APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AARON E. CHOAT,

Petitioner,

v.

RICK COURSEY, Superintendent,
Eastern Oregon Correctional Institution,

Respondent.

Civil No. 2:16-cv-01459-JR

AMENDED FINDINGS AND RECOMMENDATION

RUSSO, Magistrate Judge:

Petitioner, an inmate in the custody of the Oregon Department of Corrections, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Amended Petition for Writ of Habeas Corpus (ECF No. 20) should be DENIED and this action should be DISMISSED.

Background

On November 19, 2006, a 1999 Jeep Grand Cherokee belonging to Rachel Grant ("Grant") crashed outside of Bend, Oregon. All four occupants — 17-year old Grant, 20-year-old Brieann Blocker ("Blocker"), 20-year-old Brett Sells ("Sells"), and petitioner, who was then 22 — were ejected from the vehicle. Grant and Blocker died from their injuries. Sells and petitioner survived.

On June 1, 2007, a Deschutes County grand jury indicted petitioner on two counts of Manslaughter in the First Degree, two counts of Manslaughter in the Second Degree, three counts of Recklessly Endangering Another Person, and one count each of Assault in the Third Degree, Assault in the Fourth Degree, Reckless Driving, and Driving Under the Influence of Intoxicants. Resp. Ex. 102, pp. 1–3. The case was tried to a jury, which acquitted petitioner on both counts of Manslaughter in the First Degree and the single count of Assault in the Third Degree, but found petitioner guilty on all remaining charges. Resp. Ex. 119, pp. 1–4. Petitioner was sentenced to 156 months of imprisonment. Resp. Ex. 101, pp. 4–11.

Petitioner appealed, and in a written opinion, the Oregon Court of Appeals affirmed the conviction. State v. Choat, 251 Or. App. 669, 284 P.3d 578 (2012). The Oregon Supreme Court denied review. State v. Choat, 352 Or. 666, 293 P.3d 1045 (2012). Petitioner then sought postconviction relief ("PCR"), which the PCR trial judge denied following an evidentiary hearing. Resp. Exs. 109; 127. The Oregon Court of Appeals affirmed the PCR judgment without opinion and the Oregon Supreme Court denied review. Choat v. Amsberry, 275 Or. App. 1032, 367 P.3d 568, rev. denied, 359 Or. 166, 376 P.3d 283 (2016).

On July 12, 2016, petitioner filed a *pro se* Petition for Writ of Habeas Corpus in this court. Appointed counsel thereafter filed an Amended Petition for Writ of Habeas Corpus, asserting seven grounds for relief, one of which alleges 20 sub-claims. In his Brief in Support of the

Amended Petition, petitioner does not address all grounds for relief, nor all sub-claims alleged, but instead addresses only two sub-claims with respect to his claim of ineffective assistance of counsel, the denial of due process as a result of cumulative error, and a freestanding claim of actual innocence.

All of the claims addressed in petitioner's briefing, except for petitioner's claim that trial counsel was ineffective for failing to properly cross-examine Brett Sells, are procedurally defaulted.[1] Petitioner contends this court must address the merits of his defaulted claims to avoid a miscarriage of justice, arguing his procedural default is excused under the "actual innocence" standard established in Schlup v. Delo, 513 U.S. 298 (1995).

State Court Proceedings

A. The State's Case at Trial

At trial, the state contended petitioner was the driver when the Jeep crashed. Under the state's theory, petitioner drove Grant's Jeep throughout the night, driving the group to various locations in Bend before driving to a rural area known as "China Hat" to go "booze cruising." The group spent several hours drinking beer and driving around China Hat, resulting in the intoxication of all four individuals. On the drive home to Bend, petitioner lost control and the Jeep left the roadway, triggering a rollover event along the shoulder of Highway 20. No seatbelts were in use when the crash occurred, and all four occupants were ejected from the vehicle. The crash resulted in the deaths of Grant and Blocker and caused injury to Sells and petitioner.

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[1] In a footnote, petitioner argues his claims were excused from the exhaustion requirement because exhaustion would have been futile. In another footnote, petitioner argues his procedural default is excused pursuant to Martinez v. Ryan, 566 U.S. 1 (2012). The court finds both arguments unavailing, and thus petitioner's claims are procedurally defaulted.

The accident scene, particularly the placement of the occupants outside the vehicle, provided no conclusive evidence as to the identity of the driver. Additionally, the only survivors, Sells and petitioner, had no memory of the crash itself. The state thus developed its case around a variety of investigative evidence, including the occupants' injuries, the condition of the Jeep, and other circumstantial evidence, suggesting petitioner was the driver. The state bolstered its theory at trial with eyewitness testimony placing petitioner behind the wheel in the hours leading up to the crash and expert testimony explaining the significance of the evidence collected during the investigation. Of central importance to the state's case at trial was the expert testimony of certified crash reconstructionist Daniel DeHaven, who synthesized the existing evidence into a comprehensive theory of "[h]ow the crash happened, what took place, speeds, [and] who was driving the vehicle." Tr. p. 616.[2]

1. Investigative Evidence

In the early morning hours of November 19, 2006, the Jeep was traveling west at approximately 65 miles-per-hour on Highway 20 toward Bend, when it veered off the road and onto the gravel of the westbound shoulder.[3] The Jeep came back onto the roadway, and moved across the center line onto the opposite side of the road. The driver overcorrected, causing the Jeep to slide in a "clockwise yaw motion" across the asphalt and back onto the shoulder. The tires gouged into the soft gravel, and the Jeep "tripped" over its center of mass and rolled along the

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[2] "Tr." refers to the trial transcript, which is sequentially numbered in the lower right-hand corner, so no volume numbers or dates are included in the citations. See ECF Nos. 26, 27.

[3] Using physical evidence at the scene, the state's crash reconstructionist determined the general mechanics of the pre-crash sequence, including the direction of travel and the approximate speed the Jeep was traveling when the crash occurred. Defense experts largely agreed with DeHaven's version of events and adopted his speed calculation in their own analysis.

shoulder of Highway 20. After crashing through several wooden fencing anchors filled with stones, the Jeep came to rest 193 feet away from the spot it initially left the highway. Tr. p. 641.

The noise woke Richard VanOsdel ("VanOsdel"), who had been asleep in his home nearby. Tr. p. 168. He got out of bed to investigate the sound, and searched for the wreckage for several minutes with no success. He eventually heard cries for help, and discovered a male lying on the ground in an adjacent field. Tr. p. 169–170. VanOsdel returned to his home and called 911. At trial, VanOsdel testified he placed the 911 call 15 to 20 minutes after he was first awakened by the sound of the crash. Tr. p. 169.

a. The Crash Scene and Initial Investigation

First responders were dispatched to the scene at approximately 3:30 a.m. Tr. pp. 147, 176, 227. The Jeep stood upright in a field, 10 yards off the south shoulder of Highway 20 just east of Harmony Lane, and its physical condition appeared "consistent with a vehicle that had been rolled at a high rate of speed." Tr. pp. 148, 495. Debris was strewn across the field, including beer cans, beer bottles, and empty cardboard beer cases. Tr. p. 153. Deputy Randal Zilk, who was first on the scene, testified that there was "a strong odor of an alcoholic beverage in the air" when he arrived. Tr. p. 149.

All four of the Jeep's occupants were on the ground outside of the vehicle. Blocker lay face down near the Jeep with fresh blood in her nostrils. Tr. p. 151. She had no pulse and first responders declared her dead at the scene. Tr. p. 150. Sells and Grant were next to each other along the shoulder of Highway 20, approximately 50 feet from the Jeep. Tr. p. 178. Sells was seated on the ground in an upright position and was missing his shoes. Tr. pp. 229, 233. He was noticeably disoriented, talking to Grant "in a dazed manner" and calling her "Brie." Tr. p. 229. First responders noted Sells smelled of alcohol, but had no major injuries of concern. Tr. pp. 233–

34, 241. Grant was wearing a white sweater and lay unconscious on her right side next to Sells. Tr. pp. 229–231. First responders observed obvious signs of a spinal injury and noted she appeared to be in significant respiratory distress. Tr. pp. 192, 197. Grant was rushed to the hospital in critical condition and later succumbed to her injuries. Petitioner was found in a field 40 yards southeast of the vehicle. Tr. pp. 151–152. He was conscious and told first responders he was cold, his stomach hurt, and he could not feel his left arm. Tr. p. 152. Medical personnel at the scene noted petitioner had several observable injuries, the majority of which were to the left side of his body. Tr. p. 205.

Sells and petitioner were treated for their injuries at the St. Charles Medical Center, where they were both contacted by Detective Jeffrey Winters ("Winters") of the Deschutes County Sheriff's Office. Winters contacted Sells in the emergency room in the hours after the crash, and noted Sells smelled of alcohol. Tr. p. 491. Sells answered Winters' questions slowly but coherently, and Winters observed his speech was not slurred. Id. Winters described Sells' demeanor as "fairly stoic, calm, [and] very cooperative," but noted he "broke down significantly" upon learning his girlfriend, Blocker, had died as a result of the crash. Tr. p. 490–91. Winters reported that Sells was so distraught, it took roughly 15 minutes before he "could actually get any words out[.]" Tr. pp. 491. Before learning of Blocker's death, Sells told Winters petitioner had been driving when the Jeep crashed. Tr. p. 581. Winters later collected Sells' clothing, and took photos to document his injuries. Tr. pp. 497–98.

Winters questioned petitioner in the critical care unit. Winters detected "the same odor of an intoxicated person" in the room, and noted petitioner's speech was slurred. Tr. p. 493. Winters observed petitioner had various injuries, the most significant of which included "his left arm [which] was completely wrapped in an Ace bandage," a large, swollen black eye, "significant

bruising to his chest," and scratches and abrasions extending from his chest to his stomach. Tr. pp. 492–93. Winters later collected petitioner's clothing, ordered an additional blood draw, and photographed petitioner's injuries pursuant to a search warrant. Tr. pp. 504–08.

b. The Injuries

Each of the occupants suffered significant injuries in the crash, except for Sells, whose injuries were relatively minor. Daniel Leyes ("Leyes"), an EMT assigned to petitioner at the scene, testified at trial about the significance of such injuries with respect to an occupant's position in the vehicle:

> A person who was a passenger typically has more room around them. If they – it is basic physics. If energy is applied it has to go somewhere. And distance and shielding protect us from energy. So if you have an airbag, if you have open space that can absorb that or be a buffer between you and that energy, that will determine the intensity of the injury sustained.
>
> So a person in the passenger side of a vehicle typically has more open space around them, that should the force be applied to the opposite side of the car they would not be as – as prone to injuries.
>
> A person sitting in the driver's seat has the controls for the vehicle around them, specifically the steering wheel. And in a frontal impact that is a very short distance between that energy coming at them and their body. So I would typically suspect injuries to the chest, injuries to the lower abdomen. They have got foot controls underneath, brake pedals that typically come up into them from that force applied from the front of the vehicle.

Tr. pp. 206–07. Leyes also explained that, depending on the location of the impact, persons seated on the right side of the vehicle tend to primarily sustain injuries to their right side, whether seated in the front or back. Tr. p. 207. The same is true of passengers seated on the left side of a vehicle, where "[t]he long bones of the upper or lower arm, the hips, [and] the lower leg would be highly susceptible to injury" as a result of impacting the door directly to their left. Tr. p. 208.

William Boos ("Boos") oversaw patient care at the scene and placed similar emphasis on the significance of the injuries encountered by first responders following a crash. Specifically,

Boos testified that a front-passenger will likely have pain on their right side, a possible head injury from impacting the windshield, and possible shoulder injuries caused by a seatbelt. Tr. p. 220. Boos also explained the kind of injuries generally attendant the driver:

> Driver, we are looking for chest trauma [from the steering wheel], possibly pelvis. Lower extremities because the legs get wedged up underneath. Any left-side pain because that is where they are sitting up next to in the vehicle. Those were the injuries. Head, obviously, again because it could hit the front windshield. It could hit the side window also with their head. So those are the things we are looking for.

Tr. pp. 220–21. Boos testified that over the course of his career, there had been "very few" crashes in which he observed such injuries afflicting an individual who had not been the driver. Tr. p. 223.

i. Petitioner's Injuries

Petitioner's injuries were extensive and included fractures to both bones of his left-forearm, a left-humerus fracture, a left-orbital fracture, mid- and lower-spinal fractures, a fractured sternum, a liver laceration, and vertical abrasions to his right leg and chest. Petitioner also had rounded bruising on his chest, which appeared to be "consistent with the circular roundness of a steering wheel." Tr. 477–78. Based on the extent of his left-side injuries and chest trauma, Boos and Leyes both believed petitioner had been the driver when the Jeep crashed. Tr. pp. 208, 222.

Dr. Darren Kowalski ("Dr. Kowalski"), the trauma surgeon who treated petitioner after the crash, testified at trial about the statistical significance of petitioner's chest injuries. Specifically, Dr. Kowalski cited several studies which concluded that sternal fractures are relatively rare, typically manifesting in less than one percent of hospital admissions. Tr. p. 479. Of those sternal fractures admitted to the hospital, the "vast majority," or roughly 80 percent, are sustained in motor vehicle accidents. Tr. p. 480. Dr. Kowalski testified that between 65 and 68 percent of the time, "those patients that have sternal fractures are going to be the driver of the vehicle." Tr. p. 480.

ii. Sells' Injuries

Boos evaluated Sells at the scene and observed no major injuries. Though there was initially some confusion among law enforcement as to whether Sells could have been the driver, Boos found his injuries lacking:

> Uh, he didn't have any chest injuries and nothing appeared – I mean where the front two people were riding was very compacted down – the vehicle was. And so there was going to be trauma. There was going to be a lot of injuries in the front area. In the back it was more open. And so anybody riding back there, pretty much there was no intrusion in that rear area.

Tr. p. 222. Boos testified he did not believe Sells had been the driver because his injuries had been minimal, particularly when compared to the injuries sustained by petitioner. Tr. p. 222.

iii. Blocker and Grant's Injuries

Autopsies were not performed on Grant or Blocker, but postmortem physical examinations were conducted by the Deschutes County Medical Examiner, Dr. Christopher Hatlestad ("Dr. Hatlestad"). His examination of Blocker revealed she had sustained "extensive physical trauma," but Dr. Hatlestad was unable to determine the specific cause of death without the benefit of an autopsy. Tr. pp. 259–261. Dr. Hatlestad testified that he observed no trauma to Blocker's chest or to the front of her body to suggest she had been driving at the time of the crash. Tr. p. 282.

With respect to Grant, Dr. Hatlestad testified that she suffered a fatal fracture of the C2 vertebrae known as a "hangman's fracture," but he could not opine as to the specific mechanism of injury. Tr. pp. 272, 289. There was a large bruise on Grant's right shoulder and her right arm had sustained multiple fractures, including fractures to the forearm and humerus. Dr. Hatlestad testified that Grant's humerus fracture was a "comminuted fracture," meaning the bone had shattered, and agreed such injuries are generally the result of "a lot of force." Tr. p. 265. Grant

also had bruising across her right hip, which Dr. Hatlestad agreed could have been caused by a seatbelt buckle. He noted, however, that she had no companion injuries that would typically indicate seatbelt use, such as "belt type bruising across the abdomen" or bruising across the collarbone. Tr. pp. 266–70. Grant had numerous additional injuries, including bleeding beneath her sternum, a partially collapsed left lung, lacerations to her liver and spleen, hematomas on both kidneys, glass tattooing to her forehead and hands, and bruising beneath her chin.

Dr. Hatlestad opined the glass tattooing on Grant's forehead, generally caused by either "striking glass and having it shatter" or glass shards impacting the body, could have resulted from "contact with the glass of the front windscreen." Tr. p. 268, 272. Thus, Dr. Hatlestad testified that Grant's injuries, particularly the injuries to her face and head, were "consistent with being in the front seat." Tr. p. 272. He did not speculate whether Grant had been in the passenger seat or the driver's seat, but noted he had observed no semi-circular bruising to her chest, fractures to her ribs, or fractures to her sternum that would otherwise indicate she had impacted the steering wheel. Tr. pp. 270–71.

c. Circumstantial Evidence Recovered from the Jeep

Winters surveyed the Jeep at the crash site before later subjecting it to a comprehensive inspection. Though there was "damage all over the vehicle, over the roof . . . and mainly over the front," the airbags had not deployed, indicating there had not been a substantial impact to the front bumper. Tr. pp. 341, 382. The inside of the vehicle was relatively unscathed, with no damage to the center console or the protruding four-wheel drive or transmission gear shifters. Tr. p. 515. Inspection of the Jeep revealed several pieces of circumstantial evidence as to where the occupants had been positioned in the vehicle before the crash occurred.

i. Seat Placement

At the scene, Winters documented the position of the driver's seat "to get an approximation of the size of a person that would be needed to operate the controls of the vehicle." Tr. pp. 513-14. He observed the seatback was reclined to a position approximately two feet from the steering wheel, with the headrest even with, or slightly beyond, the side pillar of the driver's side door. Tr. pp. 496, 514, 1269. The leading edge of the seat bucket was more than a foot and a half from the Jeep's control pedals. Tr. p. 514. The passenger seat was noticeably further forward, with the front edge of the seat bucket positioned approximately seven and a half inches from the dashboard with the seatback "more upright." Tr. p. 496.

Winters shook the backs of both seats and determined neither seat was loose nor broken. Tr. p. 517. He attempted to move the seats forward and back using the electric controls on the side of the seat, but neither would move. Id. Inspection of the Jeep later revealed the electronically controlled seats lacked a power source because the Jeep's battery had been thrown clear of the engine during the crash, thereby freezing the seats in place. Id.

At trial, the state introduced the testimony of Grant's father, who testified that Grant drove with the seat "all the way forward" and in an upright position because she was a "petite, small girl." Tr. pp. 128–29. Grant's coworker, Caitlin Johnson-Barnhart ("Johnson-Barnhart"), similarly testified that Grant drove with the seat pushed forward to accommodate her small frame and stated she had never seen Grant drive with the seat reclined. Tr. pp. 138–39.

The state also presented two witnesses who were approximately the same height as petitioner. Tr. 382, 733. One testified that he could easily reach the pedals and steering wheel from the driver's seat and was able to sit comfortably without being "crammed in with [his] knees

up to [his] chin[.]" Tr. p. 383. The other testified that fitting himself into the passenger seat would be very difficult, and if even possible, highly uncomfortable. Tr. p. 733. The state thus asserted the relative positions of the front seats were "consistent with a six-foot-tall man being in the driver's seat, not a five-foot-three female." Tr. p. 1406.

ii. Fibers in the Front Passenger Door

Winters located a "fuzzy white substance" embedded in plastic near the window on the inside of the front-passenger door. Tr. p. 518. Thomas Barnes ("Barnes"), a forensic expert for the state, examined the fibers and observed they were embedded so deeply they "actually look[ed] like they [were] melted almost right into [the] plastic substrate." Tr. p. 431. Barnes testified such embedding occurs only if the source garment impacts the plastic surface with "a fair amount of force." Tr. p. 432. Winters searched the rest of the vehicle "very closely," but found no additional fibers, of any type, embedded anywhere inside the Jeep. Tr. p. 520.

Barnes compared the door fibers with the clothing collected from the occupants after the crash. Barnes compared the door fibers with fibers taken from Grant's white sweater, concluding they both shared "the same characteristics such as diameter, delusterant, color, [and] the actual fiber type itself." Tr. p. 436. An "instrument test" verified further that both sets of fibers were comprised of the same type of acrylic. Tr. p. 436–37. Though Barnes also compared the clothing collected from petitioner, Sells, and Blocker, only the fibers from Grant's sweater matched the fibers in the front-passenger door. Tr. pp. 437–441.

iii. No Evidence of Seatbelt Use

The Jeep's seatbelts were examined following the crash. None of the seatbelts were found buckled at the scene, and all were functional except the front-passenger seatbelt, which would not extend. Tr. pp. 345, 354. Deputy Kevin Turpen ("Turpen"), a crash reconstructionist with the

Deschutes County Sheriff's Office, testified at trial about the significance of finding "loading" on a seatbelt after a crash:

> Basically when someone is driving in a vehicle they are going to have kinetic energy. They are going to have energy stored in their body. When they get into a crash the seatbelt is there to keep you in your seat. We want you to stay in the seat where it is safe to be in that car. So your body under physics is going to want to move out of that seat. When you do that and you are wearing a seatbelt you are going to exert a pressure on that seatbelt because the seatbelt is trying to restrain you.
>
> Sometimes what we will see is loading on that seatbelt in the form of some stretching. There [are] fibers – if you look at your seatbelt, the nylon weave has little hair fibers that stick off of it. Sometimes you need a magnifying glass to see that. And under the stress of your body's push against that seatbelt, you can actually heat up that seatbelt when it rubs against something else so hard that you will see burn marks. You will see those fibers being melted and burned.
>
> And that is part of what you will see with loading. It is just that fact that your energy pushed against that seatbelt. And there – sometimes you will see signs on the seatbelt of that loading or that force being exerted.

Tr. pp. 343–44. He explained that the presence of loading therefore is indicative of a seatbelt having been in use during a crash event. Tr. pp. 347.

Barnes found no evidence of loading on the Jeep's seatbelts. Tr. pp. 443, 1200–01. He also examined the occupants' clothing, specifically searching for evidence of seatbelt use. With respect to Grant's sweater, Barnes explained:

> I was looking for a pattern that indicated to me that the garments had somehow been distorted due to friction, melting fibers, embedded fibers from the seatbelt onto this particular garment. So I looked across both shoulders down. I didn't know which – where she was supposed to be. So I checked both directions – whether she was in a passenger seat or driver's seat. And across the front bottom again, where a seatbelt might have been, looking for a distortion pattern. I did not find anything like that.

Tr. p. 443–44. The clothing of the other occupants similarly lacked any evidence that seatbelts had been in use when the Jeep crashed. Tr. pp. 445–46.

2. Evidence Presented at Trial

At trial, the state sought to provide a cohesive narrative of the crash through eyewitness testimony placing petitioner behind the wheel in the hours leading up to the accident and expert testimony explaining how the evidence, when viewed in its totality, indicated petitioner was driving when the Jeep crashed.

a. Eyewitness Testimony Placing Petitioner Behind the Wheel Before the Crash

i. Kevin Bisenius

Kevin Bisenius ("Bisenius") testified that he saw the Jeep twice in the hours before the crash. Bisenius was camping at the East Fort Rock area on the night of the crash to attend a dirt bike race the next morning. Tr. p. 304–05. He first observed the Jeep near his campsite around 10:30 p.m. Tr. p. 307. The Jeep was "cutting cookies" in the snow and dirt near the racetrack, which had been marked by large, orange construction cones. Tr. pp. 306–07. He was unable to see the driver, but watched the Jeep drive away on "the 2510 road," heading deeper into China Hat. Tr. pp. 308, 319–320. He did not see the Jeep again for several hours.

Bisenius testified that he was sitting around a campfire at approximately 1:00 a.m. when the Jeep returned to the area. Tr. pp. 308–09. The Jeep stopped at his campsite, and Bisenius observed orange cones covering its hood and windshield wipers. Tr. p. 309. Four passengers — two males and two females — got out of the Jeep with bottles of beer in hand, and all four appeared to be intoxicated. Tr. pp. 308, 310–11. Bisenius described the driver as a male matching petitioner's description. Tr. pp. 311–12. Bisenius asked the group to return the cones, and retired to his camper to go to sleep roughly 15 minutes after the Jeep first arrived. Tr. pp. 309, 312–13. The Jeep departed "at some point" after Bisenius went to bed, but he did not see who was driving or the direction in which the Jeep drove away. Tr. p. 314.

ii. Brett Sells

Sells, the only other survivor, gave a detailed account of the events leading up to the crash. Sells testified that sometime after 10:00 p.m. on November 18, 2006, he and Blocker agreed to attend a party "right down the road" from their apartment complex with Grant and petitioner. Tr. p. 555–56. Though Sells had never met Grant or petitioner before that night, the group rode to the party together in Grant's Jeep. Tr. pp. 556–557. They were at the party for 10 to 15 minutes before they were asked to leave. Tr. p. 557. After leaving the party, the group decided to drive around in China Hat. They stopped at Albertsons, where petitioner bought beer. Tr. p. 557–58. They also stopped at an unspecified location to pick up a trail map before traveling out to China Hat to drive around in the snow. Tr. pp. 55859.

Once they reached China Hat, the group went "four-wheeling," driving around recklessly and "cutting cookies" in the dirt and snow. Tr. p. 559. Sells testified that they "found a shooting range out there," where they stopped and shot a .22 rifle belonging to Grant's roommate for 45 minutes to an hour. Tr. pp. 559, 576. At some point, they stopped to pick up orange cones that they found marking a trail, which Sells and petitioner placed on the Jeep's hood and windshield wipers. Tr. pp. 560–61. Sells recalled they stopped and talked with campers sitting around a campfire, who explained the cones decorating the Jeep's hood were meant to mark the track for motorcycle races taking place that weekend. Tr. pp. 560–62. The campers asked the group to return the cones, which they did after leaving the campfire roughly 20 minutes later. Tr. pp. 561–62. Sells testified that they took "a lot of bathroom breaks" throughout the night as a result of "all the drinking," but otherwise made no additional stops. Tr. pp. 559–60. He also stated that they never went back into town after they arrived in China Hat. Tr. p. 562.

Sells testified that the group eventually decided to return to Bend and the crash occurred en route. Tr. p. 563. He specifically recalled being in the backseat with Blocker when they set out:

> Uh, I remember leaving China Hat. Getting back onto the highway – Highway 20 coming back towards Bend. And I was sitting more towards the middle, a little bit closer to Brie because she was still a little bit scared from – not necessarily his driving but more of four-wheeling. She got a little bit scared. So I was just still trying to calm her down and talk to her about what she wanted to do when we got back home.

Tr. p. 563. Sells testified that Blocker had been seated behind Grant, who was in the passenger seat, and he had been seated behind petitioner, who was driving. Tr. p. 564. His last memory before the crash occurred was petitioner asking Grant for a cigarette and then attempting to light it. Tr. p. 563.

Sells remembered waking up in a field next to Grant, mistaking her for Blocker, and then standing up to look for his shoe before "blacking out again." Tr. p. 565. He admittedly had no other memories of the accident scene, and did not remember sitting in the back of a patrol car or talking with first responders. Tr. pp. 565–66. He next recalled waking up in the hospital and speaking with Winters. Tr. p. 566. Sells testified that he had been too sore to move, and his head had hurt at the time, but he nevertheless had understood Winters' questions and had been able to tell him, both before and after learning of Blocker's death, that petitioner had been the driver. Tr. pp. 579–581.

In closing, the prosecutor took Sells back through the events leading up to the crash and asked him to recall who had been driving. Sells' testimony was emphatic:

> Q: [W]hen you got picked up to go to the party who drove you to the party?
>
> A: Aaron had drove.

Q: And when you left the party who drove?

A: Aaron drove.

Q: When you went to Albertsons who drove?

A: Aaron.

Q: When you left Albertson's who drove?

A: Aaron.

Q: When you stopped on the way up to China Hat to get a map who drove?

A: Aaron.

Q: And when you got back into the car after you got the map who drove?

A: Aaron.

Q: When you went four-wheeling and were cutting the cookies who drove?

A: Aaron.

Q: When you stopped to get out to go to the bathroom who drove?

A: Aaron.

Q: And when you got back in after going to the bathroom who drove?

A: Aaron.

Q: When you stopped to get out to shoot who drove?

A: Aaron.

Q: And when you got back in after shooting who drove?

A: Aaron.

Q: When you stopped and picked up the cones who drove?

A: Aaron.

Q: When you went up to the campfire who drove?

