THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL RAPHAEL CANIZALES, et al.,

Defendants and Appellants.

S221958

FOURTH DISTRICT COURT OF APPEAL, DIVISION TWO NO. E054056
SAN BERNARDINO SUPERIOR COURT NO. FVA1001265
Hon. Judge Steven Mapes, Presiding

CANIZALES' REPLY BRIEF ON THE MERITS

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By appointment of the
Supreme Court

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CANIZALES' REPLY BRIEF ON THE MERITS

INTRODUCTION

This reply brief is designed solely to respond to the Attorney General's contentions which require further discussion for proper determination of the issues raised on appeal. This brief does not respond to issues that appellant believes were adequately discussed in the opening brief, and appellant intends no waiver of these issues by not expressly reiterating them herein.

ARGUMENT

I THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO SUPPORT THE PROPOSITION THAT CANIZALES SPECIFICALLY INTENDED TO KILL BOLDEN OR TO SUPPORT THE INFERENCE THAT A KILL ZONE WAS CREATED, OR IF IT DID EXIST, THAT BOLDEN WAS IN IT

Respondent's contentions that substantial evidence supported finding Canizales specifically intended to kill Bolden or that he and Windfield created a kill zone around Pride to ensure his death and that Bolden was in the kill zone are not supported in the record. That none of these propositions has merit was something respondent ultimately recognized because he has a fall back position, "Even if the court erred by instructing on the kill zone theory when it was not supported by substantial evidence, any error was harmless." (Answer Brief on the Merits "ABOM" 37.)

Respondent is incorrect in stating that "considerable evidence supported appellants' convictions under the theory that they specifically intended to kill Bolden." (ABOM 38-39.) Respondent contends that motive and planning show intent to kill, but that theory was refuted by the actual conduct of Canizales at the moment before the shooting. Windfield pulled a gun out of his waistband, handed the gun, or attempted to hand the gun, to defendant, and said, "Bust," which means shoot. Defendant would not take the gun and/or would not shoot. Windfield took the gun back and immediately started shooting at Pride. (1 RT 200, 206, 207-210, 213, 231-232, 246-247; 2 RT 296; 2 CT 487, 490-491, 504-507.) This evidence established beyond a reasonable doubt, that appellant did not have the specific

intent to kill Bolden.

Respondent's contentions that a kill zone was established and Bolden was in it is also incorrect. (ABOM) Contrary to respondent's belief, there was no "clearly defined zone" (ABOM 15); whereas respondent's cited cases show a defined zone. In *People v. Bland* (2002) 28 Cal.4th 313 and in *People v. Smith* (2005) 37 Cal.4th 733, the people were inside a car and in *People v. Vang* (2001) 87 Cal.App.4th 554, they were inside two occupied houses. (ABOM 11-13) These cases do not support respondent's contention that a city block, which is the location of the alleged kill zone in this case, is a defined zone.

A defendant may not 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. (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 393.) The hallmark of a proper application of the kill zone theory is evidence of a method of killing which raises an inference that a defendant wanted to ensure the death of an intended victim by killing everyone within a prescribed area occupied by the victim. Logic demands that, in order for this inference to be supported, there be a nontargeted secondary victim confined within a space with well-defined boundaries. A defined space is needed in order to reasonably infer that the defendant intended to kill everyone occupying that defined area, even though he was targeting only one person, by saturating that confined space with lethal force. While the courts have not set any bright-line definition to the term "kill zone," what the courts have made clear is the kill zone is defined by the "nature and scope of the attack." (*Bland, supra,* 28 Cal.4th at p.329 .) The cases respondent cites: *Vang, Bland and*

Smith all have a defined space and do not support respondent's contention that a city block is a defined space.

Also, in order to reasonably infer that the defendant intended to kill everyone occupying that defined area, even though he was targeting only one person, the area must be saturated with lethal force. This Court made clear in *Smith* that a kill zone or concurrent intent analysis focuses on whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a zone of fatal harm. (*Smith, supra,* 37 Cal.4th at pp. 755-756.)

The nature and scope of the attack here did not establish a kill zone. That is, the force Windfield used, 5 shots from a semi-automatic handgun, did not establish a kill zone. The gun was not a high powered weapon. (3 RT 719-720, 762-763.) The five shots from a hand gun was not a means of mass destruction. Respondent's contention that "five bullets fired at a target can constitute a kill zone ..." based on caselaw from this state and other jurisdictions is incorrect. (ABOM 20-21.) The cases respondent has listed are all distinguishable or irrelevant.

People v. Gutierrez (1993) 14 Cal.App.4th 1425, the only California case cited, is irrelevant because it does not discuss the kill zone theory. That theory only came into being in 2002 in the *Bland* case. ' "It is axiomatic that cases are not authority for propositions not considered." [Citations.]" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.) Moreover, in *Gutierrez*, the shooter was 4 feet away from the three victims which is not comparable to the approximately 150 feet that separated the defendants and Bolden.

(*Gutierrez, supra,* at p. 1430.) (2 CT 518-519; 3 RT 570.) Also, five shots where fired in *Gutierrez* and the court stated that "by firing five shots at close range, hitting two victims and missing one, intended to kill all three." (*Id.* at p. 1437.) Because the kill zone was not cited, it is reasonable to conclude that the court found three separate intents to kill. (*Id.* at pp. 1430-1431.) By contrast, the jury here must have relied on the kill zone theory because there is no evidence that Canizales or Windfield had the specific intent to kill Bolden.

Walls v. United States (D.C. 2001) 773 A.2d 424 is distinguishable because the victims were at close range as both the victims and the defendant had been at or very near the front steps of an apartment building and were talking. (*Id.* at p. 426.) The court stated, "Under the current intent doctrine, a specific intent to kill each individual may be imputed to a defendant who fires multiple shots at two or more persons at close range." (*Id.* at p. 434.) By contrast, in this case, the distance between the shooter and Bolden was about 150 feet. (2 CT 518-519; 3 RT 570.)

Ruffin v. United States (D.C. 1994) 642 A.2d 1288, 1298, is distinguishable because 10 to 15 shots were fired, 2 to 3 times the number of shots fired in this case. Ten to fifteen rounds would constitute a "hail of bullets" which would create a zone of kill; but the five rounds shot here would not. By contrast to this case, the shooters in *Ruffin* were also close to the victims as the shooters' car pulled up next to the victim's car; one occupant was killed and two others wounded. (*Id.* at pp. 1292,1298.)

Hunt v. United States (D.C. 1999) 729 A.2d 322, 326 is distinguishable because the court did not instruct on kill zone theory; instead the transferred intent instruction was given. (*Id.* at p. 325.)

Furthermore, *Hunt* is distinguishable from the instant case because it involved shooting into a confined space, one victim was in the driver's seat and the other was standing next to the passenger's window, the shooting was at close range and involved a hail of bullets when defendant standing by the driver's window fired 11 or 20 to 30 shots at a car and the area just outside the car. (*Id.* at pp. 323-324.)

Likewise, *United States v. Willis* (1997) 46 M.J. 258, 259-262 is distinguishable because the shots were fired in a confined space, a room where the victims were located. The shooter was also in close proximity as he only had to reach around a partially open office door and fire the three shots.

State v. Wilson (1988) 313 Md. 600, 601-602 is distinguishable because the court gave transferred intent instructions to hold the defendant liable for an attempted murder of a bystander. Nevertheless, in *Ford v. State* (1993) 330 Md. 682, the court held that *Wilson* should not have applied the transferred intent doctrine. (*Id* at p. 714.) *Ford* however did state that the convictions could have been upheld on the basis of concurrent intent (the kill zone theory). The concurrent intent to murder the bystander could have been drawn from multiple shots fired towards both victims. (*Id.* at pp. 716-718.) *Wilson* is still distinguishable because there were two shooters. (*Wilson, supra*, 313 Md. at p. 1042.) The number of shots fired was not stated but each fired multiple shots. It could have been far more than the 5 shots fired here. The number of shots fired is needed to determine whether a kill zone was created. Also, the court indicated that the bystander was "obviously in the .. direct in the line of fire." (*Ford, supra*, at pp. 717-718.) With the premature departure of Pride and his zigzag running, one cannot say Bolden was in the line of fire.

Harvey v. State (1995) 111 Md. App. 401 is distinguishable because the jury was not instructed on the kill zone theory but rather on transferred intent. As the court said, "The subject of this appeal is the doctrine of transferred intent." (*Id.* at p. 404.) The court determined that the trial court erred in instructing on transferred intent and reversed the assault with intent to murder conviction. (*Id.* at pp. 433-434.) Respondent relies on the dicta from the court that the evidence was legally sufficient to support her conviction for assault with intent to murder under a concurrent intent theory, which commentary was not necessary because that conviction had already been reversed for another reason. (*Id.* at pp. 434-435.) Moreover, the court described the fire power as a "fusillade of no less than five shots that sprayed the area." (*Id.* at p. 435.) In this case, there was only 5 shots. Also, the *Harvey* case is distinguishable because the unintended victim was shot in the leg with a bullet. (*Id.* at p. 404.) When the unintended victim is shot with a bullet, it is easier to show that the means of the attack including the fire power as well as the creation of the zone of harm actually established a kill zone. (See generally *Ford v. State, supra*, 330 Md. Pp. 715-716.) Here, by contrast Bolden was not hit with a bullet; therefore, the inherent logic about the creation of a kill zone is missing.

Harrison v. State (2004) 855 A.2d 1220 is distinguishable because there were two shooters, the second shooter had two guns, and the evidence showed that three guns were used. The defendant fired six shots, but there was no indication of the total number of shots fired by both shooters in the inner city basketball court or whose shot hit the bystander. (*Id.* at pp. 1224, 1231.) Ultimately, *Harrison* does not help respondent because it overturned the second degree

attempted murder conviction under the current intent theory because there was not sufficient evidence that the victim inhabited the zone. (*Id.* at pp. 1222, 1231-1232.) As explained *infra*, the same issue exists here. Bolden was not in the kill zone because Pride prematurely started to run before the shots were fired and before Bolden started to run, and when running, Pride was zigzagging. Bolden also stated he was staying as far away from the target Pride as possible. As the *Harrison* court stated where there is no indication of where the unintended victim stood in relation to the intended victim no inference is possible that the unintended victim occupied the kill zone. (*Harrison, supra,* at pp. 1231-1232.)

Respondent claims that Canizales mistakenly suggests that when Pride took off running, any kill zone was undone. (ABOM 19.) Canizales is not suggesting this; he has proof that Bolden was not in the kill zone based on Bolden's detailed police interview which occurred before his rehearsed brief trial testimony. The notion that Bolden and Pride ran together was contradicted by the more elaborate, and therefore, more truth inspiring statements in Bolden's police interview. (2 CT 473-514.). In that interview Bolden indicated that Pride started to run even before the shots were fired so that Bolden could not have been running with him. Bolden explained that Pride saw Windfield, and then Pride 'turns around and start runnin'." (2 CT 489.) That's when Bolden heard someone say, "that's the little nigga right there." (2 CT 489.) As Bolden elaborately details in the interview, which contradicted his brief trial testimony, Pride ran first and after "that's when the gunshots come on." (2 CT 488.)

In the interview, Bolden recounted with specificity that Windfield and his associates, "saw Denzel, 'cause he the one ... he

was the first one to run!" (2 CT 486.) "Denzel already gave it away when he started runnin'. That's why everybody was lookin' like why he runnin'?" (2 CT 488.) Obviously, everybody would not be wondering why Pride ran if they had heard shots.

Bolden figured out it was Pride Windfield was after, and Bolden stayed as far away from Pride as possible. Bolden said, "I'm on the sidewalk runnin' ... Cause I ain't tryin' to get shot." (2 CT 494.) It is also hard to imagine Bolden running with Pride when Pride was zigzagging whereas Bolden ran in a straight line. (1 RT 195-196; 2 CT 494.)

"A judgment is not supported by substantial evidence if it is based solely upon unreasonable inferences, speculation or conjecture." (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.) " '[S]peculation is not evidence, less still substantial evidence.' (Citations) " (*People v. Waidla* (2000) 22 Cal.4th 690, 735.) Indeed, "[s]ubstantial evidence does not mean any evidence, or a mere scintilla of evidence. It is 'evidence that is reasonable, credible, and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 614.)

The credible evidence that is of solid value supports the position that Bolden was not at any point running with Pride; and therefore, he was not at any time in any assumed kill zone. Further, as explained above, no kill zone was established around Pride based on the nature and location of the attack Therefore, Canizales' conviction for the attempted murder of Bolden based on the kill zone theory should be reversed.

The firing of a gun toward a crowd of people is clearly

reckless behavior that can be the basis for assault charges (see, e.g., *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1355-1357), but it cannot alone provide the basis to sustain a conviction for attempted murder on a kill zone or concurrent intent theory unless there is evidence that the shooter intended to kill everyone in the group in order to ensure the death of his intended victim. That is, "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." *(People v. Anzalone, supra,* 141 Cal.App.4th at p. 393.)

In a kill zone analysis, courts focus on the means employed to commit the crime and the zone of harm around the victim. The essential questions therefore become whether the fact finder could infer that the defendant intentionally escalated his mode of attack to such an extent that he created a kill zone and whether the facts establish that the actual victim resided in that zone. Since the evidence in this case was insufficient to support a finding that either defendant intended to kill Bolden, or that a kill zone existed and Bolden was in it, the finding of guilt on Count 2 must be reversed.

II ENDANGERING THE LIVES OF UNINTENDED VICTIMS IN THE VICINITY OF THE TARGET SHOWS ONLY THE MENTAL STATE OF IMPLIED MALICE WHICH IS NOT ENOUGH TO ESTABLISH LIABILITY FOR ATTEMPTED MURDER UNDER THE KILL ZONE THEORY AND THE INSTRUCTION FAILS TO EXPLAIN THIS

Appellant argued that the zone of kill theory was inapplicable to hold Canizales liable for the attempted murder of Bolden because "[t]he 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* (2012) 211 Cal.App.4th 788, 798.) The force used here did not establish that Windfield was attempting to kill Bolden in order to ensure the death of Pride. Bolden's life was endangered but that is not enough to prove attempted murder. Moreover, the instruction erroneously did not explain that the kill zone theory does not apply if the defendant merely subjects everyone in the kill zone to a lethal risk and does not care if they die. (*Id.* at p. 798.)

Respondent contends that appellant has mistakenly relied on the *McCloud* decision because "the record did not contain substantial evidence to support application of the theory in the case based on the manner in which the case had been argued." (ABOM 14, 15.) Contrary to respondent, the *McCloud* court held that "the trial court erred by instructing the jury on the kill zone theory," because "[t]he record does not contain substantial evidence to support application of the theory." (*Id.* at p. 802.) The court also took issue with the prosecution's argument because it focused on endangering

people in the line of fire (*id.* at pp. 801-802) but that was not the only reason for the court's ruling. The court also held that the kill zone instruction should not have been given because the record contained no evidence that appellants intended to kill 46 people with 10 bullets. (*Id.* at p. 799.)

While the facts of *McCloud* are not comparable to the facts in this case because in theory firing five bullets was sufficient here to attempt to kill two men, *McCloud* is significant because it highlights, as no opinion has done before, that implied malice and the intent to endanger people are not enough to support an attempted murder conviction under the kill zone theory.

Rsepondent contends that there is no suggestion that the attempted murder conviction could stand based on a finding that Bolden was merely in danger. (ABOM 23, 26-29.) As explained, Bolden was not in the kill zone. The only credible evidence was that Pride began to run before any shots were fired and Bolden admitted he was staying as far away from Pride as possible. So Bolden was not at any time running with Pride. If Bolden was not in the kill zone, his life was only in danger because the evidence would not show that he more than likely could have been killed.

The importance of *McCloud* is its lazer-like focus on the criteria that show that the kill zone has not been established. The *McCloud* case is significant because it explains the kill zone doctrine by delineating what it does not cover. "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. Nor does the kill zone theory apply if the evidence merely shows, in

addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual." (*McCloud, supra*, 211 Cal.App.4th at p.798.) Those are the circumstances shown by the facts in this case, and therefore, the kill zone theory was inapplicable to hold appellant liable for the attempted murder of Bolden.

The instruction used in the *Dionas* case made sure that the jury would not use an endangerment theory to convict the defendant by including the example of the bomb on the airplane to illustrate the force required. The instructed stated in pertinent part: "For example, when one places a bomb on a commercial airplane intended to harm a primary target on board, that person insures by this method of attack that all passengers will be killed. In that instance, the perpetrator by such intentional conduct and action, has intentionally created a zone of harm or danger to insure the death of his primary victim." (See, e.g., *Dionas v. State* (2011) 199 Md.App. 483, 533-534, rev'd on other grounds in *Dionas v. State* (2013) 436 Md. 97.)

Unless the court is prepared to include in CALCRIM No. 600 the bomb example, used in the instruction in *Dionas*, it must use the above *McCloud* language to disabuse jurors of the notion that endangering people is enough to establish and intent to kill for attempted murder. The pivotal questions that an instruction based on the *McCloud* language would address are the following: Did defendants specifically intend to kill Bolden? Or rather did they, in their attempt to kill Pride, knowingly subject Bolden to a risk of fatal injury and not care whether he lived or died? If the former, then they

are guilty of the attempted murder of Bolden. If the latter, then they are guilty of a serious crime against Bolden, but it is not attempted murder. Windfield and Canizales may have had the state of mind, "I know my conduct is dangerous to others, but I don't care if someone is hurt or killed," but that is the state of mind for implied malice murder (*People v. Olivas* (1985) 172 Cal.App.3d 984, 988), not for attempted murder.

For all the above reasons, the instruction failed to explain the parameters of the kill zone theory so that jurors would not convict the defendants of attempted murder based on their implied malice state of mind.

III THE KILL ZONE INSTRUCTION WAS INCOMPLETE, ARGUMENTATIVE, UNNECESSARY, AND LESSENED THE PROSECUTION'S BURDEN OF PROOF

A The instruction was incomplete because it did not define a kill zone and did not require the jury to find Bolden was in it

Respondent states "kill zone" is a commonsense term that does not need defining. (ABOM 29-30.) If the kill zone is a commonsense term why do juries arrive at such senseless verdicts using it, as they did in *McCloud* where the jury convicted the defendant of 46 counts of attempted murder when only 10 bullets were fired. (*People v. McCloud, supra,* 211 Cal.App.4th at p. 799.)

On the contrary, the kill zone is a technical term that should be described either by using the bomb example in *Dionas, supra,* or the caveats discussed in *McCloud, supra,* explaining when the kill zone does not exist. With the use of the term "kill zone" in popular culture where it appears in a book, a movie, a video game, employing the phrase "kill zone" in the instruction appears to mandate a factual finding of concurrent intent even if the jury does not actually draw that inference. It was therefore necessary for the Court to explain this concept so that the jurors could properly perform their function. (See, e.g., *Simmons v. South Carolina* (1994) 512 U.S. 154, 173, 114 S.Ct 2187 [Souter, J., concurring opinion].)

Another problem is that the instruction did not require the jury to find that Bolden was in the kill zone. This Court in *Smith* concluded that any nontargeted attempted murder victim must "inhabit that zone of harm." (*Smith, supra,* 37 Cal.4th at p. 756.) As

explained, the foundational facts do not support the inference that Bolden was in a kill zone; and moreover, the jury was not asked specifically in the instruction to find that he was.

Respondent does not specifically address where in CALCRIM No. 600 the jury is told they have to find Bolden was in the kill zone, and that is because, the requirement is not there.

B. The instruction was argumentative

Canizales has argued that the "kill zone" should be defined, but that does not mean that the words "kill zone" should be used in that definition. Canizales believes CALCRIM No. 600 is prejudicially argumentative in employing the phrase "kill zone."

Respondent asks this Court to follow the reasoning of *Campos*. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244.) (ABOM 33-34.) Appellant has explained in the BOM Argument III why *Campos* should not be followed, and it is because the language that the case cites as equally inflammatory but in widespread use are distinguishable.

The "kill zone" terminology detracts from a reasoned examination of the facts and virtually compels the jury to find a broad intent to kill. It dilutes the individualized intent requirement, hence lowering the prosecution's burden of proof, by implying that firing into an area must invariably carry with it an intent to kill. This is the case because the words "kill zone" strongly suggest an arcade-like shooting gallery in which all occupants are targets of a homicidal maniac or a terrorist. Implicit in the phrase itself is a strong inference that the defendant had the intent to kill all those within the zone of

risk. This is improper because it directs the jurors to reach the conclusion argued by the prosecution and thereby deprives defendant of an unbiased and impartial jury. The prejudicial effects denied Canizales his rights to a fair trial and due process of law.

C. No instruction on the kill zone theory was necessary

Instruction on the kill zone theory should not have been given in this case. This Court has reminded trial courts that the kill zone instruction is never required. (*People v. Stone* (2009) 46 Cal.4th 131,137-138; *Smith, supra*, 37 Cal.4th at p. 746.) As *McCloud* reiterated, "[i]t is consequently *impossible* for a trial court to commit error, much less prejudicial error, by declining to give a kill zone instruction." (*McCloud, supra,* 211 Cal.App.4th at p. 802-803 (italics in opinion).) Where, as here, all the legal concepts that the jury needed were covered by other instructions, no "pinpoint" instruction on the kill zone theory was necessary or appropriate, and application of the facts to this evidentiary theory was "best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate." (*People v. Wharton* (1991) 53 Cal.3d 522, 570.)

Respondent goes on a tangent creating a strawman so that he can then knock it down in his argument that the kill zone instruction does not create a presumption. (ABOM 35-37.) Appellant never contended that CALCRIM No. 600 created a presumption. What appellant did contend and cited a Ninth Circuit case as support is that the instruction was based on an inference but that those types of instructions should not be given. Respondent never addresses that concept nor even acknowledged the extensive quote explaining why

instructions based on inferences are a bad idea. The quote is so apropos to this case that it bears repeating in full.

> [I]nference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for the possible inference to be considered by the jury. Inferences can be argued without benefit of an instruction; indeed, inferences are more appropriately argued by counsel than accentuated by the court. Further, because they are a detour from the law which applies to the case, inference instructions tend to take the focus away from the elements that must be proved. In this way they do a disservice to the goal of clear, concise and comprehensible statements of the law for laypersons on the jury. Balanced inferences are also difficult to craft. And, as this case demonstrates, inference instructions create a minefield on appeal. For all these reasons, as a practical matter it seems to me both unnecessary and unwise for inference instructions to be requested or given. (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 900 [Rymer, C.J., concurring].)

As stated in the above subsections, on the one hand, the instruction as given was incomplete because it did not explain the parameters of a kill zone. On the other hand, the use of the term "kill zone" was inflammatory and inherently prejudicial. These two seemingly conflicting requirements can be resolved by simply not giving the instruction at all.

IV THE CALCRIM NO. 600 INSTRUCTION WAS PREJUDICIAL AND THE COUNT 2 CONVICTION SHOULD BE REVERSED

The finding that the attempted murder was premeditated does not make instruction on the kill zone theory harmless because the premeditation finding is determined after the jury determines whether the attempted murder was committed with the specific intent to kill.

During deliberations the jury would be focused on the instructions and the instructions separate premeditation from the rest of the elements. The instruction for attempted murder is in CALCRIM No. 600 and the word premeditation is not mentioned. Premeditation is in a separate instruction, CALCRIM No. 601, which states in pertinent part, "If you find the defendants guilty of attempted murder under Counts 2 and 3, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation." (1 CT 234.) It is in finding a specific intent to kill based on CALCRIM No. 600 that the jury relies on the kill zone theory and their analysis of the applicability of the kill zone theory therefore occurred before they even got to the second instruction, CALCRIM No. 601, asking them to find that the attempted murder was premeditated.

That the finding of culpability for attempted murder is separate from the premeditation finding establishes that the order the jury decided this issue support a finding that the error was not made harmless because there was a finding of premeditation.

CONCLUSION

Based on the above, Canizales' attempted murder conviction of Bolden in Count 2 should be reversed.

Respectfully submitted,

S/

Christine Vento

WORD COUNT CERTIFICATION

I, Christine Vento, am counsel for petitioner. I hereby certify pursuant to Rule 8.520(c)(1) of the California Rules of Court that in reliance on the word count of the computer program used to prepare this document, the word count of the body of this document, excluding tables and this Certification, is 5,553 words. The applicable word-count limit is 14,000 words.

Dated 2/13/16

S/

Christine Vento

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I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action. My business address is P.O. Box 691071, Los Angeles, CA 90069-9071. I am a member of the bar of this court. On February 13, 2016 I served the within REPLY BRIEF ON THE MERITS in said action, by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows, and deposited the same in the U. S. mail at Los Angeles, CA.

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PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D)& 8.71(f)(1)(A)-(D).)
Furthermore, I, Christine Vento, declare I electronically served from my electronic service address of vento107660@gmail.com the same referenced above document on 2-13-16 at about (8 p.m.) to the following:

APPELLATE DEFENDERS INC, e-service-criminal@adi-sandiego.com

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, http://www.courts.ca.gov/15317.htm

DAVID LAMPKIN dplampkin@aol.com

CALIFORNIA SUPREME COURT

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 13th day of February 2016, at Los Angeles, CA.

s/
Christine Vento