IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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

OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [Doc. 36]

Petitioner Mario Chavez ("Mr. Chavez"), by and through his counsel of record, Jason Bowles of Bowles Law Firm, for his *Objections to Proposed Findings and Recommended Disposition* ("Objections") [Doc.36] states:

BACKGROUND

On February 23, 2023, the United States Magistrate Judge entered her *Proposed Findings and Recommended Disposition* ("Recommendations") pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (b)(3) recommended that this Court deny all Mr. Chavez' requests for habeas corpus relief made under 28 U.S.C. § 2254, with prejudice, and his request for an evidentiary hearing and certificate of appealability. Pursuant to 28 U.S.C. §§ 636(b)(1)(C),[1] Mr. Chavez timely files his *Objections* to all the proposed findings and recommendations. In so doing, Mr. Chavez implores this Court

[1] Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

to make the required de novo determination of each of these proposed findings and recommendations to which Mr. Chavez objects as described herein, and reject the entirety of these findings and recommendations, or alternatively, set an evidentiary hearing to receive further evidence or recommit the matter to the Magistrate Judge with instructions to hold an evidentiary hearing or to grant Mr. Chavez' requests for habeas corpus relief.

Mr. Chavez is serving a life sentence, plus additional years, for his conviction in a State of New Mexico murder trial that violated his fundamental Constitutional guarantee of confrontation. Mr. Chavez was never able to cross examine the primary witness against him in the trial – his co-defendant and the only other suspect in the murder investigation, Eloy Montano ("Montano"), who not only stood the most to gain from Mr. Chavez' conviction, but whose statements were the only direct evidence of Mr. Chavez' guilt admitted at trial. In fact, the jury never heard or saw Montano testify. Rather, over trial counsel's objection, Montano's statements were introduced at trial through his wife's, Dawn Pollaro's ("Pollaro"), testimony ("Pollaro's Testimony") and by playing Montano's entire recorded police interrogation conducted by Detective Hix ("Hix Recording") for the jury. Mr. Chavez seeks only a fair opportunity at a new trial, this time with effective trial and appellate counsel, to exercise his Constitutional rights to confront and cross-examine this primary witness. To hold otherwise would result in continuing the NM courts' failure to adequately review the substance of his claims and permit the resulting manifest injustice to remain uncorrected.

The procedural background against which Mr. Chavez presents his claims for federal habeas relief is rather complex as he proceeded pro se for much of the post-conviction state and federal litigation. This bears mention, at the outset, because it can be too easy to lose sight of the actual posture in which Mr. Chavez' presents his claims, and the factual and legal support for

such claims, to reach conclusions that are contrary both to what is required by the facts and law of his case and to the spirit of justice in which federal habeas relief under 28 U.S.C. § 2254 was crafted. In this vein, the *Recommendations* present an inaccurate factual recitation of Mr. Chavez' claims and arguments. With this incomplete factual recitation, the application of the law to those facts has consistently resulted in a wrong legal outcome.

There are several vitally important clarifications and corrections of this factual account that must be made. To begin, Mr. Chavez agrees that his federal habeas claims and arguments are presented in his pro se *Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus* ("Original Petition") [Doc. 1], *Supplemental Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person In State Custody* ("Supplemental Petition") [Doc. 22], *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]* ("Reply") [Doc. 32] and *Notice of Supplemental Authority to Supplemental Petition* ("Notice of Supplemental Authority") [Doc. 33]. However, the *Recommendations* fail to include that Mr. Chavez also filed a *Notice of Addendum* [Doc. 25] attaching numerous state court documents as exhibits because his *Supplemental Petition* incorporated the claims and arguments presented in his *First* and *Second State Habeas Petitions* and their related amendments, supplements and addendums as though fully alleged therein. As such, this would include Mr. Chavez' *First State Habeas Petition* (filed pro se) (Ex. II), *Amended First State Habeas Petition* (Ex. MM), *Addendum to Amended First State Habeas Petition* (Exs. OO, PP), *Reply to State's Response to Amended First State Habeas Petition and Addendum to Amended First State Habeas Petition* (Ex. RR), *Petitioner's Closing Arguments for Evidentiary Hearing* (Ex. SS), *Petition for Certiorari re. Denial of First State Habeas Petition* (Ex. WW), *Motion for Reconsideration re. Denial of Petition for Certiorari re.*

Denial of First State Habeas Petition (Ex. ZZ), *Second State Habeas Petition* (filed pro se) (Ex. FFF), *First Supplement to Second State Habeas Petition* (filed pro se) (Ex. III), *Second Supplement to Second State Habeas Petition* (filed pro se) (Ex. LLL), *Petition for Certiorari re. Denial of Second State Habeas Petition* (Ex. OOO), and *Motion for Reconsideration re. Denial of Petition for Certiorari re. Denial of Second State Habeas Petition* (Ex. TTT).

Throughout the *Recommendations*, Mr. Chavez is criticized for failing to provide requisite claims, facts or legal support for his entire federal habeas claim, but a closer look at the language of each criticism reveals that these conclusions are misleading as they are based only a portion of the record, and not all his federal pleadings, let alone the incorporated State court filings. For example, in denying Ground One (i.e., the admission of Pollaro's Testimony violated the Confrontation Clause), the *Recommendations* state, "The substance of Mr. Chavez's argument in Ground One is actually about hearsay, not the Confrontation Clause. Indeed, Mr. Chavez cites no law related to the Confrontation Clause in Ground One of his petition. The only law Mr. Chavez cites is 'the *Wigmore* test,'" that, "The entirety of Mr. Chavez's argument related to this issue is as follows," and then quotes only his pro se argument in the *Original Petition*. While this is technically accurate, as Mr. Chavez' *Original Petition* did only cite to the "*Wigmore* test," his claims and arguments that Pollaro's testimony violated the Confrontation Clause were also provided in his *Supplemental Petition*, addressed specifically in his *Reply*, and presented throughout his numerous State court filings.[2]. Even the Government does not agree with this inference or false impression, as in its *Answer*, it concedes that:

[2] The Supplemental Petition states:

> The [*Response* to *Petition for Certiorari re. Denial of Second State Habeas Petition*] 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*,

> [I]t appears that Mr. Chavez's first mention of the Confrontation Clause came in his counseled *Addendum to Amended Petition for Writ on Habeas Corpus*, 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 (emphasis added).]. Mr. Chavez somewhat 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].

Id. (quoting *Crawford v. Washington*, 541 U.S. 36 (2004)); See *supra*, at n. 2 (pointing out that the first mention of Pollaro's Testimony violating the Confrontation Clause was presented in the *Statement of Issues* (*Docketing Statement*) in the Direct Appeal).

OBJECTIONS

Mr. Chavez agrees with the Recommendations that he makes five (5) claims for federal habeas relief under § 2254—four in his pro se *Original Petition* and one (1) in his counseled *Supplemental Petition*. However, Mr. Chavez objects to the Magistrate's finding that none of these claims have merit and recommendation that this Court deny his *Original and Supplemental Petitions* with prejudice. In support, Mr. Chavez states:

I. To avoid a de novo review, deny Mr. Chavez an evidentiary hearing, force him to needlessly satisfy § 2254(d)(1) or (2) and mandate deference to NM court decisions, the *Recommendations* incorrectly assume, without explanation or support, that Mr. Chavez' claims were adjudicated on the merits, contrary to the clear factual record.

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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. Section (A)(2) of the Reply specifically address Pollaro's testimony violating the Confrontation Clause stating:

> In its [*Answer to Original and Supplemental Petitions*] [Doc. 30], 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[.]" [Ex. 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].

The *Recommendations* correctly cite to and quote the general law regarding 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"), that governs this case. However, § 2254(d) specifically provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted ***with respect to any claim that was adjudicated on the merits in State court proceedings*** unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(emphasis added). The *Recommendations* relegate the phrase "adjudicated on the merits" as support for the legal proposition that, "where state courts have adjudicated a claim on its merits, federal courts are limited to reviewing the record as it stood before the state courts," and include the phrase as at the end of the entire section conceding that, "For federal habeas claims not adjudicated on the merits in state courts, the Court must review the claim de novo, and the deferential standards of § 2254(d) do not apply," *Id*. at pp. 8-11. However, as was pointed out in Mr. Chavez' *Reply*, whether a claim was "adjudicated on the merits" determines if § 2254(d)(1) or (2) are even required to be applied. If this threshold cannot be established, as the *Recommendations* concede, the defendant is entitled to both a de novo review of his federal habeas claims and an evidentiary hearing, and does not have to meet either condition in § 2254(d)(1) or (2) or defer to state court decisions.

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*, 556 U.S. 449, 129 S.Ct. 1769, 1784 (2009). See also, *Gipson v.*

Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (citing *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999)). This is because in requiring § 2254(d)(1) or (2) to be applied only to claims decided upon the merits by state courts, "it confirm[s] that state courts are the principal forum for asserting constitutional challenges to state convictions." *Eaton v. Pacheco*, 931 F.3d 1009, 1019 (10th Cir. 2019) (quoting, *Harrington v. Richter*, 562 U.S. 86, 103, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). "But the concerns that animate § 2254(d) [(1) and (2)], including 'comity, finality, and federalism,' don't apply with the same force when a state court declines to reach the merits of a particular constitutional claim." *Id.* (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)). Thus, "if the state court did not decide a claim on the merits, and the claim is not otherwise procedurally barred, we address the issue de novo and [§ 2254(d) 's] deference requirement does not apply." *Id*. (citing Gipson, at 1196).

A. <u>Grounds One, Three and Five.</u> Mr. Chavez claims that Pollaro's testimony and Hix' recordings violated the U.S. Confrontation Clause, and that trial and appellate counsel were ineffective for failing to raise or adequately present a Confrontation Clause challenge (over his express written directions), were never "adjudicated on the merits" by the NM courts.

In his pro se *First Supplement to his Second State Habeas Petition* (Ex. III), Mr. Chavez presented a timeline of each instance in which he raised, or attempted to raise, a Confrontation Clause challenge to the admission of his co-defendant, Montano's out-of-court statements. As was explained in his *Supplemental Petition*, *Reply* and above, Mr. Chavez first challenged the admission of Montano's statements on Confrontation Clause grounds, specifically citing to *Crawford*, both through Pollaro's testimony and through playing the entirety of Detective Hix' recorded interviews, in his *Statement of Issues (Docketing Statement)* on Direct Appeal. (Ex. Y), at pp. 6-7, 13. However, over 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*, instead only arguing that the trial court erred in admitting Pollaro's testimony because it was hearsay. See (Ex. DD), at 20-25. Despite having been placed on notice of Mr. Chavez' Confrontation Clause challenges to Montano's out-of-court statements in his *Docketing Statement*, the NM Supreme Court ("NMSC"), omitting any reference to Hix' Recordings and only addressing Pollaro's Testimony, denied Mr. Chavez' appellate challenge to Pollaro's testimony, bud ***did so only on hearsay grounds*** holding that Montano's statements were admissible under the excited utterance exception to the hearsay rule. See *Decision* (Ex. GG), at pp. 18-22. ***The NMSC did not mention the Confrontation Clause at all*****, or any hearsay or other challenges to the admission of Hix' Recordings**. *Id*. at pp. 2-3.

In his *Addendum First State Habeas Petition*, Mr. Chavez claimed that Pollaro's Testimony violated the Confrontation Clause. *Id*. at pp. 2-3. At the evidentiary hearing on the *First State Habeas Petition*, trial counsel was questioned as to the circumstances surrounding his objections to the admission of all Montano's statements on Confrontation Clause grounds under *Crawford*, and as a result of this testimony, in his *Closing Arguments for Habeas Corpus Evidentiary Hearing* (Ex. SS), Mr. Chavez argued that the trial court's admittance of all Montano's out-of-court statements violated his Confrontation Clause rights under the Sixth Amendment as held in *Crawford*. *Id*. at pp. 14-18. However, in denying Mr. Chavez' *First State Habeas Petition*, the district court only addressed the hearsay arguments to Pollaro's testimony. See *Order Denying First State Habeas Petition* (Ex. VV), at pp. 7-10. ***Any mention of Hix' recordings (as hearsay or otherwise) and the Confrontation Clause was entirely absent from the district court's decision***. *Id*. While Mr. Chavez was fulfilling the exhaustion requirements in the NM state courts for the district court's denial of his *First State Habeas Petition*, he filed his

pro se *Original Petition* raising the Confrontation Clause argument as to Pollaro's testimony. *Id*. at p. 6.

In his pro se *Second State Habeas Petition*, Mr. Chavez engaged in a *Crawford* analysis establishing that his trial and appellate counsel had been ineffective for adequately raising and arguing this challenge. *Id*. at pp.38-50. Mr. Chavez clarified that he was raising independent Confrontation Clause challenges under *Crawford* and its progeny to both Pollaro's Testimony and Hix' Recordings, and not only in relation to his ineffective assistance of counsel claims, and provided a timeline of when this challenge had been raised in prior proceedings specifically arguing that it had never been adjudicated on the merits in his pro se *First Supplement to Second State Habeas Petition*. See generally, *Id*. However, in denying these claims, the district court found, "With the exception of Petitioner's ineffective assistance of counsel claims regarding his confrontation claims, Petitioner's remaining claims have been addressed by the Court and there has been no intervening change of law or fact and the ends of justice would not be served by rehearing these claims." *Id*. at ¶ 10. The district court then proceeded to conclude that Mr. Chavez' ineffective assistance of counsel claims should be denied because it was trial counsel's strategy to waive Mr. Chavez' Confrontation Clause challenges to the admission of Hix' recordings to show that Montano was a liar, to discredit him as a witness, and to shift the focus from Mr. Chavez to his co-defendant and that appellate counsel saw nothing incorrect or illegal in trial counsel's strategy. *Id*. Thus, the district court specifically, albeit based upon an incorrect understanding of the factual state of the record, refused to address Mr. Chavez' independent Confrontation Clause claims as to all of Montano's out-of-court statements. *Id*. Additionally, the district court's ineffective assistance of counsel analysis was based only on Hix' Recordings violating the Confrontation Clause, and not Pollaro's Testimony. *Id*. Mr. Chavez subsequently

pointed out to the NM court, in his denied *Petition for Certiorari* and *Motion for Reconsideration*, that the state courts had never addressed his independent Confrontation Clause challenges to Pollaro's Testimony and had only ever addressed his hearsay challenges to her testimony. *Id*. Additionally, Mr. Chavez pointed out that these state courts had also never addressed his independent Confrontation Clause challenges to Hix' recordings, and that the district court's denial of this issue raised in his *Second State Habeas Petition* was definitively contrary to state and federal law and to the facts. See, *Bruton v. United States*, 391 U.S. 123, 125-26 (1968) (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); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Mr. Chavez also included these arguments in his *Supplemental Petition* and *Reply*, wherein he again pointed out that the NM courts had never adjudicated his Confrontation Clause challenges to both Pollaro's Testimony and Hix' Recordings.

The *Recommendations* appear to incorrectly assume that Mr. Chavez' Confrontation Clause challenges were adjudicated in his Direct Appeal. *Recommendations*, at pp. 13-14 ("The argument Mr. Chavez raises in Ground One of his federal habeas petition is the same argument he raised in his direct appeal about excited utterances.") This is incorrect. Cf. *Original Petition* at p. 5 ("Confrontation Clause Violation Due to the Unconstitutional Admission of non-testifying co-defendants inculpatory statements, wrongly admitted as 'excited utterances.'") with *Brief in Chief* (Ex. DD), at p. 20 ("ISSUE TWO: Did the trial court err in admitting the hearsay testimony of Dawn Pollaro concerning statements made her husband, the co-defendant in the case.") Thus, the *Recommendations* appear to assume, without any discussion or specific conclusion, that Mr. Chavez' Confrontation Clause claims were adjudicated on the merits by the NM courts, when they were not.

The only time Mr. Chavez' Confrontation Clause challenge to Hix' Recordings was addressed by a NM court was in the context of his ineffective assistance of counsel claim made in his *Second State Habeas Petition*. The Government never filed a written response to Mr. Chavez' *Second State Habeas Petition*, he was never permitted an evidentiary hearing on his *Second State Habeas Petition*, and the Government never provided any argument regarding Hix' Recordings in its *Answer* to his *Original and Supplemental Petitions*, thereby waiving any arguments in opposition to the issues raised in these pleadings. The *Recommendations* noted:

> Nor can the court make Mr. Chavez' arguments for him. See *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d. 664, 672 (10th Cir. 1998) ("we, like the district courts, have a limited and neutral role in the adversarial process, and are wary of becoming advocates who comb the record of previously available evidence and make ***a party's*** case for it").

Id., at p. 23 (emphasis added). The Government should be held to the same standard as Mr. Chavez. As such, this Court must review Mr. Chavez' claims for federal habeas relief de novo and grant his request for an evidentiary hearing. Thus, Mr. Chavez is entitled to both a de novo review of his federal habeas claims and an evidentiary hearing, and does not have to meet either condition in § 2254(d)(1) or (2) or defer to state court decisions.

B. Grounds Two and Four. Mr. Chavez' claims that a plethora of irrelevant and prejudicial evidence denied him of a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, and that trial **counsel was ineffective for misrepresentations related to polygraphs, failing to investigate or procure experts and witnesses to corroborate his account of events or collateral circumstances surrounding events of the crime were never addressed on the merits by the NM courts.**

Mr. Chavez' agrees with the *Recommendations*' characterization of the term "plethora of irrelevant and prejudicial evidence" to mean the trial court's denial of his objections to and Motion in Limine to exclude evidence irrelevant or prejudicial evidence which included the testimony of Chris Meyer, Rod Miller, Avy Drum, Nicholas Woo, Steven Coe and Alexandra Dort, the Woo script and Gambino/Mafia/Hitman evidence. That this evidence should not have been admitted under the Rules

of Evidence was first raised in Mr. Chavez' Docketing Statement, but no mention of its admission violating any Constitutional rights was not presented until he argued in his *Brief in Chief* that this evidence violated his Constitutional rights under the Fifth, Sixth and Fourteenth Amendments. See, *Id*. However, in denying Mr. Chavez' evidentiary and Constitutional claims pertaining to this evidence, the NMSC only addressed his evidentiary challenges. See *Decision*, at pp. 9-17. In fact, no mention of any Constitutional violations was mentioned in the NMCS's denial of Mr. Chavez' appellate issues. *Id*. While Mr. Chavez did not specifically identify his challenge to the plethora evidence as violating his Constitutional rights under the Fifth, Sixth and Fourteenth Amendments as a numbered issue in his pro se *Second State Habeas Petition*, he made these arguments throughout the pleading in the facts section, as well as arguing that the failure to adequately object and present these arguments were ineffective assistance of counsel. and to conclude that the trial court's violation of these Constitutional rights resulted in prejudice to him and cumulative error. However, in its denial of Mr. Chavez' pro se *Second State Habeas Petition*, the district court concluded, "With the exception of Petitioner's ineffective assistance of counsel claims regarding his confrontation claims, Petitioner's remaining claims have been addressed by the Court and there has been no intervening change of law or fact and the ends of justice would not be served by rehearing these claims." *Id*. at ¶ 10. Thus, the New Mexico courts only addressed the plethora of evidence on evidentiary grounds in Mr. Chavez' direct appeal and not his Constitutional challenges to the admission of that evidence. Because the district court specifically refused to address the plethora argument, in the context of Mr. Chavez' ineffective assistance of counsel claims and Constitutional violations, the NM courts never adjudicated this claim on the merits, a de novo review and evidentiary hearing are required on Ground Two, and Mr. Chavez does not need to meet either condition in § 2254(d)(1) or (2) or defer to state court decisions for this claim.

Mr. Chavez first raised challenges related to polygraphs and failing to investigate or procure experts and witnesses to corroborate his account of events or collateral circumstances surrounding events of the crime in his *Reply* in the Direct Appeal. *Id*. The challenges Mr. Chavez originally made to the admission of the polygraph results were based upon a *Daubert*/Alberico challenge to the results and to the State's expert witnesses administering and testifying regarding the results. However, neither claim was ever addressed by the NMSC in denying Mr. Chavez' appellate claims. See *Decision.* In fact, neither polygraphs nor expert witnesses were addressed by the appellate courts, despite Mr. Chavez alerting the Court to these claims in response to the Government's arguments. *Id*. Mr. Chavez, then raised the issues outlined in Ground Four of his *Original Petition* in his *First State Habeas Petition* and further developed the claim in his *Amended First State Habeas Petition*, *Reply to State's Response* and Closing Arguments. However, in denying his First State Habeas Petition, the district court, only addressed the polygraphs and expert witnesses in the context of Mr. Chavez' ineffective assistance of counsel claims, refusing to address his independent challenge to their admissibility. In so doing, the district court failed to address Mr. Chavez' independent challenge to this evidence. As such, Ground Four was also never adjudicated on the merits, a de novo review and evidentiary hearing are required on this claim, and Mr. Chavez does not need to meet either condition in § 2254(d)(1) or (2) or defer to state court decisions for this Ground Four.

II. Specific Objections to the *Recommendations*

A. Mr. Chavez objects to the Recommendation that he failed to show any error in the NM court's denial of his argument that the trial court erred in admitting Pollaro's Testimony under the "excited utterances" exception. (Ground One).

As has already been established, with ample citation to and quotation from the record, Mr. Chavez' claim in Ground One was that the admission of Pollaro's Testimony was erroneous based ***both on hearsay and Confrontation Clause grounds***. While the *Recommendations*

correctly acknowledge that Ground One of Mr. Chavez's pro se *Original Petition* argues that the trial court violated the Confrontation Clause by admitting Pollaro's Testimony and quotes his argument stated therein, it is untrue that the entirety of his argument is limited to that quoted portion from his *Original Petition*. The *Recommendations* do not and cannot provide any basis in law for disregarding the arguments Mr. Chavez made as to this issue in both his *Supplemental Petition* (in which he incorporated the facts and arguments provided in his state court habeas petitions and related filings) and his *Reply*. Instead, the *Recommendations* incorrectly state that Mr. Chavez did not address this ground in his counseled *Supplemental Petition* and utterly disregard his Confrontation Clause challenges raised specifically to Pollaro's Testimony. Cf. *Supplemental Petition*, at pp. 9-11 (Discussing the district court's violation of the Confrontation Clause as to Montano's statements, including Pollaro's Testimony, and incorporating the arguments presented in the *First and Second State Habeas Petitions*); Reply, at pp.5-7 (providing the history of the NM courts' failure to address the Confrontation Clause challenges to Pollaro's Testimony and specifically arguing that the admission of her testimony violated the Confrontation Clause). Thus, the *Recommendations* erroneously conclude that "Mr. Chavez does not state a claim under the Confrontation Clause in Ground One," and that, "Mr. Chavez offers no explanation in law or fact as to how his rights under the Confrontation Clause have been violated."

The *Recommendations* then again incorrectly state that the substance of Mr. Chavez's argument in Ground One is actually about hearsay, not the Confrontation Clause, and that Mr. Chavez cites no law related to the Confrontation Clause in Ground One of his petition. As has already been established above, Mr. Chavez certainly did cite Confrontation Clause law in his *Supplemental Petition*, *Reply* and incorporated State court filings. Thus, the *Recommendations'*

conclusion that Mr. Chavez fails to show that he is entitled to federal habeas relief on this issue is simply erroneous.

The *Recommendations* then summarily conclude that Mr. Chavez also fails to show any error in the state court's ruling, while commenting that he does not discuss the state court's ruling on this issue, because he neither argues nor demonstrates that § 2254(d)(1) and § 2254(d)(2) apply. The *Recommendations* again fail to provide any explanation or analysis as to how this conclusion is reached as only the language in § 2254(d)(1) and (2) and cases regarding deference to state court decisions are quoted. However, Mr. Chavez is not required to argue or demonstrate that either § 2254(d)(1) and (2) apply, if his claim was never adjudicated on the merits, which is what he claims. Nevertheless, as has already been established above, with specific cites to and quotes from Mr. Chavez' pleadings, he discusses all the NM court decisions at length by providing a complete history of the proceedings and arguments supporting his claim that the NM courts violated both state and federal law by permitting the admission of both Pollaro's Testimony and Hix' Recordings in violation of the Confrontation Clause. Additionally, the case law cited by the *Recommendations* pertaining to deferral to state court decisions clearly provides, "When the state court explains its decision ***on the merits*** in a reasoned opinion, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (emphasis added). Specifically as to Ground One, both the appellate and habeas courts refused to address Mr. Chavez' Confrontation Clause claims made as to Pollaro's Testimony as they erroneously thought this challenge was addressed on Direct Appeal. Finally, Mr. Chavez has clearly shown that the NM courts' rulings on this claim have been so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded

disagreement because the NM courts would only have had to read the *Decision* issued in the Direct Appeal to see that the Confrontation Clause was never addressed, and read *Crawford* and its progeny to know that under the circumstances, Pollaro's testimony violated the Confrontation Clause. Thus, Mr. Chavez has established everything necessary to obtain habeas relief in this Court on Ground One.

The *Recommendations* also maintain that because Mr. Chavez filed his Original Petition pro se, but now has counsel, he should not be permitted to rely on the less stringent standards afforded pro se litigants. However, the *Recommendations* then conclude that even if he were entitled to do so, he would still not be entitled to relief on his claims. The *Recommendations* state that because Mr. Chavez' counsel filed a "supplemental" instead of an "amended" pleading, this renders him ineligible for any pro se litigant protections for the period of time in which he was proceeding pro se. However, the Recommendations do not and cannot cite to any provision of law that stand for this proposition or for any conclusion that an amended petition would have protected his prior pro se status any more than a supplemental petition. Nevertheless, because this Court had previously denied Mr. Chavez' Original Petition for failing to exhaust his state court remedies, as his Second State Habeas was pending at the time, under Rule 15(d), a supplemental petition was the appropriate procedural vehicle to provide this Court with the transactions, occurrences, or events that happened after the date of the pleading to be supplemented—i.e., the subsequent exhaustion of Mr. Chavez' state court remedies. Mr. Chavez would maintain that he should be entitled to whatever protections are afforded to pro se litigants for the time in which he was acting pro se and should not for the time in which he had counsel. However, this argument has no bearing on whether he is entitled to federal habeas relief.

Therefore, Mr. Chavez has demonstrated that he is entitled to habeas relief on Ground One.

B. Mr. Chavez objects to the *Recommendation* that he fails to show any error in the state court's denial of his argument that the introduction of a plethora of irrelevant and prejudicial evidence denied him a fair and reliable trial. (Ground Two)

This *Recommendation* begins by again only quoting portions of Mr. Chavez' *Original Petition* and cases holding general propositions. Without quoting anything from the NM court proceedings, the *Recommendation*'s only basis for summarily concluding that Mr. Chavez failed to demonstrate he is entitled to habeas relief and recommending the Court deny this claim with prejudice is that because Mr. Chavez' claims in Ground Two were also raised and denied in his Direct Appeal, the circumstances of § 2254(d)(1) and (2) are somehow not satisfied. However, this is not accurate. In particular, Mr. Chavez' Direct Appeal challenged the admission of the listed evidence in Ground Two not only on numerous evidentiary grounds, but the *Original Petition* challenged this evidence on both hearsay and federal Constitutional grounds (violating the Fifth, Sixth and Fourteen Amendments). In denying his *First and Second State Habeas Petitions*, the district court likewise failed to address any federal Constitutional claims regarding this testimony either by refusing to address this testimony claiming it was already determined by the Direct Appeal or by only addressing the hearsay challenges. Thus, Mr. Chavez has established he is entitled to relief on this issue.

Additionally, Mr. Chavez agrees that the language quoted is from his *Original Petition* and that he did not address this ground in his *Supplemental* Petition. To the extent that the *Recommendations* attempt to infer that his choosing not to address this claim in his *Supplemental Petition* somehow provides a basis for denial of habeas relief, as opposed to merely providing information, Mr. Chavez would object as there is no such logical or legal basis. Mr. Chavez'

claims regarding this issue were adequately presented in his *Original Petition* and his *First and Second State Habeas Petitions* and related filings, so Mr. Chavez had no need to change anything and only wished to add those claims that were pending and not yet exhausted by the NM courts, which was the appropriate procedural vehicle under Fed.R.Civ.P. 15(d). Filing a supplemental pleading adds to the supplemented pleading and does not amend or withdraw anything in that original pleading.

Nevertheless, supplemental pleadings and quoted case law regarding deference to case law is not reason to deny Mr. Chavez' claims, nor is it sufficient to create a basis for denial of federal habeas relief when the NM courts never addressed any Constitutional challenges to the admission of this evidence, or even the general ineffective assistance claims raised as to admission of this evidence. Because the Constitutional claims raised in Ground Two were not adjudicated on the merits by the Direct Appeal, the sole basis for the *Recommendations*' denial of this claim, Mr. Chavez is entitled to relief on this claim, or alternatively to a de novo review and evidentiary hearing, which would result in the same outcome.

C. Mr. Chavez objects to the *Recommendation* that he fails to show any error in the state court's denial of his ineffective assistance of counsel claims. (Grounds Three and Four and Supplemental Habeas Petition (Ground 5))

The Recommendations incorrectly state that Mr. Chavez raises three ineffective assistance of counsel arguments in Grounds Three, Four and Five. However, for the reasons discussed herein, the record clearly establishes that he also raised an ineffective assistance challenge to Ground Two. Nevertheless, the *Recommendations* erroneously and summarily conclude that none of Mr. Chavez's ineffective assistance of counsel claims have merit. Mr. Chavez agrees with the *Recommendations* that courts evaluate ineffective assistance of counsel claims under the two-prong test described in *Strickland v. Washington* and the general law cited outlining that test. *Id*. 466 U.S. 668, 687–88 (1984) as Mr. Chavez cited much of the same law throughout his federal and state pleadings.

However, Mr. Chavez objects that he failed to demonstrate that the state courts' decisions applying *Strickland* are contrary to or involved an unreasonable application of clearly established law, or are based upon an unreasonable determination of the facts, and that this Court should deny his claims of ineffective assistance of counsel with prejudice.

1. Mr. Chavez fails to show any error in the state court's denial of his ineffective assistance of counsel claims. (Grounds Three and Four)

To begin, Mr. Chavez would refer this Court to his establishing that Grounds Three and Four were never determined on the merits by any NM court. This *Recommendation* does nothing to change this fact. Rather, this *Recommendation* only quotes general law regarding ineffective assistance followed by quoting language from his *Original Petition* before summarily concluding that he raised the same ineffective assistance of counsel claims in his First State Court Habeas Petition and Addendum. The Recommendations then proceed to state that the district court held a two-day evidentiary hearing and issued a detailed order denying Mr. Chavez's ineffective assistance of counsel claims, correctly identifying *Strickland* as the controlling authority and reasonably applying it to conclude he was not entitled to relief. The *Recommendations* then state the same verbatim language as earlier pertaining to deference to state court decisions in federal habeas cases before again summarily concluding that Mr. Chavez fails to show any error in the state court's ruling or even discuss the state court's ruling on these issues. However, as was already established above with cites to the record, Mr. Chavez provided a thorough analysis of his ineffective assistance of counsel claims under *Strickland* and its progeny in his state and federal pleadings demonstrating that, even if these claims had been decided on the merits, the NM courts' decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, and that the NM courts' decisions resulted in decisions that were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(1)-(2). Thus, Mr. Chavez would ask this Court to conduct

the requisite de novo review of his federal and state court pleadings, and given the lack of any substantive analysis supporting this *Recommendation*, find that he has establish trial and appellate counsel were ineffective under *Strickland* and its progeny, thus satisfying both prongs of § 2254(d)(1) and (2).

2. Mr. Chavez's supplemental petition (Ground Five) neither invokes nor demonstrates the legal standards applicable to habeas petitions under 28 U.S.C. § 2254 and should be denied on this basis.

In this instance, the *Recommendations* only address the claims and arguments made in the *Supplemental Petition*, disregarding the *Reply* and the *Second State Habeas Petition* and its related state court filings which were incorporated by reference in the *Supplemental Petition*. Mr. Chavez' claim in Ground Five is that district court's admission of Montano's statements, both through Pollaro's Testimony and Hix' Recordings, were a violation of his Confrontation Clause rights under both state and federal law, and that his trial and appellate counsel's failure to adequately argue and defend against these violations was ineffective assistance of counsel in violation of both state and federal constitutional guarantees to effective counsel. That this was the same claim presented in Mr. Chavez' *Second State Habeas Petition* and pleadings exhausting his state court remedies does not mean that somehow federal habeas relief is unwarranted or unjustified as there is no such rule of law, despite the *Recommendations*' inference as to such.

To begin, 28 U.S.C. § 2254 provides that Mr. Chavez is entitled to a de novo review of Ground One and an evidentiary hearing as this claim was never adjudicated by the state court. As established above and discussed specifically in his *Reply*, Mr. Chavez' Confrontation Clause challenges were never addressed by the NMSC and the Confrontation Clause challenges to Pollaro's Testimony were never addressed in the district court's denials of his *First and Second State Habeas Petitions*. Mr. Chavez' Confrontation Clause challenges to Hix' Recordings were only addressed when the district court denied his *Second State Habeas Petition* because it held, contrary to trial counsel's own testimony, that the trial court's admission of Hix' Recordings, over trial counsel's

objections, was a waiver of Mr. Chavez' Confrontation Clause challenges because waiving such challenges could be a strategic decision of effective counsel. Because Mr. Chavez is entitled to a de novo review of Ground Five, he does not have to establish that the circumstances in either § 2254(d)(1) or (2) are satisfied, and for this reason alone, this Court should at the very least, remand these proceedings with instructions to conduct a de novo review and hold an evidentiary hearing, if not applying its own de novo review to conclude that Mr. Chavez is entitled to relief on this claim.

Even though Mr. Chavez is not required to establish that the circumstances in either § 2254(d)(1) or (2) exist, contrary to the *Recommendation's* conclusion, he has established that one or both conditions have been met as was provided generally in his *Supplemental Petition*, *Second State Habeas Petition* and related filings, and specifically discussed in his *Reply*. Beginning on page 12 of his *Supplemental Petition*, Mr. Chavez engages in a thorough 10 page *Crawford* analysis of his Confrontation Clause challenges with an analysis of how the NM courts violated not only federal law, but their own state law, governing Confrontation Clause violations so as to uphold his conviction. Mr. Chavez also uses this argument pertaining to how clearly and obviously *Crawford* applied to his case to support his claims for ineffective assistance of trial and appellate counsel. While Mr. Chavez does focus primarily on Hix' Recordings in his Supplemental Petition, he clearly states throughout that his Confrontation Clause challenges and law also apply to Pollaro's Testimony. Because the only basis for denying *his Second State Habeas Petition* was the NM court's summary conclusion that, despite having objected on the record and his testimony to the contrary, Mr. Chavez's trial counsel somehow waived his Confrontation Clause challenges and that this was a reasonable defense strategy, Mr. Chavez also included a waiver argument beginning at p. 21 of the *Supplemental Petiton*, again to show the lengths to which the NM courts had gone to uphold his conviction in violation of state and federal law. Mr. Chavez began his ineffective assistance of counsel argument, which was supported by the previous facts and law, at p.26 of his *Supplemental Petition*, and presented an alternative cumulative error argument beginning at p. 29. In his *Reply*, Mr.

Chavez specifically stated he was addressing the substance of 2254(d) beginning on the very first page:

> 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.

Id. at p. 1. After arguing that Mr. Chavez' claims were not adjudicated on the merits, which meant Mr. Chavez did not have to meet the requirements in either § 2254(d)(1) or (2), he provided argument as to how his claims as to both Hix' Recordings and Pollaro's Testimony satisfied both prongs of § 2254(d). Because the Government's *Answer* contained no argument regarding Hix' Recordings and only addressed Mr. Chavez' arguments raised in his *Original Petition*, that Pollaro's Testimony was a violation of his Sixth Amendment Confrontation Clause rights, Mr. Chavez argued that the Government had waived any defense to his claims that Hix' Recordings also violated his Confrontation Clause rights. As such, while Mr. Chavez did touch on Hix' Recordings beginning on p. 3 of the *Reply*, he focused primarily on Pollaro's Testimony. Mr. Chavez' argument began with explaining specifically why Pollaro's Testimony was never heard on the merits for purposes of a federal habeas review and provided a summary of how admission of this testimony violated his Confrontation Clause rights. Beginning, on p. 32, Mr. Chavez also included his argument as to how trial and appellate counsel were ineffective for not successfully presenting these challenges, and because the Government's Answer had argued that there was harmless error, responded to that claim. Throughout all his state and federal pleadings, Mr. Chavez has also consistently argued for and maintained his right to an evidentiary hearing on his issues, but has only ever been permitted one (1) hearing on his *First State Habeas Petition*.

Mr. Chavez' arguments presented throughout his state and federal filings has always been that his claims have never been adjudicated on the merits, which he maintains the record establishes. However, even if they had been, the NM court proceedings both resulted in decisions contrary to, or

involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, and resulted in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the NM court proceedings. It is precisely the NM courts' continued ratification of the trial court's violation of his clearly established Constitutional rights, which have been so contrary to such clearly established federal law, and the NM courts' unreasonable application of this law, that forms a basis for Mr. Chavez' federal habeas relief. Mr. Chavez has consistently presented the facts, supported by the record, and state and federal law clearly establishing his entitlement to relief, but the NM courts, and now the *Recommendations*, refuse to acknowledge these facts or the actual state of the record and refuse to apply the law as it is written and intended, to justify upholding his conviction. Additionally, this has resulted in decisions that were based on unreasonable determinations of the facts considering the evidence presented in the NM courts further justifying federal habeas relief. Thus, Mr. Chavez' explanations and arguments as to the numerous ways in which his Constitutional rights have been violated at every state of the NM proceedings, as presented in his state and federal pleadings, provide the factual basis establishing that he has not only invoked the correct legal standards of § 2254(d), but has met both prongs of § 2254(d).

The *Recommendations* state that Mr. Chavez's *Supplemental Petition* fails to cite clearly established federal law, and that it repeatedly cites New Mexico case law, including some cites to those NM cases, but do not provide any conclusion as to the reason this bears mention. The *Recommendations* then proceed to summarily conclude that, rather than presenting an articulated claim under § 2254, Mr. Chavez is merely seeking another layer of appellate review for the state courts' decisions. However, no law is provided to support such a proposition, and a cursory look at the *Supplemental Petition*, and the *Reply* which the *Recommendations* fail to mention, contain numerous cites to federal law. See e.g., *Supplemental Petition*, at pp. 11-22 (citing and quoting, *Machibroda v. United States*, 368 U.S. 487 (1962); *Crawford*, 541 U.S. 36 (2004); *Bruton v. United*

States, 391 U.S. 123, 138 (1968); *Davis v. Washington*, 126 S.Ct. 2266, at 2268; *Richardson v. Marsh*, 481 U.S. 200, 201-02 (1987); *Gray v. Maryland*, 523 U.S. 185, 192 (1998); *Lilly v. Virginia*, 527 U.S. 116, 123–24, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004)). While these are not the only cites to federal law included in the *Supplemental Petition* and *Reply*, they are sufficient to establish that the *Recommendations*' statement that, "Mr. Chavez's supplemental petition fails to cite 'clearly established Federal law, as determined by the Court of the United States,'" is incorrect. *Id*. at p. 22.

Mr. Chavez' additional citations to New Mexico case law were included, in part, to show how blatantly the NM courts violated not only clearly established federal law, but also their own clearly established state law, to justify upholding his conviction. A state court's refusal to acknowledge facts established on the record and its own law and federal law, especially when this involves the violation of a defendant's Constitutional rights, is unreasonable. Contrary to the *Recommendations*, the status of clearly established state law is relevant to a § 2254 review, because it shows that the state court's decisions were based on unreasonable determinations of the facts considering the evidence presented under § 2254(d)(2). It also serves as factual support for the argument that the state court's conduct resulted in decisions contrary to, or involved an unreasonable application of, clearly established federal law under § 2254(d)(2).

III. Conclusion

For the reasons provided herein, Mr. Chavez objects to the *Recommendations* ultimate conclusion—that because he fails to show the state court erred in adjudicating the claims raised in his *Original* and *Supplemental Petitions*, this Court should deny both under 28 U.S.C. § 2254 and dismiss this case with prejudice. Additionally, Mr. Chavez objects to the recommendation

that he should be denied an evidentiary hearing because of the recommendations that this Court dismiss *Original* and *Supplemental Petitions*.

IV. Certificate of Appealability

Mr. Chavez also objects to the final *Recommendation* that he is not entitled to a certificate of appealability under 28 U.S.C. § 2253(c). For the reasons discussed herein, Mr. Chavez "has made a substantial showing of the denial of a constitutional right," and a certificate of appealability should issue if this Court accepts or adopts one or more of the *Recommendations*. See 28 U.S.C. § 2253(c)(2).

Respectfully submitted,
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I hereby certify that a true and correct copy
of the foregoing was submitted via email
this 29th day of September, 2021to parties listed on
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