

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RODNEY WELLS	:	CIVIL ACTION
	:	
vs.	:	
	:	
JOHN PALAKOVITCH; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	: : : : : :	NO. 04-4072

ORDER AND MEMORANDUM

ORDER

AND NOW, this 1st day of September, 2005, upon careful and independent consideration of the Petition and Amended Petition for Writ of Habeas Corpus filed by petitioner, Rodney Wells, and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter dated June 29, 2005, and Petitioner's Objections to the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Thomas J. Rueter dated June 29, 2005, is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections to the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter are **OVERRULED**;
3. The Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Document No. 1, filed August 27, 2004), and Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Document No. 2, filed December 2, 2004) are **DISMISSED AS UNTIMELY**; and,
4. Because petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for issuing a certificate of appealability.

MEMORANDUM

On August 27, 2004, petitioner filed the initial Petition for Writ of Habeas Corpus in this Court. An Amended Petition was filed on December 2, 2004. The Commonwealth defendants contend that the Petition and Amended Petition should be dismissed as untimely because the initial Petition was not filed within the one-year statute of limitations as required by 28 U.S.C. § 2244.

The Magistrate Judge recommended a dismissal of the Petition as time-barred. In doing so, he rejected petitioner's argument that he was entitled to equitable tolling for the reasons set forth at pages 2 through 5 of his Amended Petition. In those pages of the Amended Petition, petitioner reviews the state court procedural history of his filings under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541, *et seq.*, and argues that the statute of limitations should be equitably tolled during the pendency of his second PCRA petition - from August 24, 2001, to June 29, 2004. That is the issue raised in the Objections.

The Magistrate Judge analyzed the equitable tolling argument and concluded that the filing of the second PCRA petition did not toll the statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). He reasoned that the second PCRA petition, which was materially identical to the initial petition, was dismissed as untimely. The Pennsylvania Superior Court affirmed the dismissal of the second PCRA petition as "manifestly untimely." *Commonwealth v. Wells*, No. 3390 EDA 2000, slip op. at 10 (Pa. Super. Ct. Dec. 17, 2003). On June 29, 2004, the Pennsylvania Supreme Court denied petitioner's application for allowance of appeal. This Court agrees with the reasoning of the Magistrate Judge that a PCRA petition determined by state court not to have been timely filed,

such as petitioner's second PCRA petition, does not toll the statute of limitations under the PCRA statute or give rise to equitable tolling.

Case law is clear that an untimely PCRA petition is not "properly filed" and, therefore, does not statutorily toll the statute of limitations. *See Pace v. Diguglielmo*, 125 S. Ct.1807, 1814 (2005) ("Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2254(d)(2)."). Federal courts are bound by a state court decision that a PCRA petition was not timely filed. *Id.* at 1812.

Moreover, petitioner has not shown that the statute of limitations should be equitably tolled. The Magistrate Judge analyzed this issue in detail in his Report and Recommendation, and the Court agrees with that analysis. In short, for the reasons set forth by the Magistrate Judge, petitioner is not entitled to equitable tolling during the time his second PCRA petition was pending or during any other time period.

BY THE COURT:

JAN E. DUBOIS, J.