

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

2009 JAN 23 AM 11:16

M. Sanchez

GEORGE A. DEMPSEY,)
)
Petitioner,)
)
v.)
)
AL ST. LAWRENCE and)
THE ATTORNEY GENERAL OF THE)
STATE OF GEORGIA,)
)
Respondents.)
)

CASE NO. CV408-142

O R D E R

Before the Court is the Magistrate Judge's Report and Recommendation (Doc. 9), to which objections have been filed (Docs. 16, 17, & 22). After a careful de novo review, the Court concurs with the Magistrate Judge's Report and Recommendation. Accordingly, the Report and Recommendation is **ADOPTED** as the Opinion of this Court. Mr. Dempsey's objections are rejected for the reasons that follow, and his Habeas Petition is **DISMISSED WITHOUT PREJUDICE**. The Clerk of Court is **DIRECTED** to **CLOSE** this case.

The Magistrate Judge recommends that Petitioner's Habeas Petition be dismissed for failure to exhaust state remedies, as Mr. Dempsey has neither appealed his conviction nor filed a state habeas petition. (Doc. 9 at


2.) Mr. Dempsey responds that any appeal or collateral attack on his state conviction would be futile. (Doc. 16 at 2.) In support of this position, he points to a Motion to Withdraw his Plea filed in state court, which has been dormant for over six months. However, that dormant Motion cannot support a finding of futility; courts find futility only when the state court's failure to respond to a habeas petition is extreme. See Hollis v. Davis, 912 F.2d 1343 (11th Cir. 1990) (finding that further exhaustion of state remedies was unnecessary where Plaintiff had filed repeated habeas petitions for over 25 years without an adequate response), Breazeale v. Bradley, 582 F.2d 5 (5th Cir. 1978) (finding futility where state court had allowed prisoner's habeas petition to be completely dormant for over a year without an adequate explanation). In this case, Mr. Dempsey has not even filed a state habeas petition on which to claim dormancy, and, thereby, futility. Moreover, even if this Court were to consider his Motion to Withdraw his Plea sufficient to take the place of a habeas petition, his wait is not sufficiently egregious to justify a finding of futility.

Accordingly, after careful consideration of the Report and Recommendation, and the objections to the same, the Court **ADOPTS** the Report and Recommendation. (Doc. 9.) Mr.

Dempsey's Habeas Petition is **DISMISSED WITHOUT PREJUDICE**.

The **Clerk of Court** is **DIRECTED** to **CLOSE** this case.

SO ORDERED this 28th day of January, 2009.



WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA