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SUPREME COURT  
FILED

DEC 20 2013

Frank A. McGuire Clerk

Deputy

Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

\_\_\_\_\_  
PEOPLE OF THE STATE OF CALIFORNIA, )

Plaintiff and Respondent, )

v. )

CARLOS MARVIN ARGUETA, )

Defendant and Appellant. )

S150524

(Los Angeles County)

Sup. Ct. No. BA261252

**REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE**

Appellant, CARLOS MARVIN ARGUETA, through his counsel, the State Public Defender, hereby requests that this Court take judicial notice pursuant to Evidence Code sections 452, subdivisions (a) and (d), and 459, subdivision (a), of the statement of facts in the unpublished decision in the appeal of Enrique Gonzalez, appellant's co-defendant, whose case was severed for trial. (*People v. Enrique Gonzalez*, 2008 WL 1874431

DEATH PENALTY

(Cal.App. 2 Dist.), \*3, section F.) Specifically, appellant seeks notice of the court of appeal's summary of the testimony given by the gang expert at Gonzalez's trial. This testimony is relevant to the Court's consideration of Argument III of appellant's opening brief. (See Appellant's Opening Brief at p. 75 & fn. 20.)

Appellant's request is based on the attached Memorandum of Points and Authorities and the files and records in this case.

Dated: December 20, 2013

Respectfully Submitted,

MICHAEL J. HERSEK  
California State Public Defender

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NINA WILDER  
Supervising Deputy State Public Defender

Attorneys for Appellant

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE**

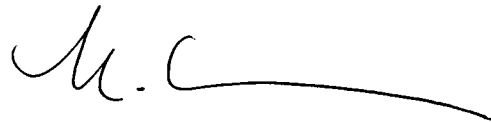
Appellant requests that the Court take judicial notice of the court of appeal's summary of certain testimony given by the prosecution's gang expert at the separate trial of co-defendant Enrique Gonzalez, as stated in *People v. Gonzalez*, 2008 WL 1874431 (Cal.App. 2 Dist.), \*3, section F. Appellant and Gonzalez were charged and sentenced jointly, but tried separately in Los Angeles County Superior Court case no. BA261252. Appellant's trial commenced on September 5, 2006, and concluded on November 3, 2006; Gonzalez's trial commenced immediately thereafter. The same prosecutor tried both cases. The gang expert did not testify at appellant's trial pursuant to a stipulation by which appellant agreed not to cross-examine certain witnesses regarding prior misidentifications in exchange for the prosecutor's forgoing the testimony of a gang expert. Appellant argues in his opening brief that the trial court erred in misadvising appellant regarding the merits of the stipulation. (AOB, Argument III.) Earlier in the trial, before appellant agreed to the stipulation, the prosecutor filed a motion in limine seeking admission of gang expert testimony and specifying a limited theory of admissibility – namely, the importance of respect in gang culture. The prosecutor's proffer at the hearing on the issue was consistent with her argument in the motion regarding the proposed scope of the expert's testimony. The summary of the gang expert's testimony at co-defendant Gonzalez's trial likewise confirms that "disrespect" was indeed the sole purpose for which the prosecutor sought to introduce expert testimony. The actual, as well as anticipated, scope of the gang expert's testimony bears directly on appellant's argument that the trial court, in effect, induced his acquiescence in the stipulation by erroneously advising appellant that, on balance, he lost nothing by forgoing the cross-examination while gaining the exclusion of the gang expert's testimony. (AOB, Argument III, at pp. 74-87.)

The court of appeal's summary of the gang expert's testimony at Gonzalez's trial is an appropriate subject of judicial notice by this Court. Evidence Code section 459, subdivision (a), permits a reviewing court to take judicial notice of "any matter specified in Section 452." Section 452, subdivision (a), provides, in relevant part, that judicial notice may be taken of "[t]he decisional . . . law . . . of this state." Section 452, subdivision (d), further states that judicial notice may be taken of the "[r]ecords of (1) any court of this state. . . ." The summary of facts in *People v. Gonzalez* comes within this statutory authorization.

Accordingly, appellant asks that this Court take judicial notice of the Court of appeal decision in *People v. Gonzalez, supra*, 2008 WL 1874431, and the gang expert's testimony in that case. A copy of this decision accompanies the filing of this motion.

Dated: December 20, 2013

Respectfully Submitted,  
MICHAEL J. HERSEK  
California State Public Defender

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NINA WILDER  
Supervising Deputy State Public Defender

ATTORNEYS FOR APPELLANT



Not Reported in Cal.Rptr.3d, 2008 WL 1874431 (Cal.App. 2 Dist.)  
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

(Cite as: 2008 WL 1874431 (Cal.App. 2 Dist.))



Only the Westlaw citation is currently available.  
California Rules of Court, rule 8.1115, restricts citation  
of unpublished opinions in California courts.

Court of Appeal, Second District, Division 7, California.

The PEOPLE, Plaintiff and Respondent,  
v.  
Enrique GONZALEZ, Defendant and Appellant.  
No. B197530.

(Los Angeles County Super. Ct. No. BA261252).  
April 29, 2008.

APPEAL from a judgment of the Superior Court of Los  
Angeles County. Curtis B. Rappe, Judge. Affirmed in part,  
vacated in part, and remanded.

Victor J. Morse, under appointment by the Court of  
Appeal, for Defendant and Appellant.  
Edmund G. Brown, Jr., Attorney General, Dane R.  
Gillette, Chief Assistant Attorney General, Pamela C.  
Hamanaka, Senior Assistant Attorney General, Victoria B.  
Wilson and Jonathan J. Kline, Deputy Attorneys General,  
for Plaintiff and Respondent.

WILEY, J.<sup>FN\*</sup>

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

\*1 A jury convicted Enrique Gonzalez of one  
murder and six attempted murders. Gonzalez says there  
was not enough evidence to find him vicariously liable for  
these crimes. We affirm the convictions. The sentence is  
vacated and the cause is remanded for resentencing.

I

A

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Enrique Gonzalez is the defendant and appellant in  
this case. Carlos Argueta is his friend. They belong to a  
“tag-banging” group called “T.C.A.” A tag-banging group  
is a tagging crew whose activities have escalated to  
include crimes, but that police have not yet documented or  
categorized as a criminal street gang.

“T.C.A.” apparently has no definite meaning. Possible  
meanings include, “Two Crazy Artists,” “Thugs Cheating  
Art,” “Them Crazy Ass Kids,” “Top Creative Artists,” and  
“Awesome Crews Around.” Carlos Argueta’s moniker is  
“Clown,” or “Solrac” (which is “Carlos” spelled  
backward). Gonzalez’s moniker is “Epic Loc.”

The shootings in this case were on February 13, 14,  
and 19, 2004. Gonzalez was 18 years old at the time.

B

On February 13, 2004 several youths were at a night  
club. Francisco Amezcua, Jorge Lua, and Carlos Zepeda  
were in Amezcua’s car near the night club. Shots rang out.  
Amezcua got scared and tried to drive off. In his haste,  
Amezcua backed into a small red car by mistake. Amezcua  
saw two men in the red car. They looked angry. Amezcua  
pulled forward, but the red car pulled around him.  
Someone in the red car fired nine shots into Amezcua’s  
car. Amezcua and Zepeda survived, but Lua was shot  
dead.

The shooter in the red Toyota was passenger Carlos  
Argueta. He fired a Sten Mark submachine gun,  
manufactured in World War II England. This submachine  
gun required two hands to carry and operate. Its magazine  
held 32 nine-millimeter bullets. The submachine gun  
could shoot in either semi-automatic or fully automatic  
mode. Argueta fired the Sten and killed Lua for bumping  
his car. That was February 13, 2004.

C

On February 14, 2004 there was to be a public  
Valentine’s Day party at a night club. Fliers announced the  
event. Gregory Gabriel, then 12 years old, got permission

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to spend the night with his best friend, Marvin Emmanuel, then 14. Their plan was to wait until Emmanuel's parents went to sleep and then have Marvin's 17-year-old brother, Kareem Emmanuel, drive them to the party. They left late at night and picked up two other school friends: 15-year-old Camille Johnson and her 13-year-old sister, Girnet Hart. Kareem Emmanuel dropped the four off at the corner of 57th Street and Manchester. He told them to wait there for him to return with another group.

Johnson noticed the people at the club seemed older and largely Hispanic. Emmanuel told Gabriel "there were too many Mexicans." Gonzalez overheard the remark and walked over to Emmanuel, Gabriel, Johnson, and Hart. He asked them what they had said about Mexicans. They all denied saying anything. Gonzalez said, "You fools talking about Mexicans." Gonzalez "threw out" the letters of his crew T.C.A. as he continued to ask what they had said. From what she learned at school and on the streets, Hart said Gonzalez would not be "throwing out" letters unless it was to do with a gang. She got very scared.

\*2 Gonzalez was angry. He turned to the two boys and asked, "Where are you from?" Gabriel and Emmanuel responded they were just students. They denied being from anywhere. Johnson recognized Gonzalez's question as a challenge. She knew if gang members ask this question it means there is "going to be a conflict. A big conflict." Hart ran across the street and started praying.

Gonzalez called out to Carlos Argueta who was standing across the street. Gonzalez told him to come over and "bring the strap." Argueta approached holding the Sten machine gun in two hands. Gonzalez told him, "These fools was talking about Mexicans." Gonzalez told Argueta they did not know T.C.A. One of them asked what T.C.A. stood for and either Gonzalez or Argueta told them. This got no response. Argueta and Gonzalez were angry. Argueta pointed his gun in Johnson's face. Johnson asked Argueta if he was going to shoot her. Argueta smiled. Argueta then pointed the gun at Emmanuel and Gabriel. They were very scared. Gabriel started crying.

A security guard told Argueta, "these are kids. Don't be bothering them." Gonzalez said, "No. They disrespected us." Argueta added, "I don't care. They

disrespecting T.C.A."

Johnson started to walk away and Emmanuel and Gabriel followed. Gonzalez and Argueta walked back across the street. Thinking the crisis had passed, Hart recrossed the street to join her sister.

Seconds later there were gunshots. Everyone tried to run into the club. Bullets hit Hart twice. She ran into the club's bathroom and collapsed. Gabriel was also hit twice in his back. He fell on the sidewalk.

Rene Jesus Jimenez was an uninvolved bystander. He was just at the club, and was stepping outside to nap in his friend's car. He was on the sidewalk when several bullets struck his chest.

Gabriel died that night from two bullets to his back. He was 12. Jimenez and Hart survived but each required two surgeries and long hospital stays.

Officers found 21 nine-millimeter shell casings at the scene.

## D

After a preliminary hearing spanning several days, the court held Argueta's younger brother Johnny to answer on a "serious felony" charge unrelated to this case. Argueta attended several court sessions. He disturbed them by murmuring comments about the witnesses and their testimony. He gave witnesses an intimidating stare. This conduct continued in the hallways outside the courtroom. Argueta was more disruptive on the day his brother was held to answer. As deputies escorted witnesses from the court house, Argueta yelled expletives at them and "gave them the finger."

Miguel Ramos testified on February 19, 2004. His friend Robert Carrillo came to court with him for moral support. In the afternoon they drove around doing errands. Ramos drove his Mazda hatchback with Carrillo as his passenger.

Ramos and Carrillo passed Argueta's red Toyota. Gonzalez was driving. Argueta sat in the passenger seat

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with the Sten gun. Gonzalez made a U-turn and pulled behind Ramos. After a few blocks Ramos noticed Argueta and Gonzalez in the red Toyota. Ramos hit the gas, turned down side streets, and ran stop signs, but he could not get away.

\*3 After 15 or 20 blocks of car chase, Argueta opened fire. A bullet shattered the Mazda's rear window and Carrillo felt a stabbing in his back. The bullet went through the glass, penetrated the passenger seat, and hit a metal bar inside the seat. The hot bullet put a hole in Carrillo's shirt and burned the skin on his back. Ramos crashed his car. Ramos and Carrillo got out, hid, and ran to Carrillo's sister and brother-in-law's apartment. Carrillo's brother-in-law was outside. He saw the red Toyota come down the street, crash into the apartment manager's truck, and speed off.

E

Days later, police arrested Argueta and Gonzalez together. An officer investigating the Ramos/Carrillo shooting was the first to interview Gonzalez, who refused to speak on tape. He gave a written statement instead. Gonzalez wrote he and Argueta followed Ramos's car until it crashed. Gonzalez drove and Argueta was the passenger in Argueta's red Toyota. Argueta fired the shot through the back window of Ramos's car.

Next, officers investigating Gabriel's murder interviewed Gonzalez. They taped this interview, and the jury heard the tape. Gonzalez confirmed the witnesses' testimony. Gonzalez got angry when he heard Emmanuel say, "There's too many Mexicans up in here." He said he argued with the "black people." He claimed T.C.A. and his moniker "Epic Loc." Gonzalez said T.C.A. meant "Too Crazy and Cracking." The girls and boys did not recognize T.C.A. Gonzalez said he called Argueta "over and told him to bring the strap." At the detectives' suggestion, Gonzalez agreed he wanted only to scare Emmanuel, Gabriel, Johnson, and Hart. Gonzalez stated they "started the argument, I guess, I took it to the next level or whatever. He didn't have to start shooting."

Gonzalez denied being with Argueta the night before the Valentine's Day shooting when the car bumped

Argueta and Argueta fired the machine gun. Gonzalez admitted he knew about that shooting when he called Argueta over and told him to bring his "strap." Gonzalez said Argueta had told him he "let off on some fools cause they crashed into his car."

F

Detective Jeff Cortina testified as a gang expert. Cortina explained T.C.A. is a "tag-banging crew," defined as a tagging crew involved in criminal activity. He said the purpose of "throwing out" the name T.C.A. and claiming a moniker is to announce, "if you disrespect my group or me that there is going to be consequences." Cortina said the question, "Where are you from?" has no right answer. It is meant to trigger a confrontation. "You've got a second to either back down, run[,] or stand up, be willing to take what is coming." Cortina testified gang members crave respect and believe they must punish expressions of disrespect, including race-based comments or insults.

G

The jury convicted Gonzalez of the first degree murder of Gabriel. (Pen.Code, § 187, subd. (a), count 4; further statutory references are to the Penal Code.) The jury also convicted Gonzalez of the premeditated, deliberate, and willful attempted murders of Hart, Jimenez, Emmanuel, Johnson, Carrillo, and Ramos. (§§ 664/187, subd. (a), counts five through ten.) As to each of these counts, the jury found true allegations Gonzalez knew a principal was personally armed with a firearm in the commission of the offenses. (§ 12022, subd. (d).)

\*4 The trial court sentenced Gonzalez to 25 years-to-life on the murder count and imposed consecutive life sentences for each of the attempted murders in counts five through ten. The court also imposed punishment on the firearm enhancements. (Carlos Argueta was tried separately. His jury returned a verdict of death (S150524).)

Gonzalez appeals from the judgment.

II

A

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In this appeal Gonzalez challenges only the murder and attempted murder convictions resulting from the shooting at the Valentine's Day party (counts four through eight). He claims there was too little evidence to sustain his convictions under either of the prosecution's two theories of accomplice liability. He also claims there was insufficient evidence he aided and abetted the murder and attempted murders, or that he was guilty of the murder and attempted murders on the theory the shooting was the natural and probable consequence of his aiding and abetting Argueta's commission of assault with a firearm. We review the record for substantial evidence. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

B

Gonzalez claims the evidence is insufficient because it fails to show he intended to aid and abet the murder and attempted murders committed by Argueta.

"All persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, ... are principals in any crime so committed." (§ 31; see also, *People v. Mendoza* (1998) 18 Cal. 4th 1114, 1122-1123.) For conviction of a charged offense "an aider and abettor's mental state must be at least that required of the direct perpetrator. To prove that a defendant is an accomplice ... the prosecution must show that the defendant acted with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. When the offense charged is a specific intent crime, the accomplice must share the specific intent of the perpetrator; this occurs when the accomplice knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. What this means here, when the charged offense and the intended offense-murder or attempted murder-are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118, internal citations and quotation marks omitted.)

Gonzalez claims the evidence "utterly fails" to show he intended the shooting. This is incorrect. Gonzalez claimed he wanted only to scare the victims when he told Argueta to bring the "strap." This self-serving effort to minimize guilt did not bind the jury, which reasonably could have looked to the other evidence, which suggested Gonzalez intended and expected Argueta to shoot.

\*5 Gonzalez had a motive to kill. Emmanuel's comment about "too many Mexicans" insulted Gonzalez, who responded with escalating provocation. Gonzalez confronted the group of children. Each denied making the statement. Gonzalez intensified the conflict by announcing T.C.A. and his moniker "Epic Loc." None of the victims recognized T.C.A. or knew what it stood for. This antagonized Gonzalez even more. The gang expert testified that displays of disrespect required response. Gonzalez went further by asking Gabriel and Emmanuel, "Where are you from?" The victims testified they knew then that Gonzalez wanted a violent confrontation.

At this moment, why did Gonzalez call for the gun? He had picked a fight with two girls and two boys, aged 15, 14, 13, and 12. He had them thoroughly cowed. One was actually praying. Next, Gonzalez had uttered the statement that in Los Angeles is infamous and filled with portent: "Where are you from?" Why order up a gun after *that* statement? One interpretation is the gun was just added intimidation, to pile wood on the fire. But the gun was unnecessary to terrorize the children, who already were frightened and compliant.

Another interpretation is that Gonzalez meant business. A typical purpose for a gun is to shoot. It would have been reasonable for the jury to conclude Gonzalez wanted the gun for the purpose of shooting.

Of course, a shooting response is exceptionally violent. It was unreasonably disproportionate in this situation. But Gonzalez knew that the night before, Argueta had machine-gunned a car that merely had bumped his red Toyota. That annoyance was slight, unintentional, and anonymous. By contrast, this situation on February 14 was face-to-face. It was personal.

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Gonzalez told the security guard how he viewed this situation: "They disrespected us." On these facts, the jury could decide Gonzalez ordered a gun because he wanted a shooting.

Gonzalez's claim-he wanted only to scare, not to kill, on that night of February 14-also was contrary to Gonzalez's conduct on February 19. On February 19, Gonzalez drove Argueta in a cross-city chase as Argueta was trying to shoot a witness to death with the same submachine gun. For 15 or 20 blocks, Gonzalez did his best to get Argueta and the Sten gun in killing range, not scaring range. It almost worked. A bullet went through the window glass, through the back of the seat, through the metal inside the seat, and through Carrillo's shirt, finally coming to rest against Carrillo's skin. With Gonzalez's help, Argueta was shooting to kill. Their February 19 teamwork pursued a common and lethal goal. A jury reasonably could conclude this killing team had the same common and lethal goal on February 14: to use the gun to kill and not frighten.

On February 14, it is true that Argueta and Gonzalez walked across the street once the security guard intervened. This fact did not establish the confrontation was over. When he reached the opposite corner, Argueta opened fire on the victims before they could walk away. As the trial court observed, Argueta and Gonzalez's act of walking away was a concerted action to lull the victims into a false sense of security. Argueta opened fire once the victims turned their backs. The jury could have reasonably concluded this was cowardice, or sadism, or both.

\*6 A reasonable juror thus could have found Gonzalez intended the murder and attempted murders. And to the extent jurors may have relied on the aiding and abetting theory to find him guilty, substantial evidence supports Gonzalez's convictions. (See People v. Santamaria (1994) 8 Cal.4th 903, 918 [if the jury unanimously agrees the defendant is guilty of first degree murder the jury "need not decide unanimously by which theory he is guilty."].)

C

Gonzalez argues the evidence is also insufficient to support the convictions under the prosecution's alternate theory. This alternate theory was that the murder and attempted murders were the natural and probable consequences of a separate crime: an assault with a gun.

"[A] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense...." (People v. Croy (1985) 41 Cal.3d 1, 12, fn. 5.)

To establish aider and abettor liability on a "natural and probable consequences" theory, the jury must have found (1) Gonzalez acted with knowledge of the perpetrator's unlawful purpose, (2) Gonzalez acted with the intent of committing, encouraging, or facilitating that target offense, and (3) Gonzalez aided, promoted, encouraged, or instigated the commission of the target crime. (People v. Prettyman (1996) 14 Cal.4th 248, 262.) The jury must have also found "that (4) [Argueta] committed an offense *other than* the target crime; and (5) the offense committed by [Argueta] was a natural and probable consequence of the target crime that [Gonzalez] aided and abetted." (*Ibid.*, fn. omitted.)

Whether a crime is a "natural and probable consequence" is judged by an objective standard. The question "is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." (People v. Mendoza, supra, 18 Cal.4th at p. 1133.)

The jury instructions specified the target crime was assault with a firearm. This was based on Gonzalez's command that Argueta "bring the strap."

Gonzalez again claims that, when he called Argueta over and told him to "bring the strap," he intended only to

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scare the victims. Gonzalez claims the evidence did not show he encouraged or intended an assault with the firearm because he did not direct Argueta to *point* the gun at Gabriel, Emmanuel, or Johnson. This distinction is immaterial. It is not necessary to point a gun directly at another person to commit the crime of assault with a firearm. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) It is enough if the person intending the assault is holding a loaded and operable gun in a position in which it could be fired. (*Id.* at p. 266.)

\*7 Our Supreme Court explained this concept before the Civil War. "Holding up a fist in a menacing manner, drawing a sword, or bayonet, *presenting a gun at a person who is within its range*, have been held to constitute an assault. So any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault." (*People v. McMakin* (1857) 8 Cal. 547, 548, italics added; accord, *People v. Colantuono* (1994) 7 Cal.4th 206, 219.)

Gonzalez claims he had to tell Argueta to point the gun-that display alone was not enough. This claim is incorrect. Displaying a gun sent an assaultive message in 1857. It sends the same message today.

Gonzalez next argues that the evidence shows at most he "encouraged Argueta to join in [his] confrontation with the teenage victims and display a gun for the purpose of scaring them." He asserts the evidence proves he merely intended to aid and abet an unlawful brandishing. But Gonzalez would fare no better if the target crime were brandishing instead of assault. Brandishing is a crime. (§ 417, subd. (a)(2).) For the natural and probable consequences doctrine, brandishing would suffice. (See *People v. Lucas* (1997) 55 Cal.App.4th 721, 731-732.) The evidence indeed showed a brandishing. Gonzalez concedes a brandishing. Using this target offense would not have mattered. Once Gonzalez encouraged Argueta to brandish the gun, the evidence showed it was probable Argueta would shoot it at the victims.

Gonzalez also argues that, whether the target offense

was assault or brandishing, neither the murder nor attempted murders were reasonably foreseeable results of his actions. For reasons already canvassed, this argument is incorrect.

There was no error.

### III

On each count, the information charged Gonzalez under section 12022, subdivision (d) with enhancement allegations that a principal was armed with a firearm in the commission of the offenses. The jury found the allegations true. Regarding these enhancements, the court imposed a consecutive term of two years on count four for Gabriel's murder and consecutive to this term one-third the mid-term, or eight months, on count nine involving the attempted murder of Carrillo. The court imposed and stayed punishment on the remaining firearm enhancements. (§ 654.)

Gonzalez argues this enhancement should not apply to his case. He says the additional punishment under section 12022, subdivision (d) constitutes an unlawful sentence and must be vacated. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The People concede firearm enhancements under section 12022, subdivision (d) were inappropriate on the facts of this case. They ask this court to exercise its discretion to instead impose punishment on the lesser included enhancement of section 12022, subdivision (a)(1).

Section 12022, subdivision (d) states: "Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal *in the commission of an offense or attempted offense specified in subdivision (c)*, shall be punished by an additional and consecutive term of imprisonment in the state prison for one, two, or three years." (Italics added.)

\*8 The offenses listed in subdivision (c) of section 12022 concern violations of the Health and Safety Code. The list does not include the offenses of which Gonzalez was convicted-murder and attempted murder.

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Accordingly, this element of the enhancement is factually inapplicable and unproved. Indeed, this element of the enhancement was omitted from the jury instruction. The court's instruction told the jury that, in order to prove the allegation a principal was armed in the commission of the offense under section 12022, subdivision (d), the prosecution was required to prove: "1. Someone who was a principal in the crime was armed with a firearm during the commission of that crime; [¶] AND [¶] 2. The defendant was also a principal in the crime and knew that the other person was armed with a firearm." (CALCRIM No. 3117.)

These elements of the arming enhancement were proved. The evidence conclusively established (1) Gonzalez was a principal in the offenses; (2) he was not personally armed; and (3) Gonzalez knew Argueta was personally armed with a firearm. These three elements are part of the greater enhancement of subdivision (d), which has, in addition, the requirement the offenses be certain violations of the Health and Safety Code. These three proved elements are the only elements of the lesser punishment of section 12022, subdivision (a)(1). The enhancement under section 12022, subdivision (a)(1) provides for an additional term of one year, and applies "to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm." Accordingly, the proved elements found by the jury are sufficient to support a finding on the lesser included enhancement of section 12022, subdivision (a)(1). We therefore reject Gonzalez's argument that the enhancement must be vacated entirely, even though he correctly argues—and the People concede—that the sentence actually imposed is in error. The proper response to this situation turns on post-briefing letters that the parties submitted to this court.

#### IV

In their post-briefing letters to this court, the parties agree we should remand this case to the trial court for resentencing to permit the court to exercise its discretion in the first instance. A remand is necessary for two reasons.

First, the court should have imposed full term gun use enhancements, and not one-third the time period specified. (See *People v. Felix* (2000) 22 Cal.4th 651, 656 ["we find that section 1170.1 does not apply to a gun-use enhancement attached to an offense which carries an indeterminate term of imprisonment. That being the case, section 1170.1's one-third limit for consecutive subordinate terms and enhancements does not apply." Internal citations and quotation marks omitted]; see also, *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1209.)

Second, each gun enhancement involved a separate victim. In these circumstances the limitation of section 654 does not apply. (*People v. Oates* (2004) 32 Cal.4th 1048, 1063 ["We have long held that the limitations of section 654 do not apply to crimes of violence against multiple victims." Citation and quotation marks omitted.] The Supreme Court has not resolved the issue whether section 654 would otherwise apply to section 12022 gun enhancements. (See *People v. Palacios* (2007) 41 Cal.4th 720, 728 ["we need not address the People's argument that section 654 generally does not apply to enhancements. We leave that question for another day."].) On the other hand, and unlike other gun use enhancements, for example, section 12022.53 enhancements, there is no express statutory prohibition against a court striking a section 12022 enhancement. (Compare § 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."] with § 12022, subd. (f) [a court may strike even the more serious enhancements under this section if the interest of justice would be served].)

#### V

\*9 The convictions are affirmed. The sentence is vacated and the cause is remanded for resentencing. We concur: PERLUSS, P.J., and WOODS, J.

Cal.App. 2 Dist., 2008.

People v. Gonzalez  
Not Reported in Cal.Rptr.3d, 2008 WL 1874431

Not Reported in Cal.Rptr.3d, 2008 WL 1874431 (Cal.App. 2 Dist.)  
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

(Cite as: 2008 WL 1874431 (Cal.App. 2 Dist.))

(Cal.App. 2 Dist.)  
END OF DOCUMENT

**DECLARATION OF SERVICE**

Re: *People v. Carlos Argueta*

Supreme Court No. S150524  
Superior Court No. BA261252

I, Tamara Reus, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607; that I served a copy of the attached:

**REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE**

on each of the following, by placing same in an envelope addressed respectively as follows:

Tasha G. Timbadia  
Deputy Attorney General  
California Department of Justice  
300 S. Spring Street  
Los Angeles, CA 90013

Carlos Argueta, #F63367  
CSP-SQ  
3AC-15-N  
San Quentin, CA 94974  
(Appellant)

Hon. Curtis B. Rappe  
Clara Shortridge Folz Criminal  
Justice Center  
Los Angeles County Superior  
Court, Dept. 103  
210 West Temple St.  
Los Angeles, CA 90012

California Appellate Project  
101 2<sup>nd</sup> St., #600  
San Francisco, CA 94105

Each said envelope was then, on December 20, 2013, sealed and deposited in the United States mail at Oakland, Alameda County, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on December 20, 2013, at Oakland, California.

  
DECLARANT