

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

<b>WILLIAM NESMITH</b>	:	<b>CIVIL ACTION</b>
	:	
v.	:	
	:	
<b>COMMON PLEAS COURT OF PHILADELPHIA COUNTY, et al.</b>	:	<b>NO. 09-4356</b>

**MEMORANDUM AND ORDER**

**L. FELIPE RESTREPO**  
**UNITED STATES MAGISTRATE JUDGE**

**AUGUST 16, 2010**

William Nesmith has filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254. Before the Court is Petitioner’s Motion for Default Judgment (Doc. 12) and Petitioner’s Motion for Judgment As a Matter of Law (Doc. 15) suggesting that petitioner is entitled to relief as a matter of law based on an alleged untimely Response to the habeas petition. However, prior to the filing of petitioner’s two motions, respondent’s Motion for **Enlargement of Time** to File Response to Petition for Writ of Habeas Corpus and Motion for Permission to File Out of Time (Doc. 10) were granted, and respondent thereafter filed the Response to the habeas petition nearly two weeks **prior** to the expiration of the new filing deadline. Thus, the Response to the habeas petition was timely filed.

Moreover, a respondent’s failure to timely respond to a habeas petition does not relieve a petitioner of the burden of proving he is in custody in violation of the Constitution. See Alder v. Burt, 240 F. Supp.2d 651, 677 (E.D. Mich. 2003) (citing Allen v. Perini, 424 F.2d 134, 138 (6th Cir.), cert. denied, 400 U.S. 906 (1970)). Thus, even if the Response to the habeas petition were untimely, a respondent’s tardiness or failure to answer a habeas corpus petition is not grounds for

granting federal habeas relief. See Gordon v. Duran, 895 F.2d 610, 612 (9<sup>th</sup> Cir. 1990) (“The failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default judgment.”); Aziz v. Leferve, 830 F.2d 184, 187 (11<sup>th</sup> Cir. 1987) (“a default judgment is not contemplated in habeas corpus cases”); Allen, 424 F.2d at 138.

Accordingly, Petitioner’s Motion for Default Judgment (Doc. 12) and Petitioner’s Motion for Judgment As a Matter of Law (Doc. 15) are denied. An implementing Order follows.