# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. S271049

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

**v.**

**AHMED MUMIN,**
Defendant and Appellant.

Court of Appeal
Fourth District
Division One
Case No. D076916

San Diego County
Superior Court
Case Number
SCD261780

APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT

The Honorable Kenneth K. So, Judge

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## APPELLANT'S REPLY BRIEF ON THE MERITS

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## Introduction

The parties' contrasting arguments in this case sharpen the focus of the debate over what standards trial courts should apply in instructing on the "kill zone" theory of liability and what standards appellate courts should apply in reviewing claims of kill zone instructional error. This debate also brings the answers into sharper focus, for the right outcome is clear: Mumin's position, which is backed by multiple appellate courts, must prevail over the lone position of the Court of Appeal that respondent advocates here, because the former upholds the safeguards that this Court established in *People v. Canizales* (2019) 7 Cal.5th 591, while the latter annihilates them.

## Argument

### I. Respondent's defense of the trial court's kill zone instruction shines an even brighter spotlight on the error and the untenable nature of the standards for which respondent advocates.

Respondent argues the trial court got it right in instructing on the prosecution's kill zone theory and, by extension, that the Court of Appeal got it right in upholding the instruction. (Resp. Ans. Brief on the Merits ("RABM") 23-48.) However, the argument falls apart under scrutiny, proving Mumin's point.

### A. The new threshold for "kill zone" liability

We must be clear about what constitutes the *requisite* intent for a valid kill zone theory in determining when a jury may

properly rely on such a theory in deciding charges of attempted murder as to alleged *non*-target victims. Respondent suggests benchmarks lower than what *Canizales* demands. For example, it relies on *Vang* for the proposition that the "'proof is deemed sufficient if [the] means used and surrounding circumstances make the crime *apparently possible*.'" (RABM 59, quoting *People v. Vang* (2001) 87 Cal.App.4th 554, 564, italics added). Any such articulations of the kill zone theory's requirements are no better (and even worse) than the implied malice standards which, as respondent elsewhere acknowledges (RABM 45, 60), *Canizales* expressly rejected (*Canizales*, *supra*, 7 Cal.5th at p. 614).

Having raised the bar *above* the thresholds in the past cases, *Canizales* requires proof of an *intent to kill* everyone in the alleged zone *as a means* of *killing* the primary target. It is not enough 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* (2012) 211 Cal.App.4th 788, 798.) It is not enough that the defendant intended to kill a particular individual, "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." (*Ibid.*; accord *In re Sambrano* (2022) 79 Cal.App.5th 724, 727-728.) And, even if the defendant "intended to kill everyone in a particular area," the kill zone theory cannot properly be applied if he did not do so "*as a means of ensuring the death of a primary target*." (*Sambrano* at p. 727.) "Rather, the kill zone theory applies only if the evidence

shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*"—that is, when "the defendant *specifically intends* that *everyone* in the kill zone die." (*McCloud* at p. 798.)

### 1. The knowledge requirement is essential, and even more so after *Canizales*.

An important related question is whether or the extent to which the kill zone theory may properly be applied to convict a defendant of attempted murder as to an alleged non-target victim who was allegedly within the "kill zone" without the defendant's knowledge or awareness. This is a point of sharp contention here, since it is undisputed that Mumin lacked such knowledge or awareness as to the presence of Detective Johnson, the alleged non-target victim, outside the doors of the community room from which Mumin fired the three gunshots at issue. (16RT 3871 [the prosecutor conceded that Mumin "was on the other side of those doors in a pitch black room with no lights on, dark outside," with "no other sounds around, . . . unaware of who was outside those doors"]; RABM 17 [respondent acknowledges this].) Mumin contends that this precludes the existence of any valid kill zone theory, while respondent contends it does not. (RABM 55-60.)

Even before *Canizales*, this Court explained that where "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," such circumstances support a finding that "the shooter intended

to kill not only his targeted victim, but also others *he knew* were in the zone of fatal harm." (*People v. Bland* (2002) 28 Cal.4th 313, 329-330, italics added.) The Court said so again in both *Smith* and *Perez*, thus twice reiterating that such knowledge is required as part of any valid kill zone theory. (*People v. Smith* (2005) 37 Cal.4th 733, 745-746, quoting *Bland* at pp. 329-330; *People v. Perez* (2010) 50 Cal.4th 222, 232, quoting *Smith* at pp. 745-746.)

Further, in *Perez*, the Court admonished that "*shooting at* a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder." (*Perez*, *supra*, 50 Cal.4th at p. 224.) If shooting *directly at* someone was not enough to establish attempted murder liability before *Canizales*, then shooting *in the blind* towards others whose presence is *unknown* surely can't be enough—particularly under a *kill zone* theory of liability after *Canizales*. Because *Canizales* was designed to *raise the bar above* the baseline requirements for the kill zone theory articulated in the prior case law, those requirements cannot be eliminated or reduced to now set the bar *below* the pre-*Canizales* thresholds.

Rather, adhering to the baseline requirements on which *Canizales* built the *more rigorous* standards means that any valid kill zone theory requires the prosecution must prove: (1) the defendant *knew* or unquestionably must have known of the alleged non-target victim(s)' presence within the alleged kill zone; (2) the defendant used force *designed and intended to kill* all such alleged non-target victims *as a means of ensuring the death of a*

*primary target*; and (3) the *only* inference reasonably drawn from the evidence is that the defendant acted with such intent.

The cases properly applying or articulating the kill zone theory of liability, before and after *Canizales*, uniformly illustrate how such knowledge is a necessary prerequisite to liability, because they all involve alleged non-target victims clearly visible to and directly targeted by the defendant during the attack. (*Bland*, *supra*, 28 Cal.4th at pp. 330-331; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1233, 1244; *People v. Tran* (2018) 20 Cal.App.5th 561, 566; *People v. Stevenson* (2018) 25 Cal.App.5th 974, 979-980; *People v. Windfield* (2021) 59 Cal.App.5th 496, 517-519; *People v. Dominguez* (2021) 66 Cal.App.5th 163, 187; *Washington v. U.S.* (D.C. Ct.App. 2015) 111 A.3d 16, 24.) Again, even the pre-*Canizales* case law specifically recognized the importance of this knowledge requirement in proving liability. (*McCloud*, *supra*, 211 Cal.App.4th at p. 804, fn. 8 [focusing on the lack of evidence that defendants "specifically targeted [an alleged non-target victim inside a lodge], had any reason to target him, knew that he was inside the lodge, knew where in the lodge he was located, or even knew him at all"]; *Ford v. State* (1993) 330 Md. 682, 705-707 [emphasizing the defendant "must have seen each of [the non-target alleged victims]" while carrying out his assaultive conduct]; see also *Smith*, *supra*, 37 Cal.4th at pp. 742, 746-747, 748 [emphasizing defendant's awareness of both attempted murder victims under a theory of *direct* liability].)

### 2. Respondent advocates for an untenably broad scope of kill zone theory liability.

Respondent relies on *Vang* for a much more expansive application of the kill zone theory, arguing this theory applies whenever the other elements of the theory are satisfied and the non-target victims are "in a location where people may reasonably be expected to be present." (RABM 57.) *Vang's* analysis was driven by the judgment-deferential legal sufficiency standards and, to the extent it may be "'described … as essentially a kill zone case'" (RABM 56, quoting *Stone*, *supra*, 46 Cal.4th at p. 140), its statement of the requisite intent fell far short of the bar that *Canizales* later set. Here it is: "[t]he fact [the defendants] 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," and the necessary "proof is generally deemed sufficient if the means used by the defendant, and the surrounding circumstances make the crime *apparently possible*." (*Vang*, *supra*, 87 Cal.App.4th at p. 564, italics added.) Such reasoning is akin to the implied malice standards which, respondent agrees (RABM 60), *Canizales* squarely rejected. *Vang's* substandard analysis cannot support *expanding the scope* of kill zone theory liability.

This Court's hypothetical discussions about the scenario of a commercial airline bomber also cannot support respondent's expansive form of imputed knowledge. (RABM 57-58 [relying on the "airplane bomb example"].) As respondent acknowledges, this Court's discussion of that scenario in *Canizales* concerned

"'evidentiary bases, *other than the kill zone theory*, on which a fact finder can infer an intent to kill.'" (RABM 57, fn. 6, quoting *Canizales*, *supra*, 7 Cal.5th at p. 608, italics added.) So, this discussion does not even speak to the proper understanding or application of the *kill zone* theory, much less support expanding its reach. Moreover, any commercial airline bomber scenario is a poor analogy. The theory would have to be that the bomber sought to ensure the death of a particular passenger by blowing up the plane. Because bombing a commercial airplane would almost invariably result in the death of those onboard, the ensuing charges would normally be murder, not attempted murder. Should anyone survive the bomb and inevitable plane crash, the extent of liability for *attempted* murder is unclear since the Court has yet to resolve the "difficulties … regarding *how many* attempted murder convictions are permissible" in such situations. (*Canizales* at p. 604, quoting *Stone*, *supra*, 46 Cal.4th at pp. 140-141.) Further, because every commercial flight carries numerous passengers (and at least one pilot), the bomber could not in any way reasonably disclaim knowledge that others were on the plane and that the bomb equally imperiled all of them.

By contrast, when the defendant indisputably lacks such actual or imputed knowledge about the presence of others within the alleged kill zone—like here, where it's undisputed that Mumin was "unaware of who was outside those doors" when he fired his gun from behind the windowless wall of closed doors of the "pitch black room" (16RT 3871)—the conduct inherently reflects mere *recklessness* as to those individuals. This "should be

punished according to the culpability which the law assigns it, but no more." (*Bland*, *supra*, 28 Cal.4th at p. 326.) The law already criminalizes such reckless endangerment. (See *People v. Ramirez* (2009) 45 Cal.4th 980, 986-987 [Penal Code section 246.3 criminalizes the discharge of firearm or BB device "in a grossly negligent manner" so long as there exists "the likely presence of people in the area"]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1145 [Penal Code section 246 criminalizes "maliciously and willfully discharg[ing] a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle," etc., even if no one is actually present at the time].) Culpability for *attempted murder*, however, cannot properly attach under such circumstances, especially under the strict requirements of the kill zone theory.

Absent the requisite knowledge of the presence of—and thus *intent to kill*—the alleged non-target victim(s), the whole "kill zone" house comes down. The existence of a "primary" target *depends* on the existence of *non*-target victim(s) whose death the defendant intends to cause *"as a means of ensuring the death of a primary target*." (*Sambrano*, *supra*, 79 Cal.App.5th at p. 727.) On this point, respondent falls back on its general disagreement with Mumin about what the law requires as to knowledge, saying he is "incorrect" there "[f]or the reasons discussed" and thus must be incorrect here. (RABM 60.) It doesn't contest the logic of the point itself—that *if* the defendant must have known of the alleged non-target victim(s)' presence in the alleged kill zone, *then* the absence of such knowledge negates the existence of a "primary target" and thus dismantles any valid "kill zone" theory.

## B. The trial court's instructional duties in this context

When the prosecution seeks to rely on a kill zone theory of liability, the trial court must ensure that the *only* reasonable inference the evidence supports is that the defendant acted with the requisite intent *before* instructing on any such theory.

### 1. Respondent's interpretation of the trial court's duties fundamentally misapprehends the law.

Respondent insists that trial courts need only determine whether the required inference is just *one* inference the jury *could* draw from the evidence in deciding to instruct on a kill zone theory—and that reviewing courts must limit themselves to the same question on appeal from a resulting conviction. For support, respondent argues that the *Saddler-Valdez-Clark* line of cases "indicate" an instruction on this theory of liability is proper whenever the evidence supports *a* reasonable inference that the defendant acted with the requisite intent. (RABM 25-26.) In fact, according to respondent's rendition of the foundational principles, trial courts *must* instruct on this theory in all such instances. (*Id.* at 24-25 [a trial court has a "'duty to instruct on general principles of law … raised by the evidence'" (quoting *People v. Saddler* (1979) 24 Cal.3d 671, 681) and thus "'must instruct the jury on every theory that is supported by substantial evidence'" (quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1206)].) The opinion of the Court of Appeal was influenced by similar precepts. (See *People v. Mumin* (2021) 68 Cal.App.5th 36, 49, quoting *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 ["'The trial court is

charged with instructing upon every theory of the case supported by substantial evidence'"]; *id.* at pp. 49, 50, 53, 57 [relying on *People v. Jantz* (2006) 137 Cal.App.4th 1283, where the court said, at page 1290, "the trial court must instruct the jury on every theory that is supported by substantial evidence"].)

But *here*, the law is clear that "[j]ury instructions on the kill zone theory are *never* required." (*Sambrano*, *supra*, 79 Cal.App.5th at p. 728, citing *Stone*, *supra*, 46 Cal.4th at pp. 137-138, *Smith*, *supra*, 37 Cal.4th at p. 746, and *Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6; *McCloud*, *supra*, 211 Cal.App.4th at p. 802 ["the Supreme Court has repeatedly explained that jury instructions on the kill zone theory are *never* required"].) As the *Sambrano* court recently observed, "[g]iven the Supreme Court's words of caution, the apparently ongoing difficulty in crafting an error-free instruction on the kill zone theory, and the absence of any requirement to give a kill zone instruction, it is not clear why it would ever be prudent to give such an instruction." (*Sambrano* at p. 734.) With the associated risks, "[i]t appears easy to commit error by instructing the jury on the kill zone theory, but it is literally impossible to err by declining to do so." (*Ibid.*)

So, right away we know something is fundamentally wrong with respondent's framework. Its attempt to garner support from the generic descriptions in *Bland* and *Canizales* of the evidentiary threshold for any kill zone theory similarly reflects a failure to appreciate or accept the distinct features that uniquely define this context. Respondent points to the language stating the evidence must be such that the jury "may reasonably infer" or

"could conclude beyond a reasonable doubt" that the defendant acted with the requisite intent, or "if believed by the jury, would support [such an] inference." (RABM 29, citing *Bland*, *supra*, 28 Cal.4th at pp. 330-331; RABM 33, citing *Canizales*, *supra*, 7 Cal.5th at p. 611.) Such language just stands for the elementary principle that the evidence must *at least* support an inference that the defendant acted with the requisite intent, as the minimally necessary logical foundation for *any* kill zone theory. The whole point of *Canizales* was to *raise* the bar for any reliance on this "troubling" theory. The "past appellate opinions articulating the kill zone theory" were "incomplete" and in need of bolstering with more rigorous requirements that *increased* the prosecution's burden. (*Canizales*, *supra*, 7 Cal.5th at p. 607, fn. 5.) After *Canizales*, the question is not simply whether the evidence *potentially* supports the kill zone theory because at least *one* reasonable inference is that the defendant acted with the requisite intent. The question is whether that is the *only* reasonable inference, as the Court made clear in *Canizales*.

### 2. Before instructing on a kill zone theory, a trial court must ensure that the only reasonable inference the evidence supports is that the defendant acted with the requisite intent.

Looking closely at the *Saddler-Valdez-Clark* trilogy that respondent cites for support, the "elementary principle of law" that these cases all invoked—"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"—was drawn from *People v. Hannon* (1977) 19 Cal.3d 588, at page 597. (*Saddler*, *supra*, 24 Cal.3d at 681, citing *Hannon* at p. 597; *People v. Valdez* (2004) 32 Cal.4th 73, 137, quoting *Hannon* at p. 597; *People v. Clark* (2016) 63 Cal.4th 522, 605-606, quoting *Valdez* at p. 137, where *Valdez* had quoted *Hannon*.)[1] In this part of *Hannon*, the Court emphasized that the determination of whether the evidence properly supports a suggested inference is fundamentally "a question of law" "which must be resolved *by the trial court before* such an instruction can be given to the jury." (*Hannon* at 597.) That is, "[i]t is *the court* which must determine whether or not the record contains evidence which, if believed, will support the suggested inference." (*Id.* at p. 598.) "After making that determination of law, the court should then instruct the jury accordingly." (*Ibid.*)

Thus, the foundation of the *Saddler-Valdez-Clark* trilogy on which respondent relies cannot be squared with its position. Instead, *Hannon* can only bolster Mumin's position that a trial court determining whether to instruct on a kill zone theory must first conclude as a matter of law that the *only* reasonable inference the evidence supports is the defendant acted with the requisite intent, *before* it may properly instruct the jury on this theory. It is only *after* the court determines "the record contains evidence which, if believed, will support the suggested inference" that the matter becomes a question for the jury. (*Hannon*, *supra*, 19 Cal.3d at 598.) This interpretation squares with the reasoning

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[1] *Hannon* was abrogated on unrelated grounds in *People v. Martinez* (2000) 22 Cal.4th 750, 763.

of *Canizales* and advances its general aims. (See e.g., *Canizales*, *supra*, 7 Cal.5th at p. 608, italics added ["Trial courts should tread carefully when the prosecution proposes to rely on such a theory, and should provide an instruction to the jury only in those cases where *the court concludes* there is sufficient evidence to support a jury determination that the only reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm."].)

As respondent itself recognizes, the introduction to the *Canizales* opinion "encapsulated its holdings," and there the Court specifically admonished that permitting reliance on the kill zone theory is *improper* where "the circumstances of the attack *would also* support a reasonable alternative inference more favorable to the defendant." (RABM 39; *Canizales*, *supra*, 7 Cal.5th at p. 597.) Respondent attempts to set this aside as an "arguable ambiguity" that "potentially suggests" a trial court should not give the instruction when "there are alternative inferences that are more favorable to the defendant" (RABM 39), but that is *exactly* what the Court meant.

*Canizales* emphasized that "*even when* a jury is otherwise properly instructed on circumstantial evidence and reasonable doubt, the potential for misapplication of the kill zone theory remains troubling." (*Canizales*, *supra*, 7 Cal.5th at pp. 606-607, italics added.) The standard instructions to which the Court was referring provide that "when the prosecution's theory substantially relies on circumstantial evidence, a jury must be instructed that it cannot find guilt based on circumstantial

evidence when that evidence supports a reasonable conclusion that the defendant is not guilty." (*Id.* at p. 606.) Following the presumption that juries understand and apply the instructions given (*People v. Tully* (2012) 54 Cal.4th 952, 1020), a jury given this instruction would *not* "find guilt based on circumstantial evidence when that evidence supports a reasonable conclusion that the defendant is not guilty." Yet, that safeguard is not enough to protect against the "troubling" potential for misapplication here; *Canizales* requires *more*. Having a trial court apply the singular permissible inference rule in the first instance is essential to enforcing the higher thresholds established by *Canizales* and is fully consistent with a trial court's general duty to determine for itself "whether or not the record contains evidence which, if believed, will support the suggested inference." (*Hannon*, *supra*, 19 Cal.3d at p. 598.)

Respondent's insistence to the contrary is driven by a failure to appreciate or accept the significance of the singular permissible inference rule in *Canizales's* raising of the bar. Notably, respondent previously acknowledged the significance of this rule, to the point of conceding in *Dominguez* that the trial court's failure to "explain the People's burden to prove that the 'only' reasonable conclusion from Defendants' use of lethal force is that they intended to create a kill zone" compelled reversal. (*Dominguez*, *supra*, 66 Cal.App.5th at p. 187.) In this case, however, respondent says, "[t]his 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." (RABM 45.) That is, respondent is now saying that when a trial court decides to instruct on the kill zone theory, it need *not* expressly admonish the jury on the singular permissible inference rule, despite this Court's unmistakable message that educating the jury about this rule is crucial in guiding proper application of the kill zone theory (*Canizales*, *supra*, 7 Cal.5th at pp. 606-607, 608, 609, 613, 614, 616-617) and despite the revision of CALCRIM No. 600 to include this express admonition.

### C. The trial court's kill zone instruction was erroneous because it violated the clear mandates of *Canizales*.

For all the reasons discussed here and in the opening brief, the undisputed failure of the evidence to show Mumin *knew* or unquestionably must have known of the alleged non-target victim's presence (Johnson) within the alleged kill zone is fatal to any valid kill zone theory, for one could not even find the evidence supports *a* reasonable inference of the *requisite* intent—much less that this is *only* inference to be drawn. Respondent's arguments to the contrary are based on watered-down articulations of the kill zone theory rejected in *Canizales*. (RABM 59, quoting *Vang*, *supra*, 87 Cal.App.4th at p. 564 [arguing it is "immaterial" that Johnson's presence was unknown because "proof is deemed sufficient if means used and surrounding circumstances make the crime apparently possible"].)

Respondent's claim that the alleged "kill zone" was "well defined by the contours of the two doors" is based on the same substandard analysis. (RABM 55, 64 [although "Mumin may only have been aware that one officer was at Door 1," the prosecutor "correctly" argued that Mumin "attempted to kill not only the officer opening the door, but every single officer who was near him"].) Consistent with a standard that reduces to speculation, respondent struggles to find clarity or consistency here. (See e.g., RABM 9, 48, 58 [Mumin "had every reason to believe" other officers were present], *id.* at 10-11, 50, 58, 59, 66 [he in fact "believed" others were there], *id.* at 55 ["Mumin may only have been aware that one officer was at Door 1"], *id.* at 59 [he "did not know for a fact or could not see that Johnson was there"].)

The circumstances of this case are in no way "close[] to the facts of *People v. Windfield* (2021) 59 Cal.App.5th 496, 505, 517" (RABM 53), yet another "classic" kill zone case where the defendants tracked down personal nemeses and blasted numerous rounds at and all around them in face-to-face encounters that seriously wounded or killed multiple people. This case cannot be compared to any of the cases or circumstances that courts have found to be true "kill zone" scenarios, given that Mumin was *hiding* inside the "pitch black" community room to *avoid* law enforcement when he fired in the blind from behind the windowless wall of closed doors in response to Detective McKay's "jiggl[ing]" of one of the doorknobs. Particularly when coupled with the multiple additional factors recognized as cutting against the existence of a valid kill zone theory—the openness of the

area, the lack of injury to anyone outside, and the relatively minimal extent of force employed (three gunshots, none of which had a direct line of trajectory at or through the door that McKay tried to open) (11RT 2504; 12RT 2620-2621, 2784; see *Canizales*, *supra*, 7 Cal.5th at pp. 607, 611 [discussing the relevant factors])—the evidence fell far short of the necessary mark.

Nor is this case anything like *People v. Ervine* (2009) 47 Cal.4th 745, as respondent claims. (RABM 66-67.) *Ervine* did not even involve the kill zone theory of attempted murder liability. Moreover, the evidence there indisputably established that the defendant was *fully aware* of the presence of the officers who tried to apprehend him at his house, *directly targeted* them with numerous rounds of gunfire from "a sniper location" inside the home where he tracked their movements throughout the standoff, and he in fact orchestrated an "elaborate ambush" against them which included stationing cans full of gasoline inside and around the house with the plan of igniting the fluid with his gunfire after shooting at the officers. (*Id.* at pp. 753-756, 759, 786.)

Ultimately, in defending the trial court's decision to instruct on the kill zone theory here, respondent views everything through overly-lenient lenses that approve the kill zone instruction so long as "[t]aken together, the evidence support[s] *a* finding" and "a jury *could* reasonably infer" that Mumin harbored the requisite intent to kill Mackay and also Johnson. (RABM 51-52, italics added.) Again, "the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted*

*individual was located*"—i.e., when "the defendant specifically intends that everyone in the kill zone die." (*McCloud*, *supra*, 211 Cal.App.4th at p. 798.) The most the evidence can reasonably show here is a reckless disregard for a fatal risk to anyone near or around the doors of the community room when Mumin fired towards the doors in the blind. (*Ibid.*) Even if the evidence does support *a* finding of the requisite intent, it surely *also* reasonably supports a finding that Mumin "merely subjected persons near the primary target to lethal risk." (*Canizales*, *supra*, 7 Cal.5th at p. 607.) Therefore, the instruction was in error.

## II. Respondent's defense of the Court of Appeal's opinion ultimately just highlights why the proper standard of review on appeal is and must consist of a *de novo* review of the propriety of the trial court's instruction in the first instance.

Respondent contends that in any challenge to a kill zone instruction for want of sufficient supporting evidence, the role of the appellate court is circumscribed: it must (a) view everything "in the light most favorable to the judgment," "presuming in support of the judgment 'the existence of every fact the trier could reasonably deduce from the evidence'" (i.e., apply "legal sufficiency standards"), (b) consider only whether the required inference is at least *one* of the inferences that *could* reasonably be drawn, and (c), if it is, reject the challenge. (RABM 29, quoting *People v. Nelson* (2016) 1 Cal.5th 513, 550.) Respondent's argument is three-fold: (1) the relevant case law, including

*Canizales*, "reflects" that such "principles of substantial evidence review" must be applied on appeal in kill zone cases (*id.* at 23-27, 29-34, 40); (2) anything less deferential would invade the province of the jury as the ultimate adjudicator of the defendant's guilt (*id.* at 34-41); and (3) this standard of review upholds the safeguards mandated by *Canizales* (*id.* at 10, 24, 41-46). Again, respondent's position self-destructs upon close inspection.

### A. Respondent's proposed framework fundamentally misapprehends the nature of these claims.

Respondent misapprehends the very nature of a claim that challenges a kill zone instruction for want of sufficient supporting evidence. The appellate court is reviewing the decision of *the trial court* to instruct on the kill zone theory in the first instance, not the verdict of the jury *after* the trial court has decided to instruct it on the theory. This is "a question of law" "which must be resolved *by the trial court before* such an instruction can be given to the jury." (*Hannon*, *supra*, 19 Cal.3d at 597.) The question on review is thus one of law—whether the trial court *erred* in giving the instruction—to be reviewed *de novo* like all questions of law.

The kill zone cases recognize this fundamental point that a challenge to a kill zone instruction on the basis that it lacks the necessary evidentiary support presents a claim of instructional error. (See e.g., *McCloud*, *supra*, 211 Cal.App.4th at p. 802 ["the trial court erred by instructing the jury on the kill zone theory" *because* "[t]he record does not contain substantial evidence to support application of the theory in this case"]; *Sambrano*, *supra*,

79 Cal.App.5th at p. 735, italics added ["as a matter of law the theory did not apply *because* there was no evidence of a primary target"]; *In re Lisea* (2022) 73 Cal.App.5th 1041, 1049, italics added ["Petitioner contends there was insufficient evidence under *Canizales* to support the kill zone instruction, *a prejudicial error*"].) The focus of *Canizales* itself is entirely upon the *legal propriety* of the trial court's decision to instruct on the kill zone theory, not the ensuing verdicts. That makes sense: the defendants challenged the evidentiary support for *the instruction on the kill zone theory*, not the "legal sufficiency" of the evidence supporting the *resulting convictions*. (*Canizales*, *supra*, 7 Cal.5th at p. 596 ["This case concerns whether the trial court properly instructed the jury on the so-called kill zone theory."]; *id.* at p. 597 ["trial courts must be extremely careful in determining when to permit the jury to rely on the kill zone theory"]; *id.* at p. 608 ["In *Stone*, this court agreed with the Court of Appeal that the trial court should not have instructed on the kill zone theory…"]; *id.* at p. 614 [focusing on the prejudicial effect of the trial court's instruction on a "factually unsupported" theory "combined with the lack of any clear definition of the theory in the jury instruction as well as the prosecutor's misleading argument"].)

By requiring appellate courts to reject these instructional error claims in all instances where the proffered evidence supports *a* reasonable inference of the requisite intent, respondent's proposed framework *bypasses* the legal question presented on appeal concerning the propriety of the trial court's instructions to the jury in the first instance. The *Winship*-

*Jackson-Towler* legal sufficiency standards that respondent attempts to superimpose here all concern the reliability of a jury's verdict *after* it has been instructed on the law and thus all *presume* the propriety of such instructions. Respondent's own digest of these standards acknowledges that the purpose of these standards is to test the reliability of convictions given the risk 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[.]'" (RABM 42, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 317, italics added.)

It is *the jury's verdict*, after having deliberated over the evidence and reached a decision under *proper instructions*, that is entitled to the deferential standards of legal sufficiency review: "*Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved* through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." (*Jackson*, *supra*, 443 U.S. at p. 318, first italics added, second italics omitted.) *This* is why an appellate court reviewing for legal sufficiency does not decide for itself "'whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.'" (*Ibid.*, quoting *Woodby v. INS* (1966) 385 U.S. 276, 282.) And *this* is why the court "is bound by the finding of the jury" if, after proper instructions, "it 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." (*People v. Towler* (1982) 31 Cal.3d 105, 117-118.)

But the reviewing court is *not* bound to the conclusion of the trial court as to whether the evidence properly supported an instruction to the jury on a particular theory of guilt in the first instance. That is a question of law the appellate court reviews *de novo*; the principles and policies underlying the deferential standards that courts apply to the verdict of a properly instructed jury simply have no application. (See *People v. Zuniga* (2014) 225 Cal.App.4th 1178, 1187, fn. 8 ["a contention that the evidence is insufficient to support the judgment does not challenge *the legality* of the proceedings, but rather goes to the question of guilt or innocence"].) It is the province of the appellate court to determine the legal propriety of a kill zone instruction based on the evidentiary requirements of the law; there is and can be no intrusion upon the province of the jury here.

Tellingly, although respondent repeatedly asserts that the legal sufficiency standards "equally" apply in this context (RABM 28, 29, 33, 34), in reasoning through its position, it eventually inserts a qualifier: that employing these deferential standards satisfies the dictates of *Canizales* <u>if</u> "the [kill zone] instruction is carefully crafted to correctly reflect the law." (RABM 45, 46.) So, even respondent implicitly recognizes that we are ultimately dealing with a question of law concerning the propriety of the trial court's instruction, not "guilt or innocence," and the review framework on appeal must be focused accordingly.

### B. "Legal sufficiency" standards have no place here.

Consistent with its role of determining *de novo* whether the trial court erred in giving a kill zone instruction, an appellate court is to address the same question the trial court was required to address—whether the *only* reasonable inference to be drawn from the evidence is that the defendant acted with the requisite intent. Applying respondent's proposed framework or any other framework that constrains an appellate court to viewing everything under "legal sufficiency" lenses would dismantle the core protections that this Court established in *Canizales*.

Let's consider again the implications of the rationale driving the Court of Appeal's opinion, which respondent backs through its arguments. Respondent lauds the opinion for having "aptly noted" 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'" (RABM 39, quoting *Mumin*, *supra*, 68 Cal.App.5th at p. 49), such that "'[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 39-40, quoting *Mumin* at p. 52). But just turn this around: if the evidence supports a reasonable inference that the defendant did *not* act with the requisite intent, it necessarily follows that the jury could *not* make the required finding that the *only* reasonable inference supported by the evidence is the necessary one. That is the *key* to the protections *Canizales* established, and yet it gets lost under respondent's rationale that a reviewing court must reject the instructional

error claim and affirm whenever the evidence also "supports *a* reasonable inference of the requisite intent."

Assessing "the prejudicial effect of an instructional error" is fundamentally different than reviewing the record under the "less demanding" legal sufficiency standards, because under the latter the court must "view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of any facts the jury might reasonably infer from the evidence," whereas under the former the court's task is to decide "whether any rational trier of fact could have come to the opposite conclusion." (*People v. Mil* (2012) 53 Cal.4th 400, 417-418.) The "less demanding" legal sufficiency standards cannot be squared with the job of addressing an instructional error claim. (*Ibid.* [the appellate court erred in applying this standard to decide an instructional error claim].)

Unlike the one-dimensional analysis of assessing the legal sufficiency of evidence supporting a verdict, any review of an instructional error claim is a two-dimensional analysis—the question of error and the question of prejudice. There must be symmetry between the two, both in logic and in fairness. The reviewing court's error analysis cannot be framed in a manner that obviates any prejudice analysis or renders any error harmless. If there *is* a kill zone instructional error, the reviewing court must be able to determine the *prejudicial effect*. Under the rationale of the Court of Appeal's opinion and that of respondent, the reviewing court's analysis is cut off at the pass whenever the evidence at least supports *an* inference of the requisite intent. In

fact, the defendant would be required to *negate* the existence of any and all such inferences that *could* be drawn in favor of the kill zone theory (*Mumin*, *supra*, 68 Cal.App.5th at p. 58, italics added [holding that Mumin is required to show the evidence "*did not* support" the requisite intent to demonstrate any error])—a practical impossibility under "legal sufficiency" standards.

### C. The caselaw further demonstrates the distinct function of legal sufficiency review.

Naturally then, the cases are legion which have reviewed instructional error claims based solely on the trial court's instructional duties with no reliance on legal sufficiency standards. (See e.g., *Saddler*, *supra*, 24 Cal.3d at p. 33; *Clark*, *supra*, 63 Cal.4th at pp. 605-606; *Stone*, *supra*, 46 Cal.4th at pp. 134-141; *Valdez*, *supra*, 32 Cal.4th at p. 138; *Bland*, *supra*, 28 Cal.4th at pp. 317-333; *People v. Hart* (1999) 20 Cal.4th 546, 620; *People v. Alexander* (2010) 49 Cal.4th 846, 920-921; *People v. Gomez* (2018) 6 Cal.5th 243, 287-290; *McCloud*, *supra*, 211 Cal.App.4th at pp. 796-804; *Lisea*, *supra*, 73 Cal.App.5th at pp. 1054-1057; *People v. Grandberry* (2019) 35 Cal.App.5th 599, 604, 607-609; *People v. Lewis* (2021) 72 Cal.App.5th 1, 12.) The same is true with *Canizales*. The Court *rejected* arguments of the Attorney General based on evidence *favorable* to the prosecution and found prejudicial error "*[e]ven* accepting" the prosecution's evidence as "more credible." (*Canizales*, *supra*, 7 Cal.5th at pp. 610-611, italics added.) Despite respondent's claim that the Court was bound to and did apply legal sufficiency standards (RABM

40), the opinion shows the exact opposite: that the Court was *not* bound to apply any such standards and instead was merely illustrating that *even if* it viewed the record in the light most favorable to the prosecution, the result would be the same.

Conversely, when courts apply the legal sufficiency standards, they do so clearly and explicitly, and in the context of evaluating the reliability of the jury's verdict. (See e.g., *Smith*, *supra*, 37 Cal.4th at pp. 736-748; *Perez*, *supra*, 50 Cal.4th at pp. 224-234; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1149; *Ford*, *supra*, 330 Md. at pp. 704-705; *Vang*, *supra*, 87 Cal.App.4th at pp. 563-564; *McCloud*, *supra*, 211 Cal.App.4th at pp. 805-807; *People v. Cardenas* (2020) 53 Cal.App.5th 102, 119, fn. 11; *Lisea*, *supra*, 73 Cal.App.5th at pp. 1057-1058; *Dominguez*, *supra*, 66 Cal.App.5th at pp. 168-169, 187-188.) This is fully consistent with the settled principles of appellate review. (See *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578, italics added ["The 'substantial evidence' test is used by appellate courts in deciding *whether evidence is legally sufficient to sustain a verdict*."].) In fact, as previously discussed, any reversal for *instructional error* adjudicated under *legal sufficiency* standards risks tarnishing the judgment itself and precluding any retrial of the charges. (*Ibid.* [Double jeopardy bars retrial "when a court, using the 'substantial evidence' test, determines as a matter of law that the prosecution failed to prove its case"]; see also *People v. Hatch* (2000) 22 Cal.4th 260, 273 [a dismissal under Penal Code section 1385 will not be interpreted as barring retrial unless the ruling is

"clear enough" "to confidently conclude" the trial court "viewed the evidence in the light most favorable to the prosecution and found that no reasonable trier of fact could convict"].)

The small series of cases that respondent cites involving challenges to instructions on theories of first-degree murder liability is categorically different. (RABM 24, 27 [relying on *Cole*, *supra*, 33 Cal.4th at p. 1206, *Nelson*, *supra*, 1 Cal.5th at p. 550, *People v. Ceja* (1993) 4 Cal.4th 1134, 1137-1139 & fn. 1, and *People v. Suarez* (2020) 10 Cal.5th 116, 167-170].) As *Nelson* itself emphasized, "[a] first degree murder verdict will be upheld if there is sufficient evidence as to *at least one* of the theories on which the jury is instructed," 'absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.'" (*Nelson* at p. 552, quoting *People v. Guiton* (1993) 4 Cal.4th 1116, 1129, italics added.) Thus, in *Suarez*, the Court could dispense with the claim that the evidence was insufficient to support the *felony murder* theory because the defendant had not challenged the sufficiency of the evidence in support of the other two theories of liability on which the jury was instructed. (*Suarez* at pp. 167, 170.) *Jantz*, on which the Court of Appeal's opinion heavily relies, applied a variation of the same general principle in rejecting the defendant's challenge to an instruction on the first-degree-murder theory of lying-in-wait. (*Jantz*, *supra*, 137 Cal.App.4th at p. 1290 ["There is no instructional error when the record contains substantial evidence in support of a guilty verdict on the basis of the challenged theory."].)

Ultimately, the then-existing law of first-degree murder controls these cases. (See *Ceja*, *supra*, 4 Cal.4th at p. 1138 [resolving the matter "in light of the legal definition of lying in wait"]; *Cole*, *supra*, 33 Cal.4th at p. 1206 [same].) And there, perhaps it was enough to review for legally sufficient evidence in support of *one* of the theories of first-degree murder on which a jury was instructed.[2] But those cases cannot drive the analysis here, much less supplant the directives of *Canizales* concerning the proper review of *kill zone* theory instructions. The *Canizales* opinion certainly did not focus on the sufficiency of the evidence to support theories of liability *other than* the erroneous kill zone theory at issue. In fact, the Court recognized that the prosecution had *also* "strenuously argued" another theory of liability. (*Canizales*, *supra*, 7 Cal.5th at pp. 616-617.) But the point was that the jury could have been misled to improperly convict on the erroneous *kill zone* theory. The Court made clear that the existence of evidence sufficient to support a *different* theory of liability in *this* context *cannot* dispose of a claim that the trial court erred in instructing on an invalid kill zone liability. Rather, when prejudicial, such an error compels reversal for *trial error*.

The kill zone cases of *McCloud*, *Cardenas*, and *Dominguez*, serve as clear illustrations in the relevant context that,

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[2] The recent legislative changes curtailing the theories of permissible first-degree murder liability for non-killers, like Senate Bill 1437, undermine the notion that *necessarily* "no instructional error" has occurred (*Jantz*, *supra*, 137 Cal.App.4th at p. 1290) whenever sufficient evidence supports *any* of the theories of first-degree murder on which the jury was instructed.

consistent with the general rules, reviewing courts carefully distinguish and reserve application of legal sufficiency standards for the proper context. These courts addressed *both* the issue of whether the kill zone instruction was prejudicially erroneous and whether the evidence was legally sufficient so as to permit retrial of the attempted murder charges after reversal for trial error, applying legal sufficiency standards solely in resolving the latter issue. Despite respondent's attempts to suggest otherwise (RABM 30), there can be no logical explanation for drawing such distinctions other than to make clear that the legal sufficiency standards applied *only* in considering the sanctity of the verdicts and not in considering the propriety of the kill zone instruction.

### D. The appellate court must review *de novo* the propriety of the kill zone instruction by determining whether the only inference the evidence supports is that the defendant acted with the requisite intent.

Respondent characterizes Mumin's position as the outlier. (RABM 35.) But it's respondent and the Court of Appeal that hold the "different view." (*Ibid.*) Both Division 7 of the Second Appellate District and the Third Appellate District agree that, in deciding challenges to kill zone instructions for want of sufficient supporting evidence, *Canizales* dictates appellate courts must determine *de novo* whether the *only* reasonable inference to be drawn is that the defendant acted with the requisite intent. (*In re Rayford* (2020) 50 Cal.App.5th 754, 779-780; *Lisea*, *supra*, 73 Cal.App.5th at pp. 1045, 1053, 1056.) Division 2 of the Fourth Appellate District applied *Canizales* the same way in *Cardenas*,

holding "there was not sufficient evidence here to support a jury determination that the only reasonable inference from the circumstances of the attack was that Cardenas intended to create a zone of fatal harm as a means of killing [the alleged target]," because, while "the jury could have reasonably inferred that Cardenas possessed the requisite specific intent to kill [the alleged non-targets]," "there also was evidence from which a jury could have reasonably inferred that [he] intended to kill only [the target]." (*Cardenas*, *supra*, 53 Cal.App.5th at pp. 113, 117.)

Moreover, *Lisea* illustrates that the "reasonable likelihood" test for instructional error claims is indeed a proper framework, contrary to respondent's claim that any use of this test derives from "an incorrect reading of *Canizales*" that "conflates" the error analysis with "an unrelated standard of review" concerning prejudice. (RABM 47-48.) In *Lisea*, the court invoked this framework in resolving whether the trial court *erred* in the first instance by instructing the jury on a kill zone theory when "there was insufficient evidence under *Canizales* to support the kill zone instruction" and whether that error was prejudicial. (*Lisea*, *supra*, 73 Cal.App.5th at pp. 1049, 1055; see also *People v. Mitchell* (2019) 7 Cal.5th 561, 579, quoting *People v. Houston* (2012) 54 Cal.4th 1186, 1229 ["'[i]n reviewing a claim of instructional error, the court must consider whether there is a reasonable likelihood that the trial court's instructions caused the jury to misapply the law in violation of the Constitution'" or "'in an impermissible manner'"]; *Boyde v. California* (1990) 494

U.S. 370, 380-381 [applying the reasonable likelihood test in assessing for instructional error in the first instance].)

Unlike the framework advocated by respondent, application of the reasonable likelihood test in this context directly advances the safeguards established in *Canizales*. A challenge to the propriety of a kill zone instruction for want of sufficient supporting evidence is a claim of instructional error grounded in the contention that the proffered kill zone theory failed to meet the evidentiary requirements of the law and thus failed to hold the prosecution to its burden of proof, thereby improperly permitting conviction of attempted murder on a legally invalid theory of guilt. When such error is found, the court proceeds to assess the prejudicial effect. (See e.g., *Lisea*, *supra*, 73 Cal.App.5th at pp. 1056-1057 [after finding instructional error under the reasonable likelihood test, the court then concluded the error was not "harmless beyond a reasonable doubt," consistent with the *Chapman* prejudice standard]; *People v. Aledamat* (2019) 8 Cal.5th 1, 7 [errors in instructing on "legally inadequate" theories of guilt are assessed for prejudice under *Chapman*].)

Respondent makes short work of the reasonable likelihood test by claiming it applies only when courts are assessing the prejudicial effect of instructions that erroneously state the law and Mumin "waived" any such concerns because that "is not the instructional error here." (RABM 46, fn. 5.) This stems from the same flawed rationale regarding the standards of review and the issues presented. As has been clear throughout, the essence of the claim here is the kill zone instruction was contrary to law

because it misled the jury to believe it could convict Mumin of attempted murder based on a theory that violated the mandates of *Canizales* and thus erroneously stated the law on which the jury relied to convict him. (See e.g., Pet. for Rev. 7 ["the instruction authorizing the jury to convict Mumin based on the prosecution's kill zone theory was materially misleading with improper, incomplete, and vague descriptions of both the law and the particular theory of guilt"]; AOBM 8-9, 35 ["permitting the jury to rely on that theory violated [the court's] instructional duties" where the legal requirements of the theory were not met]; see also similar arguments in the Court of Appeal (AOB 37; ARB 9, 21, 27; Supp. Brief 3-5).) In support of this claim, Mumin has also consistently argued that the instruction was erroneous and misleading in its overly broad description of the "kill zone" (AOB 72-73; ARB 23; PFR 31; AOBM 55) and in its failure to expressly admonish on the singular permissible inference rule (AOB 75-76; ARB 22-23; PFR 30-31; AOBM 55-56).

Despite respondent's assertion that this "is not the instructional error here," it acknowledges elsewhere that the nature of this claim is prejudicial instructional error on the basis that the trial court prejudicially erred in instructing on a legally invalid kill zone theory of liability. (RABM 9, 22, 48.)

## E. Both attempted murder convictions must be reversed for prejudicial instructional error.

Respondent claims that any error here does not compel reversal of either attempted murder conviction because any deficiency in the kill zone instruction merely amounts to a "factual inadequacy," the language of the instruction and the prosecutor's closing arguments would have forestalled any misunderstanding or misapplication of the law, and the record supports another theory of liability. (RABM 63-65, 67.)

However, as respondent admits, the prosecution is relieved of its burden of proof when the jury is instructed with a kill zone theory lacking adequate support for the essential elements of the theory. (RABM 41-42, italics added ["the Court's concern [in *Canizales*] 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."].)

Respondent's argument also relies on its claim that a jury need only be told that "conscious disregard of the risk of serious injury or death is insufficient for the kill zone theory" (RABM 45, 61-62), when *Canizales* clearly requires explicit instruction on the singular permissible inference rule. Saying what is not enough is not the same as saying what is *required*—i.e., the only reasonable inference must be the defendant acted with the requisite intent, as CALCRIM No. 600 now dictates. (*Dominguez*, *supra*, 66 Cal.App.5th at p. 186 [where the Attorney General conceded as

much]; *People v. Thompkins* (2020) 50 Cal.App.5th 365, 399 [the failure to so instruct "watered down the requirement under *Canizales* that the inference of intent to kill all those in the target's vicinity must be the 'only reasonable inference'"].)[3]

Further, the instruction's description of the concurrent intent doctrine did not define either "zone of fatal harm" or "kill zone." Instead, it simply referred to these terms generically, without any definition or explication, in describing Mumin's alleged intent "to kill the person opening the door" (Mackay) by killing Johnson or "any other officer *outside the door*." (2CT 383, italics added.) While respondent says the prosecutor's arguments cabined the breadth of the instruction (RABM 64), the record shows that her arguments extended the theory to "anyone" and "every single officer" who was "near" Mackay attempting to apprehend Mumin, regardless of their actual location or whether he was "unaware of who was outside those doors." (16RT 3840, 3843, 3871.) Coupled with the instruction that this "zone" included "any other officer outside the door," the theory presented to the jury permitted conviction based on the officers' mere presence in an area where they were exposed to a risk of fatal injury. Thus, this kill zone theory "'was significantly broader than a proper understanding of the theory permits.'" (*Sambrano*,

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[3] *Sambrano* recently observed that even the revised version of the instruction remains arguably deficient under *Canizales* because it "does not require the jury to find that the defendant intended to kill everyone in the area around the primary target *in order to ensure the death of the primary target*." (*Sambrano*, *supra*, 79 Cal.App.5th at p. 733.)

79 Cal.App.5th at p. 736, quoting *Canizales*, 7 Cal.5th at p. 614.) In fact, the jury's note to the court suggesting that it believed an intent to shoot "one *or* more" officers was sufficient to prove an intent to kill—a feature of the case that respondent notably doesn't mention—suggests it was actually misled by the instructions and arguments to believe an intent to kill *any one* of the officers there (even just McKay, the alleged *primary* target) was enough to convict Mumin on both attempted murder charges.

While respondent now says, "only two counts of attempted murder are permitted on the facts of this case" (RABM 60), the concerning reality is that the rationale it advocates would permit a conviction for every person in a location where "people may reasonably be expected to be present" regardless of whether the defendant knew or had any reason to know of their presence (RABM 57). Again, respondent even characterizes Mumin as having displayed an "intent to kill as many officers as possible," implying that a defendant in this situation could and should be prosecuted for attempted murder as to every person who happened to be "on the other side" of the doors. (RABM 61, 67.)

Respondent's claim that Mumin could be properly convicted of the attempted murder of Johnson "even absent the kill zone instruction" is grounded in the same overbroad conceptions of liability. This rests on *Stone's* general principle that one "'who intends to kill can be guilty of attempted murder even if the person has no specific target in mind.'" (RABM 67, quoting *Stone*, *supra*, 46 Cal.4th at p. 140.) All *Stone* says is that a person who knows his violent conduct places *someone* in peril of death and

intends to kill that person is liable for attempted murder even if he did not know or care about the actual identity of the target. But under *these* facts, for liability to attach solely on the basis that one need not have a "specific target in mind," it would have to be enough that the defendant subjected the person to a risk of fatal injury. That is untenable on the most basic level. Any attempted murder requires "specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*Bland*, *supra*, 28 Cal.4th at pp. 327, 330.)

As in *Canizales*, this multitude of prejudicial features—"the presentation of a factually unsupported theory" in combination with erroneous instructions and arguments on the law—triggers scrutiny under *Chapman*. (*Canizales*, *supra*, 7 Cal.5th at pp. 613-614, 615; *Aledamat*, *supra*, 8 Cal.5th at p. 7.) "No matter how plausible it may seem to us that a properly instructed hypothetical jury would have found a specific intent to kill each of the five attempted murder victims, we cannot step in for this jury and so find on appeal." (*Thompkins*, *supra*, 50 Cal.App.5th .at p. 401.) That is, the reviewing court may not affirm simply because some other *properly* instructed jury could or even likely would have found the defendant guilt; it must reverse if it cannot say beyond a reasonable doubt that the erroneous instruction didn't taint *this* jury. But the error here cannot even survive the *Watson* standard because merely a "*reasonable chance*, more than an *abstract possibility*'" of a better outcome" in the absence of the error compels reversal there (*People v. Hardy* (2021) 65 Cal.App.5th 312, 330-331, quoting *College Hospital Inc. v.*

*Superior Court* (1994) 8 Cal.4th 704, 715), and such a probability surely exists for all the reasons previously stated.

Respondent does not dispute that the *only* instruction the jury received concerning *both* attempted murder charges was the same challenged kill zone instruction. Respondent only disputes the *effect* of this instruction in arguing it could have only implicated the conviction as to Johnson since the kill zone theory applies to alleged non-target victims like him, not alleged primary targets like McKay. (RABM 48, 61-62.) The crucial point, however, is that the instructions provided no *independent* guidance and no independent theories of guilt regarding the determination of the charge as to McKay. McKay's role was defined *exclusively* in his capacity as the alleged "primary" target, the very existence of which necessarily depended on the existence of Johnson as the "non-target" whom Mumin *concurrently* intended to kill *as a means of* killing McKay, as the theory went. So, the charge as to McKay was inextricably bound up with the same legally invalid kill zone theory of liability as to Johnson.

Because the jury's sole frame of reference in determining both charges was the same invalid kill zone theory, as respondent now admits, the undue prejudicial effect of the instructional error necessarily infected the jury's determination of both charges.

## Conclusion

The judgment must be reversed for prejudicial kill zone instructional error.

Dated: August 26, 2022

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
Attorney for Ahmed Mumin

## Certificate of Compliance

I certify that this brief is prepared with 13-point Century Schoolbook font and contains 9,694 words.

Dated: August 26, 2022

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
Attorney for Ahmed Mumin

## DECLARATION OF SERVICE

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

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

### Postal Service

On August 26, 2022, I served the foregoing document on each of the parties listed below, by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the United States Postal Service in Southport, North Carolina, to be delivered in the ordinary course of business:

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

### Electronic Service

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

Court of Appeal, Fourth Dist., Div. 1
San Diego County Superior Court
Appellate Defenders, Inc.
Attorney General's Office
District Attorney's Office
Sloan Ostbye (trial counsel)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on August 26, 2022.

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

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

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

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Date

/s/Raymond DiGuiseppe

Signature

DiGuiseppe, Raymond (228457)

Last Name, First Name (PNum)

Raymond Mark DiGuiseppe

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