

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

WILLIAM D'AGOSTINO : CIVIL ACTION  
: :  
v. : NO. 03-6181  
: :  
FRANKLIN J. TENNIS, et al. :

**MEMORANDUM AND ORDER**

**Juan R. Sánchez, J.**

**April 19, 2005**

William D'Agostino asks this Court to reject the Report of Magistrate Judge Charles B. Smith, which recommends denying D'Agostino's habeas corpus petition. Because D'Agostino has apparently been abandoned by his attorney, we will allow 30 days for a counseled response.

Judge Smith filed his Report and Recommendation on March 8, 2005. On April 1, 2005, D'Agostino wrote a letter to the Court; the letter is stamped received April 6, 2005.<sup>1</sup> No objection has been docketed. We will give D'Agostino the benefit of the doubt<sup>2</sup> and take his letter as an objection to Judge Smith's Report and Recommendation.

D'Agostino's letter states::

Enclosed please find a copy of a Court Order dated 12-31-03 by the Honorable Norma L. Shapiro [ordering D'Agostino to file his habeas petition on the proper form], a Court Order dated 2-2-04 by Your Honor [ordering the Montgomery County District Attorney to file a response, signed by formerly assigned Magistrate Judge James R. Mellinson], and a letter dated 3-16-04 from Gina A. Capuano, Esq., to myself. Please note that Ms. Capuano confirms entering her appearance on my behalf in the above-captioned matter.

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<sup>1</sup>A *pro se* prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998).

<sup>2</sup>*Pro se* litigants are entitled to deference. *Maleng v. Cook*, 490 U.S. 488, 493, 109 S.Ct. 1923, 1927 (1989).

Since that time I have not seen, spoken to or heard from her, so I naturally assumed that she was going ahead with the action. Just this morning I learned through a third party that she is no longer representing me, claiming that the action is time-barred. (A supposed issue that escaped her attention for over a year!)

As a review of the enclosed documents will indicate otherwise, and as the District Attorney made no mention of this issue in his response to my Petition, I pray that you will either look into this matter or appoint an attorney to protect my rights in this action.

The docket reveals Attorney Capuano entered her appearance on behalf of D'Agostino on March 5, 2005. Capuano's letter on March 16, 2005, to D'Agostino states:

Please be advised [I] have entered my appearance in this matter. Therefore, you should direct all correspondence to me, not the Judge!

Also, please send any additional paperwork which have not already provided to Kevin that you believe is relevant to your case.

I have not yet received the District Attorney's response to your petition. When I do, I will file our reply and copy you with same.

The docket shows the District Attorney was ordered to answer D'Agostino's petition on February 4, 2004, and filed an answer on February 24, 2004, nine days before Attorney Capuano's entry of appearance and 20 days before Capuano's letter to D'Agostino. The docket shows no filing by Attorney Capuano after her entry of appearance.

A habeas petitioner does not have a constitutional right to counsel. "Although the Constitution guarantees the right to counsel on direct appeal, there is no right to counsel when mounting collateral attacks." *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 1720 (1993) (internal citation omitted), citing *Pennsylvania v. Finley*, 481 U.S. 551, 555-56, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987).

When counsel enters her appearance, however, she may not abandon her client mid-stream. Rules of Professional Conduct 1.16. D'Agostino's letter of complaint was a timely response to the

Magistrate Judge's Report and Recommendation. Therefore, counsel is directed to file Amended Objections or an *Anders*<sup>3</sup> brief within 30 days of this Order. Accordingly, we enter the following:

**ORDER**

And now this 19th day of April, 2005, it is hereby ORDERED that Counsel of Record for the Petitioner is directed to file Amended Objections or an *Anders* brief to the Report and Recommendation of Magistrate Judge Smith within 30 days of this Order.

BY THE COURT:

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Juan R. Sánchez, J.

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<sup>3</sup> *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).