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

RAFAEL HERNANDEZ, Petitioner, v. LOUIS FOLINO, *et al*, Respondents.	:	CIVIL ACTION NO. 04-5398

Memorandum and Order

YOHN, J. July ___, 2006

Presently before this court is Rafael Hernandez's *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his report and recommendation, United States Magistrate Judge Thomas J. Rueter concluded Hernandez's petition was time-barred by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d), which governs the filing of habeas corpus petitions. After conducting a *de novo* review of the report and recommendation, and upon careful consideration of the parties' submissions, I will approve and adopt the report and recommendation, and dismiss Hernandez's petition.

I. PROCEDURAL HISTORY

Because this decision centers around whether Hernandez's habeas petition is time-barred under AEDPA, it is necessary to review this case's "muddled" procedural history.

On May 4, 1999, pursuant to a plea bargain, Hernandez pled guilty to first-degree murder in exchange for life imprisonment. However, on May 17, 1999, Hernandez filed an untimely post-sentence motion seeking to withdraw this plea, in part due to ineffective assistance of

counsel. Simultaneously, his attorney filed a motion to withdraw. On May 20, 1999, the court granted the motion to withdraw, denied the post-sentence motion, and appointed Gail Chiodo, Esquire, to represent Hernandez.

Chiodo did not file a direct appeal or a petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 *et seq.* Rather, Chiodo filed a "no-merit" letter pursuant to *Commnwealth v. Finley*, 550 A.2d 213 (Pa. Super. Ct. 1988), which allows counsel to withdraw from representation during PCRA proceedings so long as counsel submits a "no-merit" letter and the court independently reviews the petitioner's claims. 550 A.2d at 393. However, neither Hernandez nor his attorney had filed a PCRA petition at this time. On March 27, 2000, the trial court granted Chiodo's request and, on June 2, 2000, dismissed the "PCRA petition." *Commonwealth v. Hernandez*, No. 3319-98, slip op. at 1 (Berks County Ct. Com. Pl. Mar. 27, 2000); *Commonwealth v. Hernandez*, No. 3319-98, slip op. at 1 (Berks County Ct. Com. Pl. June 2, 2000).

On June 23, 2000, Petitioner filed a timely *pro se* appeal to the Pennsylvania Superior Court. The Superior Court appointed new counsel, Michael Dautrich, Esquire, who filed an "Amended Concise Statement of Matters on Appeal," asserting Hernandez was denied effective assistance of both trial and appellate counsel. On September 18, 2000, the Superior Court remanded the case to the trial court to determine whether Hernandez had requested Chiodo to file a direct appeal and whether she had failed to perfect his direct appeal rights. *Commonwealth v. Hernandez*, No. 1294 MDA 2000, slip op. at 1 (Pa. Super. Ct. Sept. 18, 2000).

At a January 2, 2001 hearing, the parties stipulated that Hernandez had requested Chiodo to file a direct appeal and that she had failed to perfect his direct appeal rights. On January 9,

2001, Dautrich filed an "Amended Post Conviction Petition Nunc Pro Tunc" seeking reinstatement of his client's direct appeal rights. (Am. Mot. for Post-Conviction Collateral Relief Nunc Pro Tunc, App. to Answer to Pet. for Writ of Habeas Corpus, A91.) The trial court then filed an opinion requesting the Superior Court to permit petitioner to file a direct appeal *nunc pro tunc*, consider the PCRA appeal on the merits, or remand the case for further proceedings. *Commonwealth v. Hernandez*, No. 3319-98, slip op. at 5-6 (Berks County Ct. Com. Pl. Jan. 9, 2001).

"Because the trial court [ ] treated these proceedings as if a PCRA petition had been filed," the Superior Court issued an opinion on December 21, 2001 addressing all of petitioner's claims on the merits. *Commonwealth v. Hernandez*, 1294 MDA 2000, slip op. at 3 (Pa. Super. Ct. Dec. 21, 2001.) The court found petitioner's claims of ineffective assistance of trial and appellate counsel meritless and affirmed the trial court's initial dismissal of the PCRA petition. *Id.* at 3-13. The Pennsylvania Supreme Court denied allocatur on July 24, 2002.

On October 24, 2002, petitioner filed a second *pro se* PCRA petition. On February 4, 2003, the trial court denied the petition. *Commonwealth v. Hernandez*, No. 98-3319, slip op. at 1 (Berks County Ct. Comm. Pl. Feb. 4, 2003). Hernandez appealed, and on June 10, 2004, the Superior Court affirmed the trial court's decision and found the petition was time-barred under state law. *Commonwealth v. Hernandez*, 783 MDA 2003, slip op. at 4 (Pa. Super. Ct. June 10, 2004). The Superior Court determined that petitioner's judgment of sentence became final on June 4, 1999, when his right to pursue a direct appeal expired.[1] *Id.* at 4-5. Accordingly, the court

[1] Under the Pennsylvania Rules of Appellate Procedure, a party has to file a notice of appeal "within 30 days after the entry of the order from which appeal is taken." *See* Pa. R. App. P. 903. Thus, Hernandez's conviction became final when his opportunity to seek direct review

found that Hernandez needed to file his PCRA petition by June 4, 2000 in order to be timely, regardless of whether that petition was construed as his first or second PCRA petition. *Id.* On July 9, 2004, petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on July 12, 2005. *Commonwealth v. Hernandez*, No. 771 MAL 2004, slip op. at 1 (Pa. July 12, 2005).

On November 19, 2004, prior to the last denial of allocatur by the Pennsylvania Supreme Court, Hernandez filed this instant petition for a writ of habeas corpus. On March 16, 2005, the District Attorney filed a response, and Hernandez responded on March 24, 2005. Magistrate Judge Rueter issued his report and recommendation on April 26, 2005, to which petitioner objected on May 12, 2005. On May 17, 2005, the court placed this action in civil suspense pending disposition of petitioner's petition for allowance of appeal by the Pennsylvania Supreme Court and directed counsel for the respondent to notify the court when that occurred. Counsel for the respondent notified the court by letter dated June 2, 2006 that the petition had been denied.

II. DISCUSSION

This court exercises jurisdiction over this habeas petition under 28 U.S.C. § 2254(a). When a habeas petition has been referred to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), a district court's review of "those portions of the report or specified proposed findings or recommendations to which objection is made" is *de novo*. 28 U.S.C. § 636(b). After conducting such a review, the court "may accept, reject, or modify, in

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expired on June 3, 1999, thirty days after the trial court entered his sentence on May 4, 1999. It appears the Superior Court's calculation was off by one day because it incorrectly believed petitioner was sentenced on May 5, 1999. (*See* the State Court Docket, the Proceedings of Guilty Plea and Sentencing Hearing, and the Sentence Order, in App. to Answer to Pet. for Writ of Habeas Corpus, at A3, A11, & A43.)

whole or in part, the findings or recommendations made by the magistrate." *Id.*

A. Report & Recommendation

Magistrate Judge Rueter found that Hernandez's habeas petition is barred by AEDPA's one-year statute of limitations.[2] Under AEDPA, a state prisoner seeking federal habeas relief must file his petition within one year of the date on which his judgment of conviction becomes final, either "by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1). However, AEDPA expressly tolls its one-year statute of limitations 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." 28 U.S.C. § 2244(d)(2). A state collateral petition tolls AEDPA's statute of limitations only when the petition was "submitted according to the state's procedural requirements, such as the rules governing time and place of filing." *Fahy v. Horn*, 240 F.3d 239, 243 (3d Cir. 2001) (internal citation omitted). Specifically, state time-limits on applications for postconviction relief are "condition[s] to filing," such that untimely petitions are not "properly filed" under AEDPA. *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (stating "when a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)"). Moreover, a federal district court must defer to a Pennsylvania court's determination of whether a petition is timely under state law. *Merritt v. Blaine*, 326 F.3d 157, 165-66 (3d Cir. 2003).

[2] Although the statute of limitations was not raised by the parties, a federal magistrate judge may raise the AEDPA statute of limitations issue *sua sponte Day v. McDonough* , 126 S. Ct. 1675, 1684 (2006) (holding "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition"); *Long v. Wilson*, 393 F.3d 390, 403 (3d Cir. 2004) (holding "a federal magistrate judge may raise the AEDPA statute of limitations issue in a Report and Recommendation after an answer has been filed").

In his report and recommendation, Magistrate Judge Rueter determined that petitioner's judgment of conviction became final when his opportunity to seek direct review expired on June 4, 1999.[3] Because petitioner had a "properly filed" post-conviction petition pending in state court, Magistrate Judge Rueter statutorily tolled the limitation period from June 4, 1999 until July 24, 2002, when the Pennsylvania Supreme Court denied allocatur on petitioner's first PCRA petition. However, because the Pennsylvania Superior Court determined that petitioner's second October 24, 2002 PCRA petition was untimely, Magistrate Judge Rueter did not toll the statutory period during the pendency of that petition. Accordingly, Magistrate Judge Rueter determined that Hernandez had until July 24, 2003 to file a timely petition for a writ of habeas corpus. Under Magistrate Judge Rueter's analysis, the instant petition filed on November 19, 2004 was approximately sixteen months too late.

B. Petitioner's Objections

In his objections, Hernandez asserts that Magistrate Judge Rueter erred: (1) by not properly considering Hernandez's Amended Post Conviction Petition Nunc Pro Tunc filed January 9, 2001 in determining the date on which his judgment of conviction became final,[4] and

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[3]Like the Pennsylvania Superior Court, Magistrate Judge Rueter's calculation was off by one day because he incorrectly believed petitioner was sentenced on May 5, 1999, as opposed to May 4, 1999. (*See* the State Court Docket, the Proceedings of Guilty Plea and Sentencing Hearing, and the Sentence Order, in App. to Answer to Pet. for Writ of Habeas Corpus, at A3, A11, & A43.)

[4]Petitioner's objection states that the "Report and Recommendation erred in finding that Petitioner had until July 24, 2003 to file a timely petition for a writ of habeas corpus, based on the fact [that] Petitioner [filed a] "Reinstatement of Appellate Rights nunc pro tunc, January 9, 2001." (De Novo Objection to Magistrate Judge Report & Recommendation 1.) Petitioner later explains his claim, stating that "the Magistrate Judge overlooks the fact that [Hernandez filed a] 'January 9, 2001 Petition nunc pro tunc seeking Reinstatement of Appellate Rights." (*Id.* at 3.)

(2) by ruling that his second PCRA petition did not statutorily toll the statute of limitations.[5] However, both these objections are without merit.

(1) Petitioner's Objection to the Final Judgment of Conviction Date

With regard to Hernandez's first objection, Magistrate Judge Rueter properly considered Hernandez's January 9, 2001 Amended Post Conviction Petition Nunc Pro Tunc in determining when his judgment of conviction became final. Petitioner's sentence was imposed on May 4, 1999, and his deadline for filing a notice of appeal with the Pennsylvania Superior Court was June 3, 1999. Thus, on June 3, 1999, petitioner's judgment of conviction became final due to "the expiration of the time for seeking [direct] review." 28 U.S.C. § 2244(d)(1). Hernandez then asserted several ineffective assistance of counsel claims under the PCRA, and filed his Amended Post Conviction Petition Nunc Pro Tunc on January 9, 2001. As that petition was filed *after* the expiration of the time for seeking direct review and *after* the date his judgment of conviction became final, it has no bearing on when petitioner's judgment of conviction became final.

In his objections, Hernandez appears to argue that the Superior Court's decision not to reinstate his direct appeal *nunc pro tunc*[6] was erroneous and violated his federal due process rights. Hernandez claims that this decision is relevant to the timeliness of his habeas petition

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[5]Petitioner's second objection states that "The Report and Recommendation erred in finding petition filed October 24, 2002 labeled "Second ("PCRA") did not toll the statute of limitations because judgment of sentence was not final for the purposes of 42 Pa.C.S.A. § 9545(b) in that Applicant filed "Restatement of Direct Appeal nunc pro tunc." (De Novo Objection to Magistrate Judge Report & Recommendation 1.)

[6]As noted above, petitioner requested this relief in his Amended Post Conviction Petition Nunc Pro Tunc. Rather than permitting the petitioner to file a direct appeal *nunc pro tunc*, the Superior Court itself reviewed all petitioner's claims of ineffective trial and appellate counsel on the merits. *Commonwealth v. Hernandez*, 1294 MDA 2000, slip op. at 3 (Pa. Super. Ct. Dec. 21, 2001.)

because if the Superior Court had reinstated his direct appeal *nunc pro tunc*, petitioner's judgment of conviction would not have been final until after the Pennsylvania Supreme Court denied allocatur on July 24, 2002. Under petitioner's logic, his second PCRA petition would then have been construed by the state courts as a timely first PCRA petition and consequently, his present habeas would also be timely.

However, petitioner's underlying claim[7] – that a violation of his federal due process rights on PCRA review ultimately led to his habeas petition being untimely – is without merit.[8] With

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[7]To the extent Hernandez is asserting that his habeas petition should be considered timely because the Pennsylvania Superior Court's decision violates *state* law, this claim is not cognizable on habeas review. It is well settled that this court cannot review state court interpretations of state law questions. See *Bradshaw v. Richey*, 126 S. Ct. 602, 604 (2005) (reiterating that "a court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (stating that "federal habeas corpus relief does not lie for errors of state law") (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). The United States Supreme Court has emphasized that "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States" and "that it is not province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67-68.

[8]I note that this claim is also not cognizable under federal law because it alleges an error in state collateral proceedings. The Third Circuit has described the limited scope of federal habeas corpus review as follows:

> The federal courts are authorized to provide collateral relief where a petitioner is in state custody or under a federal sentence imposed in violation of the Constitution or the laws or treaties of the United States. Thus, the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation.

Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998) (internal citations omitted); *see also Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) ("[A]lleged errors in collateral proceedings . . . are not a proper basis for habeas relief from the original conviction. It is the original trial that is the 'main event' for habeas purposes."); *Mason v. Myers*, 208 F.3d 414, 417 (3d Cir. 2000) (rejecting the premise that "a delay in a collateral proceeding can be the basis of a petition for a writ of habeas corpus"); *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992) (noting that "infirmities in state habeas proceedings do not constitute grounds for federal habeas relief"); *Williams v. Missouri*, 640 F.2d 140, 144 (8th Cir. 1991) (finding that "[e]ven where

regard to the Superior Court's decision not to reinstate his direct appeal *nunc pro tunc*, mere disagreement with a state court result does not constitute denial of due process. Rather, Hernandez is only entitled to habeas relief where the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "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)(1).

Under this standard, a state court decision may be "contrary to" clearly established federal law in one of two ways: either "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or a "state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). On the other hand, a state court decision involves an "unreasonable application" of federal law where it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. Finally, in order to show that the state court made an "unreasonable determination" of the facts, petitioner must demonstrate that the state court's determination of the facts was objectively unreasonable in light of the evidence available. *See*

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there may be some error in state postconviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself"); *Abu Jamal v. Horn*, 2001 WL 1609690, at *129 (E.D. Pa. Dec 18, 2001) (holding that "a viable habeas claim cannot be predicated on petitioner's allegation of error in his PCRA hearing").

Accordingly, a district court is limited to reviewing the proceedings that led to the petitioner's original sentence; claims of procedural impropriety at the state habeas level fall outside its domain. Thus, to the extent petitioner alleges error in his state collateral process rather than in his underlying detention, it is not cognizable. Nevertheless, given the complicated procedural history of this case, I will address petitioner's claims of PCRA court error.

Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001) (citing *Williams*, 529 U.S. at 409); *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000) (citing same).

Here, the Superior Court's procedural decision to hear all of petitioner's claims on the merits, as opposed to reinstating his direct appeal rights *nunc pro tunc*, is neither contrary to nor an unreasonable application of clearly established federal law, nor is it based on an unreasonable determination of the facts. Even if petitioner was denied effective assistance of counsel on direct review,[9] his right to a counseled, appellate review was nonetheless reinstated when the Superior Court decided all of his claims on the merits during his *counseled* PCRA proceedings. *See, e.g.*, *Hartzog v. Brooks*, 2006 U.S. Dist. LEXIS 21620, at *27 (M.D. Pa. Apr. 20, 2006) (finding that a petitioner's direct appeal was reinstated through his PCRA proceedings, when he was permitted to challenge his conviction with no limitation on any issue presented). The Pennsylvania Superior Court's procedure, in which the court conducted a thorough review of the record and decided all of petitioner's claims on the merits, comports with the federal due process requirements of providing adequate and effective appellate review to indigent defendants. *Smith v. Robbins*, 528 U.S. 259, 277 (2000) (holding a "state's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal"). Nor is petitioner constitutionally entitled to a second post-conviction proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (U.S. 1987) (noting that states have no

[9]*See Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (finding that a defendant is entitled to an appellate process "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken"); *Harrington v. Gillis*, 2006 U.S. App. LEXIS 17275, at *37 (3d Cir. 2006) (reiterating that "because [a direct] appeal is a critical stage of criminal proceedings, a defendant is entitled to the effective assistance of counsel in perfecting an appeal").

obligation to provide postconviction proceedings as an avenue of relief); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (holding "the Due Process Clause of the Fifth Amendment does not establish any right to an appeal and certainly does not establish any right to collaterally attack a final judgment of conviction") (citation omitted). No Supreme Court cases dictate an opposite result, and the Pennsylvania Superior Court did not unreasonably apply a legal rule or unreasonably determine the facts in light of the evidence available by choosing to hear petitioner's claims on the merits.

Thus, the Pennsylvania Superior Court's decision to hear petitioner's claims on the merits, versus remanding for a direct appeal *nunc pro tunc*, is not grounds for habeas relief, and has no effect on how I should determine the finality of petitioner's judgment of conviction for statute of limitations purposes. Petitioner's judgment of conviction became final on June 3, 1999, and consequently he had one year from that date to file a habeas petition, absent statutory tolling.[10]

(2) Petitioner's Objection With Regard to Statutory Tolling

With regard to statutory tolling, Magistrate Judge Reuter correctly gave Hernandez the benefit of every doubt by tolling AEDPA's statute of limitations for the entire period from June 4, 1999 to the denial of allocatur by the Pennsylvania Supreme Court on July 24, 2002. During this

[10]Moreover, even if I concluded that petitioner's judgment of conviction did not become final until after the denial of allocatur by the Pennsylvania Supreme Court, petitioner would still be time-barred. Petitioner's judgment of conviction would have been final on October 22, 2002, ninety-days after the Pennsylvania Supreme Court's denial of allocatur, because it is on this day that his time for seeking certiorari to the United States Supreme Court would have expired. *See* S. Ct. R. 13(1); *Morris v. Horn*, 187 F.3d 333, 337 n.1 (3d Cir. 1999). Thus, Hernandez would have had until October 23, 2002, to file for federal habeas relief, yet he still did not file his habeas petition until November 19, 2004, over one year too late.

time, there was a "properly filed" application for post-conviction relief in state court. 28 U.S.C. § 2244(d)(2). However, Hernandez's November 19, 2004 habeas petition was still untimely because he had to file his habeas petition by July 24, 2003.

This leads me to Hernandez's second objection, which is that his second PCRA petition on October 24, 2002 also statutorily tolled the statute of limitations. Specifically, Hernandez argues that Magistrate Judge Reuter improperly deferred to an erroneous Superior Court decision that his second PCRA petition was untimely. (De Novo Objection to Magistrate Judge Report & Recommendation 2-3.) However, federal courts must defer to a Pennsylvania court's determination of whether a petition was timely under state law. *Merritt*, 326 F.3d at 165-66; *Pace*, 544 U.S. at 414; *Estelle*, 502 U.S. at 67. Because the Pennsylvania Superior Court found that Hernandez's second PCRA petition was untimely, and the Pennsylvania Supreme Court denied allocatur, that petition cannot toll the statute of limitations. *Commonwealth v. Hernandez*, 783 MDA 2003, slip op. at 4-5 (Pa. Super. Ct. June 10, 2004.) Thus, Magistrate Judge Rueter did not err in determining that petitioner's second PCRA petition did not toll the statute of limitations.

Petitioner therefore had until July 24, 2003 to file his habeas corpus petition, and because he did not file his petition until more than sixteen months later on November 19, 2004, his petition is time-barred under AEDPA.[11]

III. CONCLUSION

[11]Judge Rueter also determined that the doctrine of equitable tolling did not apply in petitioner's case, and Hernandez has not objected to that determination. I agree that the Third Circuit case law on equitable tolling, including *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616, 618-19 (3d Cir. 1998), *Fahy v. Horn*, 240 F.3d 239, 244-45 (3d Cir. 2001), *Johnson v. Hendricks*, 314 F.3d 159, 162-63 (3d Cir. 2002), and *LaCava v. Kyler*, 398 F.3d 271, 276 (3d Cir. 2005) provide no basis for equitable tolling here.

For the reasons explained above, I will overrule petitioner's objections, adopt the report and recommendations of Magistrate Judge Rueter, and dismiss as untimely the instant petition for writ of habeas corpus.[12] The court is persuaded that reasonable jurists would not find this assessment debatable or wrong. Therefore, Hernandez has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

An appropriate order follows.

[12]Petitioner has also filed a motion for appointment of counsel, but since his petition is untimely and will be dismissed, this motion will also be denied.

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RAFAEL HERNANDEZ, Petitioner,	:	CIVIL ACTION
v.	:	NO. 04-5398
LOUIS FOLINO, *et al.*, Respondents.	:	

Order

And now, this _____ day of July 2006, upon careful consideration of petitioner Rafael Hernandez's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, the response, petitioner's reply to the response, the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, and petitioner's objections, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED.
2. The Report and Recommendation of United States Magistrate Judge Thomas J. Rueter is APPROVED and ADOPTED.
3. The petition for writ of habeas corpus is DISMISSED.
4. Petitioner's motion for appointment of counsel is DISMISSED as MOOT.
5. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability, *see* 28 U.S.C. § 2253(c).
6. The Clerk shall CLOSE this case statistically.

s/ William H. Yohn, Jr., Judge
William H. Yohn Jr., Judge