IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. AHMED MUMIN, Defendant and Appellant.	No. S271049 (San Diego Superior Court No. SCD261780) Fourth Appellate District, Division One No. D076916

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AHMED MUMIN

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INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in . . . efforts for the purpose of improving the quality of indigent defense." (Govt. Code, § 15420, subd. (b).) Further, OSPD is statutorily "authorized to appear as a friend of the court[.]" (Govt. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been accused or convicted of crimes.

The issues in this case involve the "so-called kill zone theory, under which a defendant may be convicted of the attempted murder of an individual who was not the defendant's primary target."

(*People v. Canizales* (2019) 7 Cal.5th 591, 596 (*Canizales*).) More specifically, this case concerns the circumstances under which it is appropriate for the trial court to instruct the jury on the kill zone theory. Because this ambiguously defined theory invites continued misuse and misapplication, OSPD urges this Court to eliminate it entirely. In the alternative, OSPD urges this court to clearly limit its scope.

ARGUMENT

The kill zone theory of attempted murder vastly expands criminal liability for shootings—allowing prosecutors to obtain additional attempted murder convictions for each person near the defendant's target, with the number of counts not even necessarily depending on the number of shots fired. (*Canizales, supra,* 7 Cal.5th at p. 610 [explaining that the number of shots fired is merely "one evidentiary factor" in determining the defendant's intent].) Recognizing numerous past abuses, this Court in *Canizales* attempted to limit the circumstances in which a trial court may instruct a jury on the kill zone theory, and "caution[ed] . . . that trial courts must be extremely careful in determining when to permit the jury to rely upon the kill zone theory." (*Id.* at p. 597.) This warning was based on the "substantial potential that the kill zone theory may be improperly applied" in circumstances where the defendant had no intention to kill bystanders. (*Ibid.*)

To that end, *Canizales* set out explicit limitations on the kill zone theory clarifying that it may be properly 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." (*Id.* at p. 607.)

In other words, this Court acknowledged the dangers of the kill zone theory and attempted to restrict its application to avoid improper convictions. Indeed, the Court made its intention to limit the use of the kill zone theory explicit, stating that it "anticipate[d] there will be relatively few cases in which the theory will be applicable and an instruction appropriate." (*Id.* at p. 608.) Unfortunately, this Court's guidance in *Canizales* has not succeeded in limiting the misapplication of this ambiguous and inflammatory theory of liability.

People v. Mumin (2021) 68 Cal.App.5th 36 (*Mumin*), is just one of many examples of the continued misapplication of the kill zone theory. Here, the evidence showed that Mr. Mumin blindly shot three times from inside a room into an undefined outside area occupied by a police officer opening the door to the room and potentially occupied by an unknown number of other people. Despite *Canizales*'s limitations on the kill zone theory, the trial court gave a (faulty) kill zone instruction, and the jury found Mr. Mumin guilty of the attempted murder of both the officer who was opening the door and another officer who was, unknown to Mr. Mumin, also outside the door. In turn, the Court of Appeal affirmed the conviction, reasoning that since there was "substantial evidence" that *could*

have supported an inference that the defendant created a kill zone, it was an issue properly left to the jury. (*Id.* at p. 47.)

As discussed in more detail below, the kill zone theory continues to generate confusion in the lower courts. The simplest and most direct way to eliminate misapplication of the kill zone theory would be to preclude its use entirely.

Alternatively, the Court should, at a minimum, adopt clear rules to ensure the kill zone theory is not misapplied.

First, the Court should make clear that the kill zone instruction should not be given by trial courts unless the *only* reasonable inference from the evidence presented is that the defendant intended to create a zone of fatal harm.

Second, if the circumstances warrant an instruction by the trial court, the jury must be told explicitly that it cannot convict on the kill zone theory unless it finds that the *only* reasonable inference is that the defendant intended to create a zone of fatal harm. Despite this Court's direction in *Canizales* that the standard kill zone instructions be revised, the relevant CALCRIM and CALJIC instructions retain flawed language that contradicts or undermines the reasoning of *Canizales*.

Third and finally, this Court should clarify that the instructions must 1) specify that the zone of fatal harm must be a defined space and 2) that the defendant must know that the victim was located within that defined zone of fatal harm.

I.
CASES FOLLOWING *CANIZALES* DEMONSTRATE CONTINUING AMBIGUITY IN THE APPLICATION OF THE KILL ZONE THEORY

In *Canizales*, this Court endeavored to curb "the potential for the misapplication of the kill zone theory" by refining the requirements for instruction and conviction under it. (*Canizales*, *supra*, 7 Cal.5th at p. 606.) However, since *Canizales* was decided, two districts of the Court of Appeal have split over what the case meant when it held that kill zone instructions are improper unless the "*only*" reasonable inference from the evidence is that the defendant intended to create a zone of harm and kill everyone within it. (*Id.* at pp. 597, 608.) This division in the lower courts leaves dangerous ambiguity in the application of a theory which often results in extremely long sentences and threatens to undermine this Court's efforts to curb its misapplication.

In *In re Rayford* (2020) 50 Cal.App.5th 754 (*Rayford*), the Court of Appeal read *Canizales,* consistent with its plain language, as limiting the use of kill zone instructions to those cases in which a kill zone is the "only" reasonable inference to be drawn. (*Id.* at pp. 769, 779); see also *Canizales*, *supra*, 7 Cal.5th at pp. 597, 607-608, 611.) Accordingly, *Rayford* looked to the particular facts presented there and held that the trial court had erred in instructing the jury on the kill zone theory because the "circumstances support[ed] a reasonable alternative inference more favorable to" the defendant. (*Ibid.*) For example, the court noted that, under the facts of the case, the defendant's acts—firing several shots toward a house near where people were standing—could also have been reasonably

construed as an attempt to provoke a fight or frighten others, all with "disregard of the risk" to bystanders and not with the specific intent required under the kill zone theory. (*Ibid.*) Because there were competing reasonable inferences pointing away from the kill zone theory, instructing on the theory was improper under *Canizales*. (*Ibid.*)

Mumin expressly rejected *Rayford*. (*Mumin, supra,* 68 Cal.App.5th at pp. 53-54.) It held instead that a trial court may instruct on the kill zone theory if "the evidence supports a reasonable inference that the defendant had the requisite intent," even if "the opposite inference would also be reasonable." (*Id.* at pp. 47-48.) The court acknowledged *Canizales*'s repeated statements that the evidence must be sufficient to show that kill zone is the *only* reasonable inference. (*Id.* at pp. 48, 52.) But the Court of Appeal placed on top of this straightforward rule another layer: its reading of the substantial evidence standard of appellate review for instructional error. (*Id.* at pp. 49-50.) Under this standard, the *Mumin* court reasoned, "[t]he presence of substantial evidence supporting the [challenged] jury instruction is not undermined by the existence of other interpretations of the evidence." (*Id.* at p. 53, quoting *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1291.) Thus, *Mumin* permits kill zone instructions regardless of the number, or the strength, of the reasonable competing inferences pointing to innocence, effectively neutralizing *Canizales's* effort to limit the scope of the kill zone theory.

This split between *Rayford* and *Mumin* is but one demonstration that the kill zone remains a dangerously ambiguous

legal theory. If the *Mumin* rule applies, trial courts will have broad discretion to give the instruction in essentially the same universe of cases as before *Canizales* was decided. Moreover, under *Mumin*, instructing a jury on the kill zone theory will rarely be error. This will lead to wild variations in the liability faced by defendants in cases with similar facts. Depending on whether their judge gave the kill zone instruction or not, a decision that will essentially be unreviewable, defendants who have engaged in identical behavior may receive vastly different sentences, or they may decide to forego trial altogether out of fear of a *de facto* life term threatened by kill zone instructions. This case presents an opportunity to bring additional clarity to the law in this area. However, the simplest answer is to abandon the kill zone theory altogether.

II.
BECAUSE THE KILL ZONE REMAINS AN INFLAMMATORY AND DANGEROUSLY AMBIGUOUS LEGAL THEORY, THE ONLY REASONABLE SOLUTION IS TO ELIMINATE IT

Canizales addressed a significant problem – the misapplication of an elastic theory of liability to secure lengthy sentences for individuals accused of attempted murder. As this Court repeatedly emphasized, even before *Canizales*, a jury instruction on the kill zone is never required. (*People v. Stone* (2009) 46 Cal.4th 131, 137-138 (*Stone*); *People v. Smith* (2005) 37 Cal.4th 733, 746 (*Smith*); *People v. Bland* (2002) 28 Cal.4th 313, 331, fn.6 (*Bland*).) Indeed, this "Court has repeatedly expressed skepticism over the general utility of a kill zone instruction." (*People v. Thompkins* (2020) 50 Cal.App.5th 365, 390 (*Thompkins*), citing

Canizales, *supra*, 7 Cal.5th at pp. 596-598, 608; *Stone*, *supra*, 46 Cal.4th at pp. 137-138; *Bland*, *supra*, 28 Cal.4th at p. 331, fn.6.) And courts of appeal have for years expressed concerns about the kill zone theory.

Nevertheless, lower courts continue to struggle with the application of the theory. In the 38-month period following the Court's decision in *Canizales,* 69 cases cited *Canizales* for its kill zone analysis, with 34 of those cases reversing convictions based on issues related to the kill zone theory. (See Appendix A.) Although further refining the theory to better match the requisite mental state with moral culpability could address the problems associated with the kill zone instruction, a simpler and more direct solution is simply to eliminate the theory.

It has long been understood that the "kill zone theory is not a one-size-fits-all shortcut to establishing the requisite mental state for attempted murder." (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1243.) Yet the instruction has been used for just that purpose in numerous cases where it is neither applicable nor necessary.

For example, courts have repeatedly given the kill zone instruction in cases in which there is no evidence of the required primary target. (See *Canizales, supra,* 7 Cal.5th at p. 608 ["evidence of a primary target is required"].) In *In re Sambrano* (2022) 79 Cal.App.5th 724 (*Sambrano*), the court found that the kill zone theory was "categorically inapplicable" where the evidence showed that the defendants shot at a group of people "because of the group's location within rival gang territory" and did not attempt to kill any particular person in the group. (*Id.* at p. 734.) Similarly, in *People v.*

Mariscal (2020) 47 Cal.App.5th 129, the court found that there was no evidence to support a kill zone instruction where the defendant approached a group of people in a park, had a verbal exchange with one, shot him, and continued to shoot at the others as they fled. (*Id.* at pp.132-133, 139.) The Court of Appeal held that the trial court erred by giving the kill zone instruction because there was no evidence to show that the unknown person with whom the defendant had the verbal exchange was a primary target in the shooting. (*Id.* at p. 139.) Alternatively, even if the prosecution had shown that person was the primary target, he had already been fatally wounded before the defendant moved on to shoot at the others who were running away. (*Ibid.*) In either case, the kill zone theory was inapplicable.[1] (*Ibid.*; see also *Thompkins*, supra, 50 Cal.App.5th at pp. 394-395 [kill zone instruction inappropriate where "prosecution never attempted to identify any particular target victim or victims"].)

The kill zone is also misused as a tool to stack attempted murder convictions in cases where there may be weak evidence supporting an intent to kill the secondary targets. (See *Thompkins*, supra, 50 Cal.App.5th at p. 390 [characterizing the kill zone

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[1] The Court of Appeal went on to hold that the error was harmless because the evidence showed "that there was no primary target and that, instead, defendant intended to kill all of the men on the bleachers, or as many as he could." (*Id.* at p. 140.) The *Mariscal* court's harmless error analysis makes clear that the prosecution's pursuit of the kill zone theory was not only erroneous but also unnecessary. (See *People v. McCloud* (2012) 211 Cal.App.4th 788, 798 [warning against using kill zone theory as "a means of somehow bypassing" the mental state requirement for attempted murder].)

instruction as "prosecution-friendly in that it makes it possible to secure attempted murder convictions without individual-by-individual proof of intent to kill"].) For example, in *People v. Booker* (2020) 58 Cal.App.5th 482, the defendants and the primary target had a verbal interaction at a store. (*Id.* at p. 488.) Shortly after the primary target and his girlfriend left the store and drove away, defendants' car pulled up on the driver's side of the primary target's car and the defendant in the passenger seat fired five shots at the car, killing the primary target. (*Ibid.*) The girlfriend was not injured and, while the driver's side window of the car was shattered, none of the other windows were damaged and there were no bullet holes on the car's body or doors. (*Ibid.*) Under these circumstances, the court reversed, holding that "the type and extent of force used do not support a reasonable inference [that the defendants] intended to kill [the primary target] by killing everyone in the car's cabin." (*Id.* at p. 500.)

Similarly, in *People v. Cardenas* (2020) 53 Cal.App.5th 102, the defendant and his friend were involved in a verbal confrontation with three men in the parking lot outside a bar. (*Id.* at p. 108.) Defendant and his friend shot at one of the three when he threatened to fight them and then continued to shoot as they ran away. (*Ibid.*) However, the shots were all directed at the same man; as soon as they saw the guns, the other two men had taken cover behind cars parked nearby. (*Ibid.*) Although the other men in the group were wounded, the court held that the defendant had not intended to kill them and had only incidentally subjected them to lethal risk. (*Id.* at p. 115.)

These are just a few examples of the misapplication of the kill zone theory to avoid proving specific intent for an attempted murder conviction. More importantly, they only reflect the tip of the iceberg: a few published reversals. There are many more unpublished reversals. (See Appendix A). And there are likely many other cases in which defendants were forced to plead guilty under the threat of a kill zone instruction which could result in an effective life sentence.

In addition to confusion regarding the above requirements, the theory is itself inflammatory. Even when properly applied, kill zone instructions bias the jury in the direction of guilt, by labeling defendants as the architects of a "kill zone." Moreover, the kill zone theory is premised upon the existence of a "primary target," language that is contained in the instruction which suggests to the jury that an intent to kill that primary target is a foregone conclusion.[2]

Amicus is not the only voice to express skepticism about the utility of the kill zone theory. The Fourth District Court of Appeal recently stated, "[g]iven the Supreme Court's words of caution [in *Canizales*], the apparently ongoing difficulty in crafting an error-

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[2] This problem is particularly acute for juries, like the jury in this case, that are instructed with CALCRIM No. 600. Under this instruction, the kill zone theory is included as optional language contained in the general attempted murder instruction. (Compare CALCRIM No. 600 [single attempted murder instruction including optional language on kill zone] with CALJIC No. 8.66 [attempted murder instruction] and 8.66.1 [separate kill zone instruction].) This unified instruction enhances the risk that the "primary target" language will influence the jury's consideration of whether there is proof of intent to kill that person.

free instruction on the kill zone theory[3], 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, supra,* 79 Cal.App.5th at p. 734.) This reasoning – together with an ever-present temptation for prosecutors to push the bounds of the kill zone theory beyond its proper limits – supports the elimination of the theory altogether.

To be clear, eliminating the kill zone theory will not prohibit prosecutors from pursuing multiple attempted murder charges in appropriate cases; it will only curtail abuse of the theory as an end run around proving the requisite intent. "If the evidence supports a reasonable inference that, as a means of killing the primary target, the defendant specifically intended to kill every single person in the area in which the primary target was located, then the prosecutor can make that argument and the jury can draw that inference without the aid of a kill zone instruction—the ordinary instructions on attempted murder will provide all of the necessary legal tools." (*People v. McCloud*, *supra,* 211 Cal.App.4th at p. 803.)[4]

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[3] See Section II.B., *post*, for a discussion of the ongoing errors in kill zone instructions.

[4] Of course, where such an argument exceeds the bounds of the evidence presented, a trial court should sustain a defense objection.

III.
IF THE COURT DOES NOT ELIMINATE THE KILL ZONE THEORY, IT SHOULD ADOPT CLEAR RULES LIMITING THE APPLICATION OF THE THEORY AND REQUIRE CORRESPONDING JURY INSTRUCTIONS

If it does not eliminate the kill zone theory, the Court should take further steps to ensure that lower courts are faithful to *Canizales*. First, the Court should make explicit the rule that trial courts should not give a kill zone instruction unless the only reasonable inference is that the defendant intended to create a zone of fatal harm. Second, if an instruction is given, it must require the jury to find, before convicting on a kill zone theory, that the only reasonable inference is that a defendant intended to kill everyone in the zone of fatal harm in order to ensure the death of the primary target. Third and finally, the Court must clarify that the kill zone theory can only be applied to individuals whom the defendant 1) knows are present and are 2) within a defined zone of fatal harm.

A. The kill zone instruction should be limited to cases where the *only* reasonable inference is that the defendant intended to create a zone of fatal harm.

To enforce *Canizales*'s safeguards against kill zone convictions with inadequate proof of the requisite mental state, this Court should explicitly require trial courts to limit the kill zone instruction to cases where the *only* reasonable inference is that the defendant intended to create a zone of fatal harm. (*Canizales, supra*, 7 Cal.5th at p. 597 ["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 endanger or harm) everyone in the zone of fatal

harm"].) Reviewing courts should also base their review of kill zone cases on that standard, not the lenient reformulation set out by the Court of Appeal in this case.

Most importantly, it is not sufficient, as the Court of Appeal held here, that there is some interpretation of the evidence upon which a jury could base a kill zone finding. The analysis of the court below rested strictly on its assessment of what "the jury could reasonably have found[]" followed by a recitation of the most incriminating evidence: that *Mumin* had armed himself with a dangerous firearm and ammunition which he had recently used to kill someone, hid in a room, heard that police were searching for him, and fired at multiple doors when Officer Mackay attempted to enter. (*Mumin*, *supra*, 68 Cal.App.5th at p. 57.) From these facts, the court below reasoned that a jury could have found "that Mumin was unsure exactly where the police officer opening the door was located and intended to create a zone of fatal harm in front of both double doors, killing anyone in that zone in order to ensure that the police officer (Mackay) would be killed as well." (*Ibid.*)

The court briefly acknowledged that Mumin raised "other facts" but rejected that evidence out of hand with no consideration of whether that evidence could support an alternative, reasonable inference inconsistent with an intent to kill. (*Mumin*, *supra*, 68 Cal.App.5th at p. 57.) This analysis is insufficient. At a minimum, the reviewing court must find that there was substantial evidence (i.e. evidence supporting a finding beyond a reasonable doubt), under which a reasonable jury could have *rejected* interpretations of the evidence inconsistent with guilt. (*People v. Brooks* (2017) 3

Cal.5th 1, 60 [substantial evidence test requires "substantial evidence from which a reasonable trier of fact could have rejected defendant's reading of the record"].) The Court of Appeal failed even to *consider* what reasonable interpretations of the evidence inconsistent with a kill zone theory existed, much less why or how a reasonable jury could have rejected them.

If, as the Court of Appeal urges in *Mumin*, the trial court need do nothing more than determine that there is a "*a* reasonable inference" that the defendant intended to create a zone of fatal harm in order to allow the jury to determine whether that inference is the *only* reasonable inference (see *Mumin*, *supra*, 68 Cal.App.5th at p. 47, emphasis in original), the class of kill zone cases will not shrink appreciably as this Court predicted in *Canizales*. (*Canizales, supra,* 7 Cal.5th at p.608.) Moreover, under *Mumin*'s formulation, if there was any reasonable inference that defendant intended to create a zone of fatal harm, a court of appeal reviewing a trial court's decision to give the kill zone instruction would be required to disregard inferences that point to innocence even if no reasonable juror could reject them. *Canizales* will be rendered toothless unless it is interpreted to require trial and reviewing courts to find substantial evidence under which a reasonable jury could *reject* equally reasonable inferences inconsistent with a kill zone.

The Court of Appeal in *Mumin* premised its holding on the idea that *Canizales* did not upset the established substantial evidence appellate review standard for instructional error. (*Mumin, supra*, 68 Cal.App.5th at p. 52.) Many cases have stated that, on substantial evidence review, it is sufficient if a reviewing court

concludes the evidence supports a reasonable inference that supported a particular instruction. (*Id.* at p. 50 [noting further that "[a]n appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise"].) Thus, the *Mumin* opinion reasoned that it was appropriate to layer on top of the *Canizales* formulation – that the kill zone must be the "only reasonable inference" (*Canizales*, *supra*, 7 Cal.5th at p. 608) – the additional guidance that an instruction should be provided whenever the "evidence supports a reasonable inference of the requisite intent." (*Mumin,* at p. 52.)

This reasoning is faulty. As this Court has made clear, there is "no single formulation of the substantial evidence test for all its applications." (*In re R.V.* (2015) 61 Cal.4th 181, 200.) *Canizales* clearly intended to place strict, *sui generis* limitations on the kill zone theory. The cases on which *Mumin* relies – which are extremely accommodating to the question of when juries should receive even weakly supported instructions – cannot be reconciled with these restrictions.

For example, *Mumin* holds that "'[t]he choice of which inference is to be drawn from the facts, where more than one reasonable inference is possible, is the function of the jury.'" (*Mumin*, *supra*, 68 Cal.App.5th at p. 50, quoting *People v. Sweeney* (1960) 55 Cal.2d 27, 51; see also *Mumin*, at pp. 50-51, quoting *People v. Green* (1939) 13 Cal.2d 37, 42 ["'A conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence'"].) These authorities contradict *Canizales*'s holding

that a conviction on the kill zone theory cannot stand when there is more than one reasonable inference. (*Canizales*, *supra*, 7 Cal.5th at p. 597 ["under the reasonable doubt standard, a jury may not find a defendant acted with the specific intent to kill everyone in the kill zone if the circumstances of the attack would also support a reasonable alternative inference more favorable to the defendant"].)

Equally important, the opinion below overlooks direct evidence suggesting that the kill zone instruction has distinct limitations that are inconsistent with the traditional applications of the substantial evidence test. For instance, *Mumin* reasons that "'A trial court *must* instruct the jury on every theory that is supported by substantial evidence.'" (*Mumin*, *supra*, 68 Cal.App.5th at p.49, emphasis added, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1206.) Yet this "established principle" simply does not apply in the kill zone context. As this Court held, and numerous appellate courts have repeated, a kill zone instruction is *never* required. (See *Stone, supra*, 46 Cal.4th at pp. 137-138; *Smith*, *supra*, 37 Cal.4th at p. 746; *Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6; see also *Sambrano, supra*, 79 Cal.App.5th 724 [questioning why a trial court would ever give a kill zone instruction in "the absence of any requirement" to ever do so].)

The kill zone theory presents unique dangers and therefore must be constrained by special safeguards to protect against misuse. The standard formulations for determining when a jury can be instructed on a legal theory, however, are often quite lenient, requiring merely "evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find

persuasive.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 645.) Layering such lax formulations of the substantial evidence test on top of *Canizales*'s clear limitations on the use of kill zone instructions will fatally undermine its purpose. A trial court cannot find that substantial evidence supports a finding that the *only* reasonable inference is that the defendant intended to create a zone of fatal harm, (*Canizales*, *supra*, 7 Cal.5th at p. 597), simply because there is *a* reasonable inference that the defendant harbored that intent. The weight of the evidence must be such that the jury could reject all other inferences as unreasonable. In such an analysis, some consideration must be given to the weight of reasonable inferences that point to innocence rather than guilt.

B. The jury must be explicitly instructed that the kill zone theory is limited to cases in which the *only* reasonable inference is that the defendant intended to kill everyone in the zone of fatal harm in order to ensure the death of the primary target.

As made clear in *Canizales*, requiring the jury to find that the *only* permissible inference is that the defendant intended to create a zone of fatal harm is necessary to prevent misapplication of the kill zone theory. (*Canizales*, *supra*, 7 Cal.5th at pp. 606-607.) Recognizing 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," this Court instructed that "the standard instruction should be revised to better describe the contours and limits of the kill zone theory" as set out in *Canizales*. (*Id.* at pp. 607, 609.)

However, as noted in appellant's opening brief on the merits, the instruction given in the instant case did not comply with *Canizales*; it did not make clear the limitation that the jury must find that the *only* reasonable inference was that Mr. Mumin intended to kill everyone in the zone of fatal harm. (See Appellant's Opening Brief on the Merits (AOBM) at pp. 53, 55-56.) Instead, the instruction required only that it be "proven that the defendant intended to kill everyone in the zone of fatal harm." (AOBM 53.) Thus, even if the court below was correct that the "only reasonable inference" question was one properly reserved for the jury, the erroneous instructions provided never directly asked the jury to resolve this question. [5]

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[5] Respondent contends that "Mumin did not raise the issue of whether the kill zone instruction in this case misstated the law in his petition for review or in his opening brief on the merits" and accordingly argues that any errors in the jury instructions in Mumin's case are not properly before this court. (RBM 47, fn. 5.) Amicus disagrees. Mumin explicitly raised this error in the instruction in both his petition for review and his opening brief on the merits. (Petition for Review (PFR) 30-31 [discussing the instruction's failure to admonish the jury that it could not convict unless it found that the *only* reasonable inference was that Mumin intended to create a zone of fatal harm and kill everyone in it]; AOBM 55-56 [same].) Regardless, to the extent that the propriety of the instruction given must be considered to determine whether any instructional error was prejudicial or to guide this Court in crafting its remedy for any error it finds, issues related to the instruction given can be "deeme[d] fairly included in the issue on which [this Court] granted review." (*People v. Snyder* (2000) 22 Cal.4th 304, 311, fn. 6, citations omitted; see also *People v. Hannon* (1977) 19 Cal.3d 588, 597 [noting that analysis of instructional error claim required consideration of subissues including "the form of the instruction given to the jury"].)

This instructional flaw is an important issue that requires attention from this Court. The revised CALCRIM kill zone instruction accurately reflects *Canizales's* guidance: informing the jury that it must expressly find that "the *only reasonable conclusion* from the defendant's use of lethal force, is that the defendant intended to create a kill zone." (CALCRIM No. 600, italics added.) However, not only is the instruction in appellant's case defective by failing to mention this requirement, CALJIC No. 8.66.1 likewise *still* contains no indication that a conviction on the kill zone theory is only appropriate when the *only* reasonable inference is that the defendant intended to create a zone of fatal harm. (CALJIC No. 8.66.1 [requiring only that "the evidence must show" the "intent to create a zone of fatal harm"].) This is a serious problem because, as this Court acknowledged in *Canizales*, standard instructions on circumstantial evidence and reasonable doubt do not sufficiently protect against misapplication of the kill zone theory. (See *Canizales*, *supra*, 7 Cal.5th at p. 607 ["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"].)

Moreover, despite this Court's instruction that the standard jury instructions be revised to address the issues raised in *Canizales*, both CALCRIM No. 600 and CALJIC No. 8.66.1 contain additional crucial flaws that may allow for the continued misapplication of the kill zone theory. For example, despite repeated guidance from this Court that the kill zone instruction is never required (*Stone, supra*, 46 Cal.4th at pp. 137-138; *Smith*, *supra*, 37

Cal.4th at p. 746; *Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6), the kill zone portion of the attempted murder instruction at CALCRIM No. 600 is introduced with a note that states "<*Give when kill zone theory applies*> (CALCRIM No. 600). As noted in *Sambrano*, "[a]n accurate note would be: "<*The following instruction may but need not be given when the kill zone theory applies*>." (*Sambrano, supra*, 79 Cal.App.5th at p. 733, fn.2.) CALJIC No. 8.66.1, which concerns the kill zone theory has no indication at all that it is never required.[6]

In sum, to prevent "the potential [] misapplication of the kill zone," it is essential that this Court require a jury instruction that clearly dictates that a defendant may not be convicted on the kill zone theory unless the only reasonable inference is that they intended to create a zone of fatal harm in which they intended to kill everyone present to ensure the primary target's death. (*Canizales*,

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[6] *Sambrano* also noted equivocal language in CALCRIM No. 600 regarding the requirement that the defendant harbor an intent to kill the primary target by killing everyone in the kill zone, and noted that "jurors might well be confused" by the variations in language in different parts of the instruction. (*Sambrano*, *supra*, 79 Cal.App.5th at p. 732.) Similar inconsistencies exist in CALCJIC No. 8.66.1. For example, the instruction first states that a zone of fatal harm exists "when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill [everyone] present in the zone of fatal harm." (CALJIC No. 8.66.1) This is in contrast to the later definition of a zone of fatal harm as "an area in which the perpetrator intended to kill everyone present *to ensure the primary target's death*." (CALJIC No. 8.66.1, italics added.) It is essential that the instructions concisely and completely state each of the required elements for the kill zone theory without internal inconsistency.

supra, 7 Cal.5th at p. 607.) Because no such instruction was provided in this case, this Court should reverse. (See *People v. Dominguez* (2021) 66 Cal.App.5th 163, 186-187 [accepting the Attorney General's concession that kill zone instruction was legally inadequate and attempted murder convictions should be reversed where the instruction did not include the "only reasonable inference" language].) But regardless, in deciding this case, the Court should provide clarity on this issue by formally requiring that the "only reasonable inference" language currently provided in CALCRIM be incorporated in any kill zone instruction.

C. The kill zone theory cannot be applied to unintended victims or undefined zones of fatal harm. It can only be applied to individuals whom the defendant knows are present within a defined zone of fatal harm.

The *Canizales* Court identified several factors to be considered when assessing a defendant's intent to create a zone of fatal harm: the type of weapon used, the number of shots fired, the distance between the defendant and the alleged victims, the proximity of the alleged victims to the primary target, whether the attack location was open or instead had a limited means of escape, and whether the defendant hit any of his or her intended targets. (*Canizales*, *supra*, 7 Cal.5th at pp. 607, 611.) While these factors are indeed relevant to a defendant's intent, this Court should adopt two threshold requirements: the defendant must 1) know that additional victims occupy 2) a defined zone of fatal harm. Neither requirement is satisfied in this case.

It is undisputed that Mr. Mumin was convicted under the kill zone theory after shooting blindly three times out of a dark room. At

the time he fired the shots, Mr. Mumin was aware that the door to the community room in which he was hiding was opening. However, to the extent that we assume that Mr. Mumin knew that a person was opening the door, there is no basis on which a jury could reasonably conclude that he knew that there was more than one person there. Moreover, it was almost 3:00 in the morning, meaning it was dark when Mr. Mumin entered the community room at some point in the preceding hours, and there is nothing in the record to suggest that he clearly understood the parameters of the area into which he was shooting.

Accordingly, because the evidence does not meet the two prerequisites to creating a kill zone set out above, many of the factors set out in *Canizales* are simply not relevant to the analysis of Mr. Mumin's state of mind.[7] As Mr. Mumin was entirely unaware of whether any other people were outside the door aside from the person opening the door, he could not have known the distance between himself and those hypothetical people, nor could he have known the proximity of those hypothetical people to the person opening the door.[8] Moreover, it is not clear how he could have

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[7] This mismatch between the elements listed in the instruction based on *Canizales* and the facts in *Mumin* left the jury with little guidance on what it should consider when determining whether Mumin intended to create a zone of fatal harm. (See AOBM 53.)

[8] Respondent's extensive discussion of where the bullets traveled and where the officers moved to dodge the bullets are similarly irrelevant as to Mumin's state of mind as he was shooting blindly from inside the room. (See Respondent's Brief on the Merits (RBM) 15-17.)

formed the intent to create a zone of fatal harm in an area that he could not see.

Amicus is unaware of any case in which the kill zone theory has been properly applied where a defendant shot blindly into an undefined outdoor space. Respondent contends that a defendant need not have knowledge of any additional victims under the kill zone theory. However, the case upon which respondent relies is factually distinct from the instant case.[9] In *People v. Vang* (2001) 87 Cal.App.4th 554 (*Vang*), the court of appeal upheld a kill zone conviction finding that "the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons [supported the finding] that defendants harbored a specific intent to kill every living being within the residences they shot up." (*Id.*at p. 564.) However, in *Vang;* the defendants' attack created at least 50 bullet holes along the front of one of the residences. (*Id.* at p. 558.) Moreover, the shots were fired *into* residences at approximately 9:30 in the evening; in one of the houses, the victims were "watching television by the front window with the lights on." (*Id.* at pp. 557-558.)

These facts stand in stark contrast to Mr. Mumin's blind shots out of an apartment complex community room at almost 3:00 in the morning. While the defendants in *Vang* might not have known the precise identities of the people watching television in their homes at

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[9] Respondent acknowledges that the other case upon which it relies for this proposition, *People v. Adams* (2008) 169 Cal.App.4th 1009, is premised on a natural and probable consequences theory and is therefore "inconsistent with *Canizales*." (RBM 60.)

9:30 in the evening, they knew that they were there. Respondent further suggests that Mr. Mumin must have known that there were multiple officers in the area outside of the community room doors because "a full-scale police search was ongoing." (RBM 58.) Even assuming Mr. Mumin was aware that there were multiple police officers somewhere within the apartment complex, there is nothing in the record to suggest that he had reason to believe that more than one of them was outside the community room doors when he fired.[10]

Mr. Mumin's case also illustrates the need to require that the kill zone theory be based on a defined zone of fatal harm. Here, the prosecutor argued that there was a "fatal funnel" behind the community center doors. (RBM 64 [quoting 16RT: 3838, 3840, 3842-34].) It appears that this post hoc definition of a kill zone is based on the area through which the three bullets, which Mr. Mumin blindly fired, traveled. (RBM 20 [quoting 16RT: 3842-3843.) Initially, it is not clear how an area of which Mr. Mumin likely was unaware can be used to prove his state of mind. Moreover, the space was undefined, unlike a car, a building, or other confined area typically found in kill zone cases. (*Bland*, *supra*, 28 Cal.4th at p. 318 [car]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1232 [car]; *Vang*, *supra*, 87 Cal.App.4th at p. 558 [residences]; *People v. Dominguez*,

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[10] For similar reasons, respondent's reliance on the hypothetical of a person placing a bomb on a commercial airplane in order to kill a passenger is unconvincing. (RBM 57-58.) As appellant points out, the person could not reasonably claim to have no knowledge of the airplane crew and other passengers on the flight. (Appellant's Reply Brief on the Merits (ARBM) 13.)

supra, 66 Cal.App.5th at p. 187 [alleyway area defined as "a small space enclosed on three sides"].)

Other cases have upheld the finding of a kill zone based solely on the victim's proximity to the primary target rather than on a defined space. However, these cases rely on actual knowledge of the proximity of the victims (knowledge which, in turn, implied a defined zone of danger known to the defendant). For example, in *People v. Windfield* (2021) 59 Cal.App.5th 496, the defendant "fired [multiple shots] at close range against two people who were walking side-by-side in such close proximity that they fell into each other." (*Id.* at p. 517.) Because Windfield was standing in front of the victims and intentionally aiming at the primary target, it was at least arguable that he was aware that he created a defined zone of fatal harm.

Here Mr. Mumin neither shot into a defined area, nor did he create a kill zone around an individual by shooting at a primary target with others so nearby that their death was an unavoidably intended consequence of the attack. Allowing a kill zone instruction in such circumstances – without a defined zone of danger known to the defendant – creates an untenable risk of an attempted murder conviction based on reckless behavior.

Failing to provide definitional limits to the zone of danger also threatens to vastly expand kill zone liability. Respondent argues here that because there was only one other officer outside the doors, "only two counts of attempted murder are permitted on the facts of this case." (RBM 60.) However, the reasoning of the Court of Appeal below could leave Mr. Mumin open to liability for the attempted

murder of any number of people who happened to be (unbeknownst to him) in the prosecutor-defined "fatal funnel."

The Court of Appeal's analysis will thus inexorably lead to kill zone liability based purely on fortuity and totally unrelated to ideas of moral culpability that undergird criminal punishment. (*Bland, supra*, 28 Cal.4th at p. 327 [conduct "should be punished according to the culpability which the law assigns it, but no more"].) The simple solution to this conundrum is to limit kill zone liability to 1) known victims who occupy a 2) defined zone of danger (known to and intended to be created by) the defendant. Because neither requirement was met in this case, the decision below must be reversed.

CONCLUSION

As set forth above, the efforts to curtail the improper use of the kill zone theory have been ineffective. Amicus respectfully urges this Court to eliminate the theory entirely. It is the only way to ensure that defendants are not convicted with inadequate proof of the requisite state of mind.

If this Court does not do so, amicus requests that it adopt additional, clear rules to limit the use of the kill zone theory. First, the kill zone instruction should never be given unless the only reasonable inference from the evidence is that the defendant intended to create a zone of fatal harm as defined in *Canizales*. Second, the jury must be instructed that it may not convict the defendant unless it finds that the *only* reasonable inference from the evidence is that the defendant created a zone of fatal harm around a primary target and intended to kill everyone in that zone in order to

ensure the death of the primary target. Third and finally, the Court should make clear that the kill zone theory cannot be applied to unknown victims in an undefined zone of fatal harm.

Dated: September 26, 2022

Respectfully submitted,

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State Public Defender

/s/ Elizabeth H. Eng
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Attorneys for Amicus Curiae

CERTIFICATE OF COUNSEL

I, Elizabeth H. Eng, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 7,466 words in length, excluding the tables and this certificate.

Dated: September 26, 2022

Respectfully submitted,

/s/ Elizabeth H. Eng
ELIZABETH H. ENG
Deputy State Public Defender

APPENDIX A

34 Kill Zone Cases Reversed

In re Evans	2021 WL 1711631	B281093
In re Lisea	(2022) 73 Cal.App.5th 1041	C093386
In re Milam	2022 WL 3097295	B312401
In re Rayford	(2020) 50 Cal.App.5th 754	B264402, B303007
In re Sambrano	(2022) 79 Cal.App.5th 724	E078147
In re Sirypango	2021 WL 4785924	D078705
People v. Aguilar	2021 WL 5832887	F077784
People v. Alvarado	2020 WL 2092478	H045500
People v. Booker	(2020) 58 Cal.App.5th 482	B295128
People v. Cardenas	(2020) 53 Cal.App.5th 102	E070624
People v. Casique	2020 WL 858137	B284945
People v. Dominguez	(2021) 66 Cal.App.5th 163	D076896
People v. Dorantes	2019 WL 4164803	B289777
People v. Esquivel	2019 WL 7046538	B269545
People v. Fields	2022 WL 1210474	C068047
People v. Garcia	2019 WL 6888452	C066714
People v. George	2021 WL 82315	E072299
People v. Gomez	2020 WL 1041611	B293727
People v. Gonzalez	2020 WL 1815073	B296206
People v. Gonzalez	2021 WL 1956474	C089973
People v. Guardado	2019 WL 4855111	B284144
People v. Henson	2020 WL 6054127	C084770
People v. Lazo	2021 WL 4519937	B304615
People v. Mays	2020 WL 1648660	B291995

People v. Melson	2020 WL 1545707	B292679
People v. Miranda	2020 WL 1698391	B266817
People v. Morris	2021 WL 3523405	D076312
People v. Perez	(2022) 78 Cal.App.5th 192	B300396
People v. Quiroz	2020 WL 6110984	E069820
People v. Sanchez-Gomez	2021 WL 4807976	A156198
People v. Sanders	2020 WL 2110306	B295960
People v. Singh	2019 WL 6242187	E067985
People v. Stelly	2021 WL 3615764	A157142
People v. Thompkins	(2020) 50 Cal.App.5th 365	A141375

35 Kill Zone Cases Affirmed

In re Bruno-Martinez	2021 WL 631981	C091819
People v. Anderson	2019 WL 6768776	B251527
People v. Bon	2021 WL 2546735	F078752
People v. Brown	2022 WL 522503	G060395
People v. Brown	2021 WL 2024911	C089252
People v. Cerda	(2020) 258 Cal.Rptr.3d 409	B232572
People v. Escobar	2020 WL 112664	B259309
People v. Galstyan	2019 WL 5689840	B279947
People v. Garcia	2019 WL 6269807	B259708
People v. Goins	2019 WL 5884387	B281831
People v. Granados	2020 WL 896844	B257627
People v. Harris	2019 WL 6208343	D075379
People v. Josue Sanchez	2021 WL 2176486	B302549
People v. Kennedy	2020 WL 218756	B264661

People v. King	2020 WL 1284895	E070384
People v. Lee	(2022) 81 Cal.App.5th 232	B300756, B305493
People v. Mariscal	(2020) 47 Cal.App.5th 129	B262278
People v. Mason	2019 WL 3822003	B283892
People v. Montanez	2021 WL 1730252	C083092
People v. Morales	(2021) 67 Cal.App.5th 326	A157644
People v. Mumin	(2021) 68 Cal.App.5th 36	D076916
People v. Oliver	2021 WL 2701376	B307225
People v. Ratcliffe	2020 WL 634410	E063690
People v. Reyes	2021 WL 1248216	B301357
People v. Riberal	2020 WL 5793209	C077018
People v. Rios	2019 WL 6975115	F074350
People v. Rodriguez	2022 WL 2350268	F080915
People v. Ruiz	2019 WL 6271799	F076231
People v. Salvador Espinoza	2019 WL 3821795	B288107
People v. Stone	2020 WL 994144	B293532
People v. Torres	2020 WL 255068	C087086
People v. Vivero	2020 WL 3046066	C086268
People v. Warner	(2019) 35 Cal.App.5th 25	C077711
People v. Williams	2020 WL 1983064	B259888
People v. Windfield	(2021) 59 Cal.App.5th 496	E055062

Methodology:

This Appendix was created by searching Westlaw for all cases citing *People v. Canizales* (2019) 7 Cal.5th 591, and narrowing the search with the term "kill zone." This narrowed search resulted in 127 case entries. After removing 16 entries that were duplicate

entries for various defendants and 42 entries for cases that cited *Canizales* but did not include a kill zone instruction analysis, the 69 cases (34 reversal and 35 affirmances) listed above remained.

Examples of cases that were eliminated as duplicate entries include *People v. Mumin* (2021) 286 Cal.Rptr.3d 249, which is this Court's order granting the petition for review. *People v. Mumin* (2021) 68 Cal.App.5th, the Court of Appeal's opinion appears on the list of cases affirmances above. Another example is *People v. Sirypango* 2021 WL 4785744, which is the direct appeal in defendant Konesavanh Sirypango's case. The related opinion granting Mr. Sirypango's habeas petition based on his kill zone claim, *In re Sirypango*, 2021 WL 4785924, is included on the list of case reversals above.

Examples of cases which were eliminated because they did not include a kill zone analysis include *People v. Garcia* (2020) 46 Cal.App.5th 123, 157, which cited *Canizales* for its guidance on instructional error more generally, not for a kill zone analysis. Another example is *People v. Mena* 2022 WL 1577707 at *2, which cited *Canizales* for the proposition that the theory of transferred intent does not apply in attempted voluntary manslaughter cases.

DECLARATION OF SERVICE

Case Name: *People v. Ahmed Mumin*
Case Number: Supreme Court Case No. S271049
Fourth Appellate District Case No. D076916
San Diego County Superior Court
Case No. SCD261780

I, **Brenda Buford**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT AHMED MUMIN

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **September 26, 2022**, as follows:

San Diego County Superior Court 1100 Union Street San Diego, CA 92101

The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **September 26, 2022**:

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Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101 *eservice-court@adi-sandiego.com*	Court of Appeal Fourth Appellate District Division One Symphony Towers 750 B Street, Suite 200 San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **September 26, 2022**, at Sacramento County, CA.

Brenda Buford Digitally signed by Brenda Buford
Date: 2022.09.26 10:32:22 -07'00'

BRENDA BUFORD

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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/s/Brenda Buford
Signature

Eng, Elizabeth (238265)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm