[*Sample AOB with briefing analysis & notations interjected by CCAP. With sincerest thanks to panel attorney George L. Schraer for his permission to post this sample. All names & identifiers have been changed.*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. C00X000
	)	
v.	)	
	)	
JOHN DOE,	)	
	)	
Defendant and Appellant.	)	
_____	)	

APPELLANT'S OPENING BRIEF

Sacramento County Superior Court No. 0XX0000
Honorable Joe Smith, Judge

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Attorney for Appellant by Appointment of the Third [Fifth] District Court of Appeal under the Central California Appellate Program Assisted [Independent] Case System

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

A. Introduction [*While an introduction is not necessary in every case, in a case such as this one, which is more complex and in which there was a previous appeal, it can be helpful, and here, it was.*]

This is appellant's second appeal. In the first appeal, this Court [*the CSM states that "court" should be capitalized only when the full or accepted formal name is used. The lower case should be used when a partial name is used.*] reversed appellant's conviction for second degree murder. After this Court remanded the case to the superior court for

further proceedings, appellant again was convicted of second degree murder. This appeal is from the judgment the trial court entered after that conviction.

B. The First Trial

On June 6, 2002, the felony complaint, which the Sacramento County District Attorney had filed on October 23, 2001, was deemed the information and was filed in Sacramento County Superior Court. It charged appellant with the murder of Veronica Forrester, in violation of Penal Code §187 (count one) [*counts, even when followed by numbers or letters, do not make this a proper noun, so use of the lower case – "count one" – is correct here according to the California Style Manual [CSM] §4:8*] and evasion of an officer which caused serious bodily injury to Veronica Forrester, in violation of Vehicle Code §2800.3 (count two). (CT [C00X200] 11-12.)[1] On the same day the information was filed, appellant entered a plea of not guilty to the charges. (CT 14 [C00X200].)

[1]CT [C00X200] refers to the clerk's transcript in appellant's first appeal. RT [C00X200] refers to the reporter's transcript in appellant's first appeal. Concurrently with the filing of this brief, appellant has filed a motion asking the court to take judicial notice of its files in appellant's first appeal. [*Clarification of the citing references assists the reader and assures precision in citing to the record. Rule 8.240(a)(1)(C) of the California Rules of Court (CRC) requires a citation to the volume and page number.*.]

Trial was by jury and began on September 25, 2002. (CT 101-103 [C00X200].) On October 9, 2002, the jury found appellant guilty on both counts and found the murder to be in the second degree. (CT [C00X200] 234-235.)[2] [*Although the writer does not use the active voice exclusively, the majority of his writing uses the active voice. It is more concise and sounds less evasive. The CSM, § 5:2(b) expresses a preference for use of the active voice.*]

On November 19, 2002, the court sentenced appellant to state prison for 15 years to life for the conviction for second degree murder. The court imposed an upper term of five years on count two and stayed that sentence pursuant to Penal Code §[*Technically, when citing to a code section in the text, "section" should be written out. The section sign is restricted to parenthetical citations. (See CSM, § 2:6).*] 654. (CT [C00X200] 280-281; 2RT [C00X200] 559.) [*Although this sentence is not particularly complicated, the sentence is clearly and fully set forth here.*]

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[2]Although count two alleged that appellant caused serious bodily injury to Veronica Forrester (CT [C00X200] 11-12), the jury's written verdict for count two stated that the jury found appellant guilty of evasion of a peace officer resulting in death. (CT [C00X200] 235.) [*Clarification of the variance between the charging document and the verdict prevents confusion and directs the reader to be aware of a subtlety that might*

On December 2, 2002, appellant filed a timely notice of appeal. (CT [C00X200] 282.) [*With rare exception, this should be the last sentence in every Statement of the Case.*]

C. The First Appeal

In an opinion filed on July 11, 2005, and certified for partial publication (*People v. Williams* (2005) 130 Cal.App.4th 1440), this Court affirmed the conviction for violating Vehicle Code §2800.3, vacated the stayed sentence for that offense, reversed the conviction for second degree murder, and remanded the case to the trial court for further proceedings.

D. The Retrial

Retrial was by jury and began on September 27, 2006. (CT 16-17.) On October 13, 2006, the jury found appellant guilty of second degree murder. (CT 140.) That same day the court sentenced appellant to state prison for 15 years to life. (CT 146-147.) The court again imposed an upper term of five years for the evasion conviction and stayed that sentence pursuant to Penal Code §654. (2RT 510-512.)

On October 17, 2006, appellant filed a timely notice of appeal from the judgment. (CT 148-149.)

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otherwise escape his or her attention.]

STATEMENT OF APPEALABILITY

The judgment from which appellant appeals is final (California Rules of Court, rule 8.204(a)(2)(B)), [*Technically, the proper way to cite to the Rules of Court within parenthesis is "Cal. Rule of Court, rule 8.204(a)(2)(B)" although the writer has correctly not included "subdivision" (see CSM, § 2:18.).*] and is appealable pursuant to Penal Code §1237, subdivision (a). [*Neither the Rules of Court nor the CSM specify where the statement of appealability should be included in the brief, although most panel attorneys insert it before or after the Statement of the Case. When citing code section, "subdivision" is now included and spelled out when not within parenthesis (see CSM, § 2:6.).*]

STATEMENT OF FACTS

A. Overview [*This overview gives the reader the nutshell version of the facts. The reader knows exactly what the case is about, and now can appreciate the finer detail that will follow.*]

This case concerns the death of Veronica Forrester. Forrester was one of three passengers in a car appellant was driving on the evening of October 20, 2001. The car had been stolen. [*This is an example of where the passive voice is appropriate. We do not know who stole*

the car - the use of the passive voice is not evasive, but instead, reflects the state of the information.] An officer spotted the car and received confirmation that it was the stolen vehicle. Before the officer tried to stop the car, appellant sped off, with the officer in pursuit, and got on southbound Highway 99. The car left the freeway at the Shelty Road exit, hit a curb, rolled over and caught fire. Appellant got out of the car and was taken into custody shortly after the chase ended. Two of the passengers were able to get out of the car. Forrester died in the fire after losing consciousness when the car rolled. [*Notice there are no citations to the record in this Overview section. They will follow in the detailed version of the facts, which here are separated into the facts supporting the prosecution's case, and the facts adduced in support of the defense case. Citations to the record in the facts statement are absolutely essential (CRC, § 8.204(a)(1)(C)) and the clerks can refuse to file a brief if it does not contain citations to the record (CRC, § 8.204(e).) Deciding whether this organization is appropriate in any given case requires counsel to make a judgment call, but certainly, in a case where no defense was presented, this would not be an appropriate way to organize the facts. Here, it was appropriate and helpful.*]

B. The Prosecution's Case

1. Facts Related to Veronica Forrester's Death [*It is helpful to organize the facts, and the organization of the facts will always be case specific. Here, counsel has organized his facts according to the chronology of percipient events. This is not a witness-by-witness summary of the testimony, and the reader can tell that because there are no redundancies in the facts - essential to good briefing.*]

On the afternoon of October 20, 2001, Kammy Beard was at the house of Veronica Forrester when a man she knew as Free Daddy called. (1RT 130-131.) Free Daddy said he was going to pick them up and take them to a movie. (1RT 133-134.) Free Daddy, whom Beard identified at trial as being appellant, and a friend named Jamie arrived at Forrester's house in a 2000 Audi at about 9 p.m. (1RT 135-136, 152.) All four of them went to a drive-in, but appellant decided not to pay the $24 it cost to get in and they went to the K Parkway in south Sacramento instead. (1RT 137.) They later went to a Walgreen or Rite Aid near Tack Road. (1RT 139.) While they were on Tack Road, a police car came up beside them. (1RT 140-141.) After they passed a couple of lights, the police car moved behind them. (1RT 141.) Appellant ran a red light and got onto the freeway. (1RT 142.) The police car pursued with its lights and sirens on.

