**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW MEXICO**

**MARIO CHAVEZ,**

**Petitioner,**

**vs.** **No. CIV-19-1151 KWR/LF**

**VINCENT HORTON, Warden, and ATTORNEY GENERAL for the STATE OF NEW MEXICO,**

**Respondents.**

**RESPONSE TO MARIO CHAVEZ'S *OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [Doc. 36]* [Doc. 40]**

**COME NOW** Respondents, by and through counsel, Jane A. Bernstein, Assistant Attorney General, and as their response to Mario Chavez's *Objections to Proposed Findings and Recommended Disposition [Doc. 36]* [Doc. 40], respectfully assert:

This Court reviews *de novo* timely and specific objections to a Magistrate Judge's PFRD. See United States v. One Parcel of Real Prop., 73 F.3d 1057, 1060 (10th Cir. 1996). "*De novo* review requires the . . . [C]ourt to consider relevant evidence of record and not merely review the [M]agistrate [J]udge's recommendation." In re Griego, 64 F.3d 580, 584 (10th Cir. 1995). The Court, however, need not make any specific findings, nor is the Court bound by the Magistrate Judge's recommendations, which it "may accept, reject, or modify, in whole or in part[.]" 28 U.S.C. § 636(b)(1)(C).

In the instant matter, the entirety of Mr. Chavez's objections rests on the fiction that there has been no state-court adjudication of his claims, and therefore he is entitled to *de novo* review. [See Doc. 40 at 5, 7, 11, 15]. Indeed, Mr. Chavez contests the Magistrate Judge's application of

the deferential standard of review set forth in 28 U.S.C. § 2254(d) and (e)(1), arguing that the Magistrate Judge has "incorrectly assume[d], without explanation or support, that Mr. Chavez' claims were adjudicated on the merits, contrary to the clear factual record." [Doc. 40 at 5].

The extensive state record, however, which includes a 22-page *Decision* from the New Mexico Supreme Court, as well as two detailed merits adjudications resolving Mr. Chavez's two amended and supplemented state habeas petitions, [see Doc. 30-1, Exhs. GG and II; Doc. 30-2, Exhs. MM, PP, and VV; Doc. 30-3, Exh. FFF; Doc. 30-4, Exhs. III, LLL, and NNN], supports the Magistrate Judge's decision to defer to the state courts that already have decided the issues rather than consider them *de novo*.

More specifically, Mr. Chavez's repeated insistences that the state courts did not consider his Confrontation Clause challenges on the merits[1] ignores at least two well-established rules: first, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court *must* presume that the federal claim was adjudicated on the merits[,]" see Johnson v. Williams, 568 U.S. 289, 301 (2013) (emphasis added); and second, "even in the setting where [the federal court] lack[s] a state court merits determination, any state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by 'clear and convincing evidence.'" Grant v. Royal, 886 F.3d 874, 889 (10th Cir. 2018) (internal citations omitted).

In his reply to Respondents' answer to his initial and supplemental petitions, Mr. Chavez, who contends that admission of excited utterances made by a non-testifying co-defendant violated

[1] [See Doc. 40 at 8 (contending that on direct appeal, "[t]he NMSC did not mention the Confrontation Clause at all"); at 9 (charging state habeas court with having "refused to address Mr. Chavez' independent Confrontation Clause claims"); at 10 ("Mr. Chavez pointed out that the[] state courts . . . never addressed his independent Confrontation Clause challenges."); at 10 ("[T]he Recommendations appear to assume . . . that Mr. Chavez' Confrontation Clause claims were adjudicated on the merits by the NM courts, when they were not.")].

his rights under the Sixth Amendment, [see Doc. 1 at 5], attempted to rebut the Johnson presumption. [See Doc. 32 at 5-7]. Aside from the fact that any attempt to establish a Johnson rebuttal is now waived as a result of Mr. Chavez's failure to raise Johnson in his objections to the PFRD,[2] Mr. Chavez overlooks the various state-court findings that defense counsel was not ineffective but, rather, made an objectively reasonable strategic decision to put the utterances in question before the jury in an effort to shift blame for the underlying offenses to the co-defendant. [See Doc. 30-2, Exh. VV at 433-436; Doc. 30-4, Exh. NNN at 271, 272, 273-275]. These are quintessential "state-court findings of fact that bear upon the [Confrontation Clause] claim[.]" Grant, 886 F.3d at 889. As such, they are entitled to a presumption of correctness that is not rebutted by unsupported assertions that, notwithstanding Mr. Chavez's desire to raise a Confrontation Clause argument on direct appeal, the issue "was discarded against [his] direct wishes." [Doc. 32 at 5; see also Doc. 40 at 7−8 ("[O]ver Mr. Chavez' consistent written demands, attached to his state and federal court filings, appellate counsel refused to include any Confrontation Clause arguments in the *Brief in Chief*[.]")]. That counsel raised the Confrontation Clause in the docketing statement but not in the brief−in-chief does not mean that the New Mexico Supreme Court was "on notice"[3] of a Sixth Amendment claim—it means that any such claim was abandoned. See Maes v. Thomas, 46 F.3d 979, 986 (10th Cir. 1995) ("A review of New Mexico law reveals that the New Mexico courts have consistently applied the rule that deems all issues abandoned that are not raised in an appellant's brief-in-chief.").

[2] See, e.g., Foster v. Smith, 429 F. Supp. 3d 940, 948 (D.N.M. 2019) (explaining "firm waiver rule," which holds that failure to make timely objections to PFRD waives appellate review of both factual and legal questions).
[3] [See Doc. 40 at 8].

As for the remainder of Mr. Chavez's objections, they too should be overruled for at least two reasons: first, Mr. Chavez cannot overcome the fact that there exist a number of state-court merits adjudications in this matter; and, second, Mr. Chavez is unable to demonstrate error in the Magistrate Judge's PFRD. Respondents renew their request that a certificate of appealability be denied.

Respectfully submitted,

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Electronically filed

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 2023, I filed the foregoing *Response to Mario Chavez's Objections to Proposed Findings and Recommended Disposition [Doc. 36] [Doc. 40]*, electronically through the CM/ECF system, causing e-service upon Jason Bowles; Bowles Law Firm; 4811 Hardware Dr. NE; Bldg. D, Suite 5; Albuquerque, NM 87109, at jason@Bowles-Lawfirm.com.

Assistant Attorney General