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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -vs.- WILLIAM JAMES P. MOON, Defendant.	No. 62-066138 Date: February 19, 2009 Time: 8:15 a.m. Dept. 44 - Honorable Larry D. Gaddis

MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL

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INTRODUCTION

This is a truly tragic case. It involves two close friends, Stewart Shapton and Billy Moon, both attractive and good-hearted young men, both much loved by their families and friends. Only minutes before the event that changed everything for the two, they had been partying, happy and high spirited, but both drinking to excess. Most often, the worst consequence of such foolish behavior is a bad headache. But when people, and especially the young, drink and drive, the consequences can be dire. Here, one promising young life — that of Stewart Shapton — has been ended. Another worthy young man, Billy Moon, stands convicted of murder and faces a life sentence in prison.

On June 3, 2006, Mr. Shapton and Mr. Moon were in a terrible car accident on Bell Road in Auburn. The Audi they were in was traveling over 100 miles per hour when it careened off the road and slammed into several trees. Mr. Shapton died immediately as a result of multiple traumas, including a severe blow to the head, sustained during the accident.

Mr. Moon's trial focused on the identity of the driver. Several witnesses testified for the prosecution that after the accident, they saw Mr. Shapton's body in the passenger seat, and they saw Mr. Moon sprawled across the front and back of the car. But many of the accounts given at trial differed in significant ways from statements made immediately after the accident, at which time witnesses stated that the driver had died, and that Mr. Moon was found under Mr. Shapton.

The driver's side of the car sustained much worse damage than the passenger side of the car, yet Mr. Moon sustained only relatively minor injuries while Mr. Shapton sustained multiple severe injuries that killed him instantly. Although the driver's footwell had been crushed, Mr. Moon's legs were left almost entirely untouched. And it was difficult to explain how Mr. Shapton could have sustained the severe injury to the right side of his head if he were in the passenger seat. Nonetheless, the jury returned verdicts of guilty on charges of both second degree murder and vehicular manslaughter.

It is common following jury verdicts in criminal cases that new trial motions, if made at all, are done perfunctorily, often without briefing. That is because during trial the court had an adequate opportunity to carefully consider its rulings and gave the parties its best judgment on

the question raised. If there remains a matter in dispute, an appellate court is the place to challenge the trial judge's resolution of contested matters.

There are, however, two situations where a substantial written new trial motion is in order. The first is where there is a meaningful issue about the sufficiency of the evidence introduced to establish an element of a charged crime. There is only one context in which a judicial officer has the power and obligation to independently determine whether the weight and credibility of the evidence justifies a verdict of guilt on a given charge, and that is upon the making of a new trial motion. On a section 1118.1 motion for a directed verdict mid trial and on appeal, judicial officers must interpret the evidence in the light most favorable to the prosecution, but cannot and must not do so in the context of a claim of inadequate proof under Penal Code section 1181.6.

Secondly, there will be times when a court does not have the time or resources immediately available to consider all of the relevant legal authorities that bear on a complex question that has arisen during the heat of trial proceedings. In such situations, a new trial motion can provide the court with a more studied opportunity to determine whether a mid-trial ruling was and remains the correct answer to a thorny problem. As developed below, both of these rationales for the filing of a written new trial motion apply in this case.

Defendant Moon's motion for a new trial raises different issues as to the two counts on which the jury found him guilty. This memorandum will address the two counts of conviction in the order in which they were charged in the information.

Trial counsel for the defendant challenged the Count One murder charge on the same, single theory as they did the Count Two vehicular manslaughter accusation: i.e., Mr. Moon was not driving his car at the time it was involved in the crash that killed Mr. Shapton.. The defense did not introduce evidence or argument aimed at raising a reasonable doubt that the driver of the car, whoever it may have been, acted with the required mental state for second degree implied malice murder.

Given that substantial physical evidence supported the conclusion that Mr. Shapton rather than Mr. Moon was the driver, the decision of Moon's trial counsel to try the case

exclusively on an identity theory was informed and tactical, and Mr. Moon's present counsel will not contend otherwise. But that decision by defendant's counsel in no way relieved the prosecution of its burden of proving implied malice beyond a reasonable doubt. Nor did that tactical choice by trial counsel lessen the unique obligation that this Court now faces under Penal Code section 1181.6 to assess the weight and credibility of the evidence in order to make an independent judgment as to whether it was sufficient to justify a murder conviction.

For the purpose of his challenge to the Count One murder conviction, Mr. Moon will assume that the jury's finding that he was behind the wheel during the fatal accident was correct, and will direct his claim at the finding of implied malice. What the relevant statutes and Supreme Court case law require to support a vehicular murder conviction is not simply a showing that the accused at some time in his or her life learned that driving a car at a high speed, or while intoxicated, or both, can lead to a fatal crash. No licensed driver is unaware of those facts; indeed, the prosecutor argued in closing argument that everyone knows that drinking and driving is dangerous to life.[1] If such knowledge were enough to constitute implied malice, then every fatal crash attributable to high speed or excessive drinking would constitute a second degree murder. But the Supreme Court noted in its landmark case on the application of the murder statute to fatal car accidents that "it may be difficult for the prosecution to carry its burden of establishing implied malice to the moral certainty necessary for a conviction," and that "we neither contemplate nor encourage the routine charging of second degree murder in vehicular homicide cases." *People v. Watson* (1981) 30 Cal.3d 290, 301.

To sustain a murder conviction in the vehicular homicide context, the state must prove beyond a reasonable doubt that, *at the time the defendant drove a car in a life threatening manner*, he not merely *should have known, but did in fact subjectively realize*, that his present

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[1] Prosecutor Macumber argued: "So, first of all, having said that, we all know that DUI is dangerous. We can't escape it. It's all over the news, the radio, advertisement campaigns. People die all the time. You cannot live in this world in today's day and age and not know that DUI kills people." (10/9 RT at 10.)

action posed a real danger that he would kill someone, yet, while aware of that danger, he consciously disregarded that risk in order to engage in his life-threatening conduct. *Watson*, 30 Cal.3d at 296-297 ("[A] finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved, i.e., a subjective standard."); *People v. Knoller* (2007) 41 Cal.4th 139, 170 ("We conclude that a conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life.")

The Court's duty to independently assess whether that standard of proof has been met is all the more important in this case, given that the identity defense presented by trial counsel was not directed at rebutting the allegation that Mr. Moon acted with implied malice. Defense counsel did not mention, and a fortiori did not attempt to explain to the jury, the meaning of implied malice in closing argument.[2] Yet the jury was obviously focused on the concept and puzzled by it, as they sought elucidation of the term from the Court on more than one occasion during their deliberations.

The question of whether the evidence in this case can and should be sufficient to support a murder conviction has sweeping significance beyond its grave impact on Mr. Moon and his family. As will be demonstrated below, there has never been a California vehicular murder conviction returned on as sparse an evidentiary basis as was provided the jury in this case. Unlike cases in which vehicular murder convictions have been sustained, there was no evidence here of a subjective awareness and conscious disregard of the risk of life *at the time of* the driving that constituted the actus reus of the charged crime. A conviction upon the record evidence in this case would constitute the unwarranted expansion of the doctrine of implied malice murder that the *Watson* court cautioned against.

Furthermore, the supplemental instructions given in response to the jury's questions concerning implied malice both weakened the prosecution's burden of proof on the "conscious

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[2] Defense counsel told the jury in closing argument that "there's only one issue in this case and that's who's driving the car." (10/9 RT, at 35).

disregard" element of implied malice murder and limited the exculpatory evidence that the jury could consider in deciding whether that element of the Count One charge had been proven. Contrary to the language of the Court's supplemental instruction, the subjective "conscious disregard for human life" element of implied malice murder has never been interpreted by the California Supreme Court to mean "choosing not to pay attention to something," a formulation effectively equivalent to the definition of the objective "gross negligence" test for vehicular manslaughter. Even if the paucity of evidence of implied malice alone did not require a vacation of the murder verdict, the instructional error would. A new trial should be ordered on the Count One murder charge.

Defendant Moon's challenges to his Count Two conviction for vehicular manslaughter center on the issue of identity, and for that reason apply to Count One as well. Mr. Moon's trial pitted (1) eyewitness testimony, albeit from a highly confused and confusing situation, that Stewart Shapton was found belted into the passenger's seat of Mr. Moon's vehicle by first responders, against (2) extensive evidence that the deceased's injuries could only be explained by his having been in the driver's seat during the accident, while Mr. Moon's injuries were inconsistent with that conclusion. This motion does not focus on the sufficiency of the evidence to establish the identity of the driver; the evidence presented by the parties in support of their positions was both ample and much disputed. Rather, defendant's claims arise from prosecutorial tactics that in some instances denied the jury an opportunity to hear and consider critical evidence bearing on the identity issue, and in another led the jury to believe an assertion that is demonstrably untrue. Flawed rulings prevented counsel for Mr. Moon from remedying these errors, thereby denying him a full and fair trial on the all important question of whether he was behind the wheel when Stewart Shapton died. For these reasons, a new trial is in order on both Counts One and Two.

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I. A NEW TRIAL SHOULD BE ORDERED ON THE COUNT ONE MURDER CHARGE BOTH BECAUSE THE WEIGHT OF THE EVIDENCE WAS INSUFFICIENT TO PROVE IMPLIED MALICE AND BECAUSE THE SUPPLEMENTAL INSTRUCTIONS ON THE MENTAL STATE ELEMENT OF IMPLIED MALICE MURDER WERE FLAWED

The actus reus of implied malice murder — an act dangerous to human life — was not in dispute in this case. The driver of Mr. Moon's vehicle, whether it was Mr. Moon or Mr. Shapton, was intoxicated, as lab tests results for both young men established that their blood alcohol levels were well in excess of the legal limit, and the car was concedely traveling at a high speed when it crashed against a line of trees. The prosecution's real burden on the Count One murder charge was to prove beyond a reasonable doubt the mental state element of implied malice murder--a conscious disregard for human life.

A. Statement of Facts

1. The Evidence Concerning Implied Malice

To prove implied malice, the prosecution relied almost solely on evidence relating to Mr. Moon's previous DUI conviction. On New Year's Eve 2005, Mr. Moon was stopped by Officer Kyle Turner in Irvine. (9/22 RT at 23.) After conducting a field sobriety test, Officer Turner arrested Mr. Moon. (*Id*. at 24-31.) A blood test revealed a blood alcohol level of 0.14. (Id. at 32.)

As a result of that arrest, Mr. Moon entered a first offender DUI education program. The prosecution presented evidence regarding that program and Mr. Moon's participation therein. It called Walter Stockman, president of Pacific Educational Services (PES), the company that ran the education program. He testified generally about the program's educational goals: accepting responsibility, legal aspects of DUI law, avoiding another arrest, self-help groups, the nature of addiction, treatment options, and so on. (9/23 RT at 6-7.) Stockman testified that Mr. Moon enrolled in his program in March of 2006; he was then scheduled to attend several classes, most of which he attended, but some of which he missed. (*Id*. at 13.)

In addition to Mr. Stockman, the prosecution also called several PES teachers and counselors. Counselor Charles Foden testified that Mr. Moon attended one of his classes, and at the end, Moon wrote on a questionnaire that he had learned "that certain things trigger addiction

that I need to avoid and if I avoid them I will stay out of trouble." (*Id*. at 20.) Counselor Lisa Pera similarly testified that Mr. Moon had attended one of her classes, in which she had lectured on the nature of addiction.

> [W]hat I would cover is how a person could have one night of drinking and not be addicted to any substances or a person that has that one night of drinking as well could have a problem, you know; not necessarily have to drink every day, but go out and binge drink, which is five or more drinks in any given setting.
>
> Also talking about other drugs, because this is an alcohol and other drug problem. People who use methamphetamine, per se, they use it for the first time and they get that high and they spend the rest of their addiction trying to chase that one high, because you take down a little bit, you're up here, and then you start to come down.

(*Id*. at 27.) The prosecution then called William Leonard, another PES counselor. He testified that in his class, he discussed how the effects of DUI can ripple out to victims, their families, and entire communities. (*Id*. at 30.)

The prosecution then called another PES counselor, James Thang. He testified that he taught three classes titled "My Plan to Avoid Another DUI," "Taking Responsibility for Your DUI," and "Do I Have a Problem with Drinking?" (*Id*. at 33.) He testified that Moon attended some of his classes, and at the end, completed an instructor evaluation form. On that form, in response to the question "What was the most useful information you received tonight?", Mr. Moon wrote: "The teenage deaths." (*Id*. at 36.) Mr. Thang then testified that in another class attended by Mr. Moon, he encouraged the students to develop a plan to avoid another DUI. (*Id*. at 37.)

Other evidence bearing on the mental state of the defendant and Mr. Shapton prior to and at the time of the accident was uncontradicted. Amber Ferreira, who lived on Bell Road, testified that she heard "whooping and hollering" just before the accident. (9/15 Tr. at 56.) She indicated that the sounds were like those that people make riding on a roller-coaster — "whoo-hoo" or "yahoo." (*Id*. at 69.) Her husband similarly testified that he heard "hooting and hollering — they were like 'whoo-hoo.'" (*Id*. at 101.) He testified that "they [i.e., the occupants of the passing car] were yelling out the window." (*Id*. at 125.) He said the sounds were sounds of excitement, and that it sounded like the occupants were having fun. (*Id*. at 126.) Jessica Wenger

also testified that it was common knowledge among their group of friends that a car driving very fast could get airborne at that location on Bell Road. (9/11 Tr. at 26.)

2. Closing Argument

The prosecutor devoted relatively little of her closing argument to the implied malice element. The argument she made was based on common knowledge of the dangers of DUI, and Mr. Moon's "special knowledge" based on his prior DUI.

> Element No. 2 is implied malice. That is the state of mind for this particular crime. And, again, this is really what separates the two charges. And the evidence that the Defendant had that mental state really stems, like I said, from that 12/31/05 -- December 31st, 2005,arrest for DUI down in Orange County. Okay.
>
> So, first of all, having said that, we all know that DUI is dangerous. We can't escape it. It's all over the news, the radio, advertisement campaigns. People die all the time. You cannot live in this world in today's day and age and not know that DUI kills people.
>
> With that being said, the Defendant has a special knowledge that most of us don't have because of his recent arrest for DUI six months before.
>
> (10/9 RT at 10.)

She then described his prior arrest, and the subsequent PES classes he attended.

> You also heard about the specific classes and counseling that he attended. And, again, this class, as Mr. Stockman put it, is designed to sort of show the DUI offender the errors of their ways and to deter them from further DUIs. The different counselors who came in and talked to you about the classes, the counseling that the Defendant took told you about the types of things that they taught, types of things that they talked about with the Defendant.
>
> You heard that in one course, which I believe was called Accepting Responsibility For My DUI, the Defendant, in his own hand, wrote in response to a questionnaire what he learned in that class, all about the teenage deaths. Now, if that's not proof of knowledge that driving under the influence is dangerous to human life, I don't know what is.
> .
> You also heard from one of the counselors that the Defendant attended the victim's course, and in that course the Defendant learned the consequences of DUI are significant and far reaching, far beyond himself, his own family, his employers, to the victims, to the surviving family members of the victims. Again, DUI is dangerous to human life, and he knew it.

(*Id*. at 13.)

The prosecutor added briefly that the speed at which the car was traveling also supported a finding of implied malice. (*Id*. at 14.) She then moved on to the bulk of her argument, which focused on the identity of the driver. (*Id*. at 15-33.)

3. The Jury's Questions on Implied Malice

The jury began its deliberations on October 9th. In a note time marked "3:57 pm" on that date, the jury asked a series of brief questions, and one longer one on a separate piece of paper, stating in part:

> In cases where, as here, the alleged victim was not in a second vehicle but instead was in the same car as the driver, is it relevant whether the victim was complient [sic] in any way with the driver's decision to take the risk?
>
> For example, if the jury were to determine that it is more likely than not that the driver took the risk of accelerating the car to over 100 mph for purposes of experiencing the car going airborne at the crest of the hill, is it relevant in determining the first count (the implied malice element or otherwise) as to whether the victim at some point expressed to the driver either: his concurrence or active encouragement for taking the risk, or his concern or resistance against the taking of the risk?

After consulting with counsel, the Court replied in writing in relevant part:

> J. Regarding the question, "is it relevant whether the victim was compliant in any way with the drivers decision to take the risk?", I cannot advise or instruct you as to relevance on any issue. You must determine relevance yourselves, and look to the jury instructions for guidance as to what must be proved and what defenses you may consider. The jury instructions are the law that you must utilize to assist you in making your decisions.
>
> K. As for your example regarding your duty to determine whether or not implied malice has been proved beyond a reasonable doubt, you must use only that evidence that was presented at trial. See jury instruction 200 which states, "It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial". You may of course, reach reasonable conclusions if supported by the evidence. See jury instruction 222 (Evidence), and 223, 224, and 225 regarding the use of circumstantial evidence. You must not speculate as to facts as to which there is no evidence.

L. See Jury Instruction 620 attached hereto.[3]
Again, you must not speculate as to facts as to which there is not evidence.

At 1:33 p.m. on October 10th, the jury sent a note stating:

> Murder in second requiring implied malice
> Implied malice requires an intentional act.
> Can you define intentional?

The Court replied in writing:

> Intentional (intentionally) means done by design or on purpose;
> meaning to act in a certain way.

At 1:40 pm on October 10th, the jury asked:

> "Can we get two more definitions regarding implied malice. Please define:
> deliberately
> conscious disregard.
>
> As listed in 4th element of implied malice."

After reviewing the note with counsel, the Court replied:

"Deliberately means done on purpose.
Conscious disregard means choosing to pay no attention to something."

The jury returned its verdict at 4 p.m. on October 10th, soon after the Court's response to its last question.

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[3] The Court attached a copy of CALCRIM 620: Causation: Special Issues, which read:

> There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substanial factor* is more than a trivial or remote factor. However, it does not need to be the only factor: that causes the death.
>
> A. Negligence of Decedent or Third Party,
>
> The failure of Stewart Shapton to use reasonable care may have contributed to the death. But if the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death even though Stewart Shapton may have failed to use reasonable care.

B. The Applicable Law

1. The Standard of Review of the Sufficiency of the Evidence on a New Trial Motion

Before a defendant in a tragic case such as this one is sentenced to a term of incarceration that may ensure he dies in prison, he must conclusively have been proven guilty beyond a reasonable doubt of the charged crime, not merely to the satisfaction of the jury, but of this Court as well. As Witkin notes:

> When an appellate court reviews the jury's verdict it resolves all conflicts in the evidence in favor of the verdict. . . . *The function of the trial judge is entirely different: He does not review the jury's determination but weighs the evidence himself and exercises an independent judgement, as if there were no jury at all.* As the court said in *People v. Robarge*, supra, 41 C.2d 633: "While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." (See also *People v. Knutte* (1986) 111 C. 453, 455 (additional cites omitted).

(6 Witkin, Cal. Crim. Law 3d (2000), Crim. Judgm., § 102, p. 134, italics added.)

Thus, where an appellate court *must* be bound by the jury's determinations of the credibility of witnesses, a judge hearing a motion under Penal Code § 1181(6) *cannot* defer to those determinations. In *People v Robarge* (1953) 41 Cal.2d 628, 634, the trial judge indicated that he disbelieved much of the testimony of the identifying witness, but nevertheless declared that the jury were the sole judges of credibility. The Supreme Court reversed the order denying a new trial with directions to again hear and determine the motion in accordance with the correct rule of law. "[T]he trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict." (*Accord People v. Davis* (1995) 10 Cal.4th 463, 524 [on new trial motion, trial court is to weigh the evidence independently]; *see also People v. Hines* (1954) 128 Cal.App.2d 421, 428 [same holding, following *Robarge*]; *People v. Trotter* (1984) 160 Cal.App.3d 1217,1220 [same].)

Because this was a prosecution on which the state's case as to the mental state element of implied malice was built entirely on circumstantial evidence, this Court must independently

apply to that evidence the legal rules that control a jury's decision of such a case: first, that the evidence in the record must be rationally inconsistent with any conclusion other than that of the defendant's guilt; and, second, that each fact essential to complete a set of circumstances necessary to establish the defendant's guilt must be proven beyond a reasonable doubt. (*See, e.g.*, CALCRIM 224; CALJIC 2.01.)

2. The Law of Implied Malice, As To Applied Vehicular Homicide Cases

In 1872, the California Legislature defined "malice aforethought," the cornerstone element of the crime of murder, as consisting of two equivalent components: express malice, meaning an intent to kill, or implied malice, in which "the circumstances attending the killing show an abandoned and malignant heart." Penal Code § 188. Over decades, the courts strove to illuminate for juries this cryptic "abandoned and malignant heart" language. One explanation that gained general acceptance was that of Justice Traynor in *People v. Thomas* (1953) 41 Cal.2d 470, 480: i.e., implied malice "is shown when . . . the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death." (emphasis added); *accord, People v. Poddar* (1974) 10 Cal.3d 750, 757; *People v. Conley* (1966) 64 Cal.2d 310, 321; *People v. Washington (*1965) 62 Cal.2d 777. Justice Traynor's concurring opinion provided examples of such an act from four cases decided in the district Courts of Appeal: striking the victim with a knife; firing a shotgun at trespassers; shooting with intent to wound; and, in a variation on the classic illustration of "depraved heart" second degree murder, firing shots at random into a crowded dance hall. 41 Cal.2d at 479 (Traynor, J., concurring). What the examples made clear is that implied malice murders involve a willingness to take a life so blatant as to be deserving of the same moral opprobrium and penal sanction as those with express malice — i.e., intentional killings.

In *People v. Watson* (1981) 30 Cal.3d 290, the Supreme Court held that the two formulations of the standard were correct and equivalent :

> [W]hen 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. . . . [Citations.]

> 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.

30 Cal.3d at 300;

In *People v. Dellinger* (1989) 49 Cal.3d 1212, the Supreme Court held that, as a subjective matter,"a finding of implied malice depends upon a determination that the defendant *actually appreciated the risk [to human life] involved . . .*" *Id.*, at 1217, citing *Watson*, 30 Cal.3d at 296-97. (First emphasis in original; second emphasis added) The *Dellinger* Court found that one of the two alternate formulations of the mental state element of implied malice — "wanton disregard for human life" — did in fact "adequately convey to the jury *that defendant need be shown to have subjectively appreciated that life-threatening risk created by his conduct*." 49 Cal.3d at 1217 (Emphasis added) *Dellinger* rejected an argument that the defendant in that case may have been convicted without the jury finding that he acted in conscious disregard for life by noting with approval that the jury had also been instructed pursuant to CALJIC 8.51 that a defendant should be convicted of implied malice murder rather than manslaughter "[i]f . . . he had realized the risk and *acted in total disregard of the danger to life involved*." *Id.*, at 1222 n.2.

In *People v. Knoller* (2007) 41 Cal.4th 139, the Supreme Court flatly rejected a Court of Appeal ruling that "a second degree murder conviction, based on a theory of implied malice, can be based simply on a defendant's awareness of the risk of causing *serious bodily injury* to another." *Id*. at p. 153. Specifically, in tracing the two lines of decisions defining and discussing the implied malice doctrine, the Court observed that "[u]nder both . . ., implied malice requires a defendant's awareness of the risk of death to another." *Id*. at 152; *see also id*. at 154 ("In cases decided shortly before and after [*People v. Conley* (1966) 64 Cal.2d 310], we reiterated the established definition of implied malice as requiring an awareness of the risk that the defendant's conduct will result in the death of another."].)

In *Watson*, despite reviewing a pretrial evidentiary record that demonstrated that (1) the defendant had a .23 blood alcohol level, (2) had been given warning that he was likely to cause an accident when he earlier ran a red light and had to screech to a halt to avoid an accident, then

fled away at high speed, and (3) struck a car in another intersection, ejecting three people from the other auto, killing two, including a six year child, the Supreme Court made clear that it was not "suggest[ing] that the...facts conclusively demonstrate implied malice...; [o]n the contrary, it may be difficult for the prosecution to carry its burden of establishing implied malice to the moral certainty necessary for a conviction."

