TARGETING GANG CRIME: AN ANALYSIS OF CALIFORNIA PENAL CODE SECTION 12022.53 AND VICARIOUS LIABILITY FOR GANG MEMBERS

Jennifer Walwyn*

In this Comment, Jennifer Walwyn examines California Penal Code section 12022.53 and the controversy among the California Courts of Appeal surrounding the vicarious application of firearm sentence enhancements to aiders and abettors of gang crime. She explores the traditional doctrines of conspiracy and aider-and-abettor liability and contrasts those doctrines with the operation of statutory sentence enhancements. She proceeds to analyze the case of People v. Garcia, *on review in the California Supreme Court, in which the California Court of Appeal required conviction of the actual shooter as a predicate for enhancing the sentence of an aiding or abetting gang member. She then contrasts* Garcia *with differing applications by other divisions of the California Courts of Appeal as to whether vicarious liability can be a trigger for enhancing gang members' sentences. Concluding that the interpretation of the* Garcia *court results in unintended consequences and an unadministrable system, she proposes a reading of the statute that permits vicarious sentence enhancements for aiding or abetting gang members when the aider intends to aid an enumerated target offense for the benefit of a criminal street gang and knows that a natural and probable consequence of that offense is personal use or discharge of a firearm by a co-principal.*

INTRODUCTION 686
I. GANG PROSECUTION UNDER COMMON LAW 689
A. Conspiracy Liability and the *Pinkerton* Doctrine 689
B. Aiding and Abetting Liability: The Natural and Probable Consequences Doctrine 690
II. THE INCREASING ROLE OF STATUTES IN PROSECUTING GANG CRIME 692
A. The STEP Act: California Penal Code Section 186.22 693

* Symposium Editor, UCLA Law Review, Volume 50. J.D. candidate, UCLA School of Law, 2003; B.S., Cornell University, 2000. I wish to thank Steve Levine of the Los Angeles County District Attorneys Office for introducing me to this topic, and Professor David Sklansky for his invaluable insight and encouragement throughout the drafting process. I would also like to thank Kathy Ku, Todd Foreman, Pei Pei Tan, Steven Chasin, Mieke Biesheuvel, and Mana Elihu for their commitment to the editing process. I am grateful to Professor David Sherwyn at Cornell University whose guidance helped me choose law as a career. Finally, this Comment is dedicated to my friends and family, particularly to my parents Robert and Carolyn, and my brother Jeff, for their unconditional love and unwavering support.

B. The Firearm Enhancement Statute: California Penal Code Section 12022.53 695
III. DIFFERING INTERPRETATIONS OF SUBDIVISION (E)(1) OF THE FIREARM ENHANCEMENT STATUTE 698
A. *People v. Garcia*: The Case Before the California Supreme Court 698
B. A Conflicting Interpretation: *People v. Tillett* and Determining What Must Be Pled and Proved Under the Firearm Enhancement Statute 704
C. Applying Traditional Vicarious Liability: *People v. Gonzales* and *People v. Salas* 706
D. Hypothetical Fact Patterns to Clarify Common Law and Statutory Schemes of Punishment 710
1. Hypothetical 1 710
2. Hypothetical 2 711
3. Hypothetical 3 712
IV. A PRACTICAL AND ADMINISTRABLE SUPREME COURT DISPOSITION 714
A. Analysis of the *Garcia* Interpretation 714
B. Who Should Be a Principal Under Subdivision (e)(1) of the Firearm Enhancement Statute? 715
C. How Should the Supreme Court Read the Whole of Subdivision (e)(1) of the Firearm Enhancement Statute? 717
CONCLUSION 718

INTRODUCTION

Street gang crime became an increasingly important concern in California throughout the 1990s. In 1999, firearms were used in 67 percent of reported homicides, accounting for more homicides than all other weapons combined.[1] This statistic has its most striking impact on young adults, as eighteen- to twenty-four-year-olds are those most often victimized by firearm homicides.

This Comment will analyze prosecutorial and legislative attempts to counter the problem of crime in California and specifically group criminality in the form of street gangs. Particularly, this Comment focuses on section 12022.53 of the California Penal Code,[2] which provides sentence enhancements for certain crimes when coupled with firearm use. It also analyzes the differing applications by the California Courts of Appeal of vicarious liability as a trigger for sentence enhancement for members of criminal street gangs. Finally, this Comment addresses the case of *People v. Garcia*,[3] currently under review by the California Supreme Court, and posits a realistic and workable interpretation of the statute that comports with legislative intent and traditionally accepted common law principles.

1. CRIMINAL JUSTICE STATISTICS CENTER, CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 26 (2001).

2. CAL. PENAL CODE § 12022.53 (Deering Supp. 2002).

3. 106 Cal. Rptr. 2d 227 (Ct. App. 2001), *depublished & cert. granted*, 29 P.3d 102 (Cal. 2001).

Both proponents and opponents of enacting California Penal Code section 12022.53 had grand predictions for the statute's effect, and each side has instead suffered judicial disagreement and unpredictability following the California legislature's vague and inartful pursuit of a laudable goal. The legislature passed section 12022.53 by way of Assembly Bill 4 (AB 4) of the 1997–98 session of the legislature, which became effective on January 1, 1998. The statute provides for sentence enhancements based on firearm use during the commission of specified felonies.[4] Since its adoption, courts have searched for the appropriate interpretation of the increased liability provided by the statute.

Proponents of AB 4 supported what they said was "a sensible means of punishing perpetrators of gun violence"[5] and a "necessary [measure] to appropriately punish those who create the danger of a homicide by committing a serious felony with the use of . . . a firearm."[6] Others supported the bill because they felt it helped address the rights of victims of gun violence,[7] or because they believed it appropriately punished juvenile offenders as adults.[8] Proponents touted the benefits of locking up defendants who used firearms, claiming it would increase safety, reduce crime rates, and deter would-be criminals.[9]

On the other hand, opponents of the bill were concerned with what the American Civil Liberties Union (ACLU) referred to as "inappropriately excessive sentences for acts that involve firearms."[10] Opponents of AB 4 viewed the then-current sentence enhancements under California Penal

4. Other similar bills had failed to pass. See, for example, A.B. 892, 1995–1996 Sess. (Cal. 1996), which died in the state senate.

5. Press Release, California Governor Pete Wilson, Wilson Urges Senate Public Safety Committee Not to Play Political Games with the 10-20-Life Bill (July 8, 1997).

6. Letter from Warren W. Quann, Legislative Advocate, City of Oakland, to Senator John Vasconcellos, Chairman, Senate Public Safety Committee (June 13, 1997) (on file with author).

7. *See* Letter from Jan Miller, Chairman, Doris Tate Crime Victims Bureau, to Senator John Vasconcellos, Chairman, California State Senate Public Safety Committee (June 23, 1997) (on file with author); Letter from June Dockins, California citizen, to Senator John Vasconcellos, Chairman, California State Senate Public Safety Committee (June 23, 1997) (on file with author).

8. *See* Letter from Robert Templeton, Regional Director, Sports & Arms Show Producers of America, to California State Assembly Member Tom J. Bordonaro, Jr., Author of AB 4, California State Assembly (July 3, 1997) (on file with author); Letter from California State Assembly Member Tom J. Bordonaro, Jr., Author of AB 4, California State Assembly, to Jan Osborn (Mar. 11, 1997) (on file with author) ("This measure is designed to make the penalty much higher for street punks, hoods and thugs who use a gun in the commission of a violent crime.").

9. *See* Letter from California State Assembly Member Tom J. Bordonaro, Jr., Author of AB 4, California State Assembly, to Speaker of the California State Assembly Cruz Bustamante, Speaker, California State Assembly (June 2, 1997) (on file with author); AB 4, Statement for California State Assembly Appropriations Committee (May 13, 1997) (on file with author).

10. Letter from Francisco Lobaco, Legislative Director, & Valarie Small Navarro, Legislative Advocate, American Civil Liberties Union, to Members of the California State Senate Public Safety Committee, California State Senate (July 1, 1997) (on file with author).

Code section 12022.5[11] as sufficient to punish gun violence. Another concern was that "[c]hanging the law in this manner [did] nothing to address the problem of gun violence, and merely add[ed] additional prison years, at a great cost to California taxpayers."[12] The California Public Defenders Association (CPDA), a statewide organization of public defenders, private defenders, and investigators, took a very pessimistic view of the proposed statute and opposed the bill because they believed it would have "the exact opposite effect of its author's intention to defer [sic] the use of guns in criminal acts."[13] Instead, the CPDA felt the bill would send the message to offenders that, "if you are going to use a gun in a crime to shoot someone, you might as well kill them."[14] This view was due to the mandatory nature of the sentence requirements and the fact that the offender, if convicted, would receive the same sentence regardless of whether the victim lived or died.[15] Additionally, the CPDA believed that the bill offered an incentive to kill witnesses in order to avoid getting caught because "doing so would not subject the offender to a longer sentence."[16]

Part I of this Comment focuses on the traditional common law doctrines of conspiracy liability and aiding and abetting and on the way in which these doctrines have been used to combat gang crime. Part II discusses the STEP Act, a statute that specifically targets street gang crime by enhancing sentences for participation in a criminal street gang and for the commission of felonies intended to benefit a criminal street gang. This part also discusses the basic provisions of section 12022.53. Part III takes a detailed look at subsection (e)(1) of section 12022.53, which arguably provides for sentence enhancement based on a theory of vicarious liability for crimes committed with a sufficient connection to a criminal street gang. This part also critiques the California Court of Appeal's widely varying interpretations of the sentence enhancements provided for by section 12022.53.[17] Part IV analyzes the potential outcomes available to the California Supreme Court

11. CAL. PENAL CODE § 12022.5 (Deering 1992 & Supp. 2002).

12. Letter from Katherine Sher, Legislative Advocate, California Attorneys for Criminal Justice, to California State Assembly Member Tom J. Bordonaro, Jr., Author AB 4 (Aug. 12, 1997) (on file with author).

13. Letter from Donne Brownsey, Representative, California Public Defenders Association, to California State Assembly Member Tom J. Bordonaro, Jr., Author AB 4 (Apr. 3, 1997) (on file with author).

14. *Id.*

15. *See id.*

16. *Id.*

17. CAL. PENAL CODE § 12022.53(e) (Deering Supp. 2002). The dispute has arisen from the disposition of the following cases: *People v. Salas*, 108 Cal. Rptr. 2d 137, 142–43 (Ct. App. 2001); *People v. Tillett*, 108 Cal. Rptr. 2d 76, 95–96 (Ct. App. 2001); *People v. Garcia*, 106 Cal. Rptr. 2d 227, 230–32 (Ct. App. 2001), *depublished & cert. granted*, 29 P.3d 102 (Cal. 2001); and *People v. Gonzales*, 104 Cal. Rptr. 2d 247, 249–50, 254–59 (Ct. App. 2001).

in its determination of *People v. Garcia*, a case in which the court will hopefully determine a framework for the vicarious application of the sentence enhancements under section 12022.53 to co-perpetrators of street gang crime. This part also assesses which outcome would be most consistent with legislative intent and administrability.

I. Gang Prosecution Under Common Law

A. Conspiracy Liability and the *Pinkerton* Doctrine

Conspiracy is the substantive offense of entering into an agreement with an unlawful goal. In *Pinkerton v. United States*,[18] the U.S. Supreme Court expanded the reach of the conspiracy doctrine to include liability for crimes committed by co-conspirators and recognized the special danger of group criminality: "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime."[19] Under the *Pinkerton* doctrine, once co-conspirators have entered into an agreement with an unlawful purpose, "an overt act of one partner may be the act of all without any new agreement specifically directed to that act."[20] For example, co-conspirator A is liable for any act of co-conspirator B that can be considered within the ambit of the unlawful agreement, unless co-conspirator A has expressly acted to disavow or withdraw from the conspiracy.[21] The touchstone for applying *Pinkerton* liability to a co-conspirator has been whether the non-agreed-upon crime was "in furtherance" of the conspiratorial goal.[22] If an additional crime was committed in furtherance of the common goal, then all other co-conspirators can be held liable for that crime, regardless of whether those actions were necessary to the conspiratorial goal or whether the acts were part of the original agreement.

Conspiracy law and the *Pinkerton* doctrine can be used to prosecute gang members because gangs are a quintessential example of group criminality. Common gang membership can be part of the circumstantial evidence

18. 328 U.S. 640 (1946).

19. *Id.* at 644 (stating that "the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking").

20. *Id.* at 646–47 (citing U.S. v. Kissel, 218 U.S. 601, 608 (1910)).

21. *Id.* at 646.

22. *Id.* (disagreeing with the earlier opinion of *United States v. Sall*, 116 F.2d 745, 747–48 (3d Cir. 1940), which had held that participation in a conspiracy was not enough to sustain liability for a crime committed in furtherance of the conspiracy and that direct participation in the commission of the extra substantive offense was necessary).

supporting the inference of a conspiracy.[23] Under the *Pinkerton* doctrine, if the prosecution can prove an agreement by gang members to commit a drive-by shooting or to sell drugs, then any co-conspirator could be liable for all acts committed by other co-conspirators in furtherance of that unlawful goal.[24] Courts have held that punishing defendants for entering into an unlawful agreement and also punishing them for crimes committed in furtherance of that unlawful agreement is not duplicate punishment.[25] The *Pinkerton* doctrine is incredibly broad and requires very little defendant participation for him[26] to be vicariously liable for all crimes committed by other co-conspirators in furtherance of the agreement. While the doctrine of conspiracy has been used effectively in gang-member prosecution,[27] prosecutors can also use other common law or statutory theories to create liability for gang members in most of the situations in which conspiracy doctrine could apply.

B. Aiding and Abetting Liability: The Natural and Probable Consequences Doctrine

Under California law, a person who aids and abets the commission of a crime is a principal in the crime, and thus shares the guilt of the main perpetrator.[28] Under the natural and probable consequences doctrine, a person who aids a perpetrator, knowing the intended target crime, will be held criminally liable for that crime as well as any reasonably foreseeable nontarget offense committed by the main perpetrator:

> [T]he jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facili-

23. People v. Superior Court (*In re* Quinteros), 16 Cal. Rptr. 2d 462, 467 (1993).

24. *See Pinkerton*, 328 U.S. at 646; People v. Kauffman, 152 Cal. 331, 336 (1907).

25. *See Pinkerton*, 328 U.S. at 644. "The agreement to do an unlawful act is even then distinct from the doing of the act." *Id.* (referring to the danger of inchoate crimes). "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it." *Id.* (citing Sneed v. United States, 298 F. 911, 913 (1924)).

26. Masculine pronouns are used throughout this Comment. While this is not to deny the fact that there are female gang members, most defendants in these cases are male.

27. In *People v. Cortez*, 18 Cal. 4th 1223, 1227–28 (1998), the defendant had been involved in a street-gang-related shooting and had been sentenced to twenty-five years to life at trial for conspiracy to commit murder for the death of his companion. The evidence showed that the defendant and his companion had gone to a location to retaliate against members of another gang by shooting them. *But see* Telephone Interview with Renee Meckler, Deputy District Attorney, Los Angeles County District Attorney's Office (Oct. 14, 2001). Ms. Meckler stated that, as a practical matter, she had often found conspiracy difficult to prove because gang members will almost never testify against each other regarding the presence of an agreement, and jurors are often uncomfortable convicting a defendant for crimes where he had little or no direct involvement other than entering into an agreement. *Id.*

28. People v. Prettyman, 926 P.2d 1013, 1018 (Cal. 1996).

> tating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a "natural and probable consequence" of the target crime that the defendant assisted or encouraged.[29]

Under this doctrine, the court must sua sponte identify and describe for the jury the target offenses which the defendant aider and abettor might have assisted or encouraged.[30] The jury does not have to agree unanimously as to which particular target offense the defendant aided and abetted.[31] For instance, in homicide cases, "[i]t is settled that as long as each juror is convinced beyond a reasonable doubt that the defendant is guilty of murder as that offense is defined by statute it need not decide unanimously by which theory he is guilty."[32] The California Court of Appeal has also found that the specific intent required for liability to attach to an aider and abettor is not specific intent to kill (for example, in a murder charge), but intent to "encourage and bring about conduct that is criminal."[33] For aider-and-abettor liability to attach, the crime committed by the main perpetrator need not be the target crime that was aided or encouraged, but merely one that was reasonably foreseeable. Vicarious liability through this doctrine does not extend to nontarget crimes by the main perpetrator that are outside of what could have been reasonably foreseen as part of the aided target crime, even if the nontarget crime was committed "in furtherance" of the target crime.

To illustrate, imagine that two perpetrators enter a store hoping to rob the clerk. Perpetrator A is carrying a firearm, unbeknownst to Perpetrator B.

---

29. *Id.* at 1015; *accord* People v. Olguin, 37 Cal. Rptr. 2d 596, 608 (Ct. App. 1994) ("[A] perpetrator of an assault and an aider and abettor are *equally* liable for the natural and foreseeable consequences of their crime."); People v. Luparello, 231 Cal. Rptr. 832, 849 (Ct. App. 1986) ("[A]iders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion."); People v. Beeman, 35 Cal. 3d 547, 560 (1984) (stating the accomplice must "share the specific intent of the perpetrator" to commit the target crime).

30. *Prettyman*, 926 P.2d at 1022–25 (resolving a split between the courts of appeal as to when the court had to instruct sua sponte as to potential target offenses); People v. Mouton, 19 Cal. Rptr. 2d 423 (Ct. App. 1993).

31. *Prettyman*, 926 P.2d at 1024.

32. *Id.* (citing *People v. Santamaria*, 8 Cal. 4th 903, 918 (1994), and explaining that the jury need not be unanimous as to theory as long as each member is convinced beyond a reasonable doubt that the defendant is guilty of the offense); *see also* People v. Pride, 3 Cal. 4th 195, 249–50 (1992) (reflecting that a jury can convict for first-degree murder despite the lack of unanimity as to whether the killing was premeditated or felony murder); People v. Failla, 64 Cal. 2d 560, 569 (1966) (showing that to convict for burglary, the jury does not need to be unanimous on which felony the defendant intended to commit upon entering a building).

33. *Olguin*, 37 Cal. Rptr. 2d at 608 (1994); *accord* Beeman, 35 Cal. 3d at 560–61 (holding that the specific intent by an aider and abettor that is required to attach liability under the natural and probable consequences doctrine is the intent to encourage and bring about criminal conduct).

During the attempted robbery, the store clerk is able to hit the silent alarm, and the police arrive before the perpetrators have left. To facilitate their escape, Perpetrator A shoots a police officer. Here, because Perpetrator B had no knowledge of the firearm, it is not a reasonably foreseeable, natural and probable consequence that a police officer would be shot. Thus, Perpetrator B will be a principal in the attempted robbery, but will not be liable for the shooting under the natural and probable consequences doctrine.[34] In contrast, if the court finds evidence of a conspiracy, then Perpetrator B could be liable for the officer shooting if the shooting is found to be in furtherance of the common goal of robbery.

Prosecutors have successfully argued aider-and-abettor liability in street gang prosecution,[35] and they continue to use the doctrine in that way. However, the introduction of statutory measures has provided for broadened liability and longer prison sentences.

II. THE INCREASING ROLE OF STATUTES IN PROSECUTING GANG CRIME

In addition to the traditional common law doctrines under which prosecutors target gang violence, statutes offer another way to attack the criminal activity of street gangs. For example, California Penal Code section 186.22[36] (Street Terrorism Enforcement and Prevention, or STEP, Act) broadens liability for gang members by making gang participation itself a crime. California Penal Code Section 12022.53 (Firearm Enhancement Statute) creates sentence enhancements for personal firearm use during enumerated felonies, and potentially creates vicarious sentence enhancement when firearm use during an enumerated felony is for the benefit of a criminal street gang.[37]

34. *See Prettyman*, 926 P.2d at 1021 (citing *People v. Butts*, 46 Cal. Rptr. 362 (1965), as standing for the proposition that the killing of a victim when the defendant did not know that his confederate would use a deadly weapon is not a natural and probable consequence). In *Butts*, the target crime was assault, which the courts have most often found to supply sufficient circumstances to find the death of the victim was a natural and probable consequence. *Butts*, 46 Cal. Rptr. at 374.

35. *See, e.g.*, *Olguin*, 37 Cal. Rptr. 2d at 608; People v. Godinez, 3 Cal. Rptr. 2d 325 (1992).

36. CAL. PENAL CODE § 186.22 (Deering Supp. 2002).

37. The criminal street gang requirement is defined under section 186.22(b) of the California Penal Code.

A. The STEP Act: California Penal Code Section 186.22

Section 186.22 is designed to criminalize street gang participation.[38] In 1988, the California legislature passed section 186.22, or the STEP Act, to address California's "state of crisis which had been caused by violent street gangs."[39] The STEP Act provides in relevant portion:

> (a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal activity,[40] and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in the state prison for 16 months, or two or three years.
>
> (b)(1) . . . [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . by an additional term of two, three, or four years at the court's discretion.[41]

To convict a gang member under the STEP Act, the prosecution must first show the existence of a criminal street gang. Second, the prosecution must prove that the defendant was an active participant in that gang and knew that its members engaged in a pattern of criminal activity, or alternately, that the defendant participated in a felony committed for the benefit of that gang with the specific intent to promote or assist in criminal conduct by gang members.[42] Simple membership in a gang is not enough for prosecu-

38. California Penal Code section 186.22 (STEP Act) makes gang involvement itself a crime and provides sentence enhancements for enumerated felonies committed for the benefit of a criminal street gang. *See id.*; *see also* People v. Green, 278 Cal. Rptr. 140, 145–46 (1991) (discussing gang membership itself as a crime and devising a test for "active participation," which was later overruled by *People v. Castenada*, 23 Cal. 4th 743, 746–52 (2000)).

39. § 186.21.

40. "Active participation" in a street gang by a person who has knowledge that "its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers or assists in any felonious criminal conduct by members of that gang" is enough for conviction. § 186.22(a). Subdivision (e) defines a "pattern of criminal activity" as the "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses." § 186.22(e).

41. § 186.22(a)–(b). Willful promotion has been interpreted to be synonymous with aider-and-abettor liability. *See* Kevin Patrick McGee, *Gang Charges and Allegations: Penal Code Section 186.22 Is Your Friend (Even After Prop 21)*, GANG BEAT, Summer 2000, at 2 (on file with author).

42. Committing a felony (or aiding and abetting a felony) "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," is enough to convict under sec-

tion under this statute.[43] A statute that criminalized simple membership could possibly be seen as creating a "status crime," which can fall prey to challenges under the Eighth and Fourteenth Amendments to the U.S. Constitution.[44]

Subdivision (a) provides a substantive offense and a corresponding penalty for "participation" in a criminal street gang. A defendant under subdivision (a) "does not need to have the intent to *personally* commit the particular felony."[45] Subdivision (a) applies to a gang member who personally pulls the trigger in a drive-by shooting, but also to a gang member who willfully promotes, furthers, or assists the shooter, as both members are considered "active participants" in a criminal street gang. The California Court of Appeal for the Fifth Appellate District stated that the STEP Act "applies to the perpetrator of the felonious gang-related criminal conduct as well as to the aider and abettor."[46] Courts have frequently been forced to struggle

tion 186.22(b)(1), and does not require the perpetrator to be a member of the gang. *See In re* Ramon T., 66 Cal. Rptr. 2d 816, 820 (1997).

43. *See* People v. Robles, 23 Cal. 4th 1106, 1115 (2000) (holding that gang membership combined with carrying a loaded firearm in public was not enough for liability under section 186.22(a)).

44. For an in-depth discussion of status crimes and their fallacies, see Jocelyn L. Santo, Note: *Down on the Corner: An Analysis of Gang-Related Antiloitering Laws*, 22 CARDOZO L. REV. 269, 286–92 (2000). Santo also cites *Robinson v. California*, 370 U.S. 660, 666–67 (1962); *Pottinger v. Miami*, 810 F. Supp. 1551, 1561–65 (S.D. Fla. 1992); and *Goldman v. Knecht*, 295 F. Supp. 897, 907–08 (D. Colo. 1969), to illustrate that the criminalization of drug addiction, eating and sleeping by the homeless, and vagrancy based on economic status have all been held unconstitutional as "status" crimes.

45. People v. Ngoun, 105 Cal. Rptr. 2d 837, 839 (2001) (emphasis added).

46. *Id.*; *accord* Nguyen v. Lindsey, 232 F.3d 1236, 1240–41 (9th Cir. 2000) (reasoning that the defendant could be responsible for the death of an innocent bystander under California law, because those who take part in gang warfare are equally responsible regardless of who shot the first bullet); *Ngoun*, 105 Cal. Rptr. 2d at 839 (holding that aiders and abettors are liable under subdivision (a) in addition to the perpetrator of the felony and stating that the "focus of the . . . statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, *irrespective of who actually commits the offense*"); People v. Castenada, 23 Cal. 4th 743, 747–48 (2000) (holding that "active participation" is "involvement with a criminal street gang that is more than nominal or passive," and disaffirming the *Green* test, which required a substantial time commitment and/or leadership in the gang); *Ramon T.*, 66 Cal. Rptr. 2d at 820 (holding that no proof of active gang membership is required to apply the enhancement under subdivision (b) to the defendant because the only requirement is that the felony is committed "for the benefit of, at the direction of, or in association with any criminal street gang"). *But see* People v. Sengpadychith, 26 Cal. 4th 316, 323–24 (2001) (describing the hurdles of the "primary activity" element that the prosecution must prove to the jury in order to convict under the STEP Act); *Robles*, 23 Cal. 4th at 1115 (holding that carrying a loaded firearm in public only becomes a felony when the defendant satisfies a very high standard under section 186.22(a), which requires "knowledge that [gang] members engage in or have engaged in a pattern of criminal gang activity," and "willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct," in addition to gang membership). Gang membership in addition to carrying a loaded firearm in public does not rise to the level of felonious conduct. § 186.22(e).

with the interpretation of subdivision (a),[47] specifically in determining what constitutes a "pattern of criminal activity"[48] and a gang's "primary activities."[49]

Subdivision (b) of the STEP Act provides sentence enhancements for defendants convicted of committing a felony for the benefit of a criminal street gang with the specific intent to promote, further, or assist any criminal conduct by gang members.[50] This enhancement provision can be applied to any person committing a felony for the benefit of a gang, even if the defendant is not a member of that gang.[51] Thus, subdivision (b) is slightly broader than subdivision (a). It allows the sentence enhancement to be applied to anyone convicted of perpetrating a felony for the benefit of a gang regardless of previous participation, membership, or continued association with that gang, as long as the defendant's specific intent was to further, promote, or assist the criminal activity of gang members.

While both of these provisions of the STEP Act contribute to solving the problem of gang crime, the sentences and enhancements are most often two, three, or four years,[52] allowing the gang member or affiliate to serve relatively short sentences.

B. The Firearm Enhancement Statute: California Penal Code Section 12022.53

The legislature's stated purpose in passing section 12022.53, or the Firearm Enhancement Statute, was to provide for substantially longer prison sentences for felons who used firearms in the commission of their crimes. The legislature's goal in passing the statute was to protect the citizens of California and to deter violent crime.[53]

---

47. *See Sengpadychith*, 26 Cal. 4th at 319–20 ("Step by step, this court continues its struggle through the thicket of statutory construction issues presented by the California Street Terrorism Enforcement and Prevention Act of 1988, also known as the STEP Act."). Also see *Robles*, 23 Cal. 4th at 1110–15, *Castenada*, 23 Cal. 4th at 746–52, *People v. Zermeno*, 21 Cal. 4th 927, 930–33 (1999), *People v. Loeun*, 17 Cal. 4th 1, 8–14 (1997), and *People v. Gardeley*, 14 Cal. 4th 605, 615–26 (1996), as examples of statutory construction of the STEP Act.

48. *See Gardeley*, 14 Cal. 4th at 615–26 (construing the term "pattern of criminal activity" as used in the STEP Act).

49. *See id.*; *see also Sengpadychith*, 26 Cal. 4th at 319–20.

50. § 186.22(b)(1).

51. *See Ramon T.*, 66 Cal. Rptr. 2d at 820 (holding that active gang membership is not required to apply the sentence enhancement under section 186.22).

52. The sentence enhancement can be increased to five years for a serious felony, as defined under section 1192.7(c), and can be increased to ten years for a violent felony as defined under section 667.5(c). § 186.22(b)(1)(B)–(C).

53. *See* Assembly Bill No.4 ch. 503, at 4, 1997 Cal. Stat. 91 (codified at CAL. PENAL CODE §§ 12022–12022.95 (Deering 2000)). The author of the bill wrote,

In subdivisions (b) through (d), the Firearm Enhancement Statute is limited to providing sentence enhancement for a person who commits an enumerated felony and, while doing so, intentionally and personally uses or discharges a firearm in the commission of that felony.[54] The enhancements provide for an additional ten years for personally using a firearm,[55] twenty years for personally discharging a firearm,[56] and twenty-five years to life for intentionally and personally discharging a firearm and proximately causing great bodily injury or death.[57]

Since the Firearm Enhancement Statute became effective on January 1, 1998, subdivision (e) has been used with varying effectiveness to combat group criminality perpetrated by criminal street gangs.[58] Subdivision (e)(1)

"For far too long, criminals have been using guns to prey on their victims. AB 4 will keep these parasites where they belong . . . in jail! The problem is not guns, the problem is gun violence . . . criminals misusing guns to terrorize, injure and kill their victims . . . . With the Three Strikes law, the voters sent a clear message to criminals. With the 10-20-life provisions of AB 4, we are sending another clear message: If you use a gun to commit a crime, you're going to jail, and you're staying there."

California State Assembly Committee on Public Safety, 1997–98 Sess., at 2–3 (Cal. 1997) (quoting California State Assembly Member Bordonaro).

54. § 12022.53(b)–(d).

55. California Penal Code section 12022.53(b) provides that

any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony. The firearm need not be operable or loaded for this enhancement to apply.

Id. § 12022.53(b).

56. Section 12022.53(c) provides that "any person who . . . in the commission of that felony intentionally and personally discharged a firearm, shall be punished by a term of imprisonment of 20 years in the state prison." § 12022.53(c).

57. Section 12022.53(d) provides that "any person who . . . in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury . . . or death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison." § 12022.53(d).

58. *See* People v. Hutchins, 109 Cal. Rptr. 2d 643, 647–48 (2001) (deciding that applying the sentence enhancement to the shooter in a drive-by gang shooting did not violate section 654 because it did not punish the defendant twice for the same crime (discussing California Penal Code section 654)); People v. Salas, 108 Cal. Rptr. 2d 137, 142–43 (2001) (holding that personal use of a firearm is necessary by *a principal* in the offense, but that as long as a principal did use a firearm, all aiders and abettors could be subject to the sentence enhancement under section 12022.53 (b) through (d)); People v. Gonzales, 104 Cal. Rptr. 2d 247, 256 (2001) (stating that "this statute [section 12022.53] is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang members who aid and abet that offense in furtherance of the objectives of a criminal street gang"). *But see* Salazar v. Superior Court, 100 Cal. Rptr. 2d 120, 124 (2000) (holding that the prosecution lacked evidence to prove that the defendant was associated with the groups in question, or to prove that those groups engaged or had engaged in a pattern of criminal activity sufficient to classify them as a criminal street gang); People v. Tillett, 108 Cal. Rptr. 2d 76, 95 (Ct. App. 2001) ("Each defendant must have committed some act which meets the 'personal' action required under the enhancing statute [section 12022.53]."), *withdrawn*, 2001 Cal. LEXIS 6122, at *1 (Sept. 12, 2001); People v. Garcia, 106 Cal. Rptr. 2d 227, 230 (Ct. App. 2001),

states, "The enhancements specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 [STEP Act] are pled and proved."[59] This is the only provision in the Firearm Enhancement Statute that, on its face, does not require personal use or discharge of a firearm to trigger the enhancement. Prosecutors have interpreted this provision to allow the enhancements under subdivisions (b) through (d) to apply to any principal in a felony "committed for the benefit of, at the direction of, or in association with any criminal street gang."[60] Under this interpretation, prosecutors have charged any person who aids or abets a felony committed for the benefit of a street gang with the applicable enhancement when a firearm is used during the commission of that felony by any co-principal. This interpretation creates a great advantage for prosecutors because it makes more gang members vulnerable to longer prison sentences.

For example, under the prosecutor's interpretation of subdivision (e)(1) of the Firearm Enhancement Statute, the district attorney can prosecute a drive-by shooting and apply the sentence enhancement to the driver, the shooter, any other person in the car who aided or verbally encouraged the shooting, any person who procured the car knowing it would be used in the shooting, and any person that aided the gang members after the drive-by. In addition to the enhancement under the Firearm Enhancement Statute, the defendants can be charged with traditional aiding-and-abetting liability, liability for actively participating in a gang under subdivision (a) of the STEP Act,[61] and possibly an enhancement under subdivision (b) of the STEP Act for committing a felony for the benefit of the gang.[62] However, imposing sentence enhancements under both the STEP Act and the Firearm Enhancement Statute on the same defendant is limited to the actual shooter.[63]

California Courts of Appeal have differing opinions regarding the proper interpretation of subdivision (e) of the Firearm Enhancement Statute

depublished & cert. granted, 29 P.3d 102 (Cal. 2001) (interpreting the statute to require that the perpetrator who personally used the firearm be convicted before the enhancement could be applied to an aider and abettor).

59. § 12022.53(e)(1).

60. § 186.22(b)(1).

61. § 186.22(a).

62. § 186.22(b).

63. Subdivision (e)(2) of the Firearm Enhancement Statute reads, "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." § 12022.53(e)(2). This has been interpreted by courts to stand for the rule that a gang member can only be subject to both enhancements if he "personally" used or discharged the firearm. *See Salas*, 89 Cal. App. 4th at 1282, 108 Cal. Rptr. 2d at 142; *Tillett*, 108 Cal. Rptr. 2d at 93–94.

and whether vicarious liability for the enhancement is included or even appropriate for co-perpetrators of gang crime.

III. DIFFERING INTERPRETATIONS OF SUBDIVISION (E)(1) OF THE FIREARM ENHANCEMENT STATUTE

The language of subdivision (e)(1) of the Firearm Enhancement Statute is murky and has led to inconsistent interpretation and adjudication. This part will discuss the theories underlying the conflicting interpretations by the California Courts of Appeal and examine how courts have construed the statutory language differently and whether support exists for each construction. Discussion will focus on key questions, which when answered in different ways by different appellate divisions, have led to disparate results. The questions that courts have struggled to analyze are: (1) Who is a "principal" under the statute; (2) what elements must be pled under subdivision (e) to constitute "an offense that includes an allegation" under the statute; and (3) what does it mean to have "pled and proved" the Firearm Enhancement Statute in conjunction with subdivision (b) of the STEP Act?

A. *People v. Garcia*: The Case Before the California Supreme Court

People v. Garcia is currently on review in the supreme court of the state of California.[64] The court's review hopefully will finalize the interpretation of subdivision (e) of the Firearm Enhancement Statute and resolve a split among the California appellate districts regarding application of the statute when faced with gang crime and the potential for vicarious liability.

The California Court of Appeal for the Second Appellate District in *People v. Garcia* held that subdivision (e) of the Firearm Enhancement Statute required a conviction of the gun-wielding perpetrator who personally used or discharged a firearm as a predicate to applying the enhancement to an aider and abettor in a crime committed for the benefit of a criminal street gang, as defined in subdivision (b) of the STEP Act.[65] In *Garcia*, the defendants Salvador Morales and Arturo Garcia were members of the Vineland Boys criminal street gang,[66] and the victim, Fernando Galeana, was from a rival gang known as the Burbank Trece.[67] After a drive-by shooting in which Galeana was killed, both defendants bragged to fellow gang mem-

64. People v. Garcia, 111 Cal. Rptr. 2d 1 (2001).

65. *Garcia*, 106 Cal. Rptr. 2d 227, 230 (Ct. App. 2001), *depublished & cert. granted*, 29 P.3d 102 (Cal. 2001).

66. *Id.* at 227.

67. *Id.* at 228. At the time of defendant Garcia's arrest, he made a full confession accounting for his involvement in the murder of Galeana as the driver of the truck in the drive-by shooting. *Id.* at 228–29.

bers about committing the murder.[68] Defendant Garcia was convicted of the second-degree murder of Galeana as an aider and abettor and sentenced to fifteen years in prison. His sentence was enhanced by twenty-five years to life[69] under subdivision (e)(1) of section 12022.53, because the jury found that he was a principal in the crime, which involved a firearm, proximately led to death, and was committed for the benefit of a criminal street gang under subdivision (b) of section 186.22.

However, the issue on appeal arose because Garcia's co-defendant Morales, whom the court and the prosecution acknowledge as the actual shooter, was acquitted.

The court of appeal defined a "principal" as it is defined under the common law theory of aider-and-abettor liability. As an aider or abettor, an accomplice to any target crime can be liable as a principal for any crime he aids and any natural and probable consequence of aiding that target crime. In *Garcia*, death of a rival gang member was almost certainly a reasonably foreseeable, natural and probable consequence of a gang-motivated drive-by shooting.

In discussing whether the murder charge and accompanying allegations satisfied the enhancement provision under subdivision (e)(1) of the Firearm Enhancement Statute, the court focused most closely on whether the elements of the Firearm Enhancement Statute and the STEP Act had been pled and proved. Subdivisions (b) through (d) of the Firearm Enhancement Statute each require that the defendant be convicted of an enumerated felony in which he "personally" used or discharged a firearm to apply a sentence enhancement.[70]

Because of the conviction requirement in the preceding subdivisions, the court held that "conviction" of the actual shooter was an element to be proven before applying the enhancement to an aider and abettor under subdivision (e)(1).[71] The court decided that "proof" under subdivision (e)(1) required a conviction of the person who intentionally and personally used or discharged a firearm, because subdivision (d), which supplied the twenty-five-years-to-life enhancement and was being applied vicariously in *Garcia*, applied to "any person who is convicted" of an enumerated felony.[72] The court found that all evidence against defendant Garcia showed that he did *not* personally use a firearm. The court held that, because someone had to

68. *Id.* at 228–29.

69. Section 12022.53(d) provides the twenty-five-years-to-life enhancement penalty, but subdivision (e)(1) allowed for the enhancement to attach when Garcia had not "personally" used the firearm that caused death. CAL. PENAL CODE § 12022.53(d) (Deering Supp. 2002).

70. § 12022.53(b)–(d).

71. § 12022.53(e)(1).

72. § 12022.53(d).

be *convicted* of personal use of a firearm to satisfy the Firearm Enhancement Statute and because co-defendant Morales had been acquitted, no provision of the Firearm Enhancement Statute had been "pled and proved" under subdivision (e)(1).[73] Thus, the court decided that the enhancement could not apply to defendant Garcia as an aider and abettor because the actual shooter, Morales, had been acquitted.[74]

Counsel for Garcia agrees with the court of appeal's outcome and argues in her brief to the California Supreme Court that one element of subdivision (d) is the *conviction* of a person who intentionally and personally discharged a firearm. Defendant Garcia's counsel also agrees that an aider and abettor cannot be subject to an enhancement under subdivision (e)(1), which requires that elements of the Firearm Enhancement Statute be "proved," unless the co-perpetrator, the actual shooter, is convicted first.[75] This argument is premised on the assumption that subdivision (e)(1), which requires that the offense charged against the defendant include an allegation pursuant to the Firearm Enhancement Statute, means that the provision of the Firearm Enhancement Statute alleged must be applied in exactly the same way as if the defendant had personally used the firearm. Thus, under *Garcia*, every element which must be proven under subdivision (b), (c), or (d) for a gun-wielding perpetrator, one of which is "conviction," also must be proven for a "principal" to be subject to the enhancement under subdivision (e)(1). Therefore, for all elements of subdivision (e)(1) to be satisfied with respect to an aider and abettor under this construction, the actual shooter must be convicted first. Otherwise, the court of appeal held, the Firearm Enhancement Statute is not "pled and proved."

In contrast, the prosecution argues in its brief to the California Supreme Court that subdivision (e)(1) of the Firearm Enhancement Statute should be satisfied if the prosecution can plead and prove (1) that a principal in the commission of an enumerated felony personally and intentionally used or discharged a firearm, (2) that the aider and abettor was a principal in the commission of the same target offense, and (3) that the target offense was committed for the benefit of a criminal street gang under the STEP Act.[76]

The prosecution construes the term "principal" to carry the same definition as it would under common law aiding and abetting, such that an aider and abettor becomes a principal in the target crime. However, it appears from the above statement that the prosecution has added a further require-

73. *Garcia*, 106 Cal. Rptr. 2d at 230–31.

74. *Id.*

75. Appellant's Answer Brief on the Merits at 13, *Garcia*, 106 Cal. Rptr. 2d 227 (No. S097765).

76. Respondent's Brief on the Merits at 8–9, *Garcia*, 106 Cal. Rptr. 2d 227 (No. S097765).

ment for triggering the sentence enhancement under subdivision (e)(1) of the Firearm Enhancement Statute. Based on the prosecution's statement regarding elements of proof, it appears that to be liable for the sentence enhancement under subdivision (e)(1), an aider and abettor is only a principal under the statute if the aider and abettor was a principal in the *target* crime in which the firearm was used or discharged.[77] This differs from common law aider-and-abettor liability, under which an aider and abettor is liable for a co-principal's firearm use in a nontarget crime as long as the nontarget crime was a natural and probable consequence of the target crime.[78]

To illustrate the distinction, imagine that two gang members, Frankie and Jimmy, enter a store intending to rob it. Frankie knows that Jimmy is carrying a loaded firearm during the robbery, but Jimmy only uses the firearm once they are outside of the store to shoot a witness and facilitate their escape. Based on the prosecution's characterization of required proof under subdivision (e)(1) of the Firearm Enhancement Statute, it seems that Frankie could not be subject to the sentence enhancement because the shooting of the witness was a nontarget offense, and simply carrying a loaded firearm, which Jimmy did during the target offense, does not trigger the enhancement. However, under traditional common law aiding-and-abetting liability, Frankie would likely be liable for the nontarget shooting because Frankie knew that Jimmy was carrying a loaded firearm, and a jury could find that using the firearm to facilitate escape was a reasonably foreseeable, natural and probable consequence of the robbery.

With respect to the "pled and proved" language in subdivision (e) of the Firearm Enhancement Statute, the prosecution states that the

> statutory language does not plainly mandate that the prosecution prove the perpetrator was convicted of the underlying felony as a prerequisite to the imposition of an enhancement against the aider and abettor. Instead, subdivision (e)(1) explicitly provides for vicarious liability when violations of both section 12022.53 [Firearm Enhancement Statute] and section 186.22 [STEP Act], subdivision (b) are pled and proved.[79]

Thus, the prosecution takes the view that they can "prove" a violation of the Firearm Enhancement Statute by satisfying the requirements of the STEP Act, and without providing a conviction of the gun-wielding co-principal in the target crime. The prosecution looks to subdivision (j) of the Firearm

77. *See id.* at 9 ("[T]he prosecution must plead and prove that . . . the aider and abettor was a principal in the commission of the same target offense (i.e., the aider and abettor must be convicted of the target offense) . . . .").

78. *See* People v. Prettyman, 926 P.2d 1013, 1018–21 (Cal. 1996).

79. Respondent's Brief on the Merits at 10, *Garcia*, 106 Cal. Rptr. 2d 227 (No. S097765).

Enhancement Statute to support this position. Subdivision (j) states, "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact."[80] The prosecution reads subdivision (j) to allow a district attorney to "prove" the allegation that the sentence enhancement does apply under the Firearm Enhancement Statute with facts other than a conviction of the actual shooter. The prosecution interprets subdivisions (b) through (d) as identifying firearm-related conduct that can be pled and proved under subdivision (e)(1) by harmonizing the intent behind subdivisions (e)(1) and (b) through (d). Harmonizing is required because in the prosecution's view, the "conviction" language in subdivisions (b) through (d) is present to express the fact that a defendant cannot be punished with an enhancement under those provisions until convicted of a predicate offense.[81] The prosecution reads this requirement to mean that an aider and abettor must be convicted of an enumerated predicate felony under subdivision (a) before applying the sentence enhancement vicariously through subdivision (e)(1) when any co-principal to the enumerated felony uses or discharges a firearm.[82] That is why they have defined the term "principal" under the Firearm Enhancement Statute as a principal to an enumerated felony, committed for the benefit of a gang, in situations in which a firearm was used or discharged.

The prosecution analogizes liability for the sentence enhancement to liability for aiders and abettors generally.[83] Under common law aider-and-abettor liability, there has never been a rule that an aider and abettor's guilt

80. CAL. PENAL CODE § 12022.53(j) (Deering Supp. 2002).

81. This logic is reasonable under the Firearm Enhancement Statute because the enhancements cannot be applied unless the defendant has been convicted of a predicate felony enumerated in subdivision (a).

82. *See* Respondent's Brief on the Merits at 10–11, *Garcia*, 106 Cal. Rptr. 2d 227 (No. S097765).

83. The prosecution also analogizes to the "Arming Enhancement" provided for under section 12022. Subdivision (a)(1) of section 12022 states,

> Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year, unless the arming is an element of the offense of which he or she was convicted. This additional term shall apply to any person who is a principal in the commission or attempted commission of a felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.

§ 12022(a)(1). The prosecution's analogy is to the "conviction" language in section 12022, which courts have not found to mean that a conviction of the actual shooter is a prerequisite to imposing the sentence enhancement against an unarmed principal. *See* Respondent's Brief on the Merits at 11, *Garcia*, 106 Cal. Rptr. 2d 227 (No. S097765) (citing People v. Font, 41 Cal. Rptr. 2d 281, 285 (1995) (holding that the finding by a jury that an armed co-principal was not guilty was consistent

is contingent on a conviction of the main perpetrator. Traditionally, it has been possible to prove that an accomplice aided a crime by proving that the crime was committed and then showing the aid or encouragement given by the defendant. It is not necessary to prove the identity of the main perpetrator who the accomplice was aiding, nor to convict the main perpetrator as a predicate to convicting the accomplice. The policy behind this system is based on the fact that the main perpetrator is not always found, cannot always be tried first, and may encounter different evidence at trial than an accomplice.[84]

The court of appeal in *Garcia* discarded as "irrelevant" the general rule that an aider and abettor can be liable regardless of whether the perpetrator is convicted.[85] The court found that, at a minimum, "proof that *someone* . . . was convicted of that murder by 'intentionally and personally discharging a firearm,'" was necessary to satisfy the requirement that subdivision (e)(1) of the Firearm Enhancement Statute had been "proved," and thus to apply the enhancement to an aider and abettor.[86] The court also read subdivision (j) of the Firearm Enhancement Statute as illuminating the proof requirement under subdivision (e)(1) and found that the "personal use" element contained in subdivisions (b), (c), and (d) must be proven before an enhancement could be applied to the defendant.[87] The court interprets proof of personal use of a firearm as requiring conviction of the actual shooter, because it sees the conviction as a fact to be pled and proved

with its finding that the armed allegation was true as against the unarmed co-principal)); CAL. JURY INSTR. 17.15.

84. *Cf.* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985) (assessing the theory of treating accomplices as if they had actually perpetrated the crime).

85. *See Garcia*, 106 Cal. Rptr. 2d at 231. The attorney general argued, to no avail, that an aider and abettor does not escape criminal liability merely because the person he aided and abetted has been acquitted. *See, e.g.*, People v. Bohmer, 120 Cal. Rptr. 136, 146 (Ct. App. 1975) ("Persons standing by and aiding, abetting or assisting, and persons not present who have advised and encouraged the perpetration of the crime, are designated as accessories, 'and shall be deemed and considered,' says the statute, 'as principals, and punished accordingly.' As principals, they may be indicted and tried together, or separately, and either may be convicted or acquitted without reference to the previous conviction or acquittal of the other." (quoting People v. Bearss, 10 Cal. 68, 69 (1858)).

86. *Garcia*, 106 Cal. Rptr. 2d at 230.

87. Section 12022.53(j) of the California Penal Code reads in full:

> For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of the law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

§ 12022.53(j).

under subdivisions (j) and (e)(1). Thus, in *Garcia*, the court's proof requirement, coupled with the actual shooter's acquittal, forbade the application of the enhancement to the defendant.

B. A Conflicting Interpretation: *People v. Tillett* and Determining What Must Be Pled and Proved Under the Firearm Enhancement Statute

In *People v. Tillett*,[88] four defendants went on a spree of robberies where two of the defendants used and discharged firearms.[89] The police found evidence of gang activity in the defendants' residences that included photos of gang members in gang poses, paperwork containing gang information, and poems that incorporated gang phrases and topics.[90] In addition, the defendants sported numerous gang tattoos related to the Crips criminal street gang.[91] The district attorney argued that sentence enhancements should apply to all four defendants under subdivision (e)(1) of the Firearm Enhancement Statute because it created sentence enhancements for crimes committed for gang-benefit under the STEP Act. At trial, the sentences of all four defendants were enhanced under subdivision (e)(1) of the Firearm Enhancement Statute, based on the personal use and discharge of the firearms by two of the co-perpetrators during the robberies.[92]

The trial court recognized that proving the elements of the Firearm Enhancement Statute under subdivision (e)(1) implicated the personal use requirement contained in subdivisions (b), (c), and (d) of the Firearm Enhancement Statute.[93] The jury instructions allowed the jury to find that the defendants met the "personal use" requirement in one of two ways. The requirement could be met if "[t]he defendant [ ] intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it."[94] Alternately, the requirement could be met if "[t]he defendant was a principal in the commission . . . of the charged felony, and . . . [t]he defendant *or another defendant* in that charged felony (co-principal) personally used a firearm"[95] and the felony was committed for

88. 108 Cal. Rptr. 2d 76 (Ct. App. 2001), *withdrawn*, 2001 Cal. LEXIS 6122, at *1 (Sept. 12, 2001).

89. *Id.* at 81.

90. *Id.* at 82.

91. *Id.* at 82–83.

92. *Id.* at 83–84.

93. *Id.* at 80, 84.

94. *Id.* at 94 (defining the term "personal use" in Paragraph 1.A. of the court's instructions to the jury).

95. *Id.* (defining the term "personal use" in Paragraph 2.A. & B. of the court's instructions to the jury).

the benefit of a criminal street gang under the STEP Act.[96] This second part of the jury instruction mirrors traditional aider-and-abettor liability, and it appears that the trial court was willing to define a "principal" under subdivision (e)(1) in the same way that a "principal" is defined under traditional aider-and-abettor liability.

The court of appeal in *Tillett* disagreed with the jury instructions and construed subdivision (e)(1) of the Firearm Enhancement Statute to require a "personal" action related to the firearm by each individual defendant before that defendant's sentence could be enhanced for being a principal who committed the felony for the benefit of a gang.[97] Because the jury was told that it did not need to find such personal conduct and that all it had to find was personal use or discharge by *any one* of the four defendants, the court of appeal reversed the enhancements. The court stated that "all other principals were . . . imputed to have 'personally' discharged the gun," and vicarious liability for sentence enhancements was "distinctly *not* what the statute require[d]."[98] Here, the court took the firm view that the personal use requirement from subdivisions (b) through (d) must be read into subdivision (e)(1) to define who could be liable as a principal for the enhancement. Under this view, aiders and abettors could not be vicariously liable for firearm use or discharge by a co-principal, even in an enumerated felony committed for the benefit of a criminal street gang under subdivision (b) of the STEP Act.

The prosecution in *Tillett* had argued that when a defendant

> is part of a group, and it is not possible to determine which member personally used and/or personally discharged the firearm, the appellant can be punished under Penal Code sections 12022.53 [Firearm Enhancement Statute], subdivisions (b) or (c) if his conduct was such that he *could* have used and discharged the firearm.[99]

This argument is essentially an analogy to other sentence enhancements for committing great bodily injury.[100] In cases of group beatings, where specific injury cannot be attributed to a single defendant, courts have

96. *Id.* (splitting the requirements of California Penal Code section 186.22 into two jury instructions: (1) the felony committed for the benefit of a criminal street gang, and (2) the felony committed with the specific intent to promote, further, or assist any criminal conduct by gang members); *see also* CAL. PENAL CODE § 186.22(b) (1999) (the section on which the jury instructions were based).

97. *Tillett*, 108 Cal. Rptr. 2d at 95.

98. *Id.* Counsel for defendant Kizzee made this argument by stating, "The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." Appellant's Reply Brief at 7, *Tillett*, 108 Cal. Rptr. 2d 76 (No. G025414) (citing People v. Cole, 31 Cal. 3d 568, 572 (1982)).

99. Respondent's Brief at 96, *Tillett*, 108 Cal. Rptr. 2d 76 (No. G025414) (emphasis added).

100. *See* § 12022.7.

allowed an enhancement against a defendant for great bodily injury in a situation in which his conduct would have been enough to create the great bodily injury.[101] The prosecution argued that the same rationale should apply under subdivision (e)(1) of the Firearm Enhancement Statute, and that all defendants ought to be subject to the enhancement based on the discharge of a firearm during a robbery in which they all participated. The court of appeal disagreed with this reasoning. The court noted that the prosecution had never tried to prove which defendant had discharged the firearm and that because there were witnesses to the crime, who likely would have been able to identify the actual shooter, the facts in *Tillett* were not analogous to the group beating cases.[102] Under the court's interpretation, "[e]ach defendant must have committed some act which meets the 'personal' action required under the enhancing statute."[103] It appears that the court was requiring proof of firearm use to define who could be a principal under subdivision (e)(1) and not as an element of proving the Firearm Enhancement Statute.

C. Applying Traditional Vicarious Liability: *People v. Gonzales* and *People v. Salas*

In *People v. Gonzales*,[104] two brothers, Michael and Steven Gonzales, and their co-defendant Jimenez, members of the Little Hill street gang, were riding in a car with Michael's pregnant girlfriend. When they saw two people on the sidewalk, they flashed gang hand signs and said that the pedestrians flashed the sign for the rival Happy Homes Puente gang. Taking this as offense to the pregnant woman, the three defendants got out of the car and headed toward the pedestrians. One of the pedestrians said he saw Jimenez carrying a handgun. A fight ensued, and the other pedestrian was shot in the head and killed.[105] The California Court of Appeal for the Second Apellate District, Division Four, affirmed the conviction of the two non-

101. *See In re* Sergio R., 279 Cal. Rptr. 149, 156–57 (Ct. App. 1991) (holding that a defendant was subject to the sentence enhancement under section 12022.7 based on his participation in a drive-by shooting, where three rounds were discharged from a shotgun, which resulted in death, and where it was not possible to determine which bullets, from which gang member, caused the death); People v. Corona, 261 Cal. Rptr. 765, 768 (Ct. App. 1989) (subjecting a defendant to the sentence enhancement for great bodily injury under section 12022.7 even though there was no evidence that the defendant personally inflicted any of the particular injuries).

102. *Tillett*, 108 Cal. Rptr. 2d at 95. *See* Appellant's Reply Brief at 9, *Tillett*, 108 Cal. Rptr. 2d 76 (No. G025414) (arguing that the *Corona* principle is inapplicable where "the prosecution fails to prove the person who personally used or discharged the weapon and the jury is not instructed on the need to find that proof of the actual perpetrator is impossible").

103. *Tillet*, 108 Cal. Rptr. 2d at 95.

104. 104 Cal. Rptr. 2d 247 (Ct. App. 2001).

105. *Id.* at 250–251.

gun-wielding defendants, Michael and Steven, for murder on the theory of aider-and-abettor liability.[106] The court then enhanced both defendants' sentences according to the Firearm Enhancement Statute, also based on their liability as aiders and abettors.[107]

In their appeal, both Michael and Steven argued that they did not know Jimenez had a gun and, thus, that the shooting was not reasonably foreseeable.[108] However, the court found that the open use of the handgun and the fact that Michael was heard to shout, "Shoot him, shoot him," before the gun was fired was enough for the jury to find that the death was the natural and probable consequence of the aided crime.[109] The court held it was reasonably foreseeable that the gun would be used to commit a criminal act other than the assault.[110] Thus, both defendants in *Gonzales* were held to have aided and abetted the resulting death as principals and were convicted of murder. The court then seemed to apply the same definition of principal under subdivision (e)(1) when finding both Michael and Steven subject to the sentence enhancement of twenty-five years to life.[111] The court stated, "The Legislature has chosen to severely punish aiders-and-abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang."[112] This statement is a bit circular because usually aiders and abettors *are* principals in the crime, so it is possible that the court was using the term "principal" to refer to the actual shooter. With reference to the "aiders and abettors," the court stated that "the only requirement is [that] the aider-and-abettor intend to facilitate the target offense and that the offense ultimately committed is the natural and probable consequence of the target offense."[113]

In the *Gonzales* case, the analysis works well because the trial court had made a finding of fact that Michael and Steven knew that Jimenez was carrying a gun. Thus, murder was seen as a natural and probable consequence of assault with a firearm. The court seems to entirely incorporate aider-and-abettor liability into subdivision (e)(1) of the Firearm Enhancement Statute for purposes of applying the sentence enhancements. It seems that the prosecution must allege that a co-principal personally used a firearm, that the use, discharge, or proximate injury was a natural and probable consequence of the aided crime, and that the felony was committed for the benefit of a

106. *Id.* at 253.
107. *Id.* at 255–56.
108. *Id.* at 251.
109. *Id.* at 253.
110. *Id.*
111. *Id.* at 254–55. California Penal Code section 12022.53(d) applied because death had proximately resulted from Jiminez's personal use of the firearm. *Id.*
112. *Gonzales*, 104 Cal. Rptr. 2d at 259.
113. *Id.* at 256.

criminal street gang under subdivision (b) of the STEP Act. It also appears that the court understood the "pled and proved" language in subdivision (e)(1) to operate in the same way as traditional aider-and-abettor liability. The court was willing to find Michael and Steven subject to the sentence enhancements based on the personal firearm use of their co-principal Jimenez.[114]

It remains unclear under this opinion what would happen if a co-perpetrator aided and abetted a crime, not knowing that the person he aided and abetted was carrying a firearm. The aider and abettor would certainly be a principal under common law with respect to the target crime. However, he probably would not be a principal under common law for any nontarget crimes committed with the firearm. This distinction may not help with analysis under the Firearm Enhancement Statute if the target crime was an enumerated felony listed in subdivision (a). Technically, the aider and abettor would be a principal in a felony in which a firearm was used or discharged, even though the use or discharge may not have been reasonably foreseeable. In that situation, the aider and abettor might still be a principal under subdivision (e)(1) because the statute does not list a scienter requirement.

Defense counsel in the *Gonzales* case suggested that the court was in effect utilizing a strict liability definition of the term "principal" because it did not instruct the jury on the objective test of whether a nontarget crime was reasonably foreseeable.[115] Without an analysis of whether a shooting is the natural and probable consequence of the target offense, vicarious liability for the sentence enhancement would rest on whether the defendant was a principal in the target offense. An aiding-and-abetting definition of principal is based on the premise that an aider and abettor can be held liable only for "reasonably foreseeable" nontarget crimes. There is no such scienter requirement in subdivision (e)(1) of the Firearm Enhancement Statute. A finding that a defendant meets the definition of "principal" without a scienter requirement could lead to widely expanded liability and greatly increased sentences.

The case of *People v. Salas*[116] reflected the same result as the decision in *Gonzales*, and the *Salas* court also seemed to interpret the Firearm Enhancement Statute as providing for traditional aider-and-abettor liability through

114. Jiminez was tried with Michael and Steven Gonzales, so under a *Garcia* interpretation, there would have been absolutely no way to prove the allegation of personal use under subdivision (e)(1) of the Firearm Enhancement Statute. *See* CAL. PENAL CODE § 12022.53(e)(1) (Deering Supp. 2002).

115. *See* Appellant's Petition for Review at 11–13, *Gonzales*, 104 Cal. Rptr. 2d 247 (No. B137494); Appellant's Opening Brief at 18–22, *Gonzales*, 104 Cal. Rptr. 2d 247 (No. B137494).

116. 108 Cal. Rptr. 2d 137 (Ct. App. 2001).

subdivision (e)(1). However, it appears that the court in *Salas* had a slightly different focus than the court in *Gonzales*. The court in *Salas* focused specifically on what allegations must be included in the offense charged against the defendant in order to apply the sentence enhancement under subdivision (e)(1) of the Firearm Enhancement Statute.[117]

In *People v. Salas*, the defendant was involved in a gang shooting in which a rival gang member was injured. It was unclear whether the defendant or his confederate was the actual shooter in the drive-by.[118] The trial judge instructed the jury that they could find the defendant subject to the enhancements under subdivision (e) of the Firearm Enhancement Statute if a principal in the felony personally used the firearm, but that the defendant's personal use was not required to impose the enhancement.[119] This treatment of the term "principal" in *Salas* seems to be nearly identical to its definition under both traditional aider-and-abettor liability and the *Gonzales* case.

One key point in the *Salas* decision was that the court emphasized the state's burden of proving that great bodily injury was proximately caused by the discharge of the firearm during the commission of the enumerated felony.[120] The court stated this was a necessary "allegation" that had to be found true as part of convicting the non-gun-wielding defendant under a theory of aider-and-abettor liability.[121] The court stated, "Section 12022.53, subdivision (e)(1) extends potential liability under the firearm enhancement when the accused, in a gang case, does not personally use the weapon."[122] However, for liability to attach to a non-gun-wielding principal, it appears that the offense charged must include an allegation that the great bodily harm which occurred was proximately caused by the discharge of a co-principal's firearm during the commission of the felony. This interpretation is in stark contrast to that of the *Garcia* court because it allows the prosecution to allege personal use as an element of the Firearm Enhancement Statute against an aider and abettor.

The court in *Salas* determined that the prosecution had proved the Firearm Enhancement Statute provision under subdivision (e)(1), because the jury found that "the allegation . . . that *a principal personally and intentionally discharged a firearm* . . . which proximately caused great bodily in-

117. *Id.* at 141.

118. *Id.*

119. *Id.* at 142 ("[I]n order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances.").

120. *Id.*

121. *Id.*

122. *Id.*

jury . . . [was] true."[123] Thus, the aider and abettor was held subject to the sentence enhancement as a principal under subdivision (e)(1) based on the firearm use of his co-perpetrator.

It appears that the court of appeal in *Salas* understood the "pled and proved" language in subdivision (e)(1) to operate the same way under the Firearm Enhancement Statute as it would under traditional accomplice liability. This interpretation does not rely on the conviction or even apprehension of the main perpetrator of the felony. Under this analysis, the aider and abettor could be found guilty because the prosecution had proven all elements of the Firearm Enhancement Statute and the STEP Act and had proven the defendant's liability as a principal to the crime.

D. Hypothetical Fact Patterns to Clarify Common Law and Statutory Schemes of Punishment

Sample fact patterns and their outcomes under different theories can help distinguish between the common law approaches and the results under both statutes. I will analyze the fact patterns below to determine first whether there is a conspiracy, second whether any co-conspirators could be liable for substantive crimes under the *Pinkerton* doctrine, third whether aider-and-abettor liability is appropriate, fourth whether the perpetrators could be prosecuted under the STEP Act, and finally whether any of the perpetrators could be subject to an enhancement under the Firearm Enhancement Statute.

1. Hypothetical 1

Imagine a case in which a man, Bill, wants to kill his girlfriend and, without revealing his purpose, enlists his friend, Joe, to steal a car so that Bill will not be identified by his vehicle. Suppose that Joe does steal a car and that Bill drives to his girlfriend's house in the stolen car and shoots and injures his girlfriend, who is in the front yard.

Both defendants could probably be convicted of the substantive offense of conspiracy because it is clear from the facts that Bill asked and Joe agreed to steal a car.

Under the *Pinkerton* doctrine, any substantive offenses not within the original agreement must be in furtherance of the common unlawful purpose. Shooting and injuring a woman is not in furtherance of their conspiracy to steal the car, so Joe likely would not be guilty of the shooting under *Pinkerton*.

123. *Id.* at 141 (emphasis added).

To attach aider-and-abettor liability, prosecutors must show that Joe had the intent to encourage or aid the actual crime. Here, prosecutors must show that the shooting of Bill's girlfriend was a nontarget crime that was a natural and probable consequence of the target crime: stealing a car. Because Bill's purpose for the stolen car was unknown to Joe and because Joe did not aid or encourage the shooting, Joe is not subject to liability for the shooting under a theory of aiding and abetting.

To subject Joe to liability under the STEP Act, Joe would need to know that Bill was a member of a criminal street gang that engaged in a pattern of criminal activity. Even then, liability would attach only if Joe had stolen the car with the intent of assisting that criminal street gang. The facts here are unclear, and prosecutors would have to decide whether evidence exists either that Joe was actively participating in a gang or that the carjacking was knowingly done for the benefit of a gang. If the shooting is found to have been committed for the benefit of a criminal street gang under the STEP Act, then Bill could be subject to an enhancement of ten years under subdivision (b) because personally using a firearm is a violent felony. If the carjacking is found to have been committed for the benefit of a criminal street gang, Joe could also potentially be subject to an enhancement of five or ten years under the STEP Act, depending on whether his carjacking offense is classified as a serious or violent felony.

Under the Firearm Enhancement Statute, Bill would receive an enhancement of twenty-five years to life on top of any sentence imposed for assault because he discharged a firearm, which proximately caused great bodily injury. If the crime was committed for the benefit of a street gang under subdivision (b) of the STEP Act, Bill could be subject to enhancements under both the STEP Act and the Firearm Enhancement Statute through subdivision (e)(2) of the Firearm Enhancement Statute. To subject Joe to liability under subdivision (e)(1), prosecutors would need to show that Joe was a principal in the shooting. Most courts have used an aiding-and-abetting definition of "principal" under the Firearm Enhancement Statute, but, as stated above, Joe did not have the requisite knowledge to be convicted under a theory of aider-and-abettor liability for the shooting. Thus, Joe is probably not a principal and, therefore, not subject to the enhancement under the Firearm Enhancement Statute.

2. Hypothetical 2

Imagine that two co-perpetrators with distinctive tattoos commit a robbery at the corner gas station, and one of them is armed with a firearm. George, who has the firearm, waves it menacingly at the store clerk and the clerk pulls out a shotgun and shoots, seriously wounding Harry, George's

accomplice. George gets scared, shoots at the gas station clerk, and punches a patron in the face on his way out.

In this situation, it is likely that George and Harry had agreed to rob the gas station.

If a conspiracy is proven, then Harry, under *Pinkerton*, is liable for George's departing assault on the gas station patron, as long as the assault was in furtherance of the common goal: robbery. An assault on a patron as part of escape seems to be in furtherance of the robbery.

Under a theory of aiding and abetting, Harry intended to aid and did aid in the target crime of robbery; thus, he is a principal in that crime. If the assault on the patron was a natural and foreseeable consequence of the robbery, then Harry could be held liable as an aider and abettor and could serve time for George's assault.

Under the STEP Act, the tattoos and an expert may be enough to prove that George and Harry belong to the same criminal street gang. If prosecutors prove that this robbery was committed for the benefit of that gang under subdivision (b), then both George and Harry could receive sentence enhancements of ten years in addition to the sentence for the actual robbery, because armed robbery is a violent felony.

Under the Firearm Enhancement Statute, George's sentence could be enhanced by twenty years if his bullet did not injure anyone, or twenty-five years to life if the discharge of his firearm proximately caused great bodily injury or death, whether or not the crime was committed for the benefit of a criminal street gang. Because Harry did not personally use a firearm, any enhancement he might receive would be based on subdivision (e)(1), which provides for sentence enhancements if any principal personally uses a firearm and the enumerated felony is committed for the benefit of a gang under subdivision (b) of the STEP Act. If the crime was committed for the benefit of a street gang under subdivision (b) of the STEP Act and if Harry was a principal to the robbery, Harry would be subject to the same sentence enhancement as George under the logic of *Gonzales* and *Salas*. Under *Tillett*, Harry would not be subject to sentence enhancement under subdivision (e)(1); in this scenario, it is possible to determine who actually discharged the weapon, so there is no need to apply vicarious liability. Finally, under *Garcia*, Harry would be subject to the enhancement under the Firearm Enhancement Statute if George is first convicted of personal use and discharge of the firearm during the felony in which Harry was an aider and abettor.

3. Hypothetical 3

Imagine that Adam is angry with his friend Victor. Adam asks Brian to drive him to Victor's house so that he can "put Victor in his place." Carl

overhears Adam and Brian talking and says to Adam, "Yeah! Victor is a real jerk. Just the other day I heard him call your girlfriend a slut." Hearing this, Adam says, "Let's go." Adam, Brian, and Carl drive to Victor's house where Adam gets out, knocks on the door, and begins a heated discussion with Victor on the front porch. The two men start shoving each other, and Brian and Carl get out of the car, run over, and reach Adam and Victor embroiled in a tussle. Adam, Brian, and Carl beat Victor to death.

Here, unless it can be proved that Adam intended to kill Victor and that Brian and Carl agreed, there is no evidence of conspiracy to assault or to murder. Driving to Victor's house to "put him in his place" may sound menacing but is not illegal, so there was no agreement with an unlawful purpose.

Without a conspiracy, the *Pinkerton* doctrine does not apply.

To be liable under a theory of aiding and abetting, Brian and Carl would have to have intended to aid actively in the target crime. Here, Brian and Carl both apparently aided and intended to aid in the assault of Victor, because they stepped out of the car when Adam and Victor's exchange became heated and assisted in the beating. Even if they did not participate in the beating, if they knew Adam intended to assault Victor, Brian's driving and Carl's comment could be enough for encouragement under aider-and-abettor liability. However, it is not clear whether any of them intended that Victor actually die. This problem is resolved by the court's sua sponte duty to instruct on potential target offenses, one of which could be assault.[124] If the jury were to find that Brian and Carl aided and intended to aid in the assault of Victor and that the death was a natural and probable consequence of the group beating, then Brian and Carl could be liable for Victor's death as aiders and abettors. As aiders and abettors, Brian and Carl become principals and are convicted as such for the homicide.

For any of the perpetrators to be liable under the STEP Act, the prosecution would need to prove either that Adam, Brian, and Carl were participating in a street gang under subdivision (a), or that the felony was for the benefit of a criminal street gang under subdivision (b). Inflicting great bodily injury is a violent crime under the STEP Act and would subject Adam, Brian, and Carl to a ten-year sentence enhancement.

Under the Firearm Enhancement Statute, none of the perpetrators would be subject to any sentence enhancement because they committed the assault with their fists and feet rather than with firearms. The same assault resulting in the same death, but perpetrated by use and discharge of a firearm, would have subjected Adam (and possibly Brian and Carl) to an enhancement of twenty-five years to life.

124. *See* People v. Prettyman, 926 P.2d 1013, 1023, 1029–30 (Cal. 1996).

IV. A PRACTICAL AND ADMINISTRABLE SUPREME COURT DISPOSITION

The California Supreme Court's disposition of *People v. Garcia* will certainly have broad effects on when and how prosecutors can apply the sentence enhancement under subdivision (e) and, depending on the holding regarding vicarious liability, how much deterrent effect the statute will have on potential aiders and abettors to gang crime. This part discusses and critiques the implications of potential interpretations of the Firearm Enhancement Statute. This part also analyzes which portions of the statute have the most crucial impact on the whole and how those portions should be interpreted with respect to legislative intent and the goal of avoiding illogical results.

A. Analysis of the *Garcia* Interpretation

The court's interpretation of subdivision (e)(1) in *Garcia* allows aiders and abettors of gang crimes to escape sentence enhancement under the Firearm Enhancement Statute if the actual shooter is never apprehended, acquitted, or killed. It seems illogical that the state legislature would craft a statute intending that an aider and abettor to a crime committed for the benefit of a criminal street gang would be subject to the provided sentence enhancement only if the gun-wielding perpetrator survived so as to face a conviction. Where a shooter survives the gun battle and is subsequently convicted, his aiders and abettors would face a sentence enhancement of twenty-five years to life through vicarious liability under subdivision (e)(1) of the Firearm Enhancement Statute. However, in cases in which a shooter does not survive the gun battle (that is, he either is shot or dies of a heart attack, etc.), his aiders and abettors could incur only a one-year arming enhancement because the shooter cannot be "convicted"[125] as required by *Garcia*.

The attorney general in *Garcia* argued that requiring a prior conviction of the actual shooter was "overly strict."[126] Disagreeing with the attorney general, the court focused on the fact that subdivision (e) itself does not distinguish between use, discharge, or death and does not specify any pen-

125. Letter of Amici Curiae from California District Attorneys Association to Chief Justice George at 3 People v. Garcia, 111 Cal. Rptr. 2d 1 (2001) (Supreme Court No. S097765) ("Evidence against multiple members involved in a single criminal act is frequently disparate. Just as the conviction of an aider-and-abettor is not dependent on the result of the perpetrators [sic] case, there is no reason or logic requiring the shooter to be convicted as a prerequisite to Penal Code section 12022.53(e)(1) liability.").

126. *Garcia*, 106 Cal. Rptr. 2d at 231.

alty.[127] Thus, in applying subdivisions (b), (c), and (d), the court read the conviction language present in each of those subdivisions to be an element of "proving" subdivision (e)(1). The fate of the actual gun-wielding perpetrator seems a dubious rationale for deciding whether to impose sentence enhancements on aiders and abettors who are apprehended. This is especially true when it is clear that the crime involved a firearm and that the crime was committed for the benefit of a criminal street gang. Thus, the *Garcia* interpretation creates an unintended loophole in the statute and will affect hundreds of cases involving gang-related shootings in which the actual shooter remains at large, is acquitted, or is killed.[128]

B. Who Should Be a Principal Under Subdivision (e)(1) of the Firearm Enhancement Statute?

If the *Garcia* interpretation of the Firearm Enhancement Statute is unreasonable, then it becomes necessary to evaluate alternate interpretations and assess their reasonableness and administrability. The first question that the statute presents is: Who should be deemed a principal under subdivision (e)(1)? The most logical answer is that a principal for purposes of the Firearm Enhancement Statute is one who would be considered a principal under the traditional common law aiding-and-abetting doctrine. Moreover, true to tradition, the status of principal under the Firearm Enhancement Statute should include a requirement that principal liability attaches only for the natural and probable consequences of the aided target crime.

This interpretation is reasonable because it comports with well-established, well-accepted tenets of U.S. jurisprudence, and it leads to logical results. Courts have often addressed the natural and probable consequences doctrine of aiding and abetting liability, and have accepted it as an appropriate way to punish aiders and abettors.[129] This interpretation of the term "principal" also avoids the illogical results seen under *Garcia*. Under the *Garcia* interpretation of the Firearm Enhancement Statute, aiders and abettors effectively play a game of roulette with respect to the sentence enhancement. An aider and abettor to a crime in which a gun was used or discharged has the incentive to keep the actual shooter out of jail, or to arrange his death. Aiders and abettors are therefore unlikely to help law enforcement in any way because capture and conviction of the actual shooter greatly increases the aider's sentence. Additionally, even if the ac-

127. *Id.*

128. *See* Respondent's Petition for Review at 10, *Garcia*, 111 Cal. Rptr. 2d 1 (No. S097765).

129. *See, e.g.*, *Prettyman*, 926 P.2d at 1019; People v. Croy, 710 P.2d 392 (Cal. 1985); People v. Olguin, 37 Cal. Rptr. 2d 596 (Ct. App. 1994); People v. Francisco, 27 Cal. Rptr. 2d 695 (Ct. App. 1994); People v. Brigham, 265 Cal. Rptr. 486 (Ct. App. 1989).

tual shooter is apprehended and brought to trial, it is not clear that the prosecutor can force the aider to wait in jail for the outcome of the shooter's trial without violating the aider's right to a speedy trial.[130]

This Comment proposes an interpretation of "principal" that avoids the quagmire described above. Interpreting "principal" as it is construed under common law aider-and-abettor liability would allow prosecutors to proceed with their strongest case, regardless of the identity or status of the potential defendant. There is no danger of violating the aider and abettor's right to a speedy trial because prosecution under the Firearm Enhancement Statute will not be dependant upon conviction of the gun-wielding co-principal.

Legislative history here is of minimal value to the question of who is a principal under subdivision (e)(1) because much of the history can be seen as contradictory. The original draft of the bill enacting the Firearm Enhancement Statute stated that the intent of the bill was to apply the enhancement to any "person who is charged as a principal in the commission of an offense *who is armed with or uses a firearm*."[131] Additionally, subdivisions (b) through (d) in the text of the proposed bill provided sentence enhancements for "any person" who was armed with,[132] used,[133] discharged,[134] or proximately caused great bodily injury by discharge of a firearm.[135] However, the original draft of subdivision (e) read, "The enhancements specified in this section shall apply to *any person charged as a principal* in the commission of an offense that includes an allegation pursuant to this section."[136] If subdivision (e) utilized the term "principal" to denote a personal use requirement, then it would seem redundant, because each of the preceding subdivisions provided enhancements for perpetrators who had personally used or discharged a firearm.

It appears that the language in subdivision (e) was understood by legislators as allowing vicarious liability as a sufficient predicate for enhancing a co-perpetrator's sentence. In a summary of the bill at the Third Reading in the Assembly on June 3, 1997, the bill was characterized as imposing "the enhancements on each person involved in a specified felony, where *any* co-perpetrator is armed with or discharges a firearm."[137]

The Senate Appropriations Committee modified subdivision (e) on September 9, 1997, creating (e)(1), which applied the enhancement to a

130. *See* Respondent's Brief on the Merits at 14, *Garcia*, 111 Cal. Rptr. 2d 1 (No. S097765).
131. A.B. 4 at 1, 1997–98 Sess. (Cal. 1997) (emphasis added).
132. A.B. 4(b).
133. *Id.*
134. A.B. 4(c).
135. A.B. 4(d).
136. A.B. 4(e) (emphasis added).
137. A.B. 4, 1997–98 Sess. (Cal. 1997) (Assembly Third Reading June 3, 1997) (emphasis added).

principal with the same language previously quoted, but with the additional requirement that "a violation of both this section and subdivision (b) of section 186.22 [STEP Act] are pled and proved."[138] Because the STEP Act is specific to gang offenses, it is possible to interpret the modification as providing vicarious liability for the sentence enhancement when an enumerated felony is committed for the benefit of a criminal street gang.[139] However, the legislature never explained the modification and left the provision untouched throughout the remainder of its discussions.

C. How Should the Supreme Court Read the Whole of Subdivision (e)(1) of the Firearm Enhancement Statute?

Different courts have struggled with the interpretation of the language in subdivision (e)(1) of the Firearm Enhancement Statute. Subdivision (e)(1) applies to any principal in the "commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 [STEP Act] are pled and proved."[140] The confusion arises from the somewhat inartful wording of the statute. However, the language is most reasonably read to require that the prosecution: (1) allege the commission of an enumerated felony which, if proven, would be a violation of the Firearm Enhancement Statute;[141] (2) allege facts which, if found true, would characterize the enumerated felony in a way that would constitute a violation of subdivision (b) of the STEP Act;[142] and (3) allege facts which, if found true, would make the defendant liable as a principal for the enumerated felony.[143] Interpreting the statute in this way facilitates logical and consistent outcomes and provides for specific vicarious liability.

Under this proposed interpretation of subdivision (e)(1), principals to felonies enumerated in subdivision (a) and committed for the benefit of a criminal street gang are subject to vicarious sentence enhancement for personal firearm use or discharge by a co-principal in that felony. This interpre-

138. *Id.* at 5.

139. *See* Kathryn B. Storton et al., *The 10-20-Life Firearm Enhancement: Penal Code § 12022.53*, Sample Pleadings 1, *in* XVIII CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, PROSECUTOR'S NOTEBOOK ("[A] defendant is *vicariously* liable for P.C. 12022.53 if a P.C. 186.22(b) gang enhancement is found true as to that defendant . . . . When charging firearm use in gang cases, unless you are certain you can prove a particular defendant was the actual user or shooter, use [the vicarious liability forms].").

140. CAL. PENAL CODE § 12022.53(e)(1) (Deering Supp. 2002).

141. § 12022.53(a).

142. § 186.22(b).

143. *See supra* Part IV.B.

tation resolves the issue presented by defense counsel in *People v. Gonzales*[144] of whether a principal is effectively strictly liable for crimes committed by co-perpetrators. As stated in Part IV.B., a principal is only liable for the natural and probable consequences of the aided target crime. Additionally, under this proposed interpretation, principals are held vicariously liable only for their participation in a felony enumerated under the Firearm Enhancement Statute when committed for the benefit of a criminal street gang. This more limited application of vicarious liability seems reasonable in light of the gravity of the sentence enhancements. Courts have found that the legislature is authorized to create punishments for firearm use that are more severe than those for crimes which do not involve firearms. However, it seems that the legislature would have been more explicit in providing sentence enhancements triggered simply by liability as a principal to an enumerated felony under the Firearm Enhancement Statute. The proposed scienter requirement protects defendants from an onerous application of sentence enhancement.

CONCLUSION

While the language of subdivision (e)(1) of the Firearm Enhancement Statute is murky, it can be interpreted in a way that creates reasonable, consistent outcomes and provides for administrability under the current legal system. This interpretation allows an aider and abettor in a target crime, which qualifies as an enumerated felony, to be vicariously liable for the sentence enhancements under the Firearm Enhancement Statute based on a co-perpetrator's personal use or discharge of a firearm. However, it only allows this vicarious liability when the prosecution has been able to prove the commission of the enumerated felony, actual personal use or discharge of a firearm by a co-perpetrator during that felony, and commission of the felony for the benefit of a criminal street gang. This interpretation effectuates the stated intent of the legislature, which was to protect the citizens of California and deter violent crime by providing longer prison sentences. The proposed interpretation allows the punishment of aiders and abettors when it is clear that they knowingly endangered the lives of Californians by participating in a felony in which the natural and probable consequences included firearm use or discharge. This interpretation also answers the concerns of defense attorneys by including a scienter requirement within the application of vicarious sentence enhancements. With careful application, the Firearm

144. *See* Appellant's Opening Brief at 18–22, People v. Gonzales, 104 Cal. Rptr. 2d 247 (2001) (No. B137494).

Enhancement Statute can deter and punish violent gang activity and also can be administered consistently and fairly by the California courts.

***

AUTHOR'S NOTE

The California Supreme Court did decide the case of *People v. Garcia*.[145] This Comment was written in the fall of 2001, before the case was decided, and still presents a potential problem left unexplained by the court even after its decision.

The holding of the case clarified the elements to be pled and proved under section 12022.53, subdivision (e)(1) in order to vicariously apply the sentence enhancements to non-gun-wielding principals of gang crime. The court held that

> in order to find an aider and abettor—who is not the shooter—liable under section 12022.53, subdivision (d), the prosecution must plead and prove that (1) a principal committed an offense enumerated in section 12022.53, subdivision (a) . . . (2) a principal intentionally and personally discharged a firearm and proximately caused great bodily injury or death to any person other than an accomplice during the commission of the offense; (3) the aider and abettor was a principal in the offense; and (4) the offense was committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."[146]

While this test seems clear and administrable, this Comment presents and analyzes a potentially severe ambiguity left open by the court's determination. The court fails to address the presence or absence of any scienter requirement for aiders and abettors under section 12022.53. Looking at the court's decision, it appears that an accomplice could aid an enumerated offense, not knowing his co-principal carried a gun, and still be subject to an enhancement if the prosecution could prove that the gun-wielding co-principal intentionally and personally used the firearm in the aided enumerated crime and that the crime was committed for the benefit of a criminal street gang. This ambiguity could potentially lead to severe sentence enhancements for aiders and abettors who do not know, or even suspect, that their co-principal will use or discharge a firearm. This result seems sufficiently harsh that the legislature would have been more particular in its drafting of the statute.

145. 28 Cal. 4th 1166 (2002).
146. *Id.* at 1174 (citing § 186.22(b) and § 12022.53(d)).

While the court takes for granted that the sentence enhancements provided by section 12022.53 were intended to apply to aiders and abettors of gang crime, it relies on the opinion of *People v. Gonzales* to find what it termed "clear intent to punish aiders and abettors in this context."[147] As I discuss in Part IV.B. the legislative history is anything but clear regarding section 12022.53, subdivision (e)(1), and reasonable people can differ as to the intent of the California legislature.

Even after the California Supreme Court's decision in *People v. Garcia*, questions remain as to the intended vicarious application of the sentence enhancements provided by section 12022.53. It will be up to prosecutors, defense attorneys, and trial courts to work through the remaining ambiguity toward a clear standard of liability for aiders and abettors of gang crime.

147. *Id.* at 1173 (citing People v. Gonzales, 104 Cal. Rptr. 2d 247, 256 (Ct. App. 2001)).