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

MOTION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SECOND JUDICIAL DISTRICT COURT OF NEW MEXICO

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This Motion seeks reconsideration of this Court's Order denying Petitioner Mario Chavez' ("Petitioner") Petition for Writ of Certiorari to the Second Judicial District Court of New Mexico ("Petition") filed February 22, 2021. The Petition sought review of the Second Judicial 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 was filed pursuant to the provisions of the New Mexico Constitution, Rule 5-802 and Rule 12-501 NMRA. On March 22, 2021, this Court entered an order requesting Respondent file a written response by April 6, 2021. On April 6, 2021, Respondent filed its Response to Petition for Writ of Certiorari to the Second Judicial District Court ("Response"). On April 27, 2021, this Court entered its Order denying the Petition ("Order"). Pursuant to Rule 12-404(A) NMRA, Petitioner now requests this Court reconsider its denial of the Petition and instead grant the Petition, or alternatively, order further proceedings to determine whether the Petition should be granted. Pursuant to Rule 12-309(C), opposing counsel was contacted regarding their position on this Motion and they oppose.

Introduction

While the Order denying the Petition does not specify which points of law or fact upon which this Court relied in its disposition, it is Petitioner's opinion that this

Court overlooked or misapprehended certain facts, relying primarily on the Response's inaccurate recitation of facts, and/or the controlling law regarding the failure of counsel to raise and argue Confrontation Clause issues at trial, on appeal and/or in Petitioner's first habeas corpus petition. As such, this Motion will focus largely on the facts and law in Defendant's Response as it would seem logical that had this Court adopted all the facts and law in the Petition, it would have granted the Petition.

Petitioner specifically asked this Court to review whether the District Court erred in concluding 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 ("Montano"). The Response accurately points out that the Petition, while discussing two (2) categories of out-of-court statements admitted at trial—videotaped statements made by Eloy during police interviews that were played, unredacted, for the jury and Eloy's statements made to his wife, Dawn Pollaro ("Pollaro"), who testified at trial. The underlying and appellate record shows that Petitioner's position has been consistent that both categories of statements violated his rights under the Sixth Amendment's Confrontation Clause as held in *Crawford v. Washington*, 541 U.S. 36 (2004) and that his trial and appellate counsels' failure to raise these arguments at trial and during his appeal constitute deprived him of his Sixth Amendment right to effective assistance of counsel. However, due to the page limitations for his Petition and because Petitioner had more

thoroughly briefed ancillary challenges to Pollaro's testimony in his first Petition for Certiorari, Petitioner was forced to focus primarily on Eloy's taped interviews. Nevertheless, pursuant to Rule 12-404(A), if this Court relied upon facts or law regarding Pollaro's testimony in its disposition, Petitioner would request this Court permit further briefing on this issue as Petitioner maintains that the District Court's denial of his first petition for habeas corpus on this issue summarily denied his Confrontation Clause challenges to this testimony by relying on the appellate court's upholding the admission of these statements as excited utterance exceptions to hearsay without ever subjecting their admission under a *Crawford* Confrontation Clause analysis because appellate counsel failed to argue that issue. Additionally, the admission of these statements provide guidance as to Petitioner and trial counsel's "strategy" regarding Montano's videotaped statements made during police investigation as Pollaro had already been permitted to testify before the videotaped statements were objected to and then admitted.

As another initial matter, as the Response points out, through inadvertent error of Petitioner's counsel, the Petition originally did not include a copy of the Habeas Corpus Petition to the Petition as required by Rule 12-501(D) NMRA. As such, on February 22, 2021, this Court issued a Notice of Non-Conforming Pleading identifying this specific omission and providing that to correct this deficiency, Petitioner has to file a conformed pleading within two (2) days. Petitioner timely did so and filed his

conformed Petition the next day, on February 23, 2021. To the extent that this Court relied upon Defendant's position that Petitioner did not comply with Rule 12-501(D) in denying the Petition, Petitioner did in fact comply with the Rule and this Court's Notice.

The Petition arises from Petitioner's February 22, 2006 conviction for 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. At trial, the only direct evidence presented by the State were statements made by Montano, Petitioner's co-defendant. However, Montano did not testify. Instead, the State was able to introduce Montano's statements into evidence through the testimony of Montano's wife, Pollaro, and by playing the unredacted video recordings of statements made by Montano to police during their investigation for the jury. As such, Petitioner was never able to cross-examine Montano on these statements. The Petition provided an outline of the procedural history of the case, which has been long and complex, involving numerous appeals and post-conviction actions during which, because of his indigency, Petitioner has been represented by numerous counsel. It is the failure of his trial, appellate and previous habeas corpus petition counsel to effective raise and argue the Confrontation Clause issues surrounding Montano's statements made at trial that form the basis for Petitioner's ineffective assistance claim in his Petition.

Without any citation to the trial court record, the appellate record or the habeas records, Defendant makes numerous inaccurate or incomplete statements of facts it contends were the "evidence" upon which it claims Petitioner's convictions were based. Defendants state in a footnote that its summary of the evidence was based upon review of this Court's opinion in Petitioner's direct appeal and a review of the transcripts of Petitioner's trial. Additionally, again without specific citation to the record, the Response provides an inaccurate and incomplete recitation of the procedural background leading up the District Court's permitting Montano's statements to be presented to the jury. Defendant states that it based its summary of arguments presented to the trial court on a list of four (4) volumes of trial transcripts and its summary of Petitioner's testimony on two (2) volumes of trial transcripts. The Petition notably omits reference to other portions of the record that would be detrimental to its ultimate conclusion that Petitioner's trial counsel used Montano's statements to further the defense strategy of claiming that Montano, and not Petitioner, was the killer. Defendant states that it based its summary of trial counsel's admission and use of Montano's statements was based upon a review of the same two (2) volumes of transcripts upon which it based its summary of Petitioner's trial testimony.

Despite Petitioner raising his ineffective assistance claims with regard to not only trial counsel for failing to adequately present and argue his Confrontation Clause challenges to the admission of Montano's statements, but also with regard to appellate

and prior habeas counsel for failing to adequately present and argue those challenges, Defendant does not argue that appellate counsel's or prior habeas counsel's failures amounted to ineffective assistance of counsel. Petitioner included numerous exhibits establishing his insistence that his appellate counsel and prior habeas counsel raise these issues and their failure to do so and often their failure to inform Petitioner of this failure until after the fact.

Defendant is correct that in raising a claim of ineffective assistance of counsel, a defendant has the burden of establishing that the counsel's performance was deficient, and that the deficient performance prejudiced the defense. However, the Response never addresses the prejudicial prong as it concludes that the record supports that trial counsel's performance was not deficient because its decision not to adequately raise or argue a Confrontation Clause challenge to Montano's statements was part of his trial strategy to accuse Montano of committing the murder and that this strategy was reasonable and rational. Nevertheless, Defendant's incorrect and incomplete summary of evidence upon which it claims Petitioner's conviction was based seems to, at the very least, present the implication that were Montano's statements excluded, Petitioner would not have been prejudiced because the jury would have convicted him based upon this other evidence. As is explained herein, Defendant's summary of evidence is incomplete and incorrect.

Instead, the Response focuses primarily on its contention that trial counsel intended to effectively waive Petitioner's rights under the Confrontation Clause as part of Petitioner's trial strategy and that this strategy was reasonable and thus, not defective. Defendant based this conclusion solely on the record, which it maintains is reflected by portions of the trial transcript ultimately admitting Montano's statements. Interestingly, Defendant omits entirely the testimony of Petitioner and his trial counsel provided during a January 10, 2019 evidentiary hearing on Petitioner's first habeas corpus petition, which most certainly bears upon both Petitioner's and his trial counsel's understanding of the defense strategy and contradicts many of those facts recited by Defendant or provides additional context to show that the summaries of facts provided in the Response were incomplete. Rather, Defendant relies only on this small sampling of self-serving procedural facts to divine Petitioner's and his trial counsel's actual intent to present a defense whereby he essentially waived his rights under the Confrontation Clause so as to place blame on Montano for the murder despite direct, testimonial evidence to the contrary.

The Petition and the record reflect that the State never filed any written Response to his Habeas Corpus Motion and that the District Court never granted an evidentiary hearing, instead summarily denying the Petition. The Response does not address these issues. If a petition for a writ of habeas corpus demonstrates on its face that a Petitioner may have been deprived of his constitutional rights, the court must

address the issue in an evidentiary hearing, unless it plainly appears that the petitioner is not entitled to any relief as a matter of law, based on the facts alleged in the petition, or the uncontroverted facts shown by the court record. *State v. Franklin*, 1967-NMSC-151, ¶ 6, 78 N.M. 127, quoting *Machibroda v. United States*, 368 U.S. 487 (1962); see also *Duncan v. Kerby*, 1993-NMSC-0l1, ¶ 3, 115 N.M. 344 (court must hold an evidentiary hearing where a petition adequately alleged ineffective assistance of counsel). If the petition raises factual issues which cannot be conclusively determined from the files and records of the action, the petitioner is entitled to an evidentiary hearing. *Franklin*, 1967-NMSC-151, 16; *State v. Patton*, 1970-NMCA-105, ¶ 6, 82 N.M. 29. (claim that guilty plea was coerced justifies a hearing). Habeas corpus proceedings are the preferred method for adjudicating claims of ineffective assistance of counsel, because the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness. State v. Hunter, 2006-NMSC-043, ¶ 30, 140 N.M. 406, 143 P.3d 168; *Duncan*,1993-NMSC-011, ¶ 4. Consequently, when a petition for a writ of habeas corpus alleges particular facts which set out a claim of inadequate representation, the petitioner is entitled to a hearing. *State v. Moser*, 1967-NMSC-163, ¶ 6, 78 N.M. 212 (overruled on other grounds).

The District Court's Order denying the Habeas Corpus Petition provides no explanation as to why Petitioner was not granted an evidentiary hearing, especially as

the State failed to file any response contradicting Petitioner's alleged facts. Instead, the District Court summarily concluded that despite contrary direct, testimonial evidence of Petitioner and his trial counsel as to their mental impressions of their trial strategy at the evidentiary hearing on Petitioner's first habeas corpus petition, the record established it was Petitioner's trial strategy not to raise any Confrontation Clause challenges to Montano's testimony. The District Court's failure to grant an evidentiary hearing was error and, for this reason, the District Court's denial of the Habeas Corpus Petition should have been reversed and remanded for an evidentiary hearing.

Montano's unredacted videotaped statements made during police investigation

Neither the District Court nor the Response address whether playing Montano's videotaped interviews with police during their investigation of the case would have violated the Confrontation Clause had trial counsel, appellate counsel or prior habeas counsel adequately raised and argued this issue. Instead, the Response concludes, as did the District Court, that because trial counsel did not properly raise these objections at trial, Petitioner waived any Confrontation Clause challenge, and that the waiver of constitutional protections was a reasonable and sound trial strategy employed by Defendant to show Montano was a liar and that Montano had committed the murder. This is an erroneous framing of the proper analysis. Instead, the proper analysis should proceed as follows:

1. <u>Had trial counsel adequately raised and argued a Confrontation Clause challenge to Montano's unredacted videotaped interviews being played for the jury, would those interviews or portions thereof been suppressed, and had appellate counsel adequatey raised and argued this challenge on appeal, would his conviction have been reversed?</u>

Petitioner contends that under *Crawford v. Washington*, 541 U.S. 36, 124 S. CT. 1354, 158 L.Ed.2d 177 (2004), the Sixth Amendment Confrontation Clause prohibits the prosecution from using a "testimonial" statements against a defendant unless the declarant is not available to testify, and the defendant has had a previous opportunity to cross-examine the declarant. *Id.*, at 53–54. *Crawford* provided that some statements qualify under any definition as "testimonial," such as "[s]tatements taken by police officers in the course of interrogations," *Id*. at 52-53. Thus, the deponent's statement in *Crawford*—which was made and recorded while she was in police custody, after having been given Miranda warnings as a possible suspect herself—"qualifies under any conceivable definition" of an " 'interrogation,'" *Id*. at 53, n. 4. Statements are testimonial when the circumstances objectively indicate that there is no 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*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). At the time of Petitioner's trial, *Crawford* had been the law for nearly two (2) years, and *Davis* was decided months after Petitioner's trial but the month prior to his filing his Notice of Appeal.

At the time of trial, Montano's video-taped statements made during Officer Hix' interrogation were clearly testimonial under *Crawford*. 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. In *State v. Romero*, decided during the pendency of Petitioner's appeal, 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. However, despite *Davis* and *Romero* being decided after Petitioner's conviction and prior to the denial of his appeal, Petitioner's appellate counsel failed to present any Confrontation Clause. The Petition for Habeas Corpus provides extensive detail and exhibits regarding appellate counsel's raising a Confrontation Clause issue citing *Crawford* in his Statement of Issues only to discard the issue and refuse to argue it despite Petitioner's insistence that it be presented in his appeal. Neither the District Court nor the Response address appellate counsel's failure other than to conclude in only a sentence that it appears appellate counsel made a strategic decision not to present the argument. Neither the District Court nor the Response provide any explanation of facts or law that would establish this was part of Petitioner's appellate strategy, to waive a constitutional violation, let alone that appellate counsel's omission was a sound and reasonable strategic decision, especially given Petitioner's insistence the issue be part of the

appeal. At the very least, appellate counsel should have been aware of the decision in *Romero*, finding reversible error when a taped interview with the victim made by an officer was played for the jury, facts even more analogous to Petitioner's case than *Crawford*. Appellate counsel could have and should have presented this new law to the appellate court, and neither the District Court nor Defendant present any rational explanation as to how appellate counsel's failure to do so was reasonable and sound legal strategy.

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"). 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)).

Because Montano's statements were testimonial and had no previous opportunity to cross-examine the declarant, in light of *Crawford* and its progeny, those statements would still be inadmissible regardless of whether Montano was unavailable to testify in person. 541 U.S. at 59. Nevertheless, trial counsel failed to adequately raise and argue the issue of Montano's "unavailability." See *State v. Romero*, 2007-NMSC-013, ¶ 37, 141 N.M. 403, 156 P.3d 694 (holding that the prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness). It seems clear that had trial counsel adequately presented a *Crawford* confrontation challenge to Montano's videotaped interviews being played

in their entirety to the jury, that these statements would have been suppressed. At the very least, as was held in *Romero*, only those portions of the statements that were nontestimonial would have been presented to the jury along with a limiting instruction. Recognizing, the law in *Zamarripa, Davis* and *Romero*, had appellate counsel adequately presented this a Confrontation Clause challenge, Petitioner's convictions would have been reversed as was the defendant's conviction in *Romero*.

2. Recognizing that permitting the entirety of Montano's videotaped statements made during the police investigation violated Petitioner's constitutional rights under the Confrontation Clause, did trial counsel waive these rights as part of Petitioner's trial strategy? Did appellate counsel waive these rights as part of Petitioner's appellate strategy?

Instead of addressing the clear constitutional violations under *Crawford* and its progeny, the District Court and Response focus only on what is essentially a waiver argument—that it was trial strategy to waive these challenges so as to prove that Montano was a liar and committed the murder. As for the rationale that is was Petitioner's appellate strategy to again waive these challenges as part of an appellate strategy, no rationale is provided as to why or what Petitioner sought to achieve in so doing. Petitioner has been consistent throughout his trial, appeal and post-conviction remedies that it was never his trial or appellate strategy to waive his Confrontation Clause challenges, and with respect to his appeal, provided an extensive explanation of the numerous times he insisted these challenges be raised only to be ignored by counsel and often informed of their omission only after pleadings were filed.

There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000) (quoting, *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (internal quotations and citations omitted). See, *Romero*, 2006–NMCA–045, ¶¶ 37, 139 N.M. 386, 133 P.3d 842 (reaffirming the holding in *Alvarez–Lopez*, 2004–NMSC–030, ¶ 5, 7–10, 12–14, 136 N.M. 309, 98 P.3d 699, that that the prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness).

It is the District Court's and Defendant's contention that 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 Montano's statements and argued against the admission of the entirety of those statements. However, this is an incomplete and oversimplified version the facts that ultimately led to the District Court's admission of the entirety of Montano's videotaped interviews. Petitioner subpoenaed Montano, but once it became clear that Montano was most likely going to raise his Fifth Amendment right and refuse to testify, on January 12, 2006, he filed a motion in limine asking the Court to rule on the admissibility of certain of Montano's statements, arguing that those statements affected the state of mind and subsequent actions of law enforcement

officers, and that because these statements would not be offered for the truth of the matter asserted, they were not hearsay, or alternatively, if hearsay, admissible under Rule 11-804(B)(3). After a January 24, 2006 hearing on this motion, the District Court entered an order granting Petitioner's motion in its entirety. At the hearing, Petitioner informed the Court that it intended to question Detective Hix about the untruthful statements Montano made during the investigatory interviews or interrogations as proper cross-examination of his theory of the case, his decision to arrest Petitioner and not to arrest Montano and the overall incompetence of the investigation. The Court ruled that Petitioner would be permitted to cross-examine Detective Hix about Montano's untruthful statements in support of the defense theory that Montano was the real killer and lied to cover up his participation. During voir dire, opening statement and preliminary cross-examination, Petitioner discussed the lies of Montano and indicated that these would be proven through Detective Hix. Trial counsel began impeachment of Detective Hix using Montano's untruthful statements demonstrating the statement and the lie. The District Court stopped the cross-examination and in bench conference informed Petitioner it was going to reverse its ruling and deny further cross-examination on Montano's lies. Ultimately, the District Court determined, and the State agreed, that it would permit the jury to view the entirety of the videotaped statements. The Court expressed concern that permitting Trial Counsel to ask about every false statement made by Montano would result in extensive litigation over the

truthfulness of each statement and would have little probative value to establish that Montano lied as Detective Hix had already testified that Montano that he found only 80% of Montano's statements to be truthful that would be outweighed by danger of confusing the jury, which would be compounded because under *Crawford*, the State would not be able to use Montano's truthful statements in rebuttal. Trial Counsel objected to the presentation because the videotaped interviews contained statements that were both true and untrue, that exposing Montano as a liar was important to the defense because the Court had allowed Pollaro to testify about Montano's statements made to her implicating Petitioner when there was considerable evidence linking Montano to the murder, so much so that he had been charged as a co-defendant, and it was part of Petitioner's defense that Monatano was the killer and not Petitioner. Essentially, trial counsel argued that the Court was forcing Petitioner to accept Montano's hearsay statements if he wanted to demonstrate and prove the untruthful statements. The Court stated that this was the only manner in which it would permit Trial Counsel to continue Detective Hix' cross-examination and made clear that if Petitioner objected to the admission of any statement Montano made during his police interviews, the interviews would be excluded in their entirety. Trial Counsel stated Petitioner was not waiving his Confrontation Clause objections in accepting the Court's compromise and argued that Petitioner was being forced to give up substantial constitutional rights in order to exercise cross-examination rights. Thus, without

waiving his *Crawford* Confrontation Clause challenge and given the District Court's, forcing Petitioner to permit the unredacted videotaped interviews of Montano to be played for the jury if he wished to continue his cross-examination of Detective Hix, trial counsel moved for the admission of the interviews because the District Court had stated that were he to object to any of Montano's statements, the interviews would be excluded in their entirety. Additionally, no limiting instruction was provided. Thus, the District Court and Defendant concluded that Petitioner waived all his Confrontation Clause challenges because he was ultimately forced to admit, or not to object, to the entirety of Montano's police interviews if he wished to use any of those statements to demonstrate that Montano lied to cover up his involvement and shift blame to Petitioner, which Petitioner argued was necessary to his defense so as to show the untruthfulness of Montano's similar statements to which his wife, Pollaro, had already testified. However, the complete facts of the proceedings clearly establish that Petitioner never intended to waive any Confrontation Clause challenges, and that the District Court's orders at trial and in denial of the Petition for Habeas Corpus misapprehend the relevant law.

Defendant's general Confrontation Clause arguments were sufficient to preserve his Crawford claims. *State v. Romero* ("*Romero I*"), 2006-NMCA-045, ¶ 15, 139 N.M. 386, 393, 133 P.3d 842, 849, aff'd, *Romero*, at ¶ 15 (citing *State v. Lopez*, 2000–NMSC–003, ¶ 11, 128 N.M. 410, 993 P.2d 727) (holding that objection on the grounds

of "inability to cross examine or confront the witness" was adequate to raise Confrontation Clause claims even though the defendant did not mention the Sixth Amendment). In *Romero I*, the State argued Defendant waived his objections to both the grand jury testimony and the victim's statement to the SANE practitioner because he either admitted those statements himself or acquiesced in their admission, an argument identical to that of Defendant and embraced by the District Court in the present case. *Id.* at ¶ 16. However, the Court of Appeals disagreed. In that case, Defendant made clear throughout the proceedings that none of the victim's statements should be admitted, but that, if some statements were admitted, he wanted to introduce others for impeachment purposes. *Id.* This did not constitute a waiver. *Id.* (quoting *State v. Martinez*, 95 N.M. 795, 802, 626 P.2d 1292, 1299 (Ct.App.1979) ("The law in this jurisdiction is that if improper evidence is admitted over objection, resort may be had to like evidence without waiving the original error."); *State v. Kile*, 29 N.M. 55, 70, 218 P. 347, 351 (1923) ("[W]here incompetent evidence is admitted over objection, and where it becomes expedient or necessary to rebut the same, ... resort may be had to the same class of objectionable evidence without waiving the original error."); 1 John W. Strong, McCormick on Evidence § 55, at 246–47 (5th ed. 1999) ("If a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection.... However, when his objection is made and overruled, he is entitled to ... explain or rebut, if he can, the evidence

admitted over his protest. Consequently, there is no waiver ... if he meets the testimony with other evidence which, under the theory of his objection, would be inadmissible." (footnotes omitted))). Thus, *Romero I* held that Defendant properly preserved, and did not waive, his objections to the admission of each of the victim's four statements.

Here, the District Court made clear that it would be playing the entirety of Montano's videotaped interviews over Petitioner's objection, which included both testimonial and non testimonial statements and statements that were 80% true and 20% false according to Detective Hix. Petitioner was denied from cross-examining Montano on which of those specific statements were true and which were false, and was forced upon pain of the District Court excluding the entire interviews including Montano's lies should he object to any portion of Montano's statements. Petitioner specifically reserved his Confrontation Clause challenge before, out of expediency and necessity to rebut those non-testimonial and nonhearsay statements the District Court was permitting, resorting to the same class of objectionable evidence without waiving his original Confrontation Clause challenge. That trial counsel failed to raise *Romero I*, which had been law for nearly a year at the time of Petitioner's trial, and *Romero*, which affirmed *Romero I* in the weeks prior to trial, or otherwise request a limiting instruction, only further establishes trial counsel's deficient performance. Likewise, that appellate counsel failed to address these cases, especially in light of *Davis* decided

after Petitioner's conviction, but prior to the determination of his appeal, further establishes the deficiency of appellate counsel's performance.

3. Recognizing that Montano's videotaped interviews violated the Confrontation Clause, and that neither trial or appellate counsel waived this challenge as part of Petitioner's trial or appellate strategy, was trial and defense counsel's failure to adequately present and argue the facts and law discussed above ineffective assistance of counsel?

"The Sixth and Fourteenth Amendments to the Constitution guarantee criminal defendants the right to effective assistance of counsel." *State v. Mieria*, 2018-NMCA-020, 30, 413 P.3d 491. To establish ineffective assistance of counsel, a defendant must show 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." *Id.* (quoting *State v. Bahney*, 2012-NMCA-039, ¶ 48, 274 P.3d 134. Where the facts necessary to a full determination of ineffective assistance are not part of the record, but an appellant nonetheless makes a prima facie showing of ineffective assistance of counsel, an appellate court may remand for an evidentiary hearing. *Id.* (citing *State v. Roybal*, 2002-NMSC-027, ¶ 25, 132 N.M. 657, 54 P.3d 61; *State v. Cordova*, 2014-NMCA-081, ¶ 7, 331 P.3d 980). Because the trial court's record "may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness[,]" ineffective assistance of counsel claims are often better adjudicated through habeas corpus proceedings. *Id.* (quoting *State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M.

107, 163 P.3d 494; *Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466 (acknowledging that habeas corpus proceedings are the "preferred avenue for adjudicating ineffective assistance of counsel claims")).

In determining whether counsel's performance fell below an objective standard of reasonableness, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at ¶ 31(quoting *State v. Paredez*, 2004-NMSC-036, ¶ 14, 136 N.M. 533, 101 P.3d 799). In order to overcome the presumption that counsel acted reasonably, Defendant must show that the challenged action could not be considered "sound trial strategy." *Id.* (citing *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406, 143 P.3d 168).

It is beyond dispute that "no lawyer should approach any task without knowledge of the applicable statutes, court rules, and case law[.]" *Id.* at ¶ 32 (quoting *Garcia v. State*, 2010-NMSC-023, ¶ 40, 148 N.M. 414, 237 P.3d 716; *State v. Lopez*, 1996-NMSC-036, ¶ 9 n.1, 122 N.M. 63, 920 P.2d 1017 (expressing dismay at the trial court's, prosecutor's, and defense counsel's failure to apprise themselves of the current state of the law three years after case law altered the legal standard, noting that "[a]ttorneys and judges have an obligation to keep abreast of current changes in the law")). Here, trial counsel apparently failed to apprise himself of the applicable legal authority governing the admissibility of Montano's statements made in his police interview and to Pollaro. A cursory review of recent *Crawford* progeny would have

revealed *Romero I* and *Romero II*. Similarly, appellate counsel failed to apprise himself of this legal authority, and *Davis*, which was decided while Petitioner's appeal was pending.

The Courts next look to whether a "plausible, rational strategy or tactic explains [defense] counsel's conduct[.]" *Id.* at ¶ 33 (quoting *Bahney*, 2012-NMCA-039, ¶ 48, 274 P.3d 134). Here, it is inconceivable that defense counsel's total failure to apprise himself of the law governing constitutional challenges to the State's strongest and most prejudicial direct evidence might be considered sound trial strategy when trial counsel could have sought redaction of Montano's testimony or a limiting instruction. See *Garcia*, 2010-NMSC-023, ¶ 40, 148 N.M. 414, 237 P.3d 716 (concluding counsel did no research to discover an amendment to statute, stating, "[w]e cannot conceive of a strategic reason for [defense counsel's actions].... It is of little comfort that both the prosecution and the trial court appear to have labored under a similar misapprehension of the law"). Likewise, appellate counsel's abandonment of Petitioner's constitutional violations after citing *Crawford* in its Statement of Issues, without any evidence contrary to Petitioner's allegations made in his Habeas Corpus Petition cannot plausibly be a rational appellate strategy.

In addition to apprising himself of the relevant law, counsel has a duty to investigate. *Id.* (citing *State v. Barnett*, 1998-NMCA-105, ¶ 30, 125 N.M. 739, 965 P.2d 323) ("Failure to make adequate pretrial investigation and preparation may ... be

grounds for finding ineffective assistance of counsel.")). Courts may find counsel's performance deficient where he "fail[s] to investigate a significant issue raised by the client." *Id.* (quoting *State v. Hunter*, 2006-NMSC-043, ¶ 14, 140 N.M. 406, 143 P.3d 168). However, a "general claim of failure to investigate is not sufficient to establish a prima facie case if there is no evidence in the record indicating what information would have been discovered." *Id.* (quoting *Cordova*, 2014-NMCA-081, ¶ 10, 331 P.3d 980). Here, trial counsel knew that the State would seek to enter the entirety of Montano's statements at trial, as is reflected by his Motion in Limine filed prior to trial. Despite the possibility that the Court would permit all Montano's statements, and that he would be unable to cross-examine Montano, Trial Counsel failed to investigate any recent decisions interpreting *Crawford*. Had he done so, he would have found *Romero I* and *Romero*, which presented Confrontation Clause challenges to facts analogous to the present case. Similarly, had appellate counsel investigated these constitutional violations that provided the State with the overwhelming majority of its direct and prejudicial evidence in a largely circumstantial case, it would have discovered these case and *Davis*, which was decided while Petitioner's appeal was pending. Particularly egregious was that both trial counsel and appellate counsel refused to investigate the Confrontation Clause challenges despite Petitioner's insistence to do so as is reflected in the record, testimony of trial counsel, the Petition and exhibits thereto.

Both the District Court and the Response appear to imply that even if admission of Montano's unredacted videotaped police interviews was unconstitutional, is was not cumulative error, or it was harmless error, because it was cumulative of other properly admitted evidence and thus, not prejudicial to Petitioner's defense. However, this is not the case. "Cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *Id.* at ¶ 45 (quoting *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d 937 ("We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial.")). The doctrine is strictly applied, however, and "cannot be invoked when the record as a whole demonstrates that the defendant received a fair trial." *Id.* (quoting *State v. Salas*, 2010-NMSC-028, ¶ 39, 148 N.M. 313, 236 P.3d 32). Like the defendant in *Miera*, although it is possible that none of the errors discussed herein alone would constitute grounds for reversal, together they deprived Defendant of a fair trial, especially when provided in the context of Petitioner's other post-conviction arguments. Had appellate counsel presented all Defendant's post-conviction claims together on appeal, the various errors resulting in his conviction would have established that Defendant was deprived a fair trial and that this deprivation resulted in a murder conviction.

When a constitutional trial error has been committed, "the burden is on the State to demonstrate the error is harmless beyond a reasonable doubt." *Romero*, at ¶ 70 (quoting *State v. Johnson*, 2004–NMSC–029, ¶ 9, 136 N.M. 348, 98 P.3d 998). The "central focus" of this inquiry is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* A reviewing court must make "an objective reconstruction of the record of evidence the jury either heard or should have heard absent the error." *Id.* (quoting *Johnson*, at ¶ 10). An error is not necessarily harmless even when the evidence that was properly admitted constitutes "overwhelming evidence of the defendant's guilt." *Id.* (quoting *Johnson*, at ¶ 11). Error is not automatically harmless when the improperly admitted evidence was cumulative of other properly admitted evidence. Id. (quoting *Johnson*, at ¶ 37). Moreover, evidence is not considered "cumulative" if it "corroborates, and therefore strengthens, the prosecution's evidence." *Id.*

As in the present case, the *Romero* court found that examining the evidence the jury would have heard absent the erroneous admission the statements, the State would have had little direct evidence of Defendant's involvement in the victim's injuries. *Id.* at ¶ 71. The State would have had to rely solely on the statement the victim made at the scene and testimony of other witnesses, who testified to the victim's statements over the phone that Defendant would not let her leave and was holding a knife to her throat. *Id.* At a minimum, the improperly admitted evidence corroborated this other

testimony. *Id*. Thus, *Romero* concluded that the State did not show beyond a reasonable doubt that there was no "'reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Id*. (quoting *Johnson*, at ¶ 9. Like *Romero,* in the present case, the State relied heavily on Montano's videotaped interviews at trial, as well as his statements made to Pollaro, as the majority of the evidence was circumstantial or pointed to Montano's involvement in the murder. Thus, trial counsel's, appellate counsel's and prior habeas counsel's failure to adequately present and argue Petitioner's Confrontation Clause challenges, along with other error resulting in his conviction, was not harmless error and their failures were detrimental to his defenses.

PRAYER FOR RELIEF

WHEREFORE Defendant-Petitioner requests that this Court reconsider its denial of the Petition for Writ of Certiorari to the District Court providing for further briefing and argument, or reversing and/or remanding its denial of Petitioner's Habeas Corpus Motion or for an evidentiary hearing, and for such further relief as this Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that a copy of this pleading was served electronically to the Attorney General's Criminal Appeals Division, this **14th** day of May 2021.

/s/ Jason Bowles
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