No. 19-

In the United States Supreme Court

PHILIP ROGERS,

Petitioner,

v.

DEBBIE ASUNCION, Warden,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

AMY M. KARLIN
Interim Federal Public Defender
MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Philip Rogers was driving after several drinks. Ahead of him a woman was jaywalking, possibly obscured by two bicyclists also crossing. When he saw the woman he tried to avoid her. But she stepped back into the path of the car, which fatally struck her. Though Rogers's defense counsel learned that the pedestrian had cocaine in her system, he failed to introduce that fact at trial to prove that her conduct was unforeseeable.

Did this failure render counsel's assistance constitutionally ineffective?

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PETITION FOR WRIT OF CERTIORARI

Philip Rogers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's unpublished memorandum disposition is published at 777 F. App'x 257, and reproduced at App. 1a. The district court's unpublished memorandum opinion and order is reproduced at App. 5a. The state superior court's unpublished reasoned ruling is reproduced at App. 22a. The state court of appeal's unpublished opinion is reproduced at App. 22a.

JURISDICTION

The Ninth Circuit affirmed on September 20, 2019. (App. 1a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to … have the assistance of counsel for his defense.

The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Finally, 28 U.S.C. § 2254 provides in pertinent part:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

…

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A. The collision.

One mid-July evening, Philip Rogers was driving south on San Pedro Street.[1] It was around 8:20 p.m. Ahead of him was East 80th Street, which meets San Pedro at a "T" junction.

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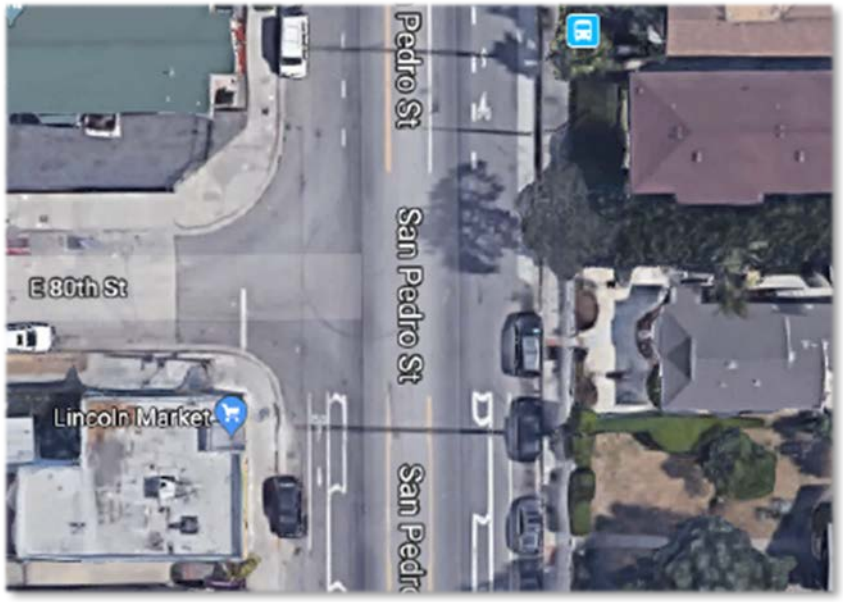
[1] Unless otherwise noted, the facts in this section are as reflected in the "factual and procedural background" section of the California Court of Appeal's opinion. (*See* App

Figure 1—80th and San Pedro[2]



There at the intersection, two boys on bicycles began jaywalking San Pedro from the east side, at a diagonal toward the south-west corner, remaining north of the unmarked crosswalk[3] that ran from that corner east-west across San Pedro. Meanwhile, a woman named Mary Webster was also jaywalking, south of the crosswalk, moving more directly east to west.[4] (*See* Defense Exhibit B[5] ("Video") 20:24:24–29; Reporter's Transcript ("RT") 497.)

26a–29a.) Rogers does not concede that any other statements of fact in that opinion are true.

[2] Ninth Circuit ECF No. 44.

[3] Where two streets meet at right angles and there's no crosswalk marked, an unmarked crosswalk is considered to run along the area of the road that would be covered if the sidewalk were extended across it. (RT 382, 497–98.)

[4] Though the state court of appeal and district court both stated that the collision was between 79th and 80th (*see* App. 7a, 27a), the collision was south of 80th (*see* RT 526), which in turn is south of 79th.

[5] Ninth Circuit ECF No. 45.

The next critical seconds were caught by a security camera near the intersection. As Rogers' car enters the camera frame, the bicyclists finish crossing the street, possibly opening the line of sight between Rogers' car and Webster. Within about the next second, Rogers veers from the right to left southbound lane, and would likely miss Webster. But Webster turns back, into the car's path, and is hit full on. (*See* Video at 20:24:30–32; RT 327, 439, 492–93, 496, 499, 504. *See also* RT 791–76, 803–07 (counsel arguing similarly in closing).) Webster would soon after die of her injuries.

LAPD officers Erin Burns and Kiel Kearney responded to the scene. Burns saw Webster lying in the street, Rogers next to her, kneeling, very emotional, possibly trying to resuscitate her. (RT 435–36.) Despite his emotions, which may have made it difficult for him to follow directions, he was cooperative. (RT 447.) He admitted that he'd had four beers to drink starting at about 7:00 p.m., and that his driver's license was suspended for a DUI conviction. Burns would later testify that Rogers's breath smelled strongly of alcohol, that he was flushed, and that he had watery eyes, an unsteady gait, and slurred speech, signs Burns believed showed intoxication. (RT 430–434.) An LAPD drug recognition expert named Anthony Trovato later took over the interview and ran Rogers through field sobriety tests, which were videotaped by a patrol car camera. Though the video of the interview would later be played, Trovato would never testify.

After the on-site interviews and tests, Rogers was transported to a police station, where an officer tried to give Rogers a breath alcohol test. But Rogers couldn't breathe into the tube long enough to generate

a sufficient sample. So he agreed to a blood test. After he was transported to the jail's medical facility, however, he changed his mind and refused. He was then transported to another station for a forced blood draw, and he continued to object. Still, when his blood was actually taken, about five hours after the accident, he didn't resist.

A blood analyst would later testify at trial that Rogers' blood alcohol level at the time of the draw was 0.22 percent, estimating that it would have been between 0.26 and 0.32 percent (the equivalent of about 15 8-ounce beers) at the time of the accident. Though defense counsel would try to challenge the analyst on these points (*see*, *e.g.*, RT 328), he would never call a defense expert to assist in those efforts.

Based on this evidence, Rogers was charged with gross vehicular manslaughter while intoxicated (count 1), vehicular manslaughter with ordinary negligence (count 2), driving under the influence and causing bodily injury (count 4), and driving while having 0.08% alcohol or more in his blood and causing bodily injury (count 5).[6] (App. 6a.) Rogers was also alleged to have suffered a prior conviction for driving under the influence of alcohol, a prior conviction for driving while having 0.08% alcohol or more in his blood, and a prior felony conviction for being a felon in possession of a firearm (*Id.*).

B. The preliminary hearing

At the preliminary hearing, Rogers' deputy public defender asked the coroner who examined Webster's body whether he did a toxicology

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[6] Based on the same underlying facts, Rogers was also charged with second degree murder (count 3), a charge later dismissed after the jury hung on it. (RT 847–48, 849.)

test and what the findings were. (RT 5–7). The defense theory was that Webster had been intoxicated and caused the accident by stepping in front of the car, as opposed to being struck as a result of Rogers' negligence. (RT 8.) Over the prosecution's objection, the coroner said that Webster at a blood cocaine level of 0.28 micrograms per milliliter. (RT 7–9.) Though the coroner couldn't say whether Webster was under the influence given the lack of information about her tolerance for the drug, he noted that cocaine may cause hallucinations, hyperactivity, or irrational behavior. (RT 10.)

C. The trial.

In opening statement at trial, defense counsel confirmed that Webster's conduct was still at the core of the defense: Despite Rogers' attempt to go around her, Webster "jump[ed]" back into the left southbound lane and was fatally hit. (RT 327.) Yet counsel didn't mention that Webster did this while having cocaine in her system. Nor would he ever seek to introduce that evidence.

The closest the trial court came to discussing the admissibility of this evidence was during trial outside the presence of the jury, when the court noted that it had read a vehicular manslaughter case in which the victim was not wearing a seatbelt, *People v. Wattier*, 51 Cal. App. 4th 948 (1996). (*See* RT 421–25.) *Wattier* held that a passenger's failure to wear a seatbelt at the time of the collision was not relevant to whether the defendant's negligent driving had caused the passenger's death. The sticking point there was that "facts attacking legal causation are only relevant if the defendant's act was *not* a substantial

factor in producing the harm," or (in other words) if there is no "superseding cause" that "break[s] the chain of causation *after* the defendant's act." *Id*. at 953–54. But here, the trial judge observed in contrast, Webster's actions were "very much a part of the accident." (RT 421–25.)

Testimony at trial by and large established the facts summarized above. But the doctor who autopsied Webster and had testified at the preliminary hearing wasn't questioned about her toxicology results this time. (RT 622–30.)

One new source of information was Marc Firestone, an expert physicist, who was called as a defense witness. Based on his analysis of the video and measurements at the scene, and consistent with the estimates given by officers testifying for the prosecution (RT 468, 509–10), Firestone opined that when Rogers began his skid, he was going about 37 miles per hour (RT 696–97)—two miles an hour over the posted speed limit of 35 (RT 387).

Firestone also opined that the average person's "perception and reaction time"—the time it takes to perceive something that's unexpected, recognize it, and then start to react to it—is about one and a half seconds during the day and two seconds at night. (RT 679.)

Before arguments, and at defense counsel's request, the trial court instructed the jury that "a person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even [if] it appears later that a different course of action would have been safer." (RT 751.)

In argument, the prosecutor pointed to the toxicologist's estimates of Rogers's blood alcohol content, and argued that knowing that he'd had too much to drink, and having been warned before about the dangers of drinking and driving, he still made the decision to drive while intoxicated, drove over the speed limit, and failed to yield. (RT 783–89.)

Defense counsel emphasized that although Rogers had been drinking (RT 791), the evidence showed that Rogers had been driving the way any other sober person would have been driving, and that a sober person would not have avoided the impact. (RT 805.) And other than his intoxication and the impact itself, there was no evidence that Rogers had been unable to control the car. (RT 810.)

But counsel also argued that Webster had created an emergency situation—that she had done so by crossing the street outside the unmarked crosswalk, at dusk, behind other jaywalkers ahead of her, circumstances that obscured her view from oncoming traffic. (RT 806, 811.)

The jury began deliberating at the end of the fourth day of trial. (RT 828.) They continued the next day, with an alternate juror seated in the morning after one of the other jurors fell ill. (RT 831–32, 833–34.) The jury reached a verdict at around 3:30 p.m., finding Rogers guilty on all counts except for count 3, and finding the prior DUI allegations true. (Clerk's Transcript at 207–209.) Rogers later admitted to the alleged felony prior (RT 863–64), and he was sentenced to 15 years to life on count 1 with another year for the felony prior.

D. Direct review and postconviction proceedings

Rogers pursued direct and postconviction review in state court exhausting his remedies there. (*See* App. 6a–7a.) The state postconviction court rejected Rogers's *Strickland* claim on the merits with a single sentence of analysis: "[That the victim had cocaine in her system] was totally irrelevant in this case and likely would not have been admissible." (App. 24a.)

Rogers timely filed a federal habeas petition in district court, alleging (among other claims) the same *Strickland* claim. The district court[7] too rejected it. Assuming that the evidence was admissible, the district court held that Rogers's counsel may have decided not to use the evidence because he had opted to argue that Rogers's level of intoxication had not impaired his driving enough for the jury to find him grossly negligent. (App. 19a.) And in any event, the district court concluded, there wasn't any prejudice: Given the evidence that Rogers had two prior DUI convictions and yet chose to drink to excess then drive that evening with his license suspended,[8] the evidence of Webster's cocaine intoxication didn't make a different trial outcome reasonably probable. (*Id*.)

The Ninth Circuit affirmed (App. 1a), and this petition follows.

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[7] The assigned magistrate judge, Jacqueline Chooljian, presiding by consent of the parties. (CR 25.)

[8] The district court's description of Rogers's vehicle as a "truck" (App. 19a) is mistaken. (*See*, *e.g.*, RT 383 (describing it as "car").)

REASONS FOR GRANTING THE WRIT

Review should be granted because the Ninth Circuit's unreported summary disposition is erroneous.

A. Standard of Review

Because Rogers's federal petition was filed after 1996, his case is governed by AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 323 (1997), under which Rogers can obtain habeas relief on a claim "adjudicated on the merits" in state court only if the adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d) (capitalization modified). In applying these standards, the Court looks to the last reasoned state court order—here, the state superior court's decision (App. 22a)—to address the merits of Rogers's claims. *Wilson v. Sellers*, —— U.S. ——, 138 S. Ct. 1188, 1192 (2018).

B. Rogers's trial counsel was constitutionally ineffective because he failed to present evidence that the pedestrian had cocaine in her system.

Rogers was deprived of his constitutional right to the effective assistance of his attorney at trial. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To prevail on his *Strickland* claim, Rogers has to show two things.

First, he has to show that his attorney's performance was "deficient," *Strickland*, 466 U.S. at 687—that it fell below an objective

standard of reasonableness under prevailing professional norms, *id.* at 688. Such deficiencies include an attorney's unreasonable failure to present relevant evidence. *See Duncan v. Ornoski*, 528 F.3d 1222, 1240 (9th Cir. 2008) (holding that failure to present serology evidence was constitutionally ineffective). And despite the "strong presumption" of reasonableness accorded trial counsel's decisions, "a single, serious error" may be enough. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986).

Second, Rogers has to show that his attorney's deficient performance "prejudiced [his] defense." *Strickland*, 466 U.S. at 687. This requires no more than a "reasonable probability" that but for the deficiency, "at least one juror" would have had a reasonable doubt about at least one essential fact. *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 776 (2017). A reasonable probability is one "sufficient to undermine confidence in the outcome" *Strickland*, 466 U.S. at 694, which "of course [is] less than a certainty, or even a likelihood," *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013) (defining phrase in context of plain error rule).

Rogers can meet both prongs.

1. The omission was unreasonable because the evidence tended to disprove the contested elements, and was consistent with the defense strategy.

The prosecution had to prove (among other elements) that Rogers had driven with "gross negligence," and that his grossly negligent driving was the "proximate cause" of Webster's death. Cal. Penal Code § 191.5(a).[9]

To act with "gross negligence" is to act with a conscious disregard of the consequences rather than with mere inadvertence." *People v. Bennett*, 54 Cal. 3d 1032, 1038 (1991), *as modified on denial of reh'g* (Jan. 30, 1992). This determination turns on "all" of the relevant circumstances, "including level of intoxication." *Id*. *See*, *e.g.*, *People v. Ochoa*, 6 Cal. 4th 1199, 1207–08 (1993) (holding evidence of gross negligence sufficient, where defendant drove intoxicated, abruptly changed lanes without signaling, and at 15 miles per hour over speed limit collided with victim's car without braking). But the "mere fact" of intoxication coupled with a traffic violation is not enough. *Bennett*, 54 Cal. 3d at 1039.

A defendant's negligent act is generally a "proximate cause" of an injury when the act is "directly connected" with the resulting injury without any "intervening force." *People v. Schmies*, 44 Cal. App. 4th 38, 49 (1996). But once an intervening force is in play—the conduct of a

[9] More generally, the death had to be the proximate result of either (1) "the commission of an unlawful act, not amounting to a felony," or (b) " the commission of a lawful act that might produce death, in an unlawful manner," with gross negligence required for either type of act. Cal. Penal Code § 191.5(a).

third party, for example—the question becomes whether the intervening act or force was "so unusual, abnormal, or extraordinary that it could not have been foreseen." *Id.* at 52. If it was, then it will render the defendant's act a remote rather than "proximate" cause. *Id.* at 49.

The most analogous cases that California courts have applied these principles to fall into broadly two types, neither of which is controlling here.

The first (considered but distinguished by the state trial court here, *see supra* p. 6) is when the defendant points to a "preexisting failure" by third parties to act that would have "prevented the effects of [his] conduct." *People v. Wattier*, 51 Cal. App. 4th 948, 953 (1996). Wattier had recklessly caused a collision that killed a passenger in another car. *Id.* at 951. He argued that the passenger's failure to wear a seatbelt was the superseding cause. *Id.* at 951. The court of appeal rejected the argument, observing that that far from an intervening force that that "broke" the chain of causation, the passenger's omission was an "*absence* of intervening force." *Id.* at 953. So the victim's omission wasn't relevant to showing that the defendant's act was "*not* a substantial factor in producing the harm." *Id.*

The second type is where the victim has made "predictable effort to escape a peril [that the defendant] created." *People v. Armitage*, 194 Cal. App. 3d 405, 421 (1987). In *Armitage*, the defendant had recklessly overturned a boat during a drunken escapade on the Sacramento River, causing his companion to drown *Id.* at 409, 419. He sought to introduce evidence that his companion had been drunk and had foolhardily tried to swim ashore, against his advice. *Id.* at 410, 419.

But as the court there observed, the defendant was the one who, through his misconduct, had placed his drunk companion in peril in the first place. This left his panicked companion's attempt to swim ashore to safety a "not wholly abnormal" reaction to the perceived peril of drowning. *Id.*

The fundamental difference between *Wattier* and *Armitage* (on the one hand) and this case (on the other) is this: The victims there played no part in creating the peril in which they found themselves. But the pedestrian here "very much" did. (RT 422.) More specifically, she did so through conduct that could have been tied to her use of a drug.

Only two states appear to have case law addressing this precise situation—and both have come to the same conclusion: Evidence about the alleged victim's drug or alcohol use can be used to prove that the victim's conduct was unforeseeable. *See People v. Feezel*, 486 Mich. 184, 199 (2010) (pedestrian's blood alcohol content); *Buckles v. State*, 830 P.2d 702, 707–08 (Wyo. 1992) (cocaine in driver whose car was hit by defendant).

The *Feezel* court's analysis will suffice here. Feezel had struck and killed a pedestrian while driving intoxicated, at night, in a rain storm. But he argued that the pedestrian's presence in the middle of the road under these conditions, with his back to traffic, and with a sidewalk nearby, was a superseding cause, and he sought to introduce evidence of the victim's blood alcohol content as additional proof of it. 486 Mich. at 199.

Applying evidentiary rules and substantive standards similar to California's, the *Feezel* court held that the evidence about the pedestrian's blood alcohol content was relevant because the charges "required the prosecution to prove an element of causation." *Id.* at 198. It was thus "highly probative of the issue of gross negligence, and therefore causation, because the victim's intoxication would have affected his ability to perceive the risks posed by his conduct and diminished his capacity to react to the world around him." *Id.* at 199. Indeed, it went "to the heart" of whether the victim himself was grossly negligent, *id.* at 200, which in Michigan is sufficient to break the causal chain between the defendant and the victim, *id.* at 195.

So too here. Rogers would have needed only to elicit reasonable doubt in the mind of a single juror about whether Webster's act was unforeseeable. Her cocaine intoxication was thus "highly probative … of gross negligence, and therefore causation." *Id.* at 199. And Rogers didn't need evidence that she was grossly negligent to do so. *Cf. id.* He just needed to show that her conduct was "so unusual, abnormal, or extraordinary" that a reasonable person wouldn't have foreseen it. *Schmies*, 44 Cal. App. 4th at 52. And because Webster's cocaine use "would have affected h[er] ability to perceive the risks posed by h[er] conduct and diminished h[er] capacity to react to the world around h[er]," *Feezel*, 486 Mich. at 199, the evidence would have provided jurors a completely different framework within which to assess and interpret her conduct—and to determine whether it would have been foreseeable to a reasonable person in Rogers's shoes.

Nor can the omission be attributed to a reasonable tactical decision. Trial counsel didn't just argue that Rogers had been driving reasonably. (*Cf.* App. 19a.) He argued that Webster, through her own misconduct, had caused the accident, by creating an emergency situation that no reasonable driver could have avoided. (RT 806, 811.) So there couldn't have been any tactical reason not to put Webster's cocaine use and its effects in play. *See Reynoso v. Giurbino*, 462 F.3d 1099, 1114 (9th Cir. 2006) (granting *Strickland* claim in AEDPA case, where counsel unreasonably omitted impeachment evidence would have been consistent with defense strategy). Doing so would have only added to the picture of a person who had not only created a dangerous situation through her own illegality, but had done so in ways that were likely to make her actions unexpected or abnormal, and thus unforeseeable.

And counsel didn't need an expert to do so, either. He already had the testimony from the coroner that Webster's blood cocaine level was measured at 0.28 micrograms per milliliter (RT 8), and that this level of cocaine may cause hallucinations, hyperactivity, or irrational behavior (RT 10). But even without the coroner's testimony, "common sense" says that people under the influence of cocaine and alcohol "may look and act in a strange manner." *Harris v. Cotton*, 365 F.3d 552, 556–57 (7th Cir. 2004) (capitalization modified) (granting habeas relief on *Strickland* claim based on counsel's failure to obtain victim's toxicology report to prove self-defense). Indeed, California courts have said as much. *See People v. Stitely*, 35 Cal.4th 514, 550 (2005) (stating that it's

"common knowledge" that "people act under the influence of alcohol in ways they do not ordinarily behave").

Still, even if counsel needed an expert, it couldn't have been very hard to find one. In the only federal or state case in Westlaw's database to mention the effect of "blood cocaine level(s)" on "behavior" within the same paragraph, an expert witness opined that a person with a BCL of 0.225 micrograms (or 225 nanograms) coupled with a high blood alcohol level might exhibit "schizophrenic symptoms," "impaired judgment," and "hostile, hyperactive, and delusional" behavior. *People v. Fortson*, 202 Mich. App. 13, 19 (1993). And even if here, without any alcohol, Webster's higher blood cocaine level would have manifested in less dramatic symptoms, a reasonable juror could still well have concluded that the drug would have had a big enough effect on her perception and judgment to cause her to act in unforeseeable and unpredictable ways, thus breaking the causal chain.

Finally, it is no answer to any of this to say that if counsel had argued Webster's intoxication, "the prosecution undoubtedly would have countered" that Rogers's own intoxication was a " 'substantial factor' " in the accident. (App. 19a (quoting *Wattier*, 51 Cal. App. 4th at 953).) Because the prosecution was going to argue that Rogers's was a substantial factor either way. So there couldn't have been any downside in letting the jury decide whether it was a substantial factor given Webster's conduct and cocaine use.

In sum, an objectively reasonable attorney would have introduced this evidence. The failure of this one to do so was deficient performance under *Strickland*.

2. But for the omission, at least one juror would have reasonably likely doubted that the pedestrian's jump back into the car's path was foreseeable.

And had he introduced that evidence, the issues would have been reframed in ways that reasonably likely would have led at least one of them to have a reasonable doubt about an essential fact. Webster's cocaine intoxication might not have "change[d] the [evidence] concerning [her] behavior;" but it does create a " 'reasonable probability' that [the jurors'] collective perception regarding [Rogers's] conduct would have changed." *Harris*, 365 F.3d at 556 (holding about evidence of victim's blood alcohol and cocaine levels to support self-defense claim).

Nor would it matter were there "no dispute" about her behavior. *Id*. Her blood cocaine level is still additional evidence that her behavior at the time was "altered and erratic." *Id*. And a reasonable juror confronting it could easily be inclined in that light to reinterpret Webster's conduct—and to reassess whether a reasonable person in Rogers's shoes would have foreseen it. If, having done so, at least one juror had a reasonable doubt that Webster's conduct was foreseeable, the jury could not have returned a verdict against Rogers on the gross vehicular manslaughter charge. And there's at least a reasonable probability that that would have happened. Rogers has thus shown that his attorney's deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687.

C. The state court's contrary decision was unreasonable, and Rogers therefore entitled to relief.

The state court's contrary assessment was an unreasonable application of *Strickland*, 28 U.S.C. § 2254(d)(1), an unreasonable

determination of the facts, *id.* § 2254(d)(1), or both. With no nod to considerations like those above, the state postconviction court's entire analysis consists of this one sentence: "[That the victim had cocaine in her system] was totally irrelevant in this case and likely would not have been admissible." (App 24.)

This reasoning can't be sustained. The core inquiry is whether the accident was free of any intervening act or force "so unusual, abnormal, or extraordinary that it could not have been foreseen." *Schmies*, 44 Cal. App. 4th at 52. California courts have expressly stated that the reasonableness of a third party's conduct can be relevant to that inquiry. *Id.* And it cannot be that intoxication is relevant when it comes to determining whether Rogers's conduct was grossly negligent, but not when it comes to determining whether Webster's conduct was sufficiently abnormal to break the causal chain. *See supra* pp. 14–15 (discussing *Feezel*).

Given its relevance, the evidence was also admissible. To start, "there is no bright line demarcating a legally sufficient proximate cause from one that is too remote." *People v. Cervantes*, 26 Cal. 4th 860, 871 (2001). So the question will "[o]rdinarily" be for the jury to decide. *Id.*

And that ordinary expectation applies here. Again, Rogers isn't citing a "preexisting failure" to act that would have "prevented the effects of [his] conduct,"[10] or Webster's "predictable effort to escape a peril [that he] created."[11] He is pointing to conduct that, as the trial judge

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[10] *Wattier*, 51 Cal. App. 4th at 953.

[11] *Armitage*, 194 Cal. App. 3d at 421.

here correctly observed, was "very much a part of the accident" (RT 422.) Webster's breach of her own duty of care as she illegally crossed the street, leading to her last-minute lurch back into the path of Rogers's car, all while cocaine was running through her system.

To the extent the state postconviction court made an evidentiary determination, this Court isn't bound by it. A state court's evidentiary ruling is due no deference when it is "untenable," or "amounts to a subterfuge to avoid federal review of a constitutional violation." *Sanders v. Ratelle*, 21 F.3d 1446, 1454 (9th Cir. 1994). This one fits that bill, because it fails to identify any legitimate or rationally defensible reason for keeping this evidence from the jury.

In sum, no fairminded jurist could agree with the state court's unanalyzed, knee-jerk denial here. It thus poses no bar to relief. *See* 28 U.S.C. § 2254(d)(1), (2). For the same reasons, and on de novo review, the Ninth Circuit should have granted it.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

December 18, 2019

MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner