IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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 REPLY BRIEF ON THE MERITS

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By Appointment of The
Supreme Court Of California

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.	)	
	)	

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PETITIONER'S REPLY BRIEF ON THE MERITS

Petitioner files the following Reply Brief on the Merits to respondent's Answer Brief on the Merits. The failure to respond to any particular argument should not be construed as a concession that respondent's position is accurate. It merely reflects petitioner's view that the issue was adequately addressed in Petitioner's Opening Brief on the Merits.

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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. Shooting A Single Bullet At A Crowd Of Eight People With The Indiscriminate Intent To Kill One Of The People In The Crowd Does Not Support Eight Attempted Murder Convictions

Respondent concedes that the evidence herein was "insufficient to demonstrate that the one bullet fired could have killed all" of the eight individuals in the crowd. (Resp. Brief p. 19, fn. 4.) Respondent further concedes that the proper interpretation of this Court's decision in *Smith* was that "the prosecution had to prove that the defendant acted with the specific intent to kill both victims with one shot… ." (Resp. Brief p. 19.) Respondent nevertheless contends that all eight attempted murder convictions are supported by the evidence herein. Respondent's contention is not well taken.

Respondent's argument is essentially based upon three contentions. First, respondent argues that a person who shoots at a crowd with the intent to kill one person endangers the life of everyone in the crowd and is more culpable than a person who shoots at only one isolated victim, and therefore, multiple attempted murder convictions are appropriate. (See Resp. Brief pp.

10-12, 14, 16-17, 21-22.) This argument misses the point because a person who shoots at a crowd with the intent to kill only one person has, as in this case, committed multiple assaults with a deadly weapon. Such an individual can therefore be appropriately punished for his or her additional culpability at the trial court's discretion based on these additional assault convictions. (See *In re Tameka C.* (2000) 22 Cal.4th 190, 196, emphasis added [a person who shoots a single bullet risking injury to multiple individuals is more culpable than an individual who shoots at an isolated victim, and is appropriately subject to additional punishment for "*commit[ting] multiple assaults*"].) However, endangering the life of additional individuals does not constitute the requisite mental state for additional attempted murder convictions, which require specific intent to kill. (See *People v. Lee* (2003) 31 Cal.4th 613, 623.)

Second, respondent contends that eight attempted murder convictions are appropriate in this case because the evidence established that defendant intended to kill any of the eight people in the group. (Resp. Brief pp. 16-19.) Defendant agrees that the evidence established that he intended to kill whichever individual happened to be struck by the single bullet, but disagrees that such an intent is sufficient to support eight attempted murder convictions.

Respondent does not offer any compelling policy reasons or authorities in support of this argument. For example, respondent suggests that

it was for the jury to determine whether the individuals were "close enough" such that defendant "endangered any of them." (Resp. Brief p. 17.) However, again, endangering the life of someone does not constitute intent to kill.

Respondent also urges that each attempted murder conviction must be judged separately as to each victim, and judged separately, the evidence was sufficient as to all eight. (Resp. Brief pp. 14, 16-17.) This argument is unavailing. Respondent takes out of context the passage that each attempted murder conviction must be judged separately, which was made by this Court in the context of rejecting the Attorney General's argument that the doctrine of transferred intent applies to the offense of attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 331.) Viewed in context, this passage stands for the proposition that there must be a specific intent to kill each attempted murder victim, and the intent to kill one cannot be transferred to others. Thus, *Bland* does not stand for the proposition that the intent to kill one person can support multiple attempted murder convictions.

Respondent further acknowledges that in *Smith,* this Court "emphasized that the prosecution in that case had to prove that the defendant acted with the specific intent to kill both victims with one shot." However, respondent downplays the significance of this Court's decision in *Smith* by emphasizing that it was a "fact-specific" decision, and is therefore of limited

applicability. (Resp. Brief pp. 18-19, citing *People v. Smith* (2005) 37 Cal.4th 733, 739, 743, 747 ("*Smith*").)

In fact, this Court's decision in *Smith* is highly applicable both factually and legally. Consistent with this Court's decision in *Smith,* two attempted murder convictions based upon the firing of a single bullet may be supported in a case where the evidence discloses that the victims were situated one behind the other in the direct line of fire such that a single shot could have killed *both* individuals. (*People v. Smith, supra,* 37 Cal.4th at p. 747, emphasis in original; see also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690-691 ("*Chinchilla*").) Also consistent with *Smith,* multiple attempted murder convictions are not supported where an individual fires a single bullet with the intent to kill only one person.[1]

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[1] In a footnote, respondent suggests that if this Court agrees with defendant's interpretation of *Smith*, then remand to the Court of Appeal is appropriate because "at least three" attempted murder convictions may have been supported by the evidence because the single bullet fired in this case struck an apartment door and a cabinet after hitting Officer Fuentes' finger. (Resp. Brief p. 19, fn. 4.) This argument lacks merit because defendant was not charged with attempting to murder anyone inside the apartment, the evidence did not establish that he attempted to kill more than one person in the crowd, and defendant was not tried upon a concurrent intent theory suggested herein by respondent in order to support additional attempted murder convictions. (See *People v. Smith, supra,* 37 Cal.4th at p. 740, fn. 2 [evaluating sufficiency of the evidence based upon the theory on which the case was tried].) Moreover, to the extent respondent is suggesting that defendant struck his intended target, Officer Fuentes' finger, then defendant would not be guilty of attempting to murder anyone.

Respondent also appears to attempt to distinguish this case from the reasoning of *Smith* and *Chinchilla* on the basis that in this case, there was no particular target. (See Resp. Brief p. 18.) However, this is a distinction without a difference. (See *People v. Stone* (2009) 46 Cal.4th 131, 140-141 ("*Stone*") [applying the same analysis regardless of whether the alleged victim was particularly targeted or randomly chosen].)

Respondent also argues that for policy reasons, an individual who shoots a single bullet at a crowd of eight people, with the indiscriminate intent to kill any of them, should be held liable for eight counts of attempted murder. (Resp. Brief pp. 22-23.) However, none of respondent's policy arguments have merit.

For example, respondent argues that the culpability of an individual who fires a single shot at a crowd is the same as an individual who fires multiple shots at a crowd. (Resp. Brief p. 22, fn. 5.) Not only is this suggestion contrary to common sense, the only authority respondent cites for this proposition is a passage from *Bland* in which this Court stated that for the crime of murder, although it might appear justified, there is no legally cognizable distinction between the culpability of a person who intends to kill two persons and a person who intends to kill only one, but kills two. (Resp. Brief p. 22, fn. 5, citing *People v. Bland, supra,* 28 Cal.4th

at p. 322) Of course, there is a legally cognizable difference between the crimes of murder and attempted murder; transferred intent applies to murder, and not to attempted murder. Respondent's contention that for attempted murder, the culpability of a person who fires multiple shots at a crowd of people is the same as an individual who fires only one shot is misplaced.

Respondent's further suggestion that the one-shot defendant is already appropriately deterred from firing additional shots at a crowd due to the increased likelihood of killing someone and being convicted of murder, is similarly unsound. (See Resp. Brief p. 22, fn. 5.) An individual is appropriately deterred from firing multiple shots at a crowd both by the prospect of killing someone and being convicted of murder, and by the prospect of being convicted of multiple counts of attempted murder.

Respondent also contends that it is appropriate for this Court to adopt a rule that an individual who indiscriminately shoots a single bullet at a crowd, and endangers each of the individuals in the crowd, should be convicted of multiple counts of attempted murder, whereas an individual who shoots a single bullet at his ex-wife at a bus stop, and endangers each of the individuals in the crowd at the bus stop, should be guilty of only count of attempted murder. (Resp. Brief pp. 22-23.) Respondent does not offer any

compelling reason as to why this should be the rule, and there is none. In fact, this Court recently stated that the contrary is true. (See *People v. Stone, supra,* 46 Cal.4th at p. 140 [citing *Bland* for the proposition that there is no basis to distinguish between a defendant who attempts to kill a particular person and one who indiscriminately attempts to kill a person].)

Third, respondent urges that rather than *Smith* or *Chinchilla*, this Court's decision in *People v. Oates* (2004) 32 Cal.4th 1048 ("*Oates*") is more applicable factually and "strongly supports" respondent's argument. (Resp. Brief pp.16, 20-22.) Respondent is mistaken. Indeed, *Oates* held that Penal Code section 654 does not bar imposition of multiple Penal Code section 12022.53, subdivision (d), firearm enhancements where only one of the victims was struck by a bullet and suffered great bodily injury. (*Id.* at pp. 1052-1053.) Respondent seizes upon the fact that in *Oates*, the defendant was convicted by a jury of five counts of attempted murder, but only two shots were fired. (*Ibid.*) However, in *Oates,* there was no challenge to the sufficiency of the evidence to support all five attempted murder convictions, that issue was therefore not considered, and cases are not authority for matters not considered. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) Thus, respondent's contention that *Oates* is applicable herein must be rejected.

Additionally, defendant notes that while the ultimate question presented herein was left open, the reasoning of this Court's recent decision in *People v. Stone, supra,* 46 Cal.4th 131, which addressed a sufficiency of the evidence challenge to one attempted murder conviction where a single bullet was fired indiscriminately at a crowd, strongly supports defendant's argument that only one attempted murder conviction was supported by the evidence herein.

For example, in *Stone*, this Court held that the mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being. (*People v. Stone, supra,* 46 Cal.4th at p. 134, emphasis in original.) It logically follows that the mental state required for eight attempted murder convictions is the intent to kill eight human beings, not one human being among a crowd of eight.

This Court further noted that "'[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences.'" (*People v. Stone, supra,* 46 Cal.4th at p. 134, quoting *People v. Bland, supra,* 28 Cal.4th at p. 327.) It logically follows that where a defendant intended to kill one person but did not accomplish that act, he is liable for attempting to kill one person, not for the unintended and unaccomplished potential consequences of his act such as

other individuals among the crowd being killed by the bullet. Moreover, this reasoning applies equally in cases such as *Bland* where there is a targeted victim, and, as in both *Stone* and the case at bar, where there is no particular targeted victim. (See *People v. Stone, supra,* 46 Cal.4th at p. 141.)

As noted above, as also stated by this Court, "[a]n indiscriminate would-be killer is just as culpable as one who targets a specific person." (*People v. Stone, supra,* 46 Cal.4th at p. 140.) Thus, an individual who places a bomb on an airplane with the intent to kill a primary target while ensuring the death of all passengers, and an individual who places a bomb on an airplane without the intent to kill any particular individual but with the intent to kill all the passengers, are both equally guilty of attempted murder of all the passengers based on a concurrent intent theory. (*Ibid.*)

Following this line of reasoning, an individual who indiscriminately intends to kill one person in a crowd of eight people by a means that will only kill one, and an individual who intends to kill all eight people in a crowd by a means that will kill all eight, are not equally guilty because the former individual does not have the same concurrent intent to kill eight people. (See also *People v. Bland, supra,* 28 Cal.4th at p. 330 [approving *People v. Vang* (2001) 87 Cal.App.4th 554, 564, in which the Court of Appeal held that eleven attempted murder convictions were supported where evidence

supported the inference that the defendant concurrently intended to kill all eleven individuals].)

As also stated in *Stone,* "[o]ne difference regarding intent to kill does exist between murder and attempted murder. A person who intends to kill can be guilty of the murder of each person actually killed, even if the person intended to kill only one. (See *Bland, supra*, 28 Cal.4th at pp. 323-324.) The same is not necessarily true regarding attempted murder. Rather, 'guilt of attempted murder must be judged separately as to each alleged victim.' (*Id.* at p. 331.) But this is true whether the alleged victim was particularly targeted or randomly chosen. As the district attorney aptly summarizes in this case, 'A defendant who intends to kill one person will be liable for multiple counts of murder where multiple victims die, but only one count of attempted murder where no one dies....'" (*People v. Stone, supra,* 46 Cal.4th at p. 141.) Thus, as stated by the district attorney in *Stone* with apparent approval by this Court, a defendant who intends to kill one person is liable for multiple murders where multiple victims die, but only one count of attempted murder where no one dies.

Finally, this case should have been pleaded as this Court suggested in *Stone.* In *Stone*, as in the case at bar, where a defendant indiscriminately fires a single shot at a crowd, the information should not specifically allege

that the defendant intended to kill any particular individual. (*People v. Stone, supra,* 46 Cal.4th at p. 141.) Rather, it is appropriate to allege "that defendant committed attempted murder in that on or about [a particular date], he attempted to murder a member of a group of persons gathered together in a parking lot in [a particular location]." (*Ibid.*)

For all of the above reasons, firing a single shot at a group of persons gathered together with the indiscriminate intent to kill one member of the group supports one, not multiple, attempted murder convictions.

B. The Evidence Did Not Support The Conclusion That Defendant Intended To Shoot And Kill All Eight Named Attempted Murder Victims, But Abandoned His Intent After Discovering That Seven Of Them Were Police Officers

Respondent alternatively argues that defendant's eight attempted murder convictions were appropriate because "there was sufficient evidence that [he] wanted to kill every one of the eight perceived gang members that he shot at, and because there was sufficient evidence that he would have shot them all had he not realized that they were police officers." (Resp. Brief pp. 23-29.) This alternative argument also lacks merit.

Defendant was not tried upon the theory that he was guilty of eight attempted murders because he intended to shoot and kill all eight people in the crowd and would have continued shooting and shot them all had he not

realized they were police officers after firing the first shot. Rather, defendant was tried upon the theory that the indiscriminate firing of a single shot at these eight individuals constituted eight attempted murders.

Indeed, the prosecutor in fact expressly argued that defendant did not attempt to "kill everybody" in the group, but rather intended to "kill anybody, wherever that bullet hit." (7 R.T. pp. 2110-2111.) The prosecutor maintained that "[t]he actual shooting of Officer Fuentes, that one shot, was actually an attempted murder of everybody in the group." (7 R.T. p. 2111.) The prosecutor later again expressly 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."[2] (7 R.T. pp. 2124.)

Because defendant was not tried upon the theory now advanced by respondent to support the eight attempted murder convictions, respondent's

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[2] The prosecutor did briefly argue that defendant did not abandon his intent before taking a direct step in furtherance of the attempted murders, but this was in the context of arguing that defendant possessed the intent to kill despite firing only a single shot. The prosecutor further briefly argued that defendant may have continued shooting had he not realized he was shooting at police officers. (7 R.T. p. 2111.) However, the prosecutor did not ask the jury to return attempted murder verdicts on the basis of additional shots that would have been fired. Rather, as noted above, the prosecutor expressly proceeded on the theory that defendant was guilty of eight attempted murders based upon the indiscriminate firing of a single shot at a group of eight people. (7 R.T. pp. 2110-2111, 2124; see also 7 R.T. pp. 2120, 2129, 2206.)

alternative claim that the evidence was sufficient to support all eight attempted murder convictions should be rejected at the outset. (See *People v. Smith, supra,* 37 Cal.4th at p. 740, fn. 2 [reviewing the sufficiency of the evidence to support multiple attempted murder convictions based upon "the theory on which the case was tried," rather than on additional evidence that might arguably support multiple convictions on an alternative theory].)

In any event, respondent's argument is misplaced because it is not supported by substantial evidence. Rather, it is founded upon speculation at best. The evidence indisputably established that defendant fired only one shot. Respondent does not point to any solid, credible evidence upon which the jury could have concluded beyond a reasonable doubt that defendant would have continued shooting and attempted to kill all eight individuals in the crowd in a hailstorm of gun fire had he not noticed that police officers were among the crowd. In fact, the evidence points only to the contrary.

Initially, it is worth repeating that defendant only fired a single shot. Thus, whatever he might have done but did not do after that is necessarily speculation. What is not speculation is what defendant did, which is fire only one shot. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946 [there is rarely direct evidence of intent, and it usually must be derived from all the circumstances including the defendant's actions].)

Moreover, the evidence disclosed that the single shot was fired from a moving vehicle, which is consistent with the intent to fire a shot and flee, as opposed to remaining at the scene long enough to shoot and kill eight people. (Slip Opn. pp. 3-4; see also 1 R.T. pp. 67-68, 73-74, 82; 3 R.T. p. 980.) The evidence further indicated that immediately after the lone shot was fired from the moving vehicle, the officers testified that the driver "punch[ed]" the accelerator, the vehicle's engine was heard winding, and the vehicle rapidly fled from the scene, which is typical in drive-by shootings as opposed to mass murder sites. (See 1 R.T. pp. 47, 67-68, 74-75.) The vehicle in fact fled so quickly after the single shot was fired that although several of the numerous officers at the scene naturally and immediately gave chase in their police vehicles, they were unable to catch up to defendant's vehicle. (1 R.T. pp. 48, 69, 102.)

Additionally, defendant did not use a weapon capable of killing all eight people in a crowd in an instant, such as a bomb, or even killing all eight people in a crowd in a relatively brief period of time, such as an AK-47 assault rifle or a machine gun. Rather, defendant fired a fairly ordinary semi-automatic firearm, most likely a Glock. (See 4 R.T. pp. 1211-1218.) Moreover, defendant could have fired at least a second shot from a semi-automatic firearm in a fairly rapid fashion, and the fact that he did not

indicates an intent to fire one shot and flee. It is pure speculation to conclude that between the time that defendant fired the first shot and the brief period of time it would have taken him to fire a second shot, that defendant realized there were police officers at the scene and thereafter abandoned his intent to shoot and kill all eight individuals.

Respondent further argues that the evidence of defendant's intent to kill all eight individuals was sufficient because it would have presumably benefited defendant's gang even more to kill all eight perceived rival gang members rather than just one. (Resp. Brief p. 25.) This argument is unavailing. Taken to its extreme, it would have presumably benefited defendant's gang even more if he killed every rival gang member in Southern California if they had somehow all been squeezed in the parking lot in question at the same time. Of course, this is absurd. Defendant's intent must be evaluated based upon the evidence, not speculation.

In addition, the evidence indicates defendant was by himself at the time of the shooting, which further militates against a conclusion that he intended on his own to kill eight rival gang members. Rather, it indicates a lone intoxicated individual taking a drive-by "pop-shot" at some perceived gang members before fleeing the scene.

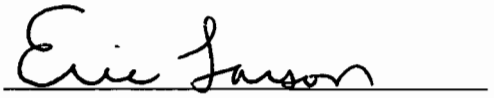
Finally, respondent maintains that the doctrine of "factual impossibility" does not preclude liability in this case. (Resp. Brief pp. 27-29.) Defendant agrees, but notes that factual impossibility is not and was never asserted as the basis for relief herein. Defendant is entitled to reversal of seven of his eight attempted murder convictions because the indiscriminate firing of a single bullet into a crowd of people supports only one attempted murder conviction in this case.

CONCLUSION

For the foregoing reasons, the reasons stated in Petitioner's Opening Brief on the Merits, and in the interests of justice, defendant Rodrigo Perez respectfully requests that seven of his eight attempted murder convictions be reversed due to insufficient evidence.

Dated: 6/17/09

Respectfully submitted,



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By Appointment of the Supreme
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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 Reply Brief On The Merits contains 3,747 a total of words.

Executed this 17th day of June, 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 18th day of June, 2009, I caused to be served the following document(s):

PETITIONER'S REPLY 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 June 18, 2009, at San Diego, California.

Madelyn Phillips