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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' OPENING BRIEF ON THE MERITS

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Supreme Court

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CANIZALES' OPENING BRIEF ON THE MERITS

QUESTION PRESENTED

Was the jury properly instructed on the"kill zone" theory of attempted murder?

SUMMARY OF THE ARGUMENT

The jury was not properly instructed, and should not have been instructed, on the "kill zone" theory. CALCRIM No. 600, the instruction on the "kill zone" theory, was inapplicable as there was no evidence that a kill zone existed that Bolden inhabitated. Even if a kill zone existed, the instruction erroneously failed to require the jury to find that Bolden was in a kill zone before liability could be imposed.

The instruction also critically misled the jury by improperly suggesting that petitioner can be convicted of the specific intent to kill crime of attempted murder merely by subjecting individuals other than his intended target to a risk of fatal injury. It allowed a conviction for attempted murder when the defendant's conduct could have only established a conscious disregard for the life of the nontargeted individual not an intent to kill.

To ensure that the jury found a concurrent intent to kill the nontargeted individual, the jury should have been instructed that "[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. 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." (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798.) Unless the instruction fully clarifies the need for the specific intent to kill in more comprehensive terms as the *McCloud* case indicates, there will be a risk that the jury will conclude that attempted murder liability is proper for highly dangerous conduct that would support a wanton disregard murder conviction if the victim died. The instruction lowered the prosecution's burden of proof by expanding the liability for attempted murder to include implied malice.

Further, the instruction was incomplete, argumentative, unnecessary. The technical term "kill zone" should be described in the instruction to ensure the jury understands that the concept is limited to situations where death is a near certainty not where death is

only a risk. The instruction violates the prohibition against argumentative instructions because it goes beyond merely referring to the requisite zone of risk, and instead, proceeds to describe it in provocative and inflammatory terms as a "kill zone." 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 by implying that firing into an area must invariably carry with it an intent to kill. Lastly, the instruction was unnecessary as this Court has repeatedly stated.

The defendants were prejudiced by the inapplicable, misleading, incomplete, argumentative and totally unnecessary instruction. The instruction lowered the prosecution's burden of proof, thus violating defendants constitutional rights to a fair jury trial and due process of law.

STATEMENT OF THE CASE

Defendant [1] was convicted, as charged, by a jury of the willful, deliberate and premeditated murder of Leica Cheri Cooksey in violation of Penal Code section 187, subdivision (a) (count 1) [2] and two counts of attempted willful, deliberate and premeditated murder of Travion Bolden and Denzell Pride (counts 2 and 3, respectively) in violation of Penal Code sections 664/187, subdivision (a). (2 CT 285, 288-289, 292-293.)

Defendant had also been charged and tried for street terrorism in violation of Penal Code section 186.22 subdivision (a) in count 4, but before the jury was instructed, the prosecutor moved to dismiss count 4 as well as the Penal Code section 12022.53, subdivisions (b), (c) and (e)(1) allegations on count 1 and the Penal Code section 12022.53, subdivision (b) and (e)(1) allegations on counts 2 and 3. (2 CT 265.)

The jury found the gang enhancement true in all counts. (Pen. Code, § 186.22, subd. (b).) (2 CT 287, 291, 295.) The jury, however, found not true on count 1 that a principal personally and intentionally discharged a firearm that caused the death of Ms. Cooksey. (Pen. Code, § 12022.53, subds. (d) and (e)(1).) (2 CT 286.) The jury found not true on counts 2 and 3 that a principal personally and intentionally discharged a firearm. (Pen. Code, § 12022.53,

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1. Defendant was tried with codefendant KeAndre Windfield who is a party in this petition.

2. The liability for Ms. Cooksey's death was based on the doctrine of transferred intent.

subds. (c) and (e)(1).) (2 CT 290, 294.)

On count 1, defendant was sentenced to 25 years to life, and on counts 2 and 3 to a consecutive term of life with parole with the minimum parole eligibility period of 15 years for each count. (Pen. Code, § 186.22, subd.(b)(5).)

The judgment was affirmed by the Fourth District Court of Appeal, Division Two in a published opinion on 3-5-14 People v. Canzales et al. Case No. E054056 formerly 224 Cal.App.4th 440.

On 6-25-14, this Court granted defendant's Petition for Review in S217860 and ordered briefing deferred pending finality of the decision in *People v. Chiu* (2014) 59 Cal.4th 155, which held that an aider and abettor cannot be convicted of first degree premeditated murder under the natural and probable consequence doctrine of derivative liability.

On 8-13-14, this Court transferred the case back to the Court of Appeal, Fourth Appellate District, Division Two, for reconsideration in light of the decision in *People v. Chiu* (2014) 59 Cal.4th 155.

In a partially published opinion on 9-10-14 ("the Opinion") in *People v. Canzales* et al. Case No. E054056, formerly 229 Cal.App.4th 820, defendant's first degree murder conviction was reversed, but the judgment was otherwise affirmed by the Fourth District Court of Appeal, Division Two.

On 11-19-14, this Court granted defendant's Petition for Review in E054056 on the question presented.

STATEMENT OF THE FACTS

Events before the shooting

The Taco Bell encounter

Around noon on July 18, 2008, Travion Bolden ("Bolden"), who was a member of Hustla Squad and defendant (aka "White Chocolate"), who was a member of a rival gang, Ramona Blocc, were at Taco Bell in Rialto. An unidentified girl who was with defendant came up to Bolden and asked him, "Where's Denzell [Pride] at"? (2 CT 478-481; 2 RT 368, 390, 483, 511; 3 RT 672.) When defendant came up and shook Bolden's hand, Bolden knew something was wrong. Bolden thought they were trying to set Denzell Pride ("Pride") up. (2 CT 480-481.)

When Pride, who was also a member of Hustla Squad, came into the Taco Bell soon thereafter, he and defendant argued over the girl. (2 CT 480-481; 2 RT 307; 3 RT 672.) Pride indicated he wanted to fight, but defendant declined, saying he was not fighting over a girl. (2 CT 481.) Bolden did not want to join the argument and didn't have to. (2 CT 481-482.)

The West Jackson Street encounter

Later that same day, on West Jackson Street, Kennetha Small ("Small") joined Bolden and a group of girls. (1 RT 153, 156-157.) Small noticed defendant and called him over. (1 RT 157, 160.) According to Small, Bolden became agitated when he saw defendant. (3 RT 732.) A loud, heated, aggressive verbal match ensued for

about 5 to 7 minutes, with each shouting their own turf. (2 RT 375-376; 3 RT 727.) Bolden walked toward defendant; both seemed angry. Small then told defendant to leave which he did. (2 RT 375-377.)

After the encounter with defendant, Bolden ran to the 300 block of West Jackson to tell Pride what had happened. (1 RT 170-171, 174.) After Bolden told him what had happened, Pride started to run out into the street to go after defendant, and made it as far as Willow, when Pride's mother and Bolden's mother yelled at him to stop. (1 RT 175-177.) Pride told Bolden that defendant was not going to fight him; he was just scaring him. (2 CT 483.) Later Pride confirmed to Bolden that the people defendant hangs out with, i.e., Ramona Blocc gang members, do not like him. (1 RT 177, 220.)

The Superior Market encounter

After the argument on West Jackson, defendant walked to a nearby grocery store. (2 CT 482.) When defendant got to the market, he sent a boy to his apartment to get help. (3 RT 741-742.) Soon thereafter, codefendant KeAndre Windfield ("Windfield"), a member of Ramona Blocc, arrived at the market. (2 RT 414-415, 487.)

Sylvia Ayala, a police Explorer and former classmate of both defendant and Windfield, happened to be standing outside Superior Market when she observed both defendants, and then saw a car drive up and make contact with them. (2 RT 418.) Windfield approached the driver's side of the car, and said, "you roll up in a whip" meaning "you go in the car." (2 RT 418.) As the defendants

were walking away in the direction of West Jackson Street, they yelled "Jackson Street." (2 RT 422-423.) Ayala described both defendants as being "pumped up" "very crazy," doing a skipping type dance. (2 RT 424-425, 434-435.) As they walked out of sight, both defendants repeatedly shouted out "Ramona Blocc," their gang name, and threw up gang signs. (2 RT 422-424, 426, 430, 435.)

The shooting on West Jackson

The 300 block of West Jackson Street is a cul-de-sac with apartment buildings on either side, a park at one end and the intersection with Willow Avenue at the other. (1 RT 108, 112, 181 Ex. 55.) Pride and his mother lived in an apartment at 330 West Jackson which is in the middle of the block. (1 RT 182; 3 RT 574-575; Ex 55.) The street is wide; it can accommodate four cars, two parked cars on either side and two cars in traffic. The apartments are set back and have lawns, and there are curbs, grass medians, and sidewalks. (Exs. 8 and 76.) The length of the street from a manhole cover near the intersection with Willow to the cul de sac is 352 feet. (Ex. 76 [letter dated 4-22-11, paragraph 4.].) Based on a visual approximation, the street's width appears to be 125 feet, which codefendant's counsel noted is about the size of a football field. (See Exs. 55, 76; Windfield's Brief on the Merits p. 4.)

Later on that same day, Bolden and Pride went outside onto the 300 block of West Jackson and they were watching all the people outside preparing for a block party that night. (1 RT 180-182.) People were outside hanging around, talking and having a good time; there was even dancing in the street. (1 RT 107, 109, 183.) The

number of people outside varied from a lot, a little more than 10, 30, to the whole block being full of people. However many people there were, they were scattered about. (1 RT 108-109, 181-182; 2 RT 400.)

Bolden and Pride said it was dark out when the defendants arrived. (1 RT 190; 3 RT 580) Bolden saw defendant, Windfield and three other males get out of the car and begin walking down Willow facing Jackson. They lined shoulder to shoulder in the middle of Willow where it intersected Jackson. (2 CT 493; 1 RT 99, 211-212, 228-230.)

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.)

Pride testified that when the shots were fired, he was on West Jackson near the entrance to his apartment building. (3 RT 578-579, 581-582.) Bolden was either several car lengths away from Pride or standing next to him. (2 CT 487-489; 1 RT 185-186, 242, 246-247.) Bolden heard Windfield say, "that's the little nigga." (1 RT 206; 2 CT 486.)

Bolden testified that, when the shots were fired, Pride grabbed him and they both ran down West Jackson toward the park. (1 RT 190, 195-196; 2 CT 494.) Bolden also however explained that while Pride started running when the first shot was fired, he was too stunned and did not start running immediately. (1 RT 194, 247.) In an earlier interview, Bolden indicated something different, he said that Pride started to run before the shots were fired. (2 CT 486, 488.)

Pride was a moving target because he was running "zigzag" or serpentine. (1 RT 196, -247.) Bolden ran down the side of the street where Pride lived; whereas Pride ran down the opposite side of the street. (1 RT 247.) Windfield could not control his shots. (2 CT 491.)

Bolden said Windfield was referring to Pride when he said "get the nigga." Bolden believed that Windfield was shooting at Pride, and he watched Windfield continue to shoot at Pride as he ran. (1 RT 217; 2 RT 296.) Bolden was sure Windfield could not have been talking about him when he said to "get the nigga" because Windfield did not know him. (1 RT 206, 249.) Bolden also did not believe that Windfield was shooting at him because if he had been, Bolden, who was between Windfield and Pride, would have been shot. (1 RT 217; 2 RT 296.) Windfield shopped shooting, and all the Ramona Blocc members fled. (1 RT 101.)

Events after the shooting

Neither Bolden or Pride were hit. One shot, however, hit Leica Cooksey, a college student, who had come to the block party. (2 RT 397-402; 3 RT 708-710.) Bolden said that when Pride ran across the street, the bullet intended for Pride hit the girl. (2 CT 494.)

Bolden saw Pride later and commented that "they were tryin' to kill your ass." (2 CT 495.) When Bolden asked Pride why, Pride would not tell him; he would just say its "personal business" or its "Squad business." (2 CT 495.)

There was a lack of evidence, and the case went cold until in 2009 Meoshi Gordon told police that Windfield had admitted

committing the crime. (3 RT 641-642, 746-747.) Windfield said that he and defendant went to West Jackson, that "he" or "they" had killed a girl. (3 RT 627-633.) Windfield told Gordon that he and defendant had gone to West Jackson Street to get revenge on a Hustla Squad gang member who had killed Windfield's cousin. (3 RT 630-635.) Windfield said the guy he was shooting at ran and a girl, who got in the way, was shot. (3 RT 632-633, 644.)

Investigation

Five cartridge casings each stamped CCI .9 mm Ruger were recovered from the scene. One damaged copper-plated fired bullet was recovered from the body of Ms. Cooksey. (3 RT 719-721, 762.) A criminalist determined that the five fired cartridge casings were fired from the same firearm and the expended bullet was consistent with a CCI .9 mm Ruger. (3 RT 762-763.)

Rialto Police Department received a 911 call at 8:41 p.m. on July 18, 2008, and the first officer on the scene, Officer Gibson, arrived at 8:43 p.m. (3 RT 763.)

ARGUMENT

I. INSTRUCTING ON THE KILL ZONE THEORY WAS ERROR BECAUSE THE CRIME SCENE WAS NOT A KILL ZONE, OR IF A KILL ZONE DID EXIST, THERE WAS INSUFFICIENT EVIDENCE THAT THE NONTARGETED VICTIM WAS IN IT

A. Introduction

" '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.]' (*People v. Saddler* (1979) 24 Cal.3d 671, 681....)" (*People v. Alexander* (2010) 49 Cal.4th 846, 920–921.) Accordingly, if the record contains no evidence that would support application of the kill zone theory in this case, then the trial court erred by instructing the jury on that theory.

The instruction on attempted murder included a kill zone provision addressed to the charge of the attempted murder of Bolden in Count 2. In pertinent part, the instruction was 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 [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. (CALCRIM No. 600, 1 CT 233.)

There was no evidence to support the giving of the kill zone instruction and the instruction amounted to a misstatement of the specific intent to kill, which is a required element for a conviction of attempted murder.

B. Two prequisites to the application of the kill zone theory are an escalated mode of attack and victims in a defined space

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) The kill zone theory "addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can also be convicted of attempting to murder other, nontargeted, persons." (*People v. Stone* (2009) 46 Cal.4th 131, 138 ("*Stone*").)

The kill zone theory therefore yields a way in which a defendant can be guilty of the attempted murder of victims who were not the defendant's "primary target." (*People v. Bland* (2002) 28 Cal.4th 313, 330 ("*Bland*").) Under *Bland*, "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 around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm." (*People v. Smith* (2005) 37 Cal.4th 733, 745–746 ("*Smith*").)

A defendant, however, 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 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, but also on whether the nontargeted alleged attempted murder victim inhabited the zone of harm. (*Smith, supra,* 37 Cal.4th at pp. 755-756.)

This Court in *Bland* gave examples of the force required. "For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent

to kill others concurrent with the intent to kill the primary victim." (*Id.*, at pp. 329–330, emphasis added.) This Court was concerned with a defendant who escalates the attack. "When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death." (*Id.*, at p. 330.) With an escalated mode of attack, this Court had no problem in finding a specific intent to kill the unintended target. "The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. " (*Ibid.)*

The "kill zone" by its nature, however, must have a limited geographical area. 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 .) A kill zone can only exist in a defined space that can be saturated with lethal force. In order to determine whether the nontargeted person is in the kill zone, the area must be defined. 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. As explained below, it was error to instruct on the kill zone theory because the crime scene was a public street slightly smaller than a football field and the force used was only five shots from a semi-automatic handgun.

C. <u>Case law supports that the kill zone must necessarily be in a</u>

defined, limited, geographical area that is saturated with lethal force

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(s) 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.

Placing a bomb on a commercial airplane in order to blow up the plane as a means of killing a specific passenger is a paradigmatic example. (See *Bland, supra,* 28 Cal.4th at pp. 329-330.) *Bland* itself dealt with victims in a confined space. In *Bland*, the driver, accompanied by two passengers, drove his vehicle to where the defendant and another man were standing, each of whom was a gang member. After a short conversation during which the driver told the defendant that he was a gang member but that his companions were not, the defendant and the other man fired a series of shots into the car, killing the driver and wounding the passengers. (*Id.*, at p. 318.) The "kill zone" was defined as the interior of the car, and the group of potential secondary victims was defined as Wilson's two companions. The evidence thus raised an inference that the defendant intended to kill everyone in the car.

In *People v. Campos* (2007) 156 Cal.App.4th 1228,

1231, 1244, after looking in the front and back seats, defendant sprayed a car containing three people with nearly a dozen bullets at close range, killing two and wounding a third. The court held that evidence supported attempted murder of the wounded victim on theory that the defendant intended to kill everyone in the car. (*Ibid.*)

Another example of a classic kill zone case is *People v. Vang* (2001) 87 Cal.App.4th 554, which affirmed convictions of 11 counts of attempted murder for using high-powered, wall-piercing weapons to spray bullets at two occupied houses -- one count for each person in the houses. Even though this case predated *Bland*, it was cited with approval by this Court in the *Bland* opinion. (See *Bland, supra*, 28 Cal.4th at p. 330.) *Vang* found the evidence supported the conclusion that the "defendants harbored a specific intent to kill every living being within the residences they shot up." (*People v. Vang, supra*, at p. 564.) This Court described *Vang* as essentially a kill zone case. (*Bland, supra*, at p. 330.)

In *People v. Adams* (2008) 169 Cal.App.4th 1009, the defendant set fire to a house with intent to kill his mother, whom he knew was inside at the time. The court held that the evidence supported the attempted murders of three other occupants of the house on the theory that defendant harbored a specific intent to kill every living being within the residence when the defendant lit fires at the front and back doors of the house. (*Id.* at pp. 1013.) In *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1391, defendant fired multiple shots at people in a doorway.

The above cases support Canizales' analysis of the kill zone as necessarily being a defined, limited, geographical area which can be saturated with lethal force. Each of the above-referenced

cases involved multiple victims in close proximity to the intended victim. Without the limitations placed on the scope of the "kill zone", this judicially created theory of liability would be both illogical and unmanageable, and would deprive a defendant of due process of law. (See Argument IV.)

D. <u>The evidence was insufficient, as a matter of law, to support the inference that a kill zone was created, or if it did exist, that Bolden was in it</u>

The nature and scope of the attack did not establish a kill zone. 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.

The crime scene was also not confined. The 300 bock of West Jackson was a cul de sac with a park at one end. It was a two lane city street that had on both sides, curbs, grass mediums, sidewalks, and apartment buildings with lawns out front, and enough space to allow for two cars to pass when cars are parked on both sides of the street . (1 RT 112, 181; Exs. 8, 76.) The length of West Jackson from the cross street Willow to the park was 352 feet and the width was estimated to be 125 feet, which total area is similar to, but smaller than, a football field. (See Ex. 76 [4-22-11 letter, paragraph 4 and Ex. 55.)

It was July 18th about 8:40 p.m. and people were scattered around the 300 block of West Jackson and were, according to Bolden, preparing for a block party. Bolden said the whole block

was filled with at least 30 people, some of them were setting up tents with food and beverage. (1 RT 108, 181-183; 2 RT 400; 3 RT 763.) Pride said there was a crowd of people partying and dancing. (3 RT 554.) Others said there were only a few people outside; there were a little more than 10 people who were scattered on both sides of the street. (1 RT 108; 2 RT 400.)

When Windfield shot, Pride was near the front of his apartment building at 330 West Jackson. Based on measurements by a detective and a defense investigator, the estimated distance from Willow, or the manhole cover on Willow, where Windfield stood, and 329 West Jackson, just across the street from Pride's apartment, was either 100 or 160 feet. (3 RT 574-575; Ex 76, letter dated 4-2-11, paragraph 1; 3 RT 715, 722.) Windfield could not control his shots. (2 CT 491.) These facts show that no "kill zone" was established around Pride based on the nature of the attack and location of it.

The facts also do not permit an inference that Bolden, the unintended victim, inhabited any assumed "kill zone" when Windfield fired the 5 shots. That is, even if a kill zone had been established, Bolden was not in it.

Bolden testified that, when the shots were fired, Pride was standing with him. (1 RT 246-247; 2 RT 288-289.) In a police interview, however, Bolden said Pride was four car lengths away from him. (2 CT 488- 489.) Pride testified he was in front of his building. (3 RT 578-579.) Bolden testified that, when the shots were fired, Pride grabbed him and they both ran down West Jackson toward the park. (1 RT 190, 195-196.) Bolden also however explained that while Pride started running when the first shot was fired, he was too stunned and did not start running immediately. (1 RT 194, 247.)