

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

SHARON BRIDGEWATER,	:	PRISONER HABEAS CORPUS
Petitioner,	:	28 U.S.C. § 2254
	:	
v.	:	
	:	
RANDY RICH, Superior Court	:	CIVIL ACTION NO.
Judge of Gwinnett County,	:	1:11-CV-3828-ODE-AJB
Respondent.	:	

**ORDER FOR SERVICE OF REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

The Report and Recommendation of the United States Magistrate Judge, made in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rule 72, is attached. The same shall be filed and a copy, together with a copy of this Order, shall be served upon counsel for the parties and upon any unrepresented parties.

Pursuant to 28 U.S.C. § 636(b)(1)(C), within fourteen (14) days of service of this Order, each party may file written objections, if any, to the Report and Recommendation. If objections are filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Report and

Recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983).

The Clerk is **DIRECTED** to submit the Report and Recommendation with objections, if any, to the District Judge after expiration of the above time period.

IT IS SO ORDERED and DIRECTED, this 22nd day of November, 2011.



ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

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**UNITED STATES MAGISTRATE JUDGE’S
ORDER AND FINAL REPORT AND RECOMMENDATION**

Petitioner, *pro se*, resides in San Francisco, California. [Doc. 1-1 at 1.]

Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254 regarding her September 2007 convictions in the State Court of Gwinnett County, Georgia for misdemeanor traffic offenses. [Doc. 1; Doc. 1-1.] The undersigned finds that the Court lacks jurisdiction over the petition in this case because Petitioner was not in custody when she filed it.

On September 19, 2007, Petitioner pled guilty to reckless driving and driving a motor vehicle without proof of insurance, both of which are misdemeanor crimes under Georgia law. [Doc. 1 at 1; Doc. 1-1 at 3; Doc. 1-2 at 2.] The Gwinnett County State Court sentenced Petitioner to twelve months confinement, but allowed her to serve the sentence on probation. [*Id.*] Petitioner contends that her guilty plea was coerced and,

thus, unconstitutional. [Doc. 1 at 1, 3, 5-6; Doc. 1-1 at 4-5.] She seeks a “Retroactive Writ of habeas corpus” that declares her convictions unconstitutional and expunges the convictions and associated records. [Doc. 1-1 at 19-20.]

Petitioner previously filed two § 2254 petitions in this Court. The Court dismissed without prejudice the first petition, which Petitioner filed on September 22, 2008, because Petitioner did not comply with the Court’s Order to either pay the filing fee or submit an application to proceed *in forma pauperis*. Order, *Bridgewater v. Georgia*, No. 1:08-cv-2971-ODE (N.D. Ga. Dec. 16, 2008). Petitioner filed the second petition on August 4, 2009, and the Court dismissed that petition without prejudice because Petitioner had not exhausted her state remedies. Order, *Bridgewater v. Gwinnett County*, No. 1:09-cv-2131-ODE (N.D. Ga. Sept. 30, 2009). Petitioner filed her petition in this case, the third action, on November 4, 2011.

A federal court has jurisdiction over a § 2254 petition only if the petitioner is “in custody pursuant to the judgment of a State court” at the time she files the petition challenging that judgment. 28 U.S.C. § 2254(a); *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). A person who is serving a sentence of probation pursuant to a state court’s judgment at the time she files her § 2254 petition is “in custody” for purposes of § 2254(a). *Stacey v. Warden*, 854 F.2d 401, 403 (11th Cir. 1988) (“Although a

petitioner need not be physically ‘in custody’ for subject matter jurisdiction to attach, the state must exercise some control over the petitioner to satisfy the ‘in custody’ requirement.” (citations omitted)); *Birdsell v. Alabama*, 834 F.2d 920, 921 (11th Cir. 1987). However, a petitioner whose state sentence has expired, including any period of probation, when she files her § 2254 petition is not “in custody,” and the federal court lacks jurisdiction. *Birdsell*, 834 F.2d at 921.

Petitioner’s filings demonstrate that she was not “in custody” when she filed her petition in this case on November 4, 2011. Her sentence resulting from the September 19, 2007 conviction that she challenges in her petition was for a total of twelve months, which she was allowed to serve on probation. Petitioner’s probation ended – and, thus, her sentence expired – over four years before she filed her petition. *See* O.C.G.A. § 17-10-3 (providing that misdemeanors may be punished by imprisonment that does not exceed twelve months); *Kovacs v. State*, 227 Ga. App. 870, 872, 490 S.E.2d 539, 541 (“The total period of probation and confinement (if any) may not exceed the maximum time provided as punishment for the crime.”) (quotation marks omitted). Thus, this Court lacks jurisdiction over the subject-matter of this case.¹ *See Birdsell*, 834 F.2d

¹ Even if Petitioner was still on probation at the time she filed her first § 2254 petition in September 2008, that action was dismissed and does not change the jurisdictional analysis. *See Reiner v. Remington*, 217 Fed. Appx. 681, 682 (9th Cir.

at 921-22 (holding that district court lacked jurisdiction over § 2254 petition because the petitioner's confinement and subsequent probationary period for the state crimes he challenged ended before he filed the petition).

Accordingly, the undersigned **RECOMMENDS** that this habeas action be **DISMISSED** for lack of jurisdiction.

The undersigned **FURTHER RECOMMENDS** that petitioner be denied a certificate of appealability because the jurisdictional issue is dispositive and not reasonably debatable. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

The Court **GRANTS** petitioner's motion to proceed *in forma pauperis*, [Doc. 2].

Finally, the undersigned **DIRECTS** the Clerk to terminate the reference to the undersigned.

2007) (affirming dismissal of second § 2254 petition for lack of jurisdiction where petitioner was on probation when he filed his first petition that was dismissed without prejudice for lack of exhaustion but was no longer on probation when he filed the second petition); *Lefkowitz v. Fair*, 816 F.2d 17, 21-24 (1st Cir. 1987) (same).

IT IS SO RECOMMENDED, ORDERED and DIRECTED, this 22nd day of
November, 2011.

A handwritten signature in blue ink, appearing to be 'MJB', is written above a horizontal line.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE