IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MARIO CHAVEZ,

Defendant-Petitioner,

vs.

TIM HATCH, Warden,
Southern New Mexico Correctional Facility,

Plaintiff-Respondent.

Case No. S-1-SC-38695
Bernalillo County
D-202-CR-2004-03558

PETITION FOR WRIT OF CERTIORARI TO THE SECOND JUDICIAL DISTRICT COURT OF NEW MEXICO

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This petition is for review of the District Court's *Order on Petition for Writ of Habeas Corpus* entered on January 22, 2021 denying Petitioner's pro se second *Petition for Habeas Corpus* and *Motion for Transcripts and Motion to Unseal and Review Document* in *Mario Chavez v. Gary Maciel*, Case No. D-202-CR-2004-03558. This petition is filed pursuant to the provisions of the New Mexico Constitution, Rule 5-802 and Rule 12-501 NMRA. A copy of the District Court's *Order on Petition for Writ of Habeas Corpus* is attached.

QUESTION PRESENTED FOR REVIEW

Did the District Court err in concluding that there had been no ineffective assistance of trial or appellate counsel for their failure to argue and raise confrontation clause challenges to the testimony of Petitioner's co-defendant, Eloy Montano?

DESCRIPTION OF THE PROCEEDINGS

At jury trial on February 22, 2006, Petitioner was convicted of first-degree murder, armed robbery and five counts of tampering with evidence for which he was sentenced to a total incarceration of life plus twenty-five (25) years. Petitioner appealed his conviction to the New Mexico Supreme Court in Case No. 29,978 raising the issues: 1) the trial court abused its discretion by admitting testimony of witnesses and certain evidence; 2) the trial court improperly admitted three out-of-court statements contrary to the hearsay rules; and, 3) the convictions and sentences for 5 counts of tampering with evidence violated the double jeopardy clause. The Supreme Court

affirmed Petitioner's convictions and specifically held that testimony from Montano's (Petitioner's Co-Defendant) wife about statements he made to her were admissible under the excited utterance exception to the hearsay rule. On December 1, 2010, Petitioner, while incarcerated, mailed his Amended Petition for Habeas Corpus ("First Habeas Petition") and an Addendum was filed on May 10, 2018. The issues raised were: 1) ineffective assistance of counsel; 2) the trial court erred in admitting polygraphs; and 3) cumulative error. Specifically, with regard to the ineffective assistance of counsel claims, Petitioner claimed trial counsel was ineffective in 1) disclosing the polygraph tests to the prosecution and advising Petitioner to agree to take a polygraph test administered by the State representing to Petitioner that he had passed the polygraph when the results were actually inconclusive; 2) failing to raise arguments preventing statements made by Montano from coming in through the testimony of his wife, Dawn Pollaro, as excited utterances; 3) failing to procure experts to testify about Petitioner's location throughout the events based on his computer location and cell phone records and calls, failure to obtain witnesses to testify about the appearance of the deceased's wallet in Arizona, and failure to obtain a better polygraph expert; 4) conflict of interest because trial counsel had a good relationship with the District Attorney; 5) failing to inform Petitioner of a plea offer to second-degree murder. The District Court denied the First Habeas Petition, and Petitioner filed

a Petition for Certiorari to the New Mexico Supreme Court in Case No. S-1-37935. The Petition for Writ of Certiorari and Motion for Reconsideration were both denied.

On March 25, 2020, Petitioner filed his Second Habeas Petition, the denial of which is the subject of the present Petitioner for Writ of Certiorari. In his Second Habeas Petition, Petitioner raised the following issues: 1) ineffective assistance of trial for failing to object on confrontation grounds to the statements of Montano, and appellate counsel's failure to investigate or raise the issue regarding the Confrontation Clause; 2) trial counsel's conflict of interest because at the evidentiary hearing, he noted that to do nothing for Petitioner's defense would have been malpractice and thus, placed his own interests before Petitioner's; 3) under Rule 11-410, the polygraph results should not have been admitted as they were statements made for purposes of plea negotiations and trial counsel should have objected; 4) appellate counsel was ineffective for failing to investigate and present the denial of Petitioner's confrontation rights; and 5) Habeas counsel's actions were detrimental to Petitioner's claims. In his First and Second Supplement to his Second Habeas Petition, Petitioner provided additional argument and information regarding his claims against appellate counsel and his confrontation claim.

The District Court concluded that with the exception of Petitioner's ineffective assistance of counsel claims regarding his confrontation claims, his remaining claims

had been previously addressed by the Court and because there had been no intervening change of law or fact, summarily dismissed these claims. With regard to Petitioner's confrontation claims, the District Court held that Petitioner was not entitled to relief as a matter of law because the files, pleadings and records showed that it was trial counsel who sought the admission of Montano's statements and argued against the admission of the entirety of those statements. The District Court summarily concluded that the trial strategy was to show that Montano was a liar, to discredit him as a witness, and to shift the focus from Petitioner as the shooter to his co-defendant. The Court concluded that record did not support Petitioner's assertion that Montano was granted use immunity on February 1, 2006 because this grant of immunity was for the testimony of Victoria Chavez and not Montano. The District Court noted that on January 12, 2006, Petitioner moved for the admission of certain statements made by Montano arguing that the statements affected the state of mind and subsequent actions of law enforcement officers to strategically demonstrate Montano had lied to police to cover up his involvement and shift blame to Petitioner. However, the Court determined that while the record indicated trial counsel initially argued successfully against admitting the entirety of the statements, it was only in response to trial counsel's questioning of Detective Hix that the decision to admit the entirety of the statement was made. The Court further summarily concluded that it appeared appellate counsel, after reviewing

the transcripts of the trial, made a strategic decision not to present the confrontation argument. The District Court also noted that the record did not support Petitioner's claims that the State intended to present the statements of Montano contrary to Petitioner's confrontation rights from the outset of the trial and that trial counsel failed to address the confrontation issue. Thus, the Court concluded that there were reasonable strategic decisions made regarding the use of Montano's statements and whether to present arguments regarding the Confrontation Clause challenges on appeal. As such, the District Court held that Petitioner failed to establish ineffective assistance of counsel related to either his trial or appellate counsel's failure to raise Confrontation Clause claims. Petitioner also filed a motion to unseal and review a document that was part of the record and sealed on April 4, 2005, which Defendant had never seen or been advised of its contents by prior counsel. The State did not file any written responses to either the Second Habeas Petition or the Motion, no evidentiary hearing was held, yet the Court summarily denied both the Second Habeas Petition and the Motion.

At trial, the State introduced Montano's out- of-court testimony through two witnesses: 1) Detective Hix - the entirety of Montano's videotaped statements was played for the jury; and 2) Dawn Pollaro - Montano's wife testified regarding a

conversation they had several hours after the murder which was admitted as an excited utterance.

BASIS FOR GRANTING THIS WRIT OF CERTIORARI

This Court has jurisdiction to grant a writ of certiorari because this case involves a significant question of law under the Constitution and an issue of substantial public interest that the Supreme Court should determine. Rule 12- 502(C)(2)(d); Section 34-5-14(B)(3)-(4). The District Court erroneously denied Petitioner's Second Habeas Petition by summarily concluding that the ineffective assistance of his trial and appellate counsel in failing to argue or defend against the infringement upon his Sixth Amendment rights as discussed in Crawford was merely a strategic decision.

ARGUMENT

Under *Crawford v. Washington*, 124 S. CT. 1354 (2004), the Sixth Amendment Confrontation Clause analysis centers on whether a certain statement is "testimonial" in nature. If it is testimonial, the Confrontation Clause prohibits the prosecution from using the statement against a criminal defendant unless the declarant is not available to testify and the defendant has had a previous opportunity to cross-examine the declarant. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court stated that "where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law- as

does [*Ohio v. Roberts*], and as would an approach that exempted such statements from the Confrontation Clause altogether." *Id.* at 68. However, where testimonial evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.*

The first prong of a *Crawford* analysis is that the statements used be testimonial. There are some statements that are "testimonial" and would include statements made under circumstances which would lead one to reasonably believe that the statements would be later used at trial. In *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J. concurring), the Supreme Court stated that "an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused." Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 126 S.Ct. 2266, at 2268.

Of the statements at issue in this Petition, most clearly testimonial are Montano's video-taped statements made in response to Officer Hix' interrogation that were played for the jury in its entirety. This interrogation occurred sometime after the alleged incident and at a different location. The emergency, if there was one, had passed and Officer Hix was collecting information that would support probable cause

for the Petitioner's arrest and eventual prosecution. "Statements taken by police officers in the course of interrogations are . . . testimonial even under a narrow standard." *Crawford*, 541 U.S. 36, at 52. In *State v. Romero*, the New Mexico Supreme Court, applying *Davis*, found reversible error when a taped interview with the victim made by an officer the afternoon of the incident in question was played for the jury. 156 P.3d 694. In *Davis* itself, the United States Supreme Court found reversible error where a lower court admitted the un-crossed affidavit of a domestic violence victim filled-out at the request of the police sometime after the incident had occurred (holding with respect to *Hammon v. Indiana*, one of two co-appellants in *Davis*). 126 S.Ct. 2266. Additionally, when Montano made statements to his wife shifting blame onto Petitioner and away from himself, he had every reason to believe and intend that his wife would later testify on Montano's behalf by shifting culpability to Petitioner and thus, these statements were also testimonial.

If Montano's statements were testimonial, in light of *Davis v. Washington*, the State would also need to establish that Montano was unavailable for testimony. The second prong under *Crawford* is that out-of-court testimony is permissible "only if the witness is demonstrably unavailable to testify in person." 541 U.S. at 59. The State would not have been able to show that Montano was unavailable to testify because he would be exempted by ruling of the court on the ground of privilege from testifying

concerning the subject matter of the declarant's statement should he be called as a witness. However, trial counsel failed to adequately raise and argue the issue of Montano's "unavailability."

A defendant's Confrontation Clause rights are violated in a joint trial situation when a co-defendant's confession that facially incriminates the defendant is admitted even with a jury instruction that the confession was only to be considered against the codefendant. *Bruton v. United States*, 391 U.S. 123, 125-26 (1968). The Court reasoned that a limiting jury instruction could not overcome the "powerfully incriminating extrajudicial statement" naming the defendant. *Id*. at 135-36. However, where a statement is redacted to omit all reference to the defendant and all reference to the fact that anyone other than the co-defendant and a third person committed the crime, and there is a limiting instruction, the defendant's Confrontation Clause rights are not violated. *Richardson v. Marsh*, 481 U.S. 200, 201-02 (1987). This is so even if the defendant is subsequently linked to the confession by other evidence against him. The Court found the distinction between a facially incriminating confession and a redacted confession to be significant. The fact of redaction alone, however, is not sufficient to withstand a *Bruton* challenge. Rather, the manner and extent of redaction is determinative. For example, redaction of the confession of a non-testifying co-defendant by replacing the defendant's name with an obvious indication of deletion

such as a blank space, the word "deleted," or similar symbol violates *Bruton. Gray v. Maryland*, 523 U.S. 185, 192 (1998). The Supreme Court explained that *Bruton* applies where the inferences "involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* at 196. This is so because, unlike the redacted confession in *Richardson*, the redacted confession in *Gray* referred to the "existence" of the nonconfessing defendant. *Id.*

Specifically, "an accomplice's testimonial statement [is] inadmissible under the Confrontation Clause unless the accomplice [is] unavailable and the defendant had a prior opportunity to cross-examine the accomplice *concerning the statement.*" *State v. Zamarripa*, 2009-NMSC-001, ¶ 23, 145 N.M. 402, 199 P.3d 846 (quoting *State v. Henderson,* 2006–NMCA–059, ¶ 15, 139 N.M. 595, 136 P.3d 1005). New Mexico courts have held on numerous occasions that, when confronted with an accomplice's statement, a defendant's rights to confront are only satisfied where he or she is allowed the opportunity to cross-examine the accomplice on the statement. *Id.* at ¶ 31 (citing *State v. Forbes*, 2005–NMSC–027, ¶ 3, 138 N.M. 264, 119 P.3d 144 (holding that an accomplice's statement was inadmissible where the defendant "was deprived of the opportunity to cross-examine [the accomplice] to challenge the reliability of his

statement"); *State v. Alvarez–Lopez*, 2004–NMSC–030, ¶ 24, 136 N.M. 309, 98 P.3d 699 (holding that, where the defendant had no opportunity to cross-examine the accomplice on the accomplice's testimonial statements, admission of the statements violated the Sixth Amendment); *State v. Johnson*, 2004–NMSC–029, ¶ 6, 136 N.M. 348, 98 P.3d 998 (holding that an accomplice's statement was inadmissible where the defendant did not "at any time have an opportunity to cross-examine [the accomplice] on his statement"); *Henderson*, at ¶ 16 (holding that a "prior opportunity to cross-examine the statement " was a prerequisite to the testimonial statement's subsequent admission at trial); *State v. Duarte*, 2004–NMCA–117, ¶ 10, 136 N.M. 404, 98 P.3d 1054 (holding that an accomplice's testimonial statement was inadmissible "unless the accomplice was unavailable and the defendant had a prior opportunity to cross-examine the accomplice concerning the statement"). Thus, in *Zamarripa,* the New Mexico Supreme court held that a defendant's Sixth Amendment rights were violated when the trial court permitted the State to introduce a transcript containing an accomplice's statements made to police even where the accomplice was granted limited use immunity and was further unavailable because he raised his privilege against self-incrimination because the defendant did not have a prior opportunity to cross-examine the accomplice on the substance of his statements. Here, Petitioner was not afforded even the limited opportunity to cross examine Montano that was held to

violate the *Zamarripa* defendant's right to confront. Thus, Montano's statement was admitted without regard to that "central concern of the Confrontation Clause[:] ... to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at ¶ 32 (quoting *Lilly v. Virginia,* 527 U.S. 116, 123–24, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)).

Absent opportunity for cross-examination of a witness on the part of defendant, the state as a prerequisite to obtaining the admission of such evidence, must demonstrate compliance with the two-pronged test enunciated in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); and *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). *State v. Martinez*, 99 N.M. 48, 51–52, 653 P.2d 879, 882–83 (Ct.App. 1982). In Roberts, the court held:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. (internal citation omitted).

In Petitioner's trial, his trial counsel ineffectively failed to raise any confrontation issues or challenges to Montano's testimony and failed to secure

redaction or a limiting instruction. In denying his Second Habeas Petition, the District Court seems to suggest that the protections afforded a Defendant by the Confrontation Clause in a joint trial can somehow be side-stepped and avoided by securing hearsay testimony of a co-defendant in a separate trial avoiding any cross-examination because that co-defendant is "unavailable" by asserting a claim against self-incrimination, and that this would be a viable strategy for trial counsel to pursue. Such a conclusion would be ludicrous and violative of a defendant's constitutional protections.

Here, Montano's statements were testimonial, he was afforded the protection of *his* Constitutional right by being permitted not to testify under the privilege against self-incrimination, but Petitioner was not permitted any cross-examination. Even if Montano's statements were not hearsay, not offered for the truth of the matter asserted, the statements would still have to be relevant. The Court should not have allowed Officer Hix to bypass hearsay altogether by playing the entirety of the Montano's video-recorded statements. Allowing in summaries to avoid the hearsay problem would be a blatant effort to establish guilt without confrontation. In *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004), law enforcement officers summarized conversations between the informant and his supplier. The State contended that the statements were admissible to explain the law enforcement officers' actions. However the Seventh Circuit stated:

> Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule. . . .Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers. Id. at 1020.

PRAYER FOR RELIEF

WHEREFORE Defendant-Petitioner requests that this Court issue its writ of certiorari to the district court reverse and/or remand to the district court and for such further relief as this Court deems appropriate.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE

The body of this petition exceeds the ten page limit set forth in Rule 12- 502(D)(2) NMRA. Pursuant, to Rule 12-502(E) NMRA, I certify that this petition complies with the limitations of Rule 12-502(D)(3) NMRA. This petition was prepared using Times New Roman, a proportionally spaced typeface, and the body of the petition, as defined by Rule 12-502(D)(l), contains **3,144** words.

CERTIFICATE OF DELIVERY

I hereby certify that a copy of this pleading was served electronically to the Attorney General's Criminal Appeals Division, this **22th** day of February 2021.

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

MARIO CHAVEZ,

Petitioner,

v. **D-202-CR-2004-03558**

STATE OF NEW MEXICO,

Respondent.

ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

THIS MATTER came before the Court on Petitioner's Writ of Habeas Corpus, filed March 25, 2020, Supplement to Petition for a Writ of Habeas Corpus, filed on May 26, 2020, Second Supplement to Petition for a Writ of Habeas Corpus, filed on June 24, 2020, and Notices of Rule 5-802(H)(1) NMRA Pre-Appointment Review filed by the Law Offices of the Public Defender. The Court having read the pleadings and being otherwise fully advised hereby **FINDS** and **ORDERS** as follows:

1. In his prior petition for writ of habeas corpus, Petitioner claimed ineffective assistance of counsel arising from the following: disclosing the polygraph tests; failure to argue against statements made by Eloy Montano coming in through other witnesses; failing to hire experts; conflict of interest; and failure to communicate a plea. Petitioner also argued the trial court erred in admitting the polygraphs and argued cumulative error.

2. After an evidentiary hearing on the first petition, the Court entered an Order Denying Petitioner's Petition and Amended Petition for Writ of Habeas Corpus, on September 6, 2019.
3. Petitioner filed a Writ of Certiorari arguing the District Court erred in denying his petition by incorrectly relying on statements from the evidentiary hearing that conflicted with the statements made at trial and did not address the claim that trial counsel failed to argue against the admission of the polygraph under Rule 11-410(A)(5)[1]. Petitioner reasserted the excited utterance issue and again argued counsel was ineffective for failing to hire experts or conduct further investigation.
4. Petitioner's Petition for Writ of Certiorari was denied, as was his Motion for Reconsideration.
5. In the present Petition, Petitioner raises the following issues:
    a. Petitioner claims ineffective assistance of counsel from counsel's failure to object on confrontation grounds to the statements of Eloy Montano. Similarly, Petitioner claims appellate counsel failed to investigate or raise the issue regarding the Confrontation Clause;
    b. Petitioner contends trial counsel was operating under a conflict of interest because, at the evidentiary hearing, trial counsel noted that to do nothing for Petitioner's defense would have been malpractice. Based on this statement, Petitioner argues trial counsel put his own interests before Petitioner;

[1] Petitioner originally made the argument pursuant to Rule 11-510 and later corrected the citation to Rule 11-410.

c. Under Rule 11-410, the polygraph results should never have been admitted as they were statements made for purposes of plea negotiations and trial counsel should have objected to their admission;

d. Appellate counsel was ineffective for failing to investigate and present the denial of Petitioner's confrontation rights; and

e. Habeas counsel's actions were detrimental to Petitioner's claims.

6. In his Supplement to Petition for Writ of Habeas Corpus, Petitioner provided additional argument and information regarding his claims against appellate counsel and Petitioner's confrontation argument. Petitioner also argues his confrontation claim has never been addressed on the merits and, therefore, should not be summarily dismissed.

7. In his Second Supplement to Petition for a Writ of Habeas Corpus, Petitioner provided further argument and information regarding his confrontation claim.

Summary Dismissal

8. Petitioner's claim against habeas counsel, regarding the hiring of an expert for the evidentiary hearing, fails to allege what expert could have been hired, the testimony that would have been provided, or that an expert would have changed the result. *See Lytle v. Jordan*, 2001-NMSC-016, ¶ 46, 130 N.M. 198. Petitioner's claim regarding habeas counsel is summarily dismissed.

9. Petitioner's claim regarding trial counsel's testimony about strategy and statement of "malpractice" does not establish a conflict of interest and appears to be another challenge to the strategy at trial which has previously been addressed by the Court. *See* Rule 5-802(I)(2) NMRA.

10. With the exception of Petitioner's ineffective assistance of counsel claims regarding his confrontation claims, Petitioner's remaining claims have been addressed by the Court and there has been no intervening change of law or fact and the ends of justice would not be served by rehearing these claims. *Id.*

Ineffective Assistance of Counsel - Confrontation

11. Petitioner is not entitled to relief as a matter of law regarding his ineffective assistance of counsel claims related to the Confrontation Clause because the files, pleadings, and records show that it was trial counsel who sought the admission of Eloy Montano's statements and argued against the admission of the entirety of those statements.
12. "[I]neffective assistance of counsel requires that a defendant establish that: (1) counsel's performance fell below that of a reasonably competent attorney; (2) no plausible, rational strategy or tactic explains counsel's conduct; and (3) counsel's apparent failings were prejudicial to the defense." *State v. Cordova*, 2014-NMCA-081, ¶ 9, 331 P.3d 900; *see also Strickland v. Washington,* 466 U.S. 668, 687 (1984) (To prevail on an ineffective assistance of counsel claim, Petitioner must show both that counsel's performance was deficient and the deficient performance prejudiced the defense.).
13. "There is a strong presumption that trial counsel's conduct 'falls within the wide range of reasonable professional assistance." *State v. Garcia*, 2011-NMSC-003, ¶ 33, 149 N.M. 185 (quoting *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406).
14. As noted repeatedly in relation to Petitioner's previous habeas petition, the strategy at trial was to show that Eloy Montano was a liar, to discredit him as a witness, and to shift the focus from Petitioner as to the shooter to Eloy.

15. Although Petitioner continuously asserts Eloy Montano was granted use immunity, the record does not support this assertion. The Statement of Issues indicates no use immunity had been granted and a September 30, 2005, notice filed by the State indicated use immunity was not forthcoming. Petitioner's assertion that Eloy Montano was granted use immunity is based on the use immunity granted on February 1, 2006; however, this grant of immunity was for the testimony of Victoria Chavez, not Eloy Montano.
16. On January 12, 2006, Petitioner moved for the admission of certain statements of Eloy Montano, arguing the statements affected the state of mind and subsequent actions of law enforcement officers. The record indicates Petitioner sought to use the statements Eloy Montano made to law enforcement strategically to demonstrate Eloy had lied to police to cover-up his involvement and shift the blame to Petitioner. The record further indicates trial counsel initially argued successfully against admitting the entirety of the statements and it was only in response to trial counsel's questioning of Detective Hix that the decision, after argument of the parties, to admit the entirety of the statement was made.
17. Further, it appears appellate counsel, after reviewing the transcripts of the trial, made a strategic decision not to present the confrontation argument.
18. The record does not support Petitioner's claims that the State intended to present the statements of Eloy Montano contrary to Petitioner's confrontation rights from the outset of the trial and does not support Petitioner's contention that trial counsel failed to address the confrontation issue.
19. It appears there were reasonable strategic decisions made regarding the use of Eloy Montano's statements and whether to present arguments regarding the Confrontation Clause challenges on appeal. *See Garcia*, 2011-NMSC-003, ¶ 33; *see also State v. Rojo*,

1999-NMSC-001, ¶ 64, 126 N.M. 438 (noting that if an error "can be justified as a trial tactic or strategy," that error is not unreasonable).

20. Petitioner has failed to establish ineffective assistance of counsel related to trial counsel or appellate counsel's failure to raise Confrontation Clause claims. *See State v. Baca*, 1997-NMSC-059, ¶ 24, 124 N.M. 333 (If a defendant does not make the required showing, he "has not carried his or her burden, and the presumption of effective assistance controls." (citations omitted)).

IT IS THEREFORE ORDERED, that Petitioner's second Petition for Habeas Corpus is **DENIED;**

IT IS FURTHER ORDERED that Petitioner's Motion for Transcripts and Motion to Unseal and Review Document are **DENIED.**

IT IS SO ORDERED.

~~JACQUELINE FLORES~~
District Court Judge, Division XX