

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

OMAR GUTIERREZ,

Petitioner,

v.

**WARDEN, BELMONT
CORRECTIONAL INSTITUTION,**

Respondent.

**CASE NO. 2:17-CV-1119
Judge George C. Smith
Magistrate Judge Vascura**

OPINION AND ORDER

On January 23, 2019, the Magistrate Judge issued an Order and Report and Recommendation recommending that the Motion for Federal Relief Pursuant to 28 U.S.C. § 2254 be denied and that Petition for a writ of habeas corpus be dismissed. (ECF No. 28.) Petitioner has filed an Objection to the Magistrate Judge's Report and Recommendation. (ECF No. 31).

Petitioner argues that his convictions pursuant to his guilty plea in the Delaware County Court of Common Pleas on possession of cocaine and complicity to trafficking in cocaine violate the Double Jeopardy Clause and Ohio law because he pleaded guilty in federal court and has already been punished on federal charges involving these same acts. He objects to the recommendation of dismissal of these claims as failing to provide a basis for relief. Petitioner again argues that application of Ohio law to permit his punishment for conduct considered at his sentencing hearing in federal court violated *Blockburger v. United States*, 284 U.S. 299 (1932).

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. As discussed by the Magistrate Judge's Petitioner's claim regarding errors in the application of State law does not provide him relief. 28 U.S.C. § 2254(a). Further, the Double Jeopardy Clause does not bar

his successive prosecutions by the State and federal government for crimes arising out of the same acts. *See United States v. Rivera*, 86 F. App'x 922, 923 (6th Cir. 2004) (citing *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985)).

For these reasons and for the reasons detailed in the Magistrate Judge's Order and Report and Recommendation, Petitioner's Objection (ECF No. 31) is **OVERRULED**. The Report and Recommendation (ECF No. 28) is **ADOPTED** and **AFFIRMED**. The Motion for Federal Relief Pursuant to 28 U.S.C. § 2254 (ECF No. 27) is **DENIED** and this action is hereby **DISMISSED**.

The Court **DECLINES** to issue a certificate of appealability.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v. Fisher*, —U.S. ——. —, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal).

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes that jurists

of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

The Court is not persuaded that reasonable jurists would debate the dismissal of this action. The Court therefore **DECLINES** to issue a certificate of appealability.

The Court certifies that the appeal would not be in good faith and that an application to proceed *in forma pauperis* on appeal should be **DENIED**.

IT IS SO ORDERED.

s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT