IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JARMAAL LARONDE SMITH,

Defendant and Appellant.

S123074

Third Appellate District, No. C042876
Sacramento County Superior Court No. 00F01948
The Honorable Michael S. Ullman, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JARMAAL LARONDE SMITH,** Defendant and Appellant.	S123074

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

ISSUES PRESENTED

Under *People v. Bland* (2002) 28 Cal.4th 313, whether the totality of the circumstances of this case, including the nature and scope of appellant's mode of attack, demonstrate that appellant created a "kill zone" and thereby demonstrated his concurrent intent to kill both victims in that "zone of harm"?

INTRODUCTION

A jury found appellant guilty of two counts of attempted premeditated murder after he fired a single shot from less than 10 feet away through the rear window of a vehicle and nearly missed an infant sitting in the rear seat and the infant's mother sitting in the driver seat. The Third District Court of Appeal rejected appellant's claim that only one conviction was proper. Relying upon *People v. Bland, supra*, 28 Cal.4th 313, the court determined that appellant demonstrated that he possessed the concurrent intent to kill both victims because, by his mode of attack, he created a "zone of harm." Appellant contests whether *Bland* was properly applied to allow two convictions for

attempted premeditated murder because he fired only a single shot at the vehicle. This Court granted review.

STATEMENT OF THE CASE

On February 18, 2000, Karen A. drove to Greenholme Lane in Sacramento with her three-month-old baby, Renell T. Jr., and her boyfriend, Renell T. Sr.[1/] (RT 20-21, 24.) The baby sat in a rear-facing infant carrier directly behind Karen, and Renell sat in the front passenger seat of the four-door Chevy Lumina. (RT 21-22, 25, 147.) Karen drove to Greenholme to drop off Renell to visit a friend. (RT 22, 24-25.) When Karen stopped and Renell got out of the car, four or five men approached the vehicle, one of whom was appellant, a former friend of Karen's. (RT 27, 30-31, 33-34, 37.) Appellant last talked to Karen on the telephone in mid-1999, when he told her that the next time he saw her he was going to "slap the shit" out of her. (RT 39-41, 338.) Appellant peered into Karen's open front passenger window and said, "Don't I know you, bitch?" (RT 26, 34.)

Renell heard appellant's statement to Karen, and said, "Well, you don't know me," and asked appellant what was up. (RT 43.) Appellant lifted his shirt to reveal a gun, a .38 revolver. (RT 43-46, 162-164, 215-216.) Renell then attempted to get back in the car as the group of men began punching and grabbing at him. (RT 47-49.) Karen tried to drive off, but when she had gotten about one car length past appellant, he pointed the gun from behind her car and shot at her through the rear window. (RT 49-51, 77-78, 81, 242.) Karen kept driving, knowing her son was in danger. (RT 93-94.)

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1. For clarity, consistency with appellant's brief (see AOB 5, fn. 1) and the court of appeal opinion, and in compliance with California Style Manual section 5:9 (4th Ed. 2000), Renell T., Jr., will be referred to as "the baby," Renell T., Sr. will be referred to as Renell, and Karen A. will be referred to as Karen.

The .38-caliber bullet shattered the rear windshield, went through the driver's seat head rest, and lodged in the driver's side door. (RT 235-239.) When Karen and Renell reached a point of safety in a nearby school parking lot, they found that the baby's face "was just full of glass pieces and he was screaming." (RT 52.)

Appellant testified that, the day before the shooting, he, Karen, and Renell argued over the phone. (RT 335-339.) Appellant claimed that Renell had told appellant he was going to "smoke" him, i.e., shoot him, so appellant arranged to meet Renell the following day on Greenholme. (RT 339-341.) When they arrived the next day, appellant saw that Karen was in the car and said, "What are you doing here, bitch," since he was surprised to see her there with the baby. (RT 345, 382.) Appellant testified that Renell got out of the car and, when appellant gestured that he wanted to fist fight, Renell pulled out a gun. (RT 345-346.) Although Renell did not fire, appellant then heard a shot, hit the ground, heard several more shots, and heard glass shatter. (RT 348, 351.) Appellant saw two .38 caliber shell casings on the ground so he picked them up and brought them to his mother's house. (RT 352-353, 356-357.)

Later that evening, Sacramento County Sheriff's Deputy Stewart went to appellant's mother's house to arrest appellant and recovered two .38-caliber shell casings from appellant's room. (RT 217.)

Appellant was charged with two counts of attempted murder of Karen and the baby (Pen. Code, § 187, 664),[2/] and it was alleged that appellant personally discharged a firearm with respect to these counts (§ 12022.53, subd. (b)). (CT 63-64, 89-90.) A jury found appellant guilty on all counts and found true the allegation that appellant had personally discharged a firearm. (CT 100-102, 145-149.) The Court sentenced appellant to 27 years on count 1 – the middle term of 7 years for attempted murder plus 20 years for the personal

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2. The amended information also charged other counts, but none of these counts are at issue in the instant case. (CT 63-64.)

firearm discharge enhancement – and an identical, but concurrent, 27-year term on count 2. (CT 247.)

Appellant claimed on appeal that his conviction for the attempted murder of the baby should be reversed for insufficient evidence of his specific or concurrent intent to kill the baby. (CT 249.) In a partially published opinion, the California Court of Appeal, Third Appellate District, rejected appellant's argument. (Slip opn. in Third District case no. C042876, hereafter Opn., at pp. 5-11.) Relying upon *People v. Bland, supra*, 28 Cal.4th 313, the court found that appellant concurrently intended to kill both Karen and the baby. (Opn. at p. 11.) On May 12, 2004, this Court granted appellant's petition for review.

SUMMARY OF ARGUMENT

The appellate court properly concluded that appellant's two convictions for attempted murder should be upheld. Circumstantial evidence demonstrated that appellant possessed the specific intent to kill the baby. Sufficient evidence also demonstrated that appellant possessed the concurrent intent to kill Karen and her baby. (*People v. Bland, supra*, 28 Cal.4th 313.) Considering the totality of the circumstances, the nature and scope of appellant's attack upon Karen showed that appellant intended to ensure harm to Karen by harming everyone in her vicinity, including her baby.

ARGUMENT

SUFFICIENT EVIDENCE DEMONSTRATED THAT APPELLANT HAD EITHER THE SPECIFIC OR CONCURRENT INTENT TO KILL BOTH KAREN AND HER BABY

A jury convicted appellant of two counts of attempted murder after he fired a single shot at close range through the rear window of Karen's car, narrowly missing both Karen and her baby who were seated directly in appellant's line of fire. The court of appeal upheld the verdicts on the theory that appellant had either the specific or concurrent intent to kill the baby. Appellant claims that the jury and court of appeal erred because he had the intent only to kill Karen and not the baby. (Appellant's Brief on The Merits, hereafter AB, 8-12.) On the contrary, the appellate court's conclusion was proper. Despite the fact that appellant fired a single shot at Karen and the baby, appellant's means and manner of attack demonstrated that he created a kill zone around the baby and, thus, harbored either a specific or a concurrent intent to kill the baby.

In assessing the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Holt* (1997) 15 Cal.4th 619, 667.) Although the reviewing court must ensure the evidence is reasonable, credible, and of solid value, it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Appellant "bears a massive burden in claiming insufficient evidence because [this Court's]

role on appeal is a limited one." (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.)

In order to prove first degree attempted murder, the prosecution must show that the defendant willfully and deliberately, with premeditation, attempted to kill, but failed. (Pen. Code, §§ 187, 664; *People v. Lenart* (2004) 32 Cal.4th 1107, 1126-1127) The test on appeal is whether the trier of fact could have found premeditation and deliberation beyond a reasonable doubt based upon the evidence presented. (*People v. Marks* (2003) 31 Cal.4th 197, 230.) At least three types of evidence demonstrate premeditation and deliberation: (1) prior planning activity; (2) motive; and (3) the manner of killing. (*People v. Mayfield* (1997) 14 Cal.4th 668, 768, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." (*People v. Thomas* (1945) 25 Cal.2d 880, 900.)

Furthermore, intent to kill may be established by circumstantial evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.) It may be inferred from all the circumstances surrounding the attempt, including the actions of the defendant. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690; *People v. Lashley* (1991) 1 Cal.App.4th 938, 946.) The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . ." (*People v. Lashley, supra,* at p. 945; *People v. Jackson* (1989) 49 Cal.3d 1170, 1201-1202; *People v. Lee* (1987) 43 Cal.3d 666, 679.) "The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." (*People v. Lashley, supra,* at p. 945;

People v. Lee, *supra*, at p. 677.)

Here, the evidence is sufficient to show that appellant not only intended to kill Karen, a point which he concedes (AB 8), but that he also intended to kill her baby. First, appellant knew that the baby was in the car. As Karen testified, he came up to her car, bent down, and peered in the window. (RT 26, 34.) Moreover, appellant even admitted on the stand that he saw the baby. (RT 345, 382.) Second, appellant showed off his gun, threatening the family enough that Renell retreated to the car and Karen quickly tried to drive off. (RT 43, 46-51, 162-164, 215-216.) Third, before they could clear his range, appellant positioned himself behind the car, aimed, and fired his gun at the baby and Karen. (RT 49-51, 77-78, 81, 242.) Karen knew that her son was in danger. (RT 93-94.) Although the bullet narrowly missed both of appellant's intended targets, the glass from the shattered window severely injured the baby's face. (RT 52, 235-239.) Given that appellant knew the baby was in the car, that he threatened all of them by showing his gun, and finally pointed and fired directly towards the baby and Karen, appellant manifested his intent to kill with respect to both victims. From the time appellant saw the baby to the time he decided to shoot at them, appellant had adequate opportunity to deliberate. Although the evidence that appellant intended to kill Karen was direct rather than circumstantial, a reasonable trier of fact could conclude, based on all the evidence, that appellant also had the specific intent to kill the baby.

However, assuming, arguendo, that the jury did not find that appellant had the specific intent to kill the baby, the evidence indicated that appellant at least had the concurrent intent to kill the baby and Karen. The means and manner of appellant's attack upon Karen and the baby demonstrated that he intentionally created a kill zone, evidencing his concurrent intent to kill both Karen and the baby.

In *People v. Bland*, *supra*, 28 Cal.4th at p. 318, the defendant shot at three persons in a vehicle, killing his target (a rival gang member who was

driving) and injuring, but not killing, the two passengers (who were not gang members). The California Supreme Court upheld the attempted murder convictions of the two passengers, finding that "a person who shoots at a group of people [can] be punished for the actions towards everyone in the group even if that person primarily targeted only one of them." (*Id*. at p. 329.) Although the doctrine of transferred intent does not apply to attempted murder, "the fact that the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within. . . the 'kill zone.'" (*Ibid*.)

Drawing upon *Ford v. State* (Md. 1992) 625 A.2d 984, this Court in *Bland* explained the "kill zone" or concurrent intent theory of liability:

> "The intent is concurrent. . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim."

(*People v. Bland, supra,* 28 Cal.4th at pp. 329-330, quoting *Ford, supra*, at pages 1000-1001.) Also quoting *Ford, supra,* at page 1001, *Harrison v. State* (Md. 2004) 855 A.2d 1220, 1230, further explained that courts focus on the "means employed to commit the crime" and the "zone of harm around [the] victim" in their concurrent-intent analyses. Courts must answer these essential questions: "(1) whether a fact-finder could infer that the defendant intentionally escalated his mode of attack to such an extent that he or she created a 'zone of harm,' and (2) whether the facts establish that the actual victim resided in that

zone when he or she was injured." (*Harrison, supra*, at p. 1231.) When a defendant fires at two people who are in such close proximity to each other such that the defendant endangers the lives of both, a jury can reasonably infer that the defendant intended to kill both. (*People v. Bland, supra,* 28 Cal.4th at pp. 329-331.) In such a situation, the perpetrator directs his or her gunfire at all persons in a so-called "kill zone" that includes but is not limited to the primary target. (*Ibid.*)

Here, the totality of the circumstances indicate that appellant deliberately created a kill zone. The trajectory of the bullet he fired shows that the bullet shattered the rear windshield directly above the baby's head, went through the driver's side headrest, and into the driver's side door. (RT 235-239.) The bullet came within inches of both the baby's and Karen's head. (People's Exhibits 3-4, 33, 39-42, 52-53, 61-64.)[3/] Moreover, Karen's testimony and the photographic exhibits show that the bullet was shot from a 6-10 foot range, giving appellant a high potential for accuracy. (*Ibid*.; RT 49-51) Appellant could see that the baby was strapped in an infant carrier and thus immobile and incapable of escaping the bullet or the shattering shards of glass. (People's Exhibit 4, 52-53.) Additionally, appellant used a .38 caliber bullet, a bullet so large that if it hit any part of the fragile baby's body, death would be likely. The baby and Karen were positioned in the car in such a way that appellant, firing from the rear, could not have killed Karen without shooting a bullet through the baby first. (RT 93-94.) The two victims were in a direct line, thus allowing just one bullet to create a kill zone. Finally, although the bullet itself somehow miraculously missed the baby, it is reasonable to infer that a defendant who fires at a vehicle at close range in which two persons are seated together knows that his act will likely cause the death of both occupants either

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3. In accordance with California Rules of Court, rule 18, respondent will file a notice requesting that the photographic exhibits be transmitted to this Court.

because his shot shatters a window or another part of the vehicle injuring both victims, or because his single shot disables the vehicle or the driver and causes it to crash, or causes it to catch fire, again injuring both victims. Given that the bullet went through the rear windshield, then through the headrest, and finally through the door, a reasonable jury could conclude that the .38 caliber bullet had the potential to kill two people, and that appellant concurrently intended to kill them both.

The inference of intent to kill can be drawn from shooting at a victim in any manner that could have inflicted a mortal wound. (*People v. Chinchilla, supra*, 52 Cal.App.4th at p. 690.) In *Chinchilla*, the defendant fired only once at two police officers, but was convicted of two attempted murders because a second police officer was visibly crouched behind the first. (*Id*. at pp. 690-691.) Relying upon *People v. Lashley, supra*, 1 Cal.App.4th at p. 945, *Chinchilla* noted that "[t]he act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . ." (*People v. Chinchilla, supra*, at p. 690, quoting *People v. Lashley, supra*, at p. 945; *People v. Jackson, supra*, 49 Cal.3d at pp. 1201-1202; *People v. Lee, supra*, 43 Cal.3d at p. 679.)

Similarly, in *State v. Sharp* (N.J.1995) 661 A.2d 1297, 1298, the court held that the defendant intended to kill two officers even though he fired at them only once. Noting its agreement with two cases from Illinois with similar facts,[4/] the court stated that the officers "were standing shoulder to shoulder only five feet from defendant when defendant aimed the gun at their mid-chest area and fired his gun. Clearly, such actions would justify a finding that defendant acted with the purpose to kill both of the officers and that defendant's actions constituted a substantial step toward that result." (*Id.* at p. 1299.)

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4. *People v. Mimms* (Ill.Ct.App.1976) 353 N.E.2d 186 and *People v. Bigsby* (Ill.Ct.App. 1977) 367 N.E.2d 358.

Here, appellant's words consisted of threats, and his actions consisted of looking in at the child, and then positioning himself behind the vehicle in such a way that both the baby and Karen would be in his direct line of fire. He then pulled the trigger, concurrently intending to kill both Karen and the baby.

Appellant presents several arguments as to why he is not liable for the attempted murder of both the baby and Karen. None of his arguments have merit.

Seizing upon the "concurrent intent" examples provided in *People v. Bland, supra,* 28 Cal.4th at pages 329-330, appellant first claims that *Bland* prevents his conviction because his case does not involve "a hail of bullets or a bomb or any other form of 'escalat[ion] [of the] mode of attack from a single bullet."[5/] (AB 10.) Appellant's reading of *Bland* is too narrow.

As explained above, courts consider both the "means employed to commit the crime" and the "zone of harm around the victim" in determining whether concurrent intent exists. (*Ford v. State, supra,* 625 A.2d at p. 1001; *People v. Bland, supra*, 28 Cal.4th at p. 330; *Harrison v. State, supra*, 855 A.2d at pp. 1230-1231.) A court must look at the totality of the circumstances of the case, including such factors as the proximity of the victims to each other and to defendant, the type of weapon used, the means used by defendant to achieve his end, and the area where the crime occurred. For example, if the victims are close to each other and to the defendant, as in the instant case, there is little doubt that both victims are in the zone of harm, especially if the defendant is using a large caliber weapon capable of a greater level of destruction.

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5. Although not discussed by appellant, respondent notes that, while only one bullet actually struck Karen's car, the evidence was inconclusive on whether only one shot was fired. Appellant testified that he heard more than one shot and picked up two bullet casings at the scene. (RT 351-353, 357.) Deputy Stewart found two bullet casings at appellant's home. (RT 217.) However, as explained throughout this brief, the number of bullets fired is not singularly dispositive regarding whether appellant had concurrent intent to kill both the baby and Karen.

Additionally, if the defendant fires his weapon at close range through a glass window with an immobile victim immediately behind that glass, as in the instant case, there is little doubt that the defendant is aware that this means of attack could cause death due to injuries from the glass shards. Or, if the defendant fires a weapon at close range at the driver of a car, he must be aware that any passengers in that car are also likely to die or be gravely injured by the driver's inability to control the car once struck by the bullet. Only by considering the totality of the circumstances, and not by limiting the analysis to the number of bullets fired, can a fact finder reasonably determine whether a defendant had concurrent intent.

Moreover, while the number of shots fired may be relevant to the totality of the circumstances, it is not dispositive. There is no doubt that a single bullet has the capacity to injure or kill more than one person, depending on the proximity of the victims to each other and to the person firing the weapon. In fact, the caliber of the weapon used is also a determining factor. (*People v. Jackson, supra*, 49 Cal.3d at p. 1201 [firing a shotgun from a close distance permits an inference of intent to kill].) Moreover, there is no reason to believe that, had Karen not successfully fled in her car, appellant would have continued firing upon her and the baby. (See fn. 5, *supra*; *People v. Lashley, supra*, 1 Cal.App.4th at p. 945.) Finally, applying appellant's one-bullet no-concurrent-intent rule would lead to absurd consequences. For example, under appellant's analysis, a defendant who fires a single bullet at a mother holding a child in her arms or an officer carrying an injured officer or bystander would only be liable for one count of attempted murder. Appellant's narrow focus on only his means of attack, the firing of a single bullet, fails to consider all of the circumstances. Indeed, appellant never even argues that only one victim was in the zone of harm. His analysis stops at the single bullet fired. Courts must apply a broader analysis.

Appellant also claims that *People v. Chinchilla, supra*, 52 Cal.App.4th

683, conflicts with *People v. Bland, supra*, 28 Cal.4th 313, and, in any event, was wrongly decided. (AB 10-12.) Appellant's arguments fail.

First, while appellant is correct in noting that *Bland* mentions *Chinchilla* only for the proposition that the doctrine of transferred intent does not apply to attempted murder, appellant incorrectly observes that *Bland*'s cite to *Chinchilla* is irrelevant to any of the issues presented here. (AB 10, fn.3, citing *People v. Bland, supra*, 28 Cal.4th at p. 326.) One of appellant's arguments is that the language of *Bland* itself precludes his liability for two counts of attempted murder because he fired a single bullet. (AB 10-12.) Indeed, appellant argues that it is "unquestionable" that *Chinchilla* is "not good law" post *Bland*. (AB 11.) However, appellant also recognizes that *Bland* did not discuss the issue raised in the present case: whether appellant is liable for two counts of attempted murder when he fires only one bullet at two victims within the same zone of harm. (AB 10, fn. 3.) This recognition is fatal to appellant's argument that *Bland* precludes liability in this case. Since this Court in *Bland* was not faced with the facts in the present case, its ruling could not have precluded appellant's liability herein. (*In re Chavez* (2003) 30 Cal.4th 643, 656 ["a case is authority only for a proposition actually considered and decided therein. [Citations.]"].) In fact, *Bland*'s cite to *Chinchilla*, even for a secondary point, indicates its awareness of the opinion. Had *Bland* found *Chinchilla* to be "unquestionabl[y]. . . [bad] law," it surely would have discussed it and disapproved it. Instead, since the *Bland* court faced different facts than *Chinchilla*, it expressed no opinion on its disposition.[6/]

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6. Appellant also argues that it is "most important" that the *Chinchilla* court recognized that there were no California cases decided upon its facts at the time it rendered its decision. (AB 11, citing *People v. Chinchilla, supra*, 52 Cal.App.4th at p. 690.) Respondent fails to recognize either the relevance or the importance of this fact to the instant case. Whether *Chinchilla* is the first or the only case of its kind does not establish that it was wrongly decided. This is especially true since appellant fails to cite any other case which addressed these same facts and came to a different conclusion than *Chinchilla*.

Second, appellant contends that the conclusion in *Chinchilla* is dependent upon a concession by *Chinchilla*'s counsel that "one shot could support a conviction on two counts of attempted murder if there was evidence that the shooter saw both victims." (AB 11, citing *People v. Chinchilla, supra*, 52 Cal.App.4th at p. 690.) Appellant argues that the concession of this "key issue" is unjustified under *Bland* and renders the *Chinchilla* decision inconsistent with *Bland*. (AB 10-11.) Appellant fails to explain how this concession or this issue is relevant to the present case. Appellant's own testimony herein established that he saw both victims. (RT 345, 382.) Therefore, regardless of whether this point is conceded, it was not only reasonable to infer that appellant knew of the baby's presence (see *People v. Chinchilla, supra*, 52 Cal.App.4th at p. 690), the inference is compelled by the evidence. In any event, appellant fails to explain how this fact (appellant's knowledge or lack of knowledge of the victim's presence) is inconsistent with *Bland*. In *Bland*, the defendant also knew of the presence of his victims. (*People v. Bland, supra*, 28 Cal.4th at p. 318.) Furthermore, *Bland* discussed with approval two cases that affirmed defendants' attempted murder convictions of multiple victims, quoting: "'[t]he fact [the defendants] could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed.'" (*People v. Bland, supra*, at p. 330, quoting *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.) Accordingly, *Chinchilla*'s conclusion is not inconsistent with *Bland*.

Finally, appellant contends that *Chinchilla* was wrongly decided because it misapplied the substantial evidence rule and assumed facts not in the record. (AB 11.) *Chinchilla* did neither. *Chinchilla* set forth the proper standard of review and applied it to the facts of the case. (*People v. Chinchilla, supra*, 52 Cal.App.4th at pp. 689-690.) In doing so, *Chinchilla* relied upon *People v. Lashley, supra*, 1 Cal.App.4th at pages 945-946, in discussing the need to

determine intent to kill from circumstantial evidence because direct evidence of such intent is rare. (*People v. Chinchilla, supra,* at p. 690.) The court did not err in doing so.

In sum, the Court of Appeal properly concluded that appellant either specifically intended to kill the baby as well as Karen or had the concurrent intent to kill both of them. Considering all of the circumstances, including appellant's mode of attack, appellant created a kill zone around Karen from which a trier of fact could reasonably conclude appellant had the concurrent intent to kill both Karen and her baby.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment and sentence be affirmed.

Dated: September 2, 2005

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Jarmaal Laronde Smith** No.: **S123074**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 16, 2004, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 16, 2004, at Sacramento, California.

_____
Declarant

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4802 words.

Dated: September 2, 2005

Respectfully submitted,

BILL LOCKYER
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