Thus, murder charges are reserved for the most extreme of vehicular homicide cases in which proof of a realization of the grave danger of death contemporaneous with the act of wildly reckless driving is clear. For example, in *People v. Autry* (1995) 37 Cal.App.4th 351, the defendant was convicted of two counts of second degree murder. He had four prior convictions for drunk driving and failed to attend court-ordered educational programs in connection with those convictions. On the very morning of the accident his *probation officer warned him not to drink and drive because he might kill someone or leave his children without a father.* At one point before the accident when Autry was under the influence; he swerved and skidded, and his *two passengers repeatedly told him to slow down and to let them drive because he was drunk. Autry told them to shut up.* Shortly thereafter Autry exited a freeway, ran a red light, and was nearly broadsided by a big rig truck. *His passengers again urged Autry not to drive. Then a passenger told Autry "slow down, [I don't] want to die"; Autry said "Fuck off."* With that the passenger climbed into the back seat and fastened his seat belt.

At a construction site Autry failed to observe a warning sign, plowed into and killed two workers, and flipped his car, severely injuring his passengers. Autry had a blood alcohol level of .22 percent. *See also People v. Murray* (1990) 225 Cal.App.3d 734 (defendant drove wrong way on freeway; just avoided collisions with ten other cars before accident killed four; had four prior DUIs; weeks before accident defendant admitted to a friend that he drove drunk and blacked out, and said he was very concerned about the incident and said he was going to stop driving to work)*; People v. Sanchez* (2001) 24 Cal.4th 983 (three prior DUIs, including a pending case, wife told him morning of accident not to drink and drive)*; People v. Olivas* (1985) 172 Cal.App.3d 984 (stolen car, high speed chase, went 100 in 25 zone, ran red lights, had minor accident before the major one, under the influence of alcohol and PCP); *People v. Watson* (1983)

150 Cal.App.3d 313 (defendant was so drunk that bartender took his keys, was on his way to fifth bar when fatal accident occurred); *People v. Whitfield* (1994) 7 Cal.4th 437 (three prior DUIs, had near head-on shortly before accident, and then had head on which caused fatality.)

C. The Evidence of Implied Malice Was Not Sufficiently Weighty And Credible to Support A Murder Conviction

There are no published decisions in which a murder charge was sustained against a young man with one prior drunk driving arrest for the death of his passenger. That is all the more true of a situation in which the passenger was a friend who had been drinking with the defendant and where, as the jury note suggested here, the evidence strongly supports an inference both the young men shared the intent to drive at an excessive speed. Defendant does not argue that a murder conviction is necessarily barred as a matter of law in such circumstances, but simply that what would be required to sustain such a conviction is powerful proof of a sort wholly missing here.

Young men who have been enjoying themselves together drinking at a party rarely consciously consider that their merry-making can have tragic consequences. Should they? Of course. Would a reasonable person in the same circumstances think long and hard about the consequences of driving in an intoxicated condition? Of course. Will youthful lack of required reflection protect a young man from a DUI charge or, given a fatal accident, a vehicular manslaughter conviction and a term of imprisonment? Absolutely not.

But a murder charge requires proof not simply of what an intoxicated person should have thought, but of what they did. To convict Billy Moon of murder, the state had to place in the record proof of sufficient quality to convince not only the jury, but this Court, that on the night of June 3, 2006, when he left the golf club with Stewart Shapton minutes before the fatal crash, Billy Moon said to himself: "If I drive my car in my present condition, there is a real possibility I may kill someone, but, with that in mind, I will go ahead and take the risk that I may kill myself or someone else."

Such was the case in *Autry, supra*, where the defendant was clearly warned of the life threatening nature of his conduct when he was about to engage in it and while he was engaged in

it, and unmistakably rejected the warning. Autry's probation officer warned him that day not to drive drunk and while he was driving in a wildly dangerous manner his passengers begged him to stop. Likewise, in *Sanchez*, the defendant's wife warned him on the morning of the accident not to drive drunk. In *Murray, Olivas*, and *Whitfield*, the defendants, in addition to having multiple prior drunk driving convictions, had near miss accidents just prior to the fatal ones that put them on notice that they were likely to cause a fatal crash. In *People v. Albright* (1985) 173 Cal.App.3d 883, the defendant admitted that he was trying to kill himself by driving recklessly before a fatal accident, thereby fulfilling the requirement that he acted in conscious disregard for human life.

Here, there is not a shred of evidence that either Billy Moon or Stewart Shapton was thinking about the possibility of their dying or their killing someone else. The evidence is uncontradicted that they were "having fun" by trying to "get some air" on Bell Road, apparently a common practice among youth in the area. The driver of that car acted in a manner no reasonable person would, and thereby was guilty of the gross negligence that constitutes a necessary element of vehicular manslaughter. But the prosecutor pointed to no evidence in her argument, and the record contained none, that Mr. Moon, if indeed he was the driver that night, decided to speed after consciously realizing that he, or Stewart, or anyone else, might well die if he pushed the accelerator of his car to the floor. The death of Stewart Shapton was not a malice murder.

D. Errors In The Supplemental Instructions, When Combined With The Weakness of the Evidence of Implied Malice, Require A New Trial

1. The Supplemental Instruction on Relevance

As noted above, during its deliberations, the jury sent a note asking the relevance of the evidence introduced at trial supporting the conclusion that Stewart Shapton had been a willing participant in the speeding episode that led to his death, as witnesses had described two voices whooping and hollering as the Audi sped down Bell Road, sounding like the passengers "were having fun." Specifically, the jury asked in its note: "For example, if the jury were to determine that it is more likely than not that the driver took the risk of accelerating the car to over 100 mph

for purposes of experiencing the car going airborne at the crest of the hill, is it relevant in determining the first count (the implied malice element or otherwise) as to whether the victim at some point expressed to the driver either: his concurrence or active encouragement for taking the risk, or his concern or resistance against the taking of the risk?"

The Court considered this a question whether, assuming that Mr. Moon was driving the car, the fact that Stewart Shapton encouraged the speeding would free Mr. Moon from murder liability. The Court's response framed the issue in terms of causation, and provided the jury with a copy of CALCRIM 602. Under that instruction, if Mr. Shapton alone caused the crime, then Mr. Moon would not be guilty of murder, but if the defendant's conduct was a substantial factor in causing Mr. Shapton's death (and it certainly would be if he was driving the car), then Mr. Shapton's role in encouraging the offense would not negate Mr. Moon's liability for murder.

The CALCRIM instruction is certainly a correct statement of the law of causation, but it did not directly respond to the crux of the jury's inquiry, which asked whether a finding that Mr. Shapton "expressed" his encouragement (or resistance) to "accelerating the car to over 100 mph for purposes of experiencing the car going airborne at the crest of the hill." would be relevant to the determination of implied malice. The answer to that question had to be a clear and unequivocal "yes, any such expression would be relevant to the determination of the existence or non-existence of implied malice."

Plainly, as in *People v. Autry* (1995) 37 Cal.App.4th 351, when passengers scream at a driver to stop driving wildly, that expression is powerful evidence that the driver realized that his conduct is endangering the lives of his passengers, and that in continuing to speed he consciously disregarded the danger to human life. But the converse is equally true. If a jury found that a passenger had encouraged a driver to speed in order to "catch air," a jury could conclude that the driver was focused only of having fun and was not subjectively thinking that he was putting the life of his passenger (or himself and others) in danger. The expression of encouragement by the passenger could alone create a reasonable doubt as to whether the defendant had the required mental state required for implied malice murder.

A criminal defendant's right to adequate jury instructions is guaranteed by the federal

Constitution's Due Process Clause; thus, when a jury's question indicates that it is confused about the instructions, the trial judge has a constitutional "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." *Bollenbach v. United States* (1946) 326 U.S. 607, 612-13 ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."); *see also People v. Beardslee* (1991) 53 Cal. 3d 68, 97) (Under Penal Code § 1138, the trial judge "has a primary duty to help the jury understand the legal principles it is asked to apply."); *People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1212) ("[T]he statute imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury.")]; *People v. Breverman* (1998) 19 Cal.4th 142, 155 ("'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'" [quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531])

The failure to adequately address the jury's question on the relevance of Stewart's expression of encouragement to the defendant in itself merits a new trial.[4]

2. The "Conscious Disregard" Supplemental Instruction

As *Dellinger* made clear, the "conscious disregard for human life" formulation of implied malice is equivalent to the alternative definition of "a base, antisocial motive and with wanton disregard for human life." These are strong words, meaning that "a finding of implied malice depends upon a determination that the defendant *actually appreciated the risk [to human life]*

[4] Apparently, there is no record of what was said by counsel during any discussion with the Court of the jury's first supplemental note. The absence of an objection to the Court's response would not, in any case, waive the issue of whether the Court's response was in error. Under penal Code section 1259, a defendant need not object to an instructional error to raise the issue on appeal. *People v. Croy* (1985) 41 Cal.3d at 12 n.6 ("[An] appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."); *People v. Garewal* (1985) 173 Cal.App.3d 285, 298-299 (attempted murder and assault convictions reversed for defective aiding and abetting instructions despite lack of defense objection, citing Penal Code section 1259)

involved . . ." 49 Cal.3d at 1217, citing *Watson*, 30 Cal.3d at 296-97. (First emphasis in original; second emphasis added). *Dellinger* rejected an argument that the defendant in that case may have been convicted without the jury finding that he acted in conscious disregard for life by noting with approval that the jury had also been instructed pursuant to CALJIC 8.51 that a defendant should be convicted of implied malice murder rather than manslaughter "[i]f . . . he had realized the risk and *acted in total disregard of the danger to life involved*." *Id.*, at 1222 n.2.

On the other hand, a conviction for vehicular manslaughter requires only a finding that, as an objective matter, viewed from the perspective of an "ordinarily careful person", a defendant's conduct evidenced a "disregard for human life or indifference to the consequences of [his] act." CALCRIM 590.

In response to the jury's question as to the definition of "conscious disregard," this Court replied: "Conscious disregard means choosing to pay no attention to something." No appellate court has ever approved such a definition of conscious disregard. The Court's supplemental instruction is certainly closer to the definition of vehicular manslaughter than it is to the only definition ever found to be equivalent to the CALCRIM language approved in *Watson, Dellinger,* and *Knoller* — i.e., the powerful formulation of "a base, antisocial motive and with wanton disregard for human life." The supplemental instruction diluted the state's burden of proof on the critical element of implied malice. A new trial is required absent proof beyond a reasonable doubt that the error did not effect the jury's verdict. *Neder v. United States* (1999) 527 U.S. 1. Given the closeness of the evidence on implied malice, the misinstruction on implied malice.

II. THE PROSECUTION'S VIOLATION OF CAL. PENAL CODE § 1054.1 PREVENTED THE DEFENSE FROM PRESENTING CRITICAL REBUTTAL EVIDENCE, AN ERROR COMPOUNDED WHEN THE COURT DISALLOWED EVIDENCE OF THE DISCOVERY VIOLATION

The core of the defense case revolved around the injuries suffered by Mr. Moon and Mr. Shapton, and how those injuries corresponded with the damage to the car. One such critical issue was the cause of the injury to Mr. Shapton's head. As the state's forensic pathologist, Dr. Henrickson, testified, Mr. Shapton suffered a severe acute injury to the right side of his head.

Defense expert Robertson testified that the injury was likely caused by contact with the car's B-pillar as it came down onto the driver during the crash. (9/30 Tr. at 86.) During the rebuttal phase of the trial, the prosecution offered the testimony of M.A.I.T. expert Chris Port, who opined that the injury was caused by contact with the rear passenger door grip. (10/2 Tr. at 28-32.)

Port's opinion about the cause of injury is not worthy of belief. It was undisputed that the severe injury to Mr. Shapton's head would have required at least 1,500 pounds of force. (9/30 Tr. at 77, 81.) The severe nature of the head wound itself, which was graphically demonstrated in photographs to the jury, made clear that Mr. Shapton's head made significant and violent contact with some external object. But it is almost inconceivable that the door grip — which was undamaged — could have caused that injury. As the attached report of Dr. Richard Lund attests, anything approaching the force required to cause Shapton's head injury when applied to the car handle would have caused severe damage. Other than "very minor superficial scratches," the door grip was not damaged at all.

And yet because the prosecution violated its discovery obligations by failing to disclose any information about Port's opinion in advance of his testimony, the defense had no opportunity to present rebuttal evidence at trail.

A. Background

1. Defense Requests for Disclosure

The defense informed the prosecution at least as early as September 2006 that it planned to argue at trial that Mr. Shapton was driving. Prior to trial, the defense complied with its discovery obligations under Cal. Penal Code § 1054.3, including supplying information regarding the testimony of Dr. Robertson.

On August 28, 2008, the defense sent to the prosecution a letter requesting disclosure of any reports or statements made by experts who would testify in response to Dr. Robertson's testimony. The prosecution disclosed nothing in response. On September 16, 2008, the defense filed a formal motion requesting disclosure of information regarding any potential rebuttal witnesses. Once again, the prosecution disclosed nothing in response.

On September 23, the defense raised the issue with this Court. (9/23 Tr. at 132.) The prosecutor indicated that she had received no statements, either written or oral, from any potential rebuttal witnesses. (*Ibid*.) The prosecutor claimed that she had disclosed nothing because she was not certain whether she would present any evidence to rebut Dr. Robertson's testimony.

> And as we indicated earlier, this was discussed in chambers and I understand this is a formal motion at this time. Just to set the record straight, I have met with M.A.I.T. about this case. I certainly have discussed with them areas of cross-examination of the Defense experts and I've -- certainly do intend to go into those areas. Beyond that, I have no idea at this point if I'm going to present rebuttal evidence or, if I do, what it will entail.
>
> In addition, I have to let the Court know that at this point I have received two different versions of a PowerPoint by the Defense, which are substantively different, and a report -- both -- all three of them from Dr. Robertson, for example. I don't know how he's going to testify. I don't know if he will make any concessions. If -- it will only be at that point after I have cross-examined Dr. Robertson, for example, that I make a determination whether or not it's necessary to put on rebuttal evidence. I just can't make that determination at this point. (*Id*. at 133-34.)

The defense once again explained the need for the disclosure:

> But what our concern is being properly prepared for any rebuttal testimony. And if she had -- she asked any of those witnesses if -- who was driving the car, for their opinion based upon the analysis and investigation they did, and they gave her an opinion, either way, it seems to me it's discoverable. If the opinion was, "We think Shapton was driving the car," then it seems to me that's Brady material, which we should have. And if they said, "We think it was Moon who was driving the car," it's difficult to understand how she would not call that witness in rebuttal. And we would be entitled to any information that she had retained -- obtained from that witness.
>
> (Id. at 135.)

Nonetheless, this Court accepted the prosecutor's representation that she had no plans to put on an expert in rebuttal, and that she had received no statements from M.A.I.T. experts about who was driving.

2. Port Testimony

The prosecution did, of course, call M.A.I.T. expert Chris Port to testify on rebuttal that Mr. Moon was driving and Mr. Shapton was riding in the passenger seat. The most important piece of his opinion testimony had to do with Mr. Shapton's head injury. Port opined that the

injury was caused by violent contact with the right rear door grip. (10/2 Tr. at 28-32.) Largely on the basis of that conclusion, Port opined that Shapton was riding in the passenger seat, in a reclined position, at the time of the accident.

On cross, the defense asked Port when he had first become involved in the case. Port was evasive. (*Id*. at 53.) He did admit, however, that he had been involved in the case for longer than 60 days. (*Ibid*.) He also admitted that he had likely received Dr. Robertson's report at least 60 days prior. (*Id*. at 54.) The defense then attempted to ascertain whether he had prepared any reports or responses to Dr. Robertson's conclusion, and this Court sustained a series of objections to those questions.

Mr. Moore:	Did you meet with and convey to Ms. Macumber any of your comments or opinions concerning Dr.Robertson's report?
Ms. Macumber:	Objection. This calls for privilege and it's not relevant.
Mr. Moore:	I think at this point there is a waiver. He's a witness testifying as an expert.
The Court:	Sustained. Next question.

(*Id*. at 55-56.)

The defense subsequently asked Port about the post-accident condition of the hand grip. Port stated that the hand grip (which was made of plastic) had "very minor superficial scratches," and no indentation of any kind. (*Id*. at 64.) He also conceded that he had no way of knowing whether the scratches were even caused by the accident, or whether they were preexisting. (*Id*. at 65.)

3. Robertson Rebuttal

In an attempt to rebut Port's testimony, the defense called Dr. Robertson back to the stand. The defense asked Dr. Robertson whether, if Mr. Shapton's head had struck the door grip with enough force to cause his massive injury, he would expect to see more damage to the door grip. (10/6 Robertson Tr. at 15-16.) This Court sustained the prosecution's foundation and lack of expertise objections, and refused to allow the testimony. (*Id*. at 17.)

B. Argument

The prosecution knew of Dr. Robertson's opinion concerning the source of the Shapton

head injury well in advance of trial. It is clear that before trial, Port reviewed the basis of that opinion, and in response, he formed a contrary opinion on the etiology of the wound, specifically including the door grip as its source. The prosecutor in this case was competent and well prepared. Any claim that Port never communicated his opinion concerning the door grip to the prosecution is simply unbelievable on its face. The prosecution's failure to disclose the basis for Port's opinion prevented the defense from offering a fair response and undermined the reliability of the jury's finding that Moon, not Shapton, was the driver.

1. The Prosecution's Duty to Disclose

The prosecution has the duty to disclose the basis of expert opinions in advance of trial. (*See* Cal. Penal Code § 1054.1.) Although the statute does not specifically mention rebuttal witnesses, the California Supreme Court has explicitly held that it covers witnesses expected to be called in rebuttal as well as those to be called in the case-in-chief. (*Izazaga v. Superior Court* (1991) 54 Cal. 3d 356, 375-376.) As the *Izazaga* Court held, both California's discovery statutes and the federal Due Process Clause require that the defendant be given "the opportunity to discover the prosecutor's rebuttal witnesses (and their statements) following discovery of defense witnesses by the prosecutor." (*Id*. at p. 377, citing *Wardius v. Oregon* (1973) 412 U.S. 470, 479.) Pursuant to that obligation, the prosecution must disclose anyone whom it "reasonably anticipates it is likely to call" in rebuttal. (*Izazaga*, *supra*, 54 Cal.3d at p. 376, fn. 11.) It also must disclose the contents of any statements made by such witnesses. That requirement extends to oral statements. (*Roland v. Superior Court* (2004) 124 Cal. App. 4th 154, 164-165.)

In short, after reviewing Dr. Robertson's report, the prosecution was required to disclose Port's proposed testimony if it reasonably anticipated that it was likely to call him as a rebuttal witness. Given that Dr. Robertson's trial testimony was congruent with this pre-trial report (which Port had reviewed well in advance of trial), the prosecution cannot seriously claim that it did not anticipate a likelihood that it would call Port in rebuttal. The prosecution was required to disclose statements, including oral statements, that Port made summarizing his conclusions and their factual premises. As an officer of the Court, the prosecutor simply cannot maintain that Port did not orally disclose to her his opinion concerning the door grip before Port took the stand.

2. Relevance of Discovery Violations

During its cross of Mr. Port, the defense attempted to establish that he had made statements to the prosecution regarding his conclusions, and that the prosecution had violated its discovery obligations by failing to disclose those statements. As described above, however, this Court rejected that line of questioning on relevance grounds. That ruling was error.

California law is clear that the jury may be informed of discovery violations, and that it may draw an adverse inference against the offending party; such information is therefore relevant. (*People v. Riggs* (2008) 44 Cal. 4th 248, 306-309.) In fact, if there is evidence of a discovery violation, the defense is entitled to an instruction under CALCRIM 306. In pertinent part, that instruction states:

> Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.
>
> An attorney for the (People/defense) failed to disclose: _____ <describe evidence that was not disclosed> [within the legal time period].
>
> In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.

Thus, if Port prepared any response to Robertson's report and orally disclosed his opinions to the prosecutor, and the prosecution failed to disclose that to the defense, the jury was entitled to consider that failure as part of its consideration of the evidence. This Court's ruling that any such evidence was irrelevant was clear error. (*See* Cal. Penal Code § 1054.5(b); *People v. Zamora* (1980) 28 Cal. 3d 88, 103; *People v. Edwards* (1993) 17 Cal. App. 4th 1248, 1265.)

3. The Inability to Respond to Port's Faulty Conclusion

Because the prosecution failed to disclose the basis for Port's conclusion, the defense had no ability to respond. Had it been given a fair opportunity to respond, the defense could have easily undermined Port's opinion. Port's conclusion that the severe injury to Shapton's skull was caused by contact with the unscathed door grip could have been rebutted in any number of ways, with an additional expert or evidence based on experimentation.

The attached report from metallurgic expert Richard Lund demonstrates the fallacy of Port's opinion. (See Exhibit A) Lund performed a simple test where he applied a force estimated to be approximately 930 pounds to an exemplar door grip. That amount of force caused significant and clearly visible damage. As Lund's report demonstrates, it is simply inconceivable that Mr. Shapton's head could have struck the grip in a way that caused a massive skull fracture but also left the door grip undamaged. [5]

The simple test performed by Lund is just one example of the type of rebuttal that could have been presented by the defense if the prosecution had timely disclosed the basis of Port's testimony. But because the prosecution engaged in the sort of sandbagging tactics that the discovery statutes are designed to prevent, Port's entirely unreliable door grip theory went unchallenged, constituting highly prejudicial but unreliable evidence on the central issue of identity. Mr. Moon is entitled to a new trial on Counts One and Two so that he may have a fair opportunity to challenge that dubious theory.

III. THE DENIAL TO THE DEFENSE OF THE OPPORTUNITY TO CORRECT THE PROSECUTION'S MIS-CHARACTERIZATION OF THE DEFENDANT'S MEDICAL RECORDS WAS PREJUDICIAL ERROR

Another critical forensic issue at the trial was that concerning foot injuries. Because the driver's side of the car, especially the footwell, was badly damaged, there was a strong argument that whoever was sitting in the driver's seat would have had lower body injuries. At trial, the prosecution falsely suggested that Mr. Moon's medical records showed lower body injuries.

As the attached report attests, the laceration referenced on Mr. Moon's medical record was to his head, not to his foot, as the prosecutor suggested.

> The medical records specifically state that the extremities are "without evidence of obvious trauma" (Bates 235, trauma history and physical authored by Dr. Michael Sutherland). This same report itemizes the other injuries noted above and the list of these injuries appears elsewhere in the medical records (i.e. Bates 242). No comment of a laceration on the legs or repair of same appears

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[5] The original of Doctor Lund's report will be offered at the hearing on this motion. Should the prosecution question the credibility of Lund's conclusions, an evidentiary hearing should be convened thereafter at which he may testify.

> anywhere in the medical records. It is my understanding that the trauma resuscitation flow sheet (Bates 243) had been interpreted by some to indicate the presence of a laceration on Mr. Moon, possibly on the "insole." The drawing which appears on the left mid-portion of this page demonstrates a laceration (labeled "lac") on the right side of the nose and a circle on the back of the head designated "bleeding." Overlying the lower leg portion of the drawing, the words "lac inside" appear. Based upon the review of the records in toto, these words most likely refer to the scalp injury rather than an injury on the legs not otherwise appearing in the medical records. Furthermore, I am unaware of an anatomic region described as an "insole."

(*See* Exhibit B, report of Dr. Terri L. Haddix.)[6]

After the prosecution offered her false interpretation of the medical record, this Court refused to allow the defense to correct the record. For the reasons described below, that ruling was prejudicial error.

A. Background

1. Robertson Direct

One of the chief witnesses for the defense was Dr. Richard Robertson, an expert in biomechanics. (9/29 Tr. at 135-36.) Dr. Robertson testified extensively over two days, and he provided extensive analysis to demonstrate that it was likely that Mr. Shapton, not Mr. Moon, was driving at the time of the accident.

Perhaps the most significant portion of his testimony focused on the physical injuries sustained by Mr. Moon and Mr. Shapton. He compared the injuries sustained by each occupant with the damage to the car. Analysis of post-accident photographs and other physical evidence demonstrated that the left side of the car — the driver's side — had sustained a significant impact. The passenger side, by contrast, had no such damage. (9/30 Tr. at 60.) As Dr. Robertson described,

> it [i.e., a photograph of the car] shows that we've got substantial force coming from the left side of the driver, which is then, again, consistent with the injuries that we see to Mr. Shapton. And noting

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[6] The original of Doctor Haddix's report as well as the full medical records for Mr. Moon from Sutter Roseville Hospital will be proffered at the hearing on this motion. Should the prosecution question the credibility of Doctor Haddix's conclusions, an evidentiary hearing should be convened thereafter at which she may testify.

> that anybody who is sitting in that driver's seat is going to likely see very substantial forces, particularly to the -- in the case of the driver's seat, to the left side, but also because of the damage to the headrest coming down from the top as well.

(9/30 Tr. at 58.)

Robertson testified that because the left side of the car, especially the driver's side footwell, had been collapsed by the accident, whoever was driving likely would have sustained significant injuries to the left side of the body, especially the lower extremities. (*Id*. at 58-59.) He reviewed the injuries that both Mr. Shapton and Mr. Moon suffered. (*Id*. at 54-56, 58.) Whereas Mr. Shapton had injuries to his lower left extremities, Mr. Moon did not. He testified that Mr. Shapton's injuries were:

> certainly consistent with someone having their feet in the driver's side foot well that was significantly compromised. In other words, it's being crushed. And I have a couple of slides of that. So that you would expect that if your feet are on the driver's side, it gets crushed; you're going to have some indication of that on your feet. And that there's even on Mr. Shapton's shoe -- on his left shoe, an indication of some tearing or scuffing of the -- of the leather itself.
> . . .
> This is a picture of the driver's -- or sorry -- the passenger's side compartment showing that there is no – A, there's no pedals in there, and, B, there's no crushing of the foot well area. So there really is nothing in that area that provided an opportunity for creating things like abrasions, contusions, or other injuries to the -- to the feet. And so it really shows quite a contrast where Mr. Moon has nothing on that part of his body, his feet, lower extremity, whereas Mr. Shapton has a considerable number of contusions and abrasions.

(*Id*. at 59-60.)

Dr. Robertson concluded that based on the nature of the accident and the injuries sustained by Mr. Shapton — particularly those injuries on his legs, ankles, and feet — he must have been in the driver's seat. (*Id*. at 62-63.) And he concluded that based on the lack of injuries on Mr. Moon's lower extremities, he must have been in the passenger's seat. (*Id*. at 63.)

2. Robertson Cross

The prosecutor opened her cross of Dr. Robertson in dramatic fashion with a piece of evidence that appeared to critically undermine his analysis.

> Q: Sir, you've indicated several times in your testimony that you believe that it's important to your analysis that the Defendant

did not suffer any injuries to his lower extremities, his feet, his lower legs; is that right?

A: I did say that would be more consistent with being in the passenger seat, yes.

...

Q: So would it affect your opinion if you learned that, in fact, the Defendant had suffered injuries to his lower extremities in this collision?

A: I guess it depends on what those would be.

Q: All right. And as it stands right now, you are aware of no injuries suffered by the Defendant to his lower extremities; is that correct?

A: That's correct. (9/30 Tr. at 89-90.)

She then provided him a copy of the hospital medical record.

Q: All right. And what does it indicate there in terms of any injuries noted by the hospital staff to the Defendant's lower extremities?

(Witness reviews document.)

A: It looks like it says, "l-a-c" -- which I assume is "laceration" -- "to the insole."

Q: All right. And are you familiar with how the hospitals document areas that have suffered general lacerations and contusions?

A: Yeah. Usually they have, like, an injury diagram and they, you know, just scribble in to indicate those.

Q: Right. Okay. Can I show you, then, this particular portion here in that -- on that page. You see where I'm pointing?

A: I do; yes.

. . .

Q: And could you describe what has been noted there to the Defendant's lower part of his legs beneath the knee?

A: You know, I saw that and I wasn't clear, because initially, it looked like somebody may have put something around the knees, then they kind of had to scribble, like they were scribbling it out or something. So it's not clear to me exactly what that means.

(*Id*. at 91.)

She then used his apparent failure to account for the injuries to Mr. Moon's lower

extremities as a way to attack his opinion, and returned to the topic several times. (*See, e.g.*, Id. at 91-94, 100, 113-15.)

3. Robertson Redirect

On redirect, the defense attempted to correct the prosecutor's mistaken characterization of the medical records. Defense counsel showed Dr. Robertson the same records, and asked him to clarify what the notation indicated. (9/30 Tr. at 133-134.) The prosecutor objected on hearsay grounds, and this Court sustained the objection. (Id. at 134.) The defense attempted to elicit additional records showing no injuries to Mr. Moon's lower extremities, and the prosecution once again objected.

This Court requested a basis of admissibility from defense counsel, and defense counsel responded that the record was admissible as a business record, and also that experts are entitled to rely on hearsay. (Id. at 139.)

> MR. BLACKMON: I'd offer it as a business records exception, Your Honor.
>
> THE COURT: No foundation's been laid, Counsel.
>
> (Sotto voce discussion between Mr. Blackmon and Mr. Moore.)
>
> MR. BLACKMON: Your Honor, he can rely on hearsay as an expert.
>
> THE COURT: Counsel, please. I haven't solicited argument in front of the jury. Let me put it this way: You may not argue in front of the jury. Do you understand me?
>
> MR. BLACKMON: I understand you entirely, Your Honor. I do not mean to argue with this Court at all.
>
> THE COURT: Please don't then.
>
> MR. BLACKMON: I was merely stating the grounds for the hearsay exception, possibly in further support of my position.
>
> THE COURT: Well, I'd be happy to hear that. Would you please state the Evidence Code section that is the basis for your hearsay exception?
>
> MR. BLACKMON: Well, Your Honor, I think it's all settled in the law --
>
> THE COURT: Excuse me. Counsel, the number of the Evidence Code only, without argument.

> MR. BLACKMON: Then I'd like to reserve this. We can take it up outside of the presence of the jury then later today, Your Honor.
>
> THE COURT: Next question. (*Id*. at 139-140.)

4. Closing Argument

During her closing argument, the prosecutor emphasized at some length how the purported injuries to Mr. Moon's foot undermined Dr. Robertson's testimony.

> There was also quite a bit of talk about the injuries to feet. Now, there's been testimony that both the Defendant and Stewart suffered some injuries to their feet. When Mr. Robertson testified, he told us that there is no possible explanation for the victim's injuries. And he had remembered it was contusion-abrasion-type injuries to the tops of his feet. There's no possible explanation for those injuries.
>
> I had him read -- I read to him the sentence that he wrote in his report. He said, "Yeah. I wrote that. No way that those injuries were caused anywhere but in that driver's seat foot well." But what about the Defendant's foot? There was certainly evidence that in the medical records he had a laceration to the bottom of his foot. A laceration, not just a contusion or an abrasion, but a laceration to his insole.
>
> There was also some evidence that he had contusions to his lower extremities. I'll give it to Mr. Robertson. He didn't call to confirm, because apparently it wasn't important to him. I'm not sure. But let's say that someone crossed those out. Certainly, the laceration at the insole is sort of an important -- an important fact, not just for the evidentiary value of the laceration, but for the fact that Mr. Robertson was provided about 100 photos of the Defendant from the hospital of his injuries. Not a single one from the knees down. Pictures showing slightest injuries, but nothing from the knees down.

(10/9 Tr. at 28-29.)

B. Argument

As summarized above, during her cross-examination of Dr. Robertson, the prosecutor presented evidence that Mr. Moon's medical records showed an injury to his leg. That evidence was false – the prosecutor mischaracterized the entries on the medical records.[7] On redirect, the defense attempted to correct the record, but based on the prosecutor's hearsay objection, this

[7] It should be noted that personnel at Sutter Roseville have been contacted and none will attest that the "lac" writing refers to a foot injury.

Court refused to allow the defense to inform the jury of the truth. That decision was error for three reasons.

First, the medical record was admissible for the nonhearsay purpose of showing the basis of the expert's opinion. It is well-settled that an expert may rely on hearsay. Cal. Evid. Code 801(b). And it is hornbook law that such evidence may be admitted not for the truth of the matter asserted, but rather to allow the jury to assess the weight of the expert's opinion.

> An expert often should be allowed to disclose to the jury the basis for an opinion because otherwise the opinion is left unsupported with little way for evaluation of its correctness. In those situations, the expert may testifiy to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. It is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception.

(*McCormick on Evidence* (6th ed. 2006) § 324.3; *see also West v. Johnson & Johnson Products, Inc*. (1985) 174 Cal.App.3d 831, 861; *Kelley v. Bailey* (1961) 189 Cal.App.2d 728, 737-738.)

Indeed, the prosecution's own experts relied on similar material. For example, the state's forensic pathologist Dr. Henrickson testified that he reviewed Mr. Shapton's medical records, and that they showed no significant prior medical issues. (Shapton Tr. at 9.) In fact, a large portion of Dr. Henrickson's testimony was based on hearsay evidence, since he admitted that he did not have independent recollection of the details of the Shapton autopsy, and so referred to his report in order to testify. (Id. at 53.) Thus, the prosecutor's hearsay objection was invalid on its face — there was no need to establish the foundation for a hearsay exception.

But second, even if resort to an exception were necessary, the exception clearly fit the requirements of the business records exception, Cal. Evid. Code § 1271. "It is well established that, as a general rule, 'hospital records are business records and as such are admissible if properly authenticated.'" (*People v. Diaz* (1992) 3 Cal. 4th 495, 535, quoting *People v. Moore* (1970) 5 Cal.App.3d 486, 492-493.) In this case, there was no question about the authenticity of the document, in part because the prosecution itself had already repeatedly relied on it, and had done so in her cross-examination of Dr. Robertson. Indeed, the prosecutor argued in closing that there was relevant "evidence . . . in the medical records" of defendant Moon. The prosecution is

thus ethically barred from contending that the Sutter Roseville records were not what they purported to be. Thus, even if offered for the truth of the matter asserted, there was absolutely no basis for excluding the records.[8]

Third, and perhaps most obviously, the prosecution had already admitted the very same statement on cross-examination. Indeed, as this Court ruled, the prosecution had already elicited the hearsay. (*See* 9/30 Tr. at 139 ["It was hearsay when she asked it."].) The hearsay had already been admitted – the defense merely sought to clarify and correct what the statement asserted. There is no basis in the hearsay rules, or any other provision of evidence law, for preventing a party from correcting the record regarding the content of an already-admitted hearsay statement. (*See People v. Dennis* (1998) 17 Cal. 4th 468, 531 [holding that where defense counsel's cross-examination left a false impression about content of witness's testimony, prosecution had the right to respond by admitting hearsay statements on redirect].)

This Court's ruling refused to allow the defense to tell the jury the truth about the critical evidence in the medical record, and thus allowed the prosecution to proceed on false evidence. Moreover, the prosecutor put great weight on the supposed foot laceration in her closing argument. ((10/9 Tr. at 28-29: "Certainly, the laceration at the insole is sort of an important -- an important fact....) "The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such, it does, and it should, carry great weight." *People v. Talle* (1952) 111 Cal.App.2d 650, 677; *accord People v. Pitts* (1990) 223 Cal.App.3d 606, 694 ("A prosecutor's closing argument is an especially critical period of trial"); *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].)

The lack of an injury to the lower extremities of Moon and their presence on Shapton

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[8] Although defense counsel cited the business records exception as a basis, this Court demanded a citation to the number of the evidence code: "Counsel, the number of the evidence code only, without argument." (9/30 Tr. at 140.) Defense counsel was apparently unable to remember the citation, § 1271, so this Court instructed defense counsel to proceed with other questioning. There is of course no requirement that a party offering hearsay evidence cite the precise code number in order to admit the evidence.

alone could have raised a reasonable doubt in the mind of jurors as to who was driving. Given the importance of the issue to the case, and given the weight put on the issue by the prosecutor in her closing, the error was highly prejudicial, and in itself requires a new trial on Counts One and Two.

IV. THE EXCLUSION OF DEFENSE-PROFFERED TESTIMONY CONCERNING THE RECORDS OF THE DEFENDANT'S DUI CLASSES WAS ERROR WHICH, WHEN COMBINED WITH THE OTHER ERRORS IN THE TRIAL, REQUIRES A NEW TRIAL

A. Background

As described more fully in the implied malice argument above, the prosecution sought to establish implied malice by calling several counselors from Pacific Educational Services. These witnesses described the sessions that Mr. Moon attended after his 2005 DUI conviction.

On direct, during the testimony of counselor Charles Foden, the prosecution introduced evidence of Moon's statements on a Participant Program Evaluation form. (9/30 Tr. at 20.)

> Q: Okay. The first question that is asked in terms of the evaluation, can you tell us what is asked there and tell us the Defendant's answer.
>
> A: The question is -- is: "Why are you in this class?" The answer is, "I am in this class for a DUI."
>
> Q: Okay. Is there more to that answer?
>
> A: Yes, ma'am.
>
> Q: Can you go on, please.
>
> A: "What skills have you learned today to help you next time when the same situation arises?"
>
> Q: His answer?
>
> A: "I have learned that certain things trigger addiction that I need to avoid and if I avoid them I will stay out of trouble." (Ibid.)

On cross, the defense attempted to introduce additional statements made by Mr. Moon on the same form. The prosecution objected on hearsay grounds, noting that the statements were not admissions, and this Court sustained the objection. (Id. at 22.) The statements that were excluded indicated that, in the future, if Mr. Moon were drinking, he would not drive and that he

would "make a plan" to deal with the situation.

Other evidence would have shown that plan was to give his keys to another driver. Defense witness Shane Evans offered testimony that Mr. Shapton enjoyed driving Mr. Moon's car. He said that when Mr Moon was drinking, Evans and Mr. Shapton would sometimes have a rock-paper-scissors contest to determine who got to drive. (9/25 Tr. at 42.) Other times, they would call "shotgun" and "whoever said it first would get to drive." (Ibid.)

B. Argument

The ruling excluding the statement was error for two reasons.

1. Rule of Completeness

First, under the rule of completeness, when one party introduces part of a document, the other party is entitled to admit the rest of the document in response. In California, the rule of completeness is codified in Evidence Code § 356. It states:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

As the California Supreme Court has explained, § 356 applies in precisely these circumstances. "[I]f a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.'" (*People v. Arias* (1996) 13 Cal. 4th 92, 156, quoting *People v. Breaux* (1991) 1 Cal. 4th 281, 302.) Thus, contrary to the prosecutor's argument, it makes no difference that the statements were not admissions — even if they were self-serving, they were admissible under § 356. (*People v. Stallworth* (2008) 164 Cal. App. 4th 1079, 1098.)

Moreover, the California Supreme Court has also made clear that the "in connection with" requirement must be applied liberally.

> In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation

> or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence. . . .'"

(*People v. Zapien* (1993) 4 Cal. 4th 929, 959, quoting *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174, italics in original.)

There is no question that Mr. Moon's other statements in the same evaluation form had "some bearing on, or connection with" the other statements made on the form. The ruling excluding statements offered by the defense was thus error under § 356.

2. State of Mind Exception

Even aside from the rule of completeness, this Court's ruling was error for another reason: the statements were admissible under the state of mind exception to the hearsay rule. Under Evidence Code § 1250:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> > (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
> >
> > (2) The evidence is offered to prove or explain acts or conduct of the declarant.
>
> (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

The statement made by Mr. Moon on the evaluation form was a statement of his plan and intent. It was offered as circumstantial evidence of his state of mind or conduct on a later date — namely, the time of the accident. Consequently, it came squarely within the terms of the rule.

Indeed, the history of the state of mind exception makes it clear that this was precisely the sort of statement that the exception was meant to cover. The state of mind exception dates to the classic case of *Mutual Life Ins. Co. v. Hillmon* (1892) 145 U.S. 285. In that case, a man named Walters had written letters to his family explaining his intent to travel west with Hillmon.

When Walters later turned up dead, the letters were offered as circumstantial evidence that he had, in fact, traveled with Hillmon. The Supreme Court held that the exclusion of the letters was error. (Id. at pp. 299-300.)

The California Supreme Court adopted the *Hillmon* rationale in *People v. Alcalde* (1944) 24 Cal. 2d 177. Under the *Hillmon* doctrine: "From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn." (*Id*. at 185.) Thus, the Court held that "declarations of present intent are admissible to prove a future act." (*Id*. at p. 186.) Section 1250 codified the *Hillmon-Alcade* doctrine. (*People v. Jones* (1996) 13 Cal. 4th 535, 548 ["The legislative history of section 1250 makes it clear that this provision specifically was intended, in part, to codify the *Alcalde* decision."].)

The defense sought to show that because Mr. Moon had been drinking, he had turned the keys over to Mr. Shapton. Under § 1250, Mr. Moon's prior statement of intent was admissible to prove that subsequent act. This Court's ruling excluding that evidence was prejudicial error.

CONCLUSION

For the foregoing reasons, the Court should vacate defendant Moon's convictions on both counts and set the matter for a new trial. Alternatively, the Court should order a new trial on the count one charge of second degree murder.

DATED: February 9, 2009

Respectfully Submitted,

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