

GENERAL OFFICE MEMORANDUM 19-108

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM:  JOSEPH P. ESPOSITO
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SUBJECT: VIABILITY OF “KILL ZONE” THEORY OF ATTEMPTED MURDER
AFTER PEOPLE V. CANIZALES

DATE: OCTOBER 11, 2019

On June 24, 2019, in *People v. Canizales* (2019) 7 Cal.5th 591, the California Supreme Court provided a two-part standard for application of the “kill zone” theory of liability for attempted murder that it first articulated in *People v. Bland* (2002) 28 Cal.4th 313.

In *Bland*, the court described “kill zone” liability as a theory of concurrent intent to kill, not transferred intent. (*Bland*, 28 Cal.4th at 329.) The court held that the theory could apply where the perpetrator has a primary target and attacks in a manner that shows that the person intended to ensure harm to the primary target by killing everyone in the vicinity of that target. (*Ibid.*) The Supreme Court’s example was of an assailant placing a bomb on a commercial airplane intending to kill a primary target; because the assailant chose a means by which the deaths of all on board the airplane would occur, the evidence would show that the assailant had a concurrent intent to kill everyone on board the plane. (*Id.*, pp. 329-330.)

In *Canizales*, Canizales and his accomplice attempted to shoot and kill a rival gang member who happened to be standing in close proximity to a second rival gang member who was not an intended target. Neither rival gang member was struck, however, an innocent bystander was shot and killed. Relevant to this discussion, Canizales and his accomplice were charged with two counts of attempted murder with respect to the two rival gang members. As to these two counts, the trial court instructed the jury that they could convict the defendants either on a theory that they intended to kill the two or on the “kill zone” theory. The prosecutor relied on both theories in her closing arguments. The jury convicted Canizales and his accomplice of the two attempted murders and they appealed.

In reversing the conviction as to the rival gang member victim who was not the intended target, the California Supreme Court stated:

[T]he kill zone theory for establishing specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant’s attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a

zone of fatal harm – that is, an area in which the defendant intended to kill everyone present to ensure the primary target’s death – around the primary target; and (2) the alleged attempted murder victim who was not the primary target was located in that zone of harm.

(*Canizales*, 7 Cal.5th at 607.)

The justices unanimously found that the trial court erred by instructing with language regarding the “kill zone” theory because the evidence did not show that defendants intended to create a zone of fatal harm. (*Canizales*, 7 Cal.5th at 611.) “Going forward trial courts must exercise caution when determining whether to permit the jury to rely upon the kill zone theory” and the theory should be used in “relatively few cases.” (*Id.*, p. 608.)

Canizales does not substantially change the law. It repeats the definition of the “kill zone” theory in a succinct fashion, adopts a two-part clear and workable test for application of the “kill zone” theory, and requires that CALCRIM 600 be supplemented.

Necessary Changes to CALCRIM 600

When the evidence supports a kill zone theory of specific intent, the jury will be instructed with CALCRIM 600. Because the *Canizales* court found the language in CALCRIM 600 to be faulty, the instruction must be amended to define “zone of harm” and to instruct the jury to consider the following factors related to the defendant’s attack in determining whether the defendant intended to kill everyone in the zone of harm: (1) the type of weapon used, (2) the number of shots fired (where a firearm is used), (3) the distance between the defendant and the alleged victims, and (4) the proximity of the alleged victims to the primary target. (*Canizales*, pp. 609, 613.)

Template language that may be inserted into CALCRIM 600 is provided with this GOM. Until CALCRIM 600 is amended by the Judicial Council, this language should be used in every case in which deputies rely on the “kill zone” theory.

jfp

**TEMPLATE LANGUAGE TO BE ADDED TO THE RELEVANT PORTION OF
CALCRIM 600 WHEN THE EVIDENCE SUPPORTS A “KILL ZONE” THEORY OF
CONCURRENT INTENT**

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 fatal harm or “kill zone.” In order to convict the defendant of the attempted murder of <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>, the People must prove that the defendant not only intended to kill <insert name of primary target alleged> but also either intended to kill <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>, or (1) the circumstances of the attack on <insert name of primary target alleged>, including the type and extent of force used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm — that is, an area in which the defendant intended to kill everyone present to ensure <insert name of primary target alleged> death: and (2) <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory> was located within that zone of fatal harm.

In determining whether the defendant intended to kill everyone in the kill zone, you shall consider the following factors: (1) the type of weapon used, (2) the number of shots fired (where a firearm is used), (3) the distance between the defendant and the victims, and (4) the proximity of the other victims to <insert name of primary target alleged>.

If you have a reasonable doubt whether the defendant intended to kill <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory> or intended to kill <insert name or description of primary target alleged> by killing everyone in the zone of fatal harm, then you must find the defendant not guilty of the attempted murder of <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>.