No. 22-3783

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH TETAK,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

ORDER

Before: SUTTON, Chief Judge; NORRIS and McKEAGUE, Circuit Judges.

Joseph Tetak, an Ohio prisoner, petitions for rehearing of our January 31, 2023, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying his motion for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appx. A

No. 22-3783

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH TETAK,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

ORDER

Before: CLAY, Circuit Judge.

Joseph Tetak, an Ohio prisoner proceeding pro se, appeals from a district court judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Tetak seeks a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b), and also moves for leave to proceed in forma pauperis ("IFP") on appeal, *see* Fed. R. App. P. 24(a)(5).

In 2018, Tetak was indicted on one count of assault (Count 1), two counts of felonious assault (Counts 2 and 4), two counts of kidnapping with firearm specifications (Counts 3 and 6), and one count of rape with a firearm specification (Count 5). *See State v. Tetak*, No. CT2019-0052, 2020 WL 3057840, at *1 (Ohio Ct. App. June 8, 2020). In exchange for the dismissal of Counts 4 and 6, Tetak pleaded guilty to one count of assault, one count of aggravated assault, one count of kidnapping with a firearm specification, and one count of sexual battery with a firearm specification. *Id.* The trial court imposed sentences of 6 months' imprisonment on the misdemeanor assault charge, 18 months' imprisonment on the aggravated assault charge, 9 years' imprisonment on the kidnapping charge, and 60 months' imprisonment on the sexual battery charge. *Id.* The court specified that Tetak's sentences for the kidnapping and sexual battery convictions were to run consecutively, for an aggregate sentence of 15 years' imprisonment. *Id.*

Appx. B

On direct appeal, Tetak argued (1) that the trial court's imposition of consecutive sentences was not supported by the record, and (2) that counsel rendered ineffective assistance by failing to object to the imposition of costs. The Ohio Court of Appeals rejected these arguments. *Id.* at *4-5. Tetak then moved to reopen his appeal, contending that appellate counsel rendered ineffective assistance by failing to argue that the trial court impermissibly imposed sentences for allied offenses of similar import, in violation of state law and his constitutional right against double jeopardy. The Ohio Court of Appeals denied Tetak's motion, and the Ohio Supreme Court denied leave to appeal. *State v. Tetak*, 168 N.E.3d 521 (Ohio 2021) (table).

In 2021, Tetak filed his § 2254 petition, raising the same ineffective-assistance claim that he presented in his motion to reopen. A magistrate judge recommended that Tetak's petition be denied because counsel could have reasonably concluded that there was no basis on which to challenge the sentencing court's conclusion that kidnapping and sexual battery were not allied offenses. The district court overruled Tetak's objections and adopted the magistrate judge's report and recommendation in full. This application followed.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 578 U.S. 120, 127 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), if a state court has previously adjudicated a petitioner's claims on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). When AEDPA

deference applies, a reviewing court, in the COA context, must evaluate the district court's application of § 2254(d) and determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

The sole claim in Tetak's petition is that appellate counsel rendered ineffective assistance by failing to raise the "'dead-bang winning' argument that he was twice punish[ed] for the same offen[s]e." Underlying Tetak's claim is the argument that "the issue of kidnapping and rape/sexual assault being allied offenses of similar import is well-settled," and the state court violated the Double Jeopardy Clause of the Fifth Amendment when it failed to apply the rule from *Blockburger v. United States*, 284 U.S. 299 (1932).

To prevail on an ineffective-assistance claim, a petitioner must show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and that the deficient performance resulted in prejudice to the defense, such that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *see also Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) ("[I]neffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel."). In assessing such claims, "courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct,' and '[j]udicial scrutiny of counsel's performance must be highly deferential.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (internal citations omitted) (quoting *Strickland*, 466 U.S. at 689-90). The deferential standards established by *Strickland* and § 2254(d) make habeas review of ineffective-assistance claims "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Tetak argues that kidnapping under Ohio Revised Code § 2905.01(A)(3) includes "all other assaultive crimes," and counsel therefore was ineffective for failing to raise such an argument. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). And "for purposes of double jeopardy

analysis, once a state court has determined that the state legislature intended cumulative punishments, a federal habeas court must defer to that determination." *Volpe v. Trim*, 708 F.3d 688, 697 (6th Cir. 2013) (quoting *Banner v. Davis*, 886 F.2d 777, 780 (6th Cir. 1989)).

Under Ohio law, "a defendant charged with multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus." *State v. Ruff*, 34 N.E.3d 892, 896 (Ohio 2015); *see State v. Logan*, 397 N.E.2d 1345, 1346 (Ohio 1979) (syllabus); *see also* Ohio Rev. Code § 2941.25(B). In its denial of Tetak's motion to reopen, the Ohio Court of Appeals concluded that multiple sentences were permissible because the harm from each charged offense was separate and identifiable:

> [Tetak's] confinement of [the victim] was clearly secretive, prolonged, and substantially increased the risk of harm to [the victim]. Tetak changed the locks to prevent [the victim] from escaping. [Tetak] subjected [the victim] to a series of beatings and sexual assaults over a series of days causing bruising and lacerations to the victim's face. [Tetak] bit her ear, caused bruising to her throat, lips, lacerations to her mouth, injuries to her shoulder, hands, legs, arms, and buttocks. Tetak also sexually assaulted the victim by forcing vaginal intercourse with her against her will.

The Ohio Court of Appeals reasonably concluded that counsel could not have raised a successful double jeopardy claim. This is because Tetak's offenses were not allied under state law, which means that there was no double jeopardy violation; the courts were not required to apply *Blockburger*. *See Jackson v. Smith*, 745 F.3d 206, 212 (6th Cir. 2014) (explaining that "*this* statute, not the *Blockburger* test," determines whether a defendant has been punished twice for the same offense in violation of the federal Double Jeopardy Clause). And because the state court could reasonably conclude that appellate counsel's performance did not fall below an objective standard of reasonableness, reasonable jurists would not debate the district court's resolution of this claim.

Accordingly, Tetak's application for a COA is **DENIED**, and his motion to proceed IFP is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3783

JOSEPH TETAK,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

Before: CLAY, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Joseph Tetak for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH TETAK,

Petitioner,

v.

Case No. 2:21-cv-3903
Judge Edmund A. Sargus, Jr.
Magistrate Judge Elizabeth P. Deavers

JAY FORSHEY, Warden, Noble Correctional Institution,

Respondent.

REPORT AND RECOMMENDATION

Petitioner Joseph Tetak seeks a writ of habeas corpus under 28 U.S.C. § 2254 (Petition, ECF No. 1.) Petitioner seeks release from confinement imposed as part of the judgment of a state court in a criminal action. The case has been referred to the Undersigned pursuant to 28 U.S.C. § 636(b) and Columbus General Order 14-1 regarding assignments and references to Magistrate Judges. The Respondent Warden has filed a Return of Writ (ECF No. 6), and Petitioner has filed a Traverse (ECF No. 9), making the Petition ripe for decision. For the reasons set forth below, it is recommended that the Petition be **DENIED** and this action be **DISMISSED**.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Fifth District Court of Appeals provided the following facts and procedural history:

> {¶2} Between the dates of May 27, 2018 and May 30, 2018, A.R. was held captive, against her will by Tetak. During this time, Tetak assaulted her on several occasions. He physically caused bruising and lacerations to her face, bit her ear, caused bruising to her throat, lips, lacerations to her mouth, injuries to her shoulder, hands, legs, arms, and buttocks. Tetak also sexually assaulted A.R. by forcing vaginal intercourse with her against her will. During these events, Tetak was in possession of a firearm. There were other individuals present who confirmed various parts of A.R.'s story.[1] PT. at 11-12.
>
> {¶3} On June 6, 2018, Tetak was indicted as follows,

Appx. C

Count 1: Assault, a misdemeanor of the first degree, in violation of R.C. 2903.13(A);

Count 2: Felonious Assault, a felony of the second degree, in violation of R[.]C. 2903.11(A)(1);

Count 3: Kidnapping, with a firearm specification, a felony of the first degree, in violation of R.C. 2905.01(A)(3);

Count 4: Felonious Assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1);

Count 5: Rape, a felony of the first degree, with a firearm specification, in violation of R.C. 2905.01(A)(2); and

Count 6: Kidnapping, with a firearm specification, a felony of the first degree, in violation of R.C. 2905.01(A)(2).

{¶4} On August 10, 2018, Tetak entered a negotiated guilty plea as follows,

Count 1: Assault, a misdemeanor of the first degree, in violation of R.C. 2903.13(A);

Count 2: Aggravated Assault, a felony of the fourth degree, in violation of R.C. 2903.12(A)(1);

Count 4: Kidnapping with a firearm specification, a felony of the first degree, in violation of R.C. 2905.01(A)(3); and

Count 5: Sexual Battery, a felony of the third degree, with a firearm specification, in violation of R.C. 2907.03(A)(1).

{¶5} In exchange for the plea, the state dismissed Count 4 and Count 6 of the Indictment. PT. at 9. Further, an amendment was made to the firearm specification to make it a one year firearm specification. ST. at 9.

{¶6} Sentencing was deferred and a pre-sentence investigation report was ordered to be prepared. On October 17, 2018, Tetak was sentenced as follows:

Count 1: 6 months of local incarceration on the misdemeanor Assault;

Count 2: 18 months prison time on the Aggravated Assault;

Count 3: 9 years prison time on the Kidnapping with a mandatory one-year on the firearm specification; and

Count 5: 60 months in prison on the Sexual Battery charge.

> {¶7} The court ordered the periods of incarceration for Counts 1 and 2 to be served concurrently with each other and concurrently with all other counts; the periods of incarceration imposed for Counts 3 and 5 were ordered to be served consecutively, with the firearm specification contained in Count 3, by law, being mandatory consecutive, for an aggregate sentence of 15 years in prison, with 1 year mandatory.

State v. Tetak, 5th Dist. Muskingum No. CT2019-0052, 2020-Ohio-3263 (Jun. 8, 2020).

> Petitioner, represented by counsel, raised two assignments of error on appeal:
>
> {¶9} "I. THE TRIAL COURT UNLAWFULLY ORDERED JOSEPH TETAK TO SERVE CONSECUTIVE SENTENCES, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, GUARANTEED BY SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."
>
> {¶10} "II. JOSEPH TETAK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

Id. The appellate court overruled both assignments and affirmed his convictions and sentence. *Id.* at ¶¶ 23, 33-34.

On October 16, 2020, Petitioner, proceeding *pro se*, filed a Motion to Reopen Direct Appeal (State Court Record, ECF No. 5, PageID 105.) Therein, he argued that counsel was ineffective in failing to include the "dead-bang winning" claim that the trial court erred in sentencing him "for allied offenses of similar import, contrary to Ohio Rev. Code § 2941.25, and the Double Jeopardy Clauses of the United States and Ohio Constitutions." (*Id.* at PageID 107.) The Fifth District rejected this claim, concluding "that the offenses Aggravated Assault, Kidnapping with a firearm specification, Kidnapping with a firearm specification, and Sexual Battery with a firearm specification were committed separately and with separate animus[.]" (*Id.* at PageID 121.) Consequently, the Court found "that the issues raised by Tetak in his motion raise 'no genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal' . . . ." (*Id.* at PageID 122 (brackets in original), quoting *State v. Smith*, 95 Ohio St.3d 127, 2002-

Ohio-1753, at ¶ 9.) Petitioner, again proceeding *pro se*, appealed to the Supreme Court, which declined jurisdiction on May 25, 2021. *State v. Tetak*, No. 2021-0276, 163 Ohio St. 3d 1428, 2021-Ohio-1721. Petitioner filed the instant Petition on June 30, 2021 (ECF No. 1, PageID 6.)

II. LEGAL STANDARD

As Petitioner is imprisoned based on a state court judgment, he may petition for a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petition "shall not be granted with respect to any claim" that:

> [W]as adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented[.]

28 U.S.C. § 2254(d). A habeas corpus petitioner must also satisfy additional procedural requirements, including but not limited to exhaustion of State court judicial remedies. 28 U.S.C. § 2254(b). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, the Court's review of claim adjudicated on its merits in a State court proceeding is sharply circumscribed; "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A state court may be found to have acted "contrary to" federal law in two ways: (1) if the state court's decision is "substantially different from the relevant precedent" of the U.S. Supreme Court; or (2) if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the U.S. Supreme] Court and nevertheless arrives at a result different from [U.S. Supreme Court] precedent." *Williams (Terry) v. Taylor*, 529 U.S. 362, 405, 406 (2006). A state

court does not act contrary to federal law simply because its application of federal law was incorrect. Rather, the decision must have been "mutually opposed[,]" *id.* at 406, to "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), which encompasses only the holdings of Supreme Court decisions, and not their dicta. *Williams (Terry)*, 529 U.S. at 412.

The "unreasonable application" standard is distinct from and more deferential than that of "clear error." "It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court decision was erroneous. . . . Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75, 76 (2003) (internal quotation marks omitted). "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). However, this deferential standard applies only when the state court has addressed the merits of a claim raised on appeal; "[w]here a state court has not adjudicated a claim on the merits, the issue is reviewed *de novo* by a federal court on collateral review." *Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir. 2015).

III. ANALYSIS

Petitioner raises a single claim on appeal: ineffective assistance of counsel for failing to raise as error the "'dead-bang winning' argument that he was twice punish[ed] for the same offence [*sic*]." (Petition, ECF No. 1, PageID 4.) He claims that "the issue of kidnapping and rape/sexual assault being allied offenses of similar import is well-settled." (Petition, ECF No. 1, PageID 4, citing *State v. Logan*, 60 Ohio St. 2d 126 (1979); *State v. Botta*, 27 Ohio St. 2d 196, 201 (1971).) As failure to raise the issue was plain error, a plea of guilty or a failure to object at sentencing does

not operate as a waiver of the issue. (*Id.* at PageID 4-5, citing *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *State v. Williams*, 134 Ohio St. 3d 482, 2012-Ohio-5699, ¶ 28.) While the state court adjudicated Petitioner's Double Jeopardy claim, it erred by not using the *Blockburger v. United States* standard; thus, according to Petitioner, *de novo* review is appropriate. (*Id.* at PageID 5, citing 284 U.S. 299 (1932).)

The Respondent Warden argues that the state court considered and rejected Petitioner's ineffective assistance claim, a decision that it is entitled to deference (Return of Writ, ECF No. 6, PageID 155, citing 28 U.S.C. § 2254(d); *Harrington v. Richter,* 562 U.S. 86, 103 (2011); *Williams (Terry)*, 529 U.S. at 412-13.) Respondent notes that a petitioner raising ineffective assistance bears a heavy burden: "Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." (*Id.* at PageID 156, quoting *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004).) Such a finding would have been inappropriate here, Respondent claims, because whether kidnapping constitutes an allied offense of similar import is a fact-specific inquiry (*id.* at PageID 157, citing Ohio Rev. Code § 2941.25; *State v. Ruff*, 143 Ohio St. 3d 114, 2015-Ohio-995, ¶ 26), and there was ample reason to believe that a court would have concluded that kidnapping was a separate offense: "In addition to holding the victim captive for three days while possessing a firearm, he beat her, bit her, inflicted injuries to her body and face, and repeatedly sexually assaulted her against her will." (*Id.* at PageID 159.) "Accordingly, there were ample reasonable arguments that Tetak's appellate counsel was not ineffective by strategically raising other potentially more effective issues upon appeal." (*Id.* at PageID 160.)

The appellate court adjudicated the ineffective assistance issue under the correct federal constitutional standard, and concluded that counsel's performance was not deficient under

Strickland v. Washington, 466 U.S. 668 (1984) (State Court Record, ECF No. 5, PageID 117-18, 121-22.) Petitioner attempts to evade the required double deference by arguing that *Strickland* is not the proper lens of analysis; rather, the Court should examine his claim under *Smith v. Murray*, which "asks a court to consider whether omitted error/claim stood a better chance of succeeding than that raised. Petitioner asserts that his double-jeopardy claim, with advocacy from a trained litigator, was more likely to succeed than issues with the trial court's discretion." (Traverse, ECF No. 9, PageID 167, citing *Smith*, 477 U.S. 527, 536 (1986).) "This Federal law does not require the outcome to be different, but compares that raised to what was omitted." (*Id.* at PageID 168, citing *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).) Yet, this *is* an ineffective assistance claim, and even the *Smith* Court harkened back to *Strickland* in its assessment of counsel's performance. 477 U.S. at 536, quoting *Strickland*, 466 U.S. at 689. Thus, the question before this Court "is whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105 (emphasis added). The state appellate court's recitation of the facts of the case, *State v. Tetak*, 2020-Ohio-3263, at ¶ 2, show that there was ample evidence from which counsel could have reasonably concluded that the sentencing court's conclusion that kidnapping was not an allied offense was not contrary to *Blockburger*, and thus, that the issue was not worth raising on appeal. Petitioner's claim is thus unavailing.

IV. CONCLUSION

For the foregoing reasons, it is recommended that the Petition be **DENIED** and the action be **DISMISSED**. Because reasonable jurists would not disagree that Petitioner has failed to make a substantial showing of a violation of constitutional rights, Petitioner should not be granted a certificate of appealability and should not be permitted to proceed on appeal *in forma pauperis*.

V. PROCEDURE ON OBJECTIONS

If any party seeks review by the District Judge of this Report and Recommendation, that party may, within fourteen (14) days, file and serve on all parties objections to the Report and Recommendation, specifically designating this Report and Recommendation, and the part in question, as well as the basis for objection. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy. Fed. R. Civ. P. 72(b).

The parties are specifically advised that the failure to object to the Report and Recommendation will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgment of the District Court. *See, e.g.*, *Pfahler v. Nat'l Latex Prod. Co.*, 517 F.3d 816, 829 (6th Cir. 2007) (holding that "failure to object to the magistrate judge's recommendations constituted a waiver of [the defendant's] ability to appeal the district court's ruling"); *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005) (holding that defendant waived appeal of district court's denial of pretrial motion by failing to timely object to magistrate judge's report and recommendation). Even when timely objections are filed, appellate review of issues not raised in those objections is waived. *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) ("[A] general objection to a magistrate judge's report, which fails to specify the issues of contention, does not suffice to preserve an issue for appeal . . . .") (citation omitted)).

Date: November 2, 2021

/s/ Elizabeth A. Preston Deavers
ELIZABETH A. PRESTON DEAVERS
UNITED STATES MAGISTRATE JUDGE

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

JOSEPH TETAK,

Petitioner,

vs.

Case No. 2:21-cv-3903

JUDGE EDMUND A. SARGUS, JR

Magistrate Judge Elizabeth P. Deavers

WARDEN, NOBLE CORRECTIONAL INSTITUTION,

Respondent.

OPINION AND ORDER

This matter is before the Court for consideration of Petitioner's Objection to the Magistrate Judge's Report and Recommendation. (ECF No. 11.) Petitioner again argues that his appellate attorney was ineffective for failing to raise on appeal what he calls the "'dead-bang winning' argument that he was twice punish[ed] for the same offence [*sic*]." (Petition at p. 1.) He maintains the state courts failed to interpret *Blockburger v. United States*, 284 U.S. 299 (1932), properly and questions why he, as a layman "can figure this out, how could a licensed attorney not do the same?" (Objections at p. 2.)

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. The Court has reviewed Petitioner's Objections and the Report and Recommendation. The Magistrate Judge applied the proper standard in assessing whether there was any reasonable argument that counsel satisfied *Strickland's* deferential standard. The Court agrees with the Magistrate Judge that the state appellate court's recitation of the facts of the case, *State v. Tetak*, 2020-Ohio-3263, at ¶ 2, show that there was ample evidence from which appellate counsel could have reasonably

concluded that the sentencing court's conclusion that kidnapping was not an allied offense was not contrary to *Blockburger*, and thus, that the issue was not worth raising on appeal. Petitioner's Objections, as were his original claims, are unavailing.

For these reasons, Petitioner's Objection (ECF No. 11) are **OVERRULED**. The Report and Recommendation (ECF No. 10) is **ADOPTED AND AFFIRMED**. The Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**. This case is **DISMISSED**.

IT IS SO ORDERED.

DATED: 8/15/2022

s/ Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

Joseph Tetak
Plaintiff
v.
Warden, Nobel Correctional Institution
Defendant

Civil Action No. 2:21-cv-3903

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☒ other: OPINION AND ORDER adopting Report and Recommendations ECF No. [10] Report and Recommendations. The Petition for Writ of Habeas Corpus ECF No. [1] is DENIED. This case is DISMISSED.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☐ decided by Judge _____ on a motion for _____.

Date: 08/15/2022

CLERK OF COURT

Christie M. Wern
Signature of Clerk or Deputy

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO