IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S167051

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RODRIGO PEREZ,

Defendant and Appellant.

No. _____

Court of Appeal
No. B198165

(Los Angeles County
No. BA298659)

Appeal From The Superior Court Of The State Of California
In And For The County Of Los Angeles
Honorable Judith L. Champagne, Judge

PETITION FOR REVIEW

DAVID M. THOMPSON
State Bar No. 62999
Attorney for Appellant
100 Tamal Plaza
Suite 140
Corte Madera, CA 94925
(415) 457-3859

By Appointment of The Court of Appeal Under The California Appellate Project Independent Case System.

TABLE OF CONTENTS

Statutes

Miscellaneous

NECESSITY FOR REVIEW

The Court of Appeal misapplied the facts to the pertinent law in finding the willful, deliberate and premeditated designation of the attempted murders to be supported by substantial evidence.

This court has not decided whether multiple, or even one, conviction for attempted murder may be sustained where, as here, a defendant indiscriminately fires a single gunshot into a loosely dispersed group of people from a distance of 60 feet from a moving vehicle. Neither the "kill zone" theory articulated in *People v. Bland* (2002) 28 Cal.4th 313, nor *People v. Smith* (2005) 37 Cal.4th 733, where defendant fired one shot into a vehicle intending to hit the mother of a baby which was also in the direct line of fire, are applicable.

Moreover, currently before this court is *People v. Stone*, review granted June 25, 2008, S162675, where defendant was convicted of one count of attempted murder "when he fired a single shot into a crowd although he was ostensibly not shooting at anyone in particular and there was no 'primary' target." (Sup. Ct. statement of issues.) The questions presented are whether or not the trial court erred by instructing on the "kill zone" theory and whether substantial evidence supported the attempted murder conviction. These issues are sufficiently related to those presented here, that, at the very least, this court should grant review and defer briefing pending the decision in *Stone*.

Review should be granted to secure uniformity of decision and to settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FINDING THAT THE ATTEMPTED MURDERS WERE WILLFUL, DELIBERATE AND PREMEDITATED

The finding by the jury that the attempted murders were willful, deliberate and premeditated were not supported by substantial evidence. The Court of Appeal erred in sanctioning that verdict.

Whether this court sanctions all, none, or one of the attempted murder convictions (see argument II), the finding by the jury that the attempted murders were willful, deliberate and premeditated was not supported by substantial evidence. No rational trier of fact, on this record, could have made such a finding beyond a reasonable doubt.

In *People v. Anderson* (1968) 70 Cal.2d 15, this court set out guidelines to be considered by appellate courts when judging the sufficiency of the evidence necessary to sustain a finding of premeditation and deliberation. Such courts must determine whether there was evidence of (1) a defendant's planning activity prior to the homicide (2) a motive to kill, as gleaned from his prior relationship or conduct with the victim, and (3) the manner of killing, from which may be inferred that the defendant had a preconceived desire to kill. An analysis of the cases shows that this court "sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in

By using the words "willful," "deliberate" and "premeditated," the legislature intended to require substantially more reflection than may be involved in the mere formation of a specific intent to kill. (*People v. Risenhoover* (1968) 70 Cal.2d 39, 51.) A finding that a murder is "willful," "deliberate" and "premeditated" is "proper only if the defendant killed 'as a result of careful thought and weighing of considerations, as a deliberate judgment or plan; carried on coolly and steadily, [especially] according to a preconceived design.' " (*People v. Martinez* (1987) 193 Cal.App.3d 364, 369.)

Appellant's defense was that his friend, unknown to appellant, carried a firearm and, without warning or appellant's knowledge, fired one shot at the group in the parking lot. Either believing that appellant was the shooter or that he aided the shooter, the jury convicted appellant. In any event, even if true, whether appellant knew the people were police officers or he mistakenly believed they were VNE gang members, the shooting was still not willful, deliberate and premeditated.

If appellant knew the people in the parking lot were police officers, there is absolutely no evidence which complies with the *Anderson* criteria. Appellant did no planning as there is no evidence that he knew the officers would be in that parking lot at that time. There was no evidence of any motive including that appellant had any grudge against the police in general or any of the officers in the lot in particular. Finally, the one shot was fired from a moving vehicle some 60 feet from the group, not at point blank, or even close enough range to ensure a killing shot. (See *People v. Marks* (2003) 31 Cal.4th 197, 230 [close

Also, as noted above, only one shot was fired at the group which was approximately 60 feet away from the moving vehicle. This certainly was not at close range or did it involve a flurry of bullets to ensure a kill. (*People v. Francisco* (1994) 22 Cal.App.4th 1180, 1191-1192 [five or six shots fired at close range (five feet) by gang member who was looking for someone to shoot would support finding of premeditation].)

While the Court of Appeal dismissed the cases cited by appellant as "of no avail" contending that the facts of this case are all that matters, appellant disagrees. (Opn. 9.) A review of cases finding and not finding premeditation are helpful in determining in which category the instant facts fall. For instance, in *People v. Herrera* (1999) 70 Cal.App.4th 1456, defendant was convicted of attempted willful, premeditated, deliberate murders which occurred during rival gang related drive-by shootings. The shootings were in direct retaliation for very recent murders and attacks between the rival gangs. Before entering the vehicle from which the attack was launched, defendant told his girlfriend that his gang needed to retaliate against the rival gang. Also, defendant admitted at trial that he got into the car knowing that the plan was to "fuck up" the enemy. Finally, defendant admitted to casing the area of the attack before it occurred. (*Id.* at 1461-1463.)

Based upon these factors, the Court of Appeal found the evidence sufficient to sustain the verdicts. (*Id.* at 1463.) Here, however, none of these factors were present. There was no evidence of any prior recent conflicts between 8th Street and VNE. Also, there was no evidence that at 3 a.m.

stealing; no evidence of the use of a "spotter;" and, no evidence that appellant knew a group of VNE gang members would be at that location at 3 a.m. until only seconds before the incident.

Finally, *People v. Munoz* (1984) 157 Cal.App.3d 999, is instructive. There, defendant and two friends, Ramirez and Galvan, were "cruising." Ramirez saw a man crossing the street and defendant told Ramirez to drive up to the man and stop the car. Defendant asked for directions to Los Angeles and the man, Klima, responded. Ramirez drove off but, at defendant's request, backed the car to question the man again. Klima said to keep going the same way. Ramirez began to drive away when defendant told Ramirez to stop. Munoz again asked Klima for directions. When Klima bent down to answer, defendant demanded his wallet. Klima took a step backwards; defendant shot him from a distance of four to five feet. Ramirez heard three shots from the back of the car, saw Klima grab his chest and heard him yell for help. Defendant told Ramirez to drive away, hitting him on the back of the head when he did not immediately do so. Ramirez asked defendant why he shot the man. Defendant said, "For the hell of it." Ramirez testified there had been no discussion of a robbery and he did not know there was a gun in the car. (*Id.* at 1004-1005.)

Despite the fact that the defendant in *Munoz* had multiple contacts with Klima and was in possession of a weapon, the court concluded that, "the events surrounding the killing do not contain sufficient solid planning or motive facts of credible value to support" a first degree murder conviction, and the brief time

II.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT ANY OF THE ATTEMPTED MURDER CONVICTIONS OR, AT MOST, AS TO OFFICER FUENTES

Appellant was convicted of the attempted murder of seven of the police officers and one civilian at the scene of the carjacking investigation although only one shot was fired which struck Officer Alejandro Fuentes. On appeal, it was argued that under the facts of this case, the evidence was insufficient to sustain seven of the attempted murder convictions. The Court of Appeal sustained the verdicts based primarily upon *People v. Smith* (2005) 37 Cal.4th 733. (Opn. 9-10.) As discussed below, appellant contends that *Smith* is not controlling as the operative facts in that case are much different than those presented here and that only one attempted murder conviction, that of Officer Fuentes, is sustainable.

Moreover, as argued in the dissent by Justice Rothschild, under the unique facts of this case, none of the attempted murder verdicts are supportable by substantial evidence.

The Law

Section 187, subdivision (a) provides: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." In order to prove an attempted murder charge, there must be sufficient evidence of the intent to commit the murder plus a direct but ineffectual act toward its commission. (*People v. Morales* (1992) 5 Cal.App.4th 917, 925.) Although malice may be

someone else -- is inapplicable to attempted murder. (*Id.* at 688.) Indeed, the court quoted from *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1475 that, " '[W]here a single act is alleged to be an attempt on two persons' lives, the intent to kill should be evaluated independently as to each victim and the jury should not be instructed to transfer intent from one to another.' " (*People v. Chinchilla, supra*, 52 Cal.App.4th at 688.)

In *People v. Vang* (2001) 87 Cal.App.4th 554, 11 counts of attempted murder were upheld where, in two incidents, defendants fired numerous shots into residences occupied by several individuals in addition to the intended targets. In so doing, the Court of Appeal noted that, "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 thing being within the residence they shot up." (*Id.* at 563-564.)

Defendants had argued that the evidence was deficient as it failed to prove they intended to kill any inhabitants other than the two targets. (*Id.* at 563.) Interestingly, the Court of Appeal observed that, "Defendant's argument might have more force if only a single shot had been fired in the direction of where [the intended targets] could be seen." (*Id.* at 564.)

Next came *People v. Bland* (2002) 28 Cal.4th 313, where defendant and another fired numerous times into a stopped vehicle at point-blank range and as the vehicle pulled away, killing the driver and wounding the two passengers. Defendant was convicted of the first degree murder of the driver and the

had fired at close range at a van full of people in response to a gang challenge. "The exact number of the occupants of the van is immaterial. Defendant's actions created a 'kill zone.' His act of firing multiple shots at a vehicle full of people endangered the lives of every occupant in that vehicle ..." (*Ibid.*)

This court revisited the attempted murder issue in *People v. Smith*, *supra*, 37 Cal.4th 733. There, defendant fired a single shot into a vehicle occupied by a mother and her infant son. The mother, whom appellant was trying to hit, was driving and her son was in a rear-facing infant car seat in the backseat directly behind her. The single shot shattered the rear window and narrowly missed both mother and baby. (*Id.* at 736-737.) Defendant challenged his conviction for two counts of attempted murder arguing that his firing only one bullet into the vehicle reflected his intent to kill only mother and that the conviction for attempted murder of the child "must be reversed for lack of substantial evidence that he harbored specific intent to kill the child." (*Id.* at 738.)

This court observed that, "To be guilty of attempted murder of the baby, defendant had to harbor express malice toward that victim" and that, "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.]" ' " Also, " 'To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else.' " (*Id.* at 739-740.)

In rationalizing its conclusion that the attempted murder conviction of the baby was supported by substantial evidence, this court noted that, among

This also is nothing like *Chinchilla* or even *Smith*. In both of those cases, the two victims of the one shot fired by the defendant were directly in the line of fire and there was evidence that defendant actually wanted to kill both victims. In *People v. Chinchilla*, *supra*, 52 Cal.App.4th 683, defendant was attempting to escape from the two officers. (*Id.* at 687.) In *People v. Smith*, *supra*, 37 Cal.4th 733, there was evidence that defendant may have wanted to kill his ex-girlfriend's baby as well as the ex-girlfriend. (*Id.* at 748.)

Here, according to the prosecution's theory, appellant fired a single shot toward a group of people whom he believed to be VNE gang members and that by doing so, appellant specifically intended to kill each and every person. The problem is the manner of the shooting does not show that appellant either desired the death of any of those persons not hit or knew to a substantial certainty that such result would occur. (*Id.* at 739.)

While there was evidence that appellant was an 8th Street gang member and that the shooting took place at a VNE hangout, there was no evidence that 8th Street and VNE, who were rivals, had recently clashed or that appellant held any particular grudge against VNE members. In other words, there was no incident which had precipitated any desire on appellant's part to exact revenge on VNE members.

Also, the single shot was fired by appellant from a distance of some 60 feet from a slowly moving vehicle. However, while the police officers were in fairly close proximity, there is no evidence that they were so close that any one shot endangered more than one person. It is entirely reasonable to assume that

Werdegar in her dissent in *People v. Smith*, *supra*, 37 Cal.4th 733, Justice Rothschild explained that, "Here, there is no evidence of a 'targeted victim.' Here, the single shot was fired from 60 feet away, not 'at close range.' Here, the victims were standing anywhere from 2 to 15 feet apart from one another, not 'in a close crowd.' " Accordingly, the "convictions on eight counts of attempted murder are not supported by substantial evidence." (Dis. Opn. 3.)

* * * * *

EXHIBIT A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RODRIGO PEREZ,

Defendant and Appellant.

B198165

(Los Angeles County
Super. Ct. No. BA298659)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

claims territory bordered on one side by Grande Vista Avenue. VNE claims the territory on the other side of Grande Vista.

On the afternoon of the following day, July 2, 2005, defendant, his girlfriend, Vanessa Espinoza, and Espinoza's cousin, Lissette Guerrero, attended a barbeque in Elysian Park. Guerrero testified that the three left the barbeque after dark. Defendant dropped Guerrero and Espinoza off at defendant's house and drove away. Espinoza testified (under a grant of immunity) that defendant woke her up around 3:00 a.m. the next morning (July 3). Defendant appeared drunk and told Espinoza he thought he had shot a cop.

Meanwhile, about 1:30 a.m. on July 3, 2005, officers responded to a report of a carjacking. The car which had been stolen was at an apartment building parking lot abutting the VNE side of Grande Vista Avenue. Officers arrived at the scene and detained some of the carjack suspects. The carjack victims were brought to the scene for in-field identifications.

At one point, eight uniformed officers and one of the carjack victims, as well as three marked police cars, were in the parking lot. A fourth marked police car was at a nearby corner. One of the officers noticed a car with two people inside turning from Olympic onto Grande Vista, driving about 60 feet away at 10 to 15 miles per hour. A shot was fired from the passenger side window. The shot hit the middle finger of Officer Rodolfo Fuentes, who was standing next to the carjack victim. Fuentes dropped down (as did the other officers at the scene) and pulled the carjack victim down with him. The car, with what appeared to have been two males inside, sped off.

The parking lot where the officers were standing had an "overhang illuminated light." There were also some trees between the lot and Grande Vista. The lighting conditions were described by one officer as "good enough where you can see." Another officer described the lighting as "very dim" and "very dark." When the shot was fired, several officers were standing in an area near the carjack victim and his car. As described in the testimony of the various officers, the carjack victim (counts 17–18) was standing next to Officer Fuentes (counts 1–2), Officer Trujillo (counts 9–10) was two feet

responded, "'[L]et me hold on to it. Let me use it.'" Leyva acceded to defendant's request, stating that he would come back for the gun in two days. Two days later, when Leyva went to retrieve the gun, defendant told him that he was drunk the night before, had fired a shot, and then sped home.

The prosecution's gang expert was of the opinion that the shooting had been committed for the benefit of the Eighth Street gang, whose primary activities included murder and robbery. Members of the gang had committed predicate offenses.

Testifying in his own behalf, defendant admitted that in the past he had been a member of the Eighth Street gang but asserted that his gang activities ceased in 2004. (Defendant's father and an ex-VNE member who directed a youth program also testified to this effect.) Defendant denied spray painting the elementary school. On the night of the shooting, defendant drove to an apartment complex to meet a friend. The two smoked marijuana and drank beer. As defendant was driving home, another friend asked for a ride. Defendant drove the friend on Olympic Boulevard, intending to get on the Interstate-5 freeway. Defendant had turned on Grande Vista when his friend said, "'Who's them fools right there, fool?'" Defendant said he did not know who they were, at which point he heard a loud noise and saw his friend holding a gun. The friend told defendant to "'step on it,'" and defendant drove away quickly. The next morning, defendant heard on the news of a police officer getting shot. Defendant further claimed that his conversations with Morales and Leyva did not include an admission that he had fired a gun.

DISCUSSION

1. Sufficiency of the Evidence

In resolving claims of insufficient evidence, "our role on appeal is a limited one. 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]

of the transcripts and exhibits, we conclude ample evidence was presented to demonstrate that someone in defendant's position reasonably should have known that his intended victims were peace officers.

Defendant alternatively contends that his trial counsel rendered ineffective assistance in failing to object to, or later clarify, the prosecutor's opening argument to the jury that voluntary intoxication could not be used in determining whether defendant reasonably should have known that his intended victims were peace officers. Again, we disagree.

"To show ineffective assistance of counsel, defendant has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. [Citations.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 519–520; see also *People v. Ledesma* (1987) 43 Cal.3d 171, 215–218.) The first prong of this test is satisfied on direct appeal only if the record affirmatively discloses that counsel had no rational tactical explanation for the allegedly ineffective act or omission. (*People v. Zapien* (1993) 4 Cal.4th 929, 980; *People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

It is true that during closing argument the prosecutor disparaged defendant's legitimate intoxication defense to knowledge that he was shooting at police officers, stating among other things that "you don't get to walk on that allegation because you were intoxicated, because your perceptions were off." It is also true that defense counsel also argued that "[y]ou can't go out and get drunk, and then use intoxication as a defense." But as to defense counsel's statement, it appears more likely that these words were merely a summary of the prosecutor's position, said in a tone of voice which, of course, is not knowable from the record. Immediately after making that statement, defense counsel went on to argue the intoxication defense, referring the jurors to the instruction they would be receiving on the topic and asserting that no one would be so

[Citation.] . . . The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; accord, *People v. Hawkins* (1995) 10 Cal.4th 920, 957, overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

The evidence here established that at the time of the shooting defendant was a participant in the activities of the Eighth Street gang, which had a rivalry with the VNE gang. Shortly before the shooting, defendant borrowed a gun from a friend, asking to use it for two days. On the night of the shooting, defendant decided to "pass by the VNE's" territory. While doing so, driving at a slow speed, defendant saw a group of people about 60 feet away whom defendant stated he thought to be VNE members. At that point, defendant fired a shot into the group, hitting Officer Fuentes.

Defendant's reliance on cases such as *People v. Herrera* (1999) 70 Cal.App.4th 1456 and *In re Serigio R.* (1991) 228 Cal.App.3d 588, which he characterizes as having evidence of premeditation that appears stronger than here, and on *People v. Munoz* (1984) 157 Cal.App.3d 999, where the evidence of premeditation appears weaker, is of no avail. The question we must resolve is whether the evidence in *this* case was sufficient to convince a rational trier of fact beyond a reasonable doubt that the attempted murders committed by defendant were premeditated. Based on the evidence outlined above, we conclude that it was.

c. Convictions of multiple attempted murders

Defendant was convicted of attempted murder in counts 1, 5, 7, 9, 11, 13, 15, and 17. He contends that because he fired only one shot, with which he hit Officer Fuentes, only the conviction of attempting to murder Fuentes (count 1) was supported by the evidence. The contention is without merit.

In *People v. Smith* (2005) 37 Cal.4th 733, the defendant fired a single bullet into a slowly moving vehicle, narrowly missing the driver and her baby son who was seated directly behind her. On appeal, the defendant contended that his conviction for attempted murder of the baby was unsupported because he harbored no animus toward the baby and the single shot evidenced only an intent to kill the mother. (*Id.* at pp. 738–739.) The

The graffiti defendant sprayed on the two walls of the Christopher Dena Elementary School on July 1, 2005, was painted over on July 5. Two witnesses testified on the issue of the damage caused by defendant's vandalism: Los Angeles Unified School District "senior painter" Edward McEniry and Los Angeles Unified "paint supervisor" Charles Sawyer.

McEniry testified that the timecard of the painter who did the actual work showed that he spent 2.25 hours at a rate of "[a]t least $49 an hour" with a paint cost of $25 to $30. A painter doing such work might paint over only the graffiti rather than paint the entire wall on which the graffiti is written. Schools in the East Los Angeles area such as Christopher Dena needed graffiti painted out on a "not-too-infrequent basis."

Sawyer, who is McEniry's supervisor, was shown a photograph of the graffiti sprayed on by defendant before it was painted over. McEniry testified that to paint over the graffiti and restore the walls to their original condition would take 10 hours of labor at $29 per hour and $200 in materials, for a total of $490. Including overhead and fringe benefits, the cost would rise to $687. Sawyer's department does not ask for entire walls with graffiti to be put back in their original condition because there is not enough time or manpower to do so. Sawyer further explained that it was not general policy to paint entire walls, but to paint only the sections of walls on which graffiti has been sprayed. In some cases, a section that had been painted over might have more graffiti sprayed on it the following week. Sawyer agreed that 2.25 hours for labor and approximately $25 in costs is "[t]he most accurate estimate for the repair of that wall is the work that was actually done."

Defendant asserts that the policy of the school district in dealing with graffiti, which was put into practice here, limited the damage done by defendant's vandalism to under the $400 threshold (2.25 hours at $49 per hour plus $25 equals $135.25). But merely because a school district may not have the resources to fully repair graffiti damage by completely repainting the wall on which it is written, the amount of damage caused by the defendant does not change. The $697 figure for that damage, which the

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to award 57 days of presentence conduct credits and to forward the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

MALLANO, P. J.

I concur:

NEIDORF, J.*

---

* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

zone" theory to uphold the defendants' convictions on one count of murder and two counts of attempted murder. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 318, 329-331.) The "kill zone" theory would have been unnecessary, however, if the Court had not been considering the convictions collectively. Each conviction, considered individually, would have been supported even if the defendant had not created a "kill zone" by firing multiple rounds but rather had fired only one bullet into the car.

In *Smith*, the defendant was standing behind a car when he fired a single bullet through the rear windshield, hitting the driver's headrest but missing both the driver and her three-month-old son, who was "secured in a rear-facing infant car seat in the backseat" directly behind her. (*People v. Smith*, *supra*, 37 Cal.4th at pp. 736-737.) In affirming the defendant's convictions on two counts of attempted murder, the Court repeatedly emphasized that both victims "were in [the defendant's] direct line of fire." (*Id.* at p. 745; see also *id.* at p. 746 ["two victims who are both, one behind the other, directly in [the defendant's] line of fire"].) Again, the presence of *both* victims in the defendant's "direct line of fire"—which gave the shooter the apparent ability to kill them both with one shot—would have been irrelevant if the Court had not been considering the convictions collectively. Considered individually, each conviction would have been supported by the evidence even if the victims had been situated in such a way that a single bullet could *not* have killed them both. (See also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690-691 [affirming two attempted murder convictions on the basis of one shot "fire[d] at two officers, one of whom [was] crouched in front of the other"].)

Given the Supreme Court's analysis, I believe we must consider Perez's eight attempted murder convictions collectively when evaluating his substantial evidence challenge. If we do so, the convictions must be reversed. The record contains no evidence that Perez intended to kill eight people or had the apparent ability to kill eight people with one bullet.

In her dissent in *People v. Smith*, *supra*, 37 Cal.4th 733, Justice Werdegar described the following hypothetical: "If assailant D shoots a handgun once at close range in the direction of a targeted victim, V1, who is standing in a close crowd of

PROOF OF SERVICE BY MAIL

I, PAT HAGER, declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the within action. My business address is 100 Tamal Plaza, Suite 140, Corte Madera, and I am employed in the City of Corte Madera, County of Marin, California. I reside in the City of Mill Valley, County of Marin, California.

I served the attached **PETITION FOR REVIEW** on September 25, 2008, by depositing a copy in the United States mail in Mill Valley, California in a sealed envelope, with first class postage fully prepaid, addressed as follows:

RODRIGO PEREZ
F-71704
K.V.S.P.
P.O. Box 5102
Delano, CA 93216

DISTRICT ATTORNEY
Los Angeles County
320 W. Temple Street, Rm. 780
Los Angeles, CA 90012

JONATHAN B. STEINER, ESQ.
California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

SUPERIOR COURT
Los Angeles County
Attn: Hon. Judith L. Champagne
210 W. Temple Street
Los Angeles, CA 90012

CALIFORNIA ATTORNEY GENERAL
300 South Spring Street
North Tower, Suite 5001
Los Angeles, CA 90013
Representing the People of
the State of California

COURT OF APPEAL
Second Appellate District,
Division One
300 South Spring Street
Floor Two, North Tower
Los Angeles, CA 90013-1213

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

Dated: September 25, 2008

PAT HAGER