(1RT 142-143.) Beard estimated that the Audi was going 100 miles an hour. (1RT 143, 156.)

Beard testified the Audi left the freeway at Shelty Road. (1RT 144.) Appellant got out of the car and closed the door. (1RT 145.) Beard got out of the car through the back window, which had been shattered. (1RT 145.) [*Note that the writer uses ordinary words to describe the movement of people/cars, i.e., "ran a red light" and "got out of the car," as opposed to police jargon such as "exited the automobile". Non-jargon, plain English is preferable unless it is from a quote.*] Forrester was sitting in the front passenger seat with her seat belt on. Her eyes were closed, her head was tilted forward, and there was blood coming from a wound on her head. (1RT 146-147.) Beard unbuckled Forrester's seatbelt and Forrester tilted over. (1RT 147-148.) Beard did not know what happened to Jamie. (1RT 146.)

Sacramento police officer Leslie Matt testified that on the evening of the incident, she saw a silver Audi next to her on Tack Road near Highway 99. (1RT 179-180.) Earlier, Matt had been given information about an Audi having been stolen. (1RT 180.) Matt got behind the Audi to confirm its license number and followed the car. (1RT 182-184.) Her dispatcher confirmed that the Audi she was following had been stolen. (1RT 186.)

The Audi ran a red light, slowing down a bit before doing so, and causing other cars to slam on their brakes. (1RT 184-185, 216.) Matt activated her lights and siren and pursued the Audi. (1RT 185-186.) The Audi got onto southbound 99, accelerated, and changed lanes without signaling. (1RT 187.) Matt followed, reaching 120 miles an hour, but could not keep up with the Audi, which she estimated was going 140. (1RT 187-188.) The Audi shut off its lights and Matt lost sight of it, although she saw cars hitting their brake lights. (1RT 188-189, 232-233.)

Matt saw a car hit its brake lights quickly in the lane used to exit the freeway at Shelty Road and concluded it was the Audi. (1RT 189-190.) Matt got off at the Shelty Road exit. (1RT 190.) The Shelty exit has a 20 mile an hour turn. Matt saw a cloud of dust at the exit. (1RT 190.) Matt stopped for a minute and saw flames to her left, near a frontage road. (1RT 191.) Matt turned her car around so she was facing the Audi and directed her spotlights toward it. (1RT 191-192.) She saw someone get out of the driver's door of the car and run in a southeast direction, toward the freeway. (1RT 192-193.)

The Audi was on fire. (1RT 193.) There was a girl standing outside the car screaming for help and saying her friend was inside the car. (1RT 193.) Matt drew her gun, took cover, and told the girl to walk toward her.

(1RT 194.) Matt patted the girl down and put her in the back of her police car. (1RT 195.) Matt rearranged her spotlights and saw a man lying on the ground on the passenger side of the Audi. (1RT 195.) Matt yelled at the man to show his hands, but he did not respond. (1RT 196-197.) Grass near the car started to catch fire. (1RT 200.) Officers went over to the man and dragged him away. (1RT 200.) The fire department arrived and put out the fire. (1RT 201.) An officer came over with appellant in his vehicle. (1RT 212.) This is the person Matt saw earlier on Tack Road driving the Audi. (1RT 212, 246.) Officer Karl Jasper heard Matt's broadcasts about following a stolen vehicle. (1RT 247-248.) He went south on Highway 99, heard the pursuit had ended, and went to the Shelty Road exit, parking near Stockton Boulevard. (1RT 249, 251.) Jasper joined Officer Light, who was standing near some trees, and saw the Audi engulfed in flames. (1RT 249-250, 253.) Jamie Smith was lying face-down near the Audi. (1RT 254, 258.) Light told Smith to show his hands, but Smith did not comply with the request and the grass on which he was lying began to catch fire. (1RT 254.) Because Smith was not responding to directions and was in danger of being burned, Jasper approached him to pull him away but heard what sounded like a gunshot and retreated. (1RT 255.) Light told Smith to roll toward them, and he rolled 10 or 15 feet. (1RT 256.) Because the fire

was approaching Smith, Jasper grabbed Smith by the jacket and dragged him toward Light. (1RT 256-257.) Jasper and another officer carried Smith to Stockton Boulevard. (1RT 257.) Jasper summoned medical personnel who took Smith to the hospital. (1RT 258.)

Officer Robert Rook of the Elk Grove Police Department helped set up a perimeter around the location where the Audi had stopped. Rook was located on the east side of Highway 99, north of Shelty. (1RT 161-163.) He saw a man lying in the center median divider of the freeway, passed this information to other officers, and saw Deputy Small and other officers approach the man. (1RT 164-165.)

Deputy Sheriff Nick Small testified that after hearing a broadcast of someone being on Highway 99, he went to the area, took appellant into custody, and turned him over to another officer. (1RT 166-168, 175.) Small found no weapons on appellant's person. (1RT 170.) *[Note that every fact is appropriately supported by references to the record as the story unfolds.*]

Officer Frank Wong took photographs of the scene. (1RT 281.) There was debris from the vehicle near a tree which the vehicle had hit. (1RT 284-285.) There were tire marks which appeared to indicate a vehicle had hit the curb. (1RT 290, 294.)

Forensic pathologist Robert Anthoin performed an autopsy on Veronica Forrester's body. (2RT 303, 305.) Forrester suffered severe burns, but no penetrating or blunt trauma. (2RT 305-306.) There were thermally induced fractures and she had soot in her upper airway. (2RT 307-308.) The cause of death was thermal burns. (2RT 310.)

2. Appellant's Two Prior Uncharged Acts [*While these events are not part of the percipient facts, its inclusion here suggests that these are facts that will relate to an issue that will be briefed. Our courts prefer a barebones summary if it does not relate to a briefed issue.*]

On the afternoon of January 14, 1999, Officer Marty Ziebo of the East Palo Alto Police Department was involved with another officer, Sergeant Right, in the pursuit of a pickup truck. (1RT 112-113, 115.) The pursuit went from East Palo Alto to Menlo Park, over the Dunbarton Bridge, ending at the Thornton Avenue on-ramp in Newark. (1RT 113-115.) Ziebo was behind Right, who had his emergency lights on as he pursued the truck. (1RT 116.) The truck made quick lane changes without signaling while other cars swerved and slammed on their brakes to avoid a collision. (1RT 117.) The truck took the Newark Boulevard off ramp and Right followed, but the truck swerved westbound across a median and back

onto the freeway, while Right continued on the off ramp. (1RT 117-118.)

Ziebo continued the pursuit, going 80 to 85 miles an hour, with the truck changing lanes without signaling. (1RT 118.) The truck went into the right hand lane, slowed to 30 or 35 miles an hour, and the driver jumped out. (1RT 119.) The driver landed on his feet, flipped in the air, landed on his head and back, and ended up sliding along the roadway in a seated position. (1RT 119.) The truck fishtailed, rolled for about a quarter of a mile, ran off the freeway, through a canal and onto a frontage road. (1RT 119-120.) Appellant, who was the driver, was bleeding from a deep cut on his scalp and was taken by ambulance to a hospital. (1RT 120-121.)

Shortly before 3 a.m. on November 18, 1999, Officer Joe Contreras of the East Palo Alto Police Department saw three people in a green Mitsubishi Diamonte that was running stop signs and going 60 miles an hour in a 25 miles an hour zone. (1CAT 1-3, 8-9.)[3] Contreras followed the car for half a mile, until the car crashed into several unoccupied parked cars and a parked school bus. (1CAT 3, 10, 11.) Appellant, who was the driver

[3]Contreras suffered a massive heart attack at the end of August 2006 and was unavailable to testify due to his medical condition. (1RT 263-264.) Transcripts of his testimony at the preliminary examination and the first trial were marked People's exhibits 36 and 37 and read to the jury, but not transcribed by the court reporter. (1RT 266-267.) Exhibit 36 appears at pages 1-7 of the first volume of the Clerk's Augmented Transcript (1CAT).

of the car, ran from the scene. Contreras caught appellant and took him into custody. (1CAT 3-5, 10.)

C. The Defense Case [*Because appellant's testimony conflicted with the prosecution witnesses' testimony, the author appropriately related appellant's recollection of the percipient events separately.*]

Appellant testified he had two prior incidents involving evasion and an incident in which he gave a false name to the police. (2RT 349-350.) Prior to the charged incident, a probation officer called appellant's mother and told her there was a warrant for appellant and he should turn himself in. (2RT 350.) Because of the warrant, appellant evaded Matt by going through a red light, and got onto the freeway. (2RT 351-352.) Appellant passed several cars, could have gone 140 miles an hour, and turned off his lights to get away from Matt. (2RT 354-355.) It did not occur to appellant that someone might get killed if he went 140 miles an hour. (2RT 355-356.) When appellant got off the freeway, the car's steering wheel would not turn and he jumped the curb. (2RT 358-359.) Appellant got out of the car and ran. (2RT 359-360.) Appellant thought the others in the car also got out. (2RT 359.) He saw Beard and Smith, but not Forrester, get of the car. (2RT 384-385.)

Exhibit 37 appears at pages 8-15 of the same volume.

Appellant testified about the incident in 1999 when he went from East Palo Alto to Newark. (2RT 366.) During the incident, appellant jumped out of the car. His head hit the pavement and he needed staples to close the wound. (2RT 368.) During the other evasion incident in 1999, appellant drove 60 miles an hour in a residential neighborhood. (2RT 368-369.)

Greg Michael was on Highway 99 at the time of the incident leading to the charges and planned to get off at Shelty Road. (2RT 389-390.) He saw a car with its lights off drive past him in the number 1 lane and swerve to the number 3 lane to take the Shelty off ramp. (2RT 390-391.) The brake lights of the car stayed on for 30 or 45 seconds. (2RT 392.) The car was going too fast to make the turn onto Shelty. The car hit the curb and flipped, went down a culvert, and rolled. (2RT 392.) Michael heard someone in the car screaming and saw a girl getting out of the car. (2RT 392-393.) The girl ran toward the police, who told her to get down and told Michael to get back to his car. (2RT 394.) There was a tiny fire on the car, but it started burning more. (2RT 396.) A young man came out of the right side of the car. He was on fire and was rolling on the ground. The police told the young man not to move or they would shoot him. (2RT 396.) The car later became engulfed in flames. (2RT 397.)

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED EVIDENCE OF TWO PRIOR INCIDENTS IN WHICH APPELLANT EVADED POLICE OFFICERS

[CRC 8.204(a) (1)(C) requires each point to be stated under a separate heading or subheading summarizing the point, and to be supported by citation to authority where possible. It is, however, also advisable to federalize the issue, where possible, and to frame the issue in such a way that it includes the standard of review. Here, the author has included these showings under the subheading designated "The Error."]

A. Introduction [*Because of the way the facts statement was written, the reader has already anticipated this issue. Now the author's use of an introduction to this argument will let the reader know exactly what the theory is for the claim of error.*]

It was undisputed at trial that appellant was the person who was driving the car during the pursuit and at the time the car left the freeway, hit a curb, rolled, and caught fire, resulting in the death of Veronica Forrester. The only disputed issue was whether appellant harbored implied malice, making him guilty of second degree murder; or acted without malice, and therefore was not guilty of murder. Implied malice is based on a subjective rather than objective mens rea standard. Implied malice is not present if a

reasonable person in the defendant's position would not have been aware of the risk to human life inherent in his conduct. Instead, implied malice requires that the defendant actually appreciate that his conduct endangers the life of another person. It also requires that the defendant act with a conscious disregard for the subjectively appreciated risk to life caused by his conduct. (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.)

In most cases in which a murder conviction stems from the driving of an automobile, the death resulted because the defendant drove while intoxicated. In such cases, evidence of prior convictions for drunk driving and evidence of classes dealing with the dangers of drunk driving that the defendant attended following a drunk driving conviction is introduced to show that the defendant has a subjective awareness of the danger to life posed by drunk driving. In appellant's case, the prosecutor, relying primarily on drunk driving cases, persuaded the trial court to allow the introduction of evidence of two cases in 1999 in which appellant evaded a police officer. The prosecution's theory was that the two prior cases tended to show that appellant was subjectively aware that his evasive driving in the present case posed a danger to life. However, there was no showing that the prior evasion cases resulted in injuries to any person or resulted in appellant taking classes which provided information that evasion is

dangerous to life, or had otherwise been informed of such danger.

In the argument which follows, appellant contends that the trial court erred when it permitted the prosecutor to introduce evidence of the two 1999 evasion cases. As appellant will demonstrate, the prosecutor failed to show that those cases involved facts giving rise to a subjective appreciation on appellant's part that his conduct during the prior incidents involved a danger to life, or that as a result of those cases appellant took classes or otherwise received information providing such subjective appreciation.

[*As the reader now begins to review the facts and procedural stance of the case, s/he knows exactly what appellant's theory is, and can appreciate the significance of the procedural facts, as well as the facts related to the priors.*]

B. Factual and Procedural Background

On September 27, 2006, appellant filed a document containing a number of in limine motions. (CT 18-31.) Among them was a motion to exclude evidence of the two 1999 incidents of evasion on the ground that this evidence was not relevant because the count in the information charging appellant with evasion had been affirmed in appellant's first appeal to this Court and evasion therefore was no longer in issue. (CT 25-26.)

On the same day appellant filed his in limine motions, the trial court held a hearing on in limine motions made by both parties. During the hearing, the prosecutor told the court he wanted to introduce evidence of the two prior evasions on the issue of appellant's knowledge. (1RT 31.) The prosecutor explained that he meant by this that the prior incidents provided knowledge of the danger to life inherent in conduct like that which resulted in Forrester's death. (1RT 33-34.) The prosecutor relied on five cases, three of which were cited in a pleading the prosecutor filed before appellant's first trial, and two of which the prosecutor mentioned during the in limine hearing. (1RT 33-34.) The cases cited in the pleading filed before the first trial were *People v. Brogna* (1988) 202 Cal.App.3d 700; *People v. McCarnes* (1986) 179 Cal.App.3d 525; and *People v. Eagles* (1982) 133 Cal.App.3d 330. (CT [C00X200] 118-119.) The two additional cases cited at the in limine hearing were *People v. Talamantes* (1992) 11 Cal.App.4th 968 and *People v. Murray* (1990) 225 Cal.App.3d 734. (1RT 33.) [*Here the author has identified the universe of cases relied on by the prosecution in the trial court.*]

Appellant argued that the facts surrounding the prior incidents did not provide knowledge that someone might die as a result of evading an officer, noting that one of the cases involved an injury only to appellant

caused by his jumping out of the car, not an injury occurring while appellant evaded officers, and the other did not involve any injury. (1RT 36.)

The prosecutor countered by arguing that most of the cases he had cited did not involve prior accidents but found the requisite knowledge to be present because the defendant's act of driving under the influence, in itself, made the defendant aware of the danger to life inherent in driving under the influence. (1RT 38.) The prosecutor acknowledged that appellant's case did not involve driving under the influence, but contended that appellant had engaged in prior instances of dangerous driving. (1RT 39.) [*Counsel has now set the stage: the reader now recognizes that there is no case law directly on point, and that the strength of the prosecution's case depends on whether s/he can analogize the malice showing here to the malice implied in the driving-under-the-influence cases, where the knowledge imputed there is not supported by the same factual basis in the instant case.*]

The trial court ruled that the prior evasions were relevant to knowledge of risk and conscious disregard needed for implied malice, and the evidence therefore was admissible. (1RT 39.)

Later, appellant argued that the prior evasion in which appellant hit

another car did not show knowledge of dangerousness to life because appellant had left the car by the time it hit the other car, and in the other incident no one was hurt other than appellant, and his injury was not due to the manner of his driving, but rather due to his having jumped from the car. Appellant contended that the incidents were not relevant because appellant's driving during the prior incidents did not injure anyone. (1RT 96.)

The prosecutor took the position that the prior incidents were relevant even though they did not result in an accident. The prosecutor argued that an accident is not required in the cases involving driving while intoxicated, yet the prior incident is found to be relevant to knowledge, and therefore an accident should not be required here in order for the incident to be relevant on the issue of knowledge. (1RT 96-97.) The prosecutor also contended that appellant's conduct was dangerous because even though other people had not been hurt, they could have been. (1RT 97.)

The court reaffirmed its earlier ruling that the evidence was admissible to show knowledge. (1RT 97.)

At trial, Officer Ziebo testified about the incident that occurred in January 1999, and the prior testimony of Officer Contreras was admitted regarding the incident in November 1999. (See pages 9-10, above.)

C. The Error [*Once the procedural and factual bases for the argument have been set forth, the author begins with setting forth the relevant statutory authority governing the issue.*]

Evidence Code §1101, subdivision (a), after listing exceptions not relevant here, states that evidence related to a person's character is inadmissible to prove his conduct on a specified occasion. Evidence Code §1101, subdivision (b), however, allows the admission of evidence that a person committed an uncharged crime or other act when this evidence is relevant to prove a fact such as knowledge, but is not admissible to prove that the person has a disposition to commit such an act.[4]

[Now the author moves to a discussion of the relevant case law, beginning with the seminal case in which the high court has explicated the concept of relevance used in Evidence Code section 1101.]

The Supreme Court [*According to § 4:1 of the CSM, "Supreme Court" and "Court of Appeal" should be capitalized, even when standing alone.*] has "set out three requirements which must be met

[4]Evidence Code §1101, subdivision (b), provides, in relevant part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . knowledge . . .) other than his or her disposition to commit such an act."

before evidence of other crimes is admitted: the evidence must be relevant to some material fact at issue; it must have a tendency to prove that fact; and admissibility must not contravene policies limiting its admission." (*People v. Bigelow* (1984) 37 Cal.3d 731, 747.)

[*The author then begins his discussion of the case law related to each of these three elements.*] In order to satisfy the requirement of materiality, the fact sought to be proved may be either an ultimate fact in the proceeding or an intermediate fact from which an ultimate fact may be presumed or inferred. (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) Ultimate facts are the identity of the perpetrator, the elements of the charged crimes, and the elements of certain defenses. (*Id*. at p. 315, fn. 13.) [*The use of Id. and Ibid. are correctly used here, referring to the immediately preceding authority cited in the same paragraph. Ibid. is used when there is no change to the citation; Id. is used for a cite to a new page. Supra is used for a different paragraph or intervening citations within the same paragraph, to signal that it was previously cited. See examples in CSM, 3:1[D]. All three are italicized in text.*] Intermediate facts include such things as motive, opportunity, plan, scheme, design, and modus operandi. (*Id*. at p. 315, fn. 14.) Evidence of an uncharged act is not necessarily material. (*Ibid*.) For

an intermediate fact to be material, it must tend logically and reasonably to prove a disputed ultimate fact. (*Ibid*.)

In ascertaining whether evidence of other crimes has a tendency to prove the material fact, the court must first determine whether or not the uncharged offense serves logically, naturally, and by reasonable inference to establish that fact. (*Id*. at p. 316.) *[Technically should switch to supra for this citation.*] When making this determination, the court must look behind the label describing the kind of similarity or relation between the prior acts and the charged offense and must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the two is reasonably strong. (*Ibid*.) If the connection between the prior act and the ultimate fact in dispute is not clear, the evidence should be excluded. (*Ibid*.)

In light of these rules, evidence of uncharged acts may only be admitted if it tends logically, naturally and by reasonable inference to prove the issue upon which it is offered. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.) When evidence tends to prove a material fact, it is considered to be relevant evidence. (*People v. Thompson, supra,* 27 Cal.3d at p. 319, fn. 15.) [*Notice the absence of "string citing" in this discussion of the*

case law and identification of the dispositive "rule." Rather than proceeding on the theory that if one citation supports a claim, three citations will nail it, the author exercises judgment as to the authority he chooses to rely on. Also note that his reliance here is exclusively on cases decided by the California Supreme Court on issues of state law.]

[*The author now shifts from the "rule" to a discussion of the policies underlying the rule. This will then set the stage for how the author will make his prejudice showing for the violation of this rule and the policies underlying it.*] The policies limiting admission of other crimes evidence include "policies barring evidence which tends to prove guilt by proving disposition to commit crime, those barring the use of prejudicial cumulative evidence, and the statutory provision (Evid. Code, §352) permitting exclusion of evidence when its probative value is outweighed by its prejudicial effect." (*People v. Bigelow*, *supra*, 37 Cal.3d at p. 747.)

Evidence of uncharged crimes contains within itself a substantial degree of prejudice and should be examined with care and received with extreme caution, with doubts as to admissibility resolved in favor of the accused. (*People v. Holt* (1984) 37 Cal.3d 436, 451.) The prejudicial

effect of the evidence stems from the fact that it produces an over-strong tendency to believe the defendant is guilty of the charge merely because he is a likely person to do such acts. (*Id*. at pp. 450-451.) The evidence "can tempt a jury to identify a defendant as the wrongdoer illogically, simply because he has committed prior, similar crimes." (*People v. Mason* (1991) 52 Cal.3d 909, 949.) The Supreme Court therefore has cautioned that because substantial prejudicial effect is inherent in such evidence, uncharged offenses are admissible only if they have *substantial* probative value. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) "A trial court's ruling admitting evidence of other crimes is reviewable for abuse of discretion." (*People v. Hayes* (1990) 52 Cal.3d 577, 617.) [*Here, the author sets for the standard of review for the trial court's "substantial probative value" determination.*]

Knowledge can constitute an ultimate fact in some cases. For example, knowledge that property is stolen is an element of the crime of receiving stolen property, so other crimes evidence showing the defendant's participation in the theft of the property is admissible to prove he knew the property he offered to sell was stolen. (*People v. Pic'l* (1981) 114 Cal.App.3d 824, 856.)

Knowledge also can constitute an intermediate fact from which an

ultimate fact can be established. Under the theory of admissibility advanced by the prosecutor, this was the situation here. Knowledge is not an element of murder with implied malice. Nor is it any other ultimate fact in a prosecution for murder. Here, the evidence of the two 1999 evasions was offered to show that appellant subjectively knew that evading an officer was dangerous to life. From this knowledge, the prosecutor wanted the jury to infer that appellant was subjectively aware that his evasive driving on the night of the incident posed a substantial risk to life and that appellant drove with a conscious disregard for this known danger. From this awareness the prosecutor wanted the jury to find that appellant harbored implied malice aforethought, which is a subjective (actual) appreciation that one's conduct poses a danger to life and a conscious disregard for life. (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1218-1219; *People v. Watson*, *supra*, 30 Cal.3d at pp. 296-297.)

The introduction of evidence of uncharged acts to show knowledge is a sort of neglected step-child of the case law discussing Evidence Code §1101, at least in the context of establishing general principles of law that govern the admission of other acts evidence for the this purpose. This appears to be due to the fact that while evidence of uncharged acts often is introduced to show such common facts as identity, intent, motive,

opportunity or common scheme, introducing the evidence to show knowledge is relatively rare. Indeed, appellant has been unable to find a California case that discusses the general legal principles applicable to the introduction of evidence of uncharged acts to prove knowledge, or the policies that might inform those principles. However, there are other authorities that provide some guidance. [*This is the kind of qualitative judgment that a judicial attorney really appreciates, but it is also the kind of judgment that the attorney must have great confidence in setting forth, because if the research leading to this conclusion is incomplete or inaccurate, the attorney will suffer a palpable loss of credibility with the court.*]

The most detailed discussion of applicable principles is in Wigmore's classic treatise on evidence. Wigmore describes as follows the reasoning under which evidence of an uncharged act is admissible to show the defendant's knowledge during the commission of the charged offense:

> "When fact X is used to show a person's knowledge of fact A, it is assumed (a) that through fact X there probably was received an impression by the person; and (b) that this impression would probably result in notice or warning of fact A. . . . These two elements may not both be doubtful in a given case, but they are always impliedly present if the inference is to have any validity. Apply this to the class of

> cases we are now concerned with. Suppose A's knowledge of the poisonous nature of substance X is to be shown; suppose the fact offered [is] that he once gave it to a sick dog and that the dog died; if we are to base an inference of probable knowledge, it is because we believe it probable (a) that the dog's death came to his notice, and (b) that the fact of the death would suggest to him that it was the substance X and not the illness that caused the dog's death. . . .
>
> Such, then, is the strict and legitimate scope of the evidence of other similar acts to show knowledge. The process of thought is: The other act will probably have resulted in some sort of warning or knowledge; this warning or knowledge must probably have led to the knowledge in question." (2 Wigmore on Evidence (Chadbourn rev. 1979) §301, p. 239.)

[*The author uses the "block-indent" style for including quoted material. (See CSM §4:20 and CRC 8.204(b)(5).) Note that the indentation and single-spacing indicates that it is a quotation, so the quotation marks that embrace the excerpt are unnecessary. Only quotation marks that appear within the quotation are used. But the parenthetical citation to the source, here Wigmore, should not be indented, or single-spaced, but should be placed at the left-hand margin. As it appears here, it would indicate that the Wigmore citation was part of the quotation.*]

There is also authority indicating that in order for the evidence of the uncharged act to be admissible on the issue of knowledge, there must be sufficient similarity between the prior and charged acts to support an inference that the uncharged act provided the requisite knowledge. As the Second Circuit put it in a recent case: "If the other act is unconnected to the alleged offense conduct, it must be sufficiently similar to that conduct to permit a rational factfinder to draw the knowledge inference advocated by the proponent of the evidence. Similarity, being a matter of relevancy, is judged by the degree in which the prior act approaches near identity with the elements of the offense charged. There is no necessity for synonymity but there must be substantial relevancy." [*Formerly, the CSM adopted a "line length" rule, so that if the author was using the block and intend style, its use would be triggered by the number of lines the quotation occupied. That has now been abandoned in the CSM, but it is still advisable to be consistent. For example, a quotation that occupies more than five lines of text could trigger use of the block, indent and single space style.*] (*United States v. Perez* (2d Cir. 2003) 325 F.3d 115, 129, citations, quotation marks and ellipses omitted.) The Second Circuit has found two situations in which a trial court abused its discretion in

permitting the prosecution to introduce evidence of uncharged acts to show knowledge. They are when "the other act [is] not sufficiently similar to the conduct at issue" and when "the chain of inferences necessary to connect evidence with the ultimate fact to be proved [is] unduly long." (*United States v. Peterson* (2d Cir. 1987) 808 F.2d 969, 974, citations and internal quotation marks omitted.)

Although there are no California cases containing any focused analysis of the principles and policies that govern the use of evidence of prior acts to prove knowledge, there are several cases, including those cited by the prosecutor below, which acknowledge that the element of implied malice supporting a conviction for second degree murder based on the operation of a motor vehicle requires knowledge that a danger to life is a natural consequence of operating a vehicle in a manner that resulted in death. There are in addition, several cases, including the cases cited by the prosecutor below, which indicate that, in certain situations, evidence of prior acts can be introduced to prove that the defendant knew his conduct during the charged offense posed a danger to life. All of these cases are factually distinguishable from appellant's on either or both of two bases. The first is that the prior offense involved an outcome that showed the conduct was dangerous to life. The second is that following the prior

offense the defendant was required to take a class at which he was told why his conduct was dangerous to life, or was otherwise expressly informed by an officer that his conduct was dangerous to life. [*The author has clearly stated that all the published authority on the use of prior acts to show knowledge are factually distinguishable on two grounds.*]

In appellant's case, however, the prior acts did not have an outcome that showed the evasion was dangerous to life, and appellant did not take a class that imparted such knowledge and was not given information by an officer providing such knowledge. Appellant will discuss the relevant California cases and show that they do not support the admission of the evidence of uncharged acts in his case and are not consistent with the general framework found in the above-discussed section of Wigmore's treatise and the above-described federal cases discussing the admission of evidence of uncharged acts to prove knowledge.

Most California cases dealing with evidence of uncharged acts being admitted to show knowledge in the form of a subjective awareness of a danger to life in the context of implied malice involve prior incidents of drunk driving resulting in the taking of classes at which the dangers of drunk driving are explained. These cases hold that the evidence of the uncharged acts is relevant and therefore admissible because the classes

which are a result of a conviction following the act of drunk driving provide the requisite knowledge. (*People v. Garcia* (1995) 41 Cal.App.4th 1832, 1848-1849; *People v. Johnson* (1994) 30 Cal.App.4th 286, 290-292; *People v. Murray* (1990) 225 Cal.App.3d 734, 738-739, 744-745; *People v. Brogna* (1988) 202 Cal.App.3d 700, 705-710; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 530-532.) [*Here the author has defined the universe of all cases which hold that evidence of a prior drunk driving conviction can provide the knowledge required to show implied malice. Note that all of these cases are intermediate appellate opinions.*]

There also is a case in which the current offense involved reckless driving but no intoxicants, and the defendant had prior convictions for drunk driving and took a class on the dangers to life posed by drunk driving. In that case, the Court of Appeal held that evidence of the prior acts and the taking of the class was admissible to show that the defendant knew that driving recklessly poses a danger to life and the defendant, armed with this knowledge, harbored implied malice. (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 106-116.) As the Court explained " a motor vehicle driver's previous encounters with the consequences of recklessness on the highway – whether provoked by the use of alcohol, of another intoxicant,

by rage, or some other motivator – sensitizes him to the dangerousness of such life-threatening conduct. This is so because apprehensions for drunk driving, and the citations, arrests, stiff fines, compulsory attendance at educational programs, and other consequences do not take place in a vacuum." (*Id*. at pp. 112-113.) [*Here counsel has singled out the only case in which knowledge is found from prior conduct which did not involve drunk driving.*]

There are, in addition, cases in which the defendant argued on appeal that the evidence of implied malice was insufficient and the Court of Appeal rejected the contention based, in part, on the defendant having prior convictions which resulted in the taking of classes at which the dangers to life of driving while intoxicated on alcohol or drugs were explained.

[*Here the author begins his discussion of each case in the universe he has defined, and distinguishes each case in the universe.*] *People v. Talamantes*, *supra*, 11 Cal.App.4th 968, which was cited by the prosecutor below (1RT 33), is such a case. There, the defendant was convicted of second degree murder after causing a fatal accident while driving with a 0.32 blood alcohol level. (*Id*. at pp. 970-971.) Evidence was introduced showing that the defendant had previously attended a 10-week course that emphasized the dangers of driving under the

influence, explained the effects of alcohol on the body, and discussed the injuries and death caused by drunk drivers. (*Id*. at pp. 971-972.) The defendant did not contend on appeal that the trial court erred in admitting the evidence. Instead, he argued the evidence of implied malice was insufficient. The Court of Appeal rejected the argument based, in part, on the fact the class provided knowledge of the danger to life inherent in drunk driving. (*Id*. at pp. 972-973.)

People v. David (1991) 230 Cal.App.3d 1109 is similar. It involved a charged vehicular murder committed while the defendant was under the influence of PCP; two prior incidents in which the defendant drove under the influence of PCP, caused accidents and was convicted of driving under the influence; and two classes the defendant attended at which the dangers of driving under the influence of drugs or alcohol were explained. (*Id*. at pp. 1111-1116.) Although the defendant did not challenge the admission of evidence about the prior convictions and the classes, the Court of Appeal noted: "Prior convictions and exposure to mandatory educational programs are admissible to show the accused's awareness of the life threatening risks of driving under the influence." (*Id*. at p. 1115.)

There is also a case in which intoxicants were not involved in either the prior incidents or the current offense and the defendant argued the

evidence was insufficient to establish implied malice. (*People v. Contreras* (1994) 26 Cal.App.4th 944.) *Contreras* is an unusual case. It involved a bandit tow truck driver – the driver of an illegal tow truck who unlawfully monitors police broadcasts about accidents and races to the accident scene so he can choose which damaged car to tow to a body shop in order to receive a kickback for work the body shop performs on the damaged car. (*Id*. at pp. 947-948.) The defendant was convicted of murder after he raced another tow truck by going at excessive speed and rear-ending a car that was stopped at a light. (*Id*. at p. 952.) In *Contreras*, the defendant, in a nine-month period preceding the collision that resulted in the death, had ten separate incidents involving various types of dangerous driving, including speeding, failures to stop at red lights, reckless driving, unsafe lane changes, following too closely, making an unsafe u-turn, and causing an accident. During some of the incidents, officers expressly provided the defendant with information about the way he drove, telling the defendant that he had been driving recklessly, he had nearly caused a collision, and he could have killed someone. (*Id*. at pp. 947-950.) In addition, the person for whom the defendant worked had told him that because of the way he (the defendant) drove, he was likely to kill someone. (*Id*. at pp. 948, 952.) Also, there was evidence showing that the brakes in the defendant's tow

truck were defective and would not stop the vehicle if it was going more than 10 or 15 miles an hour. (*Id*. at pp. 950-952.)

On appeal, the defendant did not contend that the trial court erred in admitting the evidence of the uncharged offenses. Instead, he argued that the finding of implied malice was not supported by substantial evidence. The Court of Appeal rejected the contention, holding that the defendant's driving record, prior accident, and knowledge about the problem with his brakes provided a basis for a jury to conclude he knew his conduct was dangerous to life and acted with a conscious disregard for that danger. (*Id*. at pp. 955-957.)

Finally, there is *People v. Eagles* (1982) 133 Cal.App.3d 330, decided by this Court. There, the defendant was acquitted of three counts of second degree murder and convicted instead of three counts of vehicular manslaughter with gross negligence. (*Id*. at p. 333.) The convictions were based on a collision that occurred when the defendant entered an intersection at a high rate of speed, going through a red light. (*Ibid*.) The trial court permitted the prosecutor to introduce evidence showing that the defendant engaged in reckless driving during the afternoon before the accident, including testimony that he was speeding by going up to 85 miles per hour on a highway, weaving in and out of traffic, and that he forced a

car off the road while suddenly exiting at an off ramp. The prosecution argued the evidence was relevant to defendant's state of mind with respect to the charges of second degree murder of which the defendant was acquitted in that it showed the defendant's knowledge of the life-threatening dangers of driving at excessive speed. (*Id*. at pp. 338-339.)

This Court upheld the trial court's ruling admitting the evidence. (*Id*. at pp. 339-341.) The Court concluded that evidence of driving at excessive speed resulting in a near collision is relevant to knowledge in the form of actual awareness of the risk of harm inherent in driving at excessive speed. (*Id*. at p. 340.) As the Court put it:

> "Defendant's prior driving conduct occurred on the same day and some nine hours before the killings. Although it took place on a freeway with speed limits different than on Watt Avenue, it involved driving at excessive speeds, resulting in a near accident. We agree with the prosecutor at trial that it is a permissible inference that '[when] you're driving around . . . at a high rate of speed, almost cause an accident, you must see what the risk of harm is that can follow it.' What defendant knew in the afternoon he undoubtedly knew that night before the fatal accident. The evidence was admissible to prove implied malice." (*Ibid*.)

Although evidence of prior acts of poor driving has been held to be admissible in several cases, each of those cases necessarily is dependent on

the facts surrounding the prior acts and the sort of knowledge they imparted to the defendant. Evidence of prior DUI convictions resulting in classes on the dangers of driving under the influence obviously is highly probative on whether the defendant has knowledge of the dangers of such driving. The same is true of cases like *Contreras* which does not involve driving under the influence but involves repeated citations for various forms of dangerous driving coupled with warnings from citing officers that the defendant is driving in a manner that is dangerous to life. In a case like *Eagles*, the evidence of the prior act again is probative because it was recent, it involved driving similar to the driving that resulted in a fatal collision, and it resulted in a near collision. But as the Supreme Court has mandated, in all cases involving the admission of evidence of uncharged acts, courts must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the two is reasonably strong, and must exclude the evidence if the connection between the prior act and the ultimate fact in dispute is not clear. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 316.) In appellant's case the prior incidents and the charged one are different in crucial respects, and the link in the chain of inference on the issue of knowledge of the danger to life is not reasonably strong.

Appellant's case is factually distinguishable from all of the cases in which appellate courts ruled that evidence of the facts and results of prior incidents was admissible to show actual knowledge of the risk to life inherent in the conduct leading to the murder charge. Appellant's prior incidents of evasion did not result in anyone being injured, other than appellant being injured when he jumped from a car traveling at about 30 miles an hour.

Also, there was no evidence introduced showing that appellant had attended classes providing him with information or knowledge that evasive driving posed a danger to life or that he had been told by an officer that his conduct during the evasions was dangerous to life. Nor did the circumstances of the two prior acts of evasion provide appellant with inferential information that evasion was dangerous to life. To be sure, the two acts of evasion inferentially informed appellant that evasion is a crime. And they provided appellant with information that jumping from a car traveling about 30 miles an hour could result in appellant himself being injured, and that evasion can result in parked cars being damaged. But the lack of potentially fatal injuries to others – or, more accurately, the lack of any injuries to others of any sort – had no tendency in reason to make appellant aware that evasion was dangerous to the lives of others. Instead,

the only reasonable inference the circumstances of the prior evasions logically provided was that when appellant evaded officers no one had been or would be injured, let alone killed, and evasion was not dangerous to life.

It is important to emphasize that the analysis of whether evidence of a prior act is admissible turns on whether the act tends logically and by reasonable inference to establish a fact related to the charged offense and requires a similarity between the charged and uncharged offense sufficient to show that each link of the chain of inference between the two is reasonably strong. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 316.) Or, as Wigmore put it, evidence of a prior act is admissible on the issue of knowledge when that "act will probably have resulted in some sort of warning or knowledge" and "this warning or knowledge must probably have led to the knowledge in question." (2 Wigmore on Evidence (Chadbourn rev. 1979) §301, p. 239.) The inquiry turns on whether there is sufficient similarity between the charged and uncharged acts to permit a rational fact finder to draw the knowledge inference advocated by the proponent of the evidence. (*United States v. Perez*, *supra*, 325 F.3d at p. 129.)

In appellant's case, there was no sufficient similarity between the prior acts of evasion and the conduct on the night of the incident to support

an inference that the prior incidents provided appellant with knowledge that his conduct on the night of the incident was dangerous to life. The prior acts resulted in knowledge that evasion is illegal, that one can injure oneself when jumping out of a moving car while evading the police, and that evasion can result in damage to parked cars. But the prior acts did not result in anyone being injured other than appellant being injured when he got out of a moving car. There is nothing inherent in the unique facts of the prior incidents that would give rise to knowledge that appellant's conduct on the night of the charged offense was dangerous to life.

It also is significant that appellant's conduct on the night of the incident was markedly different than his conduct during the prior two evasions. There is no evidence that the prior incidents involved driving at more than twice the speed limit, driving without headlights, or taking an off ramp at excessive speed. It might be argued that any person would know from his own experience that such conduct would pose a danger to life, and the prosecutor in fact argued this theory to the jury. (2RT 444-451.) But there is nothing in the prior incidents showing that appellant previously engaged in conduct such as this and therefore nothing in the prior incidents that provided knowledge that conduct of this sort posed a danger to life.

An analogy may help illustrate the point. Taking a class in Roman

history provides a person with knowledge of events in Roman history. But it does not provide a person which knowledge of events in medieval history absent a showing that this topic was part of class discussion. Here, appellant's two prior incidents of evasion made him aware of the dangers of the sorts of conduct involved in those two incidents. But they did not involve conduct similar to the conduct during the charged incident, and there was no showing that they provided knowledge that the specific conduct underlying the charged offense was dangerous to life. The trial court therefore erred when it permitted the prosecutor to introduce evidence of the two 1999 evasions.

D. The Error Requires Reversal *[This begins the prejudice showing and sets forth the standard of prejudice.*]

When evidence of a prior uncharged act is erroneously admitted, the error requires reversal if it is reasonably probable that a result more favorable to the defendant would have been reached if the error had not occurred. (*People v. Rivera* (1985) 41 Cal.3d 388, 393; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) There was such a reasonable probability here.

One important factor to take into consideration when conducting harmless error analysis is the impact of the erroneously admitted evidence.

Appellant submits that the erroneous introduction of evidence of a prior criminal act has an enormous prejudicial impact. In one case involving evidence of two prior uncharged offenses that resulted in the defendant's conviction, the en banc Tenth Circuit stated that once such evidence is introduced "the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." (*United States v. Burkhart* (10th Cir. 1972) (en banc) 458 F.2d 201, 204.) And as another court observed "when jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can." (*United States v. Johnson* (6th Cir. 1994) 27 F.3d 1186, 1193.)

In appellant's case, the evidence of the two instances of evasion in 1999 could only have had a huge impact on the jury. The evidence suggested that appellant was a lawless person who repeatedly evaded officers. The evidence also suggested that the prior instances of evasion had done nothing to deter appellant from engaging in further acts of evasion. Nor was the jury given information indicating that appellant had been condignly punished for the prior acts. All of these inferences would have made it unlikely the jury would base its verdict solely on an

evaluation of the circumstances surrounding the charged offense and would have ignored the evidence of the prior acts. [*Here, the author focuses the prejudice showing on the effect the prior acts would have had on the jury, rather than whether, without that evidence, the jury would still have convicted appellant as charged.*]

The prosecutor's argument reinforces appellant's contention. The prosecutor relied extensively on the prior incidents of evasion when arguing the issue of implied malice to the jury. (2RT 451-455, 485, 487, 489.) The prosecutor's exploitation of erroneously admitted evidence weighs in favor of concluding that the error in admitting the evidence was not harmless. (*People v. Woodard* (1979) 23 Cal.3d 329, 341.)

[*Here the author relies on "close case indicia" to fortify his prejudice showing.*] The record also contains three separate indicia which showed that the jury viewed the case as being close. These indicia are important because in a close case, any doubts about the prejudicial nature of an error are resolved in favor of the defendant. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.)

First, the jury deliberations were lengthy. The jury deliberated for two hours and six minutes – from 2:14 to 4:30 p.m. – on October 11, 2006. (CT 63.) The record indicates that jury deliberations resumed at 9 a.m. the

next day, October 12. (CT 63.) On that day the jury deliberated until 4:06 p.m. (CT 133.) The record does not reveal the length of the morning, lunch and afternoon recesses. The record does show, however, that part of the day was spent having the court reporter read back the testimony of appellant and Officer Matt, with that read back beginning at 1:35 p.m. (CT 132-133.) We therefore do not know exactly how much time the jury spent in actual deliberations on October 12. But it had to have been something in the neighborhood of four to five hours. The record indicates that the jury resumed deliberations on October 13 at 10:30 a.m. (CT 133.) The jury reached a verdict at 12:02 that day. (CT 137-138.) The total time spent deliberating was thus was somewhere in the neighborhood of 7½ to 8½ hours.

Various courts have found that deliberations for amounts of time comparable to that involved here indicate that a case is close and that an error requires reversal. (See, e.g., *People v. Rucker* (1980) 26 Cal.3d 368, 391 [stating that deliberations of nine hours underscored that the question of the degree of the defendant's criminal liability was not clear-cut]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [deliberations of almost six hours showed that the issue of guilt "was far from open and shut"]; *People v. Collins* (1968) 68 Cal.2d 319, 332 [deliberations of eight hours showed the

case was a close one]; *People v. Fabert* (1982) 127 Cal.App.3d 604, 610 [the fact that the deliberations lasted six hours "underscores the closeness of the case"]; *Gentry v. Roe* (9th Cir. 2003) 320 F.3d 891, 902 [finding a reasonable probability of a different result after disagreeing that the evidence of guilt was overwhelming and noting that the jury deliberated for six hours before reaching a verdict]; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637 [finding error not to be harmless after noting "the jurors deliberated for over nine hours over three days, which suggests that they did not find the case to be clear-cut"] *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855 and fn. 8 [finding a reasonable probability of a different result and that the case against the defendant was close, based, in part, on jury deliberations having lasted nine hours].) [*This is not string-citing. This is the cataloging of cases that have decided the case was a close case based on the length of the jury's deliberations. This serves to bracket-in a range of hours that have been found indicate of a close case.*]

Second, the jury sent the court two notes requesting additional instructions on the central issue of implied malice. (CT 135, 136.) A jury's request for additional instructions shows a case is close, particularly when the requested instructions deal with the defendant's intent in a case in

which his intent is in issue. (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852; see also *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["Juror questions and requests to have testimony reread are indications the deliberations were close."]; *People v. West* (1983) 139 Cal.App.3d 606, 612.)

Third, the jury asked for a re-reading of the testimony of appellant and Officer Matt. (CT 134.) A jury's request to have testimony re-read is an indication that the jury finds the case to be close. (*People v. Pearch*, *supra*, 229 Cal.App.3d at p. 1295; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 456; *People v. West*, *supra*, 139 Cal.App.3d at p. 612.)

In view of the prejudicial nature of the error, the huge impact of other-crimes evidence on a jury, and the three indicia showing the case to be a close one, the error should not be found harmless and the judgment must be reversed. [*This is a succinct, one-sentence, wrap-up of the factors that demonstrate that the error was prejudicial.*]

CONCLUSION

Appellant respectfully requests that the judgment be reversed.

DATED: October 2, 2007

Respectfully submitted,

GEORGE L. SCHRAER
Attorney for Appellant

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.360(b)(1), I certify that this brief contains 9,288 words, based on the word-count feature of my word-processing program.

DATED: October 2, 2007

Respectfully submitted,

GEORGE L. SCHRAER
Attorney for Appellant

[*Page break for signed and dated Proof of Service goes here.*]

DECLARATION OF SERVICE BY MAIL

Re: [CASE NAME] No. [DCA CASE NUMBER]

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is [ADDRESS OF APPELLATE COUNSEL]. On [DATE], I served a true copy of the attached [DOCUMENT BEING FILED] on each of the following, by placing same in an envelope or envelopes addressed respectively as follows:

Court of Appeal
[ADDRESS]

CLIENT
ADDRESS

ATTORNEY GENERAL
1300 I Street, #1101
P.O. Box 944255
Sacramento, CA 94244-2550
Attorney for Respondent
State of California

CCAP
2407 J Street, Ste. 301
Sacramento, CA 95816

Hon. [TRIAL JUDGE'S NAME]
[COUNTY OF CONVICTION] Superior Court
[ADDRESS]

District Attorney
[ADDRESS]

Each said envelope was then sealed and deposited in the United States Mail at [COUNTY WHERE APPELLATE COUNSEL WORKS], California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on [DATE] , at, [LOCATION] California.

_____

Declarant