APPENDIX

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP ROGERS, Petitioner-Appellant, v. DEBBIE ASUNCION, Warden, Respondent-Appellee.	No. 18-55102 D.C. No. 2:16-cv-00901-JC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jacqueline Chooljian, Magistrate Judge, Presiding

Argued and Submitted September 11, 2019
Pasadena, California

Before: RAWLINSON, IKUTA, and BENNETT, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Philip Rogers appeals the district court's decision to deny his petition for a writ of habeas corpus.[1] We have jurisdiction under 28 U.S.C. § 2253.

Rogers failed to establish that his trial counsel rendered ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Even if Rogers's trial counsel had introduced evidence that Mary Webster had .28 micrograms per milliliter of cocaine in her system at the time of the accident, there is not a reasonable probability that the result of the proceeding would have been different, given the jury was presented with evidence that Rogers had a high level of intoxication at the time of the incident, was driving with a revoked license over the speed limit, and had prior convictions for both driving under the influence of alcohol and driving while having 0.08% alcohol or more in his blood. Further supporting this conclusion, Rogers failed to introduce evidence that the cocaine in Ms. Webster's system had any intoxicating effect, and the video footage of the incident presented to the jury did not show that Ms. Webster's movements at the time of the incident indicated intoxication. Because we conclude on de novo review that Rogers failed to show that any deficient performance of trial counsel

[1] We grant Rogers's motions to take judicial notice of a Google map depicting the intersection where the events at issue took place and to transmit to the Court and take judicial notice of a video of the accident introduced during Rogers's trial in state court. *See McCormack v. Hiedeman*, 694 F.3d 1004, 1008 n.1 (9th Cir. 2012); *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

prejudiced the defense, we need not reach the question whether we afford AEDPA deference to the state court's decision. *See Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHILIP ROGERS, Petitioner, v. R. GROUNDS, Respondent.	Case No. CV 16-901 JC JUDGMENT

Pursuant to this Court's Memorandum Opinion and Order Denying Petition for Writ of Habeas Corpus and Dismissing Action, IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is denied and this action is dismissed with prejudice.

IT IS SO ADJUDGED.

DATED: May 11, 2017

/s/
Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILIP ROGERS, Petitioner, v . R. GROUNDS, Respondent.	Case No. CV 16-901 JC MEMORANDUM OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DISMISSING ACTION

I. SUMMARY

On February 9, 2016, petitioner, who is in state custody and is proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody with an attached memorandum (collectively, "Petition"), challenging a criminal judgment in Los Angeles County Superior Court.[1] Petitioner raises two grounds for relief: (1) blood sample evidence which was forcibly seized from him and the fruits thereof should have been suppressed pursuant to the Fourth Amendment in light of the post-sentencing decision in Missouri v. McNeely, 133 S. Ct. 1552 (2013); and (2) his counsel was ineffective because he failed to present evidence

[1]The Court herein refers to the Petition page numbers provided in the Case Management/ Electronic Case Filing (CM/ECF) system.

that the pedestrian victim petitioner hit and killed had cocaine in her system at the time of the collision. (Petition at 5, 10-11, 19-26).

On April 8, 2016, respondent filed an Answer ("Answer") and lodged multiple documents ("Lodged Doc."), including the Clerk's Transcript ("CT"), and the Reporter's Transcript ("RT"). Petitioner did not file a Reply.

The parties have consented to proceed before the undersigned United States Magistrate Judge. For the reasons explained below, the Petition is denied and this action is dismissed with prejudice.

II. PROCEDURAL HISTORY

On June 26, 2012, a Los Angeles County Superior Court jury found petitioner guilty of 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). (CT 219-22; RT 842-47).[2] As to all of the foregoing counts, the jury also found true, among other special allegations, that petitioner had suffered both a prior conviction for driving under the influence of alcohol and a prior conviction for driving while having 0.08% alcohol or more in his blood. (CT 219-22; RT 842-46). Petitioner thereafter admitted that in 2003, he had suffered a prior felony conviction for being a felon in possession of a firearm. (RT 863-64).

On July 26, 2012, the trial court sentenced petitioner to a total of 16 years to life in state prison. (CT 240-43, 261-62; RT 871). More specifically, the court imposed a sentence of 15 years to life on Count 1 and a consecutive sentence of one year based upon the 2003 prior conviction. (CT 240-43, 261-62; RT 871). The court did not impose sentence on the remaining counts – Counts 2, 4 and 5 –

[2]The jury was unable to reach a verdict on the second degree murder charge (Count 3), and that charge was dismissed. (CT 225; RT 847-79, 852, 857-58).

because they constituted lesser included offenses of Count 1. (CT 242-43; RT 864-66, 871).

On April 4, 2014, the California Court of Appeal affirmed the judgment. (Lodged Doc. 7). On June 18, 2014, the California Supreme Court denied review. (Lodged Doc. 9).

Petitioner thereafter sought and was denied habeas relief in the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court. (Lodged Docs. 10-12, 14-17).

III. FACTS[3]

Between about 7:00 p.m. and 8:00 p.m. on July 17, 2010, petitioner drank between four and 15 eight-ounce glasses of beer. (RT 393-94, 578, 583-84). By approximately 8:20 p.m., petitioner had a blood alcohol level of between 0.26% and 0.32%.[4] (RT 579, 589, 610). At about that time, petitioner was driving south on San Pedro Street when he hit and killed pedestrian Mary Webster, who was crossing San Pedro between 79th and 80th Streets. (RT 373-74, 459, 496-98, 630). A security camera at a market recorded the collision. (RT 439, 492-93, 496). The recording was played for the jury. (RT 492-93).

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[3]The Court has independently reviewed the entire state court record. See Nasby v. McDaniel, 853 F.3d 1049 (9th Cir. 2017) (essentially holding that federal habeas court required to review independently state court record where relief sought on basis of record before state court).

[4]A blood sample was taken from petitioner at about approximately 1:25 a.m. on July 18, 2010. (RT 478, 553, 555, 583). Such sample had a blood alcohol level of 0.22%. (RT 572, 576-79, 583). Although petitioner admitted to a police officer at the scene that he had drunk four eight-ounce glasses of beer beginning at 7:00 p.m., the criminalist who analyzed petitioner's blood sample estimated that petitioner would have had to drink about 14 or 15 eight-ounce glasses of beer to have a blood alcohol level of 0.22% five hours later. (RT 583-84). The criminalist estimated that at the time of the collision, five hours before the blood sample was taken, petitioner's blood alcohol would have been between 0.26% and 0.32%. (RT 579, 589, 610).

Los Angeles Police Officers Errin Burns and Kiel Kearney responded to the scene. (RT 373-74, 484). Burns saw Webster lying in the street and petitioner kneeling next to her. (RT 388, 390). Petitioner was very emotional. (RT 435-36, 447). Burns observed objective signs of petitioner's intoxication – he emitted a strong odor of alcohol, he was very sweaty, his face was flushed, his eyes were watery and bloodshot, his gait was unsteady and his speech was slow and slurred. (RT 430-32). Petitioner stated that he had drunk four beers starting at about 7:00 p.m. and that his license was currently suspended as the result of a prior driving under the influence conviction. (RT 392-96, 432-33). While Burns was speaking to petitioner, a patrol car equipped with a camera arrived at the scene and Burns's interview of petitioner, which was already in progress, was recorded. (RT 397-99). A recording of the interview was played for the jury. (RT 399-403). The same patrol car camera recorded Officer Trovato arriving at the scene and administering field sobriety tests to petitioner. (RT 403-04, 428-29). Such recording was also played for the jury. (RT 403-04, 428-29).

Trovato's partner that night, Officer Lashawn Robins, testified that after Trovato performed the field sobriety tests, she and Trovato transported petitioner to the 77th Street Police Station where Robins tried to administer a chemical breath test. (RT 534-41). Petitioner was unable to breathe into the tube long enough to get a sufficient sample. (RT 541-44). Petitioner ultimately declined to agree to submit to a blood test, but did not physically resist when his blood was being taken. (RT 474-76, 478-79, 544-48, 550). Nurse James McKeever drew petitioner's blood at about 1:25 a.m. on July 18, 2010. (RT 553, 555). Criminalist Chrissy Su analyzed petitioner's blood sample and determined that it had a blood alcohol level of 0.22%. (RT 572, 576-79, 583). Su estimated that at the time of the collision, petitioner's blood alcohol would have been between 0.26% and 0.32%. (RT 579, 589, 610); see supra note 4.

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At a later time, approximately eight months before trial, petitioner approached and spoke to the victim's brother, Bernard Webster, following a court proceeding. (RT 330, 332-33). Petitioner told the victim's brother that he was sorry for what had happened to the victim, that he just hadn't seen her, that she wasn't in the wrong, and that petitioner had been drinking all day. (RT 333-34).

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody 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." 28 U.S.C. § 2254(d).[5]

In applying the foregoing standards, federal courts look to the last reasoned state court decision and evaluate it based upon an independent review of the record. See Nasby v. McDaniel, 853 F.3d 1049 (9th Cir. 2017); Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir.), cert. denied, 133 S. Ct. 1831 (2013). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim are

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[5]When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562 U.S. 86, 99 (2011); see also Johnson v. Williams, 133 S. Ct. 1088, 1094-96 (2013) (extending Richter presumption to situations in which state court opinion addresses some, but not all of defendant's claims).

presumed to rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); Cannedy v. Adams, 706 F.3d 1148, 1158 (9th Cir. 2013) (it remains Ninth Circuit practice to "look through" summary denials of discretionary review to the last reasoned state-court decision), as amended on denial of rehearing, 733 F.3d 794 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014); but see Kernan v. Hinojosa, 136 S. Ct. 1603, 1606 (2016) (Ylst presumption is rebuttable; strong evidence can refute it).

V. DISCUSSION

A. Petitioner Is Not Entitled to Federal Habeas Relief on His McNeely Claim (Ground One)

In Missouri v. McNeely, 133 S. Ct. 1552 (2013) ("McNeely") – which was decided after petitioner was sentenced and while his direct appeal was pending – the Supreme Court held that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's search warrant requirement for nonconsensual blood testing in drunk driving cases; exigency must be determined case by case based on the totality of the circumstances. See McNeely, 133 S. Ct. at 1556, 1563 (observing that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specified case, . . . it does not do so categorically"). Petitioner contends in Ground One that McNeely, "dictates habeas relief" because petitioner was forced to provide a blood sample against his will in violation of the Fourth Amendment. (Petition, Ground One; Petition at 5, 10-11, 19-24). He essentially contends that the admission of Criminalist Su's analysis – which is summarized above and was not the subject of a motion to suppress or pertinent objection[6] –

[6]Although petitioner's counsel asserted a chain of custody objection to the admission of the blood/blood analysis at the conclusion of the prosecution's case in chief (RT 663-64), the record does not reflect that the seizure of blood from petitioner was the subject of a motion to (continued...)

violated the Fourth Amendment and should have been suppressed because it was a product of the unlawful forced seizure of his blood.

The Los Angeles County Superior Court – the last state court to issue a reasoned decision addressing this claim – rejected it on the merits on habeas review, finding that the instant case fell within the good faith exception to the exclusionary rule. (Lodged Doc. 11 (citing People v. Harris, 234 Cal. App. 4th 671 (2015)). As petitioner's claim is not cognizable on federal habeas review, and as the decision of the Los Angeles County Superior Court was not contrary to, or an objectively unreasonable application of, clearly established federal law and was not based on an unreasonable determination of the facts in light of the evidence presented, petitioner is not entitled to federal habeas relief on Ground One.

1. Petitioner's Fourth Amendment Claim Is Not Cognizable on Federal Habeas Review

Ground One is not cognizable in these federal habeas proceedings. Where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. See Stone v. Powell, 428 U.S. 465, 494 (1976); Newman v. Wengler, 790 F.3d 876, 878 (9th Cir. 2015) (Stone survived the passaged of the Antiterrorism Effective Death Penalty Act and bars a Fourth Amendment claim on federal habeas review where a petitioner had a full and fair opportunity in state court to litigate such claim); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996) (Stone renders Fourth Amendment claim not cognizable in federal habeas proceedings if a petitioner has had a full and fair opportunity to litigate the claim

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[6](...continued)
suppress or objection. See Segurola v. United States, 275 U.S. 106, 110-11 (1927) (failure to object constitutes a waiver of Fourth Amendment right against unlawful search and seizure).

in state court). "The relevant inquiry is whether the petitioner had the opportunity to litigate his claim, not whether he did in fact do so or whether the claim was correctly decided." Ortiz-Sandoval v. Gomez, 81 F.3d at 899 (citations omitted).

Although petitioner's counsel did not move to suppress the blood alcohol evidence or otherwise object to the introduction of such evidence based upon the forced seizure of blood from petitioner, he nonetheless had a full and fair opportunity to litigate petitioner's Fourth Amendment claim under California Penal Code section 1538.5. See Cal. Penal Code § 1538.5 (authorizing criminal defendants to seek the suppression of evidence obtained as a result of an unreasonable search or seizure); Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990) (discussing same as foreclosing relief under Stone). Because petitioner could have litigated his Fourth Amendment challenge at trial, his Fourth Amendment claim is not cognizable in these proceedings and must be rejected. See, e.g., Oenning v. Harris, 2015 WL 237899, at *2 (N.D. Cal. Jan. 16, 2015) (rejecting challenge that petitioner was not afforded a full and fair opportunity to litigate his Fourth Amendment claim because McNeely was decided after the trial court ruled on his suppression motion; claim was not cognizable under Stone), cert. of appealability denied, No. 15-15171 (9th Cir. Aug. 31, 2015).

2. In Any Event, a Motion to Suppress the Evidence from the Forced Blood Draw Would Have Been Denied and the Superior Court's Rejection of Ground One Was Reasonable

The Court observes that counsel had good reason not to move to suppress the evidence in issue as any such motion would have been denied based on then existing law. At the time a forced blood sample was seized from petitioner, Schmerber v. California, 384 U.S. 757 (1966), was controlling authority. Schmerber permitted warrantless blood draws in driving under the influence (DUI) investigations performed in a medically approved manner. See Schmerber v.

California, 384 U.S. at 770-72. "Post-Schmerber and pre-McNeely, a period spanning nearly 50 years, California cases uniformly interpreted Schmerber to mean that no exigency beyond the natural evanescence of intoxicants in the bloodstream, present in every DUI case, was needed to establish an exception to the warrant requirement." People v. Jiminez, 242 Cal. App. 4th 1337, 1362-63 (2016) (citations and internal quotation marks omitted).

"[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the [Fourth Amendment's] exclusionary rule." Davis v. United States, 564 U.S. 229, 232 (2011). When police conduct a search in compliance with binding precedent that is later overruled, the exclusionary rule does not bar the admission of evidence thereby obtained. Id. at 232; see also id. at 241 ("[W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances.") (emphasis original; citations and internal quotation marks omitted).

In petitioner's case, the blood draw was performed after petitioner had run over Ms. Webster, admitted that he had been drinking, and exhibited signs of inebriation. At the preliminary hearing, both Officers Burns and Trovato testified about petitioner's apparent inebriation at the collision site. Officer Burns observed that petitioner "had a strong odor of alcoholic beverage emitting from his breath," he was "very sweaty," his eyes were bloodshot, and his gait was "somewhat unsteady." (CT 13; see also RT 388, 391, 394, 430-32, 444, 451 (Burns's consistent trial testimony, stating that petitioner told her he had been drinking beer, *i.e.*, four eight-ounce glasses)). Officer Trovato (who did not testify at trial) also observed that petitioner's breath smelled of alcohol, he had slurred

speech, his eyes were bloodshot and watery, he was disheveled, and he had poor coordination. (CT 37-42). Field sobriety testing of petitioner's eyes, balance, and walking yielded results consistent with alcohol use that in Officer Trovato's opinion rendered petitioner unable safely to operate a vehicle. (CT 40-46, 51-54). Petitioner reportedly said to Trovato, "It's no secret I've been drinking. I just came from a funeral." (CT 40).

Sergeant Hayes testified a trial that the police may do a forced blood draw for chemical testing in a DUI investigation if the subject refuses to give a sample. (RT 470-71). Sergeant Hayes had explained to petitioner that he had an obligation under California law to submit to a chemical test from a standard admonition. (RT 471-74). Petitioner refused to give a sample. (RT 474-76). A forced blood sample then was taken from petitioner. (RT 476-81; 546-50, 553-56).

Given these facts, reasonable police officers would have believed that they were authorized to draw petitioner's blood under Schmerber. Any motion to suppress the blood alcohol evidence properly would have been denied. See People v. Jiminez, 242 Cal. App. 4th at 1365 (finding same where evidence was that defendant ran over pedestrians and informed a nurse with a police officer present that the defendant was "withdrawing from methamphetamine"). Indeed, on habeas review the Superior Court rejected petitioner's claim because the precedent at the time of petitioner's investigation was that probable cause of DUI and the natural dissipation of alcohol or drugs in the bloodstream justified a warrantless blood test, the police officers acted in good faith reliance on such precedent, and the exclusion of the evidence in issue would not have achieved the exclusionary rule's purpose of deterring Fourth Amendment violations. (Lodged Doc. 11 (citing People v. Harris, 234 Cal. App. 4th 671, 676 (2015)). In light of the foregoing, the Superior Court's rejection of petitioner's instant claim was not contrary to, or an unreasonable application of clearly established Federal law and was not based on

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an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

B. Petitioner Is Not Entitled to Federal Habeas Relief on His Ineffective Assistance of Counsel Claim (Ground Two)

In Ground Two, petitioner contends that his trial counsel rendered ineffective assistance by failing to introduce evidence that the victim had cocaine in her system at the time of the accident to mitigate petitioner's culpability. (Petition, Ground Two; Petition at 5, 11, 19, 25-26). The Los Angeles County Superior Court – the last state court to issue a reasoned decision addressing this claim – rejected it on the merits on habeas review, reasoning that whether the victim had cocaine in her system was "totally irrelevant" and "likely would not have been admissible." (Lodged Doc. 11). Petitioner is not entitled to federal habeas relief on this claim.

1. Additional Pertinent Facts

At the preliminary hearing, petitioner's counsel asked the doctor who performed the autopsy on Ms. Webster whether he did a toxicology test and what the findings were. (CT 5-7). Over the prosecution's objection, the doctor said that a toxicology test showed that Ms. Webster had cocaine in her system at a level of 0.28 micrograms per milliliter. (CT 7-8). The court asked counsel the legal relevance to Ms. Webster's intoxication, and counsel stated that if the victim is the cause of an accident – as would be argued in this case – Ms. Webster's intoxication would be relevant to whether petitioner was grossly negligent in his driving. (CT 8-9).

During trial outside the presence of the jury, the trial court noted that it had read a vehicular manslaughter case where the victim was not wearing a seatbelt, People v . Wattier, 51 Cal. App. 4th 948, 953 (1996) ("Facts attacking legal causation are only relevant if the defendant's act was *not* a substantial factor in producing the harm or injurious situation. The defendant is liable for a crime

irrespective of other concurrent causes contributing to the harm, and particularly when the contributing factor was a preexisting condition of the victim.") (emphasis original; internal citations omitted). To the court, it seemed that, unlike in Wattier, "the actions of the victim who died in this case [were] very much a part of the accident." (RT 421-25). The trial record reflects no further discussion or evidence regarding the victim's actions beyond how she crossed the street and likewise reflects no discussion or evidence of her toxicology results.

The doctor who performed the autopsy on Ms. Webster testified at trial about the victim's injuries but was not questioned about any toxicology results for Ms. Webster. (RT 622-30).

2. Pertinent Law

The Sixth Amendment guarantees the effective assistance of counsel at trial. See Strickland v. Washington, 466 U.S. 668, 686 (1984). To warrant habeas relief on an ineffective assistance of counsel claim, a petitioner must demonstrate both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. Id. at 668, 687-93, 697. As both prongs of the Strickland test must be satisfied to establish a constitutional violation, failure to satisfy either prong requires that an ineffective assistance claim be denied. Id. at 697.

Counsel's representation is "deficient" if it "fell below an objective standard of reasonableness." Id. at 688; Harrington v. Richter, 562 U.S. at 104, 111. Courts must apply a "strong presumption" that an attorney's performance was within "the wide range of reasonable professional assistance." Richter, 562 U.S. at 104 (citation omitted). A petitioner can overcome the presumption only by showing that, when viewed from counsel's perspective at the time, the challenged errors were so egregious that counsel's representation "amounted to incompetence under 'prevailing professional norms.'" Id. at 105 (citation omitted).

Deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is one

that is "sufficient to undermine confidence in the outcome" of the trial. Id. The likelihood that a verdict would have been different "must be substantial, not just conceivable." Richter, 562 U.S. at 112 (citation omitted).

Where there has been a state court decision rejecting a Strickland claim, review is "doubly" deferential. Richter, 562 U.S. at 105 (citing Knowles v. Mirzayance, 556 U.S. 111, 123-24 (2009)). "The pivotal question is whether the state court's application of the Strickland standard was unreasonable." Richter, 562 U.S. at 101; see also 28 U.S.C. § 2254(d). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 562 U.S. at 102 (citing Lockyer v. Andrade, 538 U.S. 63, 71 (2003)). Relief is available only if "there is no possibility fairminded jurists could disagree" that the state court's application of Strickland was incorrect. Richter, 562 U.S. at 102. Moreover, since "[t]he Strickland standard is a general one, [ ] the range of reasonable applications is substantial." Id. at 105 (citing Knowles, 556 U.S. at 123).

3. Analysis

Petitioner fails to overcome the strong presumption that his trial counsel's election to forego eliciting evidence of the cocaine in Ms. Webster's system was sound trial strategy under the circumstances. Strickland, 466 U.S. at 689.

Petitioner's defense was that, notwithstanding his drinking, he had been driving safely at the time of the collision and that Ms. Webster simply stepped out in front of petitioner's car without sufficient time for petitioner to avoid hitting her. Petitioner's counsel admitted in his opening statement that petitioner had been drinking before he drove that evening and did have prior convictions, but indicated that the evidence would establish that petitioner was not grossly negligent when he drove, and instead that he was driving safely. (RT 326-28). Petitioner's counsel pointed out that the evidence would show that petitioner was driving in his own lane of traffic at approximately 40 miles per hour in a 35 mile

per hour speed zone, when Ms. Webster jaywalked "at a staggered angle" in front of petitioner's car. (RT 327-29). Petitioner slammed on his brakes and tried to go around Ms. Webster, but she was going back and forth between lanes and moved right into petitioner's lane as he tried to swerve around her. (RT 327; see also RT 791-96, 803-13 (counsel arguing similarly in closing)).

Petitioner's counsel elicited evidence to support the defense explained in his opening statement. A responding police officer testified from the video footage of the collision that Ms. Webster was walking outside of an "unmarked crosswalk" (*i.e.*, a permissible place to cross the street at an intersection that was not painted as a crosswalk), just prior to being hit. (RT 494-97, 532). By state law, she should have yielded to traffic because she was not in a crosswalk. (RT 498, 508). The officer further testified, however, that even if a pedestrian is outside a crosswalk, drivers have a duty to use all due care to yield the right of way when approaching a pedestrian. (RT 498-99, 508-09, 516, 529-30, 532). Petitioner swerved from the number two lane to the number one lane right at the point of impact – suggesting that petitioner was trying to avoid hitting Ms. Webster. (RT 530, 681-82). The speed limit was 35 miles per hour but the officer opined based on his experience, the footage, and the evidence from the collision that petitioner had been driving faster than 35 miles per hour. (RT 500-02, 509-12, 517). An expert for the defense opined that petitioner had been driving between 35 and 45 miles per hour. (RT 682-90, 694).

Petitioner's counsel – in support of a California Penal Code section 1118.1 motion for judgment of acquittal – argued to the court outside the presence of the jury, that there was insufficient evidence to establish that petitioner drove with gross negligence to support the murder charge (which was ultimately dismissed after the jury was unable to reach a verdict thereon) or the gross vehicular manslaughter charge. (RT 635-37). The trial court disagreed, noting it had "little trouble" denying petitioner's motion in light of the evidence. (RT 637).

Counsel cannot be faulted for failing to try to admit toxicology results for Ms. Webster at trial. Counsel purposefully may have refrained from introducing the cocaine evidence because counsel was arguing in petitioner's defense that petitioner's consumption of alcohol – a fact counsel could not dispute – did not impair how petitioner was driving at the moment of the collision sufficient for the jury to find he was grossly negligent. If counsel had argued that Ms. Webster was impaired when she stepped into the street, the prosecution undoubtedly would have countered that petitioner also was impaired such that his intoxication was a "substantial factor" for criminal liability. People v . Wattier, 51 Cal. App. 4th at 953. Strategic decisions, such as the choice of a defense or which evidence to present, "are virtually unchallengeable" if "made after thorough investigation of law and facts relevant to plausible options." Strickland, 466 U.S. at 690. There is no suggestion in petitioner's case that his counsel did not thoroughly investigate the applicable law and facts.

Assuming, *arguendo*, the toxicology evidence would have been admissible at trial had counsel sought to introduce it, petitioner has not shown a reasonable probability that the outcome of trial would have been different if the jury had known that Ms. Webster had cocaine in her system. Strickland, 466 U.S. at 694. As summarized herein, the jury was presented with evidence that Ms. Webster jaywalked in front of petitioner's car. The fact that there was cocaine in her system would not have changed the substantial other evidence of petitioner's own culpability, *i.e.*, that petitioner, having suffered two prior DUI convictions (RT 728-33), chose to drink to excess and, even though his driver's license had been revoked, then chose to get behind the wheel of his truck and drive that evening (RT 388, 391, 394, 430-32, 444, 451).

In short, the Los Angeles County Superior Court's rejection of Ground Two was not unreasonable and petitioner is not entitled to federal habeas relief on such claim.

VI. ORDER

IT IS THEREFORE ORDERED: (1) the Petition is denied and this action is dismissed with prejudice; and (2) Judgment shall be entered accordingly.

DATED: May 11, 2017

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 02/23/2016 02:35 PM

Docket (Register of Actions)

ROGERS (PHILIP) ON H.C.
Case Number S229362

Date	Description	Notes
09/17/2015	Petition for writ of habeas corpus filed	Petitioner: Philip Rogers Pro Per
12/16/2015	Petition for writ of habeas corpus denied	

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CV 16-901 DSF (JC)
Rogers v. R. Grounds
Lodged Doc. 11

FILED
Superior Court of California
County of Los Angeles
APR 22 2015
Sherri R. Carter, Executive Officer/Clerk
By _____ Deputy
Melody Ramirez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

IN RE	BA 373750
PHILLIP ROGERS,	RULING
Petitioner,	
ON HABEAS CORPUS	

On July 17, 2010, petitioner, who had three prior driving under the influence convictions (one in 1996, and two in 2006) and was driving despite his license being suspended, was grossly intoxicated and crashed his car into a sixty-year-old woman pedestrian, killing her. He was convicted by jury of gross vehicular manslaughter while intoxicated and related offenses. His conviction was affirmed on appeal. (*People v. Rogers* (April 4, 2014) 2014 Cal. App. Unpub. LEXIS 2413.)

In this habeas petition, Rogers asserts the recent United States Supreme Court decision of *Missouri v. McNeely* (2013) 569 U.S. ___ [185 L.Ed. 2d 696, 133 S.Ct. 1552] dictates he be granted habeas relief. McNeely held that before police may conduct a non-consensual blood test of a motorist arrested on suspicion of drunk driving, they must obtain a warrant or demonstrate exigent circumstances. Petitioner asserts that following his arrest in

this case, he was forced to provide a blood sample against his will; that the resulting sample was wrongly obtained in violation of his constitutional rights; and as a result he was wrongly convicted. He is mistaken.

People v. Harris (2015) 234 Cal. App. 4th 671 considered the application of McNeely to California drunk driving investigations conducted prior to McNeely. Defendant Harris was convicted of driving under the influence. He asserted the McNeely decision required reversal of his conviction. The Harris court disagreed, finding that Harris had freely and voluntarily provided a blood sample and that his Fourth Amendment rights were not violated. Of significance here, the Harris court specifically found the good faith exception to the exclusionary rule applied. The Court stated,

> Defendant's blood test was taken before the United States Supreme Court decided McNeely, and at a time when the California courts uniformly held that probable cause of DUI and the natural dissipation of alcohol or drugs in the bloodstream was sufficient to justify a warrantless blood test. Because the police obtained defendant's blood sample without a warrant in reliance on binding precedent, excluding the evidence in the case would not achieve the exclusionary rule's purpose of deterring future Fourth Amendment violations.

People v. Harris, Id., p. 676.

The instant case falls within the good faith exception to the exclusionary rule for the reasons stated in Harris.

Petitioner's second ground for habeas relief is that trial counsel provided constitutionally ineffective assistance for not attempting to introduce the fact that the victim had some cocaine

in her system when she was killed. This was totally irrelevant in this case and likely would not have been admissible.

The petition for writ of habeas corpus is unmeritorious and is denied.

Dated: April 22, 2015

Robert J. Perry, Judge

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Filed 4/4/14

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP ROGERS, Defendant and Appellant.	B243041 (Los Angeles County Super. Ct. No. BA373750)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.

Michael S. Evans, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Phillip Rogers was intoxicated on July 17, 2010, when the car he was driving hit Mary Webster as she was crossing the street. A jury convicted defendant of gross vehicular manslaughter while intoxicated.[1] On appeal, defendant contends his conviction must be reversed because: (1) he was denied due process and a fair trial as the result of comments made by the trial court during voir dire; and (2) the prosecution did not adequately establish a chain of custody for the blood evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Collision

The nature of defendant's contentions does not require a detailed recitation of the facts. Viewing the evidence in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358), it is sufficient to state that between about 7:00 p.m. and 8:00 p.m. on July 17, 2010, defendant drank between 4 and 15 eight-ounce glasses of beer. By 8:00 p.m., defendant had a blood alcohol level of between 0.26

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[1] Defendant was charged by amended information with gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a); count 1); vehicular manslaughter without gross negligence (Pen. Code, § 191.5, subd. (b); count 2); second degree murder (Pen. Code, § 187, subd. (a); count 3); driving under the influence causing injury with two or more priors (Veh. Code, § 23153, subd. (a); count 4); and driving with a blood alcohol level over .08 percent causing injury with two or more priors (Veh. Code, § 23153, subd. (b); count 5); various enhancements were also alleged. Following a jury trial, he was convicted on counts 1, 2, 4 and 5; the jury found true the allegation that he had suffered two prior convictions for driving under the influence, had a blood alcohol level of .15 percent or more and refused to submit to a chemical test. The jury was unable to reach a verdict on the murder charge (count 3), which the People dismissed in the furtherance of justice. Defendant admitted the prior prison term enhancement and was sentenced to 16 years to life on count 1, comprised of 15 years to life for gross vehicular manslaughter plus a consecutive one year for the prior prison term enhancement. Finding the offenses charged in counts 2, 4 and 5 to be lesser included within count 1, the trial court did not impose any sentence on those counts. Defendant timely appealed.

percent and 0.32 percent.[2] At about that time, defendant was driving south on San Pedro Street, when he hit Webster, who was crossing San Pedro between 79th and 80th Streets. A security camera at a market recorded the collision. The recording was played for the jury.

Los Angeles Police Officers Errin Burns and Kiel Kearney responded to the scene. Burns saw Webster lying in the street and defendant kneeling next to her. Defendant was very emotional. He admitted drinking four beers starting at about 7:00 p.m. and that his license was currently suspended as the result of a prior driving under the influence conviction. While Burns was speaking to defendant, a patrol car equipped with a camera arrived at the scene and Burns's interview of defendant, which was already in progress, was recorded. A DVD of the interview was played for the jury. When Officer Trovato, a drug recognition expert, arrived at the scene, he took over the interview from Burns. Trovato's interview, including his administration of field sobriety tests, was recorded by the same patrol car camera. Trovato did not testify, but a DVD of his interview was played for the jury.

B. The Blood Sample

Trovato's partner that night, Officer Lashawn Robins, testified that after Trovato performed the field sobriety tests, she and Trovato transported defendant to the 77th Street Police Station where Robins tried to administer a chemical breath test. When defendant was unable to breath into the tube long enough to get a sufficient sample, he agreed to submit to a blood test. Defendant changed his mind after he was transported to

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[2] The blood sample taken from defendant at about 1:30 a.m. on July 18, 2010, had a blood alcohol level of 0.22 percent. Although defendant admitted to a police officer at the scene that he drank 4 eight-ounce glasses of beer beginning at about 7:00 p.m., the criminalist who analyzed defendant's blood sample estimated that defendant would have had to drink about 14- or 15-eight-ounce glasses of beer to have a blood alcohol level of 0.22 percent five hours later. The criminalist estimated that at the time of the collision, five hours before the blood sample was taken, defendant's blood alcohol would have been between 0.26 and 0.32 percent.

the jail's medical facility. He was then transported to Parker Center for a forced blood draw. At Parker Center, defendant continued to object to a blood test, but did not physically resist while his blood was being taken.

Nurse James McKeever drew defendant's blood at about 1:25 a.m. on July 18, 2010. McKeever testified that the dispensary at Parker Center keeps a stock of vacuum sealed vials (empty except for the necessary preservative material) to use for blood samples, and evidence envelopes preprinted with a form to be filled out by the officer and the person who draws the blood. In McKeever's experience, either the officer accompanying the suspect takes an empty vial, writes the date on it and hands it to McKeever or McKeever hands an empty vial to the officer, who writes the date on it and then hands it back to McKeever. McKeever then draws the subject's blood, which is sucked into the vial by the vacuum. McKeever shakes the vial to mix the preservative with the blood sample. After writing his initials and the time on the vial of blood, McKeever hands it back to the officer, who also writes the time and his initials on it. The officer then hands the vial back to McKeever, who places it into an evidence envelope. In this case, McKeever could not recall if he handed an empty vial to Trovato, or whether Trovato handed an empty vial to McKeever, but McKeever was sure that he followed the procedures just described. McKeever identified People's Exhibit No. 68 as the vial of blood McKeever drew from defendant, People's Exhibit No. 65 as the front of the evidence envelope into which he placed the vial of defendant's blood and People's Exhibit No. 70 as the back of that evidence envelope.[3] McKeever testified that he was present when Trovato filled out the top of the preprinted form on the front of the evidence envelope, including writing the case number and an acknowledgment that he observed the blood draw; McKeever filled out the bottom part of the form stating that he performed the blood draw. McKeever identified People's Exhibit No. 67 as a close up of the bottom part of the form which he filled out.

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[3] From the record, it appears that People's Exhibit Nos. 65 through 70 were photographs of the identified items, not the actual items.

Officer Joseph Covarrubias testified that at about 6:00 a.m. on July 18, 2010, Trovato asked Covarrubias to book into evidence the evidence envelope depicted in People's Exhibit Nos. 65 and 70. When Trovato handed Covarrubias the envelope, it had already been sealed with three evidence labels in accordance with Los Angeles Police Department procedures. Either Trovato or his partner wrote Covarrubias's name and serial number on the envelope in the "booked by" box. Without opening the envelope, Covarrubias transported it to the Southwest Station and booked it into evidence at about 7:00 a.m. that day.

When criminalist Chrissy Su received the envelope containing defendant's blood sample (People's Exhibit Nos. 65, 68, 70) it was properly sealed. Su broke the seal, opened the envelope, removed the vial of blood and analyzed it. She then returned the vial containing the remainder of the blood sample to the envelope, wrote her name and the date on the bottom front of the envelope and returned the envelope to the evidence locker or property division.

At the conclusion of the People's case-in-chief, defendant challenged the chain of custody of the blood sample evidence.[4] He argued that without Trovato's testimony, there was no evidence as to the whereabouts of the blood sample between 1:30 a.m. when McKeever placed the vial in the evidence envelope and gave it to Trovato and 7:00 a.m. when Covarrubis received the evidence envelope from Trovato. According to defendant, this was a missing essential link in the chain of custody. The trial court found the testimony and documentary evidence sufficient to establish chain of custody.

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[4] Although defendant did not object to Su's testimony on chain of custody grounds immediately after she began testifying (see Evid. Code, § 353; *People v. Hall* (2010) 187 Cal.App.4th 282, 292 (*Hall*) [defendant did not forfeit chain of custody challenge where he raised claim after criminalist began testifying]), the People did not challenge the timeliness of the objection in the trial court, nor do they do so on appeal. Accordingly, we do not decide the issue.

DISCUSSION

A. The Failure to Timely Object to the Trial Court's Comments Constitutes a Forfeiture of the Issue on Appeal

Defendant contends he was denied due process and a fair trial by comments the trial court made at the very outset of voir dire, when the prospective panel was still in the audience. He contends the comments amounted to a directed verdict. We find defendant's failure to timely object to the challenged comments and request an admonition constitutes a forfeiture of the issue on appeal. Even if the issue were not forfeited, we would find no merit in defendant's contentions.

Trial courts may comment on the evidence at a criminal trial, including during voir dire. (Cal. Const., art. VI, § 10; *People v. Sturm* (2006) 37 Cal.4th 1218, 1232.) But the court "may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) It is unlikely that comments occurring during voir dire will unduly influence the jury's verdict since they "obviously reach the jury panel at a much less critical phase of the proceedings . . . ." [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 797 [finding alleged prosecutorial misconduct during voir dire harmless].) A defendant ordinarily cannot obtain appellate relief based upon grounds that the trial court might have addressed had the defendant availed himself or herself of the opportunity to bring them to the court's attention. (*People v. Fuiava* (2012) 53 Cal.4th 622, 655 (*Fuiava*) [failure to object to trial court's statements during voir dire resulted in forfeiture of the issue].)

People v. Seaton (2001) 26 Cal.4th 598 (*Seaton*) is instructive. In that case, the defendant challenged comments made by the trial court during voir dire which "impl[ied] it believed defendant was guilty of murder, that he used a hammer in committing the murder, and that the special circumstance findings were a foregone conclusion." (*Id.* at p. 635.) The *Seaton* court rejected the contention, finding the defendant's failure to

object resulted in a forfeiture of the issue. Alternatively, it concluded the contention lacked merit because the trial court never implied a belief in the defendant's guilt and the defendant's argument to the contrary was based on isolated fragments of the trial court's comments taken out of context. (*Ibid.*)

Here, before voir dire began, the parties agreed that the trial court could summarize the case as follows for the panel of prospective jurors: "What I plan to say to the jury is the defendant is alleged to have driven a vehicle while under the influence of alcohol and to have struck and killed a woman who was [crossing the street]. It's also alleged that the defendant has three prior convictions for driving under the influence of alcohol." Before any prospective jurors had been seated in the "box", the trial court summarized the case as discussed and, without objection, added the following:

> "The issue in this case for the jury is expected to be what is the defendant responsible for under the law? He is responsible for the crime of murder or the lesser charge of gross vehicular manslaughter while intoxicated, or the lesser charge of vehicular manslaughter without gross negligence? That's going to be the principal issue, I believe, the jury is going to have to wrestle with and to decide. And of course, you'll make that decision based on the evidence that you see and hear in the trial. And so that's what this case is about.
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> "*We have some cases where murder is charged, they're who-done-it cases. Everybody agrees that the person who was killed was, you know, shot to death and it's likely a murder, but they don't know who did it. This is more of a what-is-it case, what is the crime that best fits the facts of the case.* And that's up to the jury to decide, and you'll make that decision based on the evidence you're going to hear in the courtroom and then on the instructions that I will give you at the end of the trial that will set out what the law is and what is required to be proven by the prosecution to satisfy the different elements of the various crimes that will be submitted to you." (Italics added.)

Among the instructions the trial court gave to the 12 jurors and 2 alternates who were later sworn in were the following: "Keep an open mind throughout the trial. Do not make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations. Do not take anything I say or do during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." Prior to the commencement of deliberations, the trial court reiterated: "It is

not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be."

Defendant's failure to timely object to the trial court comments at the beginning of voir dire constitutes a forfeiture of the issue on appeal. (See *Fuiava, supra*, 53 Cal.4th at p. 655; *Seaton, supra*. 26 Cal.4th at p. 635.)

Even assuming that the issue was not forfeited, we would find no merit in defendant's contention. The challenged comment was unlikely to have unduly influenced the jury's verdict since it was made before voir dire even began (i.e. "at a much less critical phase of the proceedings") and was followed by repeated formal instructions that nothing the trial court said was evidence or to be taken as an indication of what the verdict should be. (*Thomas, supra*, 53 Cal.4th at p. 797; *Seaton, supra*, 26 Cal.4th at p. 635.) We also observe that defendant did not deny that he was the person who collided with Ms. Webster.

B. Chain of Custody Was Adequately Shown

Defendant contends the trial court erred in overruling his chain of custody objection to the blood sample analysis evidence. He argues there was no evidence of the whereabouts of the blood sample from 1:25 a.m., when McKeever handed it to Trovato, and 6:00 a.m., when Trovato gave it to Covarrubias to book into evidence.[5] We find no error.

"We review a trial court's exercise of discretion in admitting evidence over a chain of custody objection for abuse of discretion. [Citation.] A chain of custody is adequate when the party offering the evidence shows to the satisfaction of the trial court that,

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5 Defendant also argues that McKeever did not know Trovato and did not know what was in the empty vial McKeever used for the blood sample. But defendant does not flesh out these arguments in any meaningful way. In particular, he does not explain the significance of McKeever's lack of familiarity with Trovato. Nor does he point to a scintilla of evidence that the empty vial contained anything other than the preservative to which McKeever testified.

taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [Citation.] The reasonable certainty requirement is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citation.] However, when there is only the barest speculation that the evidence was altered, it is proper to admit the evidence and let what doubt remains go to its weight. [Citation.]" (*Hall, supra*, 187 Cal.App.4th at p. 294, internal quotations omitted.)

Hall is instructive. As here, the defendant in *Hall* argued evidence regarding the blood-alcohol level of his blood sample should have been excluded because of an inadequate chain of custody. (*Hall, supra,* 187 Cal.App.4th at p. 290.) In particular, the arresting officer did not testify as to what procedures he followed in having the defendant's blood drawn, and there was no evidence of the whereabouts of the sample for the three days between the time it was taken and the time the crime lab received it, or the six days following the crime lab's receipt of the sample and the criminalist's analysis of it. The court held the following evidence was sufficient to withstand a chain of custody challenge: a deputy testified that he took the defendant to the hospital to have his blood drawn and that the defendant's blood was drawn; the criminalist who analyzed the blood sample testified that she received a sealed evidence envelope that included the date and time the blood was drawn, the name of the hospital where the blood was drawn, the name of the person who took the blood, as well as an illegible signature of the arresting officer; the criminalist stated there was no indication that either the evidence envelope or the blood vial had previously been opened; the defendant introduced no evidence that the deputies, the hospital staff or crime lab officials failed to perform their duties. (*Id.* at pp. 294-297.)

By contrast, the court in *People v. Jimenez* (2008) 165 Cal.App.4th 75 (*Jimenez*) found the chain of custody of a DNA sample taken from the defendant to compare to DNA found at the crime scene was so inadequate as to compel reversal. In *Jimenez*, a

police sergeant testified that he made arrangements to have a technician swab defendant's DNA and someone instructed the technician to send the swab to the Department of Justice (DOJ). The sergeant did not testify that the technician preserved and labeled the specimen or was directed to send the sample to DOJ, that anyone ever sent the sample to DOJ or that the sample was processed, labeled, or stored. The technician did not testify. A criminalist testified that he received properly packaged and preserved swabs; the paperwork submitted with the swabs showed that the submitting party was a detective who did not testify at trial and the booking party was the technician who did not testify.

The chain of custody evidence in this case was far stronger than that in *Jimenez* and at least as strong, if not stronger, than that in *Hall*. Here, McKeever testified that he drew a sample of defendant's blood into a vial containing only preservative (People's Exhibit No. 68), and placed the blood sample into an evidence envelope (People's Exhibit Nos. 65 and 70) which he handed to Torvato. Covarrubis received the sealed evidence envelope (People's Exhibit Nos. 65 and 70) from Trovato. Thus, the evidence showed the evidence envelope containing the blood sample went from McKeever, to Trovato, to Covarrubis. Under *Hall*, this evidence was sufficient to establish chain of custody.

That McKeever did not testify he saw Trovato seal the evidence envelope, and that Trovato did not give the envelope to Covarrubis until several hours later, does not compel a contrary result. " 'While a perfect chain of custody is desirable, gaps will not result in the exclusion of evidence, so long as the links offered connect the evidence with the case and raise no questions of tampering.' " (*People v. Catlin* (2001) 26 Cal.4th 81, 134; see also *People v. Riser* (1956) 47 Cal.2d 566, 581 [in the absence of evidence of actual tampering, the prosecution is not required to negate all possibility of tampering][6].) Here, Covarrubis testified that the envelope was sealed when he received it from Trovato and Su testified she saw nothing to indicate that the sealed evidence envelope she received, or the vial of blood inside, had been tampered with. In the absence of evidence of actual

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6 *Riser* was disapproved on another point in *People v. Chapman* (1959) 52 Cal.2d 95, 98.)

tampering, the prosecution was not required to negate all possibility of tampering. (*Catlin* at p. 134; *Riser* at p. 581.)

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.