IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ERIC FIERRO,

Petitioner,

vs.

CIV 17-0738 JCH/KBM

R.C. SMITH, Warden and
HECTOR H. BALDERAS,
Attorney General for the
State of New Mexico,

Respondents.

ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on the Magistrate Judge's Proposed Findings of Fact and Recommended Disposition ("PF&RD") (*Doc. 34*), filed July 6, 2018. Petitioner was convicted in the Second Judicial District Court, State of New Mexico, of eight counts of criminal sexual penetration in the first degree, sixteen counts of criminal sexual penetration in the second degree, three counts of criminal sexual penetration in the third degree, and two counts of bribery of a witness. *Doc. 23-1* at 1-9. Eric Fierro filed this Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Petition") (*Doc. 1*) and an Amendment for Writ of Habeas Corpus ("Amended Petition") (*Doc. 13*), asserting seven grounds for relief: (1) denial of the right to a speedy trial; (2) denial of the right to self-representation; (3) actual innocence; (4) *Brady* violation; (5) violation of double-jeopardy; (6) ineffective assistance of counsel; and (7) witness intimidation. Petitioner also filed numerous other motions and objections, asking for assorted relief. *See Docs. 21, 22, 26, 28, 31*. The Magistrate Judge issued a PF&RD recommending that

the Petition and Amended Petition be denied and the various other motions and objections be overruled or denied. *Doc. 34* at 28. Respondents raised no objections to the PF&RD (*Doc. 35*, ¶ 5), while Petitioner filed a 56-page Response and Objections to Proposed Findings of Fact and Recommended Disposition Filed by Judge Karen B. Molzen ("Objections") (*Doc. 38*) on August 6, 2018, along with a Pro Se Motion Seeking Answer to a Question of Law from U.S. District Court Judge JCH Pursuant to D.N.M.LR. 1.7 ("Motion") (*Doc. 39*).

When a party files timely objections to a magistrate judge's recommendation, the district court will conduct a *de novo* review of the portion objected to and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). *De novo* review requires the district judge to consider relevant evidence of record and not merely to review the magistrate judge's recommendations. *In re Griego*, 64 F.3d 580, 583-84 (10th Cir. 1995). "[A] party's objections to the magistrate judge's [PF&RD] must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. One Parcel of Real Prop., with Buildings, Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1060 (10th Cir. 1996).

In his Objections, Petitioner argues that he is entitled to "a brief in chief of the Supreme Court of New Mexico's decision." *Doc. 38* at 4. As the Court has already explained, this Court has no authority to order the New Mexico Supreme Court to elaborate on its written ruling, nor would it be inclined to interfere in such a manner. *Doc. 6.* Petitioner also objects to the Court's orders which granted extensions of time for Respondents to answer. But because Respondents have filed an answer (*Doc. 23*), Petitioner's objections are moot.

Petitioner's Objections also repeat the arguments addressed in the PF&RD concerning

the right to a speedy trial, ineffective assistance of counsel, witness intimidation, right to self-representation, *Brady* violation, violation of the right to be free from double jeopardy, and actual innocence. Having conducted a *de novo* review of the Petition and Amended Petition, the Court finds that the Objections lack merit and that Petitioner is not entitled to relief on any ground for the reasons stated in the PF&RD. The Court also denies Petitioner's Motion, which reiterates his speedy trial argument, because the New Mexico Court of Appeals' thorough application of the *Barker* factors in denying relief is neither contrary to nor an unreasonable application of clearly established federal law. *See Doc. 23-4* at 15-29; *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Finally, Petitioner argues that he did not agree "to proceed on with the unexhausted claims," contained in his Petition and Amended Petition, and that "[t]he Court cannot claim that the unexhausted claims did not have merit when they determined the claims did have merit in initial proceedings." *Doc. 38* at 3. However, the Court never found that any claims in the Petition or Amended Petition were meritorious. Rather, the Court initially found that the Petition was not subject to summary dismissal (*Doc. 8*) and upon further review, the Magistrate Judge found that all the claims Petitioner presented for review, including exhausted and unexhausted claims, lacked merit (*Doc. 34*). The undersigned agrees with the Magistrate Judge that the unexhausted claims are easily resolvable against Petitioner and therefore dismisses them on the merits, along with the exhausted claims. *See Fairchild v. Workman*, 579 F.3d 1134, 1156 (10th Cir. 2009).

Wherefore,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Petitioner's Objections to the Proposed Findings of Fact and Recommended Disposition (*Doc. 38*) are **OVERRULED**;

2. The Magistrate Judge's Proposed Findings of Fact and Recommended Disposition (*Doc. 34*) is **ADOPTED**;

3. The Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (*Doc. 1*) and the Amendment for Writ of Habeas Corpus and Exhibit's Attachments (*Doc. 13*) are **DENIED**;

4. Petitioner's Objections on the Order Granting Extension of Time to Answer (*Docs. 21, 22*) are **OVERRULED**;

5. Petitioner's Motions for Summary Judgment (*Docs. 26, 28*) are **DENIED**;

6. Petitioner's Motion for Status and Evidentiary Hearing (*Doc. 31*) is **DENIED**;

7. Petitioner's Motion Seeking Answer to a Question of Law (*Doc. 39*) is **DENIED**;

8. This action is **DISMISSED** with prejudice;

9. For the reasons stated in the Magistrate Judge's proposed findings and the Court's order adopting those findings, Petitioner has failed to make a substantial showing of a denial of a constitutional right. Therefore, a certificate of appealability is **DENIED**; and

10. A Final Order pursuant to Rule 58 of the Federal Rules of Civil Procedure will be entered dismissing this action with prejudice.

UNITED STATES DISTRICT JUDGE