IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California,	)	S221958
Plaintiff and Respondent,	)	
v.	)	
Michael Raphael Canizales et al.,	)	
Defendants and Appellants.	)	

San Bernardino Superior Court,
Case No. FVA 1001265
The Honorable Steven A. Mapes, Judge

Fourth Appellate District, Division Two, Case No. E054056

Application to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Respondent the People of the State 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. Michael Raphael Canizales et al., Defendants and Appellants.	)	S221958

Mitchell Keiter's Application to File Amicus Curiae Brief

To the Honorable Chief Justice Tani Cantil-Sakauye, and the Honorable Associate Justices of the California Supreme Court:

Mitchell Keiter hereby applies for permission to file a brief as amicus curiae, pursuant to Rule 8.520, subdivision (f) of the California Rules of Court.

This case will construe *People v. Stone* (2009) 46 Cal.4th. 131. Amicus curiae has contemplated the case and its ramifications fully, having filed the petition for review, as well as the opening and reply briefs, and having argued the

case before this Court. Amicus also published one of the first and most comprehensive analyses of the issues presented in the seminal case of *People v. Bland* (2002) 28 Cal.4th 313. (Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law* (2004) 38 U.S.F.L. Rev. 261.)

If this Court grants this application, amicus curiae requests that the Court permit the filing of the brief that is bound with the application.

Dated: March 16, 2016

Mitchell Keiter

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Amicus Curiae Brief

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Introduction

Laypeople intuitively conceive of attempted murder as a crime where the offender targets a particular victim and then engages in an act designed to kill her. Most attempted murders do occur this way, as assailants usually have a particular animus against their target. Until recently, juries received instruction that the crime of attempted murder required the People to prove "the defendant took direct but ineffective steps towards killing another person" and "the defendant intended to kill *that person.*" (See *People v. Adams* (2008) 169 Cal.App.4th 1009, 1020, quoting CALCRIM 600, emphasis added.)

But the law does not actually require an offender preselect and target a particular victim to be guilty of attempted murder. It is enough to intend *someone*'s death and engage in a direct but ineffectual act toward that end. (*People v. Stone* (2009) 46 Cal.4th 131.) Targeting a particular victim is not necessary for attempted murder because an indiscriminate would-be killer is just as culpable as one who

targets a specific person. (*Id.* at p. 140.) Under the nascent "kill zone" concept, a person may commit attempted murder even if he is unaware of the victim's identity — or her existence. (*People v. Bland* (2002) 28 Cal.4th 313, 330, citing *People v. Vang* (2001) 87 Cal.App.4th 556, 564.)

Although jury instruction on "kill zone" liability is not mandatory, it is useful for juries, as even appellate courts have difficulty understanding it. Both in this case and in *People v. McCloud* (2012) 211 Cal.App.4th 788, the Court of Appeal misstated the scope of the doctrine. The misunderstanding revolves around the terms "intend" and "target." The Court of Appeal below mistakenly indicated an offender can be guilty of attempted murder without *intending* the victim's death (*People v. Canizales* (2014) 229 Cal.App.4th 820, 177 Cal. Rptr. 3d 128, 130), whereas *McCloud* erroneously concluded an offender could not be guilty unless he *targeted* a particular victim. (See *McCloud, supra,* at p. 802, fn. 6: "if the kill zone theory does apply, then there must be a targeted individual.") Neither was correct.

The correct scope of the doctrine lies in between. Attempted murder requires an intent to kill; the instant Court of Appeal erred insofar as it apparently denied that requirement. (*Stone, supra,* 46 Cal.4th 131, 136.) But attempted murder does not require targeting a particular victim; *McCloud* erred in holding it does. (*Stone, supra,* 46 Cal.4th at p. 140.) This Court should use this case to inform lower courts of the actual requirements for kill zone liability.

Statement of the Case

Amicus incorporates by reference the Statement of the Case provided by the People.

Statement of Facts

Amicus incorporates by reference the Statement of the Case provided by the People.

Argument

I. Attempted murder requires an intent to kill.

An intent to kill has long been an element of attempted murder, though not murder. (*People v. Stone* (2009) 46 Cal.4th 131, 136; see Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law* (2004) 38 U.S.F.L.Rev. 261, 282-299.) This Court has explained the intent requirement for both murder and attempted murder in multiple victim cases. (*People v. Bland* (2002) 28 Cal.4th 313.) If a person acted with malice as to one victim, that malice would legally extend to all persons killed to support murder convictions, even if the offender did not subjectively intend every victim's death (or manifest a conscious disregard as to each victim). (*Id.* at pp. 323-324.) But the law does not impute the offender's mental state as to other victims to support attempted murder liability. If no victim dies, the defendant who intended to kill only one person would be guilty of only that victim's attempted murder, and no one else's. (*Bland, supra,* 28 Cal.4th at p. 328.)

The Court of Appeal below incorrectly concluded an intent to kill was not required for attempted murder in kill zone cases. (*Canizales, supra*, 177 Cal.Rptr.3d 128, 131.) Quoting three separate sentences from *Stone, supra*, 46 Cal.4th 131, *Canizales*' own italicized language alternated between "targeting" a victim and "intending" to kill.

> The evidence supported a jury finding that the defendant intended to kill the driver [of the car into which he shot] but *did not specifically target* the two who survived. [Citation.] ...
>
> We summarized the rule that applies when an intended target is killed and *unintended* targets are injured but not killed.... [¶] ...
>
> [I]f a person targets one particular person, ... a jury could find the person also, concurrently, intended to kill—and thus was guilty of the attempted murder of—other, *nontargeted* persons.

(*Canizales, supra*, at p. 131.)

These three sentences indicate the Court of Appeal highlighted the terms "intended" and "target[ed]" interchangeably. But the two terms differ in their meanings and legal significance.

The first quoted sentence indicated the **fact** that the *Bland* defendant did not target the two passengers in the car. (*Stone, supra*, 46 Cal.4th 131, 136, citing *Bland, supra*, 28

Cal.4th 313, 319.) The third sentence recalled the **rule** that a person could *intend* the death of a *nontargeted* person, and thus be guilty of his attempted murder. These two sentences, read together, produced the **conclusion** that the evidence supported the *Bland* defendant's conviction for attempted murder regarding the two victims whose deaths he *intended*, even though he did not *target* them.

But the second quoted sentence from *Stone* had a very different meaning. As the next line in *Stone* (not quoted in *Canizales*) reveals, there could be no attempted murder liability for an *unintended* victim. "We summarized the rule that applies when an intended target is killed and *unintended* targets are injured but not killed. 'Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder . . . .'" (*Stone, supra*, 46 Cal.4th at p. 136, italics added.) In other words, even the three sentences from *Stone* quoted in *Canizales* reiterated the rule that there could be attempted murder liability as to *untargeted* victims but not *unintended* ones.

Attempted murder requires an intent to kill. Insofar as *Canizales,* held otherwise, it incorrectly described the law. *Canizales* was correct, however, in rejecting the description of kill zone law offered in *McCloud, supra,* 211 Cal.App.4th 788. Just as *Canizales* incorrectly denied that attempted murder liability requires an intent to kill, *McCould* incorrectly held the kill zone doctrine requires the defendant target a primary victim.

II. Targeting a victim is not an essential element of attempted murder.

In the lay imagination, the crime of attempted murder requires the perpetrator target a particular victim and commit an act intended to harm *that person.* Indeed, jury instruction formerly expressed the elements of attempted murder to require "the defendant took direct but ineffective steps towards killing another person" and "the defendant intended to kill *that person.*" (*People v. Adams* (2008) 169 Cal.App.4th 1009, 1020, quoting CALCRIM 600, emphasis added.)

Although most cases do involve an intent and act toward the same victim, homicide law has long recognized that any variance between the targeted victim and the actual victim does not diminish the offender's culpability. (*People v. Suesser* (1904) 142 Cal.354; *Queen v. Saunders & Archer* (1576) 75 Eng.Rep. 706 (*Saunders*).) The *Stone* court extended this principle to attempted murder cases, holding a defendant need not target a particular individual to be guilty of attempted murder, because "An indiscriminate would-be killer is just as culpable as one who targets a specific person." (*People v. Stone* (2009) 46 Cal.4th 131, 140.)

A. *Targeting a particular victim is not an essential element of single-count attempted murder prosecutions.*

Saunders, supra, 75 Eng.Rep. 706, first showed it did not matter if the targeted victim differed from the actual one. The defendant poisoned an apple with the intent to kill his wife, but instead his daughter ate it and died. Although Saunders "had no malice against the daughter," he was still liable in accordance with the harm he intended to commit. Saunders intended to and did commit murder. He was therefore guilty, regardless of whether he (1) intended to kill his wife and killed her; (2) intended to kill his daughter and killed her; (3) intended to kill his wife but instead killed his daughter; or (4) intended to kill his daughter but instead killed his wife. Under any of these permutations, the defendant would harbor the requisite mens rea (intent to kill) and commit the requisite actus reus (proximately causing the death of another human being) and thus be guilty of murder. It was the malicious act and intent, not the preferred victim's identity, that rendered Saunders liable for murder.

The same principle that appeared in the "bad aim" case

of *Saunders* appeared in the "mistaken identity" case of *Suesser, supra,* 142 Cal. 354. The defendant shot and killed Farley, possibly under the mistaken belief that Farley was the desired victim Allen. (*People v. Scott* (1996) 14 Cal.4th 544, 549; *Suesser, supra,* 142 Cal. at p. 365.) The trial court correctly instructed that Suesser would be guilty of murder regardless of whether he believed the man at whom he shot was Allen or Farley. (*Ibid.*) Because the defendant's knowledge of the victim's identity does not affect his culpability, Suesser would have been guilty if he (1) thought the victim was Allen; (2) thought the victim was Farley; or (3) was unsure whether he was Allen or Farley (or some other individual).

These cases rest on the premise that all human life is equally valuable. With limited exceptions,[1] the law does not deem some victims more or less worthy of protection than others.

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[1] See e.g. Penal Code section 190, subds. (b), (c) [additional punishment when second degree murder victim was peace officer on duty]; *People v. Steele* (2002) 27 Cal.4th 1230, 1253 [heat of passion defense applies only if victim was the provocateur].

Saunders and *Suesser* demonstrate that express malice requires neither an animus toward the particular victim, nor knowledge of his identity, because not caring about or knowing the victim's identity does not diminish the offender's culpability. Saunders would have been no less culpable if he had left a poisoned apple on the table, indifferent as to which household member ate the fatal fruit.[2] In fact, an offender who willingly contemplates the death of either of two individuals may be more culpable than someone who confines his malice to a single victim. (Alan C. Michaels, *Acceptance: The Missing Mental State* (1998) 71 S. Cal. L. Rev. 953, 1032-1033; see also Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability* (2000) 88 Cal. L. Rev. 931, 948.) Likewise, more culpability would have arguably attached to Suesser had he shot an individual, uncertain as to whether he was Farley or Allen, but willing to kill regardless. "A preplanned, purposeful resolve to shoot

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2

Under contemporary law, Saunders would actually face more liability because an untargeted victim was harmed; he could be convicted of both the murder of his daughter and the attempted murder of his wife. (*Scott, supra,* 14 Cal.4th 544, 551.)

anyone . . . wearing a certain color, evidences the . . . most culpable, kind of premeditation and deliberation." (*People v. Rand* (1995) 37 Cal.App.4th 999, 1001, italics added.)

These principles led the Court to reject a targeting requirement for attempted murder in *Stone, supra*, 46 Cal.4th 131. The defendant shot in the vicinity of ten members of the rival Norteno gang. (*Id.* at p. 135.) Substantial evidence supported the finding that he intended to kill *someone* in the group, but not anyone in particular. Although the Court of Appeal found there could be no conviction for attempted murder because the defendant did not target a particular victim, the Supreme Court reversed, rejecting any targeting element for an attempted murder conviction. (*Id.* at pp. 135, 142.)

> [A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person.

(*Id.* at p. 140.)

Just as targeting a particular victim does not render attempted murders more culpable where the defendant intends to kill one person, targeting a primary victim does not aggravate culpability where the defendant intends to kill *everyone* present.

B. ***Targeting a particular victim is not an essential element of kill zone attempted murder prosecutions.***

Stone concluded individuals could act with the requisite express malice even where they were *indifferent* to the victim's identity, just as *Suesser* had held defendants could be guilty where they were *unaware* of the victim's identity. (*Stone, supra,* 46 Cal.4th 131, 140; *Suesser, supra,* 142 Cal. 354, 366-367.) The Court has also recently indicated that a defendant could commit attempted murder even when he was unaware of the victim's *presence.* (*People v. Bland* (2002) 28 Cal.4th 313, 330, citing *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.) *Vang* and *Bland* expanded the requisite intent from one rooted in targeted *persons* to one rooted in a targeted *place.* The Court recognized an offender's intent to

kill is sometimes not confined to individuals, but may extend to everyone present in a particular location.

The *Bland* court recalled the *Vang* defendants used "high-powered, wall-piercing weapons" to shoot at two houses. (*Bland, supra*, 28 Cal.4th at p. 300, citing *Vang, supra*, 87 Cal.App.4th at pp. 563-564.) The force used supported the inference that the "defendants harbored a specific intent to kill every living being within the residences they shot up." (*Bland, supra*, at p. 330, quoting *Vang, supra*, at p. 564.) That intent existed even though the defendants did not see all the potential victims present, and thus did not know how many living beings were within the residences when they shot at them. (*Bland, supra*, at p. 330, quoting *Vang, supra*, at p. 564.)

Bland relied upon *Vang* in creating what has become known as the "kill zone" doctrine. This applies where the defendant acts with the intent to kill *everyone* in a particular location. *Bland* gave as an example the case of someone who plants a bomb on an airplane with the intent of killing everyone on it. (*Bland, supra*, 28 Cal.4th 313, 329-330.) The

defendant would not need to know how many individuals would be on the plane (*Vang, supra*, 87 Cal.App.4th at p. 564), or their identities (*Suesser, supra*, 142 Cal. at pp. 366-367), to be guilty of the attempted murder of everyone aboard (if the attempt did not actually kill anyone).

The *Bland* decision addressed the facts of that case, where the defendant apparently targeted a "primary" victim, a rival gangmember driving a car, and also intended to kill his passengers, who were not gang members. (*Bland, supra*, 28 Cal.4th at p. 318.) As the facts apparently involved a targeted primary victim, and untargeted additional victims also present in the kill zone, the Court's analysis applied this factual premise. The Court recognized that a defendant could *intend* to kill secondary victims without *targeting* them.

> "The intent is concurrent ... when the nature and scope of the attack, *while directed at a primary victim*, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed."

(*Bland, supra*, at pp. 329-330, emphasis added, citing *Ford v. State* (1993) 330 Md. 682 [625 A.2d 984, 1000].)

The question for the future of the kill zone concept is whether the italicized language, describing the targeting of a primary victim, is a prerequisite for the application of the doctrine, or just a condition that happened to appear in *Bland* but is not necessary for kill zone attempted murder convictions.

The *McCloud* court concluded the primary target condition is an essential element of kill zone liability. (*McCloud, supra,* 211 Cal.App.4th 788, 802.) *McCloud* concluded the kill zone cannot exist absent a primary target.

> The theory applies only if the defendant chooses, as a means of killing the primary target, to kill everyone in the area in which the primary target is located; with no primary target, there can be no area in which the primary target is located and hence no kill zone.

(*Id.*, at p. 802.)

McCloud thus deemed *Stone* and the "kill zone" to be mutually exclusive paths to attempted murder liability. (*Id.*, at p. 802, fn. 6.) *McCloud* described *Stone* as applying "when there is *no specifically targeted individual at all,*" but the kill zone applies "when the defendant chooses, *as a means of killing a targeted individual,* to kill everyone in the area in which the targeted individual is located." (*Ibid.*)

But *Stone* refused to hold that targeting a primary victim is a prerequisite for the kill zone doctrine. *Stone* recalled that while there was a primary target in *Bland*, that decision expressed no view regarding whether an individual could be convicted of attempted murder in the absence of a primary target. (*Stone*, *supra*, 46 Cal.4th 131, 140.) *Stone* finally addressed that precise question, and concluded that a primary target was not a prerequisite for attempted murder liability. "Now that we consider the question, we conclude that a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*Ibid.*)

Stone showed its analysis extended beyond the case's facts, where the defendant wished to kill *someone* from a larger group. It also applied to a kill zone, where the defendant wished to kill *everyone* present.

> One of *Bland*'s kill zone examples involved a bomber who places a bomb on a commercial airplane intending to kill a primary target but ensuring the death of all passengers. We explained that the bomber could be convicted of the attempted murder of all the passengers. [Citation] But a terrorist **who simply wants to kill as many people as possible, and does not know or care who the victims will be**, can be just as guilty of attempted murder.

(*Stone, supra*, 46 Cal.4th at p. 140, emphasis added.)

Selecting a primary target is not a prerequisite for attempted murder kill zone liability; one may intend to kill an entire group of unknown victims.

Bland's description of a primary target was dicta, as the opinion addressed a case where there was a primary victim. *Bland* actually indicated there could be additional counts of attempted murder *notwithstanding* the existence of a primary target. "[T]he fact the person desires to kill a particular target *does not preclude finding* that the person also, concurrently, intended to kill others . . . . (*Bland, supra*, 28 Cal.4th at p. 329, emphasis added.) Nothing in *Bland* holds the preselection of a primary target is a prerequisite for attempted murder liability.

Bland described the intended death of the additional

victims as a means to guarantee the primary victim's death.

> [C]onsider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone' *to ensure the death of his primary victim*, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity *to ensure A's death.*

(*Bland, supra*, 28 Cal.4th at p. 330, emphasis added.)

But the question is *whether* the defendant intended the extra victims' deaths, not *why*. Intending to kill secondary victims to ensure a primary victim's death is no worse than wanting to kill everyone present, with equal intensity and for the same reason. If a defendant threw an explosive device at a car, not because he recognized the driver and wished to ensure his death, but because he was angered by a bumper sticker and decided to kill everyone present, without knowing who or how many were there, the offender would be no less culpable for not having designated a "primary" target. "A preplanned,

purposeful resolve to shoot *anyone* . . . wearing a certain color, evidences the . . . most culpable, kind of premeditation and deliberation." (*Rand*, supra, 37 Cal.App.4th 999, 1001, italics added.) As an indiscriminate would-be killer is just as culpable as one who targets a specific person, the bumper sticker avenger is just as culpable, and deserving of liability, as the offender who selects a primary target and then seeks to kill others to ensure that target's death.

Tragically, the indiscriminate intent to kill harbored by *Stone*'s hypothetical airplane bomber appears all too often. Since the Court granted review in this case, terrorists "who simply want[] to kill as many people as possible, and do[] not know or care who the victims will be" have executed that intent not only in far away places like the Bataclan theater and Hyper Cacher market in Paris but also at the Inland Regional Center right here in San Bernardino, California. If indiscriminate would-be killers fail in attempting to blow up a plane or building and are captured alive, there would be no basis in law or logic to exempt them from full liability because they did not have a "primary target" in mind.

III. Juries should receive instruction on the kill zone.

Both appellants challenge the reading of the instant kill zone instruction. Appellant Canizales contends the instruction was unnecessary below, and appellant Windfield asserts, more broadly, no court should ever read a kill zone instruction to a jury. (Canizales Opening Brief 44, Windfield Opening Brief (WOB) 32-33.) Kill zone instructions clarify a confusing area of law, and should be given where supported by the evidence.

Appellant Windfield contends no instruction is necessary because the rule is so intuitive. "The jury does not need an instruction to understand that a defendant who places a bomb on an airplane may be found to have intended to kill every one of the passengers. [¶.] No instruction is needed to tell the jury a defendant may harbor the intent to kill several people at one time." (WOB 32-33.) To the contrary, the concept has confounded appellate justices, and so is even more confusing for lay jurors.

Is it really obvious that a terrorist who plants a bomb on an airplane may be guilty of the attempted murder of everyone on board? The *Stone* Court of Appeal believed a

defendant could not be guilty of attempted murder if he did not intend to kill a particular victim. Could there be such an intent where the defendant cannot identify any of the passengers? Is the defendant guilty of as many attempted murders as there are passengers, or as many passengers as he expects or wants there to be? How could the terrorist who does not know any of the passengers select a "primary victim," which *McCloud* believed is an essential element? (*McCloud, supra*, 211 Cal.App.4th 788, 802, fn. 6.)
That a defendant may be guilty of attempting to murder persons of whose identity and presence he is unaware is not an intuitive point for many jurors.

Appellant Canizales rhetorically asks why the *McCloud* jury "senseless[ly]" convicted on 46 counts of attempted murder where the defendants fired only 10 shots. (Canizales Reply Brief 15). It is because factfinders are inclined to measure the evidence as to each individual victim. The *Stone* Court of Appeal considered whether the defendant had the intent to kill someone who might be deemed "Norteno number 1," and found no substantial evidence of such intent. There

was also no evidence that the defendant intended to kill "Norteno number 2", or "number 3," and so forth. Under this individualized analysis, the defendant lacked the intent to kill *any* of the victims. Only a global analysis of the entire transaction showed the defendant had the intent to kill one of the Nortenos.

The converse occurred in *People v. Perez* (2010) 50 Cal.4th 222, where the defendant fired a single shot at seven police officers and a civilian. Viewed individually, was it possible for the *Perez* defendant to have killed the first police officer? Yes. Was it possible for him to have killed officer number two? Yes. And the same was true for each of the other six potential victims. Only by viewing the entire transaction globally was it clear that he could not have killed all eight victims. *McCloud* involved the same contrast between an individualized and transactional evaluation. It was possible for the defendants to have killed any of the 46 victims, but not all of them.

Appellant Windfield further observes the kill zone is not a "legal doctrine," citing *Bland, supra*, 28 Cal.4th 313, 331,

fn. 6. (Windfield Reply Brief 11.) *Bland* distinguished between murder and attempted murder cases. Where victims die, the offender's mental state as to the intended victim "transfers" or replicates to all other victims. (*Id.* at pp. 321-326.) If the offender acted with express malice (or even premeditation and deliberation) as to the intended victim, that same intent would apply in evaluating the other homicides. (*Ibid.*) But for attempted murder, no such doctrine thus imputes constructive malice; the defendant will be guilty of attempted murder as to any given victim only if he subjectively intended to kill her.

That the kill zone is not a "legal doctrine" imputing malice does not mean it is simple or easy to comprehend. A defendant may shoot at a car with the intent to kill the driver, and be unable to see if there are any passengers. The shooter may affirmatively desire that there be no surviving witnesses to describe the crime to police, and thus wish to kill "everyone" in the car. But he may simultaneously desire that no one else is present in the car, so no one else needs to die to achieve his goal of a witnessless killing. In other words, he

prefers that there be no additional persons in the car, but if there are additional persons in the car, that they die in the attack. Such conditional intent to kill supports attempted murder convictions if the additional victims are present, but few jurors can easily perceive this.

Nor does the identity of the persons present matter. (See e.g. *Saunders*, *supra*, 75 Eng.Rep. 706; Keiter, *supra*, 38 U.S.F.L. Rev. at p. 273.) Consider a defendant who comes home early, and, hearing voices in his bedroom which he believes to be those of his wife and the neighbor, who he suspects are having an affair, fires two shots into the darkened room, wishing to kill both persons. Such conduct would support two attempted murder convictions, even if it turned out that there was no affair, and the wife was speaking to the defendant's child, and the defendant would not have shot at anyone had he known these facts. Jurors who consider murder to be a crime against a specifically targeted victim (like the *Stone* Court of Appeal), so that it requires a defendant intend to kill a victim and take a direct but ineffectual act toward killing *that* victim (as CALCRIM No.

600 formerly instructed) might erroneously fail to convict based on a misunderstanding of the law.

The kill zone offers jurors the option of returning attempted murder convictions regarding everyone present if the defendant intended to kill "everyone," even if he did not know or care about their identities. (*Stone, supra*, 46 Cal.4th 131, 140.) That is a sound policy judgment, but not one whose ramifications are clear, even more than a decade after *Bland, supra*, 28 Cal.4th 313, introduced the kill zone concept to California. Juries should receive instruction on the kill zone concept where the evidence supports it.

Conclusion

Many if not most jurors intuit that attempted murder requires a particular animus toward, and desire to kill, a particular victim. This Court held otherwise in *Stone, supra,* 46 Cal.4th 131, but its lessons remain misunderstood by trial and appellate courts. *Stone* distinguished between *intending* to kill a victim, which is necessary for attempted murder liability, and *targeting* a primary victim, which is not. But neither the Court of Appeal below, nor the panel in *McCloud, supra,* 211 Cal.App.4th 788, correctly perceived the difference between intending and targeting. The erroneous *McCloud* holding could preclude the proper imposition of liability for terrorists who neither know nor care who their victims are. Juries can benefit from instruction on this challenging subject and should continue to receive instruction where supported by the evidence.

Respectfully submitted,

Dated: March 16, 2016

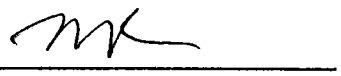
Mitchell Keiter

Certification of Word Count

(Cal. Rules of Court, rule 8.204(c).)

I, Mitchell Keiter, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 4,781 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 16, 2016



Mitchell Keiter

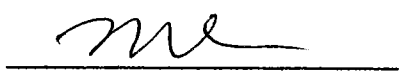
Proof of Service

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On March 16, 2016, I served the foregoing document described as **AMICUS CURIAE BRIEF** in case number S221958 on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list, or sending them electronically at approximately 10:30 p.m. I deposited the envelopes in the mail at Beverly Hills, California. The envelopes were mailed with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of March, 2016, at Beverly Hills, California.



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