

# POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Surveillance of  
Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 --  
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Week Of	Topic	Guests	General
March 2 2015	<b>Gun Battles: Legal and Tactical Issues Part II</b>	Micheal O'Connor	30 min

This week's P&A is the second segment in a two-part series entitled "Gun Battles: Legal and Tactical Issues." Both segments (Parts I and II) address the problems posed by urban gun battles, in which innocent adults and children are often victims.

Because all participants in these gun battles bear some level of responsibility, this P&A series reviews the different theories and principles of homicide that allow assignment of liability to all involved in a manner both legally sound and morally just.

In last week's episode, we reviewed the basic principles of homicide, and discussed felony murder, provocative act murder, defenses, and implied malice murder involving concurrent proximate cause.<sup>1</sup>

This week continues with the scenario in which an innocent victim is killed by a stray bullet, fired during a gun battle, resulting in murder convictions for both shooters, based on express malice.

This P&A also discusses the applications of the gun use statutes and the importance of charging and trying together all those involved in the gun battle.

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<sup>1</sup> Last week's P&A is best understood by watching the video, which uses actual footage of the shootings and other visuals to explain events and the basis of liability. For those in the Alameda County District Attorney's Office, the video can be found on the Points and Authorities site, in the Index at "List of Shows." For persons outside the office, please contact Mary Pat Dooley at [marypat.dooley@acgov.org](mailto:marypat.dooley@acgov.org) for the video link.

## **I. Implied Malice Murder: Concurrent Proximate Cause**

A. As discussed in the 2/23 P&A, murder requires malice and causation.

B. One of the videos reviewed in the 2/23 P&A depicted a verbal argument between two men at an Oakland gas station that escalated into a gun fight. McNeely slapped Poston. Poston drew his handgun, and then McNeely simultaneously pulled out his handgun. Poston fired the first shot at McNeely, firing 10 shots at him. Poston then stopped firing and ran as McNeely then fired eight shots at him. One of McNeely's bullets killed a man who was driving nearby, passing through his windshield and striking him in the head.

C. Both Poston and McNeely were tried together and convicted of second degree murder. The prosecution's theory was an implied malice murder theory. A defendant acts with implied malice when he commits an act, the natural and probable consequences of which are dangerous to human life. The defendant must know the act was dangerous to human life and consciously disregard that risk and intentionally commit the act. A defendant who engages in a gun battle in a gas station in a busy public location acts with implied malice. (See, e.g., *People v. Gilbert* (1966) 63 Cal.2d 690, 704.)

D. Moreover, even though it was McNeely's bullet that struck the victim, both men proximately caused the victim's death. At the moment they both drew weapons, McNeely and Poston concurrently caused a predictable chain of increasingly violent actions and reactions that resulted in the victim's death.

## **II. Express Malice Murder: Concurrent Proximate Cause**

In *People v. Sanchez* (2001) 26 Cal.4th 834, the defendant and his co-defendant, who were rival gang members, engaged in a gun battle in which an innocent person was killed by a stray bullet. This case illustrates the scenario in which both shooters are convicted of first degree murder, based on express malice.

### **A. Factual Background**

1. Defendant Sanchez and co-defendant Gonzalez were each charged with first degree murder in the shooting death of victim Reynaldo Estrada. Sanchez was a member of the TDK gang. Gonzalez was a member of a rival gang, the Headhunters. Both gangs had a history of mutual animosity and had exchanged gunfire in the past. On the day of the murder, Gonzalez and a fellow gang member were standing outside of Gonzalez's house. The street in front of the house was marked with Headhunters graffiti. Sanchez was a passenger in a car that drove past Gonzalez and his friend three times. There was evidence that the two groups were throwing gang signs at one another. When the car drove by the second time, the occupants of the car stared down Gonzalez and his friend. When the car returned a third time, it stopped two houses away and Sanchez fired at Gonzalez and his friend. Gonzalez fired back about four times and Sanchez fired three or more rounds as his car sped off. Victim Estrada, who had been working on his truck in his driveway, was struck in the head by a stray bullet.

## B. Analysis

### 1. Causation

a. It could not be established from the evidence whether Sanchez or rival gang member Gonzalez had fired the fatal shot. Actual causation is not required, however. It is *proximate* causation, together with malice, that determined Sanchez's liability for murder. It was only necessary that Sanchez's conduct be a substantial concurrent cause of the victim's death. (*Id.* at p. 845.)

b. There may be more than one proximate cause of the death. When two or more persons contribute *concurrently* as the proximate cause of the death, each is a proximate cause of the death if that person's conduct was a substantial factor contributing to the result. (*Id.* at p. 847.)

c. Here, it could not be determined who was the actual shooter of the fatal round. But the evidence supported a finding that Sanchez's commission of life-threatening deadly acts in his attempts on Gonzalez's life "was a substantial concurrent, and hence proximate, cause of [the victim's] death." (*Id.* at pp. 848-849.)

### B. Malice

a. This case involved express malice.<sup>2</sup> The jury could have reasonably found that by the time the first shots rang out, both Sanchez and Gonzalez had armed themselves and premeditated and deliberated the attempted murder of one another. (*Id.* at p. 849.)

b. "Although the actual shooting here may have been almost spontaneous, the mutual planning of one another's murder supports a finding of premeditation as to both Sanchez and Gonzalez." (*Id.* at p. 850.)

c. "Significantly, we are not faced with a situation in which the mental state of the person who fired the fatal shot was substantially more culpable than the mental state of the person who induced the shooter to act. Here, both defendant [Sanchez] and Gonzalez acted with intent to kill, and the evidence was equally persuasive that for both of them the intent to kill was deliberate and premeditated. Because defendant and Gonzalez had equally culpable mental states and engaged in precisely the same conduct at the same time and place in exchanging shots, it is not unfair to hold them equally responsible for Estrada's death, without regard to which of them actually fired the bullet that struck and killed Estrada." (*Id.* at p. 856, Kennard, J. concurrence.)

## **III. Importance of Charging Gun Battle Defendants Together**

A. In charging a situation such as *People v. Sanchez* above, where two defendants fired at each other, it is important to keep the two defendants together in order to avoid the empty chair defense. Keeping the defendants together allows prosecutors to assign blame where it legally and morally belongs.

B. Charging the defendants separately invites the jury to take the perspective of only one participant rather than both participants. It enables the charged defendant to put all the blame on the

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<sup>2</sup> In the discussion in the video, there was a reference to "shared intent of implied malice." This was a misstatement; reference should have been to "express malice."

other person even though it was a concurrent decision to engage in the gun battle.

#### **IV. Gun Use Enhancements**

With gun battle cases, prosecutors will want to charge Penal Code section 12022.5 [little use] or section 12022.53 [big use]. Also gun battle cases will usually have death or serious bodily injury, requiring the charging of GBI or serious bodily injury enhancements.

##### **A. Use of a Firearm under Section 12022.5**

1. Enhancement adds 3-4-10 years to sentence.
2. Defendant must personally use a firearm.
3. Does not apply if use of a firearm is an element of the offense.
  - a. HOWEVER: specific exception for section 245 (see 12022.5(d).)
4. USE: firing the gun, menacing display of the gun, or pistol-whipping
5. Infliction of great bodily Injury is a separate enhancement that must be separately charged.

##### **B. Infliction of Great Bodily Injury**

1. Enhancement adds a sentence of:
  - a. 3 years unless --
  - b. 5 years if injury causes paralysis or coma (12022.7(b))
  - c. 5 years if victim is over 70 years old (12022.7(c))
  - d. 4-5-6 years if victim is younger than five years old ((12022.7(d))
  - e. 3-4-5 years in domestic violence cases (12022.7(e))
2. Defendant must personally inflict the injury.
3. Does not apply if infliction of injury is an element of the offense, including murder or manslaughter.
  - a. HOWEVER: specific exception for DV cases (see 12022.7(g).)

##### **C. Facts to Know About “The Big Use”: Section 12022.53**

###### **1. Effects of Section 12022.53**

- a. Defendant is ineligible for probation. (§ 12022.53(g).)
- b. The court may not strike or dismiss a finding of use. (§ 12022.53(h).)
- c. Simple use of a firearm adds ten years to the defendant’s sentence. (§ 12022.53(b).)

- d. Intentional discharge of a firearm adds 20 years. (§ 12022.53(c).)
- e. Intentional discharge causing great bodily injury adds 25 years to life. (§ 12022.53(d).)

**2. Section 12022.53 applies only to listed crimes:**

- (1) Section 187 (murder)
- (2) Section 203 or 205 (mayhem)
- (3) Section 207, 209, or 209.5 (kidnapping)
- (4) Section 211 (robbery)
- (5) Section 215 (carjacking)
- (6) Section 220 (assault with intent to commit a specified felony)
- (7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter)
- (8) Section 261 or 262 (rape)
- (9) Section 264.1 (rape or sexual penetration in concert)
- (10) Section 286 (sodomy)
- (11) Section 288 or 288.5 (lewd act on a child)
- (12) Section 288a (oral copulation)
- (13) Section 289 (sexual penetration)
- (14) Section 4500 (assault by a life prisoner)
- (15) Section 4501 (assault by a prisoner)
- (16) Section 4503 (holding a hostage by a prisoner).
- (17) Any felony punishable by death or imprisonment in the state prison for life
- (18) Any attempt to commit a crime listed in this subdivision other than an assault

Subdivision (b) and (c) do not apply to any other crimes, BUT:

If great bodily injury results from the intentional discharge of a firearm, then subdivision (d), and *only* subdivision (d), applies to the following additional crimes:

- Section 246 (shooting at occupied residence or motor vehicle)
- Section 26100(c) (maliciously shooting at a person from a motor vehicle)
- Section 26100(d) (malicious discharge of firearm from a motor vehicle)

**3. Some Limitations on Section 12022.53(d)**

- a. Defendant must intentionally fire the firearm.
- b. Injured person may not be an accomplice.
- c. Defendant must *proximately* – not personally – cause great bodily injury.

## **D. Section 12022.53(d) and Causation**

1. *Defendant may be liable under subdivision (d) even where he or she does not actually fire the fatal bullet.*

- Section 12022.53(d), while requiring that a defendant intentionally and *personally* discharge a firearm, does not require that he *personally* inflict great bodily injury and death, only that he *proximately* caused great bodily injury or death. (*People v. Bland* (2002) 28 Cal.4th 313, 333-336.) Thus, a defendant may proximately cause great bodily injury under section 12022.53(d) even if he did not personally fire the bullets that hit the victims. (*Id.* at 338.) Instead, the defendant's personal discharge of a weapon proximately causes an injury if it is a substantial factor contributing to the injury. (*Ibid.*)

- For example, in *People v. Bland, supra*, 28 Cal.4th 313, the defendant and a second gunman fired shots at a car containing three people. One of the victims was killed; the other two were injured. It was unclear which of the two men fired the bullets that caused injury to the surviving victims. The defendant was convicted of the murder, and of the attempted murder of both victims, and the jury found true the allegation under section 12022.53, subd.(d) that defendant intentionally discharged a firearm and proximately caused great bodily injury to the surviving victims.

The Court of Appeal reversed the conviction. The Court of Appeal's ruling relied in part on its conclusion that "[t]he enhancement [under 12022.53(d)] cannot be found true unless defendant personally fired the bullets which struck the victim." (*Bland, supra*, at p. 335.)

The Supreme Court disagreed: "Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' . . . , but only that he 'proximately caused' the great bodily injury or death. The jury . . . reasonably found that the defendant did personally discharge a firearm. The statute states nothing else that defendant must *personally* do." (*Bland, supra* at p. 336 (*emphasis in original*).)

The Supreme Court cited an earlier decision in which "two persons engaged in a gun battle, killing an innocent bystander. Who fired the fatal bullet, and . . . personally inflicted the harm was unknown, but we held that the jury could find that *both* gunmen proximately caused the death. . . . The same is true here. If defendant did not fire the bullets that hit the victims, he did not *personally inflict*, but he may have *proximately caused* the harm." (*Bland, supra*, at pp. 337-338 (*citing People v. Sanchez* (2001) 26 Cal.4th 834.))

2. *Defendant may be liable under section 12022.53 (d), even when the injury was not caused by a bullet.*

- For example, in *People v. Palmer* (2005) 133 Cal.App.4th 1142, a police officer stopped a car driven by the defendant, a robbery suspect. As the officer was getting out of his patrol car, the defendant stepped out of the driver's seat of the suspect car, swiveled around with a gun, and fired a shot at the officer. The officer pivoted on his ankle and dove behind the car door, breaking his ankle in the process.

The bullet fired by the defendant struck the patrol car but did not strike the officer. The defendant was convicted of several crimes, including the attempted murder of the police officer. The jury found true the allegation that the defendant personally discharged a firearm, proximately causing great bodily injury under section 12022.53(d).

On appeal, the defendant argued that he could not be convicted of the firearm enhancement under subdivision (d) because the bullet he fired never actually struck the officer. The court of appeal disagreed: “[T]he defendant’s discharge of a firearm may be the proximate cause of a victim’s injury, even if the defendant’s bullet does not hit the victim. (*Palmer, supra*, at pp. 1151-52.) The court found the evidence sufficient to establish that the defendant’s discharge of the firearm was the proximate cause of the officer’s injury and upheld the conviction. (*Id.* at p. 1153.)

3. *Defendant may be liable under section 12022.53 (d) even when the injured victim is not the victim of the underlying count.*

- For example. In *People v. Oates* (2004) 32 Cal.4th 1048 the defendant fired two shots at a group of five men. The first shot hit one of the victims in the leg and badly damaged it. None of the other men were injured. The jury convicted the defendant of five counts of attempted murder and five separate allegations under section 12022.53(d). The defendant argued that the number of enhancements imposed should be limited to the number of actual injuries inflicted.

The California Supreme Court disagreed. The court noted that subdivision (d) is applicable if any person other than an accomplice is injured, and that the person injured need not be the victim of the charged crime. (*Oates, supra*, at p. 1055.) The court went on to hold that the one injury justified five separate allegations under section 12022.53(d), one for each crime.

## **E. Special considerations in Penal Code section 246/26100 cases**

1. Section 12022.53 does not apply to violations of section 245. However, consider the context of the shooting. Has defendant really committed a 245, or has the defendant committed a 246? If the defendant shoots at persons outside a house or occupied car, and it is readily apparent that the shots he has fired will strike that occupied house or car, he may in fact be guilty of violating section 246. Or if he maliciously fires from a car and shoots at a person outside the car with the intent to injure, he may be guilty of a violation of 26100(c). See this quote:

“[S]ection 246 is not limited to the act of shooting directly “at” an inhabited or occupied target. Rather, the act of shooting “at” a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant’s conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act.” (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356-1357, footnote omitted)

## **V. Take-Aways from Assistant District Attorney Micheal O'Connor**

When charging and trying gun battle cases, think outside the box. Stay focused on the big picture of the gun battle and not the individual components. Measure responsibility from the moment the gun battle begins and not from some other point.

But not every case is going to be a gun battle case. For example, in the Art Murmur case discussed in the 2/23 P&A, the deceased initiated the gun battle, and the response by the survivor was reasonable self-defense.

It requires thought and care, both legally and morally, to assign blame where it belongs.

The culpable persons are those who with a similar state of mind, at a similar place, at a similar time, begin the gun battle, which ultimately causes the deaths of so many innocent people.

**NEXT WEEK: The California Supreme Court addresses GBI in vehicular manslaughter cases: May a defendant's sentence for this crime be enhanced for infliction of GBI on surviving victims? (*Peo. v. Cook*); Also, the impact of the implied consent law on warrantless blood draws (*Peo. v. Harris*)**

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.