IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MARIO CHAVEZ, Petitioner, vs. VINCENT HORTON, Warden, and NEW MEXICO ATTORNEY GENERAL, Defendants.	)	19-CV-1151 KWR-LF

SUPPLEMENTAL PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

COMES NOW Petitioner Mario Chavez, by and through his counsel of record, Jason Bowles of Bowles Law Firm, and for his Supplemental Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person In State Custody ("Supplemental Petition") states:

BACKGROUND

On December 6, 2019, Mr. Chavez filed his pro se Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person In State Custody ("Original Federal Habeas Petition"). [Doc. 1] On March 30, 2020, Mr. Chavez filed his Motion to Stay and Abey, in which he stated that he has not fully exhausted his state court remedies and asked the Court to stay the proceedings to allow him to complete pending state court proceedings to exhaust those remedies [Doc. 8].

Prior to this time, Mr. Chavez had filed a pro se Petition for Habeas Corpus pursuant to Rule 5-802 NMRA on December 1, 2010 ("First State Habeas Petition") in Case No. D-202-CR-2004-03558, which had been amended on February 6, 2017, and an Addendum to which had been filed on May 10, 2018 before it was denied by the Second Judicial District Court of New

Mexico on September 6, 2019. On November 5, 2019 Mr. Chavez filed his Petition for Certiorari to the New Mexico Supreme Court in Case No. S-1-SC-37935 for Review of the Court's Denial of his First State Habeas Petition pursuant to Rule 12-501 NMRA, which was denied on November 13, 2019. On December 3, 2019, pursuant to Rule 12-404(A) NMRA, Mr. Chavez filed his Motion for Reconsideration of the Supreme Court's Order Denying his Petition for Certiorari on the Denial of his First State Habeas Petition. It was while this Motion for Reconsideration was Pending that Mr. Chavez filed his Original Federal Habeas Petition. All the issues that Mr. Chavez presented in his First State Habeas Petition were presented in his Original Federal Habeas Petition, and Mr. Chavez attached a copy of the First State Habeas Petition to his Original Federal Petition. [Doc. 1-1] On January 3, 2020 the New Mexico Supreme Court entered its Order Denying Mr. Chavez' Motion for Reconsideration of the Supreme Court's Order Denying his Petition for Certiorari on the Denial of his First State Habeas Petition.

On March 30, 2020, Mr. Chavez filed his above-referenced Motion to Stay and Abey. [Doc. 8]. While this Motion was pending, on May 26, 2020, Mr. Chavez filed his second pro se Petition for Habeas Corpus pursuant to Rule 5-802 NMRA ("Second State Habeas Petition") in Case No. D-202-CR-2004-03558. While this Second State Habeas Petition, on July 17, 2020, this Court entered its Order to Show Cause in the present case, in which it directed Mr. Chavez to show cause why his Original Federal Habeas Petition should not be dismissed without prejudice to Mr. Chavez' right to refile a federal habeas petition once he had exhausted his state remedies. [Doc. 12] Mr. Chavez, still pro se, attempted to appeal this Order to the Tenth Circuit Court of Appeals, which ultimately found that the Order to Show Cause was not a final appealable order and that the appellate court thus lacked jurisdiction. [Doc. 18] On January 11,

2021, present counsel entered his appearance on behalf of Mr. Chavez, and the present case remained open. [Doc. 19]

On January 22, 2021, the Second Judicial District Court entered its Order Denying Mr. Chavez' Second State Habeas Petition. On February 22, 2021, Mr. Chavez filed his Petition for Certiorari to the New Mexico Supreme Court in Case No. S-1-SC-38695 for Review of the Court's Denial of his Second State Habeas Petition pursuant to Rule 12-501 NMRA. While this Petition for Certiorari was pending, on March 2, 2021, this Court entered its Order Denying Certificate of Appealability in which it found Mr. Chavez' Motion for a COA moot because the 10th Circuit had dismissed Mr. Chavez' appeal for lack of jurisdiction. [Doc. 20] On April 27, 2021, Mr. Chavez' Petition for Ceriorari was denied, and on May 12, 2021, pursuant to Rule 12-404(A) NMRA, Mr. Chavez filed his Motion for Reconsideration of the Supreme Court's Order Denying his Petition for Certiorari on the Denial of his Second State Habeas Petition, which was ultimately denied on June 29, 2021. On July 22, 2021, Mr. Chavez filed his Notice of Exhaustion of State Remedies and New Mexico Supreme Court Decision, informing the Court Mr. Chavez had exhausted his state remedies. [Doc. 21]

DESCRIPTION OF THE UNDERLYING PROCEEDINGS

At jury trial on February 22, 2006, in Case No. D-202-CR-2004-03558 before the New Mexico Second Judicial District Court, Mr. Chavez 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. Mr. Chavez 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 Mr. Chavez's convictions and specifically held that testimony from Montano's (Mr. Chavez'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, Mr. Chavez, 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, Mr. Chavez claimed trial counsel was ineffective in 1) disclosing the polygraph tests to the prosecution and advising Mr. Chavez to agree to take a polygraph test administered by the State representing to Mr. Chavez 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 Mr. Chavez'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 Mr. Chavez of a plea offer to second-degree murder. The District Court denied the First Habeas Petition, and Mr. Chavez 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, Mr. Chavez filed his Second Habeas Petition, the denial of which is the subject of the present Mr. Chavez for Writ of Certiorari. In his Second Habeas Petition, Mr. Chavez 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 Mr. Chavez's defense would have been malpractice and thus, placed his own interests before Mr. Chavez'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 Mr. Chavez's confrontation rights; and 5) Habeas counsel's actions were detrimental to Mr. Chavez's claims. In his First and Second Supplement to his Second Habeas Petition, Mr. Chavez provided additional argument and information regarding his claims against appellate counsel and his confrontation claim.

The District Court concluded that with the exception of Mr. Chavez'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 Mr. Chavez's confrontation claims, the District Court held that Mr. Chavez 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 Mr. Chavez as the shooter to his co-defendant. The Court concluded that record did not support Mr. Chavez'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, Mr. Chavez 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 Mr. Chavez. 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 Mr. Chavez's claims that the State intended to present the statements of Montano contrary to Mr. Chavez'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 Mr. Chavez failed to establish ineffective assistance of counsel related to either his trial or appellate counsel's failure to raise Confrontation Clause claims. Mr. Chavez 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.

Mr. Chavez filed his Petition for Writ of Certiorari to the Second Judicial District Court of New Mexico on February 22, 2021. The Petition sought review of the Second Judicial District Court's Order entered on January 22, 2021 denying Mr. Chavez' pro se Second State Habeas Petition and Motion for Transcripts and Motion to Unseal and Review Document in 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, the New Mexico Supreme 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. On April 27, 2021, the New Mexico Supreme Court entered its Order denying the Petition. Pursuant to Rule 12-404(A) NMRA, Petitioner requested the New Mexico Supreme 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.

It was Mr. Chavez' position that the New Mexico Supreme Court overlooked or misapprehended certain facts, relying primarily on the State's 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 State Habeas Petition. Without any citation to the trial court record, the appellate record or the habeas records, Defendant made numerous inaccurate or incomplete statements of facts it contended were the "evidence" upon which it claimed Petitioner's convictions were based. Defendants stated in a footnote that its summary of the evidence was based upon review of the New Mexico Supreme 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 provided 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 stated 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 Response notably omitted 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 stated that it based its summary of trial counsel's admission and use of Montano's statements 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 did 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 was 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 addressed the prejudicial prong as it concluded that the record supported 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 claimed Petitioner's conviction 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. However, Defendant's summary of evidence was incomplete and incorrect.

Instead, the Response focused 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 maintained was reflected by portions of the trial transcript ultimately admitting Montano's statements. Interestingly, Defendant omitted entirely the testimony of Petitioner and his trial counsel provided during a January 10, 2019 evidentiary hearing on Petitioner's First State Habeas Petition, which most certainly bears upon both Petitioner's and his trial counsel's understanding of the defense strategy and contradicted many of those facts recited by Defendant or provided additional context to show that the summaries of facts provided in the Response were incomplete. Rather, Defendant relied only on a 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.

In his Petition for Certiorari on the Denial of his Second State Habeas Petition, Petitioner specifically asked the New Mexico Supreme 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 pointed 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 for Certiorari and because Petitioner had more thoroughly briefed ancillary challenges to Pollaro's testimony in his First State Habeas Petition, Petitioner was forced to focus primarily on Eloy's taped interviews. Nevertheless, Petitioner maintains that the District Court's denial of his First State Habeas Petition 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.

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 MR. CHAVEZ' ORIGINAL AND SUPPLEMENTAL PETITIONS FOR A WRIT OF HABEAS CORPUS

This Court has jurisdiction to grant the relief requested in both Mr. Chavez' Original Federal Habeas Petition and this Supplemental Habeas Petition pursuant to 28 U.S.C. § 2254. Mr. Chavez hereby incorporates the arguments presented in his First Habeas Petition and First State Habeas Petition as though fully alleged herein. Additionally, Mr. Chavez' provides this Supplemental Petition raising Mr. Chavez' claims presented in his Second State Habeas Petition. It is Mr. Chavez' position that the District Court erroneously denied his 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

Initially, it should be noted that the State never filed any written Response to Mr. Chavez' Second State Habeas Petition and the District Court never granted an evidentiary hearing, instead summarily denying the Petition. 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 Mr. Chavez' Second State Habeas Petition provides no explanation as to why he 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 Mr. Chavez and his trial counsel as to their mental impressions of their trial strategy at the evidentiary hearing on Petitioner's First Habeas 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 Second State Habeas Petition should have been reversed and remanded for an evidentiary hearing.

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 Mr. Chavez'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 Mr. Chavez 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 Mr. Chavez 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, Mr. Chavez 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 Mr. Chavez'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 Mr. Chavez 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.

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

Recognizing that permitting the entirety of Montano's videotaped statements made during the police investigation violated Petitioner's constitutional rights under the Confrontation Clause, effective trial counsel would not have waived these rights as part of Petitioner's trial strategy and appellate counsel would not have waived 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.

Montano's videotaped interviews violated the Confrontation Clause, and because neither trial or appellate counsel waived this challenge as part of Petitioner's trial or appellate strategy, their failure to adequately present and argue the facts and law discussed above was 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

This Supplemental Federal Habeas Petition seeks to vacate and set aside Mr. Chavez' convictions and to vacate, set aside or correct the illegal sentences imposed for these convictions. **Mr. Chavez seeks an evidentiary hearing and an opportunity to be heard.**

WHEREFORE Defendant-Mr. Chavez requests this Court issue a Writ of Habeas Corpus, directed to Respondent, requiring him to make a return forthwith and to produce Mr. Chavez before this Court upon a day and at a time certain, so that he may show why his convictions should be vacated or set aside and why his sentences are illegal and should be vacated, set aside or corrected.

Respectfully submitted,

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I hereby certify that a true and correct copy
of the foregoing was electronically submitted
this 29th day of September, 2021to parties listed on
the CM/ECF filing system

/s/ Jason Bowles
Jason Bowles
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