IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MARIO CHAVEZ,

Petitioner,

vs. **No. CIV-19-01151 KWR/LF**

RONALD MARTINEZ, Warden,[1] and NEW MEXICO ATTORNEY GENERAL,

Respondents.

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]

COME NOW Respondents, by and through counsel, Jane A. Bernstein, Assistant Attorney General, and as their timely filed answer to Mario Chavez's initial *pro se* and supplemental petitions for writ of habeas corpus, [see Docs. 1 and 2], filed December 6, 2019, and September 29, 2021, respectively, respectfully submit that, notwithstanding Mr. Chavez's apparent exhaustion of available state-court remedies, he has failed to satisfy the standards for relief set forth in 28 U.S.C. § 2254(d) and (e). Respondents ask that both an evidentiary hearing, [see Doc. 22 at 31], and a certificate of appealability be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On February 20, 2006, a jury found Mario Chavez guilty of first-degree murder (felony and deliberate killing); second-degree armed robbery; and five counts of third-degree tampering

[1] An October 30, 2021, offender search for Mr. Chavez indicates that he currently is housed at the Southern New Mexico Correctional Facility, where Ronald Martinez serves as warden. See https://cd.nm.gov/divisions/adult-prison/nmcd-prison-facilities/southern-new-mexico-correctional-facility/. As Mr. Chavez's immediate physical custodian, Warden Martinez is properly named as a Respondent. See Rumsfeld v. Padilla, 542 U.S. 426, 434-442 (2010).

with evidence, in connection with the fatal shooting of Garland Taylor, an Albuquerque-area realtor who was showing a home when he was killed on August 16, 2004. [Exhs. L-T; Exh. W]. Mr. Chavez currently is serving a total term of life imprisonment plus 25 years. [Exh. W].

Pursuant to Rule 12-102(A)(1) NMRA, Mr. Chavez appealed directly to the New Mexico Supreme Court. He argued that (1) "[t]he introduction of a plethora of irrelevant and prejudicial evidence denied [him] a fair and reliable trial[,]" in violation of, among other protections, the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; (2) the trial court erred in admitting as excited utterances/present sense impressions incriminating statements that Mr. Chavez's co-defendant, Eloy Montano, made to his wife, Dawn Pollaro, hours after the murder of Garland Taylor; and (3) the five tampering convictions and sentences violated Mr. Chavez's right to be free from double jeopardy. [Exh. DD]. In its April 5, 2010, decision, the New Mexico Supreme Court affirmed. [Exh. GG]. Mr. Chavez did not seek certiorari review from the United States Supreme Court. See Locke v. Saffle, 237 F.3d 1269; see also 28 U.S.C. § 2244(d)(1)(A).

On December 1, 2010, Mr. Chavez, proceeding *pro se*, signed, and thus filed,[2] his first state habeas petition. He contended that trial counsel was ineffective for (1) neglecting to "obtain qualified experts" to testify as to the interpretation of the results of several polygraph examinations that Mr. Chavez had taken; (2) interfering with Mr. Chavez's constitutional right not to testify; (3) operating under a conflict of interest; and (4) failing to (a) prepare for trial, (b) make appropriate objections, and (c) cross-examine adequately. [Exh. II].

On February 6, 2017, appointed counsel amended Mr. Chavez's petition to add that (1) trial counsel was further ineffective for (a) unreasonably relying on the results of the polygraph exams "because the validity of the tests [was] highly suspect[,]" (b) rejecting an alleged initial plea offer

[2] See Rule 5-802(B) NMRA (2009).

without communicating the plea to Mr. Chavez, and (c) advising Mr. Chavez to reject a second plea offer after falsely advising that Mr. Chavez had "passed" the polygraph exams; (2) the trial court abused its discretion in admitting the polygraph results; and (3) the cumulative effect of the errors of counsel and the court resulted in the denial of a fair trial. [Exh. MM].

The State responded, pointing out, in sum, that "[b]ecause the balance of the evidence in this case overwhelmingly supported [Mr. Chavez's] convictions, his allegations of ineffective counsel demonstrate[d] no actual prejudice that merit[ed] relief." [Exh. NN].

On May 10, 2018, newly appearing contract counsel, [see Exh. OO], filed an *Addendum to Amended Petition for Writ on Habeas Corpus*, further challenging the admission of Eloy Montano's statements to Dawn Pollaro under the "excited utterance" exception to the rule against hearsay. Specifically, "Mr. Chavez s[ought] to add the issue of Excited Utterance to his Habeas Petition based on the failure of Trial and Appellate Counsel to raise the proper legal arguments supporting exclusion of the excited utterance and because the Supreme Court's decision violated his right of due process under the Federal and State Constitutions." [Exh. PP]. Mr. Chavez also maintained that admission of Mr. Montano's statements through Ms. Pollaro "violated Mr. Chavez' right to confrontation[.]" [Id.].

Following a response from the State, [see Exh. QQ], an evidentiary hearing was conducted. [Exh. TT]. During the hearing, trial counsel disclosed that his defense strategy was to "direct[] attention away from [Mr. Chavez] and toward . . . Eloy Montano." [Exh. UU]. Counsel also explained (1) his actions vis-à-vis the polygraph evidence; (2) why there was no plea in the case; and (3) that while counsel believed that Mr. Chavez was not the triggerman, Mr. Chavez nevertheless "undervalued" his role as an accomplice. [Id.].

The parties then submitted written closing arguments. [Exhs. SS and UU]. Among other things, Mr. Chavez repeated that not only were Mr. Montano's statements to Ms. Pollaro *not* excited utterances, but that trial counsel should have sought to compel Mr. Montano to testify, and that counsel's "failure to Argue the Confrontation Rights of [Mr. Chavez] was Ineffective Assistance." [Exh. SS]. According to Mr. Chavez, absent admission of Mr. Montano's statements through Ms. Pollaro, "the result of the trial would have been different." [Id.].

In its closing, the State largely maintained that Mr. Chavez's history of fabrications and contrivances (including but not limited to using the alias "Mario Gambino" and falsely holding himself out as, alternatively, an attorney and a mafia hitman, [see FFF]) undermined his case, leaving counsel with "only one plausible strategy"—shifting attention and blame from Mr. Chavez to Eloy Montano. [Exh. UU]. In light of all the evidence, the State concluded, trial counsel's "'errors' justified themselves as sound trial tactics[.]" [Id.].

On September 6, 2019, the state district court (the Hon. Jacqueline Flores) issued a highly detailed *Order Denying Petitioner's Petition and Amended Petition for Writ of Habeas Corpus*. After setting out the applicable two-part test for the analysis of ineffective-assistance-of-counsel claims, Judge Flores found that counsel had made reasonable strategic decisions with respect to (1) the polygraph evidence; (2) the admission of Mr. Montano's statements as excited utterances; and (3) the choice not to seek additional expert witnesses. [Exh. VV]. Judge Flores also rejected Mr. Chavez's insistence that trial counsel's "admitted . . . good working business relationship" with the district attorney constituted a conflict of interest, and pointed out Mr. Chavez's misinterpretation of any plea negotiations. [Id.]. Finally, having emphasized both the strength and the volume of the evidence against Mr. Chavez, Judge Flores "conclud[ed] trial counsel was either not ineffective or that no prejudice occurred." [Id.].

The New Mexico Supreme Court denied Mr. Chavez's petition for writ of certiorari and his ensuing motion for reconsideration. [Exhs. WW-DDD].

On March 16, 2020, Mr. Chavez, again proceeding *pro se*, filed his second state habeas petition. By then, Mr. Chavez already had filed in this Court his initial *pro se* petition for 28 U.S.C. § 2254 relief, [see Doc. 1], and represented that he was continuing in state court for exhaustion purposes.[3] In his second state petition, Mr. Chavez asserted that (1) trial counsel was ineffective for (a) "fail[ing] to object to clear instances of prosecutorial conduct that [were] plainly improper, which denied [him] the right of cross-examination secured by the Confrontation Clause[,]" (b) laboring under a conflict of interest inasmuch as his primary goal was to avoid a malpractice charge, and (c) failing to object to admission of statements made in the course of plea proceedings; (2) "[a]ppellate counsel was ineffective for failing to investigate and present on direct appeal the aforementioned prosecutorial conduct that denied [Mr. Chavez] the right of cross-examination secured by the Confrontation Clause[]"; and (3) state habeas counsel were ineffective in their handling of Mr. Chavez's first state habeas petition, his amended first state habeas petition, and the addendum. [Exh. FFF]. On May 15, 2020, Mr. Chavez filed his *Supplement to Petition for a Writ of Habeas Corpus*, in which he challenged appellate counsel's effectiveness in protecting his constitutional right to confront the witnesses against him, [see Exh. III], and, on June 16, 2020, his *Second Supplement to Petition for a Writ of Habeas Corpus*, in which he did the same with respect to habeas counsel. [Exh. LLL].

[3] On March 25, 2020, Mr. Chavez filed a *Motion to Stay-and-Abey*, explaining that on March 16, 2020, he had filed what he termed "[a] successive state habeas petition" that included claims he intended to raise in an amended federal habeas petition to be filed once exhaustion was complete. [See generally Doc. 8]. This Court denied the motion, [see Doc. 12 at 5]; Mr. Chavez attempted to appeal, [see Doc. 15]; and the Tenth Circuit dismissed the appeal for lack of jurisdiction, [see Doc. 18].

On January 22, 2021, the state district court (the Hon. Alisa Hart) dismissed Mr. Chavez's second state habeas petition and both supplements thereto. As is relevant here, Judge Hart repeated that "the strategy at trial was to show that Eloy Montano was a liar, to discredit him as a witness, and to shift the focus from [Mr. Chavez] as . . . the shooter to Eloy." [Exh. NNN ¶ 14]. To that end, Judge Hart explained, the record supported that trial counsel did not fail to address "the confrontation issue" but, to the contrary, made the reasonable tactical decision to seek the admission of Eloy Montano's statements to show both (1) that Mr. Montano "had lied to police to cover-up his involvement and shift the blame to [Mr. Chavez]" and (2) the way in which Mr. Montano's statements impacted law-enforcement decisions and affected the course of the investigation. [Id. ¶ 16]. Judge Hart additionally determined that "it appear[ed that] appellate counsel, after reviewing the transcripts of the trial, made a strategic decision not to present the confrontation argument." [Id. ¶ 18].

Judge Hart took account of Mr. Chavez's belief that Eloy Montano's statements to his wife, as well as statements he made during police interviews, violated Mr. Chavez's right to confront the witnesses against him. Still, citing "reasonable strategic decisions made regarding the use of Eloy Montano's statements and whether to present arguments regarding the Confrontation Clause challenges on appeal[,]" she concluded that Mr. Chavez "ha[d] failed to establish ineffective assistance of counsel related to trial counsel or appellate counsel's failure to raise Confrontation Clause claims." [Exh. NNN ¶ 20].

Mr. Chavez, represented by counsel, then filed a petition for writ of certiorari, presenting a single question for review:

> Did the District Court err in concluding that 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 . . . Eloy Montano?

[Exh. OOO]. After the State responded, [see Exh. RRR], the New Mexico Supreme Court denied the petition by *Order* of April 27, 2021. [Exh. SSS]. Counsel for Mr. Chavez then filed two seemingly identical motions for reconsideration, [see Exhs. TTT and UUU]; on June 29, 2021, reconsideration was denied. [Exh. VVV].

As stated, Mr. Chavez filed his initial *pro se* 28 U.S.C. § 2254 petition while state-court proceedings were ongoing, on November 25, 2019.[4] [See Doc. 1 at 15]. On January 11, 2021, Jason Bowles, counsel in the 2021 state-court certiorari proceedings, entered his appearance for Mr. Chavez, [see Doc. 19], and on September 29, 2021, filed Mr. Chavez's *Supplemental Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody*. [Doc. 22].

In his initial *pro se* petition, Mr. Chavez argues that the admission of Eloy Montano's out-of-court statements as excited utterances amounted to a Confrontation Clause violation (Ground One); "[t]he introduction of a plethora of irrelevant and prejudicial evidence denied [Mr. Chavez] a fair and reliable trial as guaranteed by Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution[]" (Ground Two); and trial counsel was ineffective for (a) failing to object to the admission of Mr. Montano's statements on both hearsay and confrontation grounds, (b) misrepresenting the results of the polygraph examinations, and (c) failing to "investigate or procure experts and witnesses to corroborate [Mr. Chavez's] account of events or collateral circumstances surrounding events of the crime" (Grounds Three and Four). [Doc. 1 at 5, 7-8, 10].

In the supplemental petition, Mr. Chavez posits that the state 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

[4] See Houston v. Lack, 487 U.S. 266, 276 (198) (under federal mailbox rule, *pro se* prisoner's cause of action is deemed filed when prisoner delivers pleading to prison officials for mailing).

Amendment rights as discussed in Crawford [v. Washington, 541 U.S. 36 (2004)], was merely a strategic decision." [Doc. 22 at 11].

Because both the initial *pro se* and supplemental petitions were filed after April 24, 1996, they are subject to the terms of the Antiterrorism and Effective Death Penalty Act ("the AEDPA"). For purposes of the "in custody" requirement of 28 U.S.C § 2254, Mr. Chavez was in custody when both petitions were filed, and remains in custody as of the date of the filing of this answer. Respondents, however, deny all material allegations that Mr. Chavez has suffered a violation of any federal law or federal constitutional provision mandating the granting of federal habeas review and relief. See 28 U.S.C § 2254. Furthermore, any error that might have been committed in the course of the state-court proceedings must be deemed harmless and without substantial and injurious effect upon the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 622-623 (1993). As stated, Respondents do not dispute that Mr. Chavez appears to have exhausted available state-court remedies by presenting the issues raised here in the course of his direct appeal and/or during post-conviction review.

II. THE STATE-COURT RECORD

The following state-court documents are attached:

Second Judicial District, Bernalillo County Cause No. D-202-CR-2004-03558

Exhibit A - *Notice*, filed September 30, 2005;

Exhibit B - *Motion in Limine to Exclude Evidence that is Not Relevant and/or that is Prohibited by 404(b) or 403*, filed January 6, 2016;

Exhibit C - *Motion in Limine on the Admissibility of Statements by Eloy Montano*, filed January 12, 2006;

Exhibit D - *Motion in Limine to Exclude the Directed Lie Polygraph of Defendant*, filed January 12, 2006;

Exhibit E - *Motion to Enforce Stipulation and to Strike Defendant's Motion in Limine to Exclude the Directed Lie Polygraph of Defendant*, filed January 19, 2006;

Exhibit F - *State's Response to Defendant's Motion in Limine on the Admissibility of Statements by Eloy Montano*, filed January 20, 2006;

Exhibit G - *Motion to Compel Testimony and Grant Immunity*, filed January 25, 2006;

Exhibit H - *Form Order on Scheduled Motions*, filed January 25, 2006;

Exhibit I - *Order Denying Defendant's Motion in Limine to Exclude the Directed Lie Polygraph of Defendant*, filed January 30, 2006;

Exhibit J - *Jury Instructions*, filed February 22, 2006;

Exhibit K - *Record of Trial*, filed February 22, 2006;

Exhibit L - *Special Verdict*, filed February 22, 2006;

Exhibit M - *Verdict*, filed February 22, 2006;

Exhibit N - *Verdict*, filed February 22, 2006;

Exhibit O - *Verdict*, filed February 22, 2006;

Exhibit P - *Verdict*, filed February 22, 2006;

Exhibit Q - *Verdict*, filed February 22, 2006;

Exhibit R - *Verdict*, filed February 22, 2006;

Exhibit S - *Verdict*, filed February 22, 2006;

Exhibit T - *Verdict*, filed February 22, 2006;

Exhibit U - *Receipt for Exhibits*, filed February 24, 2006;

Exhibit V - *Judgment, Sentence and Commitment*, filed June 16, 2006;

Exhibit W - *First Amended Judgment, Sentence and Commitment*, filed June 27, 2006;

Exhibit X - *Notice of Appeal*, filed July 14, 2006.

New Mexico Supreme Court, Cause No. S-1-SC-29978

Exhibit Y- *Statement of Issues*, filed September 14, 2006;

Exhibit Z - *Motion to be Listed as Co-Counsel for Appeal and for the Department of Corrections to Provide Access to Legal Resources for Appeal*, filed October 10, 2006;

Exhibit AA - *Order*, filed October 16, 2006;

Exhibit BB - *State of New Mexico's Response to: Defendant's Motion to be Listed as Co-Counsel for Appeal and for the Department of Corrections to Provide Access to Legal Resources on Appeal*, filed November 9, 2006;

Exhibit CC - *Order*, filed November 29, 2006;

Exhibit DD - *Defendant-Appellant's Brief in Chief*, filed May 26, 2009;

Exhibit EE - *State of New Mexico's Answer Brief*, filed September 18, 2009;

Exhibit FF - *Defendant-Appellant's Reply Brief*, filed October 13, 2009;

Exhibit GG - *Decision*, filed April 5, 2010;

Exhibit HH - *Mandate No. 29,978*, filed April 22, 2010.

Second Judicial District, Bernalillo County Cause No. D-202-CR-2004-3558

Exhibit II - *Petition for Writ of Habeas Corpus*, filed March 7, 2011;

Exhibit JJ - *Motion for Appointment of Counsel*, filed March 7, 2011;

Exhibit KK - *Order of Appointment*, filed March 7, 2011;

Exhibit LL - *Amended Order of Appointment*, filed May 23, 2011;

Exhibit MM - *Amended Petition for Writ of Habeas Corpus*, filed February 6, 2017;

Exhibit NN - *State's Response to Habeas Petition*, filed March 19, 2018;

Exhibit OO - *Entry of Appearance*, filed April 3, 2018;

Exhibit PP - *Addendum to Amended Petition for Writ on Habeas Corpus*, filed May 10, 2018;

Exhibit QQ - *State's Response to Addendum to Amended Habeas Petition*, filed June 22, 2018;

Exhibit RR - *Reply to State's Response to Amended Petition for Writ of Habeas Corpus and State's Response to Petitioner's Addendum*, filed August 10, 2018;

Exhibit SS - *Petitioner's Closing Arguments for Habeas Corpus Evidentiary Hearing*, filed April 30, 2019;

Exhibit TT - *State's Notice of Filing Exhibit*, filed April 30, 2019;

Exhibit UU - *State's Written Closing Argument*, filed April 30, 2019;

Exhibit VV - *Order Denying Petitioner's Petition and Amended Petition for Writ of Habeas Corpus*, filed September 6, 2019.

New Mexico Supreme Court, Cause No. S-1-SC-37935

Exhibit WW - *Petition for Writ of Certiorari to the Second Judicial District Court in Bernalillo County Upon Denial of Petition for Writ of Habeas Corpus the Honorable Jacqueline Flores Presiding*, filed November 5, 2019;

Exhibit XX - *Order*, filed November 13, 2019;

Exhibit YY - *Motion to Accept Motion to Reconsider Petition of Writ of Certiorari as Timely Filed*, filed December 3, 2019;

Exhibit ZZ - *Motion to Reconsider Denial of Petition for Writ of Certiorari to the Second Judicial District Court of Bernalillo County*, filed December 3, 2019;

Exhibit AAA -*Off Work Certification*, filed December 4, 2019;

Exhibit BBB - *Off Work Certification*, filed December 4, 2019;

Exhibit CCC - *Order*, filed December 26, 2019;

Exhibit DDD -*Amended Motion to Accept Motion to Reconsider Petition of Writ of Certiorari as Timely Filed*, filed January 3, 2020

Exhibit EEE - *Order*, filed January 3, 2020.

Second Judicial District, Bernalillo County Cause No. D-202-CR-2004-3558

Exhibit FFF - *Petition for Writ of Habeas Corpus*, filed March 25, 2020;

Exhibit GGG -*Notice of Rule 5-802(H)(1) NMRA Pre-Appointment Review*, filed April 28, 2020;

Exhibit HHH -*Petitioner's Motion for Transcripts*, filed May 11, 2020;

Exhibit III - *Supplement to Petition for a Writ of Habeas Corpus*, filed May 26, 2020

Exhibit JJJ - *Motion for Permission to Unseal and Review Document*, filed May 29, 2020;

Exhibit KKK - *Supplemental Notice of Rule 5-802(H)(1) NMRA Pre-Appointment Review*, filed June 10, 2020;

Exhibit LLL - *Second Supplement to Petition for a Writ of Habeas Corpus*, filed June 24, 2020;

Exhibit MMM- *Second Supplemental Notice of Rule 5-802(H)(1) NMRA Pre-Appointment Review*, filed July 11, 2020;

Exhibit NNN -*Order on Petition for Writ of Habeas Corpus*, filed January 22, 2021.

New Mexico Supreme Court, Cause No. S-1-SC-38695

Exhibit OOO -*Petition for Writ of Certiorari to the Second Judicial District Court of New Mexico*, filed February 22, 2021;

Exhibit PPP - *Order*, filed March 22, 2021;

Exhibit QQQ -*Entry of Appearance*, filed April 1, 2021;

Exhibit RRR - *Response to Petition for Writ of Certiorari to the Second Judicial District Court*, filed April 6, 2021;

Exhibit SSS - *Order*, filed April 27, 2021;

Exhibit TTT - *Motion for Reconsideration of Order Denying Petition for Writ of Certiorari to the Second Judicial District Court of New Mexico*, filed May 12, 2021;

Exhibit UUU -*Motion for Reconsideration of Order Denying Petition for Writ of Certiorari to the Second Judicial District Court of New Mexico*, filed May 14, 2021;

Exhibit VVV- *Order*, filed June 29, 2021.

Docket Sheets

Exhibit WWW- Bernalillo County, Cause No. D-202-CR-2004-3558, state court docket sheet downloaded November 2, 2021;

Exhibit XXX- New Mexico Supreme Court, Cause No. S-1-SC-29978, state court docket sheet printed October 13, 2021, downloaded November 2, 2021;

Exhibit YYY -New Mexico Supreme Court, Cause No. S-1-SC-37935, state court docket sheet downloaded November 2, 2021;

Exhibit ZZZ - New Mexico Supreme Court, Cause No. S-1-SC-38695, state court docket sheet downloaded November 2, 2021.

III. ANALYSIS

A. Of the various state courts to have adjudicated the merits of Mr. Chavez's claims, not one issued a decision that (1) was contrary to, or involved an unreasonable application of, clearly established United States Supreme Court precedent; or (2) was based on an unreasonable application of the facts in light of the evidence presented.

"Under [the] AEDPA, the standard of review applicable to a particular claim depends upon how that claim was resolved by the state courts." Cole v. Trammell, 735 F.3d 1194, 1199 (10th Cir. 2013). Where a claim has been adjudicated on the merits, federal habeas relief may be granted only if the petitioner demonstrates 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)). This highly deferential and intentionally difficult-to-meet standard serves "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law[,]" Bell v. Cone, 535 U.S. 685, 693 (2002), while at the same time minimizing the "us[e of] federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." Renico v. Lett, 130 S. Ct. 1855, 1866 (2010). To secure federal habeas relief, a petitioner must demonstrate that the relevant state-court decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S 86, 103 (2011). State-court factual findings are presumed correct "unless the petitioner rebuts that presumption by 'clear and convincing evidence.'" Byrd v. Workman, 645 F.3d 1159, 1165 (10th Cir. 2011) (*quoting* 28 U.S.C. § 2254(e)(1)).

A state-court decision is "contrary to" clearly established Supreme Court law—meaning holdings, not dicta—"if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases [or] if the state court confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision and nevertheless arrives at a result different from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-406, 412 (2000); see also Hooks v. Workman, 689 F.3d 1148, 1163 (19th Cir. 2012) (determining existence of "clearly established federal law" involves "inquiry that focuses exclusively on holdings of the Supreme Court[]"). It is not, however, necessary that the state-court decision cite applicable Supreme Court decisions, nor does the state-court decision even need to demonstrate an "*awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (emphasis in original).

In assessing "unreasonable application," this Court must ask "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409. Additionally, "[a]n *unreasonable* application of federal law is different from an *incorrect* application of federal law[, and] 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." Renico, 130 S. Ct. at 1862 (2010) (emphasis in original); accord Cole, 735 F.3d 1194. Rather, the state-court decision must "be given the benefit of the doubt." Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011); see also Woodford v. Visciotti, 537 U.S. 19, 24 (2002).

"When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Harrington, 562 U.S. at 99

(constitutional claim presented for first time in habeas corpus petition submitted to California Supreme Court). Also, where the highest state court denies discretionary review from a lower court's dismissal of a habeas petition, but does so without providing reasons, the federal habeas court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

Finally, "[i]n a collateral attack pursuant to 28 U.S.C. § 2254 on a state criminal conviction, the ultimate burden of establishing that the state proceeding violated the Constitution of course remains on the petitioner." Beachum v. Tansy, 903 F.2d 1321, 1325 (10th Cir. 1990).

1. Mr. Chavez is not entitled to federal habeas relief with respect to Grounds One and Two from the initial *pro se* petition.[5]

a. Confrontation Clause (Ground One)

As his first ground for relief, Mr. Chavez contends that the admission of Eloy Montano's statements to his wife as excited utterances worked a violation of Mr. Chavez's Sixth Amendment Confrontation Clause rights. [Doc. 1 at 5].

From the record, it 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

[5] With the exception of Grounds One and Two, all of Mr. Chavez's claims for relief arise from the alleged ineffective assistance of counsel. [See Doc. 1 at 5, 7-8, 10; see also Doc. 22 at 11]. Accordingly, those ineffective-assistance claims have been grouped and are addressed together in Section III.A.2. of this answer.

States Constitution is the second test that testimonial evidence must pass in order for evidence to be admissible at trial[.]" [Exh. SS].

The Confrontation Clause to the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. CONST. amend. VI. In Crawford, the Supreme Court held that, under the Confrontation Clause, "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59 (2004). While the Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial[,]" it reasoned that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. at 68.

In a later case, the Court explained that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822 (2006). As for statements made outside the police-interrogation context, the Tenth Circuit has defined "[a] testimonial statement [as] a formal declaration made by the declarant that, when objectively considered, indicates that the primary purpose of the [statement is] to establish or prove past events potentially relevant to later criminal prosecution." United States v. Morgan, 748 F.3d 1024, 1038 (10th Cir. 2014) (internal authorities omitted).

Mr. Chavez is not entitled to federal habeas relief with respect to Ground One for several reasons.

First, even assuming that the state courts did not expressly address Mr. Chavez's freestanding Confrontation Clause claim, [see generally Exh. VV and Exh. XXX; but see Exh.

NNN], there exists a presumption—rebuttable "in some limited circumstances"—that this claim was nonetheless rejected on the merits. See Johnson v. Williams, 568 U.S. 289, 292 (2013). Indeed,

> because it is by no means uncommon for a state court to fail to address separately federal claim that the court has not simply overlooked, . . . [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[.]

Id. at 300-301.

Next, the United States Supreme Court does not appear to have decided one way or the other whether excited utterances made "without reference to police interrogation[]" are "testimonial." See United States v. DeLeon, 287 F. Supp.3d 1187, 1243 (D.N.M. 2018); see also United States v. Pursley, 577 F.3d 1204, 1223 (10th Cir. 2009) (analyzing excited utterance made following serious assault and noting that "[a]lthough we have not yet spoken on this issue, . . . we believe that an excited utterance is not *per se* excluded from the scope of the Confrontation Clause[]"). Decisions from other circuits support Respondents' position. See, e.g., United States v. Brito, 427 F.3d 53, 60-61 (1st Cir. 2005) (calling case law "muddled as to whether excited utterances may or may not be classified as testimonial hearsay[]" and describing approaches taken in various jurisdictions); see also United States v. Hadley, 431 F.3d 484, 507 (6th Cir. 2005) (reviewing for plain error and lamenting that "the admissibility of excited utterances in the wake of Crawford remains anything but 'clear' or 'obvious[]'").

"The absence of clearly established federal law is dispositive under § 2254(d)(1) and results in the denial of habeas relief." Grant v. Royal, 886 F.3d 874, 889 (10th Cir. 2018) (internal authorities omitted); see also Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("T]his Court has held on numerous occasions that it is not 'an unreasonable application of" 'clearly established

Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.). Ground One is subject to rejection for this reason alone.

Finally, even if admission of the challenged statements could be said to have violated Mr. Chavez's constitutional right to confrontation, any error in this regard must be deemed harmless, see Brecht, 507 U.S. at 622-623, in light of the other overwhelming evidence of his guilt, as laid out in the September 6, 2019, *Order Denying Petitioner's Petition and Amended Petition for Writ of Habeas Corpus*. [Exh. VV]. Absent Mr. Chavez's presentation of clear and convincing evidence to the contrary, this Court is required to presume the correctness if the factual findings set forth in that order. See 28 U.S.C. § 2254(e)(1).

b. The "plethora" claim (Ground Two)

In Ground Two, Mr. Chavez repeats the argument he made in the course of his direct appeal that "[t]he introduction of a plethora of irrelevant and prejudicial evidence denied [him] a fair and reliable trial as guaranteed by Fifth, Sixth and Fourteenth Amendments[.]" [Compare Doc. 1 at 7 with Exh. DD ("The Introduction Of A Plethora of Irrelevant And Prejudicial Evidence Denied Mario Chavez A Fair and Reliable Trial.")].

The New Mexico Supreme Court, however, disagreed, explaining in careful detail (1) the relevancy of the challenged evidence; (2) the evidentiary rules pursuant to which the evidence was admitted; and (3) why the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to Mr. Chavez. [Exh. GG]. Mr. Chavez neither contends nor demonstrates that the state supreme court's decision "was contrary to, or involved an unreasonable application of clearly established [f]ederal law," nor does he establish that it was "based on an unreasonable determination of the facts[.]" 28 U.S.C. § 2254(d). To the contrary, there still exists

the presumption of correctness. See 28 U.S.C. § 2254(e)(1). As with Ground One, this Court should find and recommend that federal habeas relief is unavailable as to Ground Two.

2. Mr. Chavez is not entitled to relief with respect to his claims of ineffective assistance of counsel as set forth in Grounds Three and Four the initial *pro se* petition and in the supplemental petition.

a. Ineffective assistance of trial counsel (Grounds Three and Four)

Mr. Chavez maintains that trial counsel was ineffective for (1) failing to object, on both hearsay and Confrontation Clause grounds, to the admission of Eloy Montano's statements to his wife, [see Doc. 1 at 8]; (2) misrepresenting the results of the polygraph examinations, [see id. at 10]; and (3) failing to investigate or secure experts and witnesses to "corroborate [his] account of events or collateral circumstances surrounding" the fatal shooting of Garland Taylor, [see id.]. He further asserts that Judge Hart "erroneously" denied his second Rule 5-802 petition "by summarily concluding that the ineffective assistance of his trial and appellate counsel to argue or defend against the infringement upon his Sixth Amendment rights as discussed in Crawford was merely a strategic decision." [Doc. 22 at 1].

In Strickland v. Washington, the United States Supreme Court established a two-part standard for assessing ineffective-assistance-of-counsel claims. First, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. Second, he must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). The petitioner must satisfy both prongs, and if he fails on one, this Court need not reach the other. See, e.g., United States v. Taylor, 492 Fed. Appx. 941, 945 (10th Cir. 2012); see also Strickland,

466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed.").

Courts "always start the [ineffective-assistance] analysis" by presuming that counsel acted objectively reasonably, and that the challenged conduct "*might* have been part of a sound trial strategy." Bullock v. Carver, 297 F.3d 1036, 1046 (10th Cir. 2002) (emphasis in original). If the decision in question "was, *in fact*, an adequately informed strategic choice, the presumption that [it] was objectively reasonable becomes 'virtually unchallengeable.'" Id. (emphasis in original). Even an "ill-informed" strategy may be deemed objectively reasonable; an unreasonable "fully-informed strategic choice [is one that] 'was so patently unreasonable that no competent attorney would have made it.'" Id. (*quoting* Phoenix v. Matesanz, 233 F.3d 77, 82 n.2 (1st Cir. 2000)) For these reasons,

> [s]urmounting Strickland's high bar is never an easy task. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.

Howell v. Trammell, 728 F.3d 1202, 1223 (10th Cir. 2013) (internal quotations and citations omitted).

With respect to the ineffective-assistance claims set forth in Grounds Three and Four of Mr. Chavez's initial *pro se* petition, they have been considered and discounted after an evidentiary hearing.

Specifically, Judge Flores found that trial counsel attempted to exclude Mr. Montano's statements to his wife on the ground that they could not have been excited utterances because they

were not sufficiently spontaneous, but that the trial court was unconvinced.[6] [Exh. VV]. However, "[j]ust because . . . counsel did not prevail . . . does not mean his performance was deficient." May v. United States, 2016 WL 3033777, at *2 (W.D. Tex. May 25, 2016).

As for counsel's alleged ineffectiveness with respect to the polygraph evidence, Judge Flores first noted that Mr. Chavez's "testimony regarding his belief in the state of the polygraph results [was] undermined by the testimony of trial counsel at the evidentiary hearing, by statements made by trial counsel prior to trial, by letters from trial counsel to the State, and from the [first] polygraph report, all of which indicated the results were inconclusive." [Exh. VV]. More importantly for present purposes, however, is that Judge Flores accepted trial counsel's actions around the polygraph evidence as reasonable trial strategy and the best way to attempt to create reasonable doubt as to Mr. Chavez's role as the shooter. [Id.]. Judge Flores also refused to second-guess trial counsel's decision as to how best to investigate the case, and found that where the strategy was to persuade the jury that Eloy Montano—not Mr. Chavez—was the shooter, funds were most wisely spent "on the polygraphs." [Id.].

There can be no serious question that Judge Flores (1) correctly identified Strickland as the controlling authority; (2) issued a ruling that comports with Strickland's commands; and (3) reasonably determined the facts in light of the evidence presented. See Smith v. Duckworth, 824 F.3d 1233, 1250 (10th Cir. 2016) ("We will not conclude that a state court's determination of the facts is unreasonable unless the court plainly and materially misstated the record or the petitioner shows that reasonable minds could not disagree that the finding was in error."); see also

[6] Judge Flores further reminded that the New Mexico Supreme Court had addressed the underlying issue, *to wit*, whether the statements were properly characterized as excited utterances, [see Exh. VV], and concluded they were. [Exh. GG]. Where there is no underlying attorney error, there can be no ineffective assistance of counsel. See United States v. Anderson, 483 Fed. Appx. 462, 465 (10th Cir. 2012); see also Dyer v. United States, 23 F.3d 1424, 1426 (8th Cir 1994) (ineffective-assistance claim fails when underlying claim "rejected as meritless").

28 U.S.C. § 2254(d), (e)(1). Consequently, Mr. Chavez is not entitled to federal habeas relief with respect to Grounds Three and Four.

b. The supplemental petition

As stated in his supplemental petition,

> [i]t is Mr. Chavez' position that the District Court *erroneously* denied his Second State Habeas Petition by summarily concluding that the ineffective assistance of his trial and appellate counsel to argue or defend against the infringement upon his Sixth Amendment rights as discussed in Crawford was merely a strategic decision.

[Doc. 22 at 1 (emphasis added)].

Even if this Court were to agree with Mr. Chavez's assessment, the Court "may not issue a habeas grant simply because [it] conclude[s] in [its] 'independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable'" Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (*quoting* Williams, 529 U.S. at 411)). And again, "[i]n order for a state court's decision to be an unreasonable application of [United States Supreme Court] case law, the ruling must be 'objectively unreasonable, not merely wrong; even clear error will not suffice.'" Virginia v. LeBlanc, --- U.S. ----, 137 S. Ct. 1726, 1728 (2017) (*quoting* Woods v. Donald, 575 U.S. 312, 316 (2015)).

The failure of the supplemental petition to invoke—much less satisfy—the standards set forth in 28 U.S.C. § 2254(d) and (e) is sufficient reason for this Court to deny relief. To be sure, it is Mr. Chavez's burden, see Beachum, 903 F.2d at 1325, to demonstrate that Judge Hart's adjudication of the merits of his ineffective-assistance claims

> (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[.]

28 U.S.C. § 2254(d). Further, if Mr. Chavez disputes Judge Hart's factual findings, it is his additional burden to present clear and convincing evidence to overcome the presumption of correctness due those findings. See 28 U.S.C. § 2254(e)(1). He has not done so.

Instead, the supplemental petition is a near verbatim recitation of the assertions set forth in Mr. Chavez's two *Motion[s] for Reconsideration of Order Denying Petition for Writ of Certiorari to the Second Judicial District Court of New Mexico*. [Compare Doc. 22 with Exhs. TTT and UUU]. Indeed, "the manner in which [Mr. Chavez's] claim is currently presented reflects that he may be looking to this Court to simply provide another level of appellate review concerning his state court conviction." Trimble v. Hansen, 2018 WL 1046854, at *1 (D. Colo. Jul. 3, 2018). But "[f]ederal courts do not sit as 'super-appellate' courts to consider state court decisions." Id. (*citing* Brown v. McKune, 221 Fed. Appx. 806, 506-807 (10th Cir. 2007)); see also Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials.").

The dispositive issue here is not whether Judge Hart "erroneously" dismissed Mr. Chavez's second state habeas petition. [See Doc. 22 at 11]. It is whether she unreasonably or contrarily applied Strickland in reaching her conclusion that "there were reasonable strategic decisions made regarding the use of Eloy Montano's statements and whether to present arguments regarding the Confrontation Clause challenges on appeal." [Exh. NNN ¶ 19]. Further, Mr. Chavez's burden is made doubly onerous by virtue of the fact that the terms of the AEDPA control. See Howell, 728 F.3d at 1223 (review becomes doubly deferential when Strickland and 28 U.S.C. § 2254(d) "apply in tandem"); see also Schriro v. Landrigan, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."). But as a

recycled version of his motions for reconsideration, the supplemental petition simply continues to attack the nature of the evidence and attorney performance without ever addressing the reasonableness of Judge Hart's application of Strickland.

Mr. Chavez similarly fails to rebut the presumption of correctness due the factual findings made in support of Judge Hart's ultimate conclusion that he did not establish ineffective assistance in relation to either trial or appellate counsel's tactical decision not to raise and/or pursue Confrontation Clause claims. [Exh. NNN ¶ 20]. For these reasons, Mr. Chavez is not entitled to federal habeas relief with respect to any claims asserted through the supplemental petition. See, e.g., Johnlouis v. Williams, 60 Fed. Appx. 774, 775 (10th Cir. 2003) (federal habeas petitioner who "had merely repeated the claims he made in state court[, . . .] had failed to rebut the factual findings undergirding the state courts' decisions by clear and convincing evidence).

Finally, even if Mr. Chavez were able to show that trial and appellate counsel performed in constitutionally substandard fashion, he cannot demonstrate prejudice. See Knowles, 566 U.S. at 122 (reaffirming "that a defendant must show both deficient performance by counsel and prejudice in order to prove that he has received ineffective assistance of counsel"). Notwithstanding Mr. Chavez's belief that "absent the erroneous admission of [Mr. Montano's] statements, the State would have had little direct evidence of [Mr. Chavez's] involvement in the" murder of Garland Taylor, [see Doc. 22 at 30], the circumstantial evidence against him, as summarized by Judge Flores in her order, [see Exh. VV], was substantial. Additionally, "[t]he law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction." Glaze v. Hamilton, 2018 WL 7021952, at *3 (W.D. Okla. Sept. 4, 2018); see also Willard v. Hickson, 2010 WL 11523748, at *9 (D.N.M. June

8, 2010) (in 28 U.S.C. § 2254 action, considering applicability of New Mexico's Uniform Jury Instruction on direct and circumstantial evidence).[7]

For all of these reasons, this Court should find and recommend that Mr. Chavez's initial *pro se* and supplemental petitions are subject to dismissal with prejudice.

B. 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].

Because Mr. Chavez' claims can be resolved on the record, Respondents respectfully ask that this request be denied. See, e.g., Torres v. Mullin, 317 F.3d 1145, 1161 (10th Cir. 2003) (district court did not abuse its discretion in denying evidentiary hearing for federal habeas petitioner whose claims were "capable of resolution on the record[]").

IV. CONCLUSION

On the basis of the foregoing, Respondents respectfully request that this Court find and recommend that Mr. Chavez's initial *pro se* and supplemental petitions for federal habeas corpus

[7] That jury instruction reads:

> There are two types of evidence. One is direct evidence, such as the testimony of an eyewitness, which directly proves a fact. The other is circumstantial evidence. Circumstantial evidence means evidence that proves a fact from which you may infer the existence of another fact.
>
> As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

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relief should be denied. Respondents also ask the Court to deny Mr. Chavez's request for an evidentiary hearing. Finally, Respondents ask that a certificate of appealability be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the November 4, 2021, I filed the foregoing *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]*, with exhibits, electronically through the CM/ECF system, causing service to be made upon counsel of record, Jason Bowles, at jason@Bowles-Lawfirm.com.

Assistant Attorney General