UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

BERNARD PITTS,)	Case No.: 3:08 CV 497
Petitioner)	JUDGE SOLOMON OLIVER, JR.
v.)	
WARDEN, ALLEN CORRECTIONAL)	
INSTITUTION,)	
Respondent)	ORDER

I. BACKGROUND

Petitioner Bernard Pitts ("Petitioner" or "Pitts") filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, wherein he challenges the constitutionality of his five-year consecutive prison sentence on two counts of cocaine trafficking and one count of possession of cocaine. Petitioner asserts three grounds for relief: (1) the imposition of consecutive sentences of more than one year for each of the counts of drug trafficking and six months for drug possession under the Ohio sentencing statute re-fashioned by *State v. Foster*, 109 Ohio St. 3d 1 (Ohio 2007), violates the *Ex Post Facto* Clause and due process clause of the United States Constitution; (2) retroactive application of the sentencing law fashioned by judicial severance in *Foster* violates due process; and (3) upon remand, any sentence imposed under *Foster*, other than the minimum concurrent terms, is objectively contrary to and an unreasonable application of federal law. (Pet. at 5-6). Respondent filed an Answer/Return of Writ on July 3, 2008. (ECF No. 6.) Petitioner did not file a Traverse.

II. REPORT AND RECOMMENDATION

The case was referred to Magistrate Judge Nancy A. Vecchiarelli ("Magistrate Judge") for preparation of a Report and Recommendation ("R&R"). The Magistrate Judge issued her R&R (ECF No. 7) on September 15, 2008, recommending that the Petition be denied. The Magistrate Judge concluded that Petitioner's first claim was not contrary to clearly-established federal law because "the Supreme Court has never held that the retroactive application of a statute that results in the loss of a presumption of a minimum sentence within a sentencing range violates the Ex Post Facto Clause or the due process clause of the United States Constitution." (R&R at 10-11.) The Magistrate Judge concluded that Petitioner's second ground for relief, which merely repeats the same assertions made in his first ground for relief, is likewise not contrary to clearly-established law. (Id. at 12.) Finally, the Magistrate Judge construed Petitioner's third ground for relief as asking the court "to declare pursuant to its habeas authority to order Ohio's courts to re-sentence Pitts to the minimum sentence in each sentencing range for his three offenses and to order them to sentence him to concurrent sentences." (*Id.*) The Magistrate Judge concluded that the third ground for relief is not cognizable because it requests a particular kind of relief predicated on the assumption that habeas relief is warranted, rather than describing a constitutional violation resulting in his state custody. (Id.)

III. THE COURT'S FINDINGS

As of the date of this Order, Petitioner has not filed objections to the R&R. By failing to do so, he has waived the right to appeal the Magistrate Judge's R&R. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985). Furthermore, the court finds, after careful review of the Magistrate Judge's R&R and all other relevant documents, that the Magistrate Judge's conclusions are fully supported by the record and controlling case law. Accordingly, the court adopts

as its own the Magistrate Judge's R&R. (ECF No. 7.) Pitts's Petition for Habeas Corpus is hereby denied. The court further certifies that, pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR. UNITED STATES DISTRICT JUDGE

October 28, 2008