IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S167051
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
RODRIGO PEREZ,	)	
	)	
Defendant and Appellant.	)	
	)	

Second District Court of Appeal, Division One, Case No. B198165
Los Angeles County Superior Court Case No. BA298659
Honorable Judith L. Champagne, Judge Presiding

PETITIONER'S OPENING BRIEF ON THE MERITS

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By Appointment of The
Supreme Court Of California

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ISSUE PRESENTED

"Were defendant's convictions for attempted murder of seven police officers and a civilian supported by sufficient evidence when only one shot was fired, which struck an officer?"

STATEMENT OF CASE

By amended information, defendant was charged with eight counts of premeditated attempted murder of a peace officer (Pen. Code §§ 664,

subds. (e), (f)/187, subd. (a); Counts I, III, V, VII, IX, XI, XIII, and XV), one count of premeditated attempted murder (Pen. Code §§ 664/187, subd. (a); Count XVII), eight counts of assault on a peace officer with a semiautomatic firearm (Pen. Code § 245, subd. (d)(2); Counts II, IV, VI, VIII, X, XII, XIV, and XVI), one count of assault with a semiautomatic firearm (Pen. Code § 245, subd. (b); Count XVIII), and one count of felony vandalism (Pen. Code § 594, subd. (a); Count XIX). (2 C.T. pp. 301-311.)

It was further alleged as to Counts I through XIX that the offenses were committed for the benefit of a criminal street gang (Pen. Code § 186.22, subd. (b)(1)), and as to Counts I through XVIII that defendant discharged a firearm causing great bodily injury (Pen. Code § 12022.53, subds. (b), (c), (d)), and inflicted great bodily injury as a result of discharging a firearm from a motor vehicle (Pen. Code § 12022.55). (2 C.T. pp. 301-312.)

Upon a jury trial, defendant was found guilty of all counts except for Counts III and IV, which both pertained to Officer Monahan. The jury further found true all enhancement allegations as to the counts of conviction. (3 C.T. pp. 584-625.)

On March 12, 2007, defendant was sentenced to a total prison term of 40 years to life for Count I consisting of 15 years to life for his attempted murder of a peace officer conviction, plus 25 years to life for the personal

use of a firearm causing great bodily injury enhancement. Sentences for all remaining attempted murder convictions were imposed concurrently, and sentences for all assault convictions, Count XIX, and all remaining firearm enhancements were stayed pursuant to Penal Code section 654. (3 C.T. pp. 656-668.)

On appeal from the above judgment, defendant asserted, among other things, that there was insufficient evidence to support eight attempted murder convictions in light of the evidence that defendant fired only a single gunshot into a crowd. In a majority unpublished opinion, the Court of Appeal held the evidence was sufficient to support all eight attempted murder convictions and affirmed the judgment. (*People v. Perez* (Aug. 21, 2008, B198165) (dis.opn. Rothschild, J.).)

On November 19, 2008, this Court granted review on the following issue: "Were defendant's convictions for attempted murder of seven police officers and a civilian supported by sufficient evidence when only one shot was fired, which struck an officer?"

STATEMENT OF FACTS

Defendant adopts the summary of the evidence as set forth in the Court of Appeal's Opinion. (Slip Opn. pp. 2-5.)

ARGUMENT

I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN EIGHT ATTEMPTED MURDER CONVICTIONS BECAUSE THE EVIDENCE IN THIS CASE AT MOST ESTABLISHED THAT DEFENDANT INTENDED TO KILL ONE PERSON STANDING AMONG A CROWD OF EIGHT INDIVIDUALS

A. Introduction And Proceedings In The Trial Court

The evidence in this case established that at approximately 1:30 a.m. on July 3, 2005, defendant was in a vehicle travelling 10 to 15 miles per hour at a distance of approximately 60 feet away from a crowd of eight police officers and one civilian carjack victim standing in a parking lot, when defendant fired a single gunshot towards the crowd. (Slip Opn. pp. 3-4; see also 1 R.T. pp. 74, 82; 3 R.T. p. 980.) The gunshot struck Officer Fuentes on the middle finger of his left hand, causing serious injury to his finger. (Slip Opn. pp. 3-4; see also 1 R.T. p. 47; 3 R.T. pp. 989-992.)

Among the crowd at the time of the shooting, the civilian carjack victim was standing next to Officer Fuentes talking with him (1 R.T. p. 103; 3 R.T. pp. 989-990), Officer Trujillo was about two feet away from Officer Fuentes also talking with him (1 R.T. pp. 102-103), Officer Menses was about three feet away from Officer Fuentes (1 R.T. p. 48), Officer Davis was between four and eight feet away from Officer Fuentes (2 R.T. p. 635),

Officer Aguilera was approximately five feet away from Officer Fuentes (1 R.T. pp. 75-76), Officer Villaneda was 10 to 15 feet away from Officer Fuentes (4 R.T. pp. 1176-1177), Officer Ortega was standing near the other officers taking photographs of the carjack victim's vehicle (3 R.T. pp. 925-927), and Officer Monahan was 20 to 30 feet away from the other officers (2 R.T. p. 710). (Slip Opn. pp. 3-4.)

Grande Vista Avenue in Los Angeles serves as a border between the territory of the rival VNE and Eighth Streets gangs. (Slip Opn. pp. 2-3; see also 5 R.T. pp. 1678-1680.) Defendant was an Eighth Street gang member (5 R.T. pp. 1618, 1689-1691), the shooting in this case occurred on the VNE side of Grande Vista Avenue (1 R.T. pp. 66-68; 5 R.T. pp. 1678-1670), defendant had been observed spray painting Eighth Street gang graffiti in that same area less than two days earlier (5 R.T. pp. 1686-1690, 1695-1699), and the evidence indicated defendant mistakenly believed he was shooting at a group of rival VNE gang members (4 R.T. pp. 1288-1289, 1373-1374; 5 R.T. pp. 1552, 1683-1684, 1712-1715; see also 7 R.T. p. 2200 [prosecutor's closing argument]). (Slip Opn. pp. 2-4.)

At the close of evidence, there was no discussion among the court and counsel regarding the attempted murder jury instructions. (7 R.T. pp. 2087-2090.)

At closing argument, the prosecutor argued that the evidence established that defendant did not have "a specific target in mind" when he shot at the group, but he did intentionally shoot towards the group with the intent to kill someone in the group, and that was sufficient for at least eight counts of attempted murder under the law. The prosecutor argued defendant did not intend to "kill everybody" in the group, but rather intended to "kill anybody, wherever that bullet hit." (7 R.T. pp. 2110-2111.) The prosecutor later argued that the evidence established that defendant's intent was "not to hit everyone, but to hit anyone. Anyone was the target in that particular crime." Defendant "had a target and that target was the group." (7 R.T. pp. 2124, 2129, 2206.) The prosecutor further argued that Officer Monahan may have been far enough away from the group such that an attempted murder was not committed as to him. (7 R.T. pp. 2120, 2206.)

Defense counsel primarily argued that defendant was the driver, not the shooter, and he did not know that his passenger was going to commit the shooting. (See, e.g., 7 R.T. pp. 2180, 2192.) Defense counsel further argued that whoever committed the shooting did not intend to kill everyone in the group. (7 R.T. pp. 2195-2196.)

Following the arguments of counsel, the trial court instructed defendant's jury with the standard version of CALCRIM No. 600 regarding

attempted murder. However, the trial court did not instruct the jury with the "concurrent intent" portion of CALCRIM No. 600. (3 C.T. p. 561; 8 R.T. pp. 2225-2226.) The trial court also did not instruct the jury on the doctrine of transferred intent.

Defendant was thereafter convicted by the jury of eight counts of attempted murder and assault with a deadly weapon, one for each of the eight officers at the scene other than Officer Monahan, and one for the civilian carjack victim. (Slip Opn. pp. 2, 4; 3 C.T. pp. 584-604.)

Following this Court's grant of review, defendant maintains herein that the evidence is insufficient to sustain eight attempted murder convictions because under the circumstances of this case, the evidence at most establishes that defendant attempted to kill one of the individuals in the crowd of seven police officers and one civilian, and thus would at most support one attempted murder conviction.

Furthermore, because the record supports the conclusion that defendant intended to kill whoever in the crowd was struck by the bullet, and because Officer Fuentes was actually struck by the bullet, the attempted murder conviction in Count One pertaining to him should be sustained, and the seven other attempted murder convictions should be reversed due to insufficient evidence.

B. The Court Of Appeal's Opinion

A majority of the Court of Appeal rejected defendant's sufficiency of the evidence challenge to his eight attempted murder convictions. (Slip Opn. pp. 9-10.) In doing so, the majority cited to both *People v. Smith* (2005) 37 Cal.4th 733, (dis. opn. of Werdeger, J.) ("*Smith*") and *People v. Chinchilla* (1997) 52 Cal.App.4th 683 ("*Chinchilla*"). (Slip Opn. pp. 9-10.) The majority affirmed all eight convictions, holding that based on the evidence herein, the jury could have properly determined that "the officers' close proximity to each other was such that in intending to kill any of the officers defendant's shooting endangered the lives of all." (Slip Opn. p. 10.)

The dissenting Justice found all eight attempted murder convictions were unsupported by the record because considered collectively, there was no evidence that defendant "intended to kill eight people or had the apparent ability to kill eight people with one bullet." (Dis. Slip Opn. pp. 1-2.) The dissent further reasoned that even a single conviction was unsupported by the evidence because there was no evidence of any particular "'targeted victim'" among the crowd. (Dis. Slip Opn. p. 3.) Finally, the dissent concluded that the majority applied the wrong legal standard in finding the convictions to be supported based upon evidence that defendant "endangered the lives" of all eight people. (Dis. Slip Opn. p. 3.)

As will be discussed in detail below, the majority's reliance on *Smith* and *Chinchilla* to affirm the eight attempted murder convictions herein was misplaced because in both of those cases, the two victims were positioned one behind the other in the direct line of fire such that the jury could conclude that the defendant attempted to kill both victims with a single bullet. (*People v. Smith, supra,* 37 Cal.4th at p. 747, emphasis in original ["defendant acted with intent to kill *both* the baby as well as the mother when he shot at them with a large-caliber firearm from close range knowing each was directly in his line of fire"]; *People v. Chinchilla, supra,* 52 Cal.App.4th at pp. 690-691 [two attempted murder convictions supported where one shot was "fire[d] at two officers, one of whom [was] crouched in front of the other"].)

Moreover, the majority applied an incorrect legal standard in finding the eight convictions to be supported by the evidence based on the conclusion that "the officers' close proximity to each other was such that in intending to kill any of the officers defendant's shooting endangered the lives of all." This was legally incorrect because while "endangering the lives of all" may be sufficient to support eight assault convictions and would also support a finding of implied malice murder had anyone been killed, endangering the life of someone does not constitute the express malice, i.e., intent to kill, that is necessary for an attempted murder conviction. Furthermore, attempted

murder requires the intent to kill the particular alleged victim, not someone else. Thus, a finding that defendant had the intent to kill "any" of the eight people in the crowd was insufficient to support even one attempted murder conviction.

C. Seven Of Defendant's Eight Attempted Murder Convictions Must Be Reversed Because There Was Insufficient Evidence That He Intended To Kill More Than One Individual

1. Standard Of Review

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 [a criminal conviction must be reversed on appeal if not supported by substantial evidence]; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-319 [99 S.Ct. 2781, 61 L.Ed.2d 560] [the federal constitution requires that a state court conviction be supported by substantial evidence].)

2. General Principles Of Law Applicable To Attempted Murder

"The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill.

Implied malice – a conscious disregard for life – suffices. [Citation]" (*People v. Bland* (2002) 28 Cal.4th 313, 327 ("*Bland*").) In contrast, "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intending killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.)

The mental state required for attempted murder is further distinguished from the mental state for murder in that the doctrine of transferred intent applies to murder but not attempted murder. (*People v. Bland, supra,* 28 Cal.4th at pp. 328-329.) "'To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. [Citation]' Whether the defendant acted with specific intent to kill 'must be judged separately as to each alleged victim.'" (*People v. Smith, supra,* 37 Cal.4th at p. 740.)

There is rarely direct evidence of a defendant's intent to kill. (*People v. Chinchilla, supra,* 52 Cal.App.4th at p. 690; *People v. Lashley* (1991) 1 Cal.App.4th 938, 946.) Such intent usually must be derived from all the circumstances of the attempt, including the defendant's actions and words. (*Ibid.*)

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3. Seven Of Defendant's Eight Attempted Murder Convictions Are Not Supported By Sufficient Evidence Because Both the Evidence And The Prosecution's Theory Of The Case Support The Conclusion That Defendant Intended To Kill At Most One Person

Defendant fired a single gunshot from a moving vehicle late at night into a crowd of eight people 60 feet away that were standing from two to fifteen feet away from each other. Under these circumstances, the evidence at most established that defendant possessed the requisite intent to kill one person within the crowd. Furthermore, because the doctrine of transferred intent does not apply to attempted murder, the intent to kill one person in the crowd cannot be transferred to all persons in the crowd, and his eight attempted murder convictions cannot stand. Several cases are on point.

In *Chinchilla*, the defendant fired a single shot and was convicted of two counts on attempted murder involving two victims. (*People v. Chinchilla, supra,* 52 Cal.App.4th at p. 685.) On appeal, the defendant challenged the sufficiency of the evidence to support both convictions, arguing that the doctrine of transferred intent does not apply to attempted murder. (*Id.* at p. 688.) The Court of Appeal agreed that transferred intent was inapplicable, but affirmed both convictions in light of the evidence that both victims were directly in the defendant's line of fire, one "crouched behind but above" the other. (*Id.* at pp. 690-691.)

In *Smith*, the defendant fired a single shot and was also convicted of two counts of attempted murder involving a mother and her baby. (*People v. Smith, supra,* 37 Cal.4th 733.) The evidence showed that the mother, who previously knew the defendant, was driving a car, her boyfriend was in the front seat, and her baby was secured in a car seat directly behind her. (*Id.* at pp. 736-737.) Both the mother and the baby were each in defendant's direct line of fire when he fired a single .38-caliber round at them from behind the car as it pulled away from the curb. (*Ibid.*) On appeal, the defendant did not challenge the sufficiency of the evidence to attempting to kill the mother, but did challenge the sufficiency of the evidence of his conviction of attempting to also kill the baby. (*Id.* at p. 736.)

In addressing this contention, this Court's majority repeatedly noted that to be guilty of attempted murder of the baby, the prosecution had to prove that he acted with specific intent to kill *that* victim. (See *People v. Smith, supra,* 37 Cal.4th at pp. 739, 743, 747, emphasis added.) This Court further held that the fact that the defendant fired only a single shot does not "as a matter of law" preclude multiple attempted murder convictions, and that each case must be analyzed on "its own particular facts." (*Id.* at pp. 744-745.) This Court further cited *Chinchilla* for the proposition that the facts of a particular case may support the conclusion that an intent to kill two victims

with a single bullet may be found where the victims were "*one behind the other*, in the shooter's line of fire." (*Id.* at p. 744.) Based on its own particular facts, this Court affirmed both attempted murder convictions, finding the evidence supported the conclusion that "defendant acted with intent to kill *both* the baby as well as the mother when he shot at them with a large-caliber firearm from close range knowing each was directly in his line of fire" (*Id.* at p. 747, emphasis in original.)

The most appropriate interpretation of *Chinchilla* and both the majority and dissenting opinions in *Smith* is that firing a single bullet does not as a matter of law preclude multiple attempted murder convictions. However, in order to support multiple convictions based on the firing of a single bullet, the evidence in a particular case must disclose that the shooting was committed under circumstances in which the jury could reasonably conclude that the defendant concurrently intended to strike and kill both victims with the single bullet, such as where two people were situated one behind the other directly in the line of fire as they were in both *Chinchilla* and *Smith*, and the bullet could have passed through one and also killed the other. (See *People v. Smith,* 37 Cal.4th at pp. 745-748 (maj. opn. of Baxter, J.); id. at pp. 755-757, fn. 3 (dis. opn. of Werdeger, J.).)

Further, the theory of concurrent intent to kill enunciated by this Court in *Bland* is not limited to cases where a defendant creates a "kill zone" and intends to kill a primary target by means of lethal force that evidences an intent to also kill one or more other individuals in order to ensure the targeted victim's death. (See *People v. Bland, supra,* 37 Cal.4th at pp. 329-331; *People v. Smith, supra,* 37 Cal.4th at pp. 745-746; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1242 ["*Bland* did not suggest that the 'kill zone' was the only way to establish concurrent intent to kill more than one person in a fired-upon group"].) Rather, concurrent intent may also be found, for example, where the evidence discloses the defendant committed an act that was intended to concurrently kill two or more equally targeted individuals for the same motive, such as by planting a bomb on an airplane in an attempt to kill all passengers for terrorist purposes, or by shooting at two people with the same intent to kill them both. (See, e.g., *ibid.*)

On the other hand, multiple convictions for attempted murder based on a concurrent intent theory are unsupported in a single bullet case such as this one, where the evidence shows an intent to kill either victim, but not both. In such cases, defendant has not committed an act with the requisite intent to kill both victims. (See *People v. Smith, supra,* 37 Cal.4th at p. 747 (maj. opn. of Baxter, J.); id. at pp. 755-757 (dis. opn. of Werdeger, J.); see also *People v.*

Bland, supra, 28 Cal.4th at pp. 327-328 [jury must independently find intent to kill each alleged victim].)

This interpretation of *Smith* is strongly supported by the majority's emphasis therein that the evidence therein supported the conclusion that the defendant intended to kill *both* victims. (*People v. Smith, supra,* 37 Cal.4th at p. 747, emphasis in original.) Obviously, intent to kill "both" victims is different than intent to kill "either" victim. This conclusion is also strongly supported by the dissent's emphasis that multiple attempted murder convictions may not be based upon evidence that a defendant intended to kill one person and there were others nearby that were endangered. (*People v. Smith, supra,* 37 Cal.4th at p. 757.)

Firing a single bullet in the direction of multiple individuals, as in this case, clearly endangers the life of all such individuals. Thus, as recognized in *Bland*, where a defendant intends to shoot and kill one person and in doing so endangers the life of others standing nearby, the defendant may be guilty of additional assault with a deadly weapon convictions for these additional victims, and may be guilty of implied malice murder if someone else is actually killed. (See *People v. Bland, supra,* 28 Cal.4th at pp. 328-329.) However, such an act does not support multiple attempted murder

convictions, because multiple attempted murder convictions require the intent to kill each individual. (See *Id.* at pp. 327-329)

Indeed, the majority of this Court again made this exact distinction in *Smith* when it stated that "[w]e do not base our conclusion that defendant's conviction of the attempted murder of the baby must be affirmed on mere grounds that he 'placed the infant's life in danger by shooting in his direction. [Citation]. Rather, we base our conclusion on evidence that ... defendant acted with intent to kill *both*" by firing at them in the manner in which he did. (*People v. Smith, supra,* 37 Cal.4th at p. 747.)

As the above analysis demonstrates, the majority of the Court of Appeal herein erred in affirming all eight attempted murder convictions in this case on the basis that the jury could reasonably conclude that "in intending to kill any of the officers defendant's shooting endangered the lives of all." (Slip Opn. p. 10.) Consistent with the above passage in *Smith*, endangering the lives of eight individuals in a crowd by attempting to kill one does not support eight attempted murder convictions. It can only at most support one.

In reaching its conclusion to the contrary, the majority of the Court of Appeal herein cited and relied upon a somewhat similar statement in *Chinchilla*, in which that Court stated, "Where a defendant fires at two

officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both." (See Slip Opn. p. 10; *People v. Chinchilla, supra,* 52 Cal.App.4th at p. 691.)

As previously stated, defendant urges that *Chinchilla* was not necessarily wrongfully decided despite the above reference to "endangering the lives of both officers" because the decision can be interpreted to stand only for the proposition that the evidence in that case supported the conclusion that the defendant concurrently intended to kill both officers with a single bullet because one was situated directly in front of the other and a single bullet could have killed them both. However, to the extent *Chinchilla* does stand for the proposition that a single shot which endangers the life of two individuals can support two attempted murder convictions, it should be expressly disapproved by this Court for two reasons.

First, and most importantly, such a statement of law is inconsistent with *Bland, Smith*, and the entire history of attempted murder jurisprudence in this State for over one hundred years, which has consistently defined attempted murder as requiring intent to kill as opposed to endangering a life, i.e., implied malice. (See *People v. Mize* (1889) 80 Cal. 41, 43 [attempted murder requires intent to kill].)

Second, in making the above statement, the Court of Appeal in *Chinchilla* expressly noted that no other California case had ever held that firing a single bullet could support two attempted murder convictions, and further stated that in being the first, it was adopting the reasoning of two out of state cases from Illinois, one from New Jersey, and another from the Ninth Circuit Court of Appeals that were cited by the People. (*People v. Chinchilla, supra,* 52 Cal.App.4th at pp. 690-691, fn. 3, citing *State v. Sharp* (1995) 283 N.J.Super. 296; *People v. Bigsby* (1977) 52 Ill.App.3d 277; *People v. Mimms* (1976) 40 Ill.App.3d 942; *People of the Territory of Guam v. Quichocho* (9th Cir. 1992) 973 F.2d 723.)

Defendant respectfully urges that the *Chinchilla* court's reliance upon these out of state authorities was misplaced. Reliance upon the two Appellate Court of Illinois decisions was inappropriate because unlike California which demands intent to kill, the crime of attempted murder in Illinois is committed "when a person fires a gun 'at or towards' another, either with malice aforethought, *or with a total disregard for human life*...." (*People v. Mimms, supra,* 40 Ill.App.3d at p. 945, citing *People v. Nickolopoulos* (1962) 25 Ill.2d 451, 454, emphasis added.)

Thus, the fact that the two Appellate Court of Illinois decisions cited in *Chinchilla* rightfully held that two attempted murder convictions were

supported under Illinois law by evidence that the defendant fired a single shot towards two police officers that endangered both their lives is of no import to the analysis herein under California law. (See *People v. Mimms, supra,* 40 Ill.App.3d at p. 946 [evidence sufficient where defendant "inten[ded] to kill either policeman, and placed both their lives in danger"]; *People v. Bigsby, supra,* 52 Ill.App.3d at p. 283 [evidence sufficient where defendant "endangered both their lives and displayed an intent to kill either or both"].)

Moreover, the New Jersey case cited in *Chinchilla* is unhelpful to the analysis because in addition to not containing a detailed recitation of its particular facts, it cited only to the above two inapplicable Illinois decisions, stated its agreement with those two Illinois decisions, and in agreeing with them, further misstated the holding of *Bigsby* as being "that where a defendant fires at two officers, he endangers the lives of both of them and displays an *intent to kill both of them*." (*State v. Sharp, supra,* 283 N.J.Super. at pp. 300-301, emphasis added.) Furthermore, the Ninth Circuit case cited in *Chinchilla* is also unhelpful to the analysis herein because in that case, the defendant fired "several rounds" at the alleged attempted murder victims. (*People of the Territory of Guam v. Quichocho, supra,* 973 F.2d at p. 725.)

On the other hand, numerous additional California authorities support defendant's position that eight attempted murder convictions cannot be

sustained under factual circumstances where the evidence discloses that a defendant fired a single shot towards a crowd of eight individuals endangering the lives of all eight, but with the intent to at most to kill one of them with the single bullet.

For example, the Court of Appeal's decision in *Anzalone,* which was rendered subsequent to this Court's decision and clarification of the law in *Smith*, is almost directly on point. (See *People v. Anzalone* (2006) 141 Cal.App.4th 380 ("*Anzalone*").) In *Anzalone*, the defendant fired two shots from a moving vehicle towards a group of four victims attempting to take cover near another car. One of the victims sought cover near the front of the car, and the other three sought cover near the rear of the car. The first shot hit the front of the car just above the one victim's head. The other shot hit the car's trunk in the area where the other three victims were attempting to find cover. (*Id.* at pp. 384, 390.) The defendant was charged and convicted of four counts of attempted murder. (*Id.* at p. 383.)

As in this case, the trial court instructed the jury with the standard attempted murder instruction, but did not instruct on either concurrent intent or transferred intent. (*People v. Anzalone, supra,* 141 Cal.App.4th at p. 390.) Similar to this case, the prosecutor argued that "[a]nytime someone is within the zone of danger, whether it be one, two, three, or twenty people, somebody

indiscriminately shoots towards a crowd of people, everything in that zone of danger qualifies. That is how you can get three counts of attempted murder based on the gunshot at the bumper of the car. ... Separate zone of danger is up by [the victim near] the front of the car. That is how we get four counts of attempted murder." (*Id.* at p. 391.)

The Court of Appeal held the prosecutor's argument constituted misconduct as it misstated the law regarding concurrent intent. (*People v. Anzalone, supra,* 141 Cal.App.4th at pp. 392-393.) As stated by the Court:

> "Contrary to the prosecutor's argument, an attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them. The prosecutor's argument incorrectly suggests that a defendant may be found guilty of the attempted murder of someone he does not intend to kill simply because the victim is in some undefined zone of danger. In fact, to be found guilty of attempted murder, the defendant must either have intended to kill a particular individual or individuals or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means to some other end, e.g., killing some particular person." (*Ibid.*)

The Court of Appeal further found that defense counsel was ineffective for failing to object to the prosecutor's erroneous argument regarding concurrent intent because "the prosecutor left the jury with the mistaken impression that by firing indiscriminately in the direction of a group of men, [the defendant] was guilty of attempting to kill them all." (*People v.*

Anzalone, supra, 141 Cal.App.4th at p. 395.) Based on the evidence that one of the shots was fired towards the man at the front of the car and barely missed his head, the Court of Appeal held the prosecutor's erroneous argument was not prejudicial as to that count of conviction. (*Id.* at p. 396.) However, the Court of Appeal reversed the remaining three other convictions involving the three men at the rear of the car. (*Ibid.*)

Although *Anzalone* involved an issue of prosecutorial misconduct/ineffective assistance of counsel and this case involves sufficiency of the evidence, the cases are otherwise indistinguishable. As in *Anzalone*, the jury in this case was only given a standard attempted murder instruction, and as in *Anzalone*, the prosecutor erroneously argued to the jury that by firing indiscriminately in the direction of a group of men, defendant was guilty of attempting to kill them all. (7 R.T. pp. 2110-2111, 2124, 2129.) Moreover, it is clear based upon both the evidence and the prosecutor's argument in this case that the jury relied upon this erroneous theory of concurrent intent in returning eight attempted murder convictions. Consistent with the Court of Appeal's decision in *Anzalone*, seven of defendant's attempted murder convictions must be reversed due to insufficient evidence.

In *Campos, supra,* another case decided subsequent to *Smith*, the Court of Appeal held that the standard kill zone instruction contained in

CALCRIM No. 600 was ambiguous because it in part suggested that the defendant could have the intent to kill "anyone," but ultimately concluded that there was no reasonable probability that the jury in that case misapplied the instruction in part because the jury was otherwise properly instructed that they must find that the defendant had to kill "everyone." (*People v. Campos, supra,* 156 Cal.App.4th at p. 1243.) Unlike *Campos*, defendant in this case was tried on a theory that he intended to kill anyone.

Based on all the above authorities, defendant's eight attempted murder convictions are not supported by substantial evidence. Because attempted murder requires the intent to kill, because the intent to kill one person cannot be transferred to another person, and because the evidence did not support and defendant was not tried upon the theory that he intended to kill more than one person, all but one of his attempted murder convictions must be reversed due to insufficiency of the evidence.

Furthermore, because the record supports the conclusion that defendant intended to kill whoever in the crowd was struck by the bullet, and because Officer Fuentes was actually struck by the bullet, the attempted murder conviction in Count One pertaining to him should be sustained, and the seven remaining attempted murder convictions should be reversed due to insufficient evidence.

CONCLUSION

For the foregoing reasons, and in the interests of justice, defendant Perez respectfully requests that seven of his eight attempted murder convictions be reversed due to insufficient evidence.

Dated: 3/16/09

Respectfully submitted,

Eric Larson

Eric R. Larson, SBN 185750
Attorney for Defendant, Appellant
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By Appointment of the Supreme
Court of California

CERTIFICATE OF WORD COUNT

I, Eric R. Larson, hereby certify pursuant to California Rules of Court, rule 8.520(c)(1), that according to the Microsoft Word Microsoft Word computer program used to prepare this document, Petitioner's Opening Brief On The Merits contains 5,665 a total of words.

Executed this 16th day of March, 2009, in San Diego, California.

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Supreme Court No.: S167051
Court of Appeal No.: B198165

DECLARATION OF SERVICE BY MAIL

I, Madelyn Phillips, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, # 609, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this 16th day of March, 2009, I caused to be served the following document(s):

PETITIONER'S OPENING BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 16, 2009, at San Diego, California.

Madelyn Phillips