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

PETITIONER'S REPLY TO RESPONDENTS' ANSWER TO MARIO CHAVEZ'S INITIAL *PRO SE* AND SUPPLEMENTAL PETITIONS FOR WRIT OF HABEAS CORPUS (28 U.S.C. § 2254) [Docs. 1 and 22]

COMES NOW Petitioner Mario Chavez, by and through his counsel of record, Jason Bowles of Bowles Law Firm, and for *Reply to Respondent's Answer to Mario Chavez's Initial Pro Se and Supplemental Petitions for Writ of Habeas Corpus (28 U.S.C. § 2254) [Docs. 1 and 22]* ("Reply") states:

I. Despite the various filings in the New Mexico state court, most pro se, none have adjudicated the *merits* of Mr. Chavez's claims in his First or Supplemental Federal Habeas, resulting in decisions that are contrary to, or involved an unreasonable application of, clearly established United States Supreme Court precedent or have been based on an unreasonable application of the facts in light of the evidence presented.

Section 2254(d) of Title 28 of the United States Code was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which "increase[d] the deference to be paid by the federal courts to the state court's factual findings and legal determinations." *Houchin v. Zavaras*, 107 F.3d 1465, 1470 (10th Cir. 1997). Accordingly, if a claim is adjudicated on the merits in state court, federal habeas relief may be granted to a petitioner only if he can establish

that "the state court decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.'" *Welch v. Workman*, 639 F.3d 980, 991 (10th Cir. 2011) (quoting 28 U.S.C. § 2254(d)(1)-(2)). The Tenth Circuit has explained that

> [u]nder § 2254(d)(1), a federal court may grant a writ of habeas corpus only if the state court reached a conclusion opposite to that reached by the Supreme Court on a question of law, decided the case differently than the Supreme Court has decided a case with a materially indistinguishable set of facts, or unreasonably applied the governing legal principle to the facts of the petitioner's case. "Under § 2254(d)(1)'s unreasonable application clause . . ., a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." "In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." AEDPA also requires federal courts to presume state court factual findings are correct, and places the burden on the petitioner to rebut that presumption by clear and convincing evidence.

Sallahdin v. Gibson, 275 F.3d 1211, 1221-22 (10th Cir. 2002) (citing 28 U.S.C. § 2254(e)(1)). Section 2254 sets forth "stringent principles of deference" demanding a presumption that the state court's factual findings are correct unless the petitioner rebuts the presumption by clear and convincing evidence. *Wilson v. Sirmons*, 536 F.3d 1064, 1074 (10th Cir. 2008).

By contrast, where the state courts have not reached the merits of a claim, "federal habeas review is not subject to the deferential standard that applies under AEDPA [and i]nstead, the claim is reviewed de novo." *Cone v. Bell*, 129 S.Ct. 1769, 1784 (2009). If this Court determines that the state court did indeed err, this Court must still determine whether the error amounts to a "structural defect[] in the constitution of the trial mechanism," meaning that harmless-error review is not appropriate. See *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). If the error does not rise to the level of a structural defect, it is reviewed for harmlessness, with the Court asking

whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). A "substantial and injurious effect" exists when the court finds itself in "grave doubt" about the effect of the error on the jury's verdict. *Wilson* 536 F.3d at 1074 (internal quotations omitted). "Grave doubt," in turn, exists when the issue of harmlessness is so evenly balanced that the Court feels itself in virtual equipoise as to the harmlessness of the error. *Id*. (internal quotations omitted). Finally, "[f]ederal habeas courts do not sit to correct errors of fact or to relitigate state court trials. Their jurisdiction is limited to ensuring that individuals are not imprisoned in violation of the Constitution." *Thompson v. Oklahoma*, 2000 WL 14404, at *6 (10th Cir. Jan. 10, 2000) (unpublished) (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)).

A. Mr. Chavez is entitled to federal habeas relief with respect to *BOTH* his Confrontation Clause challenges.

1. <u>Video-taped interviews with Detective Hix.</u>

In its Response, the Government only addresses Mr. Chavez' arguments raised in his Original Federal Habeas Petition that the admission of Eloy Montano's ("Montano") statements made to his wife, Dawn Pollaro ("Pollaro"), hours after the murder and which were admitted by the trial court as an excited utterance, were a violation of Mr. Chavez's Sixth Amendment Confrontation Clause rights. [Doc 1]. However, those are not the only statements which Mr. Chavez' contends violated his rights under the Confrontation Clause. At trial, the State also introduced Montano's out-of-court testimony through Detective Hix by playing the entirety of Montano's videotaped statements for the jury.

Mr. Chavez does not dispute that there have been numerous state court filings, primarily due to his status as a pro se litigant unfamiliar with the technicalities of such heightened pleading requirements. Nevertheless, while complicated, procedure was properly followed. Mr. Chavez

raised his Confrontation Clause challenges to Pollaro's testimony in his First State Habeas Petition, which was denied, as was his Petition for Certiorari for Review of the Court's Denial. It was while his Motion for Reconsideration of the Order Denying his Petition for Certiorari was pending that Mr. Chavez filed his Original Federal Habeas Petition which included his Confrontation Clause challenges to Pollaro's testimony. After Mr. Chavez' Motion for Reconsideration was denied, Mr. Chavez filed his Motion to Stay and Abey in the present action. [Doc. 8]

While his Motion to Stay and Abey was pending in this Court, Mr. Chavez filed his Second State Habeas Petition, which raised his Confrontation Clause challenges to Montano's video-taped interviews with Detective Hix. While his Second State Habeas Petition was pending, 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' Second State Habeas Petition was denied, as was his Petition for Certiorari for Review of the Court's Denial and his Motion for Reconsideration. As such, Mr. Chavez has presented his Confrontation Clause challenges to the video-taped interviews in his Supplemental Federal Petition. The Government has utterly failed to address these statements, and as such, the Government has waived any argument that these interviews did not violate Mr. Chavez' rights under the Confrontation Clause. See *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) ("Because the argument was not raised in his habeas petition, it is waived on appeal.") See also, *Stouffer v. Trammell*, 738 F.3d 1205, 1222 n. 13 (10th Cir.2013); *Jones v. Gibson*, 206 F.3d 946, 958 (10th Cir.2000); *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir.1999)." Therefore, Mr. Chavez' is entitled to federal habeas relief on this issue.

2. **"Excited utterance" statements made to Pollaro**

Mr. Chavez contends that District Court's admission of the statements Montano made to Pollaro as excited utterance exceptions to hearsay also violated his rights under the Confrontation Clause. In its Response, the Government admits that Mr. Chavez' argued that these statements violated the Confrontation Clause in his Addendum to the First State Habeas Petition, when he argued that "[t]he Trial Court improperly allowed the incriminating hearsay testimony of Mr. Montano through Dawn Pollaro. This violated Mr. Chavez' right to confrontation[.]" [Exh. PP]. However, this was not the first time, Mr. Chavez' raised his argument that the Pollaro statements violated his rights under the Confrontation clause. As is stated in the Statement of Issues (Docketing Statement) filed in his appeal, it is specifically mentioned that trial counsel objected to the admission of these statements on these grounds, but was overruled by the court. [Exh. Y] However, this issue was never presented in Mr. Chavez' appellate filings having been discarded against Mr. Chavez' direct wishes. The Government also concedes that Mr. Chavez expanded on this point in his written closing argument when, with citation to *Crawford v. Washington*, he stated that "[t]he Confrontation Clause of the United States Constitution is the second test that testimonial evidence must pass in order for evidence to be admissible at trial[.]" [Exh. SS]. In denying any relief pertaining to the Pollaro statements, the Government neglects that the any court utterly failed to subject these statements to a Confrontation Clause analysis, instead only adopting the Supreme Court's reasoning in Mr. Chavez' decision on appeal that the statements fell within the excited utterance exception to hearsay.

Thus, contrary to the Government's contention, the state courts have never expressly adjudicated or addressed the merits of Mr. Chavez's Confrontation Clause claim as it pertains to

the Pollaro statements. Even the Court's ruling on Mr. Chavez' Second State Habeas Petition based its conclusion regarding the Pollaro statements on is erroneous belief that the record did not reflect that appellate counsel had ever intended to raise a Confrontation Clause challenge from the offset, which is directly contradicted by the Statement of Issues and trial counsel's objections to the admission of those statements. As such, the record clearly rebuts the presumption that Mr. Chavez' claims that that Pollaro statements violated the Confrontation Clause were rejected on the merits. See *Johnson v. Williams*, 568 U.S. 289, 292 (2013). Likewise, that the United States Supreme Court may not have appeared to have decided one way or the other whether excited utterances made without reference to police interrogation are "testimonial," was an issue that should have and would have been properly addressed had courts engaged in the requisite analysis to address Mr. Chavez' Confrontation Clause challenges. 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. 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 testimonial. Finally, violation of Mr. Chavez' Confrontation Clause rights is not harmless error

merely because the Courts have "copied and pasted" previous court's conclusory statements of Mr. Chavez' "overwhelming evidence of his guilt." In fact, the only direct, non-circumstantial evidence of Mr. Chavez' guilt presented to the jury were Montano's statements. Mr. Chavez has met his burden of presenting clear and convincing evidence to overcome the presumption of the correctness if the factual findings set forth in the Court's orders denying his state habeas petitions. See 28 U.S.C. § 2254(e)(1).

1. The "plethora" claim (Ground Two)

Likewise, and for the reasons discussed herein, Mr. Chavez has demonstrated that the Court's orders denying his state habeas petitions "were contrary to, or involved an unreasonable application of clearly established [f]ederal law," and "based on an unreasonable determination of the facts[.]" 28 U.S.C. § 2254(d).

B. Mr. Chavez is entitled to relief with respect to his claims of ineffective assistance of counsel as set forth in the Original *pro se* petition and in the supplemental petition.

Montano's statements 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. 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.

"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.

Like the District Court, the Government argues 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.

II. Mr. Chavez is not entitled to an evidentiary hearing under the circumstances.

Mr. Chavez asks for an evidentiary hearing and "an opportunity to be heard." [Doc 22 at 31]. Other than those arguments to which the State has failed to respond, Mr. Chavez' claims are simply too complex to be resolved on the record. As such, a hearing is warranted.

CONCLUSION

WHEREFORE 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 29h day of November, 2021to parties listed on
the CM/ECF filing system

/s/ Jason Bowles
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