MARIO CHAVEZ, NMCD# 65079 Defendant / Petitioner, v. RAYMOND SMITH, Warden and STATE OF NEW MEXICO, Plaintiff / Respondent.	CR#: D-202-CR-2004-03558 DA#: 04-4644-1H Hon. Jacqueline D. Flores, Div. XX

STATE'S **RESPONSE**
TO ADDENDUM TO AMENDED HABEAS PETITION

COMES NOW the State of New Mexico, by and through Gerard W. Treich, Jr., Assistant District Attorney, and in response to the Petitioner's Petition for Writ of Habeas Corpus, STATES that:

Respondent adopts the arguments, fact summary and exhibits contained in the Response filed herein on March 19, 2018 as though set out herein in full. Copies of Appellate Pleadings are attached hereto on Compact Disk marked as State's Exhibit G.

Petitioner filed the Addendum to Amended Petition for Writ On [sic] Habeas Corpus on May 10, 2018 to add the following claims:

Trial Counsel, Joseph Riggs, was ineffective when he failed to argue against the admission of Eloy Montano's statements under the "Excited Utterance" exception to the Hearsay rule, based on "controlling" case law that would not be announced until three years after Petitioner had been convicted.

Appellate counsel was ineffective by failing to make similar arguments, based on the same "future" authority.

The Trial Court abused its discretion by admitting the statements of co-defendant Eloy Montano under the Excited Utterance exception to the Hearsay rule.

'3. On Direct Appeal, Petitioner claimed trial error (abuse of discretion) in the admission of three Out-Of-Court Statements that were introduced through the testimony of Dawn Pollaro under three different exceptions to the Hearsay Rule. The New Mexico Supreme Court decided those issues squarely against Petitioner on his direct appeal, finding that the Trial Court had not abused its discretion regarding those issues. *See State v. Chavez,* S-1-SC-29,978, rip, 32-39, Mandate and

Opinion filed herein on April 30, 2010. "Points...raised and decided against defendant in his direct appeal ... will not be reviewed in this proceeding. That is to say, a Rule 93 motion [previous version of current habeas Rule 5-802 NMRA] may not be used to reconsider matters previously considered on appeal." *State v. Clark,* 1972-NMCA-112, ¶3, 84 N.M. 150, 500 P.2d 435. "A petitioner's presentation of a claim in his first application for postconviction relief does not require either a trial or an appellate court to readdress the merits of an issue squarely addressed and decided against the petitioner on direct appeal." *Clark v. Tansy,* 1994-NMSC-098, ¶14, 118 N.M. 486, 882 P.2d 527.

Petitioner also overlooks the principle that "the law, *at the time of the commission of the offense, is controlling." State v. Allen,* 1971-NMSC-026, ¶6, 82 N.M. 373, 482 P.2d 237 (citing *Williams v. State,* 1970-NMSC-092, ¶4, 81 N.M. 605, 471 P.2d 175) *(italics* added). Our Supreme Court emphasized this principle when it later relied on the U.S. Supreme Court decision in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060 ("Given the "broad scope of constitutional issues cognizable on habeas," the Court concluded "that it is 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation."). *Kersey v. Hatch,* 2010-NMSC-020, ¶23, 148 N.M. 381, 237 P.3d 683.

Petitioner Suffered No Prejudice from Mr. Riggs' Inability to Exclude Eloy Montano's Excited Utterances

Petitioner's assertion that *State v. Macias'* was "the controlling case" for trial counsel's arguments is legally untenable. Petitioner's case proceeded to trial on February 6, 2006. *Macias* was not decided until May 26, 2009 and was not released for publication until June 30, 2009, more than three years after the Jury returned its verdicts in Petitioner's case.

Petitioner raised on appeal his present argument, that the spontaneity of the excited utterance must be linked to the stimulating event in close temporal proximity. The Supreme Court rejected Petitioner's argument under the specific facts of Petitioner's case. *See Chavez,* ¶35. Petitioner's present

analysis under *Flores'* and *Macias* ignores the Supreme Court's analysis of Eloy Montano's

State v. Macias, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

[2] *State v. Flores,* 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

behavior to conclude under *Flores, Macias* and *Lopez!* that "[tjhe evidence showed that Montano was pacing, shaking, and crying when Pollaro came home and thus *was still under the emotion caused by the preceding events* when he made the statement. The trial court did not abuse its discretion by admitting the statement under the excited utterance exception." *Id. (italics* added).

In the Response filed March 19, 2018, Respondent apprised the Court of the two-prong test for ineffective assistance of counsel announced in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), acknowledged as the standard in New Mexico by *State v. Brazeal,* 1990-NMCA-010, 109 N.M. 752, 790 P.2d 1033, *cert. denied,* 109 N.M. 631, 788 P.2d 931 (1990). In 2011, the United States Supreme Court amplified its position in *Strickland* that proving a claim for ineffective assistance of counsel should be difficult:

> "An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom."

Harrington v. Richter, 562 U.S. 86, 105, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (internal citations to Strickland omitted).

Nothing in the *Strickland* standard requires trial counsel to exercise clairvoyance regarding the

law. The idea of holding Mr. Riggs culpable for failing to argue a decision that would not be announced for more than three years is absurd. Mr. Riggs did not engage in objectively deficient performance. In light of the Supreme Court's finding that the evidence supported Judge Knowles' decision to admit Eloy Montano's statements as Excited Utterances, Petitioner's discrete selections

[3] *State v. Lopez,* 1996 NMCA 101, ¶31, 122 N.M. 459, 926 P.2d 784 ("There is no set time period during which statements made are considered excited utterances. Instead, *the test is whether the victim was under the stress and strain of the excitement . . . .")* (internal citation omitted) *(italics* added); *Chavez* at ¶35.

from the trial transcripts fail to demonstrate deficient performance.

This Court's analysis must mirror the Supreme Court's reliance on the *entire* record on appeal to deny Petitioner's claim of deficient performance. "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, *in light of all the circumstances,* the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland* at 690 *(italics* added).

Strickland's analysis for prejudice is parallel to the principle of considering "all of the circumstances" when analyzing for deficient performance. *"[M]ere evidentiary prejudice is not enough* .... Thus, even if counsel's performance is deficient, Defendant is not entitled to a new trial unless, *considering the totality of the evidence,* a reviewing court determines that there is 'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *State v. Roybal,* 2002-NMSC-027, ¶25, 132 N.M. 657, 54 P.3d 61, quoting *Lytle v. Jordan,* 2001-NMSC-016, ¶27, 130 N.M.. 198, 22 P.3d 666 *(italics* added).

For that reason, the Response filed March 19, 2018 provided this Court with a neutral statement of facts and comprehensive citations to the transcripts to afford this Court ready access to the evidence introduced during the entire trial, including arguments by Mr. Riggs. Assuming *arguendo* that Mr. Riggs could have presented more effective or better prepared arguments against

the State's introduction of Eloy Montano's statements through Dawn Pollaro's testimony, the evidence against Defendant was overwhelmingly in favor of the Jury's decision to convict Petitioner of First Degree Deliberate Murder. *See* Exhibit A to Response filed March 19, 2018.

Petitioner attempted to call Eloy Montano as a witness but Montano refused to testify on Fifth Amendment grounds. [TR-V20, 5-6] Petitioner had already chosen to testify and tried to pin the murder of Garland Taylor on Eloy Montano. [TR-V19, 114-157; TR-V20, 139-164, 167-213; TR-V21, 3-144] Petitioner's decision to testify appears, in part, to be an effort to rebut Montano's Excited Utterance statements. His complaint that Mr. Riggs ill-advised him to testify' flows naturally from that failed gambit.

[4] *See* Response filed 03/19/18, *Restatement of Pro-Se Claims, 4)* at pg. *5*.

Aside from his misplaced reliance on case law that would not be announced until three years after his trial concluded, Petitioner fails to demonstrate how the absence of Montano's statements would have changed the outcome of his trial. He fails to show how he sustained prejudice from Mr. Riggs' allegedly deficient arguments to exclude Montano's Excited Utterances, particularly in the face of the Supreme Court's analysis of the Excited Utterance issue and that Mr. Riggs could not have foreseen the holding in *Macias*. The present aspect of Petitioner's ineffective assistance claim stands in similar posture to that of the defendant in *State v. Martinez,* 2007-NMCA-160, ¶21, 143 N.M. 96, 173 P.3d 18, *cert. denied,* No. 30, 726, Nov. 20, 2007. "When evaluating an ineffective assistance of counsel claim, we review the entire proceeding and consider the totality of the evidence presented.... [T]he jury had to decide who was telling the truth—Defendant or child. Defendant does not explain how his counsel's alleged deficiencies in representation could have changed the result: the jury did not believe Defendant." *Id.*

On that basis, this Court must deny Petitioner's claim of prejudice through ineffective assistance of counsel. The admission of Eloy Montano's Excited Utterances did not detrimentally outweigh the remaining evidentiary prejudice of the State's case and the Jury did not improperly

convict Petitioner by relying solely on those statements.

Appellate Counsel Was Not Ineffective

The foregoing argument also demonstrates that Appellate Counsel did not render ineffective assistance regarding the claims Petitioner now raises in his Addendum. Mr. Riggs filed Petitioner's Statement of Issues with the Supreme Court Clerk on September 14, 2006. Appellate Counsel Kathleen McGarry filed Petitioner's Brief in Chief on May 26, 2009.[5] Ms. McGarry argued concepts identical to those in Petitioner's Addendum. *See* Exhibit G, *002 29978 Brief in Chiefpdf,* 22-25.

It remains only to be observed that "[t]he weeding out of weak claims to be raised on appeal is the hallmark of effective advocacy, because every weak issue in an appellate brief or argument detracts

[5] Although the Brief in Chief was filed the same date that the *Macias* case was decided, the New Mexico Supreme Court does not use a Summary Calendar system to manage its docket, as is the case with the Court of Appeals. The Court of Appeals issues proposed summary dispositions for cases pending on its docket and reviews supplemental pleadings to determine if a case need be assigned to its General Calendar for argument and final decision. The Supreme Court does not issue previews of its decisions in the form of proposed summary dispositions.

from the attention a judge can devote to the stronger issues, and reduces appellate counsel's credibility before the court." *U.S. v. Cook,* 45 F.3d 388, 394-95 (10th Cir. 1995) (internal quotations and supplementary citation omitted).

Petitioner's deriving a conclusion that differs from the Supreme Court's can be explained only through Petitioner's decision to support his argument with a limited selection of facts from the record. Because Petitioner alleges no facts beyond the trial record that require development or objective verification to support his claim, an evidentiary hearing is not necessary and the Court should deny relief on Petitioner's two new ineffective assistance of counsel's claims.

There Is No Fundamental Error in the Trial Court's Admission of Montano's Excited Utterances

Petitioner asserts that Judge Knowles abused his discretion when he admitted some of Eloy Montano's statements under the Excited Utterance exception to the Hearsay Rule. The standard in

Habeas for review of alleged trial errors is Fundamental Error, not abuse of discretion. "[B]ecause 'the facts underlying Petitioner's habeas claim were known or knowable to him at the time of his trial, and the record was adequate to address the issue on direct appeal ... review is only for fundamental error.'" *Marquez v. Hatch,* 2009-NMSC-040, ¶15, 146 N.M. 556, 212 P.3d 1110, *quoting State v. Sutphin,* 2007-NMSC-045, ¶10, 142 N.M. 191, 164 P.3d 72; *compare State v. Ross,* 1996-NMSC-031, 122 N.M. 15, 20, 919 P.2d 1080, 1085; *State v. Salgado,* 1999-NMSC-008, ¶5, 126 N.M. 691, 974 P.2d 661.

"Fundamental error consists of error that goes to: (1) the foundation of a defendant's rights, (2) the foundation of the case, or (3) a right essential to the defense of an accused, 'which no court could or ought to permit him to waive.' [T]he [fundamental error] doctrine has evolved such that a conviction will only be reversed if the defendant's guilt is so questionable that upholding a conviction would shock the conscience, or where, notwithstanding the apparent culpability of the defendant, substantial justice has not been served." *Campos v. Bravo,* 2007-NMSC-021, ¶18, 141 N.M. 801, 161 P.3d 846 (quoting *State v. Garcia,* 1942-NMSC-030, ¶25, 46 N.M. 302, 128 P.2d 459) (internal quotations omitted).

Intentionally limiting the facts to support a post-conviction argument does not establish a *prima facie* case for fundamental error relief. Facts beyond the scope of the record might support a claim for

relief. However, Petitioner alleges no facts beyond the scope of the record before this Court or beyond the record that was available to him on direct appeal. Therefore, Petitioner is not entitled to even fundamental error review on the present issue because it was raised and decided against him on direct appeal. *Woods v. State,* 1972-NMCA-128, 84 N.M. 248, 501 P.2d 692 and *State v. Clark,* 1972-NMCA-112, 84 N.M. 150, 500 P.2d 435, "addressed situations where the issues the defendants sought to raise in post-conviction proceedings had been decided on the merits on direct appeal. Thus, a defendant may not seek post-conviction relief for issues raised on appeal that were decided on the merits against defendant." *State v. Gomez,* 1991-NMCA-061, ¶5, 112 N.M. 313, 815 P.2d 166.

For those reasons, this Court must deny Petitioner's claim that Judge Knowles abused his

discretion when he decided to admit some of Eloy Montano's statements under the Excited Utterance exception to the Hearsay rule.

WHEREFORE, Respondent respectfully prays this Court deny relief on all issues raised in Petitioner's Addendum to the Amended Petition for Writ of Habeas Corpus.

Respectfully submitted,

I certify that a copy of the foregoing
was filed with the Court and was e-mailed
to Opposing Counsel, John McCall,
at mccalljo@gmail.com this
22nd day of June, 2018.