UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6398

DONALD LEE CURTIS,

Petitioner - Appellant,

v.

ERIK A. HOOKS,

Respondent - Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:17-cv-01101-CCE-JEP)

Submitted: July 18, 2019 Decided: July 23, 2019

Before WILKINSON, AGEE, and THACKER, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Donald Lee Curtis, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

"Appendix A."

PER CURIAM:

Donald Lee Curtis seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Curtis has not made the requisite showing. Accordingly, we deny Curtis' motion for a certificate of appealability, deny his motion to assign counsel, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: July 23, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6398
(1:17-cv-01101-CCE-JEP)

DONALD LEE CURTIS

Petitioner - Appellant

v.

ERIK A. HOOKS

Respondent - Appellee

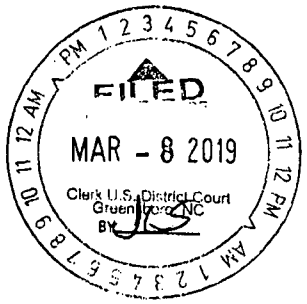
J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

3.



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
1:17-CV-1101

DONALD LEE CURTIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER and JUDGMENT
	)	
ERIK A. HOOKS,	)	
	)	
Respondent.	)	

On January 2, 2019, the United States Magistrate Judge's Recommendation was filed and notice was served on Petitioner pursuant to 28 U.S.C. § 636. *See* Doc. 11. Petitioner filed timely objections to the Recommendation. Doc. 13. The Court has reviewed Petitioner's objections *de novo* and finds they do not undermine the Magistrate Judge's analysis, which is affirmed and adopted.

IT IS THEREFORE ORDERED AND ADJUDGED that Respondent's Motion for Summary Judgment, Doc. 7, is GRANTED, the Petition for a Writ of Habeas Corpus, Doc. 1, is DENIED, and this action is DISMISSED.

Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is DENIED.

This, the 8th day of March, 2019.

UNITED STATES DISTRICT JUDGE

("Appendix B."
4.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DONALD LEE CURTIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:17CV1101
	)	
ERIK A. HOOKS,	)	
	)	
Respondent.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Donald Lee Curtis, a prisoner of the State of North Carolina, has brought a Petition [Doc. #1] seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. As shown in the record on appeal from the state court (State's Brief Ex. 3 [Doc. #8-4]), on March 12, 2014, Petitioner was convicted by a jury in the Superior Court of Forsyth County, North Carolina, of two counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, two counts of second-degree kidnapping, two counts of assault with a deadly weapon, one count of first-degree burglary, and one count of possession of a firearm by a felon in cases 13CRS10929-31 and 13CRS55189-90. Petitioner then entered a plea agreement regarding his sentence. Under that agreement, his charges were consolidated into three groups, each with a Class D felony in the group, and with a prior record level of VI. Petitioner was then to be sentenced in the presumptive range for each of the Class D felonies, with the three sentences to run consecutively. In return, the State agreed not to seek aggravating factors or a firearm enhancement. Based on this agreement, Petitioner received

"Appendix C."

5.

three consecutive sentences of 128 to 166 months of imprisonment. Petitioner pursued a direct appeal, but was ultimately unsuccessful in that appeal. State v. Curtis, 246 N.C. App. 107, 782 S.E.2d 522, aff'd, 369 N.C. 310, 794 S.E.2d 501 (2016). He then filed his current Petition, which Respondent opposes with a Motion for Summary Judgment [Doc. #7].

Facts

The basic facts of the case, as set out on direct appeal by the North Carolina Court of Appeals, are as follows:

> In the early morning hours of 30 April 2013, three armed black males, two with handguns and one with a shotgun, busted through the door of a residence at 2400 Harper Road in Clemmons where Megan Martin and Refeigo Pina lived. At the time of the break in, Christopher Cowles and Justin Collins were also at the residence. Cowles was with Pina in the downstairs living room where the intruders entered learning how to play Pina's guitar. Justin Collins and Martin were asleep in the upstairs bedroom.
>
> As the intruders entered, they asked where Collins was, instructed each other to get the cell phones, and ordered Cowles and Pina to put their hands up. Cowles attempted to quickly dial 911 before he tossed his cell phone to the side of the couch that he and Pina were sitting on. The intruders did not get either Cowles' or Pina's cell phones. Cowles recognized the two intruders with handguns (the "other intruders") and inquired why they were doing what they were doing. The third intruder, whom Cowles did not know but whom Cowles was later able to identify as defendant with 100% certainty, then placed his shotgun in Cowles' face and threatened to shoot Cowles if Cowles was not quiet. Pina was held at gunpoint by one of the other intruders while the third intruder looked around for Collins. Upon repeated questioning concerning Collins' whereabouts, Cowles told the intruders that Collins was upstairs.
>
> The intruders then ushered Cowles and Pina upstairs with guns to their backs. Cowles and Pina did not go upstairs voluntarily. Once upstairs, Cowles cut the lights on and tapped Collins on the foot to wake him up. As Collins was waking up, one of the other intruders pulled the covers back and struck Collins on the side of the head with a handgun. Martin was awakened by the commotion and was frantic. The intruders directed Cowles, Pina, Collins, and Martin into the

corner of the bedroom and told them not to move. As they were moving to the corner, one of the other intruders struck Pina in the face with a handgun.

Defendant held the shotgun pointed towards Cowles, Pina, Collins, and Martin while the other intruders tore the bedroom apart. The other intruders took Collins' cellphone and wallet with approximately $2,000 in it from the nightstand, took cash from Martin's purse, and took Martin's iPhone from the dresser.

The other intruders then instructed defendant to stay with Cowles, Pina, Collins, and Martin as the other intruders went back downstairs. Cowles could hear lots of banging and smashing downstairs, like things were being destroyed. Defendant stayed at the top of the stairs with the shotgun pointed at Cowles, Pina, Collins, and Martin to keep them from moving for several minutes before telling them not to move and backing down the stairs. The intruders then fled from the apartment, slashing tires on Cowles', Pina's, Collins', and Martin's vehicles upon their exit. In addition to the items taken from upstairs, the intruders took a PlayStation 3, Pina's guitar, and car keys from downstairs.

Besides Cowles' identification of defendant, both Collins and Martin were 100% certain that defendant was the intruder with a shotgun. Collins recognized defendant from time they spent incarcerated together.

Curtis, 246 N.C. App. at 108-09, 782 S.E. 2d. at 523-24.

Petitioner's Claim

Petitioner raises a single claim for relief in his Petition. He asserts that his convictions for second-degree kidnapping violated his constitutional right to be free from double jeopardy. Petitioner provides little explanation or reasoning for the claim in his Petition, but instead only recites basic facts from the crimes. However, in his Response [Doc. #10] to Respondent's Motion, Petitioner argues that the conduct upon which the kidnapping convictions were based coincided with the conduct associated with the robberies of which Petitioner was also convicted. Petitioner believes that this fact constitutes double jeopardy.

AEDPA Standards of Review

In considering Petitioner's claim, the Court must apply a highly deferential standard of review in connection with habeas claims "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d). More specifically, the Court may not grant relief unless a state court decision on the merits "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. "Clearly established Federal law" includes only "'holdings, as opposed to the dicta,'" of the United States Supreme Court. White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (quoting Howes v. Fields, 565 U.S. 499, 505 (2012)). A state court decision is "contrary to" United States Supreme Court precedent if the state court decision either "arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law" or "confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme] Court and nevertheless arrives at a result different" from the United States Supreme Court. Williams v. Taylor, 529 U.S. 362, 406 (2000). A state court decision involves an "unreasonable application" of Supreme Court case law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407; see also id. at 409–11 (explaining that "unreasonable" does not mean merely "incorrect" or "erroneous"). "[E]ven 'clear error' will not suffice." White, 134 S. Ct. at 1702 (citing Lockyer v. Andrade, 538 U.S. 63, 75–76 (2003)). "Rather, 'as a condition for obtaining habeas corpus

from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Id. (quoting Harrington v. Richter, 562 U.S. 82, 103 (2011)). Finally, this Court must presume state court findings of fact correct unless clear and convincing evidence rebuts them. 28 U.S.C. § 2254(e)(1).

Discussion

Here, Petitioner raised at least a version of his claim on direct appeal in the state courts, and the North Carolina Court of Appeals decided that claim on the merits. It explained:

> In North Carolina, any person who unlawfully confines, restrains, or removes from one place to another, any other person sixteen years old or older without the consent of such person is guilty of kidnapping if the confinement, restraint, or removal is for a purpose enumerated in the statute, including "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]" N.C. Gen.Stat. § 14–39(a) (2015). "If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree...." N.C. Gen.Stat. § 14–39(b).
>
> Recognizing potential double jeopardy concerns in cases where the restraint necessary for kidnapping, that is "a restriction, by force, threat or fraud, without a confinement[,]" State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978), is essential to other charges, our Supreme Court explained as follows:
>
> > It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that [N.C. Gen.Stat. §] 14–39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping, so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. [To avoid the constitutional issue], we construe the

> word "restrain," as used in [N.C. Gen.Stat. §] 14–39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.
>
> On the other hand, it is well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other (e.g., a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such larceny). In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.

Id. at 523–24, 243 S.E.2d at 351–52. Thus, in Fulcher, the Court held there was "no violation of the constitutional provision against double jeopardy in the conviction and punishment of the defendant for ... two crimes against nature and also for ... two crimes of kidnapping[,]" id. at 525, 243 S.E.2d at 352, because

> [t]he evidence for the State [was] clearly sufficient to support a finding by the jury that the defendant bound the hands of each of the two women, procuring their submission thereto by his threat to use a deadly weapon to inflict serious injury upon them, thus restraining each woman within the meaning of [N.C. Gen.Stat. §] 14–39, and that his purpose in so doing was to facilitate the commission of the felony of crime against nature.

Id. at 524, 243 S.E.2d at 352. The Court further explained that, based on the evidence, "the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature even occurred[,]" and "[t]he restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time." Id.

"In accordance with [the Court's] analysis of the term 'restraint' [in Fulcher], [the Court later] construe[d] the phrase 'removal from one place to another' [in N.C. Gen.Stat. § 14–39] to require a removal separate and apart from that

which is an inherent, inevitable part of the commission of another felony." State v. Irwin, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). The analysis applies equally to "confinement" in N.C. Gen.Stat. § 14–39, which "connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." Fulcher, 294 N.C. at 523, 243 S.E.2d at 351. More recently, the Court has explained that

> in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, [a trial court] must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

State v. Ripley, 360 N.C. 333, 340, 626 S.E.2d 289, 293–94 (2006).

Curtis, 246 N.C. App. at 110-12, 782 S.E. 2d at 525-26. The North Carolina Court of Appeals then went on to discuss the facts of similar North Carolina cases involving kidnappings and robberies before addressing the facts of Petitioner's case in light of the other cases. The court stated that although "the movement and restraint of Cowles and Pina may have occurred during the course of all the robberies, we are not convinced that the removal of Cowles and Pina from downstairs to upstairs was integral to or inherent in the armed robberies of Cowles and Pina, or the armed robberies of Collins and Martin." Id. at 117, 782 S.E. 2d at 529. The court went on to explain that Petitioner and his associates robbed or attempted to rob Cowles and Pina in the living room. By the time they moved Cowles and Pina upstairs, any robbery of those men was complete and the movement of Cowles and Pina from downstairs to the upstairs was not integral to the robberies. The court further noted that the movement of

Cowles and Pina from downstairs to upstairs was more significant than, and distinguishable from, other prior cases, and was a separate course of conduct designed to prevent Cowles and Pina from hindering the subsequent robberies of Collins and Martin. The court also noted that moving Cowles and Pina upstairs subjected them to greater danger. Based on this extensive analysis, the court concluded that, under the case law regarding kidnapping and robbery in North Carolina, "the evidence in this case is sufficient to sustain the separate second-degree kidnapping convictions." Id. at 119, 782 S.E.2d at 530. That determination was affirmed *per curiam* by the Supreme Court of North Carolina. State v. Curtis, 369 N.C. 310, 794 S.E.2d 501 (2016).

Petitioner contends that the state court decision is incorrect and that he was subjected to double jeopardy because the conduct supporting his kidnapping convictions was inherently part of the conduct necessary to support his robbery convictions. In Blockburger v. United States, 284 U.S. 299, 304 (1932), the Supreme Court announced a test for determining whether two separate crimes constitute the same offense:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

If two offenses are not the 'same' under Blockburger, it is presumed that cumulative punishments can be assessed. Missouri v. Hunter, 459 U.S. 359, 367 (1983) (citing American Tobacco Co. v. United States, 328 U.S. 781 (1946)). In addition, even if two criminal statutes are the 'same' under the Blockburger test, it does not mean that the Double Jeopardy Clause precludes the imposition of cumulative punishments pursuant to those statutes. Hunter, 459

U.S. at 369. The Supreme Court explained that if a state legislature has specifically authorized cumulative punishment for those charges, "regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." Hunter, 459 U.S. at 369. Thus, as explained by the Court of Appeals for the Fourth Circuit, where a petitioner raises a claim under the Double Jeopardy Clause not for multiple prosecutions for the same offense but instead for subjecting him to multiple punishments for the same offense, the matter is a question of state legislative intent.

> When the government convicts a defendant for two crimes based on identical conduct, the Fifth Amendment requires that the sentencing court "determine whether the legislature ... intended that each violation be a separate offense." Garrett v. United States, 471 U.S. 773, 778, 105 S. Ct. 2407, 85 L.Ed.2d 764 (1985). If the legislature did intend each violation to be a separate offense, then the Double Jeopardy Clause provides no protection against multiple punishments. But if the legislature did not intend to punish the same conduct twice, the Double Jeopardy Clause bars two or more punishments for the same offense, and thus "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983).
>
> "When the claim is made in relation to state offenses, federal courts are essentially bound by state court interpretations of state legislative intent on this score." Thomas v. Warden, 683 F.2d 83, 85 (4th Cir. 1982). That is because, when the charged offenses violate state law, the double jeopardy analysis hinges entirely on the state-law question of what quantum of punishment the state legislature intended. See Sanderson v. Rice, 777 F.2d 902, 904 (4th Cir. 1985) ("The Supreme Court has placed the state legislative definition of the crime at the heart of double jeopardy analysis."). Once a state court has answered that state-law question, "[t]here is no separate federal constitutional standard requiring that certain actions be defined as single or as multiple crimes." Id.

Jones v. Sussex I State Prison, 591 F.3d 707 (4th Cir. 2010).

The elements of second-degree kidnapping in North Carolina, as explained by the North Carolina Court of Appeals in denying Petitioner's direct appeal, are that the defendant: (1) confined, restrained, or removed from one place to another, a person 16 years of age or over; (2) without consent; (3) for the purpose of facilitating the commission of a felony or facilitating flight following commission of a felony; and (4) the victim was released in a safe place and unharmed. Curtis, 246 N.C. App. at 110, 782 S.E.2d at 525; see also N. C. Gen. Stat. § 14-39. The elements of robbery with a dangerous weapon in North Carolina are: "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use, or threatened use of firearms or other dangerous weapon, implement, or means; and (3) a danger or threat to the life of the victim." State v. Murrell, 370 N.C. 187, 194, 804 S.E. 2d 504, 509 (2017) (footnote omitted) (citing State v. Moore, 279 N.C. 455, 458, 183 S.E. 2d 546, 548 (1971) and N.C. Gen. Stat. § 14-87(a).) As another court stated succinctly in applying the Blockburger test to the North Carolina crimes of kidnapping and armed robbery, "[t]he kidnapping statute requires only restraint for the purpose of facilitating the commission of a felony or flight from the felony, not the actual commission of the felony. The two crimes have different essential elements and petitioner's indictments, convictions and sentences do not amount to double jeopardy." Robinson v. North Carolina, No. 5:09-HC-2012-BO, 2010 WL 11619228, at *3 (E.D.N.C. Mar. 4, 2010) (unpublished). Moreover, in Petitioner's case, the North Carolina courts found specifically that the removal of the victims upstairs was a separate and distinct restraint from the restraint inherent to the armed robberies, and was sufficient to

sustain the separate second-degree kidnapping convictions under state law. As such, no double jeopardy problem exists. Caldwell v. Wood, No. 3:07cv41, 2010 WL 5441670, at *14 (W.D.N.C. Dec. 28, 2010) (unpublished). Petitioner attempts to avoid this by arguing, essentially, that the North Carolina Court of Appeals' conclusion that separate restraints occurred was incorrect under preexisting state law. However, habeas review does not allow for this Court to rule on state court interpretations of state law. In any event, there was a clear factual basis for the Court of Appeals' conclusion that the robbery or attempted robberies of Cowles and Pina occurred prior to their removal to the upstairs bedroom and that the removal was not necessary in order to commit either those crimes or the subsequent robbery of Collins. The denial of Petitioner's claim by the state court does not amount to a decision that is contrary to, or an unreasonable application of clearly established law as set forth by the United States Supreme Court. Likewise, Petitioner has failed to establish that the state court's judgment resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Respondent's Motion for Summary Judgment should be granted and the Petition should be denied.

IT IS THEREFORE RECOMMENDED that Respondent's Motion for Summary Judgment [Doc. #7] be granted, that the Petition [Doc. #1] be denied, and that this action be dismissed.

This, the 2nd day of January, 2019.

/s/ Joi Elizabeth Peake
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.