

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ROBERT LEE HINSON, JR.,
Petitioner,

vs.

Case No. 3:10cv480/RV/MD

EDWIN G. BUSS,
Respondent.

ORDER

Before the court is petitioner's motion for summary judgment (doc. 29). Petitioner argues summary judgment is appropriate because respondent failed to comply with this court's order granting respondent an extension of time to file its response until May 25, 2011 (doc. 18). Petitioner filed this motion by mailbox rule on June 6, 2011. The court issued an order on June 7, 2011, directing respondent to file an answer to the petition by June 27, 2011 (doc. 26). In light of this order, petitioner's motion for summary judgment is premature.

Petitioner is also advised that to receive the relief he requests—namely immediate discharge from custody based on respondent's failure to comply with an order of the court (doc. 29, p.3)—the proper motion is one for default judgment. Fed. R. Civ. P. 55(a). However, the Eleventh Circuit has held that granting default judgment based upon a respondent's tardiness or failure to answer a petition is not appropriate in habeas corpus cases. *Aziz v. Leferve*, 830 F.2d 184, 187 (11th Cir. 1987) ("The district court should have proceeded as if it had received a return from the state authorities."); *Goodman v. Keohane*, 663 F.2d 1044, 1048 n.4 (11th Cir. 1981)

(adhering to prior Fifth Circuit decisions¹ rejecting default judgment based on the government's tardiness in responding to the petition); see *also* 28 U.S.C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."). Instead, the court should treat the respondent's procedural default defenses as waived and proceed to address the petition on the merits. *Shukwit v. United States*, 973 F.2d 903, 904 (11th Cir. 1992) (§ 2255 context). *But see* 28 U.S.C. § 2254(b)(3) (state must expressly waive nonexhaustion defense).

Accordingly it is ORDERED:

1. Petitioner's motion for summary judgment (doc. 29) is DENIED.

DONE AND ORDERED this 15th day of June, 2011.

/s/ *Miles Davis*

MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

¹ Former Fifth Circuit decisions issued before October 1, 1981, are binding precedent on the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).