<u>PROSECUTORS</u>:

FACTORS TO AID YOUR FILING DECISIONS WITH RESPECT TO FATAL TRAFFIC COLLISIONS

By: Miss Kimberly Bird

TABLE OF CONTENTS

"I know my conduct is dangerous to others, but I don't care if someone is hurt or killed."[1]

I. INTRODUCTION

On a fairly regular basis, prosecutors are faced with filing decisions with respect to fatal traffic collisions. Many of them, of course, do not involve criminal negligence and are not prosecuted as crimes. Sometimes, on the other hand, the circumstances are egregious and the decision to be made is whether to file a case as a vehicular manslaughter[2] or as a murder,[3] on an implied malice theory.[4] There are a finite number of California Supreme Court and Court of Appeal cases (beginning with *People v. Watson* (1981) 30 Cal.3d 290) that have addressed the sufficiency of evidence for implied-malice murder in vehicular collision cases - and they are each dependent on an analysis of the facts involved.

This article attempts to distill from recent case law the factors the California Supreme Court[5] and the Court of Appeal have highlighted as pivotal in determining whether to file a case as a vehicular manslaughter or as a murder, in order to give prosecutors a paradigm from which to operate.

The first section explains that upon facts showing wantonness and a conscious disregard for human life a conviction for second degree murder is appropriate.[6] The second section highlights the significant factors the courts have used to aid in order to give prosecutors a better understanding of the context in which this charge is appropriate. Finally, the last section sets forth a compendium of cases, from which the facts commonly relied on can be derived. The

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[1] *People* v. *Olivas* (1985) 172 Cal.App.3d 984, 988.

[2] Cal. Penal Code Section 192(c).

[3] Cal. Penal Code Sections 187-189. Murder of the second degree is [also] the unlawful killing of a human being when: (1) The killing resulted from an intentional act, (2) The natural consequences of the act are dangerous to human life, and (3) The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being. *See* Judicial Council of California Criminal Jury Instructions ("CALCRIM") No. 520; *See also* California Jury Instructions, Criminal, 7th Ed. ("CALJIC") No. 8.31.

[4] "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice." Cal. Penal Code Section 188.
Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence. *People v. Watson* (1981) 30 Cal.3d 290, 296.

[5] All references are to the California Supreme Court unless otherwise indicated.

[6] California Penal Code Section 192(c).

article concludes with a summary of factors prosecutors should look for when such a determination is essential to their filing decision.

II. A KILLING RESULTING FROM THE USE OF AN AUTOMOBILE MAY CONSTITUTE EITHER SECOND DEGREE MURDER OR VEHICLUAR MANSLAUGHTER DEPENDING ON THE UNDERLYING FACTS AND CIRCUMSTANCES

The court in *People v. Contreras* (1994) 26 Cal.App.4th 944, first discussed the distinction between murder and manslaughter. "Murder is the unlawful killing of a human being … with malice aforethought."[7] Malice is implied "when circumstances attending the killing show an abandoned and malignant heart."[8] Manslaughter by contrast is the unlawful killing of a human being without malice.[9] The required level of culpability for either gross vehicular manslaughter while intoxicated[10] or vehicular manslaughter[11] is gross negligence.[12] Both statutes expressly provide they "shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice, consistent with the holding of the California Supreme Court in *People v. Watson* [(1981)] 30 Cal.3d 290."[13]

The court in *Contreras* then explained that the court in *Watson* distinguished gross negligence from implied malice in a drunk driving case. Gross negligence was defined as the exercise of so slight a degree of care as to raise a presumption of a conscious indifference to the consequences.[14] Implied malice requires proof the accused acted deliberately with conscious disregard for life.[15]

> Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence. [Citations.] [¶] … A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. [Citation.] However, a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard. [Citation].[16]

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[7] Cal. Penal Code Section 187(a).
[8] Cal. Penal Code Section 188.
[9] Cal. Penal Code Sections 191.5(a), 192.
[10] Cal. Penal Code Section 191.5.
[11] Cal. Penal Code Section 192(c).
[12] *People v. Ochoa* (1993) 6 Cal.4th 1199, 1204; *People v. Bennett* (1991) 54 Cal.3d 1032, 1036.
[13] *See bench notes*, California Penal Code Section 192(c).
[14] *Watson* at p. 297; See *People* v. *Costa* (1953) 40 Cal.2d 160, 166.
[15] *Watson* at p. 297.
[16] *Watson* at p. 296-97; Cal. Penal Code Section 188; *see Kastel v. Stieber* (1932) 215 Cal. 37, 46.

It is the "conscious disregard for human life" that sets implied malice apart from gross negligence.[17]

> Even if the act results in a death that is accidental, as defendant contends was the case here, the circumstances surrounding the act may evince implied malice. [Citations.] Considerations such as whether the act underlying the homicide is a felony, a misdemeanor or inherently dangerous in the abstract, are not dispositive in assessing whether a defendant acted with implied malice. [Citations.] A finding of implied malice must be based upon 'consideration of the circumstances preceding the fatal act. [Citations.]'[18]

Thus, the court in *Contreras* reasoned that the absence of intoxication or high-speed flight from pursuing officers does not preclude a finding of malice. "These facts merely are circumstances to be considered in evaluating culpability. Where other evidence shows 'a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied.[19] In such cases, a murder charge is appropriate.' [Citations.]."[20]

IV. APPLICATION TO PROSECUTORIAL PRACTICE: THE FACTORS

In *People v. Olivias* (1985) 172 Cal.App.3d 984, the court rejected the claim that a conviction of vehicular second degree murder requires proof of all the factors identified in *Watson*. The court stated that the distinction between that crime and the vehicular manslaughter is admittedly subtle, but there is no formula to go by; rather, case-by-case analysis of the facts is required.[21] In other words, the court in *Olivas* held that the evidence adduced in *Watson*, although *sufficient* to support the charge, was not *necessary*.[22] Below is a list of the most common factors used by the California Supreme Court and California Court of Appeals in vehicular killing situations, it should be noted that each conviction for murder relied upon a combination of these factors[23] rather than one:

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[17] *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 109; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221-1222; *People v. Protopappas* (1988) 201 Cal.App.3d 152, 162-164.
[18] *People v. Contreras* (1994) 26 Cal.App.4th 944, 954-955.
[19] Cal. Penal Code Section 188.
[20] *People v. Contreras* (1994) 26 Cal.App.4th 944, 955.
[21] *People v. Olivas* (1985) 172 Cal.App.3d 984, 988-989. "The court explicitly rejected the claim that stated, 'nowhere does the opinion in *Watson* state that all of the factors present in that case are necessary to a finding of second degree murder … *Watson* … deliberately declin[ed] to prescribe a formula for an analysis of vehicular homicide cases…'" *People v. McCarnes* (1986) 179 Cal.App.3d 525, 535.
[22] *People v. Olivias* (1985) 172 Cal.App.3d 984, 988.
[23] *Albright, Contreras, Ortiz* relied on three factors; *Jarmon, McCarnes, Olivas, Watson, Whitson* relied on four factors; *Sanchez* relied on five factors; *Autry* and *Murray* relied on six factors; *David* relied on seven factors.

1) Illegal Driving Maneuvers: Running red lights & stop signs

In *David*, *Olivas*, *Watson* and *Whitson* the court considered the fact that the defendant was observed running through a red light,[24] red lights,[25] or stop signs.[26] In *Watson*, the defendant drove through a red light, narrowly avoiding a collision.[27] In *David*, the court emphasized the fact that the defendant was forced to stop only because when he drove through an intersection where his signal was red, that he then "struck the victim's vehicle with explosive force, killing both occupants."[28] This situation is similar to *Whitson*, where the defendant ran through a red light at a speed estimated to be 77 miles per hour and collided with another car, killing two women.[29] Horrifically, the defendant in *Olivas*, was observed by the officers chasing him, running four stop signs and three red lights.[30]

In the most recent of these cases, the California Supreme Court in *David* held that "in addition to the foregoing express admission by defendant of his awareness of the danger to life posed by his driving, the evidence before the jury concerning the *circumstances leading up to the collision* strongly supports a finding of such awareness."[31] Therefore, if the defendant ran stop signs or red lights prior to the killing or engaged in risky lane changes or passing, that information is a contributing factor to aid the People in establishing a second degree murder charge.

2) Speeding

Speeding is the most commonly seen factor among the vehicular murder cases. California courts have considered speeding a factor anywhere from a finding of excess speed of 5 miles per hour to 70 miles per hour over the posted limit. In *Albright*, the defendant pressed his accelerator to the floor of his station wagon reaching speeds of 90-110 miles per hour in a residential area.[32] In *Autry*, *Murray* and *Ortiz*, the defendants were traveling on a freeway and at some point before the fatal collision reached speeds of up to 80 miles per hour.[33] In *Contreras*, *David*, *Olivas*, *Watson*, *Whitson* the defendant's speed nearly doubled the posted speeds.[34]

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[24] *People v. Watson* (1981) 30 Cal.3d 290.
[25] *People v. David* (1991) 230 Cal.App.3d 1109, 1111; *People v. Olivas* (1985) Cal.App.3d 984, 986.
[26] *People v. Olivas* (1985) Cal.App.3d 984, 986.
[27] *People v. Watson* (1981) 30 Cal.3d 290, 293.
[28] *People v. David* (1991) 230 Cal.App.3d 1109, 1112; *see also People v. Whitson* (1998) 17 Cal.4th 229, 233..
[29] *People v. Whitson* (1998) 17 Cal.4th 229, 233.
[30] *People v. Olivas* (1985) Cal.App.3d 984, 986.
[31] *People v. Whitson* (1998) 17 Cal.4th 229, 251 [emphasis added].
[32] *People v. Albright* (1985) 173 Cal.App.3d 883, 884.
[33] *See Autry* at p. 356, *Murray* at p. 738 and *Ortiz* at p. 107.
[34] *Contreras* - 55-60 m.p.h. in 25 m.p.h. zone, *David* - 60-80 m.p.h. in a 20 m.p.h. zone, *Olivas* - 50-100 m.p.h. in a 25-30 m.p.h. zone, *Watson* - 84 m.p.h. in a 35 m.p.h. zone, and in *Whitson* the defendant traveled 80-85 m.p.h. in a residential area.

The California Supreme Court in *Watson* said that second degree murder based on implied malice has been committed when a person does "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."[35] Phrased in a different way, "malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life."[36] The *Watson* Court believed that there existed a rational ground for concluding that defendant's conduct was sufficiently wanton to hold him on a second degree murder charge. In reaching this conclusion, the court considered:

> Defendant drove at highly excessive speeds through city streets, an act presenting a great risk of harm or death … Defendant nearly collided with a vehicle after running a red light; he avoided the accident only by skidding to a stop. He thereafter resumed his excessive speed before colliding with the victims' car, and then belatedly again attempted to brake his car before the collision (as evidenced by the extensive skid marks before and after impact) suggesting an actual awareness of the great risk of harm which he had created.[37]

In combination, these facts reasonably and readily support the conclusion that the defendant *actually appreciated* the risk involved and nonetheless acted wantonly and with a conscious disregard for human life.

3) Not Necessarily Illegal Driving Maneuvers: Swerving & Passing

In *Autry*, *David*, *Murray*, and *Ortiz* each of the defendants were observed *swerving* into another lane,[38] over the median,[39] or into oncoming traffic before their fatal collisions.[40] In *Autry*, the defendant "recklessly drove on a freeway, *swerved* into the median strip, struck and killed two highway construction workers, and injured his two passengers."[41] In *David*, the defendant was observed passing slower southbound traffic by *swerving* over the double-double yellow center lanes forcing northbound traffic out of its lanes.[42] In *Murray*, the defendant traveled against traffic about four miles primarily in the emergency lane next to the center divider and the number one (fast) lane.[43] In *Ortiz*, the defendant tried to overtake a vehicle

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[35] *People v. Sedeno* (1974) 10 Cal.3d 703, 719, quoting from *People* v. *Phillips* (1966) 64 Cal.2d 574, 587.)
[36] *Watson* at p. 300.
[37] *Watson* at p. 300.
[38] *People v. David* (1991) 230 Cal.App.3d 1109, 1111.
[39] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[40] *People v. Murray* (1990) 225 Cal.App.3d 734, 737; *People v. Ortiz* (2003) 109 Cal.App.4th 104, 107.
[41] *People v. Autry* (1995) 37 Cal.App.4th 351, 355 [emphasis added].
[42] *People v. David* (1991) 230 Cal.App.3d 1109, 1111 [emphasis added].
[43] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.

traveling in front of him by crossing a double yellow line on a state highway.[44] Unfortunately, the defendant found himself driving directly in the path of an oncoming vehicle on the other side of the highway, causing his car to collide with the oncoming car, killing two occupants.[45]

The California Court of Appeal in *Murray* stated that the pattern of defendant's driving, that he was going the wrong way on the freeway, indicates that he had to be aware of the danger posed to human lives, and knowing this, he deliberately proceeded in conscious disregard of that risk.[46]

In *Albright*, court added to its finding of implied malice when the defendant passed three cars before his fatal collision.[47] Here, even though the defendant merely passed three cars, the court reasoned that this showed he "knew other people were on the road."[48] In *McCarnes*, the defendant repeatedly engaged in extremely dangerous passing maneuvers at speeds close to "65 plus" miles an hour on a two-lane road and that eventually lead to the head-on collision killing four.[49] The court decided when the defendant operated a motor vehicle in conscious disregard for the safety of others, implied malice could be found sufficient to convict the defendant of second degree murder.[50] It is shown throughout these cases that the court has considered swerving and passing as another contributing factor to aid in establishing a second degree murder charge because it shows that the drivers were aware of other drivers when making their driving decisions.

4) "Almost" collisions on the day of the killing

In *Murray*, *Olivas* and *Watson*, each defendant struck another car before their fatal collisions. In *Murray*, the defendant first struck the side of one car, and caused another to swerve out of control; two persons were injured when he did so;[51] and then the defendant struck *another* car head-on, killing all four persons inside.[52] This court considered evidence of defendant's reckless driving up to *24 miles away* from the point of collision.[53]

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[44] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 107.
[45] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 106.
[46] *People v. Murray* (1990) 225 Cal.App.3d 734, 747.
[47] *People v. Albright* (1985) 173 Cal.App.3d 883, 884-885.
[48] *People v. Albright*, (1985) 173 Cal.App.3d 883, 887.
[49] *People v. McCarnes* (1986) Cal.App.3d 525, 528.
[50] *People v. Albright* (1985) 173 Cal.App.3d 883, 887.
[51] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.
[52] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.
[53] *People v. Murray* (1990) 225 Cal.App.3d 734, 741, n.2 [emphasis added].

This consideration is significant because the courts tend use this factor to show a conscious awareness of one's dangerous driving before the actual fatality. The Court of Appeal in *People v. Eagles*[54] explains this concept well:

> Evidence of excessive speed resulting in a near collision is relevant to knowledge of risk, 'an actual awareness of the great risk of harm' of excessive speed … 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.[55]

5) Alcohol consumption

Alcohol consumption almost as frequent a factor as speeding is in the vehicular murder cases. It is no surprise "[t]he drunk driver cuts a wide swath of *death*, pain, grief, and untold physical and emotional injury across the roads of California and the nation."[56] That being said, California's legal blood alcohol content is .08 percent and drunk driving is a significant factor considered when whether or not the killing is a murder or manslaughter. In the vehicular murder cases, defendants have had a blood alcohol content ranging from .17 percent[57] to .27 percent.[58] In *Watson* the Supreme Court held, citing *Taylor v. Superior Court* that "'One who wil[l]fully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.'"[59]

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[54] *People v. Eagles* (1982) 133 Cal.App.3d 330 [vehicular murder prosecution that did not involve the use of alcohol or other toxicants].
[55] *People v. Eagles* (1982) 133 Cal.App.3d 330, 340; *See also People* v. *Watson* (1981) 30 Cal.3d 290, 301.
[56] *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 898-899.
[57] *See Albright, Sanchez*; *see also Murray* [defendant's blood alcohol content was .18-.23 percent].
[58] *People* v. *McCarnes* (1986) 179 Cal.App.3d 525; see also Autry [defendant's blood alcohol content was .22 percent];
see also Watson [defendant's blood alcohol content was .23 percent].
[59] *People v. Watson* (1981) 30 Cal.3d 290, 300-301. *Cf. People v. Castorena* (1996) 51 Cal.App.4th 558 [where defendant was convicted of gross vehicular manslaughter while intoxicated and not second degree murder. In this case, the defendant and several of his coworkers consumed four to five pitchers of beer over a period of several hours, defendant then drove to a friend's house, where he drank four glasses of brandy. Deciding to go home, defendant tried to exit the house through a window, apparently mistaking it for the front door. His friend, concerned about defendant's level of intoxication, asked for his car keys and told defendant he should not drive and offered to give him a ride. Defendant agreed initially and gave his keys his friend, and walked to the friend's car. However, defendant returned to the house, explaining he needed to drive his sister-in-law to work early the next morning. After his friend returned his keys, the defendant left the house, only to return within a few minutes. He again changed his mind, took his keys and drove away. "Traveling 70 to 100 miles per hour, often on the wrong side of the road," the defendant "ran several red lights." Ultimately he rear-ended a car, injuring the driver and killing a passenger. *People v. Castorena* (1996) 51 Cal.App.4th 558, 559.]

This factor shows both *knowledge* and *conscious disregard* that his driving while intoxicated endangers the lives of others. *Contreras* court noted "the criminal act underlying vehicular murder is not the use of intoxicating substances in anticipation of driving but is driving under the influence with a conscious disregard for life. The former is not necessarily a finding of the latter"[60] Additionally, the court stated, "the absence of intoxication or high speed flight from pursuing officers does not preclude a finding of malice."[61]

6) Drug use

Interestingly, the three California vehicular murder cases, the drug of choice is Phencyclidine (commonly referred to as "PCP"). In *David*, the defendant drove while under the influence of PCP and collided with another vehicle on a Thanksgiving evening, killing its two occupants.[62] The court found implied malice necessary to uphold a second degree murder conviction[63] and based its finding on substantial evidence that supported defendant drove his vehicle again[64] knowing he was under the influence of PCP.[65] It was held, in light of his prior experience with PCP, he must have realized he was under the influence.[66] The court also noted "there is ample evidence … to support the conclusion appellant knew while he was driving that his conduct was dangerous to life and consciously disregarded that risk."[67]

In *Jarmon*, the court found the defendant deliberately ingested drugs, thereby including his impaired state, with complete disregard to safety of others.[68] The trial judge found that he elected "to do drugs anyway and disregard the distinct possibility … [he] might kill somebody" despite knowing "that drugs can produce bizarre effects which can cause conduct which is dangerous to others."[69]

In *Olivas*, the Court of Appeal noted the defendant had consumed enough PCP to impair his physical and mental facilities, and then drove at extremely high speed through city streets for a relatively lengthy period of time, creating a great risk to other drivers.[70] The fact he was aware

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[60] *People v. Olivas* (1994) 26 Cal.App.4th 944, 985; *see People v. David* (1994) 230 Cal.App.3d 1109 [because of the defendant's prior experience with PCP, the court rejected his argument that he lacked implied malice because no evidence existed that he planned to drive when he consumed a PCP cigarette].
[61] *People v. Contreras* (1994) 26 Cal.App.4th 944, 955.
[62] *People v. David* (1991) 230 Cal.App.3d 1109, 1111.
[63] *People v. David* (1991) 230 Cal.App.3d 1109, 1115.
[64] The defendant had two prior vehicle collisions resulting from driving under the influence of PCP, resulting in two criminal convictions.
[65] *People v. David* (1991) 230 Cal.App.3d 1109, 1114.
[66] *People v. David* (1991) 230 Cal.App.3d 1109, 1114-1115.
[67] *People v. David* (1991) 230 Cal.App.3d 1109, 1114-1115.
[68] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1351.
[69] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1351.
[70] *People v. Olivas* (1985) Cal.App.3d 984, 989.

of this risk, was shown by his collision with one car, his near collision with two other cars, and his deliberate avoidance of two pursuing police cars.[71]

In combination, the use of drugs coupled with other factors is additional support to establish the defendant acted wantonly and with a conscious disregard for human life.

7) Traffic Citations

In *Contreras*, the defendant had received *nine serious* traffic citations in the prior two years.[72] In *McCarnes*, the defendant had previously been convicted of reckless driving.[73] And, the California Supreme Court in *Whitson* considered the facts the defendant was involved in a traffic accident four years prior (for which police determined he was at fault for failing to yield the right of way), received a citation for driving at an excessive speed and was cited for failing to obey a posted sign two years before.[74]

In *Ortiz*, the court admitted evidence that the defendant had *seven past incidents* in which the defendant had either been convicted of reckless driving, convicted of reckless drunk driving, or been observed driving recklessly, and his participation in mandatory educational program (known as the SB-38 program) on the dangers of drinking and driving.[75]

In ruling that the evidence of the defendant's prior conduct was admissible, the trial court states its rationale:

> 'Every time the defendant drove badly before he allegedly committed these two murders,' the trial judge explained, 'and every time he was convicted or arrested or punished in some fashion, *his awareness of the dangers of driving badly increased* and that is what the district attorney has a legitimate right to try to prove . . . [did] this defendant have implied malice in his mind or not when he drove the way he did, and that is a subjective standard. So we have to find out what he was exposed to that most people aren't exposed to in order to understand his level of awareness of the dangers of driving badly.[76]

It appears that the introduction of "evidence relating to defendant's poor driving record and attendance at traffic school in order to support its claim that, at the time of the collision, defendant subjectively was aware of the serious risk of death posed by his reckless driving."[77]

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[71] *People v. Olivas* (1985) Cal.App.3d 984, 989.
[72] *People v. Contreras* (1994) 26 Cal.App.4th 944, 947.
[73] *People v. McCarnes* (1986) Cal.App.3d 525, 528-529.
[74] *People v. Whitson* (1998) 17 Cal.4th 229, 235.
[75] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 110.
[76] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 115-116.
[77] *People v. Whitson* (1998) 17 Cal.4th 229, 251.

8) Driving Under the Influence (DUI) conviction(s)

The cases involving prior DUI convictions are numerous. The courts have allowed evidence of one prior conviction[78] up to admitting four prior convictions. In *McCarnes* wherein the Court of Appeal for the Fourth District, Division Two, held that a defendant's *four prior convictions* for driving under the influence were admissible to establish implied malice in a prosecution for second degree murder arising out of a vehicular homicide. In so holding, the court pointedly observed:

> [The] reason that driving under the influence is unlawful is *because* it is dangerous, and to ignore that basic proposition, particularly in the context of an offense for which the punishment for repeat offenders is more severe (Veh. Code, §§ 23165, 23170, 23175), is to make a mockery of the legal system as well as the deaths of thousands each year who are innocent victims of drunken drivers. [para.] Moreover, included in the evidence of two of defendant's [four] convictions, as shown to the jury, was the sentence that he enroll in and complete a drinking driver's education program. Even if we assume defendant did not realize after his *convictions* that it was dangerous to drink alcohol and drive, surely realization would have eventually arrived from his *repeated* exposure to the driver's educational program. To argue otherwise is little short of outrageous.[79]

In explaining why prior convictions for incidents involving alcohol were admissible when the case before it did not involve the use of alcohol, the court in *Ortiz* further stated:

> [T]he requisite mental state at the time of the prior incident -- one supporting a subsequent finding of an awareness of the dangers of recklessness -- was not formed while inebriated so much as before and after the resulting traffic incident. Whether provoked by alcohol, other intoxicants, or road rage, such incidents typically include a host of costly and inconvenient consequences. From this uncharged misconduct evidence, through a series of inferences, a jury could conclude that, at the time of the *charged* misconduct, the defendant possessed a 'wanton disregard for life, and . . . a subjective awareness of the risk created,' from which 'malice may be implied . . . .'[80]

In explaining why the prior conduct was admissible that the defendant possessed the *knowledge* requisite for second degree murder under Evidence Code section 1101, subdivision (b), the court stated:

> We emphasize the word 'knowledge' in the foregoing statutory enumeration because, in seeking admission of the uncharged misconduct evidence at defendant's trial, it was the prosecution's contention that the evidence was relevant because it tended to establish a

[78] *Autry* (4 prior DUI convictions), *David* (2), *Jarmon* (1), *McCarnes* (4), *Murray* (2), *Ortiz* (more than 2), *Sanchez* (2).
[79] *People* v. *McCarnes* (1986) 179 Cal.App.3d 525, 532.
[80] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 112.

> subjective awareness on the part of defendant of the disastrous consequences that can follow in the wake of recklessly operating a motor vehicle on a public highway. As tending to establish, in other words, defendant's *knowledge*--gained in the course of the prior misconduct--of the natural consequences, dangerous to life, of the reckless operation of a motor vehicle, and of his persistence in that behavior, thus evidencing a conscious disregard for the lives of others on the road. These mental features, of course, comprise the mens rea of implied malice, thereby supporting an accusation of second degree murder.[81]

9) Mandatory classes taken related to drinking and driving

In *David*, the defendant had two prior vehicle collisions resulting from driving under the influence of PCP, resulting in two criminal convictions. As part of his sentence, he also attended two educational programs involving the risks of driving while under the influence of alcohol or other intoxicants. The court held in light of his prior experience with PCP and attending educational classes, the defendant must have realized he was under the influence and knew while driving that this conduct was dangerous to life but consciously disregarded that risk.[82]

In *Murray* the defendant claimed attending mandatory educational classes did not necessarily follow that he attained a subjective awareness of the courts material.[83] Even though the "bulk of these cases involved the use of alcohol or other intoxicants in *both* the uncharged misconduct *and* the prosecution in which it was sought to be admitted. The resulting case law makes it clear, however, that the contours of the 'knowledge' exception to the bar imposed by section 1101(a) are not so restricted."[84] The court *Autry* noted that notwithstanding defendant's failure to attend educational programs, "…the jury could reasonably infer that the convictions alone, even without the educational programs, impressed upon appellant the dangers of drunk driving."[85]

10) Forewarning before incident cautioning about dangerous driving

In *Autry*, the defendant's "probation officer told him he should not drink and drive because he might kill someone or be killed, and leave his children without a parent."[86] On the day of the fatal accident, defendant was on probation.[87] The very morning of the collision, he

[81] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111-112.
[82] *People v. David* (1991) 230 Cal.App.3d 1109, 1112; *Cf. Whitson* [where defendant attended traffic school and the People successfully used this evidence to support defendant was subjectively aware of the serious risk of death posed by his reckless driving]. *People v. Whitson* (1998) 17 Cal.4th 229, 251.
[83] *People v. Murray* (1990) 225 Cal.App.3d 734, 745.
[84] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 112.
[85] *People v. Autry* (1995) 37 Cal.App.4th 351, 358; *see also People v. Sanchez* (2001) 24 Cal.4th 983.
[86] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[87] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.

met with his probation officer who warned him not to drink and drive.[88] In *Jarmon*, within a two-week period before the collision, the defendant twice admitted to his parole officer that he had ingested cocaine and PCP.[89] At that time, the parole officer warned him that use of PCP carried the "extreme potential for violence" which might cause "injury to himself [and] others …"[90] Finally, in *Sanchez* the defendant admitted+ his wife had told him not to drink and drive.[91]

The courts have used this factor to establish that "there was sufficient evidence to prove defendant's subjective awareness of the life-threatening consequences of his actions to support a finding of implied malice, necessary to support the convictions."[92]

V. SUPPORTING CASE LAW

This section sets forth a compendium of cases, from which the facts commonly relied on can be derived. The cases are listed in alphabetical order.

1. *People v. Albright* (1985) 173 Cal.App.3d 883

On a hot July night defendant drank at least eight beers[93] before pressing the accelerator to the floor of his station wagon reaching speeds of 90-110 miles per hour.[94] The defendant passed three cars including smashing "into a 17 year old [boy's] … car, killing him instantly in a fiery explosion."[95] The court noted that none of the various witnesses heard the sound of brakes or saw brake lights, nor were there any pre-impact skid marks.[96] When the police found the defendant, he was sitting next to his car and said, "I have killed someone, I have killed someone, it should have been me."[97] The defendant then told the ambulance driver that he had "put the pedal to the floor" because he wanted to kill himself, and that was why he was going as fast as he could, and that the other car pulled out in front of him.[98] "Defendant conceded the recklessness

[88] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[89] Phencyclidine (commonly referred to as "PCP"). *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1349.
[90] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1350.
[91] *People v. Sanchez* (2001) 24 Cal.4th 983, 987.
[92] *People v. Autry* (1995) 37 Cal.App.4th 351, 357.
[93] Defendant's blood alcohol content was .17 – the People established this significantly slowed his reactions, imparted his judgment, balance and coordination, restricted his vision and made him 35 times more likely to have an accident than an unintoxicated driver.
[94] *People v. Albright* (1985) 173 Cal.App.3d 883, 884.
[95] *People v. Albright* (1985) 173 Cal.App.3d 883, 884-885.
[96] *People v. Albright* (1985) 173 Cal.App.3d 883, 884-885.
[97] *People v. Albright* (1985) 173 Cal.App.3d 883, 884-885.
[98] *People v. Albright* (1985) 173 Cal.App.3d 883, 885.

of his behavior, but argued he was so drunk he could not have harbored malice required to establish second degree murder."[99]

The court found that defendant knew other people were on the road and must have known of the high probability he would case death if he continued his conduct.[100] The Court of Appeals found that when defendant had willfully consumed alcohol beverages to the point of intoxication and then operated a motor vehicle in conscious disregard for the safety of others, implied malice could be found sufficient to convict the defendant of second degree murder.[101]

2. *People v. Autry* (1995) 37 Cal.App.4th 351

In *People v. Autry*, the defendant had a blood-alcohol level of .22 percent and "recklessly drove on a freeway, swerved into the median strip, struck and killed two highway construction workers, and injured his two passengers."[102] Defendant "had four prior convictions for drunk driving, suffered in 1983, 1984, and 1991."[103] Interestingly, "he failed to attend court-ordered educational programs in connection with those convictions, but in 1991 admitted that he had a drinking problem and participated in a 45-day residential alcoholism program at 'How House,' where participants are 'bombarded' with horror stories about the dangers of driving while intoxicated."[104]

In October 1991, his "probation officer told him he should not drink and drive because he might kill someone or be killed, and leave his children without a parent."[105] On the day of the fatal accident, defendant was on probation.[106] That very morning, he met with his probation officer who warned him not to drink and drive.[107]

Nevertheless, that day appellant drove his Ford Bronco to the desert where he and his friends drank beer, bought more beer and drove while drinking two beers. Defendant, "who by then appeared under the influence, lost control, swerved and skidded because he was going too fast, about 70 or 80 miles per hour."[108] After "falling asleep and waking up handcuffed to a hospital bed and being told he was under arrest for killing two people, appellant said, 'Fuck 'em. They shouldn't have been out there in the first place.'"[109]

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[99] *People v. Albright* (1985) 173 Cal.App.3d 883, 885.
[100] *People v. Albright* (1985) 173 Cal.App.3d 883, 887.
[101] *People v. Albright* (1985) 173 Cal.App.3d 883, 887.
[102] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[103] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[104] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[105] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[106] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[107] *People v. Autry* (1995) 37 Cal.App.4th 351, 355.
[108] *People v. Autry* (1995) 37 Cal.App.4th 351, 356.
[109] *People v. Autry* (1995) 37 Cal.App.4th 351, 356.

The Court of Appeals upheld that "there was sufficient evidence to prove defendant's subjective awareness of the life-threatening consequences of his actions to support a finding of implied malice, necessary to support the convictions."[110]

3. *People v. Contreras* (1994) 26 Cal.App.4th 944

In *People v. Contreras*, the defendant, a "bandit" tow truck driver who had received *nine serious* traffic citations in the prior two years, knew his brakes were defective but still drove recklessly at high speed in a residential area, rear-ending a vehicle at a stop sign while racing into a accident scene. On the day of the offense, Contreras was racing another tow truck driver side-by-side on a public street at 55-60 miles per hour in a 25 mile per hour zone in an attempt to be the first tow truck on the scene of the accident.[111] He collided with a car, killing a 13-year-old boy inside.[112] The court rejected the claim that a murder charge cannot be based on accidental homicide that does not involve a high-speed chase or drug-impaired driving and upheld the evidence to support a second degree murder conviction on an implied malice theory.[113]

In other words, "the absence of intoxication or high speed flight from pursing officers does not preclude a finding of malice. These facts are circumstances to be considered when evaluating culpability."[114] In upholding the murder conviction, the court stated "where evidence shows "a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied. In such cases, a murder charge is appropriate."[115]

4. *People v. David* (1991) 230 Cal.App.3d 1109

The defendant was driving under the influence of PCP[116] when he collided with another vehicle on a Thanksgiving evening, killing its two occupants.[117] The police first observed the defendant driving his vehicle 60-80 miles per hour in a residential area where the posted speed was 40 miles per hour.[118] Then the defendant was observed running through red lights, passing slower southbound traffic by swerving over the double-double yellow center lanes forcing northbound traffic out of its lanes.[119] He was forced to stop because when he drove through an intersection where his signal was red, he struck the victim's vehicle with explosive force, killing

[110] *People v. Autry* (1995) 37 Cal.App.4th 351, 357.
[111] *People v. Contreras* (1994) 26 Cal.App.4th 944, 947.
[112] *People v. Contreras* (1994) 26 Cal.App.4th 944, 952.
[113] *People v. Contreras* (1994) 26 Cal.App.4th 944, 953.
[114] *People v. Contreras* (1994) 26 Cal.App.4th 944, 955.
[115] *People v. Contreras* (1994) 26 Cal.App.4th 944, 955.
[116] Phencyclidine (commonly referred to as "PCP").
[117] *People v. David* (1991) 230 Cal.App.3d 1109, 1111.
[118] *People v. David* (1991) 230 Cal.App.3d 1109, 1111.
[119] *People v. David* (1991) 230 Cal.App.3d 1109, 1111.

both occupants – his vehicle "ricocheting back onto the street, and finally come to rest along the center divider."[120]

The defendant had two prior vehicle collisions resulting from driving under the influence of PCP, resulting in two criminal convictions.[121] As part of his sentence, he also attended two educational programs involving the risks of driving while under the influence of alcohol or other intoxicants.[122] At the time of the fatal Thanksgiving crash, the defendant was in fact, driving with a suspended license.

The Court of Appeal found there was substantial evidence supporting the finding of implied malice and second degree murder.[123] The court based its finding on substantial evidence that supported defendant drove knowing he was under the influence of PCP.[124] In light of his prior experience with PCP, the court held that he must have realized he was under the influence.[125] The court also noted "there is ample evidence … to support the conclusion appellant knew while he was driving that his conduct was dangerous to life and consciously disregarded that risk."[126]

5. *People v. Jarmon* (1992) 2 Cal.App.4th 1345

In *People v. Jarmon*, the defendant rear-ended a car, killing *four* people and injuring two others while driving under the influence of PCP and alcohol.[127] Defendant ran a red stoplight and applied his brakes only a split second before the accident.[128] One month prior to the killing, defendant was released from prison.[129] One of the conditions of his parole was to participate in antinarcotics testing.[130] Within a two week period before the collision, the defendant admitted twice admitted to his parole officer that he had ingested cocaine and PCP.[131] The parole officer warned him that use of PCP carried the "extreme potential for violence" which might cause "injury to himself [and] others …"[132] The defendant continued to use, sometimes in

[120] *People v. David* (1991) 230 Cal.App.3d 1109, 1112.
[121] *People v. David* (1991) 230 Cal.App.3d 1109, 1112.
[122] One for the May 19, 1985 conviction (appellant had a PCP cigarette in his vehicle and was under the influence of PCP, he was subsequently convicted of DUI) and the second for his conviction on May 19, 1986 (appellant was driving under the influence of PCP and as a result was convicted of a DUI and driving with a suspended license.).
[123] *People v. David* (1991) 230 Cal.App.3d 1109, 1115.
[124] *People v. David* (1991) 230 Cal.App.3d 1109, 1114.
[125] *People v. David* (1991) 230 Cal.App.3d 1109, 1114-1115.
[126] *People v. David* (1991) 230 Cal.App.3d 1109, 1114-1115.
[127] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1348.
[128] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1350.
[129] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1348.
[130] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1349.
[131] Phencyclidine (commonly referred to as "PCP"). *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1349.
[132] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1350.

combination: cocaine, marijuana, PCP and alcohol, even after the warning.[133] Additionally, the defendant had previously been convicted of drunk driving.[134]

The Court of Appeal held the evidence supported a finding that defendant deliberately ingested drugs, thereby including his impaired state, with complete disregard to safety of others.[135] "Where circumstances reasonably support the conclusion that a defendant does act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life.'"[136] The court noted the trial judge found that he elected "to do drugs anyway and disregard the distinct possibility … [he] might kill somebody" despite knowing "that drugs can produce bizarre effects which can cause conduct which is dangerous to others."[137] Thus, the court affirmed his convictions for second degree murder.

6. *People v. McCarnes* (1986) Cal.App.3d 525

The defendant was convicted of two counts of second degree murder[138] on a summer Saturday afternoon when he killed two people while driving with a blood alcohol level of .27 percent.[139] The evidence established that the defendant repeatedly engaged in extremely dangerous passing maneuvers at speeds close to "65 plus" miles an hour on a two-lane road and collided head-on with a VW station wagon. There were six people in the VW.[140] After the collision, defendant walked to the vicinity of the VW and a bystander was giving artificial respiration to the baby, who was according to the witness missing "a big chunk of her head."[141] Defendant then leaned over and said "Don't die, baby, don't die," and walked away.[142] When the police approached defendant he ran into a field.[143]

The defendant had previously been convicted *four times* for driving under the influence of alcohol or alcohol and drugs, and had also previously been convicted of reckless driving.[144] The court found that driving by a person who has a blood alcohol level of .27 percent, and who

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[133] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1350.
[134] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1350.
[135] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1351.
[136] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1350.
[137] *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1351.
[138] In addition to two counts of vehicular manslaughter; one count of driving under the influence of alcohol and drugs so as to cause bodily injury to another; one count of driving with .10 or more of alcohol in the blood so as to cause bodily injury to another; and one count of failing to give the proper information at the scene of the accident.
[139] *People v. McCarnes* (1986) Cal.App.3d 525, 527-528. A blood sample taken from defendant about two hours later revealed an alcohol level of .23 percent, a criminologist testified that the average burn-off rate was about .02 an hour and that that figure was e3quivalent to .27 two hours earlier.
[140] *People v. McCarnes* (1986) Cal.App.3d 525, 528.
[141] *People v. McCarnes* (1986) Cal.App.3d 525, 528.
[142] *People v. McCarnes* (1986) Cal.App.3d 525, 528.
[143] *People v. McCarnes* (1986) Cal.App.3d 525, 528.
[144] *People v. McCarnes* (1986) Cal.App.3d 525, 528-529.

executes two extremely reckless passing maneuvers and embarks on a third in the face of oncoming vehicles, has "natural consequences … which are danger to life," or "a high probability [of] result[ing] in death."[145]

The court also included, such "evidence, coupled with the defendant's *four* previous convictions for driving under the influence, [was] not only sufficient but overwhelmingly uph[eld] the finding of implied malice."[146] The court articulated that the defendant's argument that there is no substantial evidence his actions could result in death … "is nonsense, if not an affront to this court."[147] Here, of course, the court said "that defendant's *four* previous convictions for drunken driving, and his *repeated* exposure to a drinking drivers' education program" provide additional elements not present in *Watson*.[148] Moreover, "nowhere does the opinion in *Watson* state that all of the factors present in that case are necessary to a finding of second degree murder … *Watson* … deliberately [declined] to prescribe a formula for analysis of vehicular homicide cases, instead requiring a case-by-case approach."[149]

7. *People v. Murray* (1990) 225 Cal.App.3d 734

The court considered evidence of defendant's reckless driving up to 24 miles away from the point of collision where defendant drove the opposite way on the freeway crashing into a vehicle and killing its occupants.[150] In this case, the defendant killed *four* people in a head-on collision and injured two others while driving drunk with a blood alcohol level between .18 and .23 percent as he drove eastbound on the westbound side of the freeway at speeds of 55-80 miles per hour.[151] Traveling against traffic, primarily in the emergency lane net to the center divider and the number one (fast) lane, he drove about four miles.[152] He first struck the side of one car, and caused another to swerve out of control; two persons were injured when he did so.[153] The defendant then struck head-on *another* car, killing all four persons inside.[154]

Evidence established the defendant had earlier been convicted of driving under the influence and ordered to attend traffic school.[155] Shortly thereafter, he was arrested, again convicted of driving under the influence, placed on probation, an ordered to attend an approved

[145] *People v. McCarnes* (1986) Cal.App.3d 525, 533.
[146] *People v. McCarnes* (1986) Cal.App.3d 525, 533 [emphasis added].
[147] *People v. McCarnes* (1986) Cal.App.3d 525, 533.
[148] *People v. McCarnes* (1986) Cal.App.3d 525, 534.
[149] *People v. McCarnes* (1986) Cal.App.3d 525, 535.
[150] *People v. Murray* (1990) 225 Cal.App.3d 734, 741, n.2.
[151] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.
[152] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.
[153] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.
[154] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.
[155] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.

drinking program.[156] Notwithstanding these convictions and attendance at the drinking program, he had three beers at lunch, 10-12 beers at an after-work party, and another 5-8 on the day and evening of the fatal collision.[157]

In rejecting the defendant's argument that insufficient evidence supported an implied malice finding, the Court of Appeal observed he had deliberately chose on the day of the fatal collision to drive his truck to work so he could attend the drinking party after work.[158] Further, the defendant thereafter deliberately chose to drink and drive – knowing that after the party he would have to drive a long distance home.[159] Here, the court mentioned that the pattern of defendant's driving, that he was going the wrong way on the freeway, indicates that he had to be aware of the danger posed to human lives, and knowing this, he deliberately proceeded in conscious disregard of that risk.[160]

8. *People v. Olivas* (1985) 172 Cal.App.3d 984

In *People v. Olivas*, the police, at high speeds, pursued the defendant while he was driving a brand new car stolen earlier that day from an automobile dealership.[161] Two police cars were involved in the chase, reaching speeds between 50-100 miles per hour on city streets with speed limits of 25-30 miles per hour; during the chase, the defendant ran four stop signs and three red lights. After narrowly avoiding a collision with other cars when he ran the first light, he ran a stop sign while traveling 57 miles per hour in a 25 mile per hour zone and struck a vehicle broadside – killing a nine month old child inside and causing the driver who was two months pregnant to miscarry.[162] A blood sample taken from the defendant "was found to contain .02 percent blood alcohol and .04 parts per million of PCP."[163]

In finding there was sufficient evidence of implied malice, the Court of Appeal noted the defendant had consumed enough PCP to impair his physical and mental facilities, and then drove at extremely high speed through city streets for a relatively lengthy period of time, creating a great risk to other drivers.[164] The fact he was aware of this risk, was shown by his collision with one car, his near collision with two other cars, and his deliberate avoidance of two pursuing

[156] *People v. Murray* (1990) 225 Cal.App.3d 734, 737.
[157] *People v. Murray* (1990) 225 Cal.App.3d 734, 740.
[158] *People v. Murray* (1990) 225 Cal.App.3d 734, 746.
[159] *People v. Murray* (1990) 225 Cal.App.3d 734, 746.
[160] *People v. Murray* (1990) 225 Cal.App.3d 734, 747.
[161] *People v. Olivas* (1985) Cal.App.3d 984, 986.
[162] *People v. Olivas* (1985) Cal.App.3d 984, 986.
[163] *People v. Olivas* (1985) Cal.App.3d 984, 986.
[164] *People v. Olivas* (1985) Cal.App.3d 984, 989.

police cars.[165] Although he was further appraised of the risk when he nearly collided with two more cars while running the first red light, he nonetheless "chose to continue his extremely dangerous driving even after the danger to the lives of others was demonstrated."[166] And, the court expressly held, "[t]he criminal act underlying vehicular murder is not use of intoxicating substances in anticipation of driving, but is driving under the influence with conscious disregard for life."[167]

9. *People v. Ortiz* (2003) 109 Cal.App.4th 104

In *People v. Ortiz*, the court discussed the admissibly of evidence of a defendant's prior conduct in a vehicular murder case to show his subjective awareness of the risk he created.[168] In that case a jury found the defendant guilty to second degree murder, arising from his involvement in a head-on vehicular collision in which two of four family members, visiting California from New Zealand, died.[169]

The defendant had likely been driving at least 80 miles per hour,[170] tried to overtake a vehicle traveling in front of him by crossing a double yellow line on a state highway.[171] Unfortunately, the defendant found himself driving directly in the path of an oncoming vehicle on the other side of the highway. Defendant's truck collided with the oncoming car and the two occupants were killed.[172] Earlier on in the morning of the collision, defendant had driving his car recklessly, traveling at high speeds, tailgating cars and passing them over double yellow lines on a curve.[173]

The parties stipulated, prior to trial, that the defendant was not under the influence of any intoxicant at the time of the accident.[174] At trial, over defense objection the trial court admitted evidence consisting of documentary and oral testimony concerning *seven past incidents* in which the defendant had either been convicted of reckless driving, convicted of reckless drunk driving, or been observed driving recklessly, and his participation in mandatory educational program (known as the SB-38 program) on the dangers of drinking and driving.[175]

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[165] *People v. Olivas* (1985) Cal.App.3d 984, 989.
[166] *People v. Olivas* (1985) Cal.App.3d 984, 989.
[167] *People v. Olivas* (1985) Cal.App.3d 984, 988-989.
[168] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 108-109.
[169] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 106.
[170] California Highway Patrol officers determined defendant's truck was mechanically sound at the time of collision and capable of reaching speeds in excess of 100 miles per hour. *People v. Ortiz* (2003) 109 Cal.App.4th 104, 106-107.
[171] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 107.
[172] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 106.
[173] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 107-109.
[174] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111.
[175] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 110.

In ruling that the evidence of the defendant's prior conduct was admissible, the trial court states its rationale:

> 'Every time the defendant drove badly before he allegedly committed these two murders,' the trial judge explained, 'and every time he was convicted or arrested or punished in some fashion, *his awareness of the dangers of driving badly increased* and that is what the district attorney has a legitimate right to try to prove . . . [did] this defendant have implied malice in his mind or not when he drove the way he did, and that is a subjective standard. So we have to find out what he was exposed to that most people aren't exposed to in order to understand his level of awareness of the dangers of driving badly.[176]

The Court of Appeal affirmed. The court held that the trial court did not err in admitting evidence of the defendant's past conduct, including the alcohol-related conduct, as relevant to the determination whether the defendant had the wanton disregard for human life requisite to establish a finding of implied malice.[177] The court further held the trial court properly ruled this evidence admissible as more probative than prejudicial.[178] Finally, the court held that any error was not prejudicial, given the admissible evidence of the egregiousness of defendant's reckless driving at the time of the accident.

10. *People v. Sanchez* (2001) 24 Cal.4th 983

In *People v. Sanchez*, the defendant was the driver of a Ford Bronco that killed a man.[179] Defendant was charged with both murder and gross vehicular manslaughter.[180]

In statements to the police and at trial, he gave conflicting accounts of the circumstances of the collision and of his own alcohol consumption preceding the collision.[181] He admitted some alcohol consumption,[182] but denied feeling intoxicated. "Because of various indications that he was under the influence of alcohol, defendant was arrested at the scene, and en route to the police station he commented laughingly that he was scheduled to appear on another driving-under-the-influence charge that morning."[183] He also commented that his wife had told him not to drink and drive.[184]

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[176] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 115-116.
[177] *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111.
[178] Cal. Evidence Code Section 352.
[179] *People v. Sanchez* (2001) 24 Cal.4th 983, 985.
[180] In addition to the charges of murder and gross vehicular manslaughter he was also charged with driving under the influence of alcohol causing injury to another; driving with a blood alcohol level in excess of .08 percent with injury to another; hit and run causing injury; and perjury.
[181] *People v. Sanchez* (2001) 24 Cal.4th 983, 986-987.
[182] *People v. Sanchez* (2001) 24 Cal.4th 983, 987. His blood-alcohol level two hours after the collision was .17 percent.
[183] *People v. Sanchez* (2001) 24 Cal.4th 983, 987.
[184] *People v. Sanchez* (2001) 24 Cal.4th 983, 987.

In addition, the defendant had sustained two prior convictions for driving under the influence of alcohol, and one additional such charge was pending against him.[185] He was ordered to attend a drinking driver's educational program, but failed to do so.[186] Finally, the defendant had been driving without a valid driver's license since 1988, when his license was suspended in connection with his first conviction.[187]

Here, the California Supreme Court held that gross vehicular manslaughter while intoxicated is not a lesser included offense of murder, and thus defendant could be convicted of both offenses.[188] Gross vehicular manslaughter while intoxicated requires proof of elements that need not be proved when the charge is murder, that is, use of a vehicle and intoxication.[189]

11. *People v. Watson* (1981) 30 Cal.3d 290

In *People v. Watson*, the California Supreme Court specifically addressed the applicability of an implied malice second degree murder theory to a vehicular manslaughter homicide. In this case, the defendant consumed large quantities of beer and then drove through a red light, narrowly avoiding a collision.[190] He then drove away at high speed reaching 84 miles per hour and, despite applying his brakes, struck a car at another intersection; where he struck a Toyota sedan and three passengers were ejected from the vehicle and the driver and her six-year-old daughter were killed.[191] There were 112 feet of skid marks prior to impact and another 180 feet thereafter.[192] The defendant's sped was estimated by experts at 70 miles per hour at the point of impact.[193] His blood-alcohol level one-half hour after the collision was .23 percent.[194] The defendant was charged with two counts of second degree murder and two counts of vehicular manslaughter, but the trial court granted his motion to dismiss the murder counts. Held, order of dismissal reversed.

The California Supreme Court in *Watson* held: (a) The general murder statutes, P.C. 187 et seq., are not preempted by the more specific vehicular manslaughter statute[195]; and (b) The defendant's conduct was sufficiently wanton to support a second degree murder charge. He drove his car to an establishment where he consumed a large quantity of beer. He then drove at

[185] *People v. Sanchez* (2001) 24 Cal.4th 983, 987.
[186] *People v. Sanchez* (2001) 24 Cal.4th 983, 987.
[187] *People v. Sanchez* (2001) 24 Cal.4th 983, 987.
[188] *People v. Sanchez* (2001) 24 Cal.4th 983, 985.
[189] *People v. Sanchez* (2001) 24 Cal.4th 983, 985.
[190] *People v. Watson* (1981) 30 Cal.3d 290, 293.
[191] *People v. Watson* (1981) 30 Cal.3d 290, 293.
[192] *People v. Watson* (1981) 30 Cal.3d 290, 293.
[193] *People v. Watson* (1981) 30 Cal.3d 290, 294.
[194] *People v. Watson* (1981) 30 Cal.3d 290, 294.
[195] *Watson* at p. 297.

an excessive speed through city streets, presenting a great risk of harm.[196] After narrowly missing one vehicle, he resumed an excessive speed and then attempted to brake his car before impact, suggesting an actual awareness of the great risk of harm he had created.[197]

The court noted that the evidence adduced at the preliminary examination was not necessarily sufficient to convict the defendant of second degree murder and that the prosecution must still establish implied malice beyond a reasonable doubt. "Moreover, we neither contemplate nor encourage the routine charging of second degree murder in vehicular homicide cases. We merely determine that the evidence before us is sufficient to uphold the second degree murder counts in the information."[198]

12. *People v. Whitson* (1998) 17 Cal.4th 229

In *People v. Whitson*, the defendant was guilty of two counts of second degree murder, arising from two deaths that occurred when defendant, while driving a VW, ran through a red light at a speed estimated to be 77 miles per hour and collided with another car.[199] Here, the defendant was being chased by an officer on a motorcycle and when the officer activated his emergency lights and siren the VW sped up to 80-85 miles per hour.[200] The officer saw the VW turn off his headlights, maneuver around two vehicles and then the officer lost track of the VW.[201] Immediately thereafter, the officer observed a scene of a "major injury accident" crash between the VW and an Acura sedan.[202] Both the driver and the passenger of the Acura sedan bled to death.[203]

There was no evidence the defendant was under the influence of drugs or alcohol at the time of the collision and the defendant possessed a California driver's license at the time of the collision.[204] At the time of trial, evidence was introduced pertaining to the defendant's driving record;[205] establishing that defendant had attended traffic school, was involved in a traffic accident four years prior (for which police determined he was at fault for failing to yield the right of way), received a citation for driving at an excessive speed and was cited for failing to obey a posted sign two years before.[206] The prosecution "introduced the evidence relating to

[196] *Watson* at p. 301.
[197] *Watson* at p. 300.
[198] *Watson* at p. 301.
[199] *People v. Whitson* (1998) 17 Cal.4th 229, 233.
[200] *People v. Whitson* (1998) 17 Cal.4th 229, 234.
[201] *People v. Whitson* (1998) 17 Cal.4th 229, 234.
[202] *People v. Whitson* (1998) 17 Cal.4th 229, 234.
[203] *People v. Whitson* (1998) 17 Cal.4th 229, 235.
[204] *People v. Whitson* (1998) 17 Cal.4th 229, 239.
[205] *People v. Whitson* (1998) 17 Cal.4th 229, 235.
[206] *People v. Whitson* (1998) 17 Cal.4th 229, 235.

defendant's poor driving record and attendance at traffic school in order to support its claim that, at the time of the collision, defendant subjectively was aware of the serious risk of death posed by his reckless driving."[207] The Court found that "even without the evidence of defendant's poor driving record … there was strong evidence establishing that defendant was aware of the serious risks from his dangerous driving--including, most significantly, his explicit admission, in one of his pretrial statements to the police, that he realized that his driving on the night in question was dangerous and that while driving he was 'afraid I'm going to kill someone or hurt someone else.'"[208]

The Court reasoned that "In addition to the foregoing express admission by defendant of his awareness of the danger to life posed by his driving, the evidence before the jury concerning the circumstances leading up to the collision strongly supports a finding of such awareness."[209]

VI. CONCLUSION

While there is certainly no hard and fast rule for determining whether a vehicle killing is a crime of murder or manslaughter, but there are common factors that continually emerge from the Court's analyses of what constitutes a sufficient degree of factors among to affirm a conviction of second degree murder. The common factors to consider they are:

11) Illegal Driving Maneuvers: Running red lights & stop signs
12) Speeding
13) Not Necessarily Illegal Driving Maneuvers: Swerving & Passing
14) "Almost" collisions on the day of the killing
15) Alcohol consumption
16) Drug use
17) Traffic Citations
18) Driving Under the Influence (DUI) conviction(s)
19) Mandatory classes taken related to drinking and driving
20) Forewarning before incident cautioning about dangerous driving

[207] *People v. Whitson* (1998) 17 Cal.4th 229, 251.
[208] *People v. Whitson* (1998) 17 Cal.4th 229, 251.
[209] *People v. Whitson* (1998) 17 Cal.4th 229, 251.

To withstand a possibility of reversal, a prosecutor should objectively evaluate the facts of his or her particular case and pinpoint these commonalities, presenting them to the trial judge with the aforementioned case law to back up their factual analysis. With these stepping-stones in mind, the road to proper filing need not be so harrowing, and, with the proper facts and presentation, a proper charge will be the result.