A: Aaron.

Q: When you left the campfire who drove?

A: Aaron.

Q: When you stopped to put the cones back who drove?

A: Aaron.

Q: When you got back into the car after putting the cones back who drove?

A: Aaron.

Q: When you headed back to town toward the end of the night who drove?

A: Aaron.

Q: And when the crash occurred who drove?

A: Aaron.

Q: Did you ever see [Blocker] drive the car that night?

A: No, I did not.

Q: Did you ever see [Grant] drive that night?

A: No, I did not.

Q: Did you ever drive the Jeep yourself that night?

A: No, I did not.

Tr. 569–571.

b. Expert Crash Reconstruction

The cornerstone of the state's case-in chief was the expert testimony of Senior Trooper Daniel DeHaven ("DeHaven"), a certified crash reconstructionist with the Oregon State Police. DeHaven based his testimony on a comprehensive analysis of all physical and testimonial evidence, scene diagrams, police reports, and medical records associated with the crash. DeHaven

described the reconstruction process in detail for the jury, explaining how the laws of physics, various calculations, and occupant kinematics — the study of the occupants' motion during the crash event — enabled him to determine "what truly happened at the crash." Tr. pp. 599–602.

As noted, DeHaven determined the Jeep had been traveling on Highway 20 toward Bend at approximately 65 miles-per-hour when driver error caused it to leave the roadway and "trip," triggering a rollover event along the shoulder. TR. 642–44. DeHaven noted the Jeep's exterior damage indicated it had rolled asymmetrically, moving perpendicularly, or side-to-side, with the driver's side leading, and had not rolled front-to-back. Tr. p. 649. There was significant damage to the exterior of the passenger side doors, and the roof had buckled and intruded into the headspace of the front-passenger seat. Tr. pp. 650, 653–54. Conversely, the exterior damage to the driver's side door was relatively minor. Tr. p. 649. The interior of the Jeep was also largely undamaged, and DeHaven noted that the console and dash areas were in good repair, the gear shifts had not been bent or twisted, there was no deformation of the steering wheel, and the cigarette lighter, which would take very little force to break off, was still in place. Tr. p. 651.

DeHaven did not attempt to calculate how many times the Jeep rolled, instead focusing on the occupants' movements inside the vehicle from the trip point through the first impact. DeHaven testified that the placement and severity of the damage indicated that the Jeep first impacted the ground on the front passenger-side roof. Tr. pp. 654–55. He explained that the force of the first impact was significant, and that the occupants on the passenger side had to travel only a short distance before impacting the roof as it struck the ground. Tr. p. 656. The occupants on the driver's side, on the other hand, had a larger distance to cover, and thus had more time to decelerate before impact. Id. Accordingly, DeHaven opined the most severe injuries would likely be sustained by the occupants seated on the passenger side of the Jeep. Tr. p. 657.

DeHaven testified that Grant likely sustained her spinal and forehead injuries during the first impact, explaining her body had moved "from left-to-right, rear-to-forward, and up towards the roof of the vehicle with her head leading." Tr. p. 664. Grant's head thus came to a stop when it impacted the roof, but her body continued to move to the right, hyper-extending her neck and causing the C2 fracture to her spine. Tr. p. 664–65. DeHaven testified that such motion would also have caused Grant's shoulder to slam into the roof upon impact, and noted the large bruise on her right shoulder was consistent with that outcome. Tr. p. 665.

With respect to the glass tattooing on Grant's forehead, DeHaven testified that the cuts appeared to broaden toward the left, suggesting the glass had moved across her forehead from right to left. Tr. p. 670. DeHaven explained the glass in the passenger-side windows had "basically explode[d]" from the force of the first impact, spraying glass shards from the right side of the Jeep toward the back. Tr. p. 671. DeHaven thus concluded the glass tattooing to Grant's forehead was consistent with being in the front-passenger seat. Tr. pp. 670–71. DeHaven opined such tattooing would not have occurred had Grant been in the driver's seat, because she would have been on the other side of the vehicle when the passenger-side windows shattered, and the glass shards would have had further to travel. Tr. pp. 671–72.

DeHaven noted Grant had no bruising to her chest to indicate that she had impacted the steering wheel. He also observed no injuries or damage to her clothing to suggest she had been wearing a seatbelt at the time of the crash. Tr. p. 672. Based on "the physical evidence, Newton's laws [of] motion and testimonial evidence," DeHaven concluded Grant had been unrestrained and seated in the front-passenger seat when the crash occurred. Tr. p. 680. DeHaven also reviewed the injuries sustained by Sells and Blocker, and determined both had been seated in the back of the Jeep — Blocker on the right and Sells on the left. Tr. pp. 680–88.

With respect to petitioner, DeHaven determined damage to the driver's-side door was caused by force coming from inside the vehicle moving outward, and opined the general size and shape of the damage appeared consistent with petitioner's left arm, which had sustained multiple fractures. Tr. pp. 690–692. DeHaven also opined petitioner's left-orbital fracture was consistent with his head impacting the hard surface of the driver's-side door. Tr. pp. 692–93. Additionally, DeHaven concluded petitioner had multiple injuries that were consistent with hitting the steering wheel, including the rounded bruising to his chest and the slightly curved scrape and burn marks along the outside portion of his right thigh. Tr. pp. 693–94, 696. DeHaven found no other surfaces inside the Jeep matching the size and shape of the steering wheel or the injuries to petitioner's chest and thigh. Tr. p. 699. Based on the available evidence, DeHaven opined petitioner was the driver at the time of the crash, and testified there were no other facts of which he was aware "that would be inconsistent with [petitioner] being in the driver's side seat." Tr. p. 699.

DeHaven confirmed there was no evidence indicating that any of the occupants had been wearing a seatbelt at time of the crash. Tr. p. 699. Though the unbelted occupants were free to move about during the rollover, DeHaven testified that the pristine condition of the Jeep's interior suggested they had remained in the area where they were seated until being ejected, as any crossover motion would generally cause damage to the center console, dash, or gear shifts. Tr. pp. 652–53. DeHaven thus concluded there was no evidence petitioner or Grant had crossed over the center console before they were ejected from the Jeep. Tr. p. 653.

B. The Defense Case at Trial

The defense's theory of the case was that petitioner had not been driving at the time of the crash. The defense sought to undermine the state's theory primarily through expert testimony rebutting key points of DeHaven's analysis. The defense also attempted to undermine the state's

theory through the cross-examination of the state's witnesses questioning the accuracy of the state's investigative methods, challenging the experts' conclusions, and otherwise exposing the speculative nature of the evidence.

1. Verne Hoyer

Verne Hoyer ("Hoyer"), a private investigator who also does crash reconstruction, conducted his own investigation at the crash site and compared his data with data gathered by state investigators. Tr. pp. 804–807. Hoyer criticized DeHaven's mapping of the accident in some detail, explaining that several of the measurements taken at the scene were inaccurate. Tr. pp. 807–839. Though he claimed the discrepancies adversely affected DeHaven's analysis, Hoyer conceded the general mechanics of the Jeep's movements leading into the trip, as determined by DeHaven, were "undisputed," and adopted DeHaven's speed calculation in his own analysis. Tr. p. 841.

Hoyer testified that the first impact had not been to the passenger-side roof as alleged by DeHaven, speculating the Jeep's speed at the trip-point could not have provided the momentum needed to roll over in the air before hitting the ground. Tr. pp. 846–47. Hoyer opined the Jeep had instead landed on the corner of the driver's-side roof, causing the initial motion of the occupants to shift toward the driver's-side door. Tr. p. 856. Hoyer also testified that "at least four definite independent scratch marks" indicated the Jeep had rolled "about four times," crashing through wooden fence anchors filled with stone before coming to rest. Tr. pp. 868–69. Based on this version of the crash sequence, Hoyer challenged several conclusions reached by DeHaven.

Hoyer first refuted DeHaven's conclusion that none of the occupants had been secured by a seatbelt. Tr. p. 859. Specifically, Hoyer believed the size and shape of the bruising to Grant's right hip was consistent with a seatbelt mark, and therefore suggested she had been secured by a

seatbelt when the Jeep crashed. Tr. pp. 860–61. To support his theory, he presented to the jury a scaled tracing of a seatbelt buckle taken from the Jeep, and demonstrated that it appeared to match the size and shape of the bruising to Grant's right hip when overlaid onto a photo of the injury.[4] Tr. pp. 861–62. Hoyer stated there was nothing else inside the Jeep that could have caused the injury to Grant's right hip. Tr. 866–67. Hoyer also testified that the bruise to Grant's chin was likely caused by the shoulder strap of a seatbelt, explaining that when a person is thrown around inside a vehicle, "the seatbelt can throw their head back and then leave marks underneath the chin[.]" Tr. p. 871. Hoyer thus concluded Grant's injuries were consistent with being secured into the driver's seat. Tr. pp. 866. Hoyer found the fibers from Grant's sweater embedded into the passenger side door of little consequence to his analysis, as the presence of the fibers simply meant Grant had come into the passenger seat at some point as the Jeep rolled. Tr. 967–68.

Hoyer also refuted DeHaven's conclusion that the damage to the driver's-side window frame had been caused by petitioner's arm as he was ejected from the vehicle, asserting the damage was "too pointed" and "too precise" to have been caused by any body part. Tr. pp. 870–71. Rather, Hoyer found the damage to the driver's-side door to be consistent with impacting the wooden fence anchors as the Jeep rolled. Tr. p. 870. Hoyer also disagreed with DeHaven's inference that none of the occupants had moved from their seats before being ejected, explaining it is possible for occupants to cross over the center console without causing observable damage to the Jeep's interior. Tr. p. 966.

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[4] The tracing overlay was allowed "for demonstrative impact" over the objection of the state. The state questioned the foundation of the photo, arguing there was no way to match "the scales to the seatbelt and [Grant's] body." The court noted the state's objection, but instructed such issues could be discussed in detail during cross-examination.

Finally, Hoyer refuted DeHaven's conclusions concerning petitioner's injuries. Notably, Hoyer did not agree that petitioner's chest injury was caused by impacting the steering wheel:

> . . . that [injury] could have been caused by anything. If he was the passenger when the car went over, he could have [come] down on top of something in the driver's seat. He could have [come] down on something on the dash. That could have been caused when he was ejected out of the vehicle from the door frame. That could also [have] been caused from impact with the ground –something on the ground. Or could have been caused by one of the fence posts, the steel fence post that was bent over when he was ejected.

Tr. pp. 871–72. Though Hoyer conceded the bruising could be consistent with the steering wheel, he opined that only petitioner's upper thighs would have been bruised if he had been in the driver's seat, because there was no direct frontal impact to throw him forward into the steering wheel. Tr. p. 872. Additionally, Hoyer testified the abrasions on petitioner's thigh were consistent with scraping against shards of glass in the window frame as he was ejected, and could not have been caused by scraping the steering wheel. Tr. pp. 873–74.

Hoyer admitted he could not determine where petitioner was seated in the Jeep at the time of the crash, but noted that the dirt and debris found on his pants was consistent with sliding across the ground after he was ejected, presumably causing some of his injuries. Tr. p. 879. He also could not offer an opinion as to whether Grant or Sells had been ejected from the Jeep, and explained that it is "next to impossible" to determine when in the crash sequence the occupants had been ejected or the portal through which each occupant had exited the Jeep. Tr. pp. 867–68.

2. Richard Robertson

Biomechanical engineer Richard Robertson ("Robertson") focused his testimony on the speculative nature of DeHaven's analysis. Specifically, Robertson explained the difficulties of reconstructing a complex, multi-roll crash like the one at issue:

> . . . I have worked on a number of cases where you have a single roll. And single rolls make it somewhat easier to actually determine what happens to the occupants.
>
> As you . . . begin to add rolls, especially when people are unbelted, after that initiation of that first roll sequence, very quickly occupants get out of position. In other words, they are no longer were they originally were seated.
>
> And the subsequent rolls are going to add significant changes in their movement pattern, again depending on how hard they hit the ground, how fast they are rolling with multiple roll sequences. It is almost like you become a marble in a can. It continues to roll. It gets very difficult to predict what is going to happen in those multiple roll sequences.

Tr. pp. 1010–11. Robertson testified that the complexity of the crash thus precluded accurate prediction of the occupants' motion and injuries inside the Jeep without first knowing the precise values of many variables, several of which were speculative in the state's analysis. Tr. pp. 1038–1041.

Robertson testified that none of petitioner's injuries could definitively place him in the driver's seat at the time of the crash. Tr. pp. 1020–23. Rather, his own review suggested petitioner had been ejected from the Jeep and landed on his buttocks with significant force, causing the fractures to his lower spine. Tr. p. 1016. Robertson opined the vertical abrasions on petitioner's leg and chest were consistent with being thrown forward after landing, and could also explain the bruising to his chest. Tr. pp. 1016–17. Though he conceded petitioner's chest injuries could have been caused by the steering wheel, he opined it was more likely his chest had struck the ground when he was ejected based on the motion of the Jeep during the crash sequence. Tr. pp. 1022–23. Additionally, Robertson testified petitioner's left-side injuries were not necessarily indicative of being in the driver's seat because the placement and severity of the injuries sustained depends on vehicle dynamics, which can differ from crash to crash. Tr. p. 1018. Robertson also testified that it was unlikely petitioner's arm caused the damage to the driver's side door because the severity of his humerus fracture did not reflect the significant force that would have been required to cause

the damage. Tr. pp. 1019–1020. Finally, Robertson estimated that a person of petitioner's height "could easily" fit in the passenger seat, but ultimately admitted he could not determine with any degree of certainty where petitioner had been seated when the crash occurred. Tr. pp. 1035, 1042.

With respect to Grant's injuries, Robertson testified that her predominantly right-sided injuries were not necessarily indicative of being in the passenger seat, and could have been sustained when she hit the ground following her ejection from the Jeep. Tr. p. 1027. Like Hoyer, Robertson agreed the bruising to Grant's right hip was consistent with a seatbelt injury, and explained that companion injuries to her chest would not necessarily be present unless a frontal impact caused her weight to be thrown against the seat belt. Tr. pp. 1028–29. Robertson conceded Grant's right-hip injury could have been caused by hitting the ground after she was ejected, but did not believe it was caused by impacting the arm rest of the passenger-side door because it was "nice and padded." Tr. pp. 1033–34. Robertson thus testified Grant's injuries were consistent with being in the driver's seat, but admitted that there was no way to conclude with any certainty where Grant had been seated in the vehicle at the time of the crash. Tr. p. 1041.

Petitioner did not testify at trial. After the defense rested, the state called crash reconstructionist Scott Skinner ("Skinner") of the Oregon State Police in rebuttal. Skinner presented his own analysis to the jury, rebutting several key points disputed by defense experts Hoyer and Robertson. In closing, Skinner summarized his findings:

> [B]asically looking at the injuries to the occupants, the positions of the seat, the forensic evidence of the right front window, the dynamics of the crash, and the motion the vehicle had and my training in respect to how people move in respect to a rolling vehicle, it is my opinion that Mr. Choat was the driver when the crash occurred.

Tr. pp. 1273–74. When asked how certain he was of his conclusion, Skinner replied, "I am very certain of that." Tr. p. 1274.

C. Verdict and Sentencing

The jury acquitted petitioner of both counts of Manslaughter in the First Degree and the single count of Assault in the Third Degree. Resp. Ex. 101. The jury found petitioner guilty on all remaining charges, reaching non-unanimous verdicts on both counts of Manslaughter in the Second Degree and the single count of Assault in the Fourth Degree. Id.

At sentencing, defense counsel explained that petitioner "to this very day is not sure that he was the driver [because he] has no memory." Tr. 1570. Petitioner's statement to the court echoed this sentiment:

> You know, I might not agree with a lot that is going on right now, you know, and I might not agree with what the verdict is. And, you know, I want you guys to know that my not guilty plea was not to put the blame on your guys' daughters, my not guilty plea was because I don't remember anything that happened during the accident or before the accident.

Tr. p. 1577. The court sentenced petitioner to a total of 156 months in prison. Resp. Ex. 101.

D. Direct Appeal

Petitioner appealed, alleging the trial court erred when it (1) ordered him to pay $1, 590.02 as a compensatory fine to Blocker's sister; (2) failed to instruct the jury the verdict must be unanimous; and (3) imposed a judgment of conviction based on a non-unanimous vote of guilty. Resp. Ex. 103. Petitioner also filed a brief *pro se*, alleging several additional assignments of error that are not relevant to this proceeding. Resp. Ex. 104. In 2012, the Oregon Court of Appeals affirmed the trial court's judgment in a written opinion. State v. Choat, 251 Or. App. 669, 284 P.3d 578 (2012). The opinion addressed only the first assignment of error, and petitioner's other claims were denied in a footnote. Resp. Ex. 106, p. 14 (internal citations omitted). Later that year, the Oregon Supreme Court denied review. State v. Choat, 352 Or. 666, 293 P.3d 1045 (2012).

E. State Post-Conviction Relief Proceedings

Petitioner subsequently filed for post-conviction relief in Umatilla County Circuit Court. Appointed counsel filed an amended petition, which contained various allegations that trial counsel had been ineffective in violation of the Sixth and Fourteenth Amendments. Resp. Ex. 109. As relevant here, the amended petition included a claim of trial counsels' ineffectiveness in failing to effectively cross-examine Brett Sells. As on direct appeal, petitioner argued numerous additional claims in a trial memorandum submitted *pro se*. Resp. Ex. 113.

In March 2013, the post-conviction court held an evidentiary hearing and made oral findings on the record. Resp. Ex. 126. The post-conviction trial court reiterated its findings in a written judgment, holding trial counsel's cross-examination of Sells was not ineffective. Resp. Ex. 127. The PCR trial court denied relief on all claims. Id. p. 3.

Petitioner raised only two issues on appeal, one of which was trial counsels' ineffectiveness in failing to adequately cross-examine Sells. Petitioner otherwise argued the post-conviction trial court's judgment did not comply with Oregon law, and sought remand for a more specific judgment with respect to his remaining claims. Resp. Ex. 128. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review of both claims. Resp. Exs. 128, 129.

Discussion

As noted, all the grounds for relief addressed in petitioner's briefing, save one sub-claim of ineffective assistance of counsel, are procedurally defaulted. Thus, those claims are barred unless petitioner can demonstrate he is "actually innocent" under Schlup.

I. Actual Innocence to Excuse Procedural Default

A. Legal Standards

A colorable claim of actual innocence serves as a gateway through which a petitioner may pass to overcome procedural default. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). A petitioner may argue the merits of his claims if he "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." Schlup, 513 U.S. at 316. To be credible, a petitioner's claim of actual innocence must be supported with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Id. at 324.

A court considering a claim of actual innocence under Schlup must consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." House v. Bell, 547 U.S. 518, 538 (2006) (citing Schlup, 513 U.S. at 331-32) (internal quotations omitted). The actual innocence inquiry requires "a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard." House, 547 U.S. at 539 (internal citation and quotation marks omitted). In other words, the function of the habeas court "is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." Id. at 538.

To apply the actual innocence exception, a court must conclude that, considering all the evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup, 513 U.S. at 327. This is an exacting standard that is satisfied

"only in the extraordinary case." House, 547 U.S. at 538 (internal quotation marks omitted). Indeed, those cases in which the Schlup standard has been satisfied have "typically involved dramatic new evidence of innocence." Larson v. Soto, 742 F.3d 1083, 1096 (9th Cir. 2013).

The Ninth Circuit has made clear that Schlup does not require a petitioner to affirmatively prove he is innocent of the crime for which he was convicted. Sistrunk v. Armenakis, 292 F.3d 669, 673 (9th Cir. 2002). Rather, evidence "undercutting the reliability of the proof of guilt . . . can be enough to pass through the Schlup gateway." Id. A petitioner thus may satisfy Schlup by providing evidence that "significantly undermines or impeaches the credibility of witnesses presented at trial, if all the evidence, including new evidence, makes it 'more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Gandarela v. Johnson, 286 F.3d 1080, 1086 (9th Cir. 2002). Speculative or collateral impeachment evidence, however, "falls far short of showing actual innocence." Id.

B. New Evidence

1. The Statements of Steven Skaggs

At trial, defense counsel asked Hoyer to recount the substance of a police report documenting statements made by Steven Skaggs ("Skaggs"), an Oregon Department of Transportation employee who reported seeing a young woman driving a jeep in Bend the night of the crash. Tr. pp. 876–78. The state objected to the testimony as hearsay under Oregon Rule of Evidence 703, and the objection was sustained. Id. At sentencing, the court explained to petitioner's family that the testimony of "the ODOT employee who passed away" was not received during the trial because it was inadmissible. Tr. pp. 1573–74. Petitioner now submits a police report and an email written by apparent defense investigator "Brad" as evidence of petitioner's

actual innocence, both of which allegedly document Skaggs' statements regarding his sighting of a similar jeep in Bend the night of the crash.

The police report indicates that on November 19, 2006, Skaggs placed a call to the Deschutes County Sherriff's Office to "pass on some information that he may have seen the suspect vehicle in this crash." Pet'r's Ex. B, p. 1. Skaggs told police he was traveling southbound on Third Street in Bend at approximately 3:11 a.m. that morning, when he noticed a vehicle quickly approaching to his rear. Id. He stated the vehicle "came flying by me" and was a "black or dark colored Jeep Cherokee." Id. He reported a blonde female was behind the wheel, a male was in the front passenger seat, and another male was in the passenger seat behind the driver. Id. Skaggs told police the jeep then "turned onto Greenwood Avenue and headed East" toward the accident site. Id.

Skaggs described the incident to a defense investigator in greater detail on February 16, 2009. Pet'r's Ex. B, p. 2. Skaggs told the investigator he had been traveling South on Third Street when a fast-moving jeep, "dark in color, burgundy [or] red, pulled into the left turn land on [Third] to head East on Greenwood." Id. Skaggs explained that he caught up with the jeep at a light, and observed a girl between the ages of 18 and 20 with shoulder-length blonde hair in the driver's seat. Id. Next to her in the front seat, he observed a male wearing a pullover cap that covered his ears and tied beneath his chin. Id. Another male was seated behind the driver and another female was seated behind the front passenger. Id. The investigator's summary of the interview indicated Skaggs had not seen photographs of anyone involved in the crash, but was willing to look at a photo array to determine if he could identify the driver. Id.

2. Petitioner's Declaration

Petitioner also presents new evidence challenging the testimony and memory of Sells, the only witness who directly placed petitioner in the driver's seat at the time of the accident. Petitioner relies on his own declaration, which purportedly establishes what occurred during "an otherwise unexplained gap in Sells's account" of the events leading up to the crash. Br. in Supp., pp. 2831. Petitioner asserts that had he been called to testify at trial, he could have testified to the following:

The night of November 18, 2006, petitioner drove Grant's jeep to a Safeway grocery store in Bend, with Grant riding in the front seat and Blocker and Sells riding in the back. Pet'r's. Ex. A. at ¶ 3. From there, petitioner drove east on Highway 20 until they reached the turnoff for China Hat at Spencer Wells Road approximately 21 miles from Bend. Id. at ¶¶ 3–4. Petitioner then drove roughly 9.5 miles South on Spencer Wells Road and Forest Service access roads before passing the campers at the Road 2510 Staging Area at 10:30 p.m. Id. at ¶ 5. Petitioner continued South toward China Hat on Forest Service roads, and the group spent the next two hours driving around the area. Id. at ¶ 7.

At approximately 12:30 a.m., petitioner began driving North back toward Highway 20. Id. at ¶¶ 7–8. By 12:45 a.m., the Jeep was back at the Road 2510 Staging Area, where they briefly stopped to return the orange traffic cones. Id. at ¶ 9. Petitioner then drove 9.5 miles back the to the intersection of Spencer Wells Road and Highway 20. Paragraph 11 of petitioner's declaration challenges the reliability of Sells' testimony as to what happened next:

> Brett Sells testified at trial that I drove back to the intersection of Spencer Wells Road and Highway 20, turned left on Highway 20, and drove West on Highway 20 toward Bend without making additional stops, and that the accident took place as we drove toward Bend. The accident site, on Highway 20 just East of Harmony Lane, is 14 miles (or a 15-minute drive) away from the intersection of Spencer Wells Road and Highway 20. Thus, if Sells's testimony was correct, the accident would have occurred at approximately 1:30 a.m., meaning that Sells's testimony

> leaves two hours unaccounted for. My testimony could have accounted for some of this time.

Petitioner's declaration states he could have testified that between approximately 1:05 and 1:15 a.m., he turned right, not left, onto Highway 20 at the Spencer Wells Road intersection. Id. at ¶¶ 11–12. He then drove two miles East on Highway 20 to a public shooting range, where, using the Jeep's headlights as a light source, the group shot a rifle belonging to Grant's roommate for approximately 45 minutes. Id. at ¶ 12. Blocker and Grant eventually returned to the Jeep for warmth while Sells and petitioner continued shooting, and Grant got into the driver's seat. Though the Jeep's headlights had served to light the range, Grant turned the Jeep around, effectively bringing the shooting to an end. Id. at ¶ 13. When the group left the shooting range between 2:00 and 2:15 a.m., Blocker and Sells were in the back seat, petitioner was in the front passenger seat, and Grant was behind the wheel. Id. Petitioner admits he can recall nothing else before the accident occurred more than an hour later, but alleges he stayed in the front passenger seat and did not drive again after the group went to the shooting range. Id.

Petitioner's declaration concedes he has no memory of what transpired in the hour immediately before the accident occurred, but alleges the accident site "was just over 5 miles East" of the intersection where Skaggs reported seeing a jeep driven by a blonde girl at 3:11 a.m. Id. at ¶ 16. Petitioner asserts that, "given the timing, we could have left the shooting range, driven into Bend, been seen by [Skaggs], driven back out Highway 20, turned around, and the accident could have occurred as we returned to Bend." Id. He attaches two maps to support his assertion: one, demonstrating the shooting range is 22.1 miles, or a 26-minute drive, from the intersection of Greenwood Avenue and Third Street in Bend, where Skaggs reportedly saw a jeep that looked

similar to Grant's; and the other, demonstrating the accident site is 7 miles, or a 10-minute drive, from that same intersection. Pet'r's Ex. A, Attach. 1, at 1–2.

C. Analysis

At trial, the state presented substantial evidence of petitioner's guilt. The physical evidence — the injuries, the condition of the jeep, the fibers in the driver's-side door, the relative positions of the front-passenger seat and driver's seat, and the unblemished seatbelts — all suggested petitioner had been the driver when the Jeep crashed. The eyewitness testimonies of Bisenius and Sells placed petitioner in the driver's seat in the hours and minutes before the crash occurred. The state's crash reconstructionist gave a thorough explanation of how this evidence fit together, and the state exposed the testimonies of the defense's experts to serious doubt. The state offered another expert crash reconstructionist to rebut the conclusions of defense experts Hoyer and Robertson, both of whom were unable to opine as to where petitioner had been seated in the vehicle.

Petitioner now presents new evidence to demonstrate actual innocence. His declaration purportedly shows the route the Jeep took the night of the crash, complete with mileage driven and precise timing of the night's events, and establishes that he was not driving when the crash occurred. Skaggs' statements allegedly support this narrative. Petitioner asserts that when taken together, his declaration and the statements of Skaggs "would have made a difference to the jury because it would have explained an otherwise unexplained gap in Sells's account." Br. in Supp., p. 31.

At the outset, the court notes that evidence supporting a claim of actual innocence must be new *and* reliable. As a general matter, the Ninth Circuit has opined that "[d]eclarations are not a strong form of evidence because 'the affiants' statements are obtained without the benefit of cross-

examination and an opportunity to make credibility determinations." Garcia v. Evans, 670 F. App'x 622, 623 (9th Cir. 2016); Cotton v. Schriro, 360 F. App'x 779, 780 (9th Cir. 2009) (stating that affidavits obtained after trial without the benefit of cross-examination should be "treated with a fair degree of skepticism"). Adding to the skepticism already attendant to post-trial declarations, petitioner's declaration was signed in March 2018, nearly 10 years after trial and 13 years after the crash. See Herrera v. Collins, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring) (stating that affidavits "produced . . . in the 11th hour with no reasonable explanation for the nearly decade-long delay" are suspect). Petitioner's declaration asserts he could have testified at trial as to the Jeep's specific route and timing of events leading up to the crash, but he does not provide any explanation as to why he did not share this information until nearly a decade later as he embarked on his last effort to appeal his conviction. Indeed, petitioner's trial counsel explained he declined to testify at trial because he had "no testimony of value to contribute" to his defense. Resp. Ex. 124 ¶ 7.

There are other reasons to doubt the reliability of petitioner's declaration. First, petitioner's declaration contradicts the testimony of multiple witnesses. Petitioner asserts the crash occurred at 3:30 a.m. Pet'r's Ex. A ¶ 14; Br. in Supp., p. 30. This contradicts the testimonies of VanOsdel, who testified that he took between 15 and 20 minutes to call 911 after the crash occurred; and three first responders, who testified they were dispatched to the scene at 3:30 a.m., 3:31 a.m., and 3:32 a.m., respectively. Tr. pp. 147, 169, 171, 227. Even adopting VanOsdel's more conservative estimate, the crash would have occurred at approximately 3:15 a.m., not 3:30 a.m. Second, petitioner alleges the Jeep passed the campers at approximately 12:45 a.m. as they were leaving China Hat. Pet'r's Ex. A ¶ 9. This directly contradicts the testimonies of Bisenius, who testified that the Jeep arrived at his campsite at approximately 1:00 a.m. and left sometime after he went to

bed in his camper 15 minutes after the Jeep arrived; and Sells, who testified the group stopped by the campfire for roughly 20 minutes before leaving to return the traffic cones. Petitioner attempts to cast doubt only on the testimony of Sells, and has given the court no reason to doubt the veracity of the other witnesses presented at trial.

Second, petitioner's declaration contradicts his own statements after the crash occurred and at trial. Petitioner's declaration states the group left the campers, drove to the intersection of Highway 20, turned right, and went to a shooting range two miles away for approximately 45 minutes. At the shooting range, petitioner insists Grant got behind the wheel, where she remained until the Jeep crashed. His contemporaneous statements to Winters, however, differed substantially:

> We left from up by . . . where the fuck were we . . . wherever we hit pavement, I know we hit fuckin' pavement. Well in the first place, I don't know where it was, up in fuckin' China Hat somewhere or some shit, but we fuckin' stopped to take a piss and switched. Rachel drove from fuckin' way up China Hat, all the way out to the fuckin' main road. And then, I don't know how fuckin' far we made it.

Resp. Ex. 112, p. 5. This statement directly contradicts his assertion that Grant got behind the wheel at the shooting range after they returned to Highway 20. Furthermore, he "repeatedly" told first responders at the scene that Sells had been the driver, not Grant. Tr. pp. 1558–59.

Moreover, petitioner admitted to Winters that he could not remember pivotal pieces of information he now attempts to advance in his declaration:

> I don't remember some stuff, I don't even remember her even fuckin' crashin', I don't even remember the fuckin' roads. That's specifically why we switched spots, 'cause I get fuckin' tired and I don't fuckin' remember shit. I don't know if I dozed off, I don't know if I was just a little buzzed. I don't know. I just don't fuckin' remember even crashin' or the fuckin' ride back.

Id. pp. 5–6. His statements at trial nearly three years later demonstrate he still could not remember much of what occurred the night of the crash, reaffirming at sentencing that he could not

"remember anything that happened during the accident or before the accident." Tr. p. 1577. Petitioner's declaration provides a thorough account of the evening's activities, including what roads the group took, specific timing of events, and a detailed explanation of how Grant came to be in the driver's seat. He has provided no explanation for how he has recovered his memory in the 13 years that elapsed between the crash and the execution of his declaration or why his contemporaneous account substantially differed from that submitted here.

Finally, this court has reason to doubt the reliability of petitioner's declaration because it conflicts with itself. Paragraph 13 details the group's visit to a shooting range off Highway 20, stating that Grant and Blocker returned to the Jeep because they were cold, Grant got in the driver's seat, and turned the Jeep around. It explicitly states that petitioner then got in the passenger seat, and that he "did not drive again after [they] went to the shooting range." Pet'r's Ex. A ¶ 13. He alleges the group left the shooting range between 2:00 and 2:15 a.m., and then explains "[his] next recollection is from after the accident." Id. Petitioner's insistence that he did not drive again after the group went to the shooting range is at odds with his admission that he remembers nothing else in the hour leading up to the crash. Even if petitioner's account is taken as true, there is simply no way for petitioner to legitimately attest that he never returned to the driver's seat.

Skaggs' statements fare no better. Though he reportedly saw a jeep that appeared similar to Grant's, Skaggs' description of that sighting was inconsistent over time. His contemporaneous account given the day of the crash indicated he saw three people in the jeep: two males and a blonde female. He also indicated the jeep was black or dark colored. His account over two years later changed to include four occupants, two females and two males, and the color of the jeep changed to dark burgundy or red. Furthermore, there is no indication Skaggs ever positively

identified the jeep he saw as Grant's Jeep, or ever identified Grant as the blonde female he saw behind the wheel.

Petitioner insists this evidence demonstrates he is actually innocent, and requests passage through the Schlup gateway to excuse his procedural default. In doing so, petitioner asks this court to disregard evidence found credible by a jury in favor of uncorroborated speculation and self-serving conjecture. Upon careful review of the record and considering all the evidence, old and new with due regard for its reliability, the court finds petitioner has failed to show a colorable claim of actual innocence to excuse his procedural default.[5]

II. Ineffective Assistance of Counsel

Petitioner alleges he was denied the effective assistance of trial counsel based upon counsels' failure to effectively cross-examine Brett Sells. Am. Pet., p. 5. As noted, petitioner exhausted this claim in his state post-conviction proceedings.

A. Legal Standards

The Antiterrorism and Effective Death Penalty Act ("AEDPA") prohibits relitigation of any claim adjudicated on the merits in state court unless such adjudication resulted in a decision that was (1) "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). A federal habeas court must apply a presumption of correctness

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[5] Because petitioner has failed to establish actual innocence under Schlup, his freestanding claim of actual innocence —which requires that he "go beyond demonstrating doubt about his guilt . . . [and] affirmatively prove that he is probably innocent," Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) — must also fail.

to the state court's findings of fact, and the habeas petitioner bears the burden of rebutting that presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). In other words, AEDPA imposes "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal quotations and citations omitted).

A state-court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). An "unreasonable application" of clearly established federal law occurs if the state court correctly identifies the governing legal principle but misapplies that principle to the facts at hand. Id. at 407. The "unreasonable application" clause requires the state court's decision to be more than merely erroneous or incorrect. Id. at 410. Rather, the state court's application of clearly established federal law must be objectively unreasonable. Id. at 409.

A federal habeas court may not disturb a state-court decision on factual grounds unless the state court's decision was based on an unreasonable determination of the facts considering the evidence before it. 28 U.S.C. § 2254(d)(2). Under the "unreasonable determination" clause, "[t]he question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007). The Ninth Circuit has clarified that when a petitioner challenges the substance of a state court's findings, the federal habeas court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably

conclude that the finding is supported by the record." Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir.), cert denied, 543 U.S. 1038 (2004).

"Determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." Harrington v. Richter, 562 U.S. 86, 98 (2011). Where a state court decision is issued without explanation, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Id. Where, however, the highest state court issues a decision on the merits unaccompanied by its reasons for the decision, a federal habeas court must "look through" to the last reasoned decision issued in a lower state court, and presume the unexplained decision adopted the same reasoning. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

The clearly established United States Supreme Court law governing ineffective assistance of counsel claims is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Williams, 529 U.S. at 391 (noting "[i]t is past question" the rule established in Strickland is clearly established federal law determined by the Supreme Court of the United States). To establish a claim of ineffective assistance under Strickland, a habeas petitioner must satisfy a two-pronged test. First, the petitioner must show his lawyer's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686. Such a showing requires the petitioner to overcome a strong presumption the challenged conduct falls within the "wide range of reasonable professional assistance; that is the [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. Thus, the first prong of Strickland is satisfied only if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687.

Second, a petitioner must show prejudice: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. Therefore, it is not enough if counsel's errors had only "some conceivable effect on the outcome of the proceeding." Id. at 693. Rather, counsel's errors must have been "so serious as to deprive [the petitioner] of a fair trial, a trial whose result is reliable." Id. In making the prejudice determination, the court must "consider the totality of the evidence before the judge or jury." Id. at 695.

Analyzing an ineffective assistance of counsel claim under AEDPA is "all the more difficult" because both standards are "highly deferential and when the two apply in tandem, review is 'doubly' so." Harrington v. Richter, 562 U.S. 86, 105 (2011) (citations omitted). The question under such circumstances "is not whether counsel's actions were reasonable." Rather, the court must determine "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

B. Analysis

As noted, petitioner alleges trial counsel was ineffective in connection with the cross-examination of Brett Sells. Specifically, petitioner asserts trial counsel's cross-examination failed to demonstrate that Sells' testimony "did not fully account for the time between 1:00 a.m. when they left the campers and 3:30 a.m. when the crash occurred." Br. in Supp., p. 34. Petitioner argues there is no strategic reason for neglecting to cross-examine Sells "on his failure to recall any of this critical time period." Id.

1. Defense Counsel's Cross-Examination of Sells

Defense counsel's cross-examination of Sells took aim at his credibility and attempted to create inconsistencies with the state's reconstruction evidence. At the outset, defense counsel established that Sells was on probation. Tr. pp. 571–72. He then questioned Sells about the number of beers he had that night, eliciting Sells' admission that he had consumed between 14 and 15 beers in the hours before the crash occurred. Tr. p. 572. Defense counsel then questioned Sells' memory regarding specific details of the roads taken the night of crash. Sells conceded he did not remember where China Hat Road intersects Highway 20 or whether the road was paved. Tr. pp. 572–73. Defense counsel's questioning also highlighted Sells' inability to clearly remember what occurred after the group left the campfire:

Q: Okay. What time in the evening was [a] decision made to return to Bend?

A: I could not tell you.

Q: At the campfire did anyone take a toilet break there?

A: Yeah.

Q: Everyone?

A: I couldn't recall. I wasn't really watching everybody else go to the bathroom.

Q: And you told us you don't know how long it was from that point at the bonfire until the crash occurred. Is that right?

A: That is correct.

Q: Could it have been 15 minutes?

A: Maybe.

Q: Could it have been two hours?

A: Maybe not two hours.

Q: Were there any other potty stops before the wreck, or do you know?

A: I can't recall.

Q: Okay. Could there have been?

A: There could have been.

Tr. pp. 573–74. Finally, defense counsel questioned the reliability of Sells' statements to police following the crash, prompting Sells to admit it had been hard for him to put his thoughts together while being questioned by Winters, and that the news of Blocker's death "affected [him] even further." Tr. p. 578.

2. The PCR Court's Decision

In his PCR proceeding, petitioner alleged counsel provided ineffective assistance by failing to effectively cross examine Sells. Petitioner asserted effectively cross-examining Sells was critical to bolster his theory of the case, and that counsel's failure "to even explore the possibility that someone else — other than Petitioner — had been driving" was ineffective.

To support his claim, petitioner submitted a lengthy police report documenting Winters' initial investigation after the crash occurred. The report recounted the substance of Winters' interviews with Sells in the emergency room, the majority of which mirrored Sells' testimony at trial.[6] Notably, he told police how everyone was positioned in the Jeep at the time of the crash and identified petitioner as the driver before learning the fates of the other occupants. Resp. Ex. 112, pp. 2–3. He repeated these statements after he learned Blocker had died. Id.

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[6] Petitioner places significance on the fact that Sells told Winters the group stopped at a Safeway store to buy beer, but testified at trial that they stopped at an Albertsons. The court does not find this discrepancy to be a noteworthy departure from Sells' account, and thus it is of no consequence in this action.

The report also recounted Winters' questioning of petitioner in the critical care unit. The report indicated petitioner related largely the same story as Sells, and admitted he had driven most of the night. Id. p. 4. His story diverged, however, on the issue of who had been driving at the time of the crash. Petitioner told Winters that Grant was driving when the accident occurred, but admitted he had no memory of the events leading up to the crash or the crash itself. Id. pp. 5–6.

In opposition, the state submitted, among other things, the declarations of petitioner's trial attorneys, Jacques Dekalb ("Dekalb") and Aaron Brenneman, both of whom indicated the cross-examination of Sells should speak for itself:

> Based on our investigation and the information available to the defense, we were not aware of any additional lines of questioning that seemed likely to produce testimony helpful to the defense. Mr. Sells was the only one of the surviving passengers who had a memory of the events just prior to the accident, as I recall. Our cross-examination was intended to call into question his memory, if possible, and to create any inconsistencies with the reconstruction testimony.

Resp. Ex. 124 ¶ 2; see also Resp. Ex. 125 ¶ 2. Significantly, Dekalb asserted petitioner "had no memory of the accident" and "wanted more than anyone in the courtroom to believe he was not the driver[.]" Id. ¶ 7.

The PCR court made oral findings on the record after a brief evidentiary hearing:

> And one of the objections being made was that the attorneys for Mr. Choat did not adequately cross-examine him regarding his testimony as to who was driving the vehicle at the time of the wreck. And if you go – if you can go back to the direct examination of this Brett Sells, the prosecutor pretty well hammered that into the ground.
>
> The description of the night's events included various places that they went and stopped and did this and that. And she took Sells through the testimony, that every time there was a stop, the person who'd been driving up to that point was the petitioner and every time when they resumed their journey, the petitioner was the one behind the wheel.
>
> And Mr. Sells testified unequivocally that petitioner was driving at that time – at the time of the wreck. So I don't see what further questions could have been asked of Mr. Sells that would have gotten him to completely change his testimony and –

> and say that somebody else had been driving when he was very specific that Mr. – that the petitioner was the only one who drove.

Resp. Ex. 126, at 910. In a written judgment, the PCR court reiterated its findings and denied relief:

> Petitioner faults his attorneys for not properly cross-examining Brett Sells, the only other person in the car who survived. The prosecutor had taken Sells through an extensive recitation of the night's activities. After each of numerous stops Sells stated that Petitioner had been and resumed driving. Sells clearly related that no one else ever drove the car that night. There was no effective cross examination available to counsel. This claim is without merit, and no error occurred.

Resp. Ex. 127, p. 2.

Petitioner contends the PCR court's finding that no effective cross examination had been available is an unreasonable determination of the facts in light of the "significant time period" left unaccounted for by Sells' testimony. Petitioner, however, has not shown that the PCR court's finding necessarily involved an objectively unreasonable determination of the facts.

Contrary to petitioner's assertion that trial counsel's cross-examination of Sells failed to expose a significant time period that was unaccounted for, the record demonstrates that trial counsel elicited Sells' admission that he could not remember when they decided to return to Bend, how much time elapsed from when they left the campfire until the crash occurred, and whether they stopped to use the restroom after leaving the campfire. Indeed, Sells testified the crash "maybe" occurred 20 minutes after leaving the campfire, but "maybe not two hours." These admissions revealed lapses in Sells' memory regarding the specific timing of the night's events, but did not otherwise impeach Sells' emphatic testimony that petitioner had been the driver.

Sells' testimony at trial was consistent with his contemporaneous statements to police, all of which demonstrated an unwavering insistence petitioner had been the driver when the Jeep crashed. There was no evidence available to impeach this testimony, because the only other

survivor, petitioner, had no memory of the ride home or the accident. Indeed, as petitioner's trial counsel pointed out, Sells was the only survivor with any memory of what occurred in the minutes immediately preceding the crash. The PCR court thus could have reasonably determined that any additional lines of questioning exploring the possibility that someone else had been behind the wheel when the Jeep crashed would have been futile, as Sells categorically named petitioner as the one and only driver the night of the crash, and would have simply reiterated that testimony. Additional questions demonstrating the lapses in Sells' memory in greater detail likewise would have done little to counter Sells' insistence that petitioner had been the driver. Thus, the PCR court's determination that no effective cross-examination was available to rebut Sells' testimony was not objectively unreasonable.

Petitioner has failed to establish that the decision of the PCR court was based on an unreasonable determination of the facts or was contrary to clearly established federal law. Accordingly, the decision of the PCR court is entitled to deference, and petitioner is not entitled to habeas relief on this claim.

III. Evidentiary Hearing

Petitioner does not explicitly request an evidentiary hearing in his Brief in Support, but attaches the declaration of investigator Rod Saiki ("Saiki") to his Sur-Reply, stating Saiki could provide testimony "about the driving distances, road conditions, driving speeds, and travel times relevant to this case" to support petitioner's claim of actual innocence. Pet. Ex. G, at ¶ 3. In his Additional Sur-Reply, petitioner notes an investigator could testify at an evidentiary hearing about the specific driving times set forth in petitioner's declaration. Pet.'s Additional Sur-Reply, at 2.

To the extent these references can be construed as a request for an evidentiary hearing, such request is denied. As noted above, the court does not question the reliability of petitioner's

assertions with respect to the length of driving time required to go from one place to another. Accordingly, an evidentiary hearing to take further testimony on this issue is not warranted. See Griffin v. Johnson, 350 F.3d 956, 966 (9th Cir. 2003) (holding an evidentiary hearing is not warranted when the petitioner has not established that the hearing would produce evidence that is more reliable or probative than what is already before the court).

IV. Remaining Claims Not Addressed in Petitioner's Brief

As previously noted, petitioner does not address the remaining grounds for relief alleged in his Petition for Writ of Habeas Corpus. Consequently, petitioner has not sustained his burden to demonstrate why he is entitled to relief on those claims. *See* Lambert v. Blodgett, 393 F.3d 943, 970 n.16 (9th Cir. 2004). Nevertheless, the court has reviewed petitioner's remaining claims and is satisfied he is not entitled to habeas corpus relief on those claims.

CONCLUSION

For these reasons, the Court should DENY the Amended Petition for Writ of Habeas Corpus (ECF No. 20), and enter a judgment of DISMISSAL. A Certificate of Appealability should be denied on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of

a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 2nd day of October, 2019.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge