Appeal No. 23-2084

IN THE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Mario Chavez,

Petitioner-Appellant,

v.

Vincent Horton, Warden and New Mexico Attorney General,

Respondent-Appellee,

Appeal from the United States District Court
for the District of New Mexico in Case No. 19-CV-1151 KWR-LF
Judge Kea W. Riggs

APPELLANT'S BRIEF/APPLICATION FOR CERTIFICATE OF APPEALABILITY
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONS

CASES

STATUTES

RULES

RELATED CASES STATEMENT

1. Case No. 17-1826. Notice of Appeal filed June 14, 2023 appealing district court's *Memorandum Opinion and Order* and *Final Judgment* denying Appellant's pro se *Original Habeas Petition and his Supplemental Habeas Petition* and denying a Certificate of Appealability. Pending, current appeal.

2. Case No. 19-CV-1151 KWR-LF. Underlying Habeas Corpus Case filed pursuant to 28 U.S.C. § 2254. Denied Original and Supplemental Habeas Petitions, overruled Appellant's Objections to Magistrate Judge's Proposed Findings and Recommended Disposition and denied Certificate of Appealability.

3. Case No. S-1-SC-38695. New Mexico Supreme Court Case wherein Appellant sought review of the New Mexico District Court's denial of his Second State Habeas Petition. Petition and Request for Reconsideration denied.

4. Case No. S-1-SC-37935. New Mexico Supreme Court Case wherein Appellant sought review of the New Mexico District Court's denial of his First State Habeas Petition. Petition and Request for Reconsideration denied.

5. Case No. 29,978. New Mexico Supreme Court case wherein Appellant filed his direct appeal of his conviction in the State District Court. Appeal denied, but not on grounds raised in First and Second State Habeas Petitions or Federal Habeas Petitions.

6. Case No. D-202-CR-2004-03558. New Mexico Second Judicial District Court Criminal Case. Trial convicting Appellant of criminal charges. Appealed and the subject of Appellant's First and Second State Habeas Petitions, the Federal Habeas Petitions and the current appeal. Also, the case in which Appellant's First and Second State Habeas Petitions were filed and decided.

INTRODUCTION

Appellant Mario Chavez ("Appellant") appeals the District Court of New Mexico's *Memorandum Opinion and Order Overruling Objections and Adopting Magistrate Judge's Proposed Findings and Recommended Disposition* ("Memorandum Opinion and Order") [Doc. 44] and Final Judgment [Doc. 45] in *Chavez v. Horton et al.,* 19-CV-1151 KWR-LF.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. § 2254 when it entered its *Memorandum Opinion and Order* and *Final Judgment* denying Appellant's pro se *Original Habeas Petition and his Supplemental Habeas Petition* and denying a Certificate of Appealability ("COA"). Appellant timely filed his *Notice of Appeal* in the district court on June 14, 2023. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF ISSUE

Whether the district court erred by adopting, in totality, the Magistrate Judges's *Proposed Findings and Recommended Disposition* ("PFRD") [Doc. 36], overruling Appellant's *Objections to PFRD* ("Objections") [Doc. 40], while considering Appellee's *Response to Mario Chavez's Objections to Proposed Findings and Recommended Disposition* ("Response to Objections") [Doc.41], but utterly disregarding Appellant's *Reply to Response to Mario Chavez's Objections*

to Proposed Findings and Recommended Disposition ("Reply to Response to Objections") [Doc.42].

STATEMENT OF THE CASE

Appellant was denied his Sixth Amendment right to confront and cross-examine the hearsay testimony of his co-Appellant under the Confrontation Clause, which was the only direct evidence the State Prosecution presented of his guilt at trial. While his trial counsel did raise and attempt to argue a Confrontation Clause challenge, the State Court refused to hear the argument and permitted unconstitutional evidence to be presented to the jury. While Appellant's appellate counsel initially raised the Confrontation Clause issue in Appellant's docketing statement for his Direct Appeal in the State Court, over Appellant's written opposition, his appellate counsel failed to present the Confrontation Clause argument to the State Appellate Court in his opening brief. As such, the State Appellate Court never addressed Appellant's Confrontation Clause challenge and the only issue decided was a hearsay objection for only 1 of the 2 sources providing the out of court statements made by Appellant's co-Appellant. Thus, through a series of State Habeas Petitions filed pro se and while represented by Counsel, during the pendency of the underlying Federal Habeas Case at issue in this Appeal, Appellant raised his Confrontation Clause challenges alone, and alternatively, under his claims that trial and appellate counsel were ineffective for

failing to adequately raise and argue these challenges. At all stages, both in his State and Federal Habeas pleadings, Appellant has complained that the State Habeas Courts denied him relief based upon their misunderstanding that his Confrontation Clause claims had already been decided by the State Appellate Court when they had not, and were instead a strategic choice by his trial and appellate counsel to waive, and did so without ever providing him an evidentiary hearing on these claims.

The Federal District Court continued the State Court's misstating and misinterpreting Appellant's claims when it wholly adopted the Magistrate Judge's PFRD, despite Appellant's clear evidence and legal argument presented in his Objections and Reply to Objections, which not only doubled-down on an incorrect factual account, but also incorrect application of the law to the true facts. Instead, the Federal District Court engaged in the very type of legal contortions Appellant's Counsel warned of in his Objections to avoid having to provide a Appellant who was either deprived his Constitutional right to confront and cross-examine the out-of-court statements of his co-Appellant, or his Constitutional right to effective counsel who failed to adequately raise and argue his Confrontation Clause Challenge at trial and/or on appeal, the very justice for which federal habeas relief under 28 U.S.C. § 2254 was crafted. *Objections*, at p. 2. As Appellant's Counsel warned:

> in the eagerness to affirm a Appellant's conviction, whether that is purportedly based upon legal principles requesting deference to state court decisions or outlining the exceptional nature of federal habeas corpus relief, when a Appellant like Appellant comes before the court with a complex and piecemeal, largely pro se, procedural history extra care must be taken to avoid merely relying upon this confusion to sustain a conviction achieved through a state court's blatant violation of a Appellant's state and federal Constitutional rights.

Id. However, the Federal District Court appears to have disregarded or utterly ignored this warning, as Appellant feared or expected it would, to find whatever ledge to which it could potentially cling to deny Appellant his Constitutional rights. If this higher court is unable to rectify this, then the now oft expected procedure over rights (i.e., if there is a narrow exception to a rule that excludes justice, it will be used to deny a Appellant of his constitutional rights regardless of how grievous the deprivation), of many Appellants and their and the citizens' erosion of faith in the high ideals of justice espoused by the higher courts of this country will go undeterred. It is not an unreasonable expectation for a criminal Appellant to expect the courts to permit him to avail himself of his Constitutional Rights with equal vigor, whether at trial or upon a habeas petition, whether pro se or represented by counsel, and for the higher or subsequent court to employ greater scrutiny to ensure that there was no illegal deprivation rather than to search for a pigeon hole to provide any basis to uphold a conviction obtained because of the violation of deprivation of those Constitutional protections.

It is in this vein that Appellant seeks relief from this Court to overrule the Federal District Court in the underlying case and permit him first with the COA that was denied, and second, to provide him with relief in reversing and remanding his convictions for a new trial consistent with the protections, and not the limitations, provided by the Constitutional guarantees to confront and cross-examine the witnesses against him and to effective counsel, or to an evidentiary hearing on his federal habeas claims, at the very least. To obtain a COA, Appellant only need make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). And for the reasons detailed herein that also warrant a reversal of the Federal District Court's decision, Appellant provides that the trial court's denial of his rights under the Confrontation Clause and the state appellate and habeas court's and the Federal District Court's denial of his rights to effective counsel provide such a sufficient showing.

STATEMENT OF FACTS[1]

After a jury trial, on February 22, 2006, in Case No. D-202-CR-2004-03558 before the New Mexico Second Judicial District Court, Appellant was convicted of first-degree murder, armed robbery and five counts of tampering with evidence for which he was sentenced to a total incarceration of life plus twenty-five (25) years.

[1] Contrary to the District Court's claims of its inability or unwillingness to comb through the pleadings attached as Exhibits to Appellant's Original and Supplemental Habeas Petitions, these facts were presented in the Supplemental Petition for the District Court to clearly consider instead of utterly disregarding and are fully supported by the pleadings.

At trial, the only direct evidence of Appellant's guilt presented to the jury were the out-of-court statements of Appellant's co-Appellant, Montano Montano ("Montano") introduced through 2 sources: the testimony of Dawn Pollaro ("Pollaro"), Montano's wife, as to statements he made hours after the alleged crime had been committed and which shifted blame away from him and on to Appellant ("Pollaro Testimony") and the entirety of the videotaped interview/interrogation of Montano conducted by Detective Hix.

Appellant's trial counsel subpoenaed Montano, but once it became clear that Montano was most likely going to raise his Fifth Amendment right and refuse to testify, on January 12, 2006, he filed a motion in limine asking the Court to rule on the admissibility of certain of Montano's statements, arguing that those statements affected the state of mind and subsequent actions of law enforcement officers, and that because these statements would not be offered for the truth of the matter asserted, they were not hearsay, or alternatively, if hearsay, admissible under Rule 11-804(B)(3). After a January 24, 2006 hearing on this motion, the District Court entered an order granting Appellant's trial counsel's motion in its entirety. At the hearing, Appellant's trial counsel informed the Court that he intended to question Detective Hix about the untruthful statements Montano made during the investigatory interviews or interrogations as proper cross-examination of his theory of the case, his decision to arrest Appellant and not to arrest Montano and the

overall incompetence of the investigation. The Court ruled that Appellant's trial counsel would be permitted to cross-examine Detective Hix about Montano's untruthful statements in support of the defense theory that Montano was the real killer and lied to cover up his participation. During voir dire, opening statement and preliminary cross-examination, Appellant's trial counsel discussed the lies of Montano and indicated that these would be proven through Detective Hix. Trial counsel began impeachment of Detective Hix using Montano's untruthful statements demonstrating the statement and the lie. The District Court stopped the cross-examination and in bench conference informed Appellant's trial counsel it was going to reverse its ruling and deny further cross-examination on Montano's lies. Ultimately, the District Court determined, and the State agreed, that it would permit the jury to view the entirety of the videotaped statements. The Court expressed concern that permitting Trial Counsel to ask about every false statement made by Montano would result in extensive litigation over the truthfulness of each statement and would have little probative value to establish that Montano lied as Detective Hix had already testified that Montano that he found only 80% of Montano's statements to be truthful that would be outweighed by danger of confusing the jury, which would be compounded because under *Crawford*, the State would not be able to use Montano's truthful statements in rebuttal. Trial Counsel objected to the presentation because the videotaped interviews contained

statements that were both true and untrue, that exposing Montano as a liar was important to the defense because the Court had allowed Pollaro to testify about Montano's statements made to her implicating Appellant when there was considerable evidence linking Montano to the murder, so much so that he had been charged as a co-Appellant, and it was part of Appellant's defense that Montano was the killer and not Appellant. Essentially, Appellant's trial counsel argued that the Court was forcing Appellant to accept Montano's hearsay statements if he wanted to demonstrate and prove the untruthful statements. The Court stated that this was the only manner in which it would permit Trial Counsel to continue Detective Hix' cross-examination and made clear that if Appellant objected to the admission of any statement Montano made during his police interviews, the interviews would be excluded in their entirety. Trial Counsel stated Appellant was not waiving his Confrontation Clause objections in accepting the Court's compromise and argued that Appellant was being forced to give up substantial constitutional rights in order to exercise cross-examination rights. Thus, without waiving his *Crawford* Confrontation Clause challenge and given the District Court's, forcing Appellant to permit the unredacted videotaped interviews of Montano to be played for the jury if he wished to continue his cross-examination of Detective Hix, trial counsel moved for the admission of the interviews because the District Court had stated that were he to object to any of Montano's statements,

the interviews would be excluded in their entirety. Additionally, no limiting instruction was provided. Thus, the District Court and Appellant concluded that Appellant waived all his Confrontation Clause challenges because he was ultimately forced to admit, or not to object, to the entirety of Montano's police interviews if he wished to use any of those statements to demonstrate that Montano lied to cover up his involvement and shift blame to Appellant, which Appellant argued was necessary to his defense so as to show the untruthfulness of Montano's similar statements to which his wife, Pollaro, had already testified. However, the complete facts of the proceedings clearly establish that Appellant never intended to waive any Confrontation Clause challenges, and that the District Court's orders at trial and in denial of the Petition for Habeas Corpus misapprehend the relevant law. Appellant was subsequently convicted.

Appellant appealed his conviction to the New Mexico Supreme Court in Case No. 29,978 raising the issues: 1) the trial court abused its discretion by admitting testimony of witnesses and certain evidence; 2) the trial court improperly admitted three out-of-court statements contrary to the hearsay rules; and, 3) the convictions and sentences for 5 counts of tampering with evidence violated the double jeopardy clause. The Supreme Court affirmed Appellant's convictions and specifically held that testimony from Montano's (Appellant's Co-Appellant) wife about statements he made to her were admissible under the excited utterance

exception to the hearsay rule. While, trial counsel included the Confrontation Clause challenge in his Docketing Statement ("Statement of Issues"), no mention of Appellant's Confrontation Clause challenges were made in his opening brief or the Supreme Court's Order, despite Appellant's clear direction to his appellate counsel that this issue should be included.

Contrary to the District Court's recitation of its adoption of the PFRD's overly simplified facts, Appellant's state habeas proceedings were not concluded prior to his filing his Original Federal Habeas Petition and Supplemental Petition but occurred throughout the underlying federal proceedings. On December 6, 2019, Appellant filed his pro se Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person In State Custody ("Original Federal Habeas Petition"). [Doc. 1] On March 30, 2020, Appellant filed his Motion to Stay and Abey, in which he stated that he has not fully exhausted his state court remedies and asked the Court to stay the proceedings to allow him to complete pending state court proceedings to exhaust those remedies [Doc. 8].

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

September 6, 2019. The issues raised were: 1) ineffective assistance of counsel; 2) the trial court erred in admitting polygraphs; and 3) cumulative error. Specifically, with regard to the ineffective assistance of counsel claims, Appellant claimed trial counsel was ineffective in 1) disclosing the polygraph tests to the prosecution and advising Appellant to agree to take a polygraph test administered by the State representing to Appellant that he had passed the polygraph when the results were actually inconclusive; 2) failing to raise arguments preventing statements made by Montano from coming in through the testimony of his wife, Dawn Pollaro, as excited utterances; 3) failing to procure experts to testify about Appellant's location throughout the events based on his computer location and cell phone records and calls, failure to obtain witnesses to testify about the appearance of the deceased's wallet in Arizona, and failure to obtain a better polygraph expert; 4) conflict of interest because trial counsel had a good relationship with the District Attorney; 5) failing to inform Appellant of a plea offer to second-degree murder. After the New Mexico Supreme Court denied his First State Habeas Petition, on November 5, 2019 Appellant filed his Petition for Certiorari to the New Mexico Supreme Court in Case No. S-1-SC-37935 for Review of the Court's Denial of his First State Habeas Petition pursuant to Rule 12-501 NMRA, which was denied on November 13, 2019. On December 3, 2019, pursuant to Rule 12-404(A) NMRA,

Appellant filed his Motion for Reconsideration of the Supreme Court's Order Denying his Petition for Certiorari on the Denial of his First State Habeas Petition.

It was while this Motion for Reconsideration was Pending that Appellant filed his Original Federal Habeas Petition. All the issues that Appellant presented in his First State Habeas Petition were presented in his Original Federal Habeas Petition, and Appellant attached a copy of the First State Habeas Petition to his Original Federal Petition. [Doc. 1-1] On January 3, 2020 the New Mexico Supreme Court entered its Order Denying Appellant' Motion for Reconsideration of the Supreme Court's Order Denying his Petition for Certiorari on the Denial of his First State Habeas Petition.

On March 30, 2020, Appellant filed his above-referenced Motion to Stay and Abey. [Doc. 8]. While this Motion was pending, on May 26, 2020, Appellant filed his second pro se Petition for Habeas Corpus pursuant to Rule 5-802 NMRA ("Second State Habeas Petition") in Case No. D-202-CR-2004-03558. In his Second Habeas Petition, Appellant raised the following issues: 1) ineffective assistance of trial for failing to object on confrontation grounds to the statements of Montano, and appellate counsel's failure to investigate or raise the issue regarding the Confrontation Clause; 2) trial counsel's conflict of interest because at the evidentiary hearing, he noted that to do nothing for Appellant's defense would have been malpractice and thus, placed his own interests before Appellant's; 3)

under Rule 11-410, the polygraph results should not have been admitted as they were statements made for purposes of plea negotiations and trial counsel should have objected; 4) appellate counsel was ineffective for failing to investigate and present the denial of Appellant's confrontation rights; and 5) Habeas counsel's actions were detrimental to Appellant's claims. In his First and Second Supplement to his Second Habeas Petition, Appellant provided additional argument and information regarding his claims against appellate counsel and his confrontation claim.

It was Appellant' position that the New Mexico Supreme Court overlooked or misapprehended certain facts, relying primarily on the State's Response's inaccurate recitation of facts, and/or the controlling law regarding the failure of counsel to raise and argue Confrontation Clause issues at trial, on appeal and/or in Appellant's First State Habeas Petition. Without any citation to the trial court record, the appellate record or the habeas records, Appellant made numerous inaccurate or incomplete statements of facts it contended were the "evidence" upon which it claimed Appellant's convictions were based. Appellants stated in a footnote that its summary of the evidence was based upon review of the New Mexico Supreme Court's opinion in Appellant's direct appeal and a review of the transcripts of Appellant's trial. Additionally, again without specific citation to the record, the Response provided an inaccurate and incomplete recitation of the

procedural background leading up the District Court's permitting Montano's statements to be presented to the jury. Appellant stated that it based its summary of arguments presented to the trial court on a list of four (4) volumes of trial transcripts and its summary of Appellant's testimony on two (2) volumes of trial transcripts. The Response notably omitted reference to other portions of the record that would be detrimental to its ultimate conclusion that Appellant's trial counsel used Montano's statements to further the defense strategy of claiming that Montano, and not Appellant, was the killer. Appellant stated that it based its summary of trial counsel's admission and use of Montano's statements upon a review of the same two (2) volumes of transcripts upon which it based its summary of Appellant's trial testimony.

Despite Appellant raising his ineffective assistance claims with regard to not only trial counsel for failing to adequately present and argue his Confrontation Clause challenges to the admission of Montano's statements, but also with regard to appellate and prior habeas counsel for failing to adequately present and argue those challenges, Appellant did not argue that appellate counsel's or prior habeas counsel's failures amounted to ineffective assistance of counsel. Appellant included numerous exhibits establishing his insistence that his appellate counsel and prior habeas counsel raise these issues and their failure to do so and often their failure to inform Appellant of this failure until after the fact.

Appellant was correct that in raising a claim of ineffective assistance of counsel, a Appellant has the burden of establishing that the counsel's performance was deficient, and that the deficient performance prejudiced the defense. However, the Response never addressed the prejudicial prong as it concluded that the record supported that trial counsel's performance was not deficient because its decision not to adequately raise or argue a Confrontation Clause challenge to Montano's statements was part of his trial strategy to accuse Montano of committing the murder and that this strategy was reasonable and rational. Nevertheless, Appellant's incorrect and incomplete summary of evidence upon which it claimed Appellant's conviction seems to, at the very least, present the implication that were Montano's statements excluded, Appellant would not have been prejudiced because the jury would have convicted him based upon this other evidence. However, Appellant's summary of evidence was incomplete and incorrect.

Instead, the Response focused primarily on its contention that trial counsel intended to effectively waive Appellant's rights under the Confrontation Clause as part of Appellant's trial strategy and that this strategy was reasonable and thus, not defective. Appellant based this conclusion solely on the record, which it maintained was reflected by portions of the trial transcript ultimately admitting Montano's statements. Interestingly, Appellant omitted entirely the testimony of Appellant and his trial counsel provided during a January 10, 2019 evidentiary

hearing on Appellant's First State Habeas Petition, which most certainly bears upon both Appellant's and his trial counsel's understanding of the defense strategy and contradicted many of those facts recited by Appellant or provided additional context to show that the summaries of facts provided in the Response were incomplete. Rather, Appellant relied only on a small sampling of self-serving procedural facts to divine Appellant's and his trial counsel's actual intent to present a defense whereby he essentially waived his rights under the Confrontation Clause so as to place blame on Montano for the murder despite direct, testimonial evidence to the contrary.

While this Second State Habeas Petition was pending, on July 17, 2020, this Court entered its Order to Show Cause in the present case, in which it directed Appellant to show cause why his Original Federal Habeas Petition should not be dismissed without prejudice to Appellant' right to refile a federal habeas petition once he had exhausted his state remedies. [Doc. 12] Appellant, still pro se, attempted to appeal this Order to the Tenth Circuit Court of Appeals, which ultimately found that the Order to Show Cause was not a final appealable order and that the appellate court thus lacked jurisdiction. [Doc. 18] On January 11, 2021, present counsel entered his appearance on behalf of Appellant, and the present case remained open. [Doc. 19]

On January 22, 2021, the District Court denied Appellant's Second State Habeas and concluded that with the exception of Appellant's ineffective assistance of counsel claims regarding his confrontation claims, his remaining claims had been previously addressed by the Court and because there had been no intervening change of law or fact, summarily dismissed these claims. With regard to Appellant's confrontation claims, the District Court held that Appellant was not entitled to relief as a matter of law because the files, pleadings and records showed that it was trial counsel who sought the admission of Montano's statements and argued against the admission of the entirety of those statements. The District Court summarily concluded that the trial strategy was to show that Montano was a liar, to discredit him as a witness, and to shift the focus from Appellant as the shooter to his co-Appellant. The Court concluded that record did not support Appellant's assertion that Montano was granted use immunity on February 1, 2006 because this grant of immunity was for the testimony of Victoria Chavez and not Montano. The District Court noted that on January 12, 2006, Appellant moved for the admission of certain statements made by Montano arguing that the statements affected the state of mind and subsequent actions of law enforcement officers to strategically demonstrate Montano had lied to police to cover up his involvement and shift blame to Appellant. However, the Court determined that while the record indicated trial counsel initially argued successfully against admitting the entirety of the

statements, it was only in response to trial counsel's questioning of Detective Hix that the decision to admit the entirety of the statement was made. The Court further summarily concluded that it appeared appellate counsel, after reviewing the transcripts of the trial, made a strategic decision not to present the confrontation argument. The District Court also noted that the record did not support Appellant's claims that the State intended to present the statements of Montano contrary to Appellant's confrontation rights from the outset of the trial and that trial counsel failed to address the confrontation issue. Thus, the Court concluded that there were reasonable strategic decisions made regarding the use of Montano's statements and whether to present arguments regarding the Confrontation Clause challenges on appeal. As such, the District Court held that Appellant failed to establish ineffective assistance of counsel related to either his trial or appellate counsel's failure to raise Confrontation Clause claims. Appellant also filed a motion to unseal and review a document that was part of the record and sealed on April 4, 2005, which Appellant had never seen or been advised of its contents by prior counsel. The State did not file any written responses to either the Second Habeas Petition or the Motion, no evidentiary hearing was held, yet the Court summarily denied both the Second State Habeas Petition and the Motion.

On February 22, 2021, Appellant filed his Petition for Certiorari to the New Mexico Supreme Court in Case No. S-1-SC-38695 for Review of the Court's

Denial of his Second State Habeas Petition pursuant to Rule 12-501 NMRA. In his Petition for Certiorari, Appellant specifically asked the New Mexico Supreme Court to review whether the District Court erred in concluding there had been no ineffective assistance of trial or appellate counsel for their failure to argue and raise confrontation clause challenges to the testimony of Montano. The Response accurately pointed out that the Petition, while discussing two (2) categories of out-of-court statements admitted at trial—videotaped statements made by Montano during police interviews that were played, unredacted, for the jury and Montano's statements made to his wife, Pollaro, who testified at trial. The underlying and appellate record shows that Appellant's position has been consistent that both categories of statements violated his rights under the Sixth Amendment's Confrontation Clause as held in Crawford v. Washington, 541 U.S. 36 (2004) and that his trial and appellate counsels' failure to raise these arguments at trial and during his appeal constitute deprived him of his Sixth Amendment right to effective assistance of counsel. However, due to the page limitations for his Petition for Certiorari and because Appellant had more thoroughly briefed ancillary challenges to Pollaro's testimony in his First State Habeas Petition, Appellant was forced to focus primarily on Montano's taped interviews. Nevertheless, Appellant maintained that the District Court's denial of his First State Habeas Petition on this issue summarily denied his Confrontation Clause

challenges to this testimony by relying on the appellate court's upholding the admission of these statements as excited utterance exceptions to hearsay without ever subjecting their admission under a Crawford Confrontation Clause analysis because appellate counsel failed to argue that issue. Additionally, the admission of these statements provided guidance as to Appellant and trial counsel's "strategy" regarding Montano's videotaped statements made during police investigation as Pollaro had already been permitted to testify before the videotaped statements were objected to and then admitted.

While this Petition for Certiorari was pending, on March 2, 2021, this Court entered its Order Denying Certificate of Appealability in which it found Appellant' Motion for a COA moot because the 10th Circuit had dismissed Appellant' appeal for lack of jurisdiction. [Doc. 20] On April 27, 2021, Appellant' Petition for Ceriorari was denied, and on May 12, 2021, pursuant to Rule 12-404(A) NMRA, Appellant filed his Motion for Reconsideration of the Supreme Court's Order Denying his Petition for Certiorari on the Denial of his Second State Habeas Petition, which was ultimately denied on June 29, 2021. On July 22, 2021, Appellant filed his Notice of Exhaustion of State Remedies and New Mexico Supreme Court Decision, informing the Court Appellant had exhausted his state remedies. [Doc. 21]

On September 29, 2021, Appellant filed his Supplemental Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person In State Custody ("Supplemental Petition") in the underlying Federal Case [Doc. 22] incorporating those arguments in his Second State Habeas Petition that had been denied and in his Motion for Reconsideration of his First State Habeas Petition, which were pending as recognized as needing to be exhausted prior to the District Court deciding the merits of the arguments raised therein, which Appellant had originally begun to present in his *Addendums*. Pursuant to Fed.R.Civ.P. 15(d), which provided that any additional pleading "setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented" was a supplemental pleading, Appellant's counsel titled the Supplemental Petition as supplemental and incorporating all of Appellant's prior pro se arguments made in the District Court case, which also included his State Court Habeas Proceedings that were included as exhibits and part of the record. After being ordered to do so, Appellee filed an *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]* [Doc. 30], and Appellant filed a *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]* [Doc. 32] Additionally on April 19, 2022, Appellant filed a *Notice of Supplemental Authority to Supplemental Petition* ("Notice of

Supplemental Authority") [Doc. 33] to which he attached the recent U.S. Supreme Court case, *Hemphill v. New York*, No. 20–637 (Jan. 20, 2022).

On February 3, 2023, the Magistrate filed her PFRD [Doc. 36], to which Appellant filed his Objections [Doc. 40], Appellee's filed its *Response to Objections* [Doc.41], and Appellant filed his *Reply to Response to Objections* [Doc.42]. After considering only the Objections, and not adequately so, and the Response to Objections, but completely disregarding the Reply to Response to Objections, the Federal District Court continued the habit of copy and paste belief in what the prosecution or previous courts had stated were the facts and law, even when quoted and referenced facts and law to the contrary were pointed out in Appellant's Objections and Reply to Response to Objections to agree with the PFRD in its entirety leading to Appellant's appeal in this case.

SUMMARY OF ARGUMENT

The district court erred in its conclusions, and refusal to employ a de novo review, stating that it would not review exhibits to the Original and Supplemental Federal Habeas Petitions and/or their addendums and supplements, instead continuing the misstatement of facts and law that has been plaguing Appellant since his State Habeas Proceedings despite Appellant having provided the District Court with ample, clear citation to the correct facts and law, which entitle him to a new trial free from the Constitutional violations and deprivations of his first state

trial, or at the very least, an evidentiary hearing on his Original and Supplemental Habeas Petition.

ARGUMENT

I. Appellant has never "waived" his argument that his claims were "not adjudicated on the merits" in state court; therefore, the Magistrate Judge applied the incorrect standard of review.

Contrary to the District Court's conclusion that Mr. Chavez did not state that his claims "were not adjudicated on the merits" in state court in either his Original Petition or his Supplemental Petition, thus requiring each claim to be considered, as they were in the PFRD, under AEDPA's deferential standard, the District Court acknowledges that Appellant included the specific phrase "adjudicated on the merits" in his state habeas petitions and in the reply, but refuses, while claiming it is performing a de novo review, to review those state petitions that were attached as Exhibits to the Original and Supplemental Petition and specifically identified on pages 3-4, and more specifically with citation to the page numbers of each exhibit on pages 6-9 of his *Objections* and, which at all times in his federal habeas pleadings, he has incorporated as though fully alleged therein.

Specifically, in his Objections, Appellant has not attempted to incorporate by reference the entirety of his state pleadings, without any specific citation to relevant arguments, as he stated:

As was also explained in his Supplemental Petition, Reply and above, and as is readily apparent from the record, Mr. Chavez first challenged the admission of his co-defendant Montano's statements on Confrontation Clause grounds, 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 documented demands, his 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. As such, when the NM Court of Appeals denied Mr. Chavez' appellate challenge to Pollaro's testimony, it 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 NM Court of Appeals did not mention the Confrontation Clause. Id.

At the evidentiary hearing on Mr. Chavez' First State Habeas Petition, his trial counsel was questioned as to the circumstances surrounding his objections to the admission of Montano's statements on Confrontation Clause grounds, and as a result of this testimony, in his Closing Arguments for Habeas Corpus Evidentiary Hearing (Ex. SS), Mr. Chavez argued that his trial and appellate counsels' failure to argue the Confrontation Clause violations were ineffective assistance of counsel. 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 Petitioner's Petition and Amended Petition for Writ of Habeas Corpus (Ex. VV), at pp. 7-10. Any mention of Hix' recordings or 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 Original Petition raising the Confrontation Clause argument as to Pollaro's testimony.

In his Second State Habeas Petition, Mr. Chavez claimed ineffective assistance of counsel for his trial counsel's failure to adequately object on Confrontation Clause grounds to Montano's statements and for his appellate counsel's failure to investigate or raise this issue. Mr. Chavez provided additional argument and information regarding his claims against appellate counsel and his confrontation claim in his First and Second Supplements to his Second Habeas Petition, and specifically argued that his

> Confrontation Clause claims had never been adjudicated on the merits. 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' Confrontation Claim challenges should be denied because it was trial counsel's strategy to waive Mr. Chavez' Confrontation Clause challenge 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. Id. However, the district court's analysis was based only on the circumstances surrounding the trial court's admission of Hix' Recordings and not Pollaro's Testimony. Id. Presumably, because no explanation was provided, the district court concluded that both Mr. Chavez' hearsay and Confrontation Clause challenges had been addressed on Direct Appeal and in the First State Habeas Petition proceedings. Mr. Chavez subsequently pointed out to the NM court, in his denied Petition for Certiorari and Motion for Reconsideration, that in both these proceedings, the district and appellate courts had only ever addressed his hearsay arguments relating to Pollaro's Testimony and had never addressed his Confrontation Clause challenges to her testimony. Additionally, Mr. Chavez pointed out that these state courts had also never addressed his 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.

Objections, at pp. 6-10.

Moreover, while Appellant may not have used the specific phrase "adjudicated on the merits" in his Original or Supplemental Federal Habeas

Petitions, in his Supplemental Habeas Petition, he provided a detailed procedural history of his State Court and Appellate Habeas Proceedings, including which issues were raised and which issues were decided by the State Courts, and with particular emphasis on Appellant's Confrontation Clause challenges and his ineffective assistance of counsel claims for failing to adequately raise and argue these challenges at trial and on appeal. In particular, Appellant references a January 10, 2019 evidentiary hearing on his First State Habeas Petition where he and his trial counsel testified and details which claims he raised in his Second State Habeas Petition (Confrontation Clause and Ineffective Assistance of Counsel Claims), and the State Court's incorrect assumption that these claims (aside from his ineffective assistance of counsel claims had been adjudicated in his Appeal). This has been something Appellant has consistently argued against, as only hearsay and not Constitutional claims were addressed in the appellate decision. As such, Appellant stated:

> Petitioner maintains that the District Court's denial of his First State Habeas Petition on this issue summarily denied his Confrontation Clause challenges to this testimony by relying on the appellate court's upholding the admission of these statements as excited utterance exceptions to hearsay without ever subjecting their admission under a Crawford Confrontation Clause analysis because appellate counsel failed to argue that issue. Additionally, the admission of these statements provide guidance as to Petitioner and trial counsel's "strategy" regarding Montano's videotaped statements made during police investigation as Pollaro had already been permitted to testify before the videotaped statements were objected to and then admitted.

Supplemental Petition, at p. 10. Thus the District Court's conclusion that Appellant first argued that his claims were not adjudicated on the merits in his Reply to Respondent's Answer is incomplete and disingenuous at best.

Finally, the District Court decided, apparently without reading Appellant's Objections or Reply that it was therefore his obligation to explain to the district court in his § 2254 petition why AEDPA did not apply, then summarily concludes that Appellant did not do so, when all that is required is a cursory review of the Objections and Reply to show that Appellant did just that:

> Instead, the Government only conclusively states that "The extensive state record, however, which includes a 22-page *Decision* from the New Mexico Supreme Court, as well as two detailed merits adjudications resolving Mr. Chavez's two amended and supplemented state habeas petitions, … supports the Magistrate Judge's decision to defer to the state courts that already have decided the issues rather than consider them *de novo*." *Response*, at p. 2. However, as Mr. Chavez' explained in his pro se *First Supplement to his Second State Habeas Petition* (Ex. III), his *Supplemental Petition*, *Reply* and *Objections*, the plain language of the NM courts in these 3 Court decisions specifically does not address his federal Confrontation Clause challenges and only a portion of his ineffective assistance of counsel claims were addressed in his *Second State Habeas Petition*, and were addressed incorrectly. As the trial transcript and record establishes, Mr. Chavez' trial counsel objected at trial to the introduction of Montano's statements based upon his Confrontation Clause challenges, citing to *Crawford*, which he later also raised for both for Pollaro's Testimony and Hix' Recordings, 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, subsequent appellate counsel refused to include any Confrontation Clause arguments in his *Brief in Chief* falsely stating to Mr. Chavez that these claims could not be included due to page limitations but did not use the maximum pages permitted. See (Ex. DD), at 20-25.

In its *Response*, the Government takes the position that Mr. Chavez' appellate counsel's failure to raise the Confrontation Clause challenges in the *Brief in Chief* "does not mean that the New Mexico Supreme Court was 'on notice' of a Sixth Amendment claim—it means that any such claim was abandoned." *Response*, at p. 3. The Government does not explain its nonsensical and illogical jump from this position to its conclusion that the NMSC adjudicated Mr. Chavez' Confrontation Clause challenges on the merits in his Direct Appeal. If Mr. Chavez' appellate counsel abandoned his Confrontation Clause challenges as the Government contends, then it would be impossible for the NMSC to adjudicate those claims on the merits. This is supported by the plain language of that 22-page Decision cited by the Government in its *Response*, which specifically ***omitted any reference to Hix' Recordings and only addressed Pollaro's Testimony on hearsay grounds alone*****,** holding that Montano's statements were admissible under the excited utterance exception to the hearsay rule. See *Decision* (Ex. GG), at pp. 18-22. Moreover, as Mr. Chavez raises ineffective assistance of appellate counsel as one of his claims, obviously the NMSC did not address that issue on the merits in his Direct Appeal. Thus, the NMSC's denial of Mr. Chavez' Direct Appeal was not an adjudication on the merits of Mr. Chavez' Confrontation Clause challenges or his ineffective assistance of counsel claims.

Similarly, the "two detailed merits adjudications" relied upon by the Government in its *Response*, the district court's decisions denying Mr. Chavez' 2 State Habeas Petitions, never addressed Mr. Chavez' Confrontation Clause challenges to either the Pollaro Testimony or Hix' Recordings, and never addressed his ineffective assistance of counsel claims in their entirety and the portion that the district court did address was based on the same erroneous factual basis and contrary to well-established law. In denying Mr. Chavez' *First State Habeas Petition*, the district court again 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*. Also, in denying Mr. Chavez' pro se *Second State Habeas Petition*, 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*. 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).

In its *Response*, while the Government does not dispute the details of Mr. Chavez' factual account, it reasserts the *Recommendations'* incorrect conclusion that Mr. Chavez' Confrontation Clause challenges were adjudicated in his Direct Appeal or prior denials of his two state habeas petitions, despite the express language of each court decision directly to the contrary. The Government also utterly fails address or respond to Mr. Chavez' *Objections*, which contend that his ineffective assistance of counsel claims were also not adjudicated on the meris. The reality of the procedural background, clearly established on the record, in the NM courts' written decisions, proves that 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 claims made in his *Second State Habeas Petition*, and his Confrontation Clause challenge to Pollaro's Testimony was ***never*** addressed by any NM court, nor was his ineffective assistance of counsel claims as to Pollaro's Testimony.

Instead of presenting quoted language from the NM State court decisions that would contradict that quoted by and cited to by Mr. Chavez in his *Objections,* most likely because no such language exists, the Government bases its contention that Mr. Chavez' Confrontation Clause challenges were decided on the merits on two arguments. First, the Government claims that when 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 (i.e., the Johnson Presumption), and claims that because Mr. Chavez did not specifically reference *Johnson*, that he has

waived any right to rebut the Johnson Presumption. Second, the Government contends that any state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence. However, as to the Government's argument that the "Johnson Presumption" applies in this case and requires that this Court engage in a deferential review of the NM court proceedings, its own assertions defeat this argument. The Government takes the position in its *Response* that Mr. Chavez' appellate counsel abandoned and never presented his Confrontation Clause challenges to the NMSC in his Direct Appeal. The Johnson Presumption provides that, "When 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. *Johnson v. Williams*, 568 U.S. 289, 301 (2013). However, the court must first be presented with the federal claim at issue to reject it. Here, the Government's position is that the NMSC was never presented with Mr. Chavez' Confrontation Clause challenges, so the Johnson presumption would not apply in this case. Moreover, despite the Government's attempt to argue that Mr. Chavez waived any right to rebut the Johnson Presumption by not mentioning the case in his *Objections*, Mr. Chavez' quoting from and citing to the record clearly rebuts the presumption that the NM State courts ever adjudicated his Confrontation Clause challenges. Mr. Chavez does not need to cite Johnson, when he provided ample argument in his *Objections* supported by the record, establishing that the NMSC was never presented with his Confrontation Clause challenges in his Direct Appeal. Moreover, the *Johnson* Court explicitly refused to make this presumption irrebuttable stating:

> Suppose, for example, that a defendant claimed in state court that something that occurred at trial violated both a provision of the Federal Constitution and a related provision of state law, and suppose further that the state court, in denying relief, made no reference to federal law. According to petitioner's argument, a federal habeas court would be required to proceed on the assumption that the federal claim was adjudicated on the merits. This argument goes too far.

Id., at 301. "A judgment is normally said to have been rendered "on the merits" only if it was "'delivered after the court . . . heard and evaluated the evidence and the parties' substantive arguments.'" *Id.,* at 302. "If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter." *Id.,* at 302-303.

> "When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge." *Id*. at 303 (2013). Thus, Mr. Chavez did not need to reference *Johnson* when his argument made with reference to the record clearly established that the NMSC failed to adjudicate his Confrontation Clause challenges on the merits, instead only addressing his challenges to hearsay exceptions for Pollaro's Testimony alone, and the NM district courts specifically declined to address these challenges based upon their incorrect assumption that the NMSC had already addressed the Confrontation Clause challenges. As such, because Mr. Chavez' direct Confrontation Clause challenges were never addressed on the merits by any state court, by the plain language of the NM court's orders denying his appeal and his two state habeas petitions, Mr. Chavez is entitled to de novo review, [sic] an evidentiary hearing, [and should not] force him to needlessly satisfy § 2254(d)(1) or (2) and mandate deference to NM court decisions.

II. Appellant clearly showed error in the State Courts' denial of his Confrontation Clause challenge to Dawn Pollaro's testimony (Ground One).

The District Court was correct that to state a claim under the Confrontation Clause, Appellant must show that Montano's statements to Pollaro were testimonial hearsay. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Appellant provided a thorough analysis of why both sets of statements Montano made, the Pollaro Testimony and Hix Interview, were testimonial. See Supplemental Petition, pp12-14 (quoting and citing only federal case law). Specifically, as to the Pollaro Testimony, Appellant stated, "Additionally, when Montano made statements to his wife shifting blame onto Mr. Chavez and away from himself, he had every reason to believe and intend that his wife would later testify on Montano's behalf by shifting culpability to Mr. Chavez and thus, these statements were also

testimonial." *Id.* at p.14. Additionally, Appellant provided further federal law pertaining to the Confrontation Clause challenge, id. at pp. 12-33, (referencing state law only to establish the ineffectiveness of trial and appellate counsel to raise a Confrontation Clause challenge under existing and intervening NM law), and an extensive explanation of the interplay between the admission of the Pollaro Testimony and the Hix Interview in the Supplemental Petition. *Id*. at pp. 22-24. However, without any citation to legal authority the District Court concluded that the arguments Mr. Chavez made as to this issue in both his Supplemental Petition and his Reply can redeem the inadequate pleading in the Original Petition itself. The District Court concluded that even though the Supplemental Petition contained a discussion of the procedural history related to the Pollaro Testimony, *id*. at 9–10, and contained arguments and allegations potentially relevant to a claim under the Confrontation Clause, *id*. at 14–17, it did not attempt to amend or otherwise refer to "Ground One." However, it would be impossible for the Supplemental Petition to refer to "Ground One" as it did not exist at the time the Supplemental Petition was filed because those designations were created by the Magistrate Judge in the PRRD as a way to try to categorize Appellant's pro se claims made in the Original Petition and Addendums, which incorporated the First State Habeas as an Exhibit, and the Supplemental Petition, which incorporated the Second State Habeas.

The District Court also mistakenly provided that the Supplemental Petition expressly raised a separate ineffective assistance of counsel claim and made no mention of amending claims raised in the original petition. See *id*. at 11. As was explained in the factual portion of the Supplemental Petition, it was not until Appellant's Motion for Reconsideration of his First State Habeas Petition, and after his Second State Habeas Petition and related filings were decided, which occurred after the Original Federal Petition was filed, and were appropriately brought as supplemental claims as defined in Rule 15(d), by filing the Supplemental Petition. That the District Court was not under a duty to comb through the factual background portion of the Supplemental Petition to discover this, is laughable, as Appellant's Counsel clearly identified the issues raised in each State and Federal Pleading and any pairings between Petitioner's original claims and his supplemental claims were obvious.

Nor did the District Court's need to "submerge itself in more than 400 pages of state habeas pleadings," as if it had read Appellant's Objections and Reply to Response to Objections, the page numbers on the specific exhibits were identified for the District Court. Moreover, according to its Memordum Opinion and Order, the District Court purported to conduct a de novo review of Appellant's claims, which would include exhibits attached to the pleadings and which were those state pleadings and orders. To say that parties cannot refer to Exhibits and page numbers

on those exhibits, but must include the entire documents in their pleadings, is simply illogical and nonsensical. Rather, the District Court's clear bias against overruling ANY state conviction is clearly established in looking at Footnote 5 where it states, "Any temptation that the Court might have to dip its toes into those pleadings [or to apparently go to the specifically identified page number of each Exhibit identified in the Objections and Reply to Response to Objections] is undermined by the fact that, by the very nature of federal habeas review under AEDPA, the vast majority of even the best-argued state pleadings would be irrelevant to a federal habeas case."

The Court notes, albeit not believably, that it would liberally construe the pro se Original Federal Habeas Petition, it concludes that liberality does not relieve Appellant of the burden of alleging sufficient facts on which a recognized legal claim could be based. However, as already explained, Mr. Chavez incorporated and attached a copy of his First State Habeas Petition to his Original Federal Petition [Doc1-1], which was stayed and not dismissed because he had yet to exhaust his state remedies as the Motion for Reconsideration on his First State Habeas Petition and his Second Habeas Petition were pending, which he did and properly filed the Supplemental Petition providing the District Court with the events that occurred after the state court proceedings were completed.

Finally, grasping at straws, the District Court, without any reference to law creates a new exception to *Crawford*, where apparently a defendant claiming a statement was testimonial has to cite to a Supreme Court case that holds, "a husband's statement to his wife is testimonial in nature." This is simply ludicrous.

III. The District Court erred when it held the Magistrate Judge correctly concluded Appellant failed to show state court error on his "plethora of evidence" claim. (Ground Two)

The District Court's only basis for overruling Appellant's objection on this claim is that it did not alert the Court to factual or legal issues in dispute and thus is insufficient. Then the Court concludes by misstating the law pertaining to the AEDPA to conclude Appellant appears to misunderstand the standards of federal habeas review under AEDPA, by falsely stating that it places the burden on the petitioner to overcome substantial deference to state courts. However, as was explained in his Objections (with citation to statutes and Rules contrary to the District Court's false conclusion that no citations were presented), substantial deference only applies if Appellant's claims were "adjudicated on the merits." Objections, at pp. 17-19. Specifically, Appellant stated:

> 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, like many of the statements in the Recommendation, this is not accurate. In particular, Mr. Chavez' Direct Appeal challenged the admission of the

listed evidence in Ground Two only on numerous evidentiary grounds, but the Original Petition challenged this evidence on both hearsay and 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 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, the factual premise behind the Recommendations' only basis for denying Ground Two being untrue, 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.

The Recommendations copy and paste the exact language from Ground One regarding deference to state court decisions, Mr. Chavez' failure to show any error in the state court's ruling or discuss the state court's ruling on these issues, and quote § 2254(d)(1) and § 2254(d)(2) to summarily conclude, without analysis or explanation, that Mr. Chavez fails to demonstrate he is entitled to habeas relief on Ground Two. Cf. *Id*. at pp. 16-17 ("When the state court explains its decision on the merits… 28 U.S.C. § 2254(d)(2).") with *Id*. at pp.14 ("When the state court explains its decision on the merits… 28 U.S.C. § 2254(d)(2).") This is interesting as it has already been explained at several points herein about the inferences and false impressions the Recommendations attempt to create by complaining about Mr. Chavez repeating the same claims or arguments.

> 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.

Id.

Moreover, the Government did not address these specific arguments in its Response to the Objections, as pointed out in Appellant's Reply to Response to Objections, and thus any opposition or potential arguments the Government could have raised should be waived. It is unfair that Defendant's pleadings and exhibits are parsed to find some narrow exclusion to claim he "waived" arguments, when the Government has failed to respond altogether or include arguments, but the State and Federal Courts have no problem going out of their way to find facts and law to support upholding convictions.

IV. The District Court further erred in concluding that the Magistrate Judge correctly concluded Appellant failed to show any error in the state court's denial of his ineffective assistance of counsel claims. (Grounds Three, Four and Five)

The District Court agreed with the Magistrate Judge's finding that, because "Mr. Chavez neither argues nor 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] that the state court decision resulted in a decision that was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings,'" these claims did not entitle him to relief. Moreover, regarding Ground Five, the District Court agreed with the Magistrate Judge's finding that, because Mr. Chavez failed to invoke AEDPA's legal standards and apply them, and instead relied primarily on New Mexico state law to attempt to show that the New Mexico state courts erred, this claim did not entitle him to relief. Appellant addressed Grounds 3, 4 and 5 together in his Objections and Reply to Response to Objections and does so again here.

As to Grounds 3, 4 and 5, the District Court erroneously dismisses Appellant's statements establishing that the State Courts did not adjudicate the issues of ineffective assistance of counsel as is discussed above. In particular, in his *Objections,* Appellant provided*:*

> As established above and discussed specifically in his Reply, Mr. Chavez' Confrontation Clause challenges were never addressed by the Court of Appeals and the Confrontation Clause challenges to Pollaro's Testimony were never even 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.

Id. at p. 20. Both the First and Second State Habeas cases were pending at the time Appellant filed his First Federal Habeas Petition, and the ineffectiveness of counsel for not adequately raising his Confrontation Clause challenges was not remotely addressed until the hearing on his First Habeas Petition as established above. Additionally, the Government did not respond to Appellant's objections on these grounds either, and any argument contrary thereto should be raised as is addressed above with regard to Ground 2.

The District Court is correct that Appellant did state in his Objections that, even were his claims adjudicated on the merits, but the District Court misstates that no part of the Objections or Reply establishes such an analysis that cites to *Strickland* or indeed any clearly established federal law. However, Appellant clearly stated:

> [Appellant] 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 blatantly 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 clear 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*.

Objections, at pp. 19-22.

Again, as was already argued in Appellant's Objections and Reply, and is obvious from an accurate reading of his Supplemental Petition and Reply, while Appellant does cite state law pertaining to Confrontation Clause challenges that existed at the time of Appellant's trial and appeal, it is to show that trial and appellate counsel were ineffective for not being aware of this law, which is certainly permissible under a federal analysis of an ineffective assistance of counsel challenge under *Strickland*. What remedies and arguments were available to trial and appellate counsel, but which they failed to raise or argue, is certainly relevant to an ineffective assistance of counsel claim under the AEDPA.

Specifically, as to Ground 5, the District Court agreed that the PFRD does not need to consider the exhibits attaching Appellant's State Habeas Arguments, which is erroneous on a de novo review and that the Reply is unhelpful because it suffers from the same fundamental defect as the Supplemental Petition: neither contains sufficient citations to clearly established federal law. However, this is simply untrue, as pointed out in the Objections and Reply to Response to Objections:

> See e.g., *Supplemental Petition*, at pp. 11-22 (citing and quoting, *Machibroda v. United States*, 368 U.S. 487 (1962); *Crawford v. Washington*, 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 patently false. *Id*. at p. 22.

Id. at pp. 23-24. These cases are far more that the "few federal cases" the District Court falsely stated Appellant had cited in his Supplemental Petition, before it rendered its conclusory decision parroting the PFRD that these cases do not address the requirements of federal habeas review under AEDPA but instead recite claims nearly identical to those raised in state court in the apparent hope that this Court will step outside its statutory bounds and review those claims de novo.

Finally, clearly contrary to the District Court's conclusion that Appellant addresses no specific factual or legal issues present in the PFRD in his Objections, naturally omitting any reference to his Reply, as already established above, Appellant clearly identifies both the factual and legal errors in the PFRD. To say otherwise, is again at best, ingenuous.

CONCLUSION

For the reasons provided herein, the District Court's ultimate conclusion is erroneous—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, the District Court erred in denying him an evidentiary hearing because of the recommendations that this Court dismiss *Original* and *Supplemental Petitions* and denying him 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. See 28 U.S.C. § 2253(c)(2). As such, a Certificate of Appealability should be issued, and the District Court's Order and Judgment must be reversed and he be awarded a new trial, or Appellant should be entitled to an evidentiary hearing on his Original and Supplemental Habeas Petitions.

Respectfully submitted on this 14th day of August, 2023.

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STATEMENT ON ORAL ARGUMENT

Oral argument is requested as the issues involve important aspects of Constitutional Rights.

STATEMENT OF COMPLIANCE

The undersigned counsel certifies that:

This brief was prepared in Microsoft Word 2010 using a proportionally-spaced type style or typeface with 14 point type. The number of words contained in the body of this brief is 11,689.

/s/ Jason Bowles
Jason Bowles
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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned counsel certifies that:

1. there were no privacy redactions to be made in the foregoing brief for Mario Chavez, and the Digital Form version e-mailed to the Court on this day is an exact copy of the written document that was sent to the Clerk;

2. The Digital Form version of this brief for Mario Chavez emailed to the Court on this day has been scanned for viruses with ESET NOD32 Antivirus, version 3.0.695.0, which is continually updated, and according to that program is free of viruses.

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed through this Court's EM/ECF and by and to counsel for the U.S. on this 15th day of August, 2023 to opposing counsel.

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm

ADDENDUM PURSUANT TO 10th CIRCUIT RULE 28.2

MEMORANDUM OPINION AND ORDER OVERRULING OBJECTIONS AND ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION, Chavez v. Horton et al., 19-CV-1151 KWR-LF (D.N.M. May 15, 2019)

FINAL JUDGMENT, Chavez v. Horton et al., 19-CV-1151 KWR-LF (D.N.M. May 15, 2019)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MARIO CHAVEZ,

Petitioner,

v. No. 1:19-cv-01151-KWR-LF

VINCENT HORTON, WARDEN, and ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,

Respondents.

MEMORANDUM OPINION AND ORDER OVERRULING OBJECTIONS AND ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court under 28 U.S.C. § 636(b)(1) on the Magistrate Judge's Proposed Findings and Recommended Disposition ("PFRD"), Doc. 36, and on Petitioner Mario Chavez's Objections to Proposed Findings and Recommended Disposition (the "Objections"), Doc. 40. Respondents filed a Response to Mario Chavez's Objections on April 3, 2023. Doc. 41.[1] The Court overrules Petitioner's Objections and adopts the Magistrate Judge's Proposed Findings and Recommended Disposition.

I. Background Facts and Procedural Posture

The background and posture of this case are ably laid out in detail in the PFRD and need not be exhaustively repeated here. In brief: in 2006, Mario Chavez was found guilty on several counts, including first degree murder, and sentenced to a term of life imprisonment, plus 25

[1] Mr. Chavez also filed a Reply in support of his Objections. Doc. 42. Rule 72(b) does not contemplate reply briefs; the rule only allows responses to objections. FED. R. CIV. P. 72(b)(2). Nonetheless, the Court has reviewed the Reply, and it does not change the Court's analysis.

years. Doc. 30-1 at 57–66, 75-76, 81. Mr. Chavez filed a direct appeal to the New Mexico Supreme Court ("NMSC"), which affirmed his convictions. Doc. 30-1 at 79–92, 202–24. He petitioned for state habeas relief, first in 2010, Doc. 30-1 at 225–28; Doc. 30-2 at 1–19, and again in 2020, Doc. 30-3 at 120–72. Both petitions were denied, as were subsequent petitions for writs of certiorari to the NMSC. Doc. 30-2 at 427–42; Doc. 30-4 at 270–75; Doc. 30-2 at 443–53; Doc. 30-5 at 7.

On December 6th, 2019, proceeding pro se, Mr. Chavez filed a petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 in this Court, arguing four grounds for relief:

1. Confrontation Clause violation "due to the unconstitutional admission of non-testifying co-defendant's inculpatory statements, wrongly admitted as 'excited utterances.'"
2. "The introduction of a plethora of irrelevant and prejudicial evidence denied petitioner a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution."
3. "Trial counsel was ineffective in failing to object on hearsay and confrontation grounds to critical testimony by co-defendant's spouse which brought forth inculpatory statements by non-testifying co-defendant."
4. "Trial counsel ineffective for misrepresentations related to polygraphs, and for failure to investigate or procure experts and witnesses to corroborate petitioner's account of events or collateral circumstances surrounding events of the crime."

Doc. 1 at 6, 8, 9, 10.

Mr. Chavez later retained counsel, Doc. 19, and filed a counseled supplemental petition, arguing one further ground for relief:

5. "[T]he District Court erroneously denied his Second Habeas Petition by summarily concluding that the ineffective assistance of his trial and appellate counsel in failing to argue or defend against the infringement upon his Sixth Amendment rights as discussed in *Crawford* was merely a strategic decision."

Doc. 22 at 11.

In the PFRD, Magistrate Judge Fashing found that Mr. Chavez's Ground One Confrontation Clause argument did not state a claim under the Confrontation Clause, but instead repeated a state law argument about hearsay. Doc. 36 at 12–15. His other claims concerning

denial of a fair trial and ineffective assistance of trial and appellate counsel contained no clear argument for relief under 28 U.S.C. § 2254(d) because petitioner neither cited clearly established federal law nor attempted to demonstrate that the state courts' decisions were contrary to or unreasonably applied such law. *Id.* at 15–23. The Magistrate Judge recommended that the Court deny the petition and dismiss this case with prejudice. *Id.* at 23–24. The Magistrate Judge also recommended that the court deny Mr. Chavez's request for an evidentiary hearing and deny a certificate of appealability. *Id.*

In the PFRD, the Magistrate Judge notified the parties of their right to file written objections within fourteen days after service of the PFRD and advised that the filing of written objections was necessary to preserve any issue for appellate review. *Id.* at 24. After an extension of time, Mr. Chavez filed written objections to the PFRD on March 20, 2023. Doc. 40. Respondents did not object to the PFRD; they urged the Court to overrule Mr. Chavez's objections and deny his request for a certificate of appealability. Doc. 41.

II. Legal Standards Governing Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition

District courts may refer dispositive motions to a Magistrate Judge for a recommended disposition. *See* FED. R. CIV. P. 72(b)(1) ("A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense . . . ."). Rule 72(b)(2) of the Federal Rules of Civil Procedure governs objections: "Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." FED. R. CIV. P. 72(b)(2). Finally, when resolving objections to a magistrate judge's proposal, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify

the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." FED. R. CIV. P. 72(b)(3).

To preserve an issue for de novo review, "a party's objections to the magistrate judge's report and recommendation must be both timely and specific." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents, Known as: 2121 E. 30th St., Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996) ("*One Parcel*"). "[O]nly an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate's Act . . . ." *Id.* Issues raised for the first time in an objection to the PFRD are deemed waived. *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996).

III. Federal Habeas Claims under AEDPA

The provisions of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"), govern this case. A petition for habeas corpus under § 2254 attacks the constitutionality of a state prisoner's conviction and continued detention. A federal court cannot grant habeas relief pursuant to § 2254(d) with respect to any claim adjudicated on the merits by a state court unless the petitioner's state-court proceeding:

> (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.

28 U.S.C. § 2254(d).

Under § 2254(d)(1), there is a two-step inquiry. The threshold question is whether the applicant seeks to invoke a rule of law that was clearly established by the Supreme Court at the time the conviction became final. *Byrd v. Workman*, 645 F.3d 1159, 1165 (10th Cir. 2011); *see*

also Williams v. Taylor, 529 U.S. 362, 390 (2000). If the law was clearly established, then the court determines whether the state court decision was "contrary to or involved the unreasonable application of that clearly established federal law." *Byrd*, 645 F.3d at 1165 (quoting *Turrentine v. Mullin*, 390 F.3d 1181, 1189 (10th Cir. 2004)) (internal quotation marks omitted).

The term "clearly established Federal law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. A state court decision is "contrary to" Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [those] cases." *Id*. at 405. The Supreme Court has interpreted the term "contrary to" as meaning, *inter alia*, "diametrically different" and "opposite in character and nature." *Id.* Therefore, habeas relief under § 2254(d)(1) may be granted only where the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Price v. Vincent*, 538 U.S. 634, 640 (2003). The state court need not cite applicable Supreme Court cases or even to be aware of such cases, "so long as neither the reasoning nor the result of the state-court decision contradicts [that precedent]." *Early v. Packer*, 537 U.S. 3, 8 (2002).

A state court decision unreasonably applies Supreme Court precedent if it "identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. However, "[i]t is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court . . . [applied] clearly established federal law erroneously or

incorrectly." *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (internal quotation marks and citations omitted). "Rather, that application must be objectively unreasonable." *Id*. at 76.

Under AEDPA, state court findings of fact are "presumed to be correct." 28 U.S.C. § 2254(e)(1). Accordingly, petitioners challenging a state court's decision based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2) must show by clear and convincing evidence that the determination was factually erroneous. *See Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Lastly, 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. *Cullen v. Pinholster*, 563 U.S. 179, 180–81 (2011) (citing § 2254(d)(1)). In other words, federal courts may not hold evidentiary hearings on claims that the state court decided on their merits. *Id.* at 181; *Littlejohn v. Trammell*, 704 F.3d 817, 857 (10th Cir. 2013). "'Adjudicated on the merits' [means] a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other ground." *Wilson v. Workman*, 577 F.3d 1284, 1308 (10th Cir. 2009) (internal quotation marks omitted), *overruled on other grounds as recognized in Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013). Thus, summary decisions, even those completely devoid of any reasoning at all, can constitute decisions "on the merits" for purposes of AEDPA. *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *see also Johnson v. Williams*, 568 U.S. 289, 293 (2013). When the state's highest court offers no explanation for its decision, "the federal 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).

"Even if a state court resolves a claim in a summary fashion with little or no reasoning, [federal courts] owe deference to the state court's result." *Paine v. Massie*, 339 F.3d 1194, 1198 (10th Cir. 2003). The Supreme Court has held that the standard is "highly deferential" to state courts and "difficult to meet," as it "demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181 (quoting *Richter*, 562 U.S. at 101); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*); *see also Black v. Workman*, 682 F.3d 880, 891 (10th Cir. 2012) ("Under [AEDPA,] a federal court in a § 2254 proceeding must be exquisitely deferential to the state court's resolution of the [petitioner's] claims.").

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. *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

IV. De Novo Review of Petitioner's Objections

A. Mr. Chavez waived his argument that his claims were not adjudicated on the merits in state court; therefore, the Magistrate Judge applied the correct standard of review.

Mr. Chavez' first objects that "the Recommendations incorrectly assume, without explanation or support, that [his] claims were adjudicated on the merits, contrary to the clear factual record." Doc. 40 at 5. However, it is *petitioner's* burden to demonstrate that his claims were *not* adjudicated on the merits. *Simpson v. Carpenter*, 912 F.3d 542, 583 (10th Cir. 2018). Nor is this burden easily carried: even in a case where a state court issues an order that summarily rejects or wholly omits mention of some or all of a petitioner's federal law claims, "the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits." *Johnson*, 568 U.S. at 293. Only "[w]hen the evidence leads very clearly to the conclusion that a federal claim was overlooked in state court [does] § 2254 entitle[] the prisoner to an unencumbered opportunity to make his case before a federal judge." *Id.* at 303.

Mr. Chavez neither argued nor demonstrated in either his original petition or his supplemental petition that his claims were not adjudicated on the merits. Consequently, each claim must be considered, as they were in the PFRD, under AEDPA's deferential standard. *See* 28 U.S.C. § 2254(d).

Mr. Chavez first argued that his claims were not adjudicated on the merits in his Reply to Respondent's Answer.[2] *Compare* Doc. 32 at 1 (the reply, arguing that "[d]espite the various filings in the New Mexico state court, most pro se, none have adjudicated the *merits* of Mr. Chavez's claims . . . .") *with* Doc. 1 (original petition, containing no argument that state court did not adjudicate his claims on the merits) *and* Doc. 22 (supplemental petition, containing no argument that state court did not adjudicate his claims on the merits). An argument raised for the first time in a reply is waived. *Pinder v. Crowther*, 803 F. App'x 165, 176 (10th Cir. 2020) ("It was therefore [petitioner's] obligation to explain to the district court in his § 2254 petition why AEDPA did not apply. Waiting until his § 2254 reply was too late."); *see also Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011). As the Tenth Circuit explained in *Pinder*,

> "AEDPA's standard of review is not a procedural defense, but a standard of general applicability for all petitions filed by state prisoners after the statute's effective date presenting claims that have been adjudicated on the merits by a state court." *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (ellipsis and internal quotation marks omitted). It was therefore [Petitioner's] obligation to explain to the district court in his § 2254 petition why AEDPA did not apply. Waiting until his § 2254 reply was too late.

Pinder, 803 F. App'x at 176.

[2] The Court acknowledges that petitioner raised such an argument in his state habeas petitions. However, as discussed below, petitioner's attempt to incorporate by reference the entirety of his state pleadings, without any specific citation to relevant arguments, is entirely ineffective. *Infra* at 12.

This rule applies to Mr. Chavez even though he filed his original petition pro se. As the Tenth Circuit has explained,

> This court does not ordinarily review issues raised for the first time in a reply brief. The reasons are obvious. It robs the appellee of the opportunity to demonstrate that the record does not support an appellant's factual assertions and to present an analysis of the pertinent legal precedent that may compel a contrary result. The rule also protects this court from publishing an erroneous opinion because we did not have the benefit of the appellee's response.

Stump v. Gates, 211 F.3d 527, 533 (10th Cir. 2000). In *United States v. Carpenter*, the Court applied this rule in a federal habeas petition, holding that where an argument was first propounded in a reply brief, "it is waived, notwithstanding the fact [it is filed by] a pro se petitioner." *United States v. Carpenter*, 24 F. App'x 899, 906 (10th Cir. 2001) (unpublished) (citations omitted). The Court ratified the application of the waiver rule in habeas proceedings as recently as 2011, when it again held that a reply brief "is not a proper vehicle to raise a new issue." *United States v. Moya-Breton*, 439 F. App'x 711, 715 (10th Cir. 2011). District courts within the Tenth Circuit similarly have recognized the rule of waiver in habeas proceedings and applied it. *See, e.g., United States v. Myers*, No. 12-CR-0196-02-CVE, 2016 WL 4479489, at *6–7 (N.D. Okla. Aug. 24, 2016) (unpublished) ("[T]he general rule is that arguments raised for the first time in a reply to a § 2255 motion are waived.") (citation omitted); *Rios-Madrigal v. United States*, No. 2:05-CR-691, 2010 WL 918087, at *3 (D. Utah Mar. 9, 2010) (unpublished) ("Because this argument was raised for the first time in [the petitioner's] reply brief, the argument is waived.") (citation omitted); *La Flora v. United States*, No. 03-10230-01-WEB, 2007 WL 1347694, at *1 (D. Kan. May 8, 2007) (unpublished) ("The defendant's argument raised for the first time in a reply brief is waived.") (citations omitted).

Because Mr. Chavez did not argue that his claims were not adjudicated on the merits until his reply brief, he waived this argument. His objection that the Magistrate Judge applied the wrong standard of review is overruled.

B. Petitioner fails to show any error in the state courts' denial of his Confrontation Clause challenge to Dawn Pollaro's testimony (Ground One).

As an initial matter, neither the original petition nor the reply clearly identify the single statement[3] Eloy Montano made to his wife, Dawn Pollaro, that the trial court admitted as an excited utterance. According to the NMSC, on the day of the murder, Ms. Pollaro received a call from Mr. Montano and went home to meet him. Doc. 30-1 at 219. When she arrived home, Mr. Montano was crying and pacing, his hands were shaking, and he kept saying, "He set me up, he set me up, that fucker set me up." *Id.* It is this statement that the trial court admitted as an excited utterance. *Id.* at 219–21.

In Ground One of his § 2254 petition, Mr. Chavez argues that the trial court violated the Confrontation Clause "due to the unconstitutional admission of non-testifying co-defendant's inculpatory statements, wrongly admitted as 'excited utterances.'" Doc. 1 at 5. The entirety of Mr. Chavez's argument related to this issue is as follows:

> Trial court ruled that co-defendant's statements to his spouse, at least two hours after the commission of the crime, were "excited utterances," applying only one of the three prongs required under the *Wigmore* test utilized for establishing such an exception to the hearsay rule. The contrivance and misrepresentation of the codefendant, documented in the record, was and is the key issue. The codefendant's statements were inadmissible because he had engaged in felonious actions such as evasion and tampering with evidence between the time of the event in question and statements made to wife; they were also self-serving as the record shows.

[3] Although both the original petition and the reply repeatedly refer to "statements" admitted as "excited utterances," *see* Doc. 32 at 5–7, the trial court admitted only one statement as an excited utterance, and one as a present sense impression. *See* Doc. 30-1 at 131–37. Because neither the original petition nor the reply make any reference to the statement admitted as a present sense impression, the Court only addresses the statement admitted as an excited utterance.

Id.

To state a claim under the Confrontation Clause, Mr. Chavez must show that Eloy Montoya's statement to his wife that "[h]e set me up" was testimonial hearsay. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).[4] His allegations in Ground One, however, say nothing about testimonial hearsay and do not state a claim under the Confrontation Clause. Doc. 1 at 5.

Petitioner objects to the Magistrate Judge's PFRD "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." Doc. 40 at 14. None of these sources can redeem the inadequate pleading in the § 2254 petition itself.

First, while the Supplemental Petition *does* contain a discussion of the procedural history related to Ground One, *id.* at 9–10, and later contains arguments and allegations potentially relevant to a claim under the Confrontation Clause, *id.* at 14–17, at no point does it attempt to amend or otherwise refer to Ground One. The Supplemental Petition expressly raises a *separate* ineffective assistance of counsel claim and makes no mention of amending claims raised in the original petition. *See id.* at 11. It is not the Court's duty to comb through counseled briefing to find plausible pairings between Petitioner's original claims and his subsequent arguments and allegations.

[4] In *Crawford*, the Supreme Court held that testimonial hearsay is not admissible in a criminal trial unless the declarant is unavailable to testify and the defendant had an opportunity to cross-examine the declarant. 541 U.S. at 68. If the hearsay at issue is not testimonial in nature, its admissibility is governed by the law of hearsay. *Id.* If the statement is not hearsay, it does not implicate the Sixth Amendment. *See id.* at 59, n.9 (Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

Second, it is even less the Court's duty to submerge itself in more than 400 pages of state habeas pleadings.[5] Mr. Chavez' single "general reference[]," *see* Doc. 22 at 11; *see also* Doc. 25, "to hundreds of pages of attached exhibits [is] insufficient to incorporate the claim[s]" contained therein. *Barnett v. Duffey*, 621 F. App'x 496, 497 (9th Cir. 2015) (citation omitted); *cf. Dye v. Hofbauer*, 546 U.S. 1, 4 (2005) ("*clear and repeated* references to an appended supporting brief" sufficiently presented a habeas claim) (emphasis added). The Court declines to trawl through a sea of pages where Mr. Chavez has "fail[ed] to specifically identify which portions of the hundreds of pages of exhibits [he] intends to incorporate." *United States v. Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d 422, 462 (E.D.N.Y. 2007); *see also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998) (district court has *discretion* to go beyond references to a voluminous record).

Finally, although the Court will liberally construe the original § 2254 petition in this case, that liberality "does not relieve [Mr. Chavez] of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Bellmon*, 935 F.2d at 1110. Here, Mr. Chavez's original petition offers no explanation in law or fact as to how the admission of Dawn Pollaro's testimony violated his rights under the Confrontation Clause. *See Gray v. Netherland*, 518 U.S. 152, 162–163 (1996) ("[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief."). Although he asserts in his Reply that Mr. Montoya's statement to Ms. Pollaro that "he set me up" was testimonial, he cites to no case—much less a Supreme Court case—that suggests, much less holds, that a husband's statement to his wife is testimonial in nature. *See* Doc. 32 at 5–7. Mr.

[5] Any temptation that the Court might have to dip its toes into those pleadings is undermined by the fact that, by the very nature of federal habeas review under AEDPA, the vast majority of even the best-argued state pleadings would be irrelevant to a federal habeas case.

Chavez has failed to state a claim under the Confrontation Clause with respect to Ms. Pollaro's testimony. Mr. Chavez is not entitled to habeas relief on Ground One, and his objections to the Magistrate Judge's PRRD with respect to Ground One are overruled.

C. The Magistrate Judge correctly concluded that Petitioner failed to show state court error on his "plethora of evidence" claim. (Ground Two)

In Ground Two of his § 2254 petition, Mr. Chavez argues that the "introduction of a plethora of irrelevant and prejudicial evidence denied [him] a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution." Doc. 1 at 7. The Magistrate Judge, after quoting the entirety of Mr. Chavez' argument on this claim, found that he discussed neither the state court ruling nor clearly established federal law and therefore failed to show any state court error. Doc. 36 at 15–17. The Court agrees.

Mr. Chavez' objection on this claim does not alert the Court to factual or legal issues in dispute and thus is insufficient. *See* Doc. 40 at 17–18; *One Parcel*, 73 F.3d at 1060. As he does throughout his counseled Supplemental Petition, Reply, and Objections, Mr. Chavez appears to misunderstand the standards of federal habeas review under AEDPA, which places the burden on the petitioner to overcome substantial deference to state courts. *See* 28 U.S.C. § 2254(d); *Pinholster*, 563 U.S. at 181. In his objection to the Magistrate Judge's findings on Ground Two, Mr. Chavez assumes without further argument that the Court has accepted that this claim was not adjudicated on the merits and appears[6] to assume that it is the Magistrate Judge's burden to show that state court proceedings were decided correctly. *See* Doc. 40 at 17–18. His objection on this claim, which contains no citations, is insufficient and overruled.

[6] Mr. Chavez' counseled briefings are inartfully drafted; the Court is doing its best here and elsewhere to discern the contours of the arguments presented.

D. The Magistrate Judge correctly concluded that Petitioner failed 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 Five)

Mr. Chavez raised three ineffective assistance of counsel arguments: Ground Three, Ground Four, and the argument in his Supplemental Habeas Petition, Ground Five. On Grounds Three and Four, the Magistrate Judge found that, because "Mr. Chavez neither argues nor 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] that the state court decision resulted in a decision that was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings,'" these claims did not entitle him to relief. Doc. 36 at 20 (citing 28 U.S.C. § 2254(d)). On Ground Five, the Magistrate Judge found that, because Mr. Chavez failed to invoke AEDPA's legal standards and apply them, and instead relied primarily on New Mexico state law to attempt to show that the New Mexico state courts erred, this claim did not entitle him to relief. *Id.* at 21–23. The Court agrees on both counts and finds Mr. Chavez' objections unpersuasive.

In his objection on Grounds Three and Four, Mr. Chavez hangs his hat on "his establishing that [these Grounds] were never determined on the merits by any NM court." Doc. 40 at 19. Mr. Chavez has not established this; in fact, he has waived this issue. *See supra* at 7–9. Next, Mr. Chavez asserts that, even were his claims adjudicated on the merits, he had "already established above [that he] provided a thorough analysis of his ineffective assistance of counsel claims under *Strickland* and its progeny in his state and federal pleadings demonstrating that" the New Mexico state courts committed error under the standards of AEDPA. Doc. 40 at 19. Setting aside the conclusory and insufficient nature of this objection, the Court can find no part of the

Objections that establishes such an analysis, nor any part of Mr. Chavez' Reply—the only of his federal pleadings[7] that might provide such an analysis—that cites to *Strickland* or indeed any clearly established federal law. *See* Doc. 40; Doc. 32. Much like his Supplemental Petition, discussed below, the Reply repeatedly cites state law on the issue of ineffective assistance of counsel. *See id.* at 7–13. State law is irrelevant to the scope of this Court's habeas review under AEDPA. Petitioner's objections on Claims Three and Four are overruled.

On Ground Five, Mr. Chavez first objects that the Magistrate Judge addressed only the "claims and arguments made in the Supplemental Petition, disregarding the Reply and the Second State Habeas Petition . . . ." The Court agrees that the PFRD does not apparently consider either of these sources when evaluating Ground Five. *See* Doc. 36 at 21–23. However, Mr. Chavez has not properly incorporated his state pleadings, and the Court is not required to consider them. *See supra* at 12. The Reply, meanwhile, is unhelpful to Mr. Chavez' claim on Ground Five because it suffers from the same fundamental defect as the Supplemental Petition: neither contains sufficient citations to clearly established federal law. *See* Doc. 32 at 7–13; Doc. 22 at 11–31.

Next, Mr. Chavez baldly states that he is entitled to "de novo review of Ground One [sic] . . . as this claim was never adjudicated by the state court." Doc. 40 at 20. The Court assumes that Mr. Chavez intended to refer to Ground Five, which raises an ineffective assistance of counsel claim related to Dawn Pollaro's testimony. *See, e.g.*, Doc. 22 at 27–28 ("trial counsel apparently failed to apprise himself of the applicable legal authority governing the admissibility of Montano's statements made in his police interview and to Pollaro"). Nevertheless, as explained

[7] For reasons laid out above, *see supra* at 12, the Court will not delve into Mr. Chavez' state pleadings.

in response to his first objection, Mr. Chavez has waived the issue of adjudication on the merits regarding Ground Five by failing to raise that issue until his Reply. *Supra* at 7–9.

Mr. Chavez then asserts that, even under AEDPA's stringent standards, he should prevail for reasons "provided generally in his Supplemental Petition, Second State Habeas Petition and related filings, and specifically discussed in his Reply." Doc. 40 at 21. He proceeds to summarize the arguments made in his Supplemental Petition but addresses no specific factual or legal issues present in the PFRD. *Id.* at 21–23. This part of the objection is therefore insufficient. *See One Parcel*, 73 F.3d at 1060.

Finally, Mr. Chavez takes umbrage at the Magistrate Judge's suggestion that his Supplemental Petition "fails to cite clearly established federal law, and . . . repeatedly cites New Mexico case law" and is "merely seeking another layer of appellate review for the state courts' decisions." Doc. 40 at 23; *see id.* at 23–24. The Court agrees with Mr. Chavez that the Supplemental Petition does, in fact, cite a few federal cases. However, it agrees with the Magistrate Judge that Mr. Chavez' arguments on Ground Five, including those citations to federal caselaw and the many citations to state law, do not address the requirements of federal habeas review under AEDPA but instead recite claims nearly identical to those raised in state court in the apparent hope that this Court will step outside its statutory bounds and review those claims de novo. *See* Doc. 36 at 22–23. The Court will not; the Court overrules Mr. Chavez's objections in their entirety.

IT IS THEREFORE ORDERED that Mr. Chavez' Petition and Supplemental Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Docs. 1, 22) are **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED.**

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MARIO CHAVEZ,

Petitioner,

v. No. 1:19-cv-01151-KWR-LF

VINCENT HORTON, WARDEN, and ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,

Respondents.

FINAL JUDGMENT

In accordance with Federal Rule of Civil Procedure 58 and the Memorandum Opinion and Order Overruling Objections and Adopting Magistrate Judge's Proposed Findings and Recommended Disposition (**Doc. 44**) entered **March 15, 2023**, final judgment is entered in favor of Respondents and against Petitioner Mario Chavez.

IT IS THEREFORE ORDERED that:

1. Mr. Chavez' Petition and Supplemental Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Docs. 1, 22) are **DENIED** and **DISMISSED WITH PREJUDICE.**

2. A certificate of appealability is **DENIED.**

IT IS SO ORDERED.

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE