IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ARNOLDO NAVARETTE,

Petitioner,

v. No. 21-cv-00379 MV/JFR

VINCENT HORTON, Warden of the Guadalupe County Correctional Facility, and HECTOR H. BALDERAS, Attorney General for the State of New Mexico,

Respondents.

MAGISTRATE JUDGE'S PROPOSED FINDING AND RECOMMENDED DISPOSITION[1]

THIS MATTER comes before the Court on Petitioner Arnoldo Navarette's *Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus By a Person In State Custody*. Doc. 1. Petitioner has also filed, through counsel, a memorandum in law in support of his petition. Doc. 2. Respondents have filed an Answer, and Petitioner filed a Reply. Docs. 12; 20. Having reviewed the parties' submissions and the relevant law, and for the reasons set forth herein, the Court finds that Petitioner has exhausted his state court remedies but the Petition is time-barred by operation of 28 U.S.C. § 2244(d)(1), and that Petitioner has not demonstrated any circumstances warranting equitable tolling of the 1-year limitation period. The Court therefore recommends against issuing a Certificate of Appealability and that the Petition be **DENIED WITH PREJUDICE.**

[1] The presiding judge referred this matter to the undersigned by Order of Reference "to conduct hearings, if warranted, including evidentiary hearings, and to perform any legal analysis required to recommend to the Court an ultimate disposition of the case." *See* Doc. 16.

PROCEDURAL BACKGROUND

Petitioner Arnoldo Navarette was convicted by a New Mexico jury in 2010 of one count of first-degree murder and one count of aggravated battery. Doc. 12-1, Exs. F, G, H, I; *see also* Doc. 12-1, Ex. OO at 242.[2] The state court sentenced Mr. Navarette to terms of imprisonment of life and three years, said terms to run consecutively. Doc. 12-1, Ex. A at 1-2. The New Mexico Supreme Court reversed and remanded for a new trial having found a violation of Mr. Navarette's Sixth Amendment right to confrontation, and after a second trial, on February 5, 2015, Mr. Navarette was again convicted of first degree murder and aggravated battery, for which he was again sentenced to consecutive terms of life imprisonment and three years. Doc. 12-1, Ex. P at 034-035.

Petitioner filed a direct appeal to the New Mexico Supreme Court, which affirmed Petitioner's convictions and sentence on July 19, 2018. Doc. 12-1, Ex. OO at 240-267. In his direct appeal, Petitioner argued various errors committed by the trial court, as well as ineffective assistance of counsel, including the claim that his trial counsel operated under a conflict given that he was the Ninth Judicial District Attorney when the incident forming the basis of the criminal charges against Petitioner occurred. Doc. 12-1, Ex. JJ at 146-194 ("Brief in Chief"). Petitioner argued that, under the circumstances, prejudice should have been presumed and the district court should not have authorized the attorney's continued representation. *Id.* at 192-93. In its affirmance, the Supreme Court ruled that Petitioner had failed to demonstrate an actual, adverse conflict that would entitle him to a presumption of prejudice, and noted that the record

[2] The record in this case was filed as an attachment to Respondents' response. *See* Doc. 12-1. The record consists of 721 pages, and consists of 56 lettered exhibits, designated A through DDD. The Court will refer to specific documents by their respective Exhibit and page number (e.g. "Doc. 12-1, Ex. A at 1-2").

"strongly suggest[ed]" that Petitioner's trial counsel "did not pose an actual, active conflict". Doc. 12-1, Ex. OO at 265.

Over a year later, on July 31, 2019, Petitioner filed a petition for a writ of habeas corpus in state court, which was denied by the trial court on December 5, 2019. Doc. 12-1, Ex. SS at 428-432 ("Decision and Order of Summary Dismissal"). Petitioner then filed a petition for writ of certiorari in the New Mexico Supreme Court, which the Court denied. Doc. 12-1, Ex. WW at 695. The New Mexico Supreme Court also considered Petitioner's motion for rehearing, which was denied by the Court on April 28, 2020. Doc. 12-1, Ex. AAA at 709.

Petitioner, through counsel, filed the instant § 2254 petition on April 25, 2021, arguing that he received ineffective assistance from both his trial and appellate counsel. Doc. 1. In Ground One, Petitioner argues that his trial counsel acted under a conflict of interest as he also "was the prosecutor in the same case," and in Ground Two that his appellate counsel "failed to review [the] record and did not submit proof of trial counsel's conflict of interest." *Id.* at 5, 7. Respondents state that Petitioner has "appeared to have exhausted" available state court remedies, Doc. 12 at 8, but note that Petitioner's current argument surrounding his waiver of conflict regarding his trial counsel, Ground One, can be read to include an independent ground for relief, as it is "not substantially similar to what he claims now." Doc. 12 at 18, fn. 5.

LEGAL STANDARD

The statutes governing federal habeas corpus actions for state and federal prisoners were substantially amended by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), effective April 24, 1996. Pub. L. No. 104–132, 110 Stat. 1214. The AEDPA amends 28 U.S.C. § 2244 by imposing a 1-year period of limitation upon the filing of a petition seeking a writ of habeas corpus by a person in custody pursuant to a state court judgment. 28

U.S.C. § 2244(d)(1). Petitioner is a New Mexico prisoner seeking federal habeas relief, so his habeas petition is governed by the AEDPA's amendments. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (AEDPA's amendments apply to habeas petitions filed after the AEDPA's effective date of April 24, 1996); *see also* Doc. 12 at 8 (conceding that Petitioner "was in custody at the time he filed the petition, and remains in the lawful custody of the New Mexico Department of Corrections as of the date of the filing of this answer").

Under 28 U.S.C. § 2244(d)(1)(A), the 1-year limitation period generally begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The 1-year limitation period is tolled for "[t]he time during which a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2). Additionally, the 1-year limitation period may in rare and extraordinary circumstances "be subject to equitable tolling." *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.), *cert. denied*, 525 U.S. 891 (1998).

Section 2244(d)(1) states:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

Thus, under the statute, a judgment becomes "final" in one of two ways—either by the conclusion of direct review by the highest court, including the United States Supreme Court, or by the expiration of the time to seek such review, again from the highest court from which such direct review could be sought. *Locke v. Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001); *see also Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999) ("We hold that the period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition."); *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998), *cert. denied*, 525 U.S. 1187 (1999) ("[T]he running of the statute of limitations imposed by § 2244(d)(1)(A) is triggered by either (i) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ.").[3]

[3] When faced with the question of when direct review by state courts is final, federal courts are in agreement that a state conviction becomes final, for purposes of determining the accrual date for AEDPA's one-year limitations deadline, 90 days after discretionary review by the highest state court in concluded. *See, e.g., Locke*, 237 F.3d at 1273; *Beery v. Ault*, 312 F.3d 948, 950 (8th Cir. 2002); *Wixom v. Washington*, 264 F.3d 894, 897 (9th Cir. 2001); *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000); *Valverde v. Stinson*, 224 F.3d 129, 132 (2nd Cir. 2000); *Flanagan v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998); *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The Tenth Circuit has further stated that the period of limitations is tolled when a state post-conviction review is "pending," holding that "regardless of whether a petitioner actually appeals a denial of a post-conviction application, the limitations period is tolled during the period in which the petitioner *could have* sought an appeal under state law." *Gibson v. Klinger*, 232 F.3d 799, 804 (10th Cir. 2000) (emphasis in original).

ANALYSIS

1. Section 2244(d)(1)(A)'s 1-Year Limitation Period Ran

Petitioner's convictions became final after the AEDPA's effective date, so AEDPA governs Petitioner's filing. Hence, barring any tolling, Petitioner had one year after the conclusion of direct review of his convictions to file a federal habeas petition. *See* 28 U.S.C. §§ 2244(d)(1)(A), (d)(2). The operative question, then, is: When did Petitioner's conviction become final so as to trigger AEDPA's 1-year period limitation?

In *Locke*, the Tenth Circuit held that AEDPA's limitation period does not begin to run until "after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed." 237 F.3d at 1273 (internal quotation marks and citation omitted); *see also* S.Ct. R. 13.1 (providing for a ninety-day period following the state judgment to petition for a writ of certiorari). The additional time allotted in *Locke*, however, only applies "following a decision by the state court of last resort." 237 F.3d at 1273.

Petitioner's direct appeal concluded when the New Mexico Supreme Court—New Mexico's court of last resort—issued its Decision. That final order is dated July 19, 2018. *See* Doc. 12-1, Ex. OO, at 240-67. Petitioner then had 90 days to seek relief from the United States Supreme Court, which he did not do. Nonetheless, those 90 days are added from the date the New Mexico Supreme Court denied his petition for certiorari. Thus, based on § 2244(d)(1)(A), Petitioner had until October 17, 2019 to file his § 2254 petition in federal court.[4]

[4] In his Reply, Petitioner claims without citing any authority that "there is no reasonable dispute that the state court judgment became final when the New Mexico Supreme Court denied Mr. Navarette's motion for reconsideration of the denial of his petition for a writ of certiorari." Doc. 20 at 2. That petition sought review of the denial of Mr. Navarette's state habeas corpus petition, Doc. 12-1, Ex. SS at 428, which was ultimately denied on April 28, 2020 with the New Mexico Supreme Court's denial of his motion for rehearing. Doc. 12-1, Ex. AAA at 709. This is clearly not the law and directly contradicts the weight of authority which holds that the 1-year limitation period of section 2244(d)(1)(A) runs upon conclusion of direct review of an inmate's convictions, which occurs 90-days after

Petitioner filed a petition for habeas corpus in state court on July 31, 2019, thereby tolling AEDPA's 1-year period of limitation. *See* 28 U.S.C. § 2244(d)(2) (the 1-year period of limitation is tolled for the time "during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . ."). But, up to when the state habeas action commenced, the clock ran on the AEDPA 1-year period of limitation. Accordingly, from October 18, 2018 to July 31, 2019, 286 days elapsed, thereby leaving Petitioner 79 days to file his § 2254 petition in federal court, once time began to run anew. The New Mexico Supreme Court's decision denying Petitioner's motion for rehearing (on his petitioner for writ of certiorari) on April 28, 2020 caused the limitation clock to re-start. *See* Doc. 12-1, Ex. AAA at 709. Thus, Petitioner was required to file his § 2254 petition on or before July 16, 2020, or 79 days after the final decision from the New Mexico Supreme Court.

Petitioner's filing in federal court was made on April 25, 2021, or more than nine months outside of the 1-year limitation period set by AEDPA. The Court views AEDPA's 1-year limitation period as clear and consistently understood and interpreted by the Federal courts, *see supra* n. 3, and thus will decline Petitioner's invitation to apply the rule of lenity. *See* Doc. 20 at 2-3. As such, absent tolling, Petitioner's habeas corpus Petition is time-barred.

2. Equitable Tolling Does Not Apply

The 1-year limitation period is subject to equitable tolling, but equitable tolling is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control. *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000); *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003). Petitioner

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the State's highest court denies the inmate's direct appeal. *See supra* n. 3. While the filing of a petition for habeas corpus in state court may toll the 1-year limitation, it does not extend it, and Petitioner's argument to the contrary is without basis in law.

has not set forth any grounds that might entitle him to equitable tolling, and the grounds that he does provide are not developed and otherwise unpersuasive. Petitioner claims that he has been incarcerated and his access to his attorney "very limited," which was exacerbated by the restrictions on attorney-client communications caused by the COVID-19 pandemic. Petitioner also claims that, because he is not a native English speaker, his need for translators caused significant delay. Doc. 20 at 4. None of these reasons justifies equitably tolling the AEDPA 1-year period of limitation, but even if they did, they can't justify the more-than nine months that it took Petitioner to file his § 2254 Petition (from July 16, 2020 to April 25, 2021).

In *Marsh*, the petitioner claimed "his ignorance of the law completely robs him of any opportunity to fend for himself or otherwise gain equal access to the courts," a claim quickly rejected by the Tenth Circuit, as the Court noted that ignorance of the law, "even for an incarcerated pro se petitioner, generally does not excuse prompt filing." 223 F.3d at 1220 (internal quotation marks and citation omitted). Reliance on an inmate law clerk does not relieve the petitioner from the personal responsibility of complying with the law, *id.*, and a 15-day closure of the prison law library, even if considered "extraordinary," does not justify the delay in filing. *Id.* at 1221; *see also Miller*, 141 F.3d at 978 (AEDPA's 1-year limitation period does not constitutionally infringe an inmate access to the Great Writ, even when the inmate lacked access to certain legal materials). Similarly, an inmate's lack of legal assistance is unavailing to toll the 1-year limitation period of § 2244(d) as there is no right to legal assistance when pursuing a habeas action unless the Court determines an evidentiary hearing is needed. *Swazo v. Wyoming Dept. of Corr.*, 23 F.3d 332, 333 (10th Cir. 1994). And even when an inmate is represented by counsel, an attorney's miscalculation of the limitation period has been held not sufficient to warrant equitable tolling. *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). These cases

strongly suggest that Petitioner here cannot rely on his claimed lack of access to his attorney, based on COVID-19 restrictions or otherwise, to justify tolling the 1-year limitation period of AEDPA.

Similarly, the Tenth Circuit has also consistently refused to consider a lack of proficiency in the English language as an extraordinary circumstance warranting equitable tolling. *See Yang v. Archuleta*, 525 F.3d 925, 929-30 (10th Cir. 2008) ("Though we have not published a decision directly addressing proficiency in the English language, our unpublished decisions have consistently and summarily refused to consider such a circumstance as extraordinary, warranting equitable tolling."); *Gonzalez v. Beck*, 118 F.App'x 444, 447 (10th Cir. 2004) (language deficiency was not impediment that might excuse untimely filing); *Gutierrez-Ruiz v. Trani*, 378 F.App'x 797, 799 (10th Cir. 2010) (same); *Gomez v. Leyba, 242 F.App'x 493, 495* (10th Cir. 2007) (unfamiliarity with English language is not an extraordinary circumstance); *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006) (rejecting a per se rule that a petitioner's language limitations can justify equitable tolling, but recognizing that equitable tolling may be justified if language barriers actually prevent timely filing); *cf. Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir.1999) (noting that unfamiliarity with the law due to illiteracy does not toll limitation period).

Equitable tolling[5] is "a remedy suitable only in extraordinary circumstances." *Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006). In the final analysis, Petitioner has failed to allege with specificity the steps that he took to diligently pursue his claims. Nor has he sufficiently established that the grounds he alleges—limited access to attorney, language barriers—actually resulted in the untimely filing. The Court concludes that a delay of over nine

[5] The Supreme Court has not explicitly decided if equitable tolling applies to § 2254's limitation period, *see Lawrence*, 549 U.S. at 336, but has stated that if it would apply, the petitioner "must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 336 (internal quotation marks and citation omitted).

months in filing the instant Petition in federal court demonstrates a lack of diligence that precludes equitable tolling. As such, AEDPA requires dismissal of the Petition.

3. Whether Petitioner Has Exhausted His State Court Remedies

Whether or not an issue is deemed to have been exhausted may have significant consequences, as dismissal of a petition as time barred (assuming exhaustion has occurred) operates as a dismissal with prejudice, meaning that future applications will be treated as "second or successive" petitions subject to the heightened requirements of § 2244(b). *Villanueva v. United States*, 346 F.3d 55, 61 (2nd Cir. 2003). However, when a petitioner fails to exhaust state court remedies, dismissal is usually without prejudice, giving the petitioner an opportunity to pursue those remedies in state court. *Demarest v. Price*, 130 F.3d 922, 939 (10th Cir. 1997). Respondents suggest that Petitioner's current argument concerning his trial counsel's conflict is slightly different from what was raised in the state courts, to the extent that now Petitioner claims that he unknowingly signed a waiver of conflict. *See* Doc. 12 at 18, n 5; Doc. 2 at 5. As such, Respondents argue that Petitioner may not have exhausted his state court remedies as is required by AEDPA. Doc. 12 at 18, fn. 5. Respondents argue that, to the extent that Petitioner's argument regarding his waiver of conflict differs from what he presented on direct appeal, this new, "unknowing waiver" claim should be deemed procedurally defaulted and subject to an anticipatory procedural bar. *Id.* (citing Grant v. Royal, 886 F.3d 874, 892 (10th Cir. 2018)).

Respondents suggest that Petitioner "appears" to have exhausted his state court remedies. Doc. 12 at 8; 18 n. 5. By way of supporting facts to Ground One, Petitioner states the following:

> --Petitioner's trial counsel was the District Attorney when the events of his case occurred;
> --The prosecutor filed a motion to disqualify Petitioner's trial counsel;
> --Petitioner's trial counsel misrepresented to Petitioner and to the trial court that he was not personally involved in Petitioner's case as District Attorney;
> --The trial court did not disqualify Petitioner's trial counsel;

--Petitioner was prejudiced by his attorney's subsequent ineffective representation.

Doc. 1 at 5. In his Memorandum of Law in Support, Petitioner adds that trial counsel's misrepresentation caused Petitioner to "unknowingly sign a waiver of conflict of interest." Doc. 2 at 5. Thus, Petitioner's conflict of interest argument certainly contains as an element a lack of voluntariness, which now prompts this Court to determine whether such claim has substantially changed from what was exhausted below.

Upon meticulous review of the record, the Court concludes that Petitioner's claim is substantially similar to what he argued in the state courts. On direct appeal to the New Mexico Supreme Court, in the Docketing Statement, Petitioner notes that the trial judge denied the State's motion to disqualify trial counsel, stating that "it was not disclosed in the State's motion that Mr. Harris was cited in the police report as being briefed on the questioning of witnesses and such was overseeing the investigation making him substantially involved. The defendant claims that Mr. Harris failed to advise him of his role in the original investigation." Doc. 12-1, Ex. W at 65 (internal citation omitted).[6] An alleged failure to disclose a crucial document suggests a lack of a knowing waiver of conflict. Then, in his Brief in Chief to the New Mexico Supreme Court, Petitioner argued that Mr. Harris labored under an actual, active conflict that affected his performance, and that the trial court erred by allowing Mr. Harris to represent the Petitioner. Doc. 12-1, Ex. JJ at 189-193. Petitioner noted his lawyer's statement that he had nothing to do with the underlying criminal investigation when he served as District Attorney, and that he thereby wanted the lawyer to represent him at trial. *Id.*, Ex. JJ at 189-90. Certainly, the

[6] Petitioner's Statement of Issues filed in the New Mexico Supreme Court sets forth the issue in identical language as used in the Docketing Statement. *See* Doc. 12-1, Ex. Y, at 95.

inference to be drawn is that Petitioner's conclusion to want the lawyer to continue representation was predicated on the lawyer's assurance of non-involvement.

In his Petition for a Writ of Habeas Corpus filed in the state district court, Petitioner argues that his trial lawyer acted under an actual conflict of interest, and that his appellate counsel failed to properly raise the issue on direct review in the Supreme Court. Specifically, Petitioner states that he did not object to Mr. Harris' representation "because he believed Mr. Harris' lie that he did not have anything to do with the case." Doc. 12-1, Ex. QQ, at 282. Finally, on petition for certiorari in the New Mexico Supreme Court, Petitioner argued:

> Mr. Harris's concealment of his involvement tainted Mr. Navarette's waiver of the apparent conflict of interest. As Mr. Navarette alleged in his pro se petition for a writ of habeas corpus, Mr. Harris also lied to him about the fact that he, his own defense attorney, formerly prosecuted him in the same case. Therefore, it would be unjust to conclude that Mr. Navarette gave informed consent to a waiver of any conflict of interest.

Doc. 12-1, Ex. TT, at 437-38 (internal citations omitted)

The Court concludes that Petitioner adequately and thoroughly raised the conflict-of-interest issue that he raises presently before this Court, including the claim that his waiver of conflict was somehow not knowing or voluntary. "When a federal claim has been presented to the state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S 86. 99 (2011). And when a state court rejects some but not all of the petitioner's federal claims, the federal court should not assume that any unaddressed federal claims were overlooked. *Johnson v. Williams*, 568 U.S. 289. 300-01 (2013). Here. Petitioner has fully developed his actual conflict-of-interest claim, which has been ruled upon by the state courts. Accordingly, the Court recommends that the District Judge find that Petitioner has exhausted his claims in the New Mexico state courts.

4. The Court is Permitted to Review the State Court Record

Petitioner claims in his Reply that Respondent "relies on evidence outside the pleadings" and that a discussion of dismissal is inappropriate as the 2254 Petition has not been converted to a motion for summary judgment. Doc. 20 at 4-5. This argument is misplaced, as the AEDPA circumscribes review of a federal habeas petition to claims that were adjudicated on the merits in state court proceedings. *Byrd v. Workman*, 645 F.3d 1159, 1165 (10th Cir. 2011). An applicant is not entitled to relief unless he can demonstrate that the state court's resolution of his claims was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2); *accord Phillips v. Workman*, 604 F.3d 1202, 1209 (10th Cir. 2010). This " 'highly deferential standard for evaluating state-court rulings[ ]' ... demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)). Indeed, the Tenth Circuit directs that federal courts may not "stray from the record before the state court in conducting the AEDPA inquiry." *Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012).

Here, Respondents have attached to their response a full and complete copy of the records from the underlying state court proceedings in Petitioner's case. This is entirely appropriate and necessary for a thorough review as required by AEDPA. Respondents have not introduced evidence outside of the pleadings. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). Petitioner's claim that review of the state court record somehow converts the procedural posture of the case to one of summary judgment, or that

Respondents must "invoke[ ] . . . [an]other dismissal remedy, such as . . . Rule 12," is incorrect as a matter of law. Doc. 20 at 5.

5. The Court Recommends Against Issuing a Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2254 Cases, the Court must issue or deny a Certificate of Appealability (COA) whenever it enters a final order adverse to the § 2254 petitioner. *See* Habeas Corpus Rule 11(a). A COA may issue only upon "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (stating that to obtain a COA, a petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"). The Court finds that Petitioner has not made such a showing, because Petitioner adequately and fully litigated his claims in the state courts and the period of limitation has lapsed. The Court recommends against the issuance of a COA.

CONCLUSION

The Court concludes that Petitioner has sufficiently raised his claims in the state courts, thereby exhausting his remedies prior to filing the instant § 2254 petition. Furthermore, the Court concludes that the § 2254 petition was filed outside of the 1-year limitation period set by AEDPA, thereby depriving this Court of jurisdiction. As such, because AEDPA requires dismissal, the Court recommends that the District Judge dismiss the Petition with prejudice. Finally, the Court recommends against granting a Certificate of Appealability.

RECOMMENDATION

For all of the foregoing reasons, the Court finds that Petitioner Arnoldo Navarette's *Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus By a Person In State Custody* is

not well-taken and recommends that it be **DENIED** and **DISMISSED WITH PREJUDICE.**

The Court further recommends that a certificate of appealability (COA) be **DENIED.**

JOHN F. ROBBENHAAR
United States Magistrate Judge

THE PARTIES ARE NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**