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Supreme Court of California
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In The Supreme Court of the State of California

The People of the State of California,
Plaintiff and Respondent,

v.

Ahmed Mumin,

Defendant and Appellant.

Fourth Appellate District, Division One, Case Number D076916
San Diego Superior Court, Case Number SCD2617809
The Honorable Kenneth K. So, Judge

APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF INNOCENCE RIGHTS OF ORANGE COUNTY ON BEHALF OF DEFENDANT AND APPELLANT

INNOCENCE RIGHTS OF ORANGE COUNTY

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APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200(c) of the California Rules of Court, INNOCENCE RIGHTS OF ORANGE COUNTY, a Pro Bono legal group working with the law students at University of California, Irvine School of Law, respectfully request permission to file the amicus curiae brief that is combined with this application.

The applicant is an organization committed to representing individuals who have been sentenced under the current kill zone theory in California and are serving excessive sentences as a result. Attorney Annee Della Donna heads Innocence Rights of Orange County and has a substantial interest in this case because she has represented clients who have been prosecuted under the kill zone theory. Two defendants, Juan Rayford and Dupree Glass have had their convictions reversed by the Appellate Court after being wrongfully prosecuted under this theory. Applicant desires to address the kill zone theory and the kill zone jury instructions and specifically Cal Crim 600 used in this case, and more importantly, how the kill zone theory adversely affects the interests of minorities in this State.

Applicant's attorney has examined the briefs on file in this case and is familiar with the issues involved and the scope of the presentations. Applicant respectfully submits a desperate need exists for additional briefing regarding the constitutional impact of a decision by this Court. In the proposed brief, Applicant argues the entire theory must be abolished. In the alternative, this Court should provide clear guidance to the lower courts so the kill zone theory does not violate a

defendant's due process rights. Without this Court's intervention, the kill zone theory will continue to illegally subject minority defendants to excessive sentences.

For the reasons stated in this application and further developed in the proposed brief, Applicant respectfully requests leave to file the amicus curiae brief that is combined with this application. The amicus curiae brief was authored by Annee Della Donna, Esq.; UCI law students Kiran Sekhon, Hannah Haines, and Matt Aghaian; and undergraduate students Alexa Dubin and Shira Alcouloumre. No person, entity, counsel, or party to this pending appeal made a monetary contribution intending to fund the preparation or submission of this brief.

Respectfully Submitted:

Dated: September 20, 2022

INNOCENCE RIGHTS OF ORANGE COUNTY

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA: Pursuant to California Rule of Court 8.520 (f), non-profit organization INNOCENCE RIGHTS OF ORANGE COUNTY ("Amici") respectfully request leave to file the attached amicus brief in support of Petitioner and Appellant Ahmed Mumin. This brief is timely, as it is filed within 30 days after the last reply brief was filed.

STATEMENT OF INTEREST

Amici is a non-profit organization assisting prisoners who have been prosecuted under the kill zone theory and kill zone jury instructions in California. The issues presented in this appeal have a direct impact on prisoners and their ability of to obtain justice after being prosecuted for multiple attempted murder charges under the kill zone theory. A brief description of the work and mission of Amici explaining their interest is as follows:

INNOCENCE RIGHTS OF ORANGE COUNTY ("IROC"), working with UCI Law School, was founded in 2015 by attorney Annee Della Donna, Esq. to provide free legal services to indigent prisoners who were improperly prosecuted under the Kill Zone. Ms. Della Donna has represented Juan Marshall Rayford and Dupree Antoine Glass whose writ of habeas corpus was granted by this Supreme Court on November 24, 2015, and whose conviction was overturned in 2020. IROC is currently reviewing other cases of indigent prisoners who were prosecuted under the kill zone theory.

The brief of Amici will provide critically focused assistance to the Court in understanding how the kill zone theory is applied

inconsistently in lower courts and has unconstitutionally resulted in longer sentences to defendants of color in comparison to white defendants.

For the foregoing reasons, Amici respectfully requests this Court grant Amici's application and accept the enclosed brief for filing and consideration.

No party or counsel for any party, other than Amici, has authored the proposed brief in whole or part or funded the preparation of the brief.

Dated: September 20, 2022 Respectfully Submitted,

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AMICUS BRIEF

INNOCENCE RIGHTS OF ORANGE COUNTY ("IROC"), respectfully submits the following Amicus Curie brief:

I.

Despite *Canizales*' Best Effort To Clarify And Limit The Application Of The Kill Zone Theory, The Only Solution Now Is To Kill The Kill Zone.

In *People v. Canizales,* this Court recognized the trial courts were misapplying the kill zone theory. (*People v. Canizales* (2019) 7 Cal.5th 591, 597.) Given this danger of misapplication, the *Canizales* decision severely limited when the kill zone theory could be used, instructing trial courts to "reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that defendants intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm." (*Canizales, supra,* 7 Cal.5th at 597.)

Post-*Canizales* cases highlight the trial courts' failure to follow the Supreme Court's ruling. The impact of these failed decisions are grave because the kill zone theory disproportionately subjects minority defendants to longer sentences. Ultimately, the kill zone theory is unconstitutional. It cannot be configured in such a way to ensure uniformity, nor shield minority groups from the discriminatory effects in sentencing. Therefore, the kill zone theory must be abolished.

A. The Kill Zone Theory Unconstitutionally Subjects Minorities To Significantly Longer Sentences.

We analyzed each reported case where the kill zone theory cited *Canizales,* identifying the defendant's race. Using simple math, we tallied the number of cases and counted up how many defendants were white, Black, Latinx, Asian, Middle Eastern, or of unknown race.[1] Alarmingly, *98.5%* of the eighty cases involved a minority defendant, either Black, Latinx, or Asian. (See, Appendix A.) In the eighty cases we reviewed, there were *no white defendants prosecuted under the theory.*[2]

When a prosecutor uses the kill zone theory at trial, they can ask the jury for multiple counts of attempted murder for each person located within the kill zone, instead of just one attempted murder charge for the intended target. This unnecessarily results in greater sentences since each attempted murder charge can lead to a separate life sentence. Based upon our above analysis, the use of the kill zone is a injustice borne disproportionately by Black and Latinx defendants.

The Eighth Amendment to the United States Constitution reads: "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*" This amendment prohibits the government from imposing unduly harsh penalties on criminal

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[1] The race or ethnicity of the defendant was determined either through explicit reference to race in the opinion, the surname of the defendant, or by determining the primary race of the gang which defendant was affiliated with.

[2] Out of eighty cases involving the Kill Zone theory and citing *Canizales,* seventy-eight involved people of color, and two involved defendants of unknown race or ethnicity.

defendants, either as the price for obtaining pretrial release or as punishment for crime after conviction. The Supreme Court of California has "never suggested that article I, section 17 employs a different or broader definition of 'punishment' itself than applies under the Eighth Amendment." (*In re Alva* (2004) 33 Cal.4th 254, 290-292.)

The Cruel and Unusual Punishments Clause is the most important and controversial part of the Eighth Amendment. It is clear in decisions involving the kill zone theory post-*Canizales,* that the burden of continuous misapplication is primarily borne by defendants of color. This serious burden subjects minorities to greater sentences under the kill zone than would be permitted under traditional theories of attempted murder. Given this disproportionate, racially discriminatory impact, the kill zone theory violates the Cruel and Unusual Punishments Clause.

While after *McCleskey v. Kemp*, 481 U.S. 279 (1987), evidence of disparate racial impact in criminal cases is not conclusive of a constitutional violation, this Court may still consider the evidence of the kill zone's racially discriminatory impact in its overall consideration of the theory. Combined with the inconsistent confusion of the kill zone theory itself, evidence that the kill zone theory is used overwhelming against minority defendants is a compelling reason to restrict the use of the kill zone theory only when specific intent to kill is conclusively established by evidence beyond a reasonable doubt and when the lethal means is so significant, one cannot doubt that everyone within the zone would have been killed; i.e., a high powered automatic firearm or bomb. Therefore, using the kill zone theory the criminal justice system is

putting black and other minorities behind bars for longer than whites. This is an injustice according to the *Equal Protection Clause of the United States Constitution*.

Cal Crim 600 kill zone instruction, has the effect of lessening the prosecutions' burden of proof, thereby, infringing on a defendant's constitutional right to due process under both the United States and California Constitutions. (Fifth, Sixth, and Fourteenth Amendments, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Flood* (1998) 18 Cal.4th 470, 480; *People v. Garceau* (1993) 6 Cal.4th 140, 209, (conc. opn. of Mos, J.), citing *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; *People v. Saddler* (1979) 24 Cal.3d 671, 679-680, citing *People v. Serrato* (1973) 9 Cal.3d 753, 766-767.). Without ever having to prove a specific intent to kill *each* person, or that the *only* reasonable inference is that the defendants intended to kill each and everyone in the zone, prosecutors can seek multiple attempted murder charges by counting the number of people within the zone. Excessive detention is cruel when applied discriminatorily in ways not correlated to the criminal acts. The kill zone theory abandons rationality entirely in sentencing, by encouraging prosecutors to include as many people as possible within the zone, unrelated to the moral culpability of the defendant. Considering the enormous generational impact of excessive punishment on families in our State, this issue is more than a criminal justice issue, it is a human rights issue.

This exploitation of the kill zone theory has allowed prosecutors to disproportionately imprison minorities to longer sentences, including multiple life sentences, not be permitted under traditional attempted

murder rules. For example, in *People v. Rayford* (2020) 50 Cal.App.5th 754, Juan Rayford and Dupree Glass, two black high school students, were sentenced to eleven consecutive life sentences for allegedly shooting at a house where no one was injured. This cruel and unusual punishment illustrates the injustice of wrongful detentions from the kill zone theory. This punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating the prohibition against cruel and unusual punishment of the Eighth Amendment of the federal constitution or against cruel or unusual punishment of article I, section 17 of the California Constitution." (*See People v. Cole* (2004) 33 Cal.4th 1158, 1235 (citing *Solem v. Helm* (1983) 463 U.S. 277, 290–292 (internal citations removed)); *See People v. Young* (2005) 34 Cal.4th 1149, 1231; *People v. Dennis* (1989) 17 Cal.4th 468, 511–512; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1240.)

In deciding whether to resuscitate the kill zone theory, this Court must consider empirical evidence of the unequal application against minorities of this prosecutorial tool. In *Kimbrough v. United States*, 552 U.S. 85, 98 (2007), the Supreme Court held federal district court judges could deviate below the Federal Sentencing Guidelines in issuing sentences to crack cocaine users. The *Kimbrough* Court found the "widely-held perception" that the crack and powder cocaine sentencing differential "promotes unwarranted disparity based on race." (*Id.*) Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus, the severe sentence required by

the 100—to—1 ratio is imposed "primarily upon black offenders." (*Id;* internal citation omitted.)

Our statistics mirror, and in fact, exceed, the statistics in *Kimbrough*: almost *100%* of defendants in post-*Canizales* appeals belong to minority groups. The consequence of this harsher sentence on minorities is that we are imprisoning minorities for ***attempted*** murder for longer sentences than ***actual*** murder charges against white defendants. This Court may consider the statistical evidence of the kill zone's racially discriminatory impact on minorities in its overall consideration of whether to kill this theory. In 2022, arguing against the death penalty in California, Governor Gavin Newsom issued an order finding that the death penalty system is inherently unfair and disproportionately targets people of color. (N-09-19.) Thus, it is not a new or novel theory that minority defendants are discriminated against in our criminal justice system. What is new and novel is rejecting laws perpetuating this discrimination. Given the extremely disproportionate impact of the kill zone theory on minority defendants, the theory should be entirely rejected.

B. Despite Narrowing The Application Of The Kill Zone Theory In *Canizales,* The Kill Zone Continues To Be Improperly And Inconsistently Applied.

California appellate decisions written after *Canizales* demonstrate that despite this Court's explicit instructions, lower courts fail to correctly apply the kill zone theory. The errors are found in these two areas: (1) whether application of the kill zone theory requires a clearly defined zone of fatal harm, and (2) whether application of the kill zone

theory requires evidence supporting that the *only* reasonable inference is the specific intent to kill everyone in the zone of harm to kill the specified target. Despite this Court's guidelines in *Canizales,* the lower courts continue to uphold the theory in cases where there is no defined space and where there are other reasons for the shooting creating "a substantial potential that the kill zone theory may be improperly applied." (*See Canizales,* 7 Cal.5th at 597.)

1. The Kill Zone Theory Continues To Be Improperly Applied Where There Is No Zone of Fatal Harm.

Despite *Canizales*'s attempt to limit the application of the kill zone theory, it has been repeatedly applied in cases where there is insufficient evidence supporting the creation of a fatal zone of harm. According to *Canizales*, there must be substantial evidence supporting that the *only* reasonable inference is that a zone of fatal harm was created. (*See Canizales, supra* at 611–12.) The jury should consider "the circumstances of the attack, including the type and extent of force used during the attack" to determine the scope and existence of the zone, and whether the alleged victim is inside of the zone. (*Id*.)

However, lower courts continuously err in determining whether there is a zone of fatal harm. For example, *People v. Warner* (2019) 256 Cal.Rptr.3d 657, the court held the "trial court did not need to define the scope of the kill zone in this case," due to the proximity of the victim to the defendant and the caliber of the weapon used. (*Warner, supra,* at 675.) The *Warner* Court justified its decision that the defendant used sufficient force to create a kill zone on the grounds that the defendant was in "close proximity" to the alleged intended victim when he began

shooting on the dance floor. (*Id.*) Given that the defendant was only a few feet away and directly in front of the victim, a more reasonable explanation is that he shot directly at the victim and intended to kill only that victim. Therefore, the defendant shot at the intended victim with only a conscious disregard of others who were in the bar. This does not support a kill zone instruction for attempted murder. (*Id.; Canizales, supra,* at 607.) Instead, the facts only show the shooter was aiming at one intended target and should have only been charged with one count of attempted murder. Yet, the *Warner* Court incorrectly expanded the zone to include everyone on the dance floor. (*Warner, supra,* at 675.)

In *Mumin*, the appellate court upheld a kill zone instruction even where there was *no definable zone.* However, according to the *Canizales* rule, there must have been substantial evidence that Mumin intended to create a zone of fatal harm around Officer Mackay in order to ensure Mackay's death. (*People v. Mumin* (2021) 68 Cal.App.5th 36, 37; *See, Canizales, supra,* at 607.) When considering all the circumstances of the attack, it is clear Mumin did not create, nor intend to create this necessary zone of fatal harm. Instead, Mumin shot from inside of a closed community room where he could not see where Officer Mackay was standing. (*See Mumin, supra,* at 57–58.) Moreover, Mumin did not know any other officers were standing outside of the doorway. (*Id.*) Additionally, only one out of three shots fired went through the door where Mackay was standing. And, most importantly, Mumin was firing into a large, open field. Mackay was not located in a definable zone, let alone an enclosed space, as evidenced by Mackay's ability to move about

freely in the open field. Given this complete lack of an enclosed or definable zone, the *Mumin* facts do not support a finding of an intention to create a zone of fatal harm. (*Id.*; *See Canizales, supra,* at 607.)

In other cases, the requirement of substantial evidence to support a zone of fatal harm has led to enormously divergent outcomes. For example, in cases where shots have been fired into a vehicle, some courts have treated shooting at a car as de facto dispositive of a kill zone. (*See, People v. Morales* (2021) 67 Cal.App.5th 326, (held that a zone of fatal harm and kill zone instruction was supported by substantial evidence although the intended victims were never identified); *People v. Oliver* (Cal.App.2d, July 1, 2021) No. B307225, 2021 WL 2701376, at *7 (zone of fatal harm supported by substantial evidence when fired eight times into a car even though one bullet hit the car.)

On the other hand, some courts have declined to find substantial evidence supporting the creation of a zone of fatal harm. (*See, People v. Booker,* 58 Cal.App.5th 482 (2020) (where shooting into a car's cabin was at most conscious disregard); *People v. Lazo,* No. B304615, 2021 WL 5088720, at *8 (Cal.App. 2d, Oct. 29, 2021) (held there was a lack of substantial evidence that would support that defendant intended to create a zone of fatal harm where defendant shot multiple shots at an occupied car). These disparate cases illustrate the danger of continuing to use the kill zone theory when lower courts continue to apply the kill zone theory differently in cases with substantially similar fact patterns. (*See, Mumin, supra,* at 58; *Booker, supra,* at 500; *Oliver, supra,* at *7; *Warner,* 256 Cal.Rptr.3d at 675.) This tendency unfortunately only

confirms this Court's fear that the kill zone theory inherently entails "a substantial potential . . . [of being] improperly applied." (*See Canizales,* 7 Cal.5th at 597.)

Ultimately, the vague phrase of "zone of fatal harm," does not lend itself to uniformity by lower courts. When defining a zone, lower courts continue to find "zones of fatal harm" in large, undefined places which would more appropriately lend itself to a finding of "conscious disregard of the risk that others may be seriously injured or killed." (*See, Canizales, supra,* at 607.) Even if this Court were to further narrow the scope of the zone, there is unfortunately a serious concern that courts will continue to misapply the kill zone theory since there is an infinite number of factual scenarios. Therefore, the kill zone theory cannot be repaired and should be abandoned.

2. The Kill Zone Theory Continues to be Improperly Applied Where the Intent to Kill the Primary Target by Killing Everyone in the Fatal Zone of Harm is Not the *Only* Reasonable Inference.

The Supreme Court was aware of the inherent danger of the kill zone theory, when it held "in future cases, trial courts should reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm." (*Canizales, supra,* at 597.) Since the kill zone theory relies primarily on the use of circumstantial evidence, and as such, where the circumstantial evidence supports an alternative reasonable conclusion, it cannot support the use of the kill zone theory.

(*Canizales, supra,* at 607; *People v. Bender* (1945) 27 Cal.2d 164, 175; *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

Post-*Canizales*, few trial courts have properly applied the kill zone theory where "the *only* reasonable inference that the defendant intended to create a zone of fatal harm – that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death – around the primary target." (*Canizales, supra,* at 607.) (emphasis added). In *People v. Perez* (2022) 78 Cal.App.5th 192, the court found there was insufficient evidence supporting that the only reasonable inference was defendant intended to create a zone of fatal harm where shots were exchanged outside of a liquor store, hitting a passing vehicle near which three people were standing. (*Perez, supra,* 78 Cal. App. 5th at 203.) Correctly, the *Perez* court held there was no evidence the defendant intended to kill the intended victims "by intending to kill everyone in a particular zone." (*Id.)*

On the other hand, in *People v. Mason,* the appellate court held there was no error in a case where defendant shot several shots at a vehicle which had two unknown victims in it. (*People v. Mason* (Cal. App. 2d., Aug. 15, 2019) No. B283892, 2019 WL 3822003, *1.) Based only on the fact that sufficient force was used directly into the vehicle, with a tenuous connection between the defendant and the unidentified target, John Doe, the court held there was no error because "the jury could reasonably find that he had concurrent intent to kill Jane Doe." (*Id*. at *3). Thus, the appellate court did not hold that the *only* reasonable inference was that the defendant intended to create a zone of fatal harm around John Doe, in defiance of *Canizales*. The differing

approaches in these two cases demonstrate the inconsistent applications of the kill zone theory which *Canizales* sought to avoid.

II.

If The Kill Zone Survives, It Should Only Be Used In Limited Facts.

Should this Court allow the kill zone theory to survive in California, it must limit its use to cases where only certain assault type weapons are used, where there is a clearly defined zone of fatal harm from which there is no means of escape, and where the trial court has determined an intent to kill everyone in the zone to ensure the primary target's death is the *only* reasonable inference.

A. The Kill Zone Theory Should Only Be Applied When The Type Of Weapon Used Will Unquestionably Kill Everyone In The Zone.

To support the concurrent, specific intent necessary for attempted murder, only weapons which are *capable* of ensuring everyone's death should be considered sufficient weapons to support a kill zone instruction. *Canizales* limited the kill zone theory to where there was specific intent to kill a primary target by killing everyone within a zone of harm and found the type of weapon used was paramount in making such a determination. (*See, Canizales, supra,* at 607.) In accordance with *Canizales*, kill zone cases should be extremely rare. (*Id.*) To achieve this goal, the theory should only be allowed in cases where certain types of weapons are used, such as a bomb on a commercial airplane or an assault rifle fired at a group of people. A case involving a simple handgun should not qualify for the theory since it will not

necessarily kill everyone in the zone. A handgun can fire only the maximum number of bullets it can hold. For example, a 0.38 Special Revolver can hold 5 to 6 rounds while a 9mm Luger Pistol can hold up to 18 rounds in its cartridge.[3] The use of a firearm of such limited capacity is insufficient means to kill everyone in a zone. Ineffectual acts from a simple revolver or handgun where there was no specific and directional aim should not result in attempted murder charges under kill zone theory of liability.

There must be an escalation of a mode of attack, a means sufficient enough to kill more than one intended target, in order to constitute concurrent intent. Finders of fact must determine the *only* reasonable inference is that the weapon used amounts to concurrent intent to kill more than one individual. Placement of shots, the number of bullets fired, and the capacity of weapons used must be considered when determining whether sufficient means to kill *everyone* in the intended zone exists.

However, most cases employing the kill zone theory are not the stereotypical bomb on an airplane, or even hails of bullets from an assault rifle. In most cases, the lethal force is single-round shots fired from small handguns. The kill zone theory should be barred in such cases where small handguns are used, since the weapon's capacity is an insufficient means of force to kill everyone within the zone. (Nevertheless, if the shooter is specifically aiming at each individual in

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[3] Diffen, *.38 Special v. 9 mm,* www.diffen.com/difference/.38_Special_vs_9mm (Accessed August 26, 2022).

the zone and shooting directly at them, then specific intent to kill exists for each victim and the kill zone theory does not need to be used.) We cannot have every simple handgun shooting constitute lethal means; otherwise, every gang shooting will become a kill zone case. If every gang shooting is a kill zone case, then every gang member will be prosecuted for multiple attempted murder counts, without any evidence of a specific intent to kill. Moreover, gang members tend to be predominately minorities, thus, the racial discriminatory effect of the theory persists.

Past legislation helps to determine which weapons constitute appropriate application of the kill zone theory. For example, Title XI of the *Federal Violent Crime Control and Law Enforcement Act* of 1994 (hereafter "the Act") banned the manufacture, transfer, and possession of certain semiautomatic firearms designed as assault weapons and large-capacity ammunition magazines. The Act banned firearms including, but not limited to, the Colt AR-15, Beretta AR-70, Avtomat Kalashnikov ("AK"), Uzi, and Galil firearms. Shared characteristics of such firearms include semiautomatic firing modes and the ability to be fed by large-capacity magazines. The lethality of such firearms correlates to their higher capacity to rapidly discharge volleys of rounds when compared with small handguns, such as the 9mm handgun used by defendant Mumin. In the *Mumin* case, the kill zone theory should not have applied because of the type of weapon used. (*See, Mumin,* 68 Cal.App.5th at 45.)

Where a weapon is used which potentially cannot ensure everyone in a given zone will die, the only reasonable inference is there is no

specific intent to kill the primary target by killing everyone around that target. This Court must restrict the use of the kill zone jury theory to either bombs, fires, or assault rifles with large capacity magazines, which indisputably has the capacity to ensure the death of everyone within the zone.

B. The Kill Zone Theory Should Only Be Used When The Zone Is A Clearly Defined Closed Space, With No Means Of Escape.

In *Mumin*, the defendant was housed inside a building shooting towards the outside where officers were standing. (*Mumin,* 68 Cal.App.5th at 58.) The officers were standing outside the building in a large area adjacent to a park. They could have easily run away when the shooting began. Had the facts been reversed, i.e., the officers were barricaded in the building and Mumin was outside shooting in, and the officers could not escape without being shot, then the theory may have been applicable. However, the use of the kill zone theory by the prosecutors at the Mumin trial exemplifies how it is easily abused.

The Supreme Court in *Canizales* held: "the kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm — that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death — around the primary target and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken

together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm." (*Canizales,* 7 Cal.5th at 607.)

This term "zone of fatal harm" is still undefined and ambiguous. This Court failed to define "the proximity of the alleged victims to the primary target." In *Canizales,* this Court aimed to protect against the substantial danger of misapplication of the kill zone theory; however, since *Canizales*, the theory has been repeatedly misapplied. This Court failed to provide a basic understanding of the perimeter required for the trial courts and juries. Prior kill zone cases have found kill zones in a vast array of physical spaces, including cars, crowds, homes, and parks; however, there is never any discussion of an objective test to define the boundaries of the zone. Perhaps devising an objective test of a boundary to fit all cases is simply impossible. For instance, suppose a shooting occurs outside a house and there are people standing in front of the house, in the house, in the basement, one child in the attic, and two people in the alley behind the house. In this instance, where does the zone start and stop? Without a clearly defined area, the kill zone theory could subject a defendant to multiple attempted murder charges simply because someone was sleeping in the attic the night of the shooting, regardless of any intent to kill, any knowledge of people within a zone, or even whether the defendant intended to create a fatal zone of harm. For this very reason, and to avoid an overbroad use of this theory, the zone should only apply to specific closed spaces, with no chance of escape, where there is no doubt had the defendant shooter been successful, *everyone* in the zone would have died.

The *Merriam-Webster* dictionary defines a zone as "a region or area set off as distinct from surrounding or adjoining parts." The kill zone, as a *zone*, therefore, needs distinct regions and boundaries to be defined, and this should be done to ensure consistency. Without this definition, the zone is fluid and malleable by the lower courts. Because there is no definition of *zone*, or attempt to articulate a specific boundary line, what constitutes the kill zone subjectively changes from case to case.

This gross inconsistency has allowed trial courts to find kill zones across drastically different physical crime scenes, such as the following cases: a defendant shot from a car into a group of people standing in a parking lot. (*People v. Perez* (2022) 78 Cal.App.5th 192); where defendant began shooting across a street at close-range, (*People v. Windfield* (2021) 59 Cal.App.5th 496); where defendant shot at a house with victims inside, (*People v. Cerda* (2020) 258 Cal.Rptr.3d 409); where defendant shot across a dance floor, (*People v. Warner* (2019) 256 Cal.Rptr.3d 657); and, where defendant shot at unidentified victims in a car. (*People v. Morales* (2021) 67 Cal.App.5th 326).

Although Cal Crim 600 was revised, it still fails to define the boundaries of the zone: "A kill zone is an area in which the defendant used lethal force…" The instruction states you should consider the distance between the defendant and the victim; however, it never describes the limit of that distance. Is 20 feet too far? The arbitrariness of what constitutes the kill zone is exemplified by courts' differing approaches to whether the kill zone even requires a specific boundary. Many courts have continued to affirm this logic that the kill zone need

not be constrained to physical boundaries. However, it is perilous to invoke the kill zone when there is no defined zone because you could mistakenly include individuals the defendant never intended to kill.

Judges and lawyers desperately need the California Supreme Court to define the boundaries of the zone to avoid the arbitrary misapplication of the kill zone theory. Until this clear definition is made, the kill zone theory should be the exception rather than the rule, and only be used in very limited situations where there is a clearly defined zone without any means of escape. Only such a limited approach protects against the inherent danger of misapplying the kill zone theory.

III.

The *Mumin* Court's Revision Of The Supreme Court's Only Reasonable Inference Standard Must Be Rejected.

In *Canizales,* this Court held to establish the specific intent to kill necessary for a conviction of attempted murder under the kill zone theory, the jury must conclude "the circumstances of the defendant's attack on a primary target, including the type of force the defendant used, are such that the *only* reasonable inference is that the defendant intended to create a zone of fatal harm." (*Canizales,* 7 Cal.5th at 607 (emphasis added).) This Court held the kill zone instructions should only be given "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." (*Id.* at 608 (emphasis added).)

Yet, in *Mumin,* the California Fourth District Court of Appeal called into question this standard. Specifically, the *Mumin* Court rejected the contention that, they "must [themselves] be convinced that the only reasonable inference from the evidence is that the defendant had the requisite intent." (*Mumin,* 68 Cal.App.5th at 47 (citing *In re Rayford* (2020) 50 Cal.App.5th 754, 779).) Instead, the *Mumin* Court argued the only role of the trial court is to determine "whether the evidence would support a *jury determination* that the only reasonable inference was that the defendant held the requisite intent." (*Id*.) While simultaneously recognizing the role of trial courts in resolving the issue of "whether the evidence would support such a determination by the jury," the *Mumin* Court argued, contrary to the *Canizales* that if "it is at least *a* reasonable inference," then the evidence on appeal is sufficient to support a trial court's use of kill zone instructions. (*Id*.)

However, the *Mumin* Court's revision of *Canizales'* holding increases the danger of substantial error which *Canizales* sought to address. At trial, the role of the trial court is to provide the jury with a kill zone instruction when the *trial court itself* has determined an intent to kill the primary target by killing everyone in a zone of fatal harm is the *only* reasonable inference. (*See, Canizales, supra,* at 608.)

Yet, the *Mumin* Court's revision of the only reasonable inference standard fails to recognize the importance of the trial court in deciding what jury instructions should be given, and the role of appellate courts in reviewing trial judge decisions. Simply put, it cannot be both that (1) the trial court must determine whether there is substantial evidence supporting that the *only* reasonable inference is intent to murder by

killing everyone in a zone of harm, and (2) that appellate courts can only review such evidence with "*a* reasonable inference" standard. This Supreme Court was wise to warn trial courts to "exercise caution" in making *their own determination* "whether to permit the jury to rely upon the kill zone theory." (*Id.*) It is the appellate court's role to review such a determination on de novo review. This change in the standard highlights the dangers of using the kill zone theory in cases of reckless disregard or where the evidence does not support the kill zone theory as the *only* reasonable inference.

By changing the question on appeal to whether there was *a* reasonable inference of intent, the *Mumin* Court waters down the standard set in *Canizales*. This watered-down rule not only increases the number of kill zone cases but also increases the chances of misapplying the kill zone theory where there is no specific intent to kill everyone in a zone of harm.

Conclusion

Considering the serious racial implications, the kill zone theory should be abolished. The theory provides prosecutors with a lower burden of proof to put minorities behind bars for longer sentences. As this Court has repeatedly acknowledged, the kill zone theory carries with it a substantial threat of misapplication and error. The cumulative effect of this error is not only nonuniform application and continual errors burdening California criminal courts, but, more importantly, disproportionate punishment for people of color. Given the continued difficulties in creating a kill zone instruction which would avoid such erroneous and tragic outcomes, and when the courts can easily rely on

traditional theories of attempted murder without error, it is unwise to keep such a dangerous theory alive.

Dated: September 20, 2022

Annee Della Donna

Annee Della Donna, Esq.

INNOCENCE RIGHTS OF ORANGE COUNTY

CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.520, I certify that the word count for this brief is 6,805 using Century Schoolbook 14-point typeface. I relied upon the word count from Microsoft program on my computer. I declare under penalty of perjury under the laws of the state of California, that the foregoing is true and correct. Executed this 20th day of September 2022.

Annee Della Donna

Annee Della Donna, Esq.
INNOCENCE RIGHTS OF ORANGE COUNTY

APPENDIX A

CASES CITING *CANIZALES* WHERE KILL ZONE INSTRUCTIONS WERE AT ISSUE

Total Cases: 80

Total Cases With A White Defendant: 0

Total Cases With A Defendant of Color: 78

Total Cases With Defendant of Unknown Race or Ethnicity: 2

*Cases were compiled from Westlaw; Race determined through identification in the opinion, reference to gang affiliation, or reference to defendant surnames.

	CASE	RACE OF DEFENDANT(S)
1	*People v. Lee* (Cal. App. 2d, June 24, 2022, No. B300756) 2022 WL 2286208	Black
2	*People v. Perez* (2022) 78 Cal. App. 5th 192	Latinx
3	*People v. Morris* (Cal. App. 4th, Aug. 11, 2021, No. D076312) 2021 WL 3523405	Black
4	*People v. Bon* (Cal. App. 5th, June 22, 2021, No. F078752) 2021 WL 2546735	Latinx
5	*People v. Josue Sanchez* (Cal. App. 2d, May 28, 2021, No. B302549) 2021 WL 2176486	Latinx

6	*In re Bruno-Martinez* (Cal. App. 3d, Feb. 18, 2021, No. C091819) 2021 WL 631981	Latinx
7	*People v. Windfield* (2021) 59 Cal. App. 5th 496	Black
8	*People v. Henson* (Cal. App. 3d, Oct. 14, 2020, No. C084770) 2020 WL 6054127	Black
9	*People v. Riberal* (Cal. App. 3d, Sept. 29, 2020, No. C077018) 2020 WL 5793209	Latinx
10	*People v. Williams* (Cal. App. 2d, April 27, 2020, No. B259888) 2020 WL 1983064	Black
11	*People v. Granados* (Cal. App. 2d., Feb. 25, 2020, No. B257627) 2020 WL 896855	Latinx
12	*People v. Cerda* (2020) 258 Cal. Rptr. 3d 409	Latinx
13	*People v. Escobar* (Cal. App. 2d, Jan. 10, 2020, No. B259309) 2020 WL 112664	Latinx
14	*People v. Rios* (Cal. App. 5th, Dec. 20, 2019, No. F074350) 2019 WL 6975115	Latinx
15	*People v. Warner* (2019) 256 Cal. Rptr 3d 657	Black

16	*People v. Anderson* (Cal. App. 3d Dec. 2019, No. B251527) 2019 WL 6768776	Black
17	*People v. Ruiz* (Cal. App. 5th Nov. 2019, No. F076231) 2019 WL 6271799	Latinx
18	*People v. Mason* (Cal. App. 2d, Aug. 15, 2019, No. B283892) 2019 WL 3822003	Black
19	*In re Sambrano* (Cal. App. 4th June 9, 2022, No. E078147) 2022 WL 2071115	Latinx
20	*People v. Fields* (Cal. App. 3d, April 25, 2022, No. C068047) 2022 WL 1210474	Black
21	*People v. Brown* (Cal. App. 4th Feb. 2022, No. G060395) 2022 WL 522503	Latinx
22	*In re Lisea* (2022) 73 Cal. App. 5th 1041	Latinx
23	*People v. Aguilar* (Cal. App. 5th Dec.9, 2021, No. F077784) 2021 WL 5832887	Latinx

24	*People v. Lazo* (Cal. App. 2d Oct. 29, 2021, No. B304615) 2021 WL 5088720	Latinx
25	*California v. Sanchez-Gomez* (Cal. App. 1st Oct. 2021, No. A156198) 2021 WL 4807976	Latinx
26	*In re Sirypangno* (Cal. App. 4th, Oct. 14, 2021, No. D078705) 2021 WL 4785924	Asian
27	*People v. Morales* (2021) 67 Cal. App. 5th 326	Latinx
28	*People v. Dominguez* (2021) 66 Cal. App. 5th 163	Latinx
29	*People v. Oliver* (Cal. App. 2d, July 1, 2021) No. B307225, 2021 WL 2701376	Unknown
30	*People v. Brown* (Cal. App. 3d, May 21, 2021, No. C089252) 2021 WL 2024911	Black
31	*People v. Gonzalez* (Cal. App. 3d May 12, 2021, No. C089973) 2021 WL 1956474	Latinx

32	*In re Evans* (Cal. App. 2d April 30, 2021, No. B281093) 2021 WL 1711631	Latinx
33	*People v. Reyes* (Cal. App. 2d. April 5, 2021, No. B301357) 2021 WL 1248216	Latinx
34	*People v. Booker* (2020) 58 Cal. App. 5th 482	Black
35	*People v. Quiroz* (Cal. App. 4th Oct. 16, 2020, No. E069820) 2020 WL 6110984	Latinx
36	*People v. Cardenas* (2020) 53 Cal. App. 5th 102	Latinx
37	*In re Rayford* (2020) 50 Cal. App. 5th 754	Black
38	*People v. Vivero* (Cal. App. 3d, June 8, 2020, No. C086268) 2020 WL 3046066	Latinx
39	*People v. Thompkins* (2020) 50 Cal. App. 5th 365	Black
40	*People v. Sanders* (Cal. App. 2d, May 1, 2020, No. B295960) 2020 WL 2110306	Black

41	*People v. Alvarado* (Cal. App. 6th, May 1, 2020, No. H045500) 2020 WL 2092478	Latinx
42	*People v. Gonzalez* (Cal. App. 2d, Apr. 10, 2020, No. B296206) 2020 WL 1815073	Latinx
43	*People v. Miranda* (Cal. App. 2d, Apr. 8, 2020, No. B266817) 2020 WL 1698391, as modified on denial of reh'g (Apr. 20, 2020)	Latinx
44	*People v. Mays* (Cal. App. 2d, Apr. 3, 2020, No. B291995) 2020 WL 1648660, review denied (June 17, 2020)	Black
45	*People v. Melson* (Cal. App. 2d, Apr. 1, 2020, No. B292679) 2020 WL 1545707, as modified on denial of reh'g (Apr. 29, 2020), review denied (June 17, 2020)	Black
46	*People v. Mariscal* (2020) 47 Cal. App. 5th 129	Latinx

47	*People v. King* (Cal. App. 4th, Mar. 18, 2020, No. E070384) 2020 WL 1284895, review denied (June 17, 2020)	Black
48	*People v. Garcia* (2020) 46 Cal. App. 5th 123, reh'g denied (Mar. 23, 2020), review denied (May 27, 2020), review denied (June 10, 2020)	Latinx
49	*People v. Gomez* (Cal. App. 2d, Mar. 4, 2020, No. B293727) 2020 WL 1041611, review denied (May 27, 2020)	Latinx
50	*People v. Casique* (Cal. App. 2d, Feb. 21, 2020, No. B284945) 2020 WL 858137, review denied (May 13, 2020)	Latinx
51	*People v. Ratcliffe* (Cal. App. 4th, Feb. 11, 2020, No. E063690) 2020 WL 634410, review denied (May 27, 2020)	Black

52	*People v. Kennedy* (Cal. App. 2d, Jan. 15, 2020, No. B264661) 2020 WL 218756, review denied (Mar. 25, 2020)	Black
53	*People v. Esquivel* (Cal. App. 2d, Dec. 23, 2019, No. B269545) 2019 WL 7046538	Latinx
54	*People v. Garcia* (Cal. App. 3d, Dec. 18, 2019, No. C066714) 2019 WL 6888452	Latinx
55	*People v. Garcia* (Cal. App. 2d, Nov. 25, 2019, No. B259708) 2019 WL 6269807, as modified on denial of reh'g (Dec. 12, 2019)	Latinx
56	*People v. Singh* (Cal. App. 4th, Nov. 22, 2019, No. E067985) 2019 WL 6242187	Black
57	*People v. Harris* (Cal. App. 4th, Nov. 21, 2019, No. D075379) 2019 WL 6208343	Black

58	*People v. Goins* (Cal. App. 2d, Nov. 12, 2019, No. B281831) 2019 WL 5884387	Black
59	*People v. Guardado* (Cal. App. 2d, Oct. 2, 2019, No. B284144) 2019 WL 4855111	Latinx
60	*People v. Dorantes* (Cal. App. 2d, Sept. 3, 2019, No. B289777) 2019 WL 4164803	Latinx
61	*People v. Salvador Espinoza* (Cal. App. 2d, Aug. 15, 2019, No. B288107) 2019 WL 3821795	Latinx
62	*People v. Rodriguez, Jr.* (Cal. App. 5th, June 30, 2022, No. F080915) 2022 WL 2350268	Latinx
63	*People v. Stelly* (Cal. App. 1st, Aug. 16, 2021, No. A157142) 2021 WL 3615764, review denied (Oct. 20, 2021)	Black
64	*People v. Montanez* (Cal. App. 3d, May 3, 2021, No. C083092) 2021 WL 1730252	Latinx

65	*People v. Bonilla-Rodriguez* (Cal. App. 3d, Mar. 18, 2021, No. C086828) 2021 WL 1031922, review denied (May 26, 2021)	Latinx
66	*People v. George* (Cal. App. 4th, Jan. 11, 2021, No. E072299) 2021 WL 82315, review denied (Mar. 30, 2021)	Black
67	*In re Chance P.* (Cal. App. 4th, Nov. 19, 2020, No. D075713) 2020 WL 6797171, review denied (Feb. 10, 2021)	Asian
68	*People v. Stone* (Cal. App. 2d, Mar. 2, 2020, No. B293532) 2020 WL 994144, review denied (June 10, 2020)	Black
69	*People v. Torres* (Cal. App. 3d, Jan. 17, 2020, No. C087086) 2020 WL 255068, review denied (Apr. 15, 2020)	Latinx

70	*People v. Villa* (Cal. App. 5th, Dec. 17, 2019, No. F076081) 2019 WL 6871248	Latinx
71	*People v. Cardona* (Cal. App. 2d, Nov. 27, 2019, No. B261458) 2019 WL 6337516	Latinx
72	*People v. Gray* (Cal. App. 2d, Nov. 21, 2019, No. B282321) 2019 WL 6206257	Black
73	*People v. Galstyan* (Cal. App. 2d, Nov. 4, 2019, No. B279947) 2019 WL 5689840	Middle Eastern
74	People v. Stewart (Cal. App. 5th, Oct. 2, 2019, No. F064564) 2019 WL 4893739	Black
75	*Stevenson v. Madden* (N.D. Cal., Mar. 23, 2022, No. 20-CV-07340-VC) 2022 WL 867251	Unknown
76	*Delgado v. Madden* (C.D. Cal., Aug. 21, 2020, No. 218CV02699FMOMAA) 2020 WL 4934364	Latinx

77	*Miranda v. Pfeiffer* (C.D. Cal., Feb. 11, 2020, No. 219CV06050FMOKES) 2020 WL 2043611, report and recommendation vacated sub nom. Christian Miranda v. Pfeiffer (C.D. Cal., Sept. 30, 2020, No. 219CV06050FMOKES) 2020 WL 7059604	Latinx
78	*People v. McMorries* (Cal. App. 2d, Dec. 31, 2020, No. B298519) 2020 WL 7777942, opinion modified on denial of reh'g (Jan. 12, 2021), vacated (Jan. 13, 2021), as modified on denial of reh'g (Jan. 13, 2021), review denied (Mar. 17, 2021)	Latinx
79	*People v. Carrillo* (Cal. App. 3d, Apr. 19, 2022, No. C091539) 2022 WL 1153145, as modified on denial of reh'g (May 4, 2022), review filed (May 26, 2022)	Latinx
80	*In re Morrison* (Cal. App. 4th, Apr. 6, 2022, No. E067811) 2022 WL 1025141, review filed (May 13, 2022)	Black

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Minh U. Le Office of the Attorney General 600 West Broadway, Suite 1800 San Diego, CA 92186	Raymond M. DiGuiseppe Attorney at Law P.O. Box 10790 Southport, NC 28461
Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101 *eservice-court@adi-sandiego.com*	

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Annee Della Donna

Annee Della Donna

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/28/2022 by Ines Calanoc, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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9/20/2022
Date

/s/Annee Della Donna
Signature

Della Donna, Annee (138420)

Last Name, First Name (PNum)

Law Offices of Annee Della Donna

Law Firm