied malice. The Opinion states: "Language in opinions of the Court of Appeal also suggest that *McCloud* misstates the kill zone theory. In *Adams* ... the Fifth District said, ... "[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 ... despite the recognition, or with the acceptance of the fact, that ... *a natural and probable consequence of that act would* [*be that*] *anyone within the zone could or would die.*" (Opinion p. 24 [italics in the Opinion.].)

Adams, not *McCloud,* misstates the kill zone theory. *Adams* implies that attempted murder can be

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[3] To infer is to deduce or conclude (information) from evidence and reasoning rather than from explicit statement; whereas to deem is simply to regard or consider something in a specified way. (Google Dictionary.) Deeming could be done without the necessity of deducing something from evidence.

established where the defendant merely recognizes or accepts the fact that, as a natural and probable consequence of his act, that a person "could or would" die. The state of mind for implied malice murder is, "I know my conduct is dangerous to others, but I don't care if someone is hurt or killed." (*People v. Olivas, supra,* 172 Cal.App.3d at pp. 987-988.) The state of mind quoted in the Opinion from *Adams* is congruent with implied malice, but not with attempted murder, which requires that the defendant specifically intend that each person die. *McCloud* was correct when it stated: "Nor does the kill zone theory apply if the evidence merely shows ... that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual." (*McCloud, supra,* 211 Cal.App.4th at p.798.)

Even though the courts consider the natural and probable consequences of a wrongdoer's actions when applying the kill zone theory, it is important not to confuse the kill zone theory with the intent required to prove murder by an act inherently dangerous to others, which shows implied malice. (Pen. Code, §187; CALCRIM No. 520.) The mental state that allows a wrongdoer to have a wanton disregard for human life is not the same as having an intent to kill. Shooting at the nontargeted victim in the alleged kill zone must be the means used to kill Pride rather than a mere collateral consequence of attempting to kill him.

People v. Anh-Tuan Dao Pham, *supra*, 192 Cal.App.4th at p. 559 is instructive because it rejects the kill

zone interpretation advanced by the Opinion that merely shooting toward a group of people that includes one's target demonstrates an intent to kill everyone in the group. *In Anh-Tuan Dao Pham*, the court explained: "the fact that the defendant fired a gun at a group of people ..., by itself, does not demonstrate that he had "a generalized intent to kill people standing in the group." (*Id.*, at p. 559.) "Just because a defendant fires a gun repeatedly at a group of people does not necessarily mean the defendant can be convicted of as many counts of attempted murder as the number of bullets fired." (*Ibid.*) This Court also stated this point: "[S]hooting at a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder." (*Perez, supra*, 50 Cal.4th at p. 224.)

The Opinion states: "Moreover, *McCloud*'s restrictive view of the kill zone theory cannot possibly be reconciled with the holding of two different appellate courts, and the approval by the California Supreme Court of one of those holdings, that kill zone victims can include those not seen by the defendant or of which the defendant is unaware." (Opinion pp. 24-25.) The issue about kill zone victims including those not seen by the defendant or of which the defendant is unaware is a "red herring" because it is not a factor in the *McCloud* holding. The essence of *McCloud* is that the implied malice state of mind is not sufficient for a conviction of attempted murder under the kill zone theory. That is, defendant cannot be convicted of attempted murder by knowingly putting lives in danger and not caring whether they

die. Case law predating *McCloud* makes clear that a defendant can commit an attempted murder of individuals he does not know are present. (*People v. Vang, supra,* 87 Cal.App.4th at p. 559; *People v. Adams, supra*, 69 Cal.App.4th at p. 1023.) These holdings are a by-product of the inference that the defendant intended to kill everyone in the vicinity of the target.

The Opinion fails to understand that the kill zone theory is totally dependent on the nature of the force and the location of the victims, whether or not the defendant knows the existence of each one of them. If the person was in the kill zone, whether or not defendant knew he was there, the person was included within the defendant's murderous intent. To establish a kill zone, the evidence must demonstrate that the defendant used a mode of attack that, by its nature and scope, shows a concurrent intent to kill *everyone* in the vicinity of the intended target, and randomly shooting in the general direction of the group does not meet that standard.

Based on the nature and scope of the attack and the location of Bolden, there is no evidence in this case that Windfield intended to kill everyone in the group, which included Bolden, in order to ensure the death of his intended victim Pide. In fact, in Windfield's statement to Meoshi Gordon, Windfield admitted the only guy he was shooting at was Pride. (3 RT 632-633; 637, 644, 663.)

On the conflicting evidence of whether or not Pride started to run before the shots were fired, the Opinion states "even of the jury credited Bolden's pretrial statement, [that

Pride began to run before the shots were fired], that did not necessarily preclude a finding that there was a zone of danger and defendants cite no authority so holding." (Opinion p. 30 fn. 19.) The problem is that the only zone of danger was one surrounding Pride, and if Pride started to run before Bolden and zigzaged while running, then Bolden would not have been in the kill zone. Although Bolden would have been in danger of being killed, that would not be enough to show an intent to kill.

Moreover, the "expansion of attempted murder liability to cover mere endangerment is unnecessary in order to ensure assailants are appropriately punished for acts that place victims' lives in danger." *(Smith, supra*, 37 Cal.4th at p. 757, Werdegar, J., dissenting.) The firing of a gun toward a crowd of people is clearly reckless behavior that can be the basis for assault charges (see, *ibid*; e.g., *People v. Trujillo, supra*, 181 Cal.App.4th at pp. 1355-1357), but it cannot alone provide the basis to sustain convictions for attempted murder on a concurrent intent theory unless there is additional evidence that the shooter intended to kill everyone in the group in order to ensure the death of his intended victim.

Windfield's firing of five shots endangered the lives of everyone on the block including Bolden, but it was not inevitable or even possible that everyone on the block would die. Without the force necessary to infer that in order to kill Pride, Windfield used enough force to ensure all the people on the block would die, Windfield's conduct established only a conscious disregard for life.

The *McCloud* case is not only correct but

significant because it explains the kill zone doctrine by delineating what it does not cover "The kill zone theory... does not apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. Nor does the kill zone theory apply if the evidence merely shows, in addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual." (*McCloud, supra*, 211 Cal.App.4th at p.798.) Those are the circumstances shown by the facts in this case, and therefore, the kill zone theory was inapplicable to hold appellant liable for the attempted murder of Bolden.

CALCRIM No. 600, the kill zone instruction, critically mislead the jury by failing to communicate to jurors that a defendant cannot be convicted of attempted murder merely by subjecting individuals other than his intended target to a risk of fatal injury, and this omission allowed for an overly broad interpretation of the crime of attempted murder. If some form of the kill zone instruction is used in the future it should contain the *McCloud* advisements to educate jurors that implied malice, shown by endangering the nontargeted individuals, is not sufficient to convict a defendant of attempted murder under the kill zone theory.

III THE KILL ZONE INSTRUCTION WAS INCOMPLETE, ARGUMENTATIVE, UNNECESSARY, AND LESSENED THE PROSECUTION'S BURDEN OF PROOF

A. The instruction was incomplete because it did not define the kill zone and did not require the jury to find Bolden occupied that zone

"Kill zone" is a technical term and the instruction does not explain what a "kill zone" is. [4](See *People v. Sek, supra,* 265 Cal.App.4th at pp. 1394-1395 [disapproving CALJIC No. 8.66.1 on attempted murder that used the term "kill zone" without adequately defining it].) Canizales acknowledges here that this Court has previously rejected his position on this issue by stating that no instruction is required. (See, e.g., *Stone, supra*, 46 Cal.4th at pp. 137-138.) But the Court's current reevaluation of the kill zone instruction requires it to revisit this issue.

A court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language. (*Bland, supra,* 28 Cal.4th at p. 334.) Words or phrases with technical legal meanings that differ from the common meaning or understanding or are peculiar to the law, however, should be explained by the court sua sponte. (See, e.g., *Bland, supra*, 28 Cal.4th at p. 334; *People v. Estrada* (1995) 11 Cal.4th 568, 574-575; *People v. Rodriguez* (2002) 28 Cal.4th 543, 547.)

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4 CALJIC No. 8.66.1 had other problems, as noted in the *Sek* case, which do not apply to CALCRIM No. 600. (*Id.* at pp. 1395-1396.)

The term "kill zone" has a technical meaning specific to the attempted murder concurrent intent concept. (See, e.g., *Bland, supra*, 28 Cal.4th at pp. 329-330; *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984, 1000-1001].) This Court in *Bland,* explained that a concurrent intent to kill may be inferred from evidence of a method of attack apparently meant to result in a mass killing. (*Bland, supra,* 28 Cal.4th at pp. 329-330, quoting *Ford v. State, supra*, 625 A.2d at pp. 1000-1001].) The term "kill zone" should be described in the instruction in similar language to ensure the jury understands that the concept is limited to situations where death is a "near certainty" not where death is only a risk. This definition of the term "kill zone" would not be readily apparent to lay jurors unfamiliar with the *Bland* and *Ford* decisions and their progeny.

Indeed, in electing to instruct the jury with the "kill zone" portion of CALCRIM No. 600, the trial court then had a sua sponte duty to do so correctly. As the *Sek* court noted in discussing CALJIC No. 8.66.1, "Where is [the kill zone], and how far does it extend? How can the jury determine who is in it and who is not? " (*People v. Sek, supra*, 265 Cal.App.4th at p. 1395.) It was therefore necessary for the Court to explain this concept so that the jurors could properly perform their function. (See, e.g., *Simmons v. South Carolina* (1994) 512 U.S. 154, 173, 114 S.Ct 2187 [Souter, J., concurring opinion].)

An explanation of the kill zone parameters is important because, according to a Google search, the term seems absorbed into popular culture which could lead to jury

confusion. "Killzone" is a popular video game published by Sony Computer Entertainment that is played on the PlayStation video system. Multiple installments of the Killzone series have been produced since 2004. "Kill Zone" (2005) is also the name of a popular Chinese mob movie. "The Kill Zone" (2010) is also the title of an action book authored by Chris Ryan. After the jury's exposure to the popular culture depiction of a kill zone, the instruction appears to mandate a factual finding of concurrent intent even if the jury does not actually draw that inference.

Another problem is that the instruction did not require the jury to find that Bolden was in the kill zone. This Court in *Smith* concluded that any nontargeted attempted murder victim must "inhabit that zone of harm." (*Smith, supra,* 37 Cal.4th at p. 756.) As explained in Argument I, the foundational facts do not support the inference that Bolden was in a kill zone; and moreover, the jury was not asked specifically in the instruction to find that he was.

B. The instruction was argumentative

In the prior subsection, Canizales has argued that the "kill zone" should be defined, but that does not mean that the words "kill zone" should be used in that definition. Canizales believes CALCRIM No. 600 is prejudicially argumentative in employing the phrase "kill zone."

"Instructions must not ... be argumentative or slanted in favor of either side, [and the instructions] should

neither 'unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory . . . nor overemphasize the importance of certain evidence or certain parts of the case.'" (*United States v. McCracken* (5th Cir. 1974) 488 F.2d 406, 414 [citations omitted].) Instructions of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence are impermissible, on the ground that such instructions are argumentative. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135; *People v. Lewis* (2001) 26 Cal.4th 334, 380.) An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. (*People v. Rice* (1976) 59 Cal.App.3d 998, 1004.)

CALCRIM No. 600 violates the prohibition against argumentative instructions because it goes beyond merely referring to the requisite zone of risk and, instead, proceeds to describe it in provocative and inflammatory terms as a "kill zone." In *People v. Campos, supra,* 156 Cal.App.4th at p. 1244, the court rejected the defendant's argument that the use of this term invited inferences favorable to either party, or integrated facts of the case as an argument to the jury. The court compared "kill zone" to other disparaging terms such as "flight," "suppression of evidence" and "consciousness of guilt," which had long been used and approved in criminal jury instructions. (*Ibid.*) This comparison is misconceived.

For example, other than being disparaging, the consciousness of guilt concept has little in common with kill

zone, as used in CALCRIM No. 600 and the earlier CALJIC version of the instruction. First, it should be noted that the term consciousness of guilt does not appear in any of the instructions setting out the elements of an offense or the prosecution's burden of proof. It is, at most, a makeweight in the determination of culpability.

Kill zone, in contrast, is the pivotal concept in the concurrent intent analysis. Under both the instruction and this Court's jurisprudence, the concurrent intent doctrine has two requirements, both dependent on the kill zone metaphor: (1) the defendant targeted a primary victim by intentionally creating a kill zone; and (2) the attempted murder victims were within that kill zone. (*Smith, supra*, 37 Cal.4th at pp. 755-756.) Further, both the common, i.e., dictionary meaning, and the legal meaning of the phrase "consciousness of guilt" are the same. The subjects of the instructions - misleading statements, concealment or fabrication of evidence and flight - are concrete actions with no extraneous connotations. Kill zone, no matter how defined in an instruction, has unavoidable inflammatory associations with the most horrific killings by terrorists. Nothing in CALCRIM No. 600 addresses, much less prevents this inevitable, prejudicial association. As such, the instruction is inherently argumentative and unduly favors the prosecution.

In Maryland, where the concurrent intent theory was first proposed, at least one case has <u>not</u> imported the "kill zone" language verbatim into its instructions." The Maryland instruction instead uses "zone of danger" or "zone of harm" in

explaining concurrent intent. (See, e.g., *Dionas v. State* (2011) 199 Md.App. 483, 534, 23 A.3d 277, 306-307, rev'd on other grounds in *Dionas v. State* (2013) 436 Md. 97, 80 A.3d 1058.) There is no conceivable reason to use the term "kill zone," with its inflammatory connotations when the neutral terminology used by the state that initiated the theory suffices to convey the relevant concept.

In *Dionas*, the court instructed the jury, in pertinent part, as follows without using the words "kill zone," and with, as Canizales requested in the prior subsection, a more elaborate explanation of the concurrent intent concept, including the example of a bomb on the plane to illustrate the nature of the force required:

> "Attempted murder in the first degree is defined as taking a step, beyond mere preparation, towards the commission of murder in the first degree. In order to convict the Defendant of ... attempted murder in the first degree, the State must prove ... that the Defendant took a substantial step, beyond mere preparation, towards the commission of murder in the first degree, or that the Defendant aided and abetted another towards the commission of murder in the first degree.
>
> Now, based on the totality of facts and circumstances in evidence before you, you may, but are not required to find, that where the nature and scope of an attack, while directed at a primary or primary victim or victims was intended to insure the harm to the primary victim or victims by harming everybody in their path, or everybody in the primary victim's vicinity.
>
> For example, when one places a bomb on a

> commercial airplane intended to harm a primary target on board, that person insures by this method of attack that all passengers will be killed. In that instance, the perpetrator by such intentional conduct and action, has intentionally created a zone of harm or danger to insure the death of his primary victim.
>
> As you may, but are not required, to infer from the method and manner employed a concurrent intent to kill all in the intended victim's immediate vicinity so as to insure the primary victim's death. This is true without regard to whether or not the intended victim was, in fact, killed. And if you find, beyond a reasonable doubt, that the conduct that created the zone of danger was done willfully and with premeditation and deliberation, with intent to kill the primary actor, ... " (*Dionas v. State, supra*, 199 Md.App. at pp. 533-534, 23 A.3d at p. 307.)

The kill zone terminology detracts from a reasoned examination of the facts and virtually compels the jury to find a broad intent to kill. It dilutes the individualized intent requirement, hence lowering the prosecution's burden of proof, by implying that firing into an area must invariably carry with it an intent to kill. This is the case because the words "kill zone" strongly suggest an arcade-like shooting gallery in which all occupants are targets of a homicidal maniac or a terrorist. Implicit in the phrase itself is a strong inference that the defendant had the intent to kill all those within the zone of risk. This is improper because it directs the jurors to reach the conclusion argued by the prosecution and thereby deprives defendant of an unbiased and impartial jury. The prejudicial effects denied Canizales his rights to a fair trial and due

process of law. (See Argument IV, post.)

C. No instruction on the kill zone theory was necessary

Instruction on the kill zone theory should not have been given in this case. This Court has reminded trial courts that the kill zone instruction is never required. (*Stone, supra*, 46 Cal.4th at pp. 137-138; *Smith, supra*, 37 Cal.4th at p. 746.) The very case that introduced the "kill zone" concept into California jurisprudence stressed that it was not a legal doctrine requiring special jury instructions. (*Bland, supra*, 28 Cal.4th at p. 331, fn. 6.) As *McCloud* reiterated, "[i]t is consequently *impossible* for a trial court to commit error, much less prejudicial error, by declining to give a kill zone instruction." (*McCloud, supra,* 211 Cal.App.4th at p. 802-803 (italics in opinion).)

As this Court has repeatedly reminded, the kill zone theory is merely an inference that the jury could make, if the facts warranted it, that would satisfy the element of intent to kill with regard to "secondary" nontargeted victims. (*Bland, supra*, 28 Cal.4th at p. 331, fn. 6; see also *Stone, supra*, 46 Cal.4th at pp. 137-138; *Smith, supra*, 37 Cal.4th at p. 746.) Where, as here, all the legal concepts that the jury needed were covered by other instructions, no "pinpoint" instruction on the kill zone theory was necessary or appropriate, and application of the facts to this evidentiary theory was "best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate." (*People v. Wharton*

(1991) 53 Cal.3d 522, 570.)

As Judge Rymer observed in a concurring opinion on the subject of "inference" instructions:

> [I]nference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for the possible inference to be considered by the jury. Inferences can be argued without benefit of an instruction; indeed, inferences are more appropriately argued by counsel than accentuated by the court. Further, because they are a detour from the law which applies to the case, inference instructions tend to take the focus away from the elements that must be proved. In this way they do a disservice to the goal of clear, concise and comprehensible statements of the law for laypersons on the jury. Balanced inferences are also difficult to craft. And, as this case demonstrates, inference instructions create a minefield on appeal. For all these reasons, as a practical matter it seems to me both unnecessary and unwise for inference instructions to be requested or given. (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 900 [Rymer, C.J., concurring].)

As stated in the above subsections, on the one hand, the instruction as given was incomplete because it did not explain the parameters of a kill zone. On the other hand, the use of the term "kill zone" was inflammatory and inherently prejudicial. These two seemingly conflicting requirements can be resolved by simply not giving the instruction at all.

IV THE CALCRIM NO. 600 INSTRUCTION WAS PREJUDICIAL AND THE COUNT 2 CONVICTION SHOULD BE REVERSED

In a jury trial, the State must prove every element of the offense, and a jury instruction violates a defendant's Fifth and Fourteenth Amendment right to due process if it fails to give effect to that requirement. (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.) The constitutional right to due process can be violated by an ambiguity, inconsistency, or deficiency in a jury instruction. (*Ibid.)* Such an instruction likewise violates a defendant's Sixth Amendment right to a fair trial at which a jury finds every fact necessary to the verdict true beyond a reasonable doubt. (*United States v. Gaudin* (1995) 515 U.S. 506, 513, 515 U.S. 506; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278, 508 U.S. 275.) "Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun* (2009) 45 Cal.4th 1172, 1201, *People v. Sek, supra*, 235 Cal.App.4th at p. 1398.)

Misdirection of a jury, including incorrect, ambiguous, conflicting, or wrongly omitted jury instructions that do not amount to federal constitutional error are reviewed under harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157.) The lesser standard of prejudice is

whether, "it is reasonably probable that a result more favorable to the defendant would have been reached" in the absence of the instruction. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *McCloud, supra*, 211 Cal.App.4th at p. 803.) "There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.' " (*People v. Mower* (2002) 28 Cal.4th 457, 484.) A "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility, and can include a hung jury. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 519.)

It was prejudicial error to instruct on a theory inapplicable to the facts of the case. No kill zone was created, or if it had been, Bolden was not in it. Also, the instruction was misleading in that it did not disabuse jurors that they could not convict the defendants of Bolden's attempted murder if they thought the shooting put Bolden in danger of death and the defendants did not care if they died. "[T]he pivotal factual question on [that] attempted murder charge concerned only the intent element: Did defendants specifically intend to kill [Bolden] . Or rather did they, in their attempt to kill [Pride] knowingly subject [Bolden] to a risk of fatal injury and not care whether [he] lived or died? If the former, then they are guilty of the attempted murder of [Bolden]. If the latter, then they are guilty of a serious crime against [Bolden], but it is not attempted murder." (*People v. Sek, supra*, 235 Cal.App.4th at p.1400.) The instruction did not explain that endangering

people was not enough to support an attempted murder conviction.

Further the instruction was incomplete in failing to define the physical parameters of the kill zone, argumentative in using the inflammatory, guilt - directed term, "kill zone," and was, in the final analysis, absolutely unnecessary. The instruction did not explain what constitutes the requisite zone or how such a zone relates to the element of intent; which could have been done without using the incendiary "kill zone" language.

Permitting Canizales to be convicted of the count 2 attempted murder based upon the CALCRIM No. 600 instruction, which was inapplicable, because no "kill zone" was established, prejudicially misleading, incomplete, and argumentative and provided an overbroad definition of the crime of attempted murder, violated petitioner's rights to due process of law and a fair jury trial under the Fifth, Sixth and Fourteenth Amendments. Because these are constitutional violations, the *Chapman* standard should be used, and under that standard, this Court cannot conclude beyond a reasonable doubt that the erroneous kill zone instruction did not contribute to the verdict on the attempted murder count as to victim Bolden. (*Chapman v. California* (1967) 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824.) Even under the state law standard, reversal is required because given the incomplete and misleading nature of the instruction, there is a reasonable chance, more than an abstract possibility, that at least one juror could have found that defendants did not intend to kill Bolden, but did intend to endanger his life.

As fully explained in the Statement of Facts,

Windfield's purpose in going to West Jackson that day was to shoot Pride and avenge the death of his cousin. There was no evidence that Windfield saw Bolden (2 CT 491) or even knew what Bolden looked like. (1 RT 249.) Bolden was sure Windfield was shooting at Pride and not shooting at him. (1 RT 213, 217; 2 RT 296.) Because there was no evidence that Windfield shot at Bolden, the jury likely relied on the kill zone theory.

The problem is that the kill zone theory was inapplicable to the facts, as discussed in Argument I. The jury instruction was also misleading in that it allowed the jury to find liability for attempted murder when Bolden was only in danger of being shot, as discussed in Argument II. The instruction was erroneously incomplete because it did not define the kill zone or require that the jury determine whether Bolden was in it, and the instruction's use of the term "kill zone" was inflammatory and prejudicial, as discussed in Argument III.

The prosecutor's argument to the jury should be examined to determine whether there was prejudice from a misleading instruction. (*Bland, supra*, 28 Cal.4th at p. 333.) The prosecutor's argument invited the jury to misuse the kill zone instruction when the jury was told, "If they're shooting at someone and people are within the zone that they can get killed, then you're responsible for attempted murder as to the people who are within the zone of fire." (4 RT 864-865.) That is, the jury was told that defendants could be convicted of attempted murder of non-targeted persons simply because they were "within the zone that they can get killed," "within the zone of fire." This would allow the jury to find attempted murder on facts that only showed endangerment or implied

malice.

Prejudice is further shown based on the jury's request for a readback of Bolden's testimony that "They weren't shooting at me," which request showed that they were concerned about whether there was an intent to kill Bolden. (2 CT 268.)

Misleading or incomplete instruction on the kill zone theory is of particular concern in this case because here two legal fictions, "transferred intent" and "kill zone," were used to hold defendants liable for the bystander's murder and Bolden's attempted murder. The two fictions could have been confusing because the predicate act for the application of both theories was the same, the shooting at Pride to kill him. Jurors may have had a hard time differentiating the two theories. They could have concluded that if the shooting of Pride would make the defendants liable for a murder of a bystander, someone the defendants did not know or intent to shoot, then surely defendants would be liable for a lesser crime of attempted murder of Bolden, a person at least Canizales knew and did not like because he was a rival gang member, whether or not Bolden was in a kill zone.

Canizales was prejudiced under both the federal and state law standards by the defective CALCRIM No. 600 instruction, which was vital to the prosecution's case but was also inapplicable, prejudicially incomplete, misleading and argumentative and provided an erroneously overbroad definition of the crime of attempted murder. Reversal of count 2 is mandated.

CONCLUSION

Based on the above, Canizales' attempted murder conviction of Bolden in Count 2 should be reversed.

Respectfully submitted,

_____

Christine Vento

WORD COUNT CERTIFICATION

I, Christine Vento, am counsel for petitioner. I hereby certify pursuant to Rule 8.520(c)(1) of the California Rules of Court that in reliance on the word count of the computer program used to prepare this document, the word count of the body of this document, excluding tables and this Certification, is 13,172 words. The applicable word-count limit is 14,000 words. Dated 7/13/15

_____

Christine Vento

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action. My business address is P.O. Box 691071, Los Angeles, CA 90069-9071. I am a member of the bar of this court. On JULY 14, 2015 I served the within BRIEF ON THE MERITS in said action, by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows, and deposited the same in the U. S. mail at Los Angeles, CA.

Michael Canizales AH6617; D1 CELL 08
CSP/LAC POB 4670
Lancaster, CA 93539

Clerk of the Superior Court; For delivery to Hon. Steven Mapes
17780 Arrow Boulevard
Fontana, CA 92335

Deputy District Attorney attn. Norma Alejo, Esq.
17780 Arrow Boulevard
Fontana, CA 92335

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D)&
8.71(f)(1)(A)-(D).)

Furthermore, I, Christine Vento, declare I electronically served from my electronic service address of vento107660@gmail.com the same referenced above document on 7-14-15 at about (8 p.m.) to the following:

APPELLATE DEFENDERS INC,
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DAVID LAMPKIN dplampkin@aol.com

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14TH day of JULY 2015, at Los Angeles, CA.

_____

Christine Vento