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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

MICHAEL RAFAEL CANIZALES, et al.,

Defendants and Appellants.

Appeal from the Superior Court of San Bernardino County
Honorable Steven A. Mapes, Trial Judge
San Bernardino County No. FVA1001265
Fourth Appellate District, Division Two No. E054056

APPELLANT WINDFIELD'S OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

This Court granted review on the following issue: Was the jury properly instructed on the "kill zone" theory of attempted murder?

STATEMENT OF THE CASE

A jury convicted appellant KeAndre Dion Windfield of the first degree murder of Leica Cooksey (Count 1, Pen. Code, § 187, subd. (a)) and the attempted, premeditated murder of Travion Bolden (Count 2, Pen. Code, §§ 664/187, subd. (a)) and Denzel Pride (Count 3). The jury found as to Count 1 that Windfield personally and intentionally discharged a firearm causing death to Cooksey (Pen. Code, § 12022.53, subd. (d)), found as to Counts 2 and 3 that Windfield personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)), and found as to Counts 1, 2, and 3 that the offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)). (1 CT 139-143; 2 CT 274-284; Supp. CT 66-67.)

The court sentenced Windfield to a total indeterminate term of 120 years to life. (Supp. CT 121-123; Sentencing RT 50-51, 54.)

The Court of Appeal affirmed the judgment as to Windfield with directions not relevant to the question presented in an opinion filed on March 5, 2014 and a superseding opinion filed on September 10, 2014 (the Opinion) and partially published (*People v. Canizales et al.* (2014) 229 Cal.App.4th 820, 832). This Court granted review on the question presented on November 19, 2014.

STATEMENT OF FACTS

This case arises out of five shots fired into a crowd of people on the

evening of Friday, July 18, 2008. Events earlier that day are not relevant to the question presented, so appellant states them briefly:

Denzell Pride lived in the 300 block and his friend Travion Bolden lived in the 200 block of West Jackson Street in Rialto. (1 RT 153; 3 RT 574-575.) They were members of Hustla Squad, a criminal street gang. (3 RT 672-673.) Canizales and Windfield lived on or near Ramona Street in Rialto. (2 RT 475.) They were members of Ramona Blocc, another criminal street gang. (2 RT 483, 487.) Hustla Squad and Ramona Blocc were rivals; a detective testified that shootings between the gangs were common. (2 RT 511-512.)

On the afternoon on July 18, Bolden, Pride, and Canizales all happened to be at a Taco Bell near West Jackson at the same time. Canizales was with a female. Bolden thought she was trying to stir something up between Pride and Canizales, although nothing overt happened. (2 CT 479-481.)

Later in the afternoon, Bolden and several females were standing outside at the intersection of West Jackson and Willow Avenue when Canizales walked by with a little boy. (2 CT 482; 1 RT 153, 159-162.) Some words were exchanged between Bolden and Canizales. Again, Bolden thought one of the females was trying to provoke something, although nothing overt happened. (1 RT 162-165, 169.) Canizales and the boy continued to their destination, a grocery store. (2 CT 482.)

Bolden felt he had been disrespected. (1 RT 168.) He ran to Pride's apartment to tell him what had just happened with Canizales. Pride started to run after Canizales, but his mother stopped him. (2 CT 483; 1 RT 174-175; 2 RT 294-296.)

When Canizales reached the grocery store, he sent the little boy to get Windfield. (3 RT 741-742.)

Around 8:40 PM, numerous people were out on the street on the 300

block of West Jackson when Windfield fired five shots into the crowd. The facts of this incident are critical to the question presented, so appellant states them in detail:

The 300 block of West Jackson is a cul de sac lined with apartment buildings. It runs east-west from its intersection with Willow at the east end to a park at the west end. (Exhibit 55; 1 RT 112, 181.) Denzell Pride's apartment building, 330 West Jackson, is on the north side of the street approximately halfway down the block. (Exhibit 55; 3 RT 574-575.) The street is wide enough that, with cars parked on both sides of the street, there is room for two or even three cars to pass between the parked cars. (Exhibit 76.) The apartments are set back from the street, and the street is bordered with curbs, grass medians, sidewalks, and lawns between the sidewalks and the apartment buildings. (Exhibit 8.) From Willow to around Pride's building, there are wrought iron fences at the far edges of the sidewalks. (Exhibits 8, 13, 15.)

A defense investigator used a rolatape to measure the length of the street from Willow to the park and found it to be 352 feet. (Exhibit 76, letter dated 4-22-11, paragraph 4.) On that basis, visual comparison of distances on an aerial photo of the block indicates the width from the apartments on one side to those on the other side is approximately 125 feet. (See Exhibits 55, 76.) Thus, the open area of the block is a little longer and a little narrower than a 300 x 160 foot football field.

July 18th was a hot summer evening. (1 RT 112.) People were out on the street and sidewalks. Although Ramona Jones, a friend of the victim Leica Cooksey, testified that there were not a lot of people outside (2 RT 400), Tracy Wright, Bolden's mother, testified there were "quite a few people," a "little more than ten people." (1 RT 108.) They were "[p]retty much scattered" around the block. (*Ibid.*) There were "people on one side and people on the other side." (*Ibid.*) "Some [were] on the sidewalks and

some on the street." (*Ibid.*) They were "[l]aughing, talking, dancing in the street." (1 RT 109.) Denzell Pride testified that there was a "crowd of people" in the street, "partying and dancing." (3 RT 554.) Bolden testified, "It was a lot of people because they were getting ready for a block party." (1 RT 181.) He said residents of Pride's apartment building were setting up tents with food and beverages. (1 RT 182-183.) There were "30 people, probably more than that." (1 RT 182.) "Some [were] in the middle of the street; some at the party; some at the end of the cul de sac. .... The whole block full of people." (1 RT 181.)

Bolden testified that, when the shots were fired, he was in the street on the south side near where the color of the wrought iron fence changes from white to black. (Exhibit 8 [black dot marks the spot]; Exhibit 15 [fence across street from Bolden's apartment changes color]; 1 RT 186, 242, 246-247, 288-289, 311; see 2 CT 487-488 [in interview, Bolden says he was by the white gate, not the black gate (see Exhibit 15)].)

Bolden testified that Pride was standing with him. (1 RT 186, 242, 246-247, 288.) But, in an interview with Detective Williams, apparently in late 2009 (see 3 RT 746-747), Bolden said Pride was about four car lengths away from him. (2 CT 487-489.) Pride testified that he was standing on the sidewalk in front of his building, where he wrote "me' on Exhibit 55. (3 RT 578-579.)

Leica Cooksey was standing with several friends by her car, which was parked outside 329 West Jackson, across the street from Pride's apartment building. (2 RT 399-401; 3 RT 751.)

Suddenly, a car parked on Willow. (2 CT 485; 1 RT 188-189.) Windfield, Canizales, and several other Ramona Blocc members got out and lined up shoulder to shoulder across West Jackson, facing down the 300 block, with Windfield on the south side. (2 CT 493; 1 RT 99, 200, 213, 244.) The chronology of the ensuing events is uncertain. At some

point, Windfield yelled, "That's the little nigga!" (2 CT 486-489, 494; 1 RT 206; 3 RT 751, 753.) He took a gun from his pants. He handed it to Canizales and told him to shoot, but Canizales either did not take it or did not shoot. Appellant took the gun back and shot. (2 CT 486, 490-491, 504-506; 1 RT 205-208.)

In his interview with Detective Williams, Bolden said that, after Windfield and his companions lined up across West Jackson, Pride "gave it away" by running, and that is when the shooting began. (2 CT 488.) In his testimony, however, Bolden said that shots were fired first and the running was a response to the shots. (1 RT 190, 194.) He said Pride grabbed him and they ran down West Jackson towards the park. (1 RT 190, 191, 195.) Bolden ran in a straight line and went to the north side of the street, but Pride did some "zig-zag stuff." Bolden ran all the way to the park; he did not know where Pride went. (1 RT 195, 196, 247.) Pride testified, however, that he was standing in front of his apartment when shots were fired, and he grabbed his young nieces and took them inside his apartment. (3 RT 554-556, 580, 581.)

Windfield was standing near a manhole cover on Willow when he fired. Bolden drew a line on Exhibit 12 to show where Windfield stood. (1 RT 228-229; see Exhibit 6.) Witnesses described Windfield using a handgun. (2 CT 491, 493; 2 CT 504 [Bolden saw Windfield pull the weapon from his pants]; 1 RT 122-123 [Tracy Wright describes how Windfield held gun when he fired]; 1 RT 208-210, 245-246.) The gun was a semiautomatic, because it ejected casings. Five casings were found near the northwest corner of Jackson and Willow, and they were all nine millimeter and fired from the same gun. They were the only casings found. (3 RT 719-720.)

Windfield was a considerable distance from Denzell Pride when he shot. Regardless of whether Bolden or Pride's testimony about where Pride

was at the time of the shooting is credited, Pride was near the front of his apartment building at 330 West Jackson. A detective estimated the distance from Willow to 329 West Jackson, the building opposite Pride's building, as approximately 100 feet (3 RT 715, 722), but a defense investigator used a rolatape to measure the distance from the manhole cover on Willow to 329 West Jackson and found it to be 160 feet (Exhibit 76, letter dated 4-2-11, paragraph 1).

Bolden described wild, unfocused shooting. In his interview with Detective Williams, Bolden said Windfield could not control the gun. (2 CT 490, 491.) He testified that Windfield's shooting "was going everywhere. You could see the little sparks. It just going everywhere. You could hear it tingling everywhere. It's going everywhere but our direction." (1 RT 213.)

Of the five shots fired, one hit Leica Cooksey, killing her. (1 RT 136, 138; 2 RT 401.) A nine millimeter round was recovered from her body. (3 RT 762-763.) There was no evidence that any other spent bullet was found. Bolden told Detective Williams "the bullet was hittin' the gates where we were at." (2 CT 491.) He testified he heard "tingling through the gates." (1 RT 192.) There is no other evidence of where Windfield's shots went.

When Windfield stopped shooting, he and the other Ramona Blocc members fled down Willow. There is no evidence that anything prevented him from firing further shots had he wished to do so. (2 CT 493-494; 1 RT 102-103.) Someone made a 911 at 8:41 PM. (3 RT 715, 763.)

ARGUMENT: THE JURY WAS NOT PROPERLY INSTRUCTED ON THE "KILL ZONE" THEORY OF ATTEMPTED MURDER.

I. THE INSTRUCTION SHOULD NOT HAVE BEEN GIVEN, BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Introduction.

The court instructed the jury on attempted murder using CALCRIM No. 600. (1 CT 233.) The instruction given is set forth in Appendix A to this brief. The instruction included the kill zone instruction that is the focus of the question presented.

The instruction was error, because there was no evidence to support it. The kill zone theory requires evidence that supports the inference defendant *intended to kill everyone* in a zone. (*People v. Smith* (2005) 37 Cal.4th 733, 745-746 (*Smith*).) Windfield's five shots do not support the inference he intended to kill everyone in any zone. He *endangered* everyone on the block, but the kill zone theory does not apply to mere endangerment. (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798 (*McCloud*); see *People v. Perez* (2010) 50 Cal.4th 222, 224 (*Perez*) ["shooting at a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder."].) The kill zone theory addresses the element of specific intent, and endangerment supports an inference of conscious disregard and implied malice (*People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1205) but not specific intent as required in attempted murder. (*People v. Perez, supra,* 50 Cal.4th at 232.) If the kill zone theory were applied so that defendant could be convicted of the attempted murder of a person because defendant merely endangered that person, the result would be conviction of attempted murder with the mental element of implied malice, which is contrary to law.

(*People v. Smith, supra,* 37 Cal.4th at 739; *People v. Mize* (1889) 80 Cal. 41, 43.)

Because Windfield's five shots do not support the inference he intended to kill everyone in any zone, there was insufficient evidence to support instruction on the kill zone theory. The Opinion's contrary conclusion is mainly attributable to the erroneous premise that the kill zone theory can be applied to evidence that shows no more than endangerment of the victim.

B. The kill zone theory applies when the defendant uses force that makes it reasonable to infer he specifically intended to kill everyone in a zone occupied by the victim.

The kill zone theory is a way to find the element of specific intent in attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 330 (*Bland*).) It holds, first, that certain uses of force by the defendant support the inference he specifically intended to kill everyone in an area. This Court has often referred to the nature and scope of the force as the basis for the inference. In *Bland*, this Court stated, "Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." (*Id.* at 330, quoting *Ford v. State*, *supra*, 625 A.2d at pp. 1000-1001, fn. omitted.) This Court approved the reasoning of the court in *People v. Vang* (2001) 87 Cal.App.4th 554 (*Vang*): "The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up...." (*Id.* at 563-564, quoted in *People v. Bland, supra,* 28 Cal.4th at 330.) In *Perez*, this Court acknowledged that "*Bland's* kill zone theory of multiple attempted

murder is necessarily defined by the nature and scope of the attack." (*People v. Perez, supra,* 50 Cal.4th at 232.)

The kill zone theory holds, second, that if the defendant specifically intended to kill everyone in an area, he specifically intended to kill any particular person who happened to be in the area, such that he may be convicted of the attempted murder of that person. "[T]he defendant may be convicted of the attempted murders of any within the kill zone ..." (*People v. Bland, supra,* 28 Cal.4th at 331.) *"Bland* simply recognizes that a shooter may be convicted of *multiple counts* of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area ...." (*People v. Smith, supra,* 37 Cal.4th at 745-746, italics added.)

Kill zone reasoning demands evidence that the defendant specifically intended to kill *everyone* in a given area. In *Perez*, this Court gave as examples of creating a kill zone "using an explosive device with intent to kill *everyone* in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill *everyone* fired upon." (*People v. Perez, supra,* 50 Cal.4th at 232, italics added.) In *Smith*, this Court stated, "A defendant creates a kill zone when he or she uses lethal force designed and intended to kill *everyone* in an area around a primary target." (*People v. Smith, supra,* 37 Cal.4th at 746, italics added.)

The intent to kill everyone in an area is important, because only from that premise is it logical and reasonable to infer that, if the victim happened to be within the area, the defendant specifically intended to kill the victim. This Court has recognized the syllogistic nature of kill zone reasoning. In *Bland*, this Court approved the reasoning of the court in *Vang*: "defendants harbored a specific intent to kill every living being within the residences they shot up.... The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims

who were present and in harm's way, but fortuitously were not killed." (*People v. Bland* (2002) 28 Cal.4th 313, 330.), quoting *People v. Vang, supra,* 87 Cal.App.4th at 563-564.) The court in *People v. Adams* (2008) 169 Cal.App.4th 1009 (*Adams*) approved the same reasoning: "(1) Adams had the express intent to kill Soult by intentionally creating a zone of harm or kill zone ... and (2) Lopes, J.V., and Marr were within that zone of harm," therefore, Adams had the necessary express malice for attempted murder of Lopes, J.V., and Marr. (*Id.* at 1023.) *McCloud* describes the reasoning as follows: "In a kill zone case, the defendant ... *specifically intends* that *everyone* in the kill zone die. If some of those individuals manage to survive the attack, then the defendant—having specifically intended to kill every single one of them and having committed a direct but ineffectual act toward accomplishing that result—can be convicted of their attempted murder." (*People v. McCloud, supra*, 211 Cal.App.4th at 798, italics in original.)

The kind of force that this Court and other courts have found sufficient to support an inference the defendant specifically intended to kill everyone in an area is force so devastating under the circumstances that it is a near certainty everyone in the area will die. This Court and other courts have held that specific intent to kill everyone in a zone could reasonably be found if a person placed a bomb on a commercial airplane and so ensured the death of all the passengers (*People v. Bland, supra,* 28 Cal.4th at 329-330.); if a defendant drove by a group of persons and attacked the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group (*id.* at 330); where the defendant or defendants fired numerous shots at short range at an automobile passenger compartment occupied by several persons (*id.* at 330–331; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1233); where the defendants sprayed a duplex with over 50 shots from multiple assault rifles firing wall-

piercing ammunition (*People v. Vang* (2001) 87 Cal.App.4th 554, 558, 564, cited in *People v. Bland, supra,* 28 Cal.4th at 330); where the defendant lit fires at the front and back doors of a house to burn down the house and prevent escape (*People v. Adams, supra,* 169 Cal.App.4th at 1012); and where the defendant fired multiple shots at people in a doorway (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1391). In all of these cases, the circumstances defined a zone, and the defendant used force sufficient to kill everyone in the zone.

C. The force used by Windfield does not support the inference he intended to kill everyone in any zone.

The evidence concerning the nature and scope of the force used by Windfield is described in detail in the Statement of Facts. It shows that Windfield fired five shots from a semi-automatic handgun at a moving target 100 or more feet away. He did this on an area of a residential street that was not much smaller than a football field and was occupied by many more than five people, possibly more than 30. Although numerous, the occupants of the block were not standing in a group or constrained by any physical structure other than widely spaced fences and apartment buildings. One of Windfield's shots hit the unintended victim, and it appears from Bolden's testimony that one or more of the shots hit the wrought-iron fence near which Bolden was standing. There is no other evidence of where Windfield's shots went.

Windfield's shooting is nothing like the assaults described above. Rather than exploding a bomb on a plane, or spraying an enclosed group with a flurry of shots, he fired five shots into an open area occupied by from 10 to 30 or more people. He could not rationally have intended to kill them all, because the force he used was so plainly inadequate for that purpose. The evidence does not suggest any zone smaller than the entire

block. The jury found that Windfield meant to kill Pride (2 CT 281), but Pride was not standing in any group like the one postulated in Bland. His movement was not constrained by any physical object such as an airplane interior (*People v. Bland, supra,* 28 Cal.4th at 330), an automobile passenger compartment (*ibid*; *People v. Campos, supra,* 156 Cal.App.4th at 1233), or a doorway (*People v. Bragg, supra,* 161 Cal.App.4th at 1391). The evidence does not suggest that Windfield intended to kill everyone within a certain distance of Pride, and, on the record here, any attempt to define such a distance would be entirely arbitrary.

Courts confronting similar facts have found it was not reasonable to infer that the defendant created a kill zone. In *People v. McCloud, supra*, 211 Cal.App.4th 788, defendant Stringer stood in the parking lot of a Masonic lodge hosting a party at which hundreds of people were packed "elbow to elbow" inside and many more were in line in the parking lot, waiting to enter. He fired 10 shots from a semiautomatic handgun at the lodge. Three bullets went through a window and struck three victims inside, killing two and injuring the third. The seven remaining bullets hit no one. The trial court instructed the jury on the kill zone theory of attempted murder, and Stringer was convicted of 46 counts of attempted murder in addition to two counts of murder. (*Id.* at 791-794.) The Second Appellate District, Division One held that the trial court prejudicially erred by instructing the jury on the kill zone theory of attempted murder, because the record contained no evidence to support application of the kill zone theory. (*Id.* at 791.) "The evidence of the size and density of the crowd ... does not constitute evidence that Stringer and McCloud intended to kill 46 people with 10 bullets, so it cannot support respondent's application of the kill zone theory in this case." (*Id.* at 801.) The court affirmed Stringer's two murder convictions but reversed the 46 attempted murder convictions. (*Id.* at 807.)

In *People v. Anh-Tuan Dao Pham* (2011) 192 Cal.App.4th 552, the defendant fired a gun a number of times into a group of people, intending to kill two people he mistakenly thought were present. (*Id.* at 556.) The court held he did not create a kill zone, because his firing a gun at a group of people he thought included those teenagers, by itself, did not demonstrate "a generalized intent to kill people standing in the group." "Just because a defendant fires a gun repeatedly at a group of people does not necessarily mean the defendant can be convicted of as many counts of attempted murder as the number of bullets he fired." (*Id.* at 559.)

Thus, other courts confronted with facts similar to the facts here have concluded that firing shots into a group does not make it reasonable to infer the defendant specifically intended to kill everyone in the group. These cases support Windfield's contention that he did not create a kill zone. Given the evidence and authorities discussed above, there was insufficient evidence to support giving a kill zone instruction.

D. The Opinion's conclusion that the evidence was sufficient relies on the erroneous premise that kill zone theory may be applied to evidence that the defendant merely endangered the victim.

The Opinion rejects the arguments made above. It concludes that there was substantial evidence to support the kill zone instruction (Opn., pp. 27-30) and that "it was for the jury to make the decision whether Windfield created a kill zone when he fired and whether Bolden was in it." (Opn., pp. 28, 29.) As appellant will discuss, these conclusions are incorrect, because they rest on flawed premises.

1. The Opinion approves giving a kill zone instruction on the basis of evidence that shows no more than endangerment.

McCloud concluded that "the kill zone theory ... does not apply if

the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury." (*People v. McCloud*, *supra*, 211 Cal.App.4th at 798, italics omitted.) The Opinion **rejects** this conclusion. (Opn., p. 23.) It holds that it is "restrictive" (Opn., p. 24) and "goes too far" (Opn., p. 23). The Opinion rejects appellant's suggestion that the existence of a kill zone "requires a defined area that can be saturated with the kind of lethal force the defendant chooses to use," saying it is not supported by authority. (Opn., p. 28.)

As support for the instruction, the Opinion points to evidence that five bullets were fired. It says the jury could infer that Windfield used "a means to kill Pride that inevitably would result in the death of other victims within the zone of danger." (Opn., p. 27.) It implies that "firing five bullets into a crowd of people" is a reasonable basis for an inference that "the defendants intended that all of those people be killed." (Opn., p. 29.)

These assertions are incorrect. Whether or not it was "inevitable" that *someone* would die, it was not inevitable or even possible that *everyone* on the block would die. "All of those people" cannot mean all of the people on the block: on even the most conservative estimate of the size of the crowd, five shots were not nearly enough to kill everyone there. The Opinion does not suggest any smaller area.

It appears that the Opinion holds that the evidence supports the instruction because Windfield's five shots endangered the lives of everyone on the block. But, as appellant will discuss, evidence of mere endangerment does not support the kill zone instruction.

2. Endangerment does not make it reasonable to infer specific intent to kill.

Windfield did endanger the lives of everyone on the block. He

committed serious crimes, including assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)). (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1355.) Such crimes could be enhanced for firearm use and gang activity. (Pen. Code, §§ 186.22, subd. (b)(1)(C), 12022.5; see 2 CT 279-280.) The aggregate sentence for a single count could be as much as nine years for the assault plus 10 years consecutive for the firearm enhancement plus 10 years consecutive for the gang enhancement, a total of 29 years. Windfield could have been convicted of multiple counts. The prosecutor made the tactical choice not to charge Windfield with assault and enhancements instead of or in addition to the charge of attempted murder, but it is not as if the instruction here must be upheld or criminals will go unpunished.

Firing five shots into a crowd is an act the natural and probable consequences of which are dangerous to human life. The jury could find that Windfield acted willfully and with conscious disregard for human life. The situation is similar to that in *People v. Sarun Chun, supra,* 45 Cal.4th 1172, in which the defendants fired three guns into the passenger compartment of a car (*id.* at 1179), and this Court remarked that "[n]o juror could have found that defendant participated in this shooting ... without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life ..." (*id.* at 1205). Conscious disregard supports a finding of implied malice. But "[a]ttempted murder requires the specific intent to kill ...." (*People v. Smith, supra,* 37 Cal.4th at 739, interior quotation marks omitted.) Implied malice does not suffice. (*Ibid.*; *People v. Perez, supra,* 50 Cal.4th at 229-230; *People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Swain* (1996) 12 Cal.4th 593, 604–605; *People v. Mize, supra*, 80 Cal. at 43.)

Evidence of implied malice does not support an inference of specific intent. Specific intent to unlawfully kill and express malice are, in essence,

"one and the same." (*People v. Saille* (1991) 54 Cal.3d 1103, 1114.) Express malice requires a showing that the assailant either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur. (Citation.)" (*People v. Smith, supra,* 37 Cal.4th at 739, interior quotation marks omitted, brackets in original; see *People v. Davenport* (1985) 41 Cal.3d 247, 262; *People v. Velasquez* (1980) 26 Cal.3d 425, 434.) Assuming the jury had a reasonable doubt that Windfield "desired" to kill Bolden specifically, the issue is whether firing five shots in a way that endangered everyone on the block supports the inference Windfield "knew to a substantial certainty" they would all die. It does not. In *Perez*, this Court said: "[S]hooting at a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder." (*People v. Perez, supra,* 50 Cal.4th at 224.) It is true that Perez fired only one shot (*ibid.*) compared to the five shots here, but the difference in number is not significant, because even five shots were too few to kill everyone in any identifiable zone. In *People v. Anh-Tuan Dao Pham, supra,* 192 Cal.App.4th at 554-55, the court said: "the fact that the defendant fired a gun at a group of people ..., by itself, does not demonstrate that he had "a generalized intent to kill people standing in the group." (*Id.* at 559.) "Just because a defendant fires a gun repeatedly at a group of people does not necessarily mean the defendant can be convicted of as many counts of attempted murder as the number of bullets he fired." (*Ibid.*) In *People v. Anzalone* (2006) 141 Cal.App.4th 380, the court said: "Contrary to the prosecutor's argument, an attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them. The prosecutor's argument incorrectly suggests that a defendant may be found guilty of the attempted murder of someone he does not intend to kill simply because the victim is in some undefined zone of danger. In fact, to be found guilty of attempted murder, the

defendant must either have intended to kill a particular individual or individuals or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means to some other end, e.g., killing some particular person." (*Id.* at 392-393.)

These authorities show that the Opinion is incorrect that evidence that Windfield endangered the lives of the people on the block supports an inference he specifically intended to kill those people. Therefore, the Opinion is incorrect that the evidence supports giving a kill zone instruction.

3. The Opinion ignores the importance to kill zone theory of intent to kill *everyone* in the zone occupied by the victim..

The Opinion's rationale is that the kill zone theory is just a reasonable inference that could be based upon many kinds of facts. It makes repeated use of *Bland*'s observation that the kill zone theory is "just a reasonable inference" and similar phrases. (Opn., pp. 22, 24, 27.) It says "it was for the jury to make the decision whether Windfield created a kill zone when he fired and whether Bolden was in it." (Opn., pp. 28, 29.) It does not state any guidance for making such findings.

As discussed above, the kill zone theory requires evidence that the defendant specifically intended to kill *everyone* in an area occupied by the victim, because only then is it reasonable to infer that appellant specifically intended to kill the victim. But the Opinion *rejects* the notion that the evidence must show that the defendant intended to kill everyone. It objects that "[i]f, as *McCloud* asserts, the defendant must in fact intend to kill each attempted murder victim, there is no reason to employ the theory—the intent to kill is established without resort to the theory." (Opn., p. 23.)

This objection reveals some sort of misunderstanding, which may be

an assumption that the kill zone theory creates intent within the meaning of the law where it would not be found otherwise. Such an assumption is incorrect. The kill zone theory "is not a legal doctrine requiring special jury instructions such as is the doctrine of transferred intent." (*People v. Bland, supra,* 28 Cal.4th at 331, fn 6.) Attempted murder still requires intent to kill the specific victim. (Id. at 327, citing *People v. Mize, supra,* 80 Cal. at 43.) "The kill zone theory ... does not operate as an exception to the mental state requirement for attempted murder or as a means of somehow bypassing that requirement." (*People v. McCloud, supra*, 211 Cal.App.4th at 798.)

An incorrect assumption that the kill zone theory creates intent is also suggested by the Opinion's discussion of the difference between "targeted" and "untargeted" victims as mentioned in *People v. Stone* (2009) 46 Cal.4th 131, 137 (*Stone*). (See Opn., p. 23.) In *Stone*, this Court said of *Bland* that it "explained ... that if a person targets one particular person, under some facts a jury could find the person *also,* concurrently, intended to kill—and thus was guilty of the attempted murder of—other, nontargeted, persons." (*People v. Stone, supra,* 46 Cal.4th at 137.) The Opinion speaks as if *Bland* or *Stone* were saying that the defendant did not actually intend to kill the nontargeted persons, and the defendant would not be found guilty of the attempted murder of the nontargeted persons were it not for the kill zone theory. (Opn., p 23.) But, in Stone, this Court surely used those terms to distinguish between a specific person the defendant is trying to kill (the "target") and the other persons the defendant intends to kill as a means of killing the target (the "nontargeted" persons), and it recognized that the jury "could reasonably also have found a *concurrent* intent to kill" the nontargeted persons. (*Ibid.*)

The misunderstanding may also be an assumption that the kind of intent *McCloud* requires, or the only kind of specific intent that is relevant

in attempted murder, is the intent to kill a specific person. The Opinion states that "*McCloud's* restrictive view of the kill zone theory cannot possibly be reconciled with decisions holding that kill zone victims can include those not seen by the defendant or of which the defendant is unaware. (Opn., p. 24, citing *People v. Vang, supra*, 87 Cal.App.4th at 564 and *People v. Adams, supra*, 169 Cal.App.4th at 1023.) The Opinion appears to assume it is impossible for a defendant to intend to kill a person he does not know is there. Not so. Although it is true that "[t]o be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else" (*People v. Bland, supra,* 28 Cal.4th at 328), the requisite intent towards a victim may take various forms. One possibility is that the defendant may intend to kill a particular person, such as Denzell Pride in Count 3. A second possibility is that the defendant may intend to kill one or more undifferentiated persons in a group. In *Perez*, this Court affirmed a conviction of attempted murder even though "there is no evidence that defendant knew or specifically targeted any particular individual or individuals in the group of officers he fired upon." (*People v. Perez, supra,* 50 Cal.4th at 225, 230-231.) In *Stone*, this Court observed, "[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." (*People v. Stone, supra,* 46 Cal.4th at 140; see *People v. McCloud, supra*, 211 Cal.App.4th at 798 ["the defendant could be convicted of attempted murder as long as he intended to kill *someone,* even if there was no *particular* person he intended to kill"].) And a third possibility is that the defendant may intend to kill everyone in an area, and, if so, he may be convicted of the attempted murder of anyone who was in the area. (*People v. Bland, supra,* 28 Cal.4th at 331.) Therefore, the defendant may commit the attempted murder of someone he does not know is present. (*People v. Adams, supra*, 169 Cal.App.4th at

1023; *People v. Vang, supra,* 87 Cal.App.4th at 559.)

The Opinion is unwilling to recognize that the kill zone inference is reasonable only when the force used makes it reasonable to infer the defendant specifically intended to kill *everyone* in a zone. It finds tension between a statement in *Smith* that *Bland* referred to "lethal force designed and intended to kill everyone in the area around the targeted victim" (Opn., p. 21) and another statement in *Smith* that Bland recognized that the kill zone theory is "simply a reasonable inference the jury may draw in a given case" (Opn., p. 22). It appears to conclude that the former is not a limitation on the latter. (Opn., pp. 21-22.) But these conclusions are incorrect, as discussed above; the inference is reasonable because of the kind of force the defendant used.

It is these mistakes and confusions that lead the Opinion to conclude, erroneously, there was sufficient evidence to support the kill zone instruction.

4. The Opinion's reliance on *Adams* is misplaced.

The Opinion relies on a statement in *Adams* that the kill zone theory "imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant's primary objective of killing a specific person . . . despite the recognition, or with the acceptance of the fact, that . . . *a natural and probable consequence of that act would [be that] anyone within the zone could or would die.*" (Opn., p. 24, citing *People v. Adams, supra*, 169 Cal.App.4th at 1023, italics added by the Opinion.)

The quoted statement does not aid the Opinion. It is internally inconsistent. If the defendant intentionally created a kill zone, he intended to kill everyone in the zone. (*People v. Bland, supra,* 28 Cal.4th at 329-330;

People v. Smith, supra, 37 Cal.4th at 746.) It is unnecessary and confusing, therefore, to say that "despite" his intention to create a kill zone, he "recognized" or "accepted" that others would die. It is even worse to talk about a "natural and probable consequence that anyone within the zone could or would die." Appellant's research has not located any decision that uses the doctrine of natural and probable consequences to determine a defendant's liability for attempted murder other than liability as an aider and abettor of another defendant's actions (e.g., *People v. Favor* (2012) 54 Cal.4th 868, 877). And, as discussed above, creating a zone of danger in which people "could" die is not the same as using force designed and intended to kill everyone in the area around the targeted victim. (*People v. Perez, supra*, 50 Cal.4th at 224; *People v. McCloud, supra*, 211 Cal.App.4th at 798.)

Thus, the Opinion's holding that there was sufficient evidence to support instruction on the kill zone theory is undermined by failure to distinguish between force that endangers other people and force that makes it reasonable to infer the defendant specifically intended to kill everyone in a zone. It is further undermined by failure to recognize the logical structure of the theory and its function as a method of proving, rather than creating, specific intent to kill.

E. The instruction was error, because it was not supported by substantial evidence.

"The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence (citations) and has the correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues. (Citation.) It is an elementary principle of law that before a jury

can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference (citation). (Citation.) (Citation.)" (*People v. Alexander* (2010) 49 Cal.4th 846, 920–921, interior quotation marks omitted; see *People v. Saddler* (1979) 24 Cal.3d 671, 681.)

As discussed above, the record contains no evidence that would support application of the kill zone theory. Therefore, the trial court erred by instructing the jury on that theory, and the jury was not properly instructed on that theory.

II. THE INSTRUCTION WAS MISINSTRUCTION ON THE SPECIFIC-INTENT ELEMENT OF ATTEMPTED MURDER.

A. The instruction allowed the jury to use the finding that Windfield "intended to kill everyone within the kill zone" as a substitute for a finding that Windfield intended to kill Bolden.

The elements of attempted murder are the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Perez, supra,* 50 Cal.4th at 229-230; *People v. Smith, supra,* 37 Cal.4th at 739; *People v. Lee* (2003) 31 Cal.4th 613, 623; see *People v. Swain, supra,* 12 Cal.4th at 604–605.) The kill zone instruction is an instruction on the specific-intent element. (*People v. McCloud, supra*, 211 Cal.App.4th at 804.)

The complete instruction on attempted murder, based on CALCRIM No. 600, is set forth in Appendix A to this brief. At the beginning, the instruction states the elements of attempted murder:

> To prove that a defendant is guilty of attempted murder, the People must prove that:

1. The defendant took a direct but ineffective step toward killing another person;

AND

2. The defendant intended to kill that person. (CALCRIM No. 600, 1 CT 233.)

The next two paragraphs discuss direct step and abandonment; they say nothing about specific intent. Specific intent is discussed only in the third next paragraph (kill zone paragraph), which is as follows:

> A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' **In order to convict the defendant of the attempted murder of Trayvon Bolden, the People must prove that the defendant not only intended to kill Denzell Pride but also either intended to kill Trayvon Bolden or intended to kill everyone within the kill zone.** If you have a reasonable doubt whether the defendant intended to kill Trayvon Bolden or intended to kill Denzell Pride by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder. (CALCRIM No. 600, 1 CT 233, bold added.)

The second sentence of the kill zone paragraph, bolded above, gives the jury an analytical framework. It tells the jury there are two ways of proving that Windfield intended to kill Bolden. Both begin by proving that Windfield intended to kill Denzell Pride. One continues by proving that Windfield intended to kill Bolden specifically. The other continues by proving that Windfield "intended to kill everyone within the kill zone." So, if the jury found that Windfield intended to kill Denzell Pride, as it obviously did (2 CT 281), and if the jury had a reasonable doubt that Windfield intended to kill Bolden specifically, as it may have (see the Prejudice section of this brief), the jury could have relied on the kill zone portion of the instruction to convict Windfield of the attempted murder of

Bolden by finding that he "intended to kill everyone within the kill zone."

Under this application of the instruction, the finding that Windfield "intended to kill everyone within the kill zone" is the only finding the jury need make about Windfield's intent to convict him. Although the instruction states at the outset that the prosecutor must prove that Windfield "intended to kill" Bolden, the instruction does not require the jury to make that specific finding. The second sentence of the kill zone paragraph tells the jury the proof of intent is sufficient if the prosecutor proves that Windfield "intended to kill everyone within the kill zone." The instruction does not require the jury to make any other or further finding of intent to convict. Thus, when the jury proceeds under the kill zone prong of the instruction, the finding that Windfield "intended to kill everyone within the kill zone" is a complete substitute for a finding that Windfield intended to kill Bolden.

B. The finding is an insufficient substitute for a finding that Windfield intended to kill Bolden.

As discussed below, the finding that Windfield "intended to kill everyone within the kill zone" is an insufficient substitute for a finding that Windfield intended to kill Bolden. It allows conviction of attempted murder based on evidence that is insufficient to show specific intent to kill.

1. The instruction does not define "kill zone."

One reason the kill zone paragraph is error is that it does not define "kill zone." It talks about a "zone of harm" and a "kill zone," but it does not say whether they are two different things or the same thing. It says the kill zone is a "particular zone of harm," but it does not say what the particulars are. Reasonable jurors could have different ideas about what these things are. Some of those ideas might rest on legally incorrect conclusions, such as that endangering the lives of everyone on the block

created a "particular zone of harm" and a "kill zone." Windfield should not stand convicted under a standard so ill-defined that it allows conviction of attempted murder upon evidence that shows implied malice at most.

As used in the kill zone paragraph, "kill zone" is, or should be, a term of legal art that the jury cannot be expected to understand without instruction. The essential thing is that the kill zone is the area within which, based on the nature and scope of the force used, the defendant intends to kill *everything*. *People v. Perez, supra,* 50 Cal.4th at 232; *People v. Smith, supra,* 37 Cal.4th at 746.) The jury should be informed of this if it is to use kill zone reasoning. This Court discussed a similar issue of a technical term, although not concerning the kill zone issue, in *Bland.* It stated that "terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance." (*People v. Bland, supra,* 28 Cal.4th at 334; see *People v. Mayfield* (1997) 14 Cal.4th 668, 773 [trial court has a sua sponte duty to define terms that have a technical meaning peculiar to the law]; *People v. Estrada* (1995) 11 Cal.4th 568, 574-575, *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.) The kill zone instruction is not a statute, but there is the same need for clarification. To preserve the requirement of specific intent to kill in attempted murder (*People v. Perez, supra,* 50 Cal.4th at 229-230), in the kill zone instruction the term "kill zone" should be limited to the zone in which death is a near-certainty. The instruction should not allow the jury to extend it to zones in which there is only an increased risk of harm. (*People v. Bland, supra,* 28 Cal.4th at 330.)

2. The instruction allowed the jury to use kill zone reasoning without making the necessary findings.

Another reason the kill zone paragraph is error is that it is a poor paraphrase of the pattern of inference described in *Bland* and other cases. It

purports to allow the jury to apply the kill zone theory without making the factual determinations that underlie a valid application of the theory. For one thing, it does not require the jury to consider whether the nature and scope of the force used make it reasonable to infer Windfield intended to kill everyone in some zone. (See *People v. Bland, supra,* 28 Cal.4th at 330.) This is the fundamental premise of the kill zone theory, but the kill zone paragraph does not inform the jury about it. If the jury had been so informed, it would have found that there was no kill zone, for the reasons discussed in Part I of Argument.

A closely related omission is that the kill zone paragraph does not require the jury to determine the extent of the kill zone it finds. Unless the extent is known, it cannot be determined that an alleged victim was within the zone. (See *id.* at 330-331; *People v. Adams, supra,* 169 Cal.App.4th at 1023,) The instruction may be read to state that the existence and extent of the kill zone are determined by the defendant's subjective intent. The jury might understand that the extent of the kill zone is determined by the defendant's intention, and the defendant's intention is defined by the extent of the endangerment.

Finally, although the kill zone theory applies only if the alleged victim is within the kill zone (see *People v. Bland, supra,* 28 Cal.4th at 330; *People v. Adams, supra,* 169 Cal.App.4th at 1023; *People v. Vang, supra,* 87 Cal.App.4th at 563-564), the kill zone paragraph does not require the jury to make that finding. It says Windfield may be convicted of the attempted murder of Bolden upon proof that Windfield "intended to kill everyone within the kill zone." It does not say there must be proof that Bolden was within the kill zone.

The instruction would better mirror the method of reasoning described in *Bland* if it told the jury to consider first the nature and scope of the force the defendant used; then to determine whether, based on the

nature and scope of the force used, it is reasonable to infer that the defendant had the intent to kill everyone in some articulable zone; and finally, to determine whether the alleged victim was within the articulable zone. (See *People v. Bland, supra,* 28 Cal.4th at 330.)

3. The instruction allowed the jury to apply the kill zone theory if the jury found that Bolden merely came into Windfield's line of fire at Denzell Pride.

A particular problem is that the instruction allowed the jury to find Windfield guilty of the attempted murder of Bolden if the jury found only that, at some point, Bolden happened to be within Windfield's line of fire at Denzell Pride. The prosecutor made that argument. She told the jury, "There's also this concept of kill zone within attempt. If they're shooting at someone and people are within the zone that they can get killed, then you're responsible for attempted murder as to the people who are within the zone of fire. Okay. So there were times when Travion [Bolden] told you that he was with Denzell [Pride], near Denzell, close proximity to Denzell, they're both within the zone of fire ...." (4 RT 864-865.) But, as appellant will discuss, just being in the line of fire is an insufficient basis for becoming a victim of attempted murder.

Line-of-fire facts are discussed in *People v. Smith, supra,* 37 Cal.4th 733 and *People v. Chinchilla* (1997) 52 Cal.App.4th 683. In *Chinchilla*, the court affirmed two convictions of attempted murder based on the firing of a single bullet at two police officers, Meisels and Silofau, who were crouched, one behind the other, in the shooter's line of fire. (*People v. Chinchilla, supra,* 52 Cal.App.4th at 687.) The court noted that, "From Silofau's testimony that she was crouched behind but above Meisels, it is reasonable to infer that she was visible to defendant, who was close enough that both officers could see the muzzle flash when he fired at them." (*Id.* at

690.) The court held that "intent to kill two different victims can be inferred from evidence that the defendant fired a single shot at the two victims, both of whom were visible to the defendant." (*Id.* at 685.) In *Smith*, as the defendant's ex-girlfriend drove her car away from the defendant with a baby strapped into a car seat behind the driver's seat, the defendant fired a single shot from a handgun at the rear window of the car at a distance of about one car-length, narrowly missing both mother and baby. (*People v. Smith, supra,* 37 Cal.4th at 736-737.) The defendant conceded that he could be convicted of attempted murder of the mother, but he disputed the sufficiency of the evidence he attempted to murder the baby. (*Id.* at 738.) This Court observed, however, that "[d]efendant's own testimony established he knew the baby was in the backseat positioned directly behind the mother, and hence directly in his line of fire when he fired the shot into the vehicle." (*Id.* at 746-747.) This Court held that the evidence "support[s] an inference that defendant intended to kill the baby." (*Id.* at 748.)

Smith and *Chinchilla* are not kill zone cases. *Chinchilla* predates *Bland*, and the court noted that "the jury was properly instructed to independently evaluate whether defendant possessed the requisite intent to kill vis a vis both Meisels and Silofau." (*People v. Chinchilla, supra,* 52 Cal.App.4th at 689.) In *Smith*, no kill zone instruction was given, and this Court stated, "We ... have no occasion here to decide under what factual circumstances, if any, the firing of a single bullet might give rise to multiple convictions of attempted murder under *Bland's* kill zone rationale." (*People v. Smith, supra,* 37 Cal.4th at 746 & fn. 3.) Instead of using kill zone theory, *Smith* and *Chinchilla* affirm convictions of attempted murder because the defendant knew the victim was in his line of fire and fired anyway.

The line of fire from a defendant's handgun to the primary target

should not be treated as a kill zone. If one such line of fire is a kill zone, then all must be, because there is no way to distinguish, based on the force used, between a defendant who intended to kill only his primary target and a defendant who intended to kill his primary target and anyone else who came into his line of fire. And, if the line of fire is a kill zone, then the defendant will be guilty of the attempted murder of anyone who comes into his line of fire, even if he was not aware of their presence, because the purpose of the kill zone theory is to allow conviction of attempted murder based on the victim's mere presence within the kill zone. "A kill zone ... analysis ... focuses on (1) whether the fact finder can rationally infer ... that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm. (Citation.)" (*People v. Smith, supra,* 37 Cal.4th at 755–756 (Werdegar, J., dissenting).) If the victim's being in the line of fire were sufficient to prove attempted murder, the emphasis in *Smith* and *Chinchilla* on the defendant's knowledge of the victim's presence in the line of fire would have been unnecessary, which is a good indication that more is required. Treating the line of fire as a kill zone will obviate proof of specific intent in all cases of that type.

Under *Smith* and *Chinchilla*, the jury here could properly have found that Windfield intended to kill Bolden if it found he shot at Pride *knowing that Bolden was in his line of fire*. Discussion of the question presented assumes, however, that the jury had a reasonable doubt that Windfield intended to kill Bolden specifically and convicted him using the kill zone theory.

The kill zone theory should not be applied to a "zone" consisting of no more than the line of fire of Windfield's handgun, because it is unreasonable to infer that Windfield intended to kill Bolden simply because Bolden happened to come into his line of fire at Pride. In the absence of

proof that Windfield knew Bolden was there, and considering that it was dark (1 RT 107) and Pride and Bolden were 100-160 feet from Windfield (Exhibit 76; 3 RT 715, 722), it is unreasonable to infer that Windfield knew to a substantial certainty that Bolden would be killed. Therefore, it is unreasonable to infer that Windfield specifically intended to kill Bolden. (*People v. Smith, supra,* 37 Cal.4th at 739.)

C. The instruction denied due process.

The forgoing discussion shows that the instruction purported to enable the jury to apply the kill zone theory of attempted murder, but it failed to ensure that the jury will have an adequate foundation for using the theory. The instruction allowed the jury to find that Windfield had the requisite mens rea by finding simply that he "intended to kill everyone within the kill zone," whatever that might be. A finding in those undefined terms provides no assurance that Windfield actually had the specific intent to kill Bolden. The instruction does not tell the jury that there was a kill zone only if the force Windfield used makes it reasonable to infer he specifically intended to kill everyone in a zone that was occupied by Bolden. The instruction does not tell the jury that Windfield did not create a kill zone if the force he used endangered the lives of people in a zone but does not make it reasonable to infer he specifically intended to kill everyone in a zone that was occupied by Bolden. It follows that the instruction allowed the jury to convict on constitutionally insufficient evidence, and reversal of Count 2, attempted murder of Bolden, is required.

"Trial courts have ... a sua sponte duty to instruct on the general principles of law relevant to and governing the case. (Citation.) That obligation includes instructions on all of the elements of a charged offense (citation) ...." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334, interior quotation marks omitted; see *People v. Cummings* (1993) 4 Cal.4th

1233, 1311; *People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds by *People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. 26.)

The kill zone instruction violated Windfield's federal and state due process rights, because it allowed the jury to convict him of the attempted murder of Bolden without finding he had intent to kill Bolden. "In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. (Citation.)" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437; see *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-521; *People v. Flood* (1998) 18 Cal.4th 470, 480.

III. INSTRUCTION ON THE KILL ZONE THEORY SHOULD NOT BE GIVEN AS A MATTER OF JUDICIAL POLICY.

This Court has stated several times that jury instruction on the kill zone theory is not required. (*People v. Stone, supra,* 46 Cal.4th at 137–138; *People v. Smith, supra,* 37 Cal.4th at 746; *People v. Bland, supra,* 28 Cal.4th at 331, fn. 6.)

As a matter of policy, instruction on the kill zone theory should not be given, because, when the evidence supports it, it is unnecessary. Otherwise, it provides an apparent legitimacy and analytical framework for arguments that would appear unreasonable without it.

When the facts are appropriate, the kill zone theory "is simply a reasonable inference the jury may draw in a given case." (*People v. Bland, supra,* 28 Cal.4th at 331, fn. 6.) When it is plainly applicable, as in the paradigmatic examples given in *Bland*, no instruction is needed to explain it. 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. If the defendant intended to kill every one of

the passengers, it is just a matter of logic that he intended to kill any particular passenger. No instruction is needed to explain this.

No instruction is needed to tell the jury a defendant may harbor the intent to kill several people at one time. *Bland* gave its discussion of the kill zone after a lengthy discussion of the holding that the doctrine of transferred intent does not apply in attempted murder. (*People v. Bland, supra,* 28 Cal.4th at 319-331.) In view of the preceding concentration on an intent that could *not* be used to support the attempted murder convictions in that case, it was natural to speak of intents that *could* be so used as "other" and "concurrent." "'[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others ...'' (*Id.* at 329.) But, without the background peculiar to that case, there is no reason to instruct the jury that there may be concurrent intents to kill several persons, because that is well known.

For these reasons, this Court should hold as a matter of judicial policy that instruction on the kill zone theory should not be given.

IV. THE INSTRUCTION WAS PREJUDICIAL AS TO COUNT 2.

Erroneous instruction on an element of an offense is a federal and state due process violation. (*Middleton v. McNeil, supra,* 541 U.S. at 437; *Sandstrom v. Montana, supra,* 442 U.S. at 520-521; *People v. Flood, supra,* 18 Cal.4th at 480.) Prejudice is judged under *Chapman*: "Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun, supra,* 45 Cal.4th at 1201.)

Error from giving a kill zone instruction not supported by substantial evidence is state law error reviewed for harmlessness under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836–837 (*Watson*). (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; *People v. McCloud, supra*, 211 Cal.App.4th at 803.) The error warrants reversal only if it is reasonably probable that appellant would have obtained a more favorable result in the absence of the instruction. (*People v. McCloud, supra*, 211 Cal.App.4th at 803.)

Windfield can show prejudice under both standards, because the evidence was such that there is a reasonable probability, and therefore it is not beyond a reasonable doubt, that the jury could have applied the instruction by finding that Windfield did not intend to kill Bolden specifically but did create a kill zone inhabited by Bolden.

There were numerous reasons the jury could have found appellant did not intend to kill Bolden specifically. There was a great deal of evidence that appellant shot at Pride, but virtually none that he shot at Bolden. When Pride started to run, appellant yelled, "That's the little nigga" (1 RT 206), but there was no similar yelling about Bolden. There is no evidence appellant saw Bolden; Bolden's statement to Det. Williams suggested his location could not easily be seen by appellant. (2 CT 491.) Bolden testified he saw appellant shoot and thought he was aiming at Pride. (1 RT 213, 217; 2 RT 296.) After the shooting, according to Bolden, Pride did not deny that appellant was shooting at him. Bolden asked Pride why they were trying to kill him, and Pride would not tell him, saying only that it was personal business or Hustla Squad business. (2 CT 495.) Bolden's question to Pride implies that Bolden did not think they were trying to kill him, Bolden. Bolden testified he did not think appellant was shooting at him. (1 RT 217.) He said a shot hit the gate near him, but that was because appellant could not control the gun, and his shots were going everywhere.

(2 CT 491; 1 RT 213.) After Bolden started to run, shots came in his direction, but he thought it was because appellant was shooting at Pride. (1 RT 213, 217.) Meoshi Gordon testified that appellant told her in 2009 that the reason Cooksey got killed was that "the guy that he was shooting at ran and the girl got in the way." (3 RT 633.) In the quoted statement, the guy who ran was Pride, not Bolden. Appellant's admission that he was targeting Pride and his failure to mention Bolden imply that he was not targeting Bolden. Thus, there was ample cause for doubt as to whether appellant specifically targeted Bolden, which makes it likely at least some jurors relied on the kill zone theory.

If the jury took the kill zone path of the instruction, it is reasonably probable that the jury misapplied the kill zone theory by applying it to facts that showed no more than endangerment and implied malice. As discussed above, the instruction does not define "kill zone" and does not require the jury to make the factual findings that underlie a valid application of the kill zone theory. The jury could follow the instruction and yet reach a conviction based on insufficient evidence that shows no more than implied malice. The prosecutor's argument about the kill zone theory invited the jury to apply the theory to facts that only showed endangerment. (4 RT 865.) Finally, the jury was concerned about the factual basis for the element of intent in Count 2, because the jury requested and received a readback of Bolden's testimony that "They weren't shooting at me." (2 CT 268; Supp CT 64-65.)

The jury's general verdict does not show how the jury found specific intent in Count 2, attempted murder of Bolden. (2 CT 277.) The Opinion claims it is significant that the jury found that the attempted murder of Bolden was done "willfully, deliberately and with premeditation." (Opn.,, p. 31; see 2 CT 278.) But if the jury found that Windfield specifically intended to kill everyone in some zone, and it found that Bolden was within

that zone, then the jury would naturally find that the attempted murder of Bolden was willful. The finding does not show that the jury found that Windfield intended to kill Bolden specifically as opposed to one of many people he intended to kill.

For these reasons, it is reasonably probable that if the kill zone instruction had not been given, or if it had been given without the errors discussed above, the jury would not have convicted Windfield of the attempted murder of Bolden.

V. REVERSAL OF COUNT 2 IS REQUIRED.

For the reasons discussed above, the jury was not properly instructed on the kill zone theory of attempted murder. The instruction should not have been given, because there was insufficient evidence that Windfield created a kill zone. The instruction given was error, because it allowed the jury to apply the kill zone theory to evidence that showed no more than endangerment of the people on the block, which does not support an inference of specific intent to kill. There is reason to believe the jury used the kill zone theory in Count 2, and nothing in the record shows the jury did not use it. Therefore, Windfield's conviction of attempted murder of Bolden in Count 2 should be reversed.

CONCLUSION

For the reasons stated above, Windfield's conviction of attempted murder of Bolden in Count 2 should be reversed.

Respectfully submitted,

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APPENDIX A – CALCRIM No. 600

The complete instruction on attempted murder was as follows:

600. Attempted Murder (Pen. Code, §§ 21a, 663, 664)

The defendants are charged in Counts 2 and 3 with attempted murder.

To prove that a defendant is guilty of attempted murder, the People must prove that:

1. The defendant took a direct but ineffective step toward killing another person;

AND

2. The defendant intended to kill that person.

A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder.

A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Trayvon [sic] Bolden, the People must prove that the defendant not only intended to kill Denzell Pride but also either intended to kill Trayvon Bolden or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Trayvon Bolden or intended to kill Denzell Pride by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder.

The defendant may be guilty of attempted murder even if you conclude that murder was actually completed. (CALCRIM No. 600, 1 CT 233.)

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.360 of California Rules of Court, counsel on appeal certifies that, according to the word count function of the word processing software with which this brief was produced, this brief contains 12,706 words.

David P. Lampkin

_____

DAVID P. LAMPKIN

PROOF OF SERVICE BY MAIL

Re: KeAndre Windfield, Court Of Appeal Case: S221958, Superior Court Case: FVA1001265

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 22 Alta Dr., Petaluma CA. On May 28, 2015, I served a copy of the attached Opening Brief on the Merits (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 28th day of May, 2015.

Eric Vanderville
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: KeAndre Windfield, Court Of Appeal Case: S221958, Superior Court Case: FVA1001265

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 22 Alta Dr., Petaluma CA. On May 28, 2015 a PDF version of the Opening Brief on the Merits (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 28th day of May, 2015 at 09:14 Pacific Time hour.

Eric Vanderville
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(Signature of Declarant)