APPENDIX

1. Direct Appeal Decision, Court of Appeals of Ohio, Seventh Appellate District, Jefferson County

Decided March 3, 2017, CASE NO. 15 JE 0019 (State v. Spring, 2017-Ohio-768)

2. Motion to Reopen Direct Appeal Court of Appeals of Ohio, Seventh Appellate District, Jefferson County Decided June 29, 2017, CASE NO. 15 JE 0019 (State v. Spring, 2017 Ohio App. LEXIS 2740)

3. Discretionary Appeal Not Allowed, Supreme Court of Ohio, Decided July 26, 2017, Case No.2017-0519. (State v. Spring, 2017 Ohio LEXIS 1565)

4. Discretionary appeal not allowed by State v. Spring, 151 Ohio St. 3d 1527, 2018-Ohio-557, 2018 Ohio LEXIS 363, 91 N.E.3d 758, 2018 WL 894326 (Feb. 14, 2018)

5. Post-conviction relief denied at State v. Spring, 2020-Ohio-4718, 2020 Ohio App. LEXIS 3636, 2020 WL 5846067 (Ohio Ct. App., Jefferson County, Sept. 29, 2020)

6. Habeas Corpus Decision: United States District Court for the Northern District of Ohio, Eastern Division March 23, 2022, Decided; March 23, 2022, Filed: CASE NO. 4:18-cv-2920. Spring v. Harris, 2022 U.S. Dist. LEXIS 52599

7. Certificate of appealability denied, Motion denied by, As moot Spring v. Gray, 2022 U.S. App. LEXIS 28412 (6th Cir., Oct. 12, 2022)
8. Rehearing denied by, Spring v. Gray, 2023 U.S. App. LEXIS 17577 (6th Cir., July 11, 2023)
9. Rehearing denied by, En banc Spring v. Gray, 2023 U.S. App. LEXIS 19182 (6th Cir., July 26, 2023)

No. 22-3421

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFREY M. SPRING, SR.,

Petitioner-Appellant,

v.

DAVID W. GRAY, Warden,

Respondent-Appellee.

ORDER

Before: WHITE, Circuit Judge.

Jeffrey M. Spring, Sr., a pro se Ohio prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The timely notice of appeal has been construed as a request for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). Spring also moves for the appointment of counsel and for leave to proceed in forma pauperis on appeal.

In 2015, a jury found Spring guilty of murder, Ohio Rev. Code § 2903.02(A), with a firearm specification, Ohio Rev. Code § 2941.145, and tampering with evidence, Ohio Rev. Code § 2921.12(A)(1). The crimes took place at Spring's home; Spring admittedly shot the victim two times at his front door. He was sentenced to 18 years to life in prison. The Ohio Court of Appeals affirmed, *State v. Spring*, 85 N.E.3d 1080 (Ohio Ct. App. 2017), and the Ohio Supreme Court denied leave to appeal, *State v. Spring*, 78 N.E.3d 910 (Ohio 2017) (table).

After unsuccessfully seeking state post-conviction relief, Spring filed his habeas petition, claiming that trial counsel was ineffective in several respects and that his appellate counsel was ineffective for failing to raise an ineffective-assistance-of-trial-counsel claim on direct appeal. In his reply to the State's response, Spring attempted to raise a third claim: that the trial court violated his due process rights when it denied his petition for post-conviction relief, in which he asserted

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 12, 2022

Mr. Jeffrey M. Spring Sr.
Belmont Correctional Institution
P.O. Box 540
St. Clairsville, OH 43950

Re: Case No. 22-3421, Jeffrey Spring, Sr. v. David Gray
Originating Case No. : 4:18-cv-02920

Dear Mr. Spring,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely yours,

s/Julie Connor
Case Manager
Direct Dial No. 513-564-7033

cc: Ms. Jerri L. Fosnaught
Ms. Sandy Opacich

Enclosure

No mandate to issue

that trial counsel was ineffective for failing to investigate the front door, pills found near the victim's body, and bullets found at the crime scene.

Upon the recommendation of a magistrate judge, the district court denied the petition, concluding that Spring's claims were procedurally defaulted, reasonably adjudicated on the merits by the state courts, or procedurally improper. The district court declined to issue a COA.

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To be entitled to a COA, the movant must demonstrate that reasonable jurists would find the district court's assessment of his claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a procedural ruling is at issue, the applicant must show 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.* When a state court previously adjudicated the petitioner's claims on the merits, the district court may not grant habeas relief unless the state court's adjudication 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).

Ground One – Ineffective Assistance of Trial Counsel

Ground One comprises three ineffective-assistance-of-trial-counsel claims. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (first quoting *Strickland*, 466 U.S. at 689; and then quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Thus, "[w]hen § 2254(d) applies, the

question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Failing to File Pretrial Motion to Suppress

Spring claims that his trial counsel was ineffective for failing to move to suppress statements that he contends were inadmissible under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Two statements are at issue. First, when in the back seat of a police car shortly after the crime took place, and after being given *Miranda* warnings, Spring told the officers, "I shot [the victim] once, went outside and shot him again in the head to make sure he was dead." Second, during a custodial interrogation that took place 10 hours after Spring's arrest, and after being given additional *Miranda* warnings, Spring told Sheriff Fred Abdalla that he shot the victim in the abdomen, and then again in the head "because [he] didn't want [the victim] to suffer." According to Spring, a combination of drugs and alcohol rendered him intoxicated and thus incapable of validly waiving his *Miranda* rights.

The Ohio Court of Appeals rejected this claim. *Spring*, 85 N.E.3d at 1087-88. It noted that, although Spring had admitted to having 15 beers and some prescription painkillers and was "pretty drunk" on the day of the shooting, he also conceded that he usually consumes 12 or 13 alcoholic drinks per day, and the recording of the 911 call that Spring made shortly before he made his first statement to officers showed that he was "coherent and calm and was able to correctly report his name, address, phone number and the victim's name"; several officers also stated that "Spring was calm and appeared to be able to understand the questions asked of him." *Id.* at 1087. Similarly, the state appellate court noted that the videotaped custodial interrogation shows that Spring was "coherent and mostly calm," "was not slurring his speech, . . . did not appear intoxicated," and even corrected Sheriff Abdalla about the number of *Miranda* warnings that he had received. *Id.* Sheriff Abdalla then gave Spring a third set of *Miranda* warnings and afforded him an opportunity to ask about each one; Spring indicated that the understood the rights he was waiving by making a statement. *Id.* Sheriff Abdalla added that "Spring never claimed to need medication during the interview" and testified that Spring did not appear "to be suffering from any

type of memory loss or confusion." *Id.* The Ohio Court of Appeals concluded that, based on this record, as well as case law from Ohio courts indicating that intoxication alone does not render a statement inadmissible, a motion to suppress would have been unsuccessful and, thus, that trial counsel was not ineffective for failing to file one. *Id.* at 1085-88.

The state appellate court's factual findings regarding Spring's coherency, calmness, and ability to understand his *Miranda* rights and the consequences of waiving them are presumed correct on federal habeas review. *See* 28 U.S.C. § 2254(e)(1). Though Spring maintains that he was intoxicated when he made his incriminating statements to police, there is nothing in the record—other than his proclaimed intoxication, which is by itself insufficient to render a confession involuntary, *see United States v. Newman*, 889 F.2d 88, 94-95 (6th Cir. 1989)—showing that he involuntarily, unknowingly, or unintelligently waived his Fifth Amendment rights. Because a motion to suppress Spring's statements on the basis that they were given in violation of his *Miranda* rights had no clear merit, reasonable jurists would agree that trial counsel was not ineffective for failing to file such a motion. *See United States v. Carter*, 355 F.3d 920, 924 (6th Cir. 2004). No reasonable jurist therefore could debate the district court's conclusion that the Ohio Court of Appeals' rejection of this claim was not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts.

Failing to Object to Alleged Prosecutorial Misconduct

Spring also claims that his trial counsel was ineffective for failing to object when, during the prosecutor's rebuttal closing argument, she (1) stated that "[t]here is a snake in this case and its name is Jeffrey M. Spring" and (2) pointed out that the defense did not call any witnesses to testify about white pills that were found near the victim's body.

In rejecting this claim, the Ohio Court of Appeals, regarding the "snake" comment, noted that Spring's counsel had just analogized the victim to a "snake" who showed up to Spring's house, "a place that he wasn't invited to [and] where he didn't belong." *Spring*, 85 N.E.3d at 1088-89. Thus, in "review[ing] the context of the entire closing statements of both parties, the comment calling Spring a snake does not rise to the level of misconduct;" rather, "it was a reasonable rebuttal

to defense counsel's closing argument." *Id.* at 1089. As to the failure-to-call-witnesses comment, the Ohio Court of Appeals noted that, again, the comment was made in response to defense counsel's multiple statements during closing argument that it was unknown to whom the pills belonged. *Id.* Thus, again given the context, the prosecutor's comment was not improper. *Id.* The Ohio Court of Appeals also found that, "given the overwhelming evidence against Spring, he cannot demonstrate he was prejudiced by the prosecutor's remarks," and thus counsel was not ineffective for failing to object to them. *Id.*

The district court agreed. As to the snake comment, the district court added that "Ohio courts have held that prosecutorial misconduct does not occur when," as here, "the [S]tate uses defense counsel's analogy against him." (*See, e.g.*, *State v. Diar*, 900 N.E.2d 565, 597-98 (Ohio 2008). As to the failure-to-call-witnesses comment, the district court noted that it was the defense that emphasized that the source or possessor of the pills was unknown and added that "Ohio courts have held [that] comments on a defendant's failure to call witnesses or present evidence he claims would have been helpful are not improper." *See, e.g.*, *State v. Lenoir*, No. 22239, 2008 WL 1838352, at *6 (Ohio Ct. App. Apr. 25, 2008). Given that both of the prosecutor's statements at issue were proper under state law, counsel had no basis on which to object. *See Tackett v. Trierweiler*, 956 F.3d 358, 375 (6th Cir. 2020) (noting that trial counsel is not ineffective for failing to raise a meritless objection). In addition, as both the Ohio Court of Appeals and district court stated, the evidence of Spring's guilt was "overwhelming"; for instance, four witnesses testified that Spring had admitted that he shot the victim in the head "to make sure he was dead." So there is no reasonable probability that the result of his trial would have been different had counsel objected. *See Strickland*, 466 U.S. at 694. Given the double deference due under *Strickland* and § 2254, reasonable jurists would agree that the Ohio Court of Appeals' resolution of this claim was not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts.

Failing to Object to Witness Opinion Testimony

Spring's final ineffective-assistance-of-trial-counsel claim is that trial counsel failed to object to the lay opinion testimony of two witnesses. First, he claims that trial counsel should have objected to Sheriff Abdalla's testimony that he assumed that the victim had urinated outside of Spring's house just before returning to the front porch, where Spring shot him. Second, Spring claims that trial counsel should have objected to testimony from Special Agent Edward Lulla as to the difference between a blood-drop stain and blood-splatter stain; Spring notes that Lulla was never deemed an expert witness.

Regarding Sheriff Abdalla, the Ohio Court of Appeals found that his testimony was proper, helpful, and admissible because he was at the crime scene and made his own personal perceptions and observations, including that he saw a patch of urine near the house. *Spring*, 85 N.E. at 1090. Regarding Special Agent Lulla, the Ohio Court of Appeals found that, although he was not deemed an expert witness, his lay opinion testimony was proper given that photographs "clearly depict various areas that appear to be blood drips versus splatters." *Id.* at 1091. The Ohio Court of Appeals added that, even if trial counsel should have objected to these witnesses' testimony, Spring suffered no prejudice in view of the "overwhelming evidence" of his guilt. *Id.* at 1090-91.

As the district court aptly noted, the Ohio Court of Appeals' determination that this testimony was admissible under state evidentiary law is binding on federal habeas review. *See Bugh v. Mitchell*, 329 F.3d 496, 513 (6th Cir. 2003). Given that the testimony was properly admitted, trial counsel could not have been ineffective for declining to object. *See Tackett*, 956 F.3d at 375. And in any event, in view of the "overwhelming" evidence of Spring's guilt, as noted above, he could not have been prejudiced even if trial counsel should have objected to both witnesses' testimony. In light of the double deference due under *Strickland* and § 2254, no reasonable jurist could debate the district court's conclusion that the Ohio Court of Appeals' rejection of this claim was not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts.

Ground Two – Ineffective Assistance of Appellate Counsel

Spring claims that his appellate counsel was ineffective for failing to argue on direct appeal that trial counsel was ineffective for neglecting to investigate pills found near the victim's body.

The district court determined that Spring had defaulted this claim because the application to reopen under Ohio Rule of Appellate Procedure 26(B) in which he attempted to raise it was rejected as untimely and because it did not include the trial transcripts, as required by Rule 26(B)(2)(e). This court has held that the timeliness and transcript requirements of Rule 26(B) are adequate and independent state grounds for a procedural default. *See Parker v. Bagley*, 543 F.3d 859, 862 (6th Cir. 2008); *Taylor v. Buchanan*, No. 20-3120, 2020 WL 7586967, at *3 (6th Cir. June 30, 2020). Reasonable jurists therefore could not debate the district court's conclusion that this claim was procedurally defaulted.

A federal habeas court is barred from reviewing a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation, or that failure to consider the claim would result in a "fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991), which can be demonstrated only by presenting new evidence showing one's actual innocence, *Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013).

According to Spring, the procedural default should be excused because he deposited his Rule 26(B) application in the prison mail four days before it was due, which was five days before it was received and rejected by the Ohio Court of Appeals as untimely. He also claimed that he did not submit the trial transcripts along with his Rule 26(B) application because his appellate counsel never gave them to him. Jurists of reason would agree that these arguments are insufficient to establish cause to excuse the default because Ohio does not have a prison mailbox rule, *see Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003), and Spring cited no authority for his suggestion that counsel is required to furnish a defendant with the trial transcripts. In other words, the rejection of Spring's Rule 26(B) application was fairly attributable to him, rather than to an external cause.

Spring also argues that his actual innocence excuses the procedural default. To excuse a procedural default on this basis, the petitioner must show that "it is more likely than not that no reasonable juror would have convicted him" in view of "new reliable evidence . . . that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995). Spring does not offer any new, reliable evidence. Instead, he argues only that he is innocent because he was intoxicated when he shot the victim through his front door; thus, he could not have acted with the requisite mens rea required for murder. *See* Ohio Rev. Code § 2903.02(A). This argument is not based on new evidence and, moreover, does not meet the actual innocence standard. *See Bousley v. United States*, 523 U.S. 614, 624 (1998) (holding that "'actual innocence' means factual innocence, not mere legal insufficiency"). Reasonable jurists therefore could not debate the district court's conclusion that Spring's procedural default is not excused by a credible showing of actual innocence.

Finally, to the extent that Spring argues that, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), ineffective assistance of his post-conviction counsel excuses the default, reasonable jurists would agree that the argument fails. The alleged ineffectiveness of post-conviction counsel cannot constitute cause to overcome the procedural default of Spring's ineffective-assistance-of-*appellate*-counsel claims because *Martinez* and *Trevino* can be invoked only to excuse ineffective-assistance-of-*trial*-counsel claims. *See Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017).

Ground Three – Denial of Petition for Post-Conviction Relief

In his reply to the State's response, Spring attempted to raise a third ground for relief: that the trial court deprived him of his due process rights by denying post-conviction relief because he had presented evidence that his trial counsel was ineffective for failing to investigate and present evidence related to the pills and bullets found at the crime scene. Reasonable jurists could not debate the court's decision not to consider this claim because claims presented for the first time in a reply are "not properly before the district court" and "the district court d[oes] not err in declining to address" them. *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005); *see also Murphy v. Ohio*,

551 F.3d 485, 502 (6th Cir. 2009) (providing that a court may decline to consider a claim raised for the first time in a reply).

Accordingly, the court **DENIES** the application for a COA and **DENIES** as moot the motions for the appointment of counsel and for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEFFREY M. SPRING, SR.,	)	Case No. 4:18-cv-2920
	)	
Petitioner,	)	JUDGE SARA LIOI
	)	
v.	)	MAGISTRATE JUDGE
	)	THOMAS M. PARKER
BRANDESHAWN HARRIS, Warden,[1]	)	
	)	
Respondent.	)	**REPORT AND**
	)	**RECOMMENDATION**[2]

On December 30, 2014, Jeffrey Spring, Sr., shot and killed Stephen Boyer. Spring gave varying accounts what happened, including that he fired shots through his front door not knowing Boyer was on the other side and then shot Boyer in the head to end his suffering. A Jefferson County, Ohio, jury found Spring guilty of murder with a firearm specification and tampering with evidence. And Spring was sentenced to 18 years to life imprisonment.

On December 19, 2018, Spring filed an incomplete, pro se petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF Doc. 1), raising two grounds for relief:

> **Ground One:** Trial counsel was ineffective for failing to: (1) file a pretrial motion to suppress Spring's statements to police; (2) object to prosecutorial misconduct during closing argument; and (3) object to witness opinion testimony (ECF Doc. 1 at 5); and
>
> **Ground Two:** Appellate counsel was ineffective for not raising trial counsel's failure to investigate pills found by Boyer's body (ECF Doc. 1 at 7).

---

[1] Since this action began, Spring was transferred to Belmont Correctional Institution, where David Gray is warden. *Rumsfeld v. Padilla*, 542 U.S. 426, 435-36 (2004) (stating that the proper respondent in a habeas action "is the warden of the facility where the [petitioner] is being held").

[2] This matter is before me by an automatic order of reference under Local Rule 72.2 for preparation of a report & recommendation pursuant to Local Rule 72.1.

On December 20, 2018, Spring filed a supplement with the remaining pages of his petition, which did not assert any additional grounds for relief. ECF Doc. 3. Warden Gray filed a return of writ on March 26, 2019. ECF Doc. 8.

On September 19, 2019, I granted Spring leave to amend his § 2254 petition to add to his Ground Two claim that appellate counsel also was ineffective for not raising trial counsel's failure to forensically test the bullets recovered from the crime scene for metal, paint, or primer residue. ECF Doc. 11; ECF Doc. 13. The amended § 2254 petition was due on January 26, 2021, which came and went without an amended petition having been filed. ECF Doc. 17. On May 24, 2021, Spring filed his traverse, raising a new, Ground Three claim of ineffective assistance of trial counsel for counsel's failure to investigate his front door, the bullets, and the pills. ECF Doc. 25. On June 1, 2021, Spring filed what appears to be a duplicate copy of his § 2254 petition, only consolidated into a single document. ECF Doc. 26. On June 8, 2021, Warden Gray filed a surreply to Spring's traverse. ECF Doc. 27.

Because all of Spring's claims are non-cognizable, procedurally defaulted, and/or meritless, I recommend that all of Spring's claims be DISMISSED and that his petition for writ of habeas corpus be DENIED. I further recommend that Spring not be granted a certificate of appealability.

I. State Court Proceedings

A. Trial Court

On January 7, 2015, Spring was charged with one count of murder with a firearm specification and one count of tampering with evidence, to which Spring pleaded not guilty. ECF Doc. 8-1 at 4-7. A jury trial was held on July 28, 2015. ECF Doc. 9 at 3, 170. The facts established by the evidence, as determined by the Ohio Court of Appeals, are as follows:

> {¶2} Spring called 911 to report that he had killed Stephen Boyer; he had sustained two gunshot wounds and his body was found outside of Spring's home.

... Spring made numerous inconsistent statements to police about the circumstances surrounding Boyer's death, regarding which defense counsel did not file a motion to suppress.

{¶3} ... Both Spring and [Boyer] had been drinking alcohol on the day Boyer was killed; Spring estimated that he had consumed fifteen beers and Boyer's blood alcohol content upon his autopsy was .292. On the 911 call, Spring claimed Boyer was trying to break into his home while brandishing a knife and seemed to indicate that there was more than one person in his home when this attempted break-in occurred.

{¶4} When police arrived, they found Spring was the only one in the home. There was no sign of forced entry at his residence and no sign of a struggle inside of his home. Police located the [Boyer's] jacket and ... cell phone in Spring's living room.

{¶5} They found Boyer dead, having sustained gunshot wounds to the head and chest. His body was laying in front of Spring's front door; however, there was a bloodstain several feet away—not near the front of the door—that appeared to have been swept up with a broom. A bloodstained push-broom was also found outside.

{¶6} Officers placed Spring in the back seat of a cruiser and questioned him. After being provided with *Miranda* warnings, Spring stated: "I shot him once, went outside and shot him again in the head to make sure he was dead."

{¶7} Officers observed [Boyer] had a knife in his hand, but they also noticed that the placement of the knife seemed odd given the condition of the body and the gunshot wound suffered by [Boyer]. The knife was recovered and sent to the BCI crime lab for processing. The only DNA recovered from the handle and the blade of the knife belonged to Spring; there was no DNA from [Boyer] on that knife.

{¶8} Officers attempted to find the firearm used in the crime, a Smith and Wesson .38 revolver, and Spring made various claims as to where the weapon might be, first claiming it was in his bedroom, and later stating that it might have been in the couch. Officers later located the weapon during a search of the residence, inside of a concealed cabinet in the kitchen. The gun contained two spent shell casings and four live rounds.

{¶9} An autopsy of [Boyer's] body resulted in a bullet being recovered from [Boyer's] abdomen. That bullet was a .38 caliber bullet and additional testing by the crime lab resulted in the conclusion that the bullet found inside Boyer's body was fired from the .38 Smith and Wesson revolver found in Spring's kitchen.

{¶10} Approximately ten hours after he made the 911 call, Spring was interviewed by Sheriff Fred Abdalla while in sheriff's department custody; this interview was videotaped. Before questioning Spring, Abdalla provided him the

Miranda warnings, and Spring indicated he understood his rights and wished to waive them.

{¶11} Spring admitted to the sheriff that he first shot [Boyer] in the abdomen and then shot him again in the head. He explained he inflicted the second shot because he did not want to see [Boyer] suffer. This statement by Spring matched the conclusions of the medical examiner, who indicated that [Boyer] was alive when the shot to the head was fired. Spring also admitted he attempted to clean up the blood outside with a broom, and that he placed the knife in [Boyer's] hand after he shot him.

{¶12} Spring elected to testify in his own defense at trial, claiming that he shot [Boyer] accidentally through his closed front door. Spring testified that he believed [Boyer] had left the premises, and therefore did not think he would hit anyone when he fired his weapon through the door. Spring claimed that prior to the shooting there were only seven bullet holes in the front door, an assertion supported by the testimony of his son. After the shooting, investigators found there were nine bullet holes in the front door.

{¶13} Spring admitted he lied when he reported [Boyer] broke into his house and had a knife. Spring said he and [Boyer] had been together at his home for approximately 30 to 40 minutes, when the two began to argue. At some point, he became agitated after observing his prescription medication bottles were moved; he suspected [Boyer] had attempted to steal from him. He then pushed [Boyer] out of his house. Subsequently, he shot two times through the closed front door.

{¶14} Spring said he discovered [Boyer's] dead body outside when his dogs began to bark. Spring conceded he took the broom and was trying to sweep away the blood stains and that he also "got some disinfectant and sprayed it around" that area. Only after his attempt at cleaning up, did Spring call 911. As for the knife, Spring said he "subconsciously" planted it in [Boyer's] hand. When asked by defense counsel whether he lied about the knife because he was afraid, Spring remarked: "I wasn't. I wasn't afraid."

{¶15} Upon cross-examination, Spring could not explain how the bullets would have taken a 90 degree turn once going through the door, to hit [Boyer] where the bloodstain was found outside. Spring asserted that three separate law enforcement officers must have misheard him when they reported he said he shot Boyer once and then went out and shot him again in the head to make sure that he was dead. Spring was unable to explain his recorded statement to the sheriff, wherein he admitted that he shot [Boyer] in the head because he "didn't want to see him suffer."

ECF Doc. 8-1 at 59-61.[3] During the course of trial, Sheriff Abdalla also gave an opinion of where on Spring's properly he believed Boyer was shot, and Special Agent Edward Lulla opined on the difference between blood drip and blood spatter. ECF Doc. 9 at 158, 182. During closing argument, in rebuttal, the state referred to Spring as a "snake" and stated that Spring could have, but did not, call witnesses to testify about pills found near Boyer's corpse. ECF Doc. 9 at 316-17. The jury convicted Spring as charged, and Spring was sentenced to an aggregate 18-year to life term of imprisonment. ECF Doc. 8-1 at 8-9; ECF Doc. 9 at 332.

B. Direct Appeal

On September 8, 2015, Spring appealed his convictions to the Ohio Court of Appeals. ECF Doc. 8-1 at 12. Through new counsel, Spring filed a merits brief, asserting one assignment of error which contained three issues:

> Jeffery Spring received ineffective assistance of counsel because his attorney failed to [(1)] file a motion to suppress his statements to the police, when he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights; [(2)] object to prosecutorial misconduct in closing argument; and [(3)] object to witness opinion which was not based on firsthand knowledge or expertise.

ECF Doc. 8-1 at 19, 23. He additionally raised a cumulative-error claim based on trial counsel's alleged deficiencies. *Id.* First, Spring argued that counsel should have moved to suppress his custodial statements to police given the evidence of (i) his alcohol use, (ii) his tenth grade education, (iii) the lack of inquiry into his mental state by police prior to questioning, and (iv) his prescription medication. ECF Doc. 8-1 at 27-30.

Second, Spring argued that trial counsel should have objected to the prosecution's statements in rebuttal closing argument calling Spring a "snake" because they were sufficiently

[3] These state court factual findings are presumed correct unless Spring rebuts them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Moore v. Mitchell*, 708 F.3d 760, 801 (6th Cir. 2013).

inflammatory to qualify as prosecutorial misconduct. ECF Doc. 8-1 at 30-31. And counsel should have objected to the prosecution's comment that Spring could have called witness to testify about the pills because it implicitly shifted the burden of proof on Spring. ECF Doc. 8-1 at 31. Third, Spring contended that counsel should have objected to: (i) Sheriff Abdalla's testimony about where he believed Boyer was shot because it was based on unfounded assumptions; and (ii) Special Agent Lulla's testimony regarding blood-stain patterns because he was not qualified as an expert. ECF Doc. 8-1 at 31-33.

The state filed an appellee brief. ECF Doc. 8-1 at 42-57. On March 3, 2017, the Ohio Court of Appeals determined that Spring's assignment of error was meritless and affirmed his convictions. ECF Doc. 8-1 at 58-75; *State v. Spring*, 85 N.E.3d 1080 (Ohio App. Ct. 2017). On Spring's first issue, the court determined that, despite the testimony that Spring had an odor of alcohol, slurred speech, and consumed 15 beers on the day of the shooting, a motion to suppress would not have been successful and counsel was not constitutionally deficient for not filing a meritless motion. ECF Doc. 8-1 at 65-66. The court reasoned that, as to Spring's statements shortly after his arrest:

> [W]e have the benefit of the 911 call audio recording as part of the record, which Spring made shortly before those officers arrived. On the call, although Spring's speech does sound slurred, Spring was coherent and calm and was able to correctly report his name, address, phone number and the victim's name. The officers indicated that Spring was calm and appeared to understand the questions asked of him.

ECF Doc. 8-1 at 65. As to Spring's statements to Sheriff Abdalla, the court reasoned:

> ... The interview was videotaped and is part of the record. Spring appears coherent and mostly calm. He was not slurring his speech, and did not appear intoxicated. He was even able to correct Abdalla about the number of times he had been Mirandized. Abdalla stated that he was about to read him his rights for the third time, when Spring correctly noted that actually it was only the second time he had been Mirandized since being placed in custody for the homicide. Abdalla went through each of the Miranda rights and gave Spring the opportunity to ask questions about each. Spring indicated he understood the rights he would waive by making a statement. Further, Abdalla testified that Spring never

> claimed to need medication during the interview and denied that Spring appeared to be suffering from any type of memory loss or confusion.

ECF Doc. 8-1 at 66.

On Spring's second issue, the Ohio Court of Appeals determined that the prosecution's remarks during closing argument were not improper. ECF Doc. 8-1 at 66-69. Specifically, the court stated:

> {¶38} Spring first asserts that trial counsel was ineffective for failing to object to the prosecutor's comment during her rebuttal closing that Spring was a "snake." * * *
>
> {¶39} However, as Spring concedes, defense counsel had just characterized [Boyer] as a snake, during an anecdote in his own closing. * * *
>
> {¶40} When reviewed in the context of the entire closing statements of both parties, the comment calling Spring a snake does not rise to the level of misconduct; it was a reasonable rebuttal to defense counsel's closing statement.
>
> {¶41} Second, Spring asserts it was improper for the State, during its rebuttal closing to point out to the jury that both sides may call witnesses. Again, the prosecutor was merely responding to statements made by defense counsel in his closing about how they were unanswered questions about white pills found next to [Boyer's] body.

ECF Doc. 8-1 at 67-69. Alternatively, the court concluded that Spring could not establish he was prejudiced by the prosecutor's remarks in light of the "overwhelming" evidence against him. ECF Doc. 8-1 at 69.

On Spring's third issue, the Ohio Court of Appeals determined that Sheriff Abdalla's testimony was not improper because it was rationally based on his observation and perception of the scene of the crime and was helpful for the determination of a fact in issue. ECF Doc. 8-1 at 70. The court also determined that (1) Special Agent Lulla likely would have been deemed an expert had the state so requested, because Special Agent Lulla testified that he was assigned to Bureau of Criminal Investigation's ("BCI") crime scene unit, processed crime scenes for local agencies, and had worked for BCI for 18 years and in law enforcement for 13 years before that;

(2) Special Agent Lulla's report was admitted into evidence and the pictures contained therein clearly depicted areas that appeared to be blood drips versus splatter; and (3) there was Ohio precedent allowing admission of testimony similar to that of Special Agent Lulla's even without expert qualification. ECF Doc. 8-1 at 70-72. Alternatively, the court concluded that any failure to object was not prejudicial given the overwhelming evidence of guilt. ECF Doc. 8-1 at 70, 72. The court's decision was journalized on March 6, 2017. ECF Doc. 8-1 at 58, 74-75.

On April 17, 2017, Spring appealed to the Ohio Supreme Court. ECF Doc. 8-1 at 76-77. His memorandum in support of jurisdiction asserted one proposition of law: "Is an Appellant Deprived of Due Process under Law under the Ohio and U.S. Constitutions when He Does Not Receive the Effective Assistance of Counsel?" ECF Doc. 8-1 at 79. Spring's arguments in support of his proposition of law largely mirrored those he made in the court of appeals. ECF Doc. 8-1 at 80-88. On July 26, 2017, the Ohio Supreme Court declined to exercise jurisdiction. ECF Doc. 8-1 at 106.

C. App. R. 26(B) Application to Reopen Appeal

On June 6, 2017, Spring filed a *pro se* application to reopen his direct appeal pursuant to Ohio App. R. 26(B), alleging that appellate counsel was ineffective for not arguing that trial counsel was ineffective for failing to test pills found by Boyer's body, which would have shown that Boyer had stolen his pills and that a lesser-included offense instruction was warranted. ECF Doc. 8-1 at 128; *see* Docket for Ohio App. Ct., 7th Dist. Case No. 15JE19.

On June 29, 2017, the Ohio Court of Appeals denied Spring's application to reopen as untimely because Spring did not file the application within the 90-day period set forth under Ohio App. R. 26(B)(1) and failed to show cause for the untimely filing. ECF Doc. 8-1 at 108-10. The court further determined that the motion was due to be denied because Spring failed to provide – as required under Ohio App. R. 26(B)(2)(e) – portions of the record upon which he

relied and cited in his application. ECF Doc. 8-1 at 109. Accordingly, the court determined, "we need not reach the merits of his arguments." *Id.*

On July 10, 2017, Spring applied, pursuant to Ohio App. R. 26(A), for reconsideration. ECF Doc. 8-1 at 111. He asserted that he had deposited his Rule 26(B) application for mailing on June 1, 2017, but it was not filed until June 6, 2017. *Id.* There was no reasonable explanation, Spring argued, for why it took five days for the motion to be filed and he should not be penalized for a delay over which he had no control. *Id.* Spring further contended that the failure to support his Rule 26(B) with records was an improper basis for denying the application because he had explained that counsel did not provide him a copy of the transcripts. ECF Doc. 8-1 at 111-12.

On September 29, 2017, the Ohio Court of Appeals denied Spring's Rule 26(A) application for reconsideration because he could not argue points to show good cause that he could have raised earlier in the proceedings. ECF Doc. 8-1 at 113, 114. The court further stated that, although counsel may not have provided him transcripts, Spring had made no other attempt to obtain the transcripts. ECF Doc. 8-1 at 114-15.

Spring filed a pro se notice of appeal to the Ohio Supreme Court. ECF Doc. 8-1 at 117-18. His memorandum in support of jurisdiction asserted one proposition of law:

> Is an Appellant Denied Due Process when His Application for Reopening pursuant to App.R. 26(b) is Denied on Purely Procedural Grounds which [*sic.*] Arguably Unrelated to Appellant's Duty to [*sic.*] Diligence?

ECF Doc. 8-1 at 120. In support, he largely reiterated his arguments in support of reconsideration and restated his grounds for Rule 26(B) relief. ECF Doc. 8-1 at 121-29. On February 14, 2018, the Ohio Supreme Court declined to accept jurisdiction. ECF Doc. 8-1 at 137.

D. Petitions for Post-Conviction Relief

Meanwhile, on September 28, 2016, Spring filed his **first** pro se petition for post-conviction relief. ECF Doc. 8-1 at 138-42. Spring raised two related claims for relief:

> 1. Trial counsel was ineffective when counsel failed to investigate Spring's front door and bullets recovered from the door and Boyer's body. ECF Doc. 8-1 at 139.
>
> 2. Spring's right to a fair trial was violated when bullets recovered from the front door and Boyer's body were not presented at trial. ECF Doc. 8-1 at 140-41.

In support, Spring argued that had the bullets had been forensically analyzed, they would have revealed paint or metal fragments from the door of his home and supported his claim that he shot through the front door without knowledge that Boyer was on the other side. ECF Doc. 8-1 at 139-41. Spring further argued that a test for gunshot residue was not performed on Boyer or the door. ECF Doc. 8-1 at 141. If Boyer had been shot in the head, gunshot residue would be present on Boyer or his clothing, whereas gunshot residue would be found on the door if – as Spring claimed – he had shot Boyer through the door. *Id.*

In a supporting affidavit, Spring stated that Boyer came to his house on the night of the offense. ECF Doc. 8-1 at 146. He and Boyer had both been drinking. *Id.* Spring had also taken hydrocodone, oxycodone, Valium, and Zanaflex. *Id.* Spring went outside to use the bathroom, after which he returned inside and found Boyer going through his medication. *Id.* Spring made Boyer leave, locked the door, and went to his room and got his gun because he was angry. *Id.* Spring went to the front door and shot twice at the door, which he had done on several prior occasions – as evidenced by the many bullet holes on the door. *Id.* He did not know Boyer was on the other side nor did he intend to shoot Boyer. *Id.* Forensic evaluation of the bullets recovered in his case would show paint/metal fragments from the front door to confirm his statements. *Id.* The state filed a response opposing the petition. ECF Doc. 8-1 at 148-49.

On June 1, 2018 – while Spring's first petition was still pending – Spring filed a **second** pro se petition for post-conviction relief. ECF Doc. 8-1 at 150-52. In it, he raised one claim: trial counsel was ineffective for not investigating narcotics that had been stolen from him and found near Boyer's body. ECF Doc. 8-1 at 151, 154. Spring attached a supporting affidavit, identical to his previous one except he additionally stated that a forensic evaluation of the pills recovered in his case would show that Boyer stole them from his bedroom. ECF Doc. 8-1 at 157. Spring also moved for forensic testing of the bullets recovered from the scene. ECF Doc. 8-1 at 145.

On December 4, 2018, Spring filed a **third** pro se petition for post-conviction relief, reiterating that trial counsel was ineffective for not submitting the front door of his house or the drugs found by Boyer to be tested. ECF Doc. 8-1 at 186-88. On March 12, 2019, Spring filed a **fourth** pro se petition for post-conviction relief, asserting – as relevant here – that (1) trial counsel was ineffective for not objecting to Sheriff Abdalla's and Special Agent Lulla's testimony and to the prosecution's statements during closing argument; and (2) appellate counsel was ineffective for not raising trial counsel's failure to test the door and pills and bullets recovered from the scene of the offense. ECF Doc. 8-1 at 192-95.

On March 19, 2019, the trial court scheduled a hearing on Spring's petitions for April 1, 2019. ECF Doc. 8-1 at 207. At the hearing, David Brundage, MS, was authorized to forensically analyze the bullets. ECF Doc. 24 at 24.

On June 4, 2019, Brundage rendered his report, noting that he was told there was only one bullet in the record. ECF Doc. 24 at 24, 26. His examination revealed that the bullet he was provided exhibited a grey paint-like material that could be removed and compared with the paint from Spring's grey front door. ECF Doc. 24 at 25-26. Brundage did not compare the paints because he had not been trained to do so. ECF Doc. 24 at 26.

On July 10 and 18, 2019, Spring filed his **fifth** and **sixth** pro se petitions for post-conviction relief. ECF Doc. 24 at 4-7, 20-23. Both petitions asserted that (1) trial counsel was ineffective for not forensically testing the bullet recovered from the scene of the offense and the front door of his house, and (2) Spring was denied a fair trial by said forensic evidence not being presented at trial – as evidenced by Brundage's report. ECF Doc. 24 at 5-6, 21-22.

On July 11, 2019, the trial court ordered that "Any motions filed on or before July 10, 2019 are overruled without a hearing." ECF Doc. 24 at 19. On August 1, 2019, Spring filed a notice of appeal. ECF Doc. 24 at 49. On August 6, 2019, the trial court summarily denied Spring's July 18, 2019 petition. ECF Doc. 24 at 48.

Spring filed a merits brief in the Ohio Court of Appeals, asserting four assignments of error on claims of trial court error. ECF Doc. 24 at 64. Specifically, that the trial court erred and denied Spring due process of law by denying his petition for post-conviction relief when he presented evidence that (1, 2, and 3) trial counsel was ineffective for not investigating evidence related to (i) his front door, (ii) bullets found at the scene of the crime, and (iii) pills found at the scene of the crime; and (4) he was denied a fair trial due to counsel's failure to investigate the bullets. ECF Doc. 24 at 69-80. Spring's supporting arguments reiterated the merits of his claims of ineffective assistance of trial counsel in his several petitions for post-conviction relief. ECF Doc. 24 at 69-75.

On September 28, 2020, the Ohio Court of Appeals overruled Spring's assignments of error and affirmed the trial court's decisions. ECF Doc. 24 at 83-89; *State v. Spring*, 2020-Ohio-4718 (Ohio App. Ct. Sept. 29, 2020). The court reasoned:

> [T]he arguments raised by [Spring] could have, or should have been raised on direct appeal. In fact, [Spring's] entire argument on direct appeal focused on his claim of multiple alleged instances of ineffective assistance of counsel; however, it did not refer to the evidentiary issues he now raises. ... Nonetheless, [Spring] could have additionally raised the issues he now raises surrounding his counsel's alleged failure to properly investigate during his direct appeal.

> {¶19} As [Spring] points out in his brief, his trial counsel was in possession of the door to [Spring's] house, which contained bullet holes that [Spring] asserts should have been forensically examined. Additionally, [Spring] testified at trial that his prescription medication bottles had been moved and he suspected [Spring] had attempted to steal from him. ... And there was considerable amount of testimony at trial regarding the bullets that killed Boyer. ... Thus, at the time of his direct appeal, [Spring] was aware of the issues he raised in postconviction. He could have, and should have, raised the issues in his direct appeal. Therefore, the trial court properly denied [Spring's] postconviction petitions as the issues he raised were barred by the doctrine of res judicata.

ECF Doc. 24 at 87.

Spring has not shown that he properly pursued any further review before the Ohio Supreme Court.

II. Discussion

A. Ground One: Ineffective Assistance of Trial Counsel

1. Parties' Arguments

In his Ground One claim, Spring asserts that he received ineffective assistance from his trial counsel, in violation of his Sixth and Fourteenth Amendments. ECF Doc. 1 at 5. Specifically, the claim was based on counsel's failure to: (1) file a pretrial motion to suppress statements he made in violation of his *Miranda* rights; (2) object to prosecutorial misconduct in closing argument; and (3) object to testimony that was not based on first-hand knowledge of expertise. *Id.*

Warden Gray responds that Spring is not entitled to relief on his Ground One claim because the Ohio Court of Appeals reasonably determined that he could not show deficient performance or prejudice. ECF Doc. 8 at 33. Spring has not further developed his Ground One claim in his traverse. *See generally* ECF Doc. 25.

2. AEDPA Deference

To obtain a writ of habeas corpus, Spring has the burden to prove that he is "in custody in violation of the Constitution or laws and treaties of the United States." 28 U.S.C. § 2554(a). Because the Ohio Court of Appeals addressed Spring's ineffective-assistance-of-trial counsel claim on the merits, Spring's Ground One claim is subject to the deferential reasonableness standard under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 124 ("AEDPA"). *Johnson v. Williams*, 568 U.S. 289, 292 (2013). Under AEDPA, habeas relief is available only when the state court's decision: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the record before the state court. 28 U.S.C. § 2254(d). The relevant question isn't whether the state court got it right or wrong, but whether the state court's determination was "unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[A] strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The petitioner must show that the state court's "decision was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

3. Ineffective Assistance Standard

Criminal defendants have a Sixth and Fourteenth Amendment right to "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To obtain relief on an ineffective-assistance claim, the petitioner must show that: (1) trial counsel's action or inaction was objectively unreasonable in light of all the circumstances of the case; and (2) "the deficient performance prejudiced the defense." *Id.* at 687-88. To meet the first *Strickland* prong, the petitioner has to overcome the presumption that trial counsel exercised reasonable

professional judgment in light of the circumstances that counsel faced when making all significant decisions. 466 U.S. at 690. And for "prejudice," the petitioner has to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The already deferential *Strickland* standard becomes even more difficult to meet when combined with the highly deferential AEDPA standard. *Harrington*, 562 U.S. at 105. The question becomes "not whether counsel's actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

4. Motion to Suppress *Miranda*-Defective Statements

a. Law

In *Miranda*, the Supreme Court held that – under the Fifth Amendment – a person taken into custody or otherwise deprived of their freedom must be advised of certain rights prior to any questioning. *Miranda v. Arizona*, 384 U.S. 436, 444, 471-78 (1966). Statements obtained without prior rights warnings and a valid waiver cannot be used against the declarant in a criminal trial. *Id.* at 479. Whether a suspect's waiver of *Miranda* rights is knowing and voluntary depends on the totality of the circumstances surrounding the interrogation. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). "The Supreme Court has never said that impairments from drugs, alcohol, or other similar substances can negatively impact a suspect's waiver of his *Miranda* rights." *Treesh v. Bagley*, 612 F.3d 424, 434 (6th Cir. 2010) (quotation marks and alterations omitted). And under Ohio law, "[t]he presence of alcohol will not, by itself, make a statement *per se* inadmissible." *State v. Stewart*, 598 N.E.2d 1275, 1279 (Ohio App. Ct. 1991) (quotation marks omitted). The relevant question is whether the amount of drugs or alcohol consumed was sufficient to impair the defendant's ability to reason. *Id.*

b. Analysis

The Ohio Court of Appeals' denial of Spring's Ground One claim – as to his first ineffective-assistance argument – was neither contrary nor an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d). The court explicitly cited and applied the two-prong deficiency and prejudice *Strickland* standard. ECF Doc. 8-1 at 62. And the court reasonably concluded that Spring failed to establish deficient performance on account of counsel's failure to move to suppress his statements to law enforcement. ECF Doc. 8-1 at 65-66.

The Ohio Court of Appeals stated that a motion to suppress Spring's statements to police officers at the scene of the offense likely would not have succeeded because – despite evidence that Spring had consumed up to 13 beers that day, had slurred speech, and had been taking prescription medication – Spring was observed to be, and sounded in his 911 call, calm and coherent and accurately relayed information. ECF Doc. 8-1 at 66. Fair-minded jurists could disagree on the correctness of the state court's determination that a motion to suppress would have been meritless, given: (1) the 911 recording, showing Spring was calm, coherent, and able to accurately convey information; (2) Sergeant Matt Henderson's testimony that Spring was calm and complied with instructions when he arrived at the scene; (3) Sergeant Sean Rath's and Sergeant Terry Grindle's testimony that Spring was calm; (4) Sergeant Joseph Lamantia's testimony that he witnessed firsthand Spring being given *Miranda* warnings at the scene of the offense, Spring was calm and listening, Spring did not appear unable to answer questions, and Spring seemed like he understood; and (5) Sheriff Abdalla's testimony that Spring appeared to be able to understand questions and accurately remembered the number of times he had been *Mirandized*. *Harrington*, 562 U.S. at 102-03; ECF Doc. 8-1 at 66; ECF Doc. 9 at 106-07, 115, 121, 124, 133-34, 158, 162.

Fair-minded jurists could likewise disagree on the correctness of the Ohio Court of Appeals' determination that a motion to suppress also would have been meritless as to Spring's statements while being interviewed at the jail. *See Harrington*, 562 U.S. at 102-03. This is especially so, given: (1) Sheriff Abdalla's testimony that (i) Spring was questioned ten hours after being brought to the jail, (ii) Spring never mentioned needing, or suffering from not having his medication, (iii) Spring corrected Sheriff Abdalla on the number of times he had been provided *Miranda* instructions, and (iv) Spring did not appear to suffer from confusion or memory loss; and (2) Spring's recorded interview with Sheriff Abdalla, during which Spring was coherent, did not slur or appear intoxicated, and indicated that he understood his rights. ECF Doc. 8-1 at 66; ECF Doc. 9 at 159, 160-62. From the evidence, the state court reasonably could conclude that Spring's alcohol and/or medication consumption did not render his waiver of his *Miranda* rights unknowing or involuntary. *See Stewart*, 598 N.E.2d at 1279. Therefore, the state court's conclusion that counsel was not deficient because a motion to suppress Spring's statements would have been denied was not so lacking in justification that it was beyond any possibility for fair-minded disagreement. *Harrington*, 562 U.S. at 102-03; *see Walker v. Chapman*, No. 20-1485, 2020 U.S. App. LEXIS 32093, at *8 (6th Cir. Oct. 8, 2020) (unreported) ("Counsel is not ineffective for failing to pursue a meritless motion or issue.").

5. Prosecutorial Misconduct

The Ohio Court of Appeals' denial of Spring's Ground One claim – as to his second ineffective-assistance argument – also was neither contrary nor an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d). Applying the *Strickland* standard, the Ohio Court of Appeals reasonably determined that Spring suffered no prejudice on account of trial counsel's failure to object to the prosecutor's remarks during rebuttal closing argument. Taking each challenged remark in turn, the state court could reasonably conclude that the state's reference to Spring as a

"snake" was not improper. Fair-minded jurists could disagree on the correctness of that determination, given that the state made that remark in rebuttal after Spring analogized Boyer to a "snake." ECF Doc. 9 at 311, 317. Under Ohio law, "[t]he prosecution is entitled to significant latitude in closing remarks." *State v. Diar*, 120 Ohio St. 3d 460, 473 (Ohio 2008). That latitude that persists in rebuttal. *State v. Powell*, 132 Ohio St. 3d 233, 265 (Ohio 2012). And Ohio courts have held that prosecutorial misconduct does not occur when the state uses defense counsel's analogy against him. *See Diar*, 120 Ohio St. 3d at 488 ("The prosecutor could properly respond to defense arguments analogizing Diar's case to a movie."); *State v. Revere*, No. 17039, 1998 Ohio App. LEXIS 6134, at *5 (Ohio App. Ct. Dec. 11, 1998) (unreported) (holding that the prosecutor's reference to the Mafia in rebuttal was not prosecutorial misconduct).

The Ohio Court of Appeals also could reasonably conclude that the state's comment that Spring could have called witnesses to testify about the pills if he thought it was so important was not prosecutorial misconduct. Fair-minded jurists could disagree on the correctness of that determination, given that the state made that remark in rebuttal after defense counsel implied that there was doubt as to Boyer's motives for coming over to Spring's house and Spring's pills were found outside and never sent to the lab. ECF Doc. 9 at 310-11. Ohio courts have held comments on a defendant's failure to call witnesses or present evidence he claims would have been helpful are not improper. *State v. Lenoir*, 2008-Ohio-1984, ¶35 (Ohio Ct. App. 2008); *see also State v. Wilks*, 154 Ohio St. 3d 359, 392 (Ohio 2018) ("The prosecutor may comment on the failure of the defense to offer evidence in support of its case."); *State v. McKnight*, 107 Ohio St. 3d 101, 143 (Ohio 2005) (same).

Moreover, fair-minded jurists could disagree on the correctness of the Ohio Court of Appeals' alternative determination that Spring suffered no prejudice. The state court could reasonably determine that the evidence against Spring was – as the court described it –

"overwhelming." ECF Doc. 8-1 at 69. This is especially true, given: (1) Sergeant Rath's, Sergeant Grindle's, Detective Dave Wojta's, and Sheriff Abdalla's testimony that Spring admitted he stepped outside his front door and shot Boyer in the head "to make sure he was dead;" (2) Spring's recorded interview, in which he admitted to shooting Boyer in the abdomen and then in the head because he did not want to see Boyer suffer; (3) expert testimony that Boyer was likely alive when he was shot in the head; (4) expert testimony that Boyer had two entry wounds – one in his chest and one in the back of his head; and (5) Spring's admission – along with corroborating physical evidence – that he placed a knife in Boyer's hands and attempted to clean his blood before calling 911. ECF Doc. 8-1 at 60; ECF Doc. 9 at 119, 126, 139, 163, 181-82, 213, 241-42, 245-46, 254-55, 280-81. The state court's conclusion that Spring was not prejudiced by counsel's failure to object to the prosecutor's closing remarks – either because the remarks were not improper or because the evidence against him was overwhelming – was, therefore, not so lacking in justification that it was beyond any possibility for fair-minded disagreement. *Harrington*, 562 U.S. at 102-03.

6. Witness Testimony

The Ohio Court of Appeals' denial of Spring's Ground One claim – as to his third ineffective-assistance argument – too was neither contrary nor an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d). Applying the *Strickland* standard, the Ohio Court of Appeals reasonably determined that Sheriff Abdalla's testimony was not objectionable, and Spring suffered no prejudice due to trial counsel's failure to object to Sheriff Abdalla's and Special Agent Lulla's testimony. ECF Doc. 8-1 at 70-72. The state court's determination that Sheriff Abdalla's testimony was not improper – and therefore admissible – and that Special Agent Lulla likely would have been deemed an expert witness had counsel objected are determinations of state law that are binding on this court. *Garcia v. Burt*, No. 17-1951, 2018 U.S. App. LEXIS

37314, at *13-14 (6th Cir. Feb. 5, 2018) (unreported); *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). The state court's conclusion that counsel was not deficient for not objecting to Sheriff Abdalla's testimony and that no prejudice resulted from Special Agent Lulla's testimony because he would have been an expert necessarily follow. *Garcia*, No. 17-1951, 2018 U.S. App. LEXIS 37314, at *14. Moreover, as discussed above, fair-minded jurists could disagree on whether there was overwhelming evidence of Spring's guilt. The state court's conclusion that counsel was not ineffective for not objecting to Sheriff Abdalla's and Special Lulla's testimony was therefore not so lacking in justification so as to be beyond any possibility for fair-minded disagreement. *Harrington*, 562 U.S. at 103.

7. Ground One Summary

Because Spring has not shown that the Ohio Court of Appeals unreasonably determined that he failed to meet the requirements of *Strickland*, I recommend that Spring's Ground One claim be DENIED as meritless.

B. Ground Two: Ineffective Assistance of Appellate Counsel

In his Ground Two claim, Spring asserts that appellate counsel was ineffective for not raising an ineffective-assistance argument based on trial counsel's failure to investigate the pills found by Boyer's body. ECF Doc. 1 at 7.

Warden Gray responds that Spring's Ground Two claim is procedurally defaulted because he failed to fairly present the claim to the Ohio Court of Appeals through a timely Ohio App. R. 26(B) application and he has not demonstrated cause or prejudice to excuse his procedural default. ECF Doc. 8 at 15-17.

In his traverse, Spring asserts that the delay in filing his Rule 26(B) application was for reasons outside his control, though he does not elaborate as to what those reasons were. ECF

Doc. 25 at 2. He argues that he can overcome his procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012). ECF Doc. 25 at 4-5. And, in connection with the new claims raised in his traverse (discussed separately in Section C below), that he can excuse his procedural default via actual innocence. ECF Doc. 25 at 7.

1. Procedural Default

Procedural default is "a critical failure to comply with state procedural law," *Trest v. Cain*, 522 U.S. 87, 89 (1997), resulting in a bar to federal habeas review unless the petitioner makes the requisite showing, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Procedural default occurs when: (1) the state courts didn't review the petitioner's claim on the merits because he didn't comply with some state procedural rule; or (2) he failed to fairly present the claim to the state courts while state court remedies were still available. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). The former occurs when: (1) the petitioner failed to comply with an applicable state procedural rule; (2) the state court actually enforced the rule; (3) the rule constituted an "adequate and independent state ground;" and (4) the petitioner cannot overcome his procedural default through cause and prejudice. *Coleman v. Mitchell*, 268 F.3d 417, 427 (6th Cir. 2001).

2. Analysis

Spring's Ground Two claim is procedurally defaulted because the Ohio Court of Appeals applied a state procedural rule to preclude merits review of the claim. *Williams*, 460 F.3d at 806; ECF Doc. 8-1 at 108-09. Spring raised his Ground Two claim in his Ohio App. R. 26(B) application to reopen. ECF Doc. 8-1 at 128. To be timely, such applications must be filed within 90 days from journalization of the challenged appellate judgment, unless there is a showing of good cause for delayed filing. Ohio App. R. 26(B)(1). And the application must include any parts of the record available to the applicant upon which his motion relies. Ohio App. R. 26(B)(2)(e).

The appellate judgment was journalized on March 6, 2017, such that Spring's Rule 26(B) application had to be filed no later than June 5, 2017. Ohio App. R. 26(B)(1); ECF Doc. 8-1 at 58. Spring filed his application on June 6, 2017, resulting in the failure to comply with an applicable state procedural rule. *Coleman*, 268 F.3d at 427; ECF Doc. 8-1 at 108-09; *see* Docket for Ohio App. Ct., 7th Dist. Case No. 15JE19. He likewise failed to attach portions of the transcript upon which his application relied. ECF Doc. 8-1 at 109. Although Spring claimed that transcripts were unavailable because counsel never furnished them, counsel was not required to do so. *State v. Quinn*, 2011-Ohio-3717, P6 (Ohio Ct. App. 2011); *State v. Marcum*, 2002-Ohio-21, 2002 Ohio App. LEXIS 86, at *4 (Ohio Ct. App. Jan. 14, 2002). And at least one Ohio court has required that applicants show what efforts they made to obtain transcripts. *State v. Sweeney*, 723 N.E.2d 655, 657 (Ohio Ct. App. 1999).

The state court actually enforced the both rules. *Coleman*, 268 F.3d at 427; ECF Doc. 8-1 at 108-09. And Rule 26(B)'s timeliness and transcript requirements are adequate and independent state law grounds for denying relief. *Taylor v. Buchanan*, No. 20-3120, 2020 U.S. App. LEXIS 20439, at *9 (6th Cir. June 30, 2020) (unreported); *Monzo v. Edwards*, 281 F.3d 568, 578 (6th Cir. 2002); *Coleman*, 268F.3d at 427. Therefore, Spring's Ground Two claim is procedurally defaulted. *See Williams*, 460 F.3d at 806.

Spring also cannot demonstrate cause and prejudice to overcome his procedural default. *Coleman*, 268F.3d at 427. Spring argued to the Ohio Court of Appeals that the one-day delay wasn't his fault because he delivered the application for mailing on June 1, 2017. ECF Doc. 8-1 at 111. But Ohio doesn't have a prison mailbox rule, so pleadings filed by prisoners are deemed filed on the day they are filed with the court. *State ex rel. Tyler v. Alexander*, 52 Ohio St. 3d 84, 84-85 (Ohio 1990); *State v. Williams*, 811 N.E.2d 561, 564 (Ohio Ct. App. 2004); *see also Stewart v. Gillie*, 2017-Ohio-4088, 2017 Ohio App. LEXIS 3594, at *2 (Ohio Ct. App. Aug. 22, 2017) (unreported) (holding, on reconsideration, that Stewart's application to reopen his appeal was untimely because the prison

mailbox rule is not applicable in Ohio). Although Spring had no control over how long it would take for his application to be delivered to the state court, he knew he had until June 5, 2017 (a Monday) yet waited until June 1, 2017 (a Thursday) – almost the last possible day – to mail the application. Thus, any filing delay was fairly attributable to Spring, such that he cannot establish cause. *See Smith v. Jenkins*, 609 F. App'x 285, 290 (6th Cir. 2015) ("The 'cause' must be external to [the petitioner] and not fairly attributable to him."). And failure to establish cause makes it unnecessary to consider prejudice. *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007).

To the extent Spring relies on *Martinez* to excuse the procedural default of his Ground Two claim, he has not succeeded. In *Martinez*, the Supreme Court held that when state law only allows ineffective-assistance-of-trial-counsel claims to be raised on collateral review, a prisoner may establish "cause" to overcome a default of an ineffective-assistance-of-trial-counsel claim if: (1) the petitioner proceeded pro se in the collateral proceeding in which he should have raised the claim; or (2) the petitioner was counseled, but counsel was ineffective. 566 U.S. at 14. In either case, the petitioner must also demonstrate that his claim has "some merit." *Id.* Spring cannot rely on *Martinez* because the Supreme Court has declined to extend *Martinez* to procedurally defaulted claims of ineffective assistance of *appellate* counsel. *Davila v. Davis*, 137 S. Ct. 2058, 2063, 2065 (2017).

Spring could attempt to overcome his procedural default under the fundamental-miscarriage-of-justice exception. *Coleman*, 501 U.S. at 750. But he would have to show that there is new, reliable evidence establishing that he was actually innocent of the offense. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). It means evidence in light of which no reasonable juror could convict the petitioner. *Schlup*, 513 U.S. at 329. Evidence that Boyers stole Spring's pills does not establish that Spring was factually innocent of killing Boyer. Rather, it raises the issue of whether Spring shot

Boyers to defend his property – a claim that he was legally innocent of murder. *See Harvey v. Jones*, 179 F. App'x 294, 299 (6th Cir. 2006) (holding that an actual-innocence argument premised on self-defense is a legal, as opposed to factual, innocence argument). Thus, because no excuse applies, Spring's Ground Two claim should be dismissed as procedurally defaulted.

3. Merits

Even though Spring's Ground Two claim is procedurally defaulted, the Court may nevertheless choose to consider the claim on the merits under *de novo* review. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (courts can ignore complicated procedural bar issues if the merits are easily resolvable against the petitioner). Spring's Ground Two claim lacks merit. Appellate counsel reasonably could have determined that raising a claim of ineffective assistance of trial counsel based on trial counsel's failure to investigate the pills found near Boyer's body would have been meritless. *See Strickland*, 466 U.S. at 690. A forensic analysis of the pills may have established that they were Spring's and that Boyer had stolen them, which would have supported Spring's testimony that he rushed Boyer out the door upon discovering that Boyer had rifled through Spring's medication. ECF Doc. 8-1 at 278-80. But appellate counsel reasonably could have determined that the outcome of trial would not have changed with the benefit of that evidence because the jury already heard (i) Spring's testimony that Boyer stole his pills, (ii) the evidence that pills were found by Boyer's body, and (iii) trial counsel's closing argument that the pills found belonged to Boyers and nevertheless chose not to credit Spring's version of events. ECF Doc. 8-1 at 278-80, 296-97, 311. And Spring can point to no legal principle that condones killing someone because you think he might have stolen your property. Thus, even if Spring could show that his appellate counsel should have asserted a claim about trial counsel's failure to investigate Spring's pill bottle, and even if such an investigation would have shown the pills in

the bottle were Springs's, Spring cannot show prejudice because having one's pills stolen does not excuse killing the thief.

4. Ground Two Summary

Because the Ohio Court of Appeals determined that Spring's failure to comply with a state procedural rule precluded consideration of his claim that appellate counsel was ineffective for not investigating the pills found by Boyer's body, I recommend that his Ground Two claim be DISMISSED as procedurally defaulted. Should the Court prefer to address Spring's Ground Two claim on the merits, the claim should be dismissed for lack of merit.

C. Ground Three: Trial Court Error

1. Parties' Arguments

In his traverse, Spring purports to raise a Ground Three claim that the trial court violated his due process rights by denying his petition for post-conviction relief, when Spring presented evidence that trial counsel was ineffective for not investigating Spring's front door, bullets found at the scene of the shooting, and pills found by Boyer's body. ECF Doc. 25 at 3-4. He contends that he was prevented from fully exhausting these grounds because: (i) of his pro se status; (ii) of a prison transfer; (iii) he never received a time-stamped copy of the state appellate decision; and (iv) of prison COVID-19 lockdown measures. ECF Doc. 25 at 4-6. He also asserts that the Ohio Court of Appeals improperly invoked res judicata, that he can overcome his procedural default, and that Brundage's forensic report established that he was actually innocent. ECF Doc. 25 at 4-5, 7-10.

Warden Gray responds that Spring's Ground Three claim is not properly before this court because: (i) it was raised for the first time in his traverse and in any event is non-cognizable because he challenges the propriety of his post-conviction proceedings; (ii) Spring cannot

