

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

<b>JOSE CORTEZ LOPEZ</b>	:	<b>CIVIL ACTION</b>
<b>Petitioner,</b>	:	
<b>vs.</b>	:	<b>NO. 04-5908</b>
	:	
<b>GERALD ROZUM, THE DISTRICT</b>	:	
<b>ATTORNEY OF THE COUNTY OF</b>	:	
<b>CHESTER COUNTY; and, THE</b>	:	
<b>ATTORNEY GENERAL OF</b>	:	
<b>THE STATE OF PENNSYLVANIA</b>	:	
<b>Respondents.</b>	:	

**ORDER AND MEMORANDUM**

**ORDER**

**AND NOW**, this 1<sup>st</sup> day of June, 2005, upon consideration the Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 and the Response to the Petition, and after review of the Report and Recommendation of United States Magistrate Judge Diane M. Welsh dated April 22, 2005, and Petitioner’s Memorandum of Law in Opposition to Court’s Interest to Dismiss, treated by the Court as an Objection to the Report and Recommendation, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Diane M. Welsh dated April 22, 2005, is **APPROVED** and **ADOPTED**;
2. Petitioner’s Memorandum of Law in Opposition to Court’s Interest to Dismiss, treated by the Court as an Objection to the Report and Recommendation, is **OVERRULED**,
3. The Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 is **DISMISSED** as **TIME-BARRED**; 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

The procedural history and background facts are set forth in detail in the Report and Recommendation of United States Magistrate Judge Diane M. Welsh dated April 22, 2005, and need not be repeated in this Memorandum. In the Report and Recommendation, Magistrate Judge Welsh recommended that the habeas petition be dismissed as untimely. This Court agrees with that recommendation.

Magistrate Judge Welsh carefully analyzed the limitations period of the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d)(1) (“AEDPA”), and concluded that the petition was not timely filed. Specifically, petitioner’s judgment of conviction became final on January 17, 1999, at the expiration of the time for seeking allowance of appeal in the Supreme Court of Pennsylvania on direct appeal. Petitioner had one year from that date to file his habeas petition in this Court and he did not do so until December 24, 2004, nearly five years after the limitations period expired.

The Magistrate Judge also analyzed the exceptions to the limitations period of the AEDPA - statutory tolling during the time a “properly filed” application for state post-conviction review is pending in state court, and (2) equitable tolling. Because petitioner’s PCRA petition was not timely filed in state court and thus not “properly filed,” the Magistrate Judge concluded that it did not toll the AEDPA limitations period. With respect to equitable tolling, although not argued by petitioner, the Magistrate Judge concluded that it was inapplicable.

Petitioner says nothing in his Memorandum of Law in Opposition to Court’s Interest to Dismiss which impacts on the conclusion of the Magistrate Judge that there was no evidence presented which would warrant statutory tolling. This Court agrees completely with the analysis and recommendation of the Magistrate Judge on that issue.

Regarding equitable tolling, although not specifically mentioned, petitioner states that he is “a foreign national from the country of Mexico, who is a un-lettered person, with not more than a (3) thir [sic] grade education in Spanish only, with no knowledge of the English language.” Such allegations fail to meet the “two general requirements for equitable tolling: (1) that ‘the petitioner has in some extraordinary way been prevented from asserting his or her rights;’ and (2 ) that the petitioner has shown that ‘he or she exercised reasonable diligence in investigating and bringing [the] claims.’” See Merritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003)(citing Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 124 S. Ct. 317 (2003)).<sup>1</sup>

Petitioner’s bare allegations regarding his unfamiliarity with the English language and his third grade education does not establish that he has in some extraordinary way been prevented from asserting his rights. Moreover, he delayed for nearly six years after his judgment of conviction became final on January 17, 1999, before filing this habeas action. There is nothing in the papers presented to Magistrate Judge Welsh or in petitioner’s Memorandum of Law that might explain such delay and demonstrate that petitioner has exercised due diligence. For all of those reasons, the Court concludes that equitable tolling is inapplicable.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**

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<sup>1</sup>The two other circumstances in which equitable tolling is permitted - (1) misleading of the plaintiff by the defendant, and (2) timely assertion of rights by plaintiff in the wrong forum - are inapplicable to this case. See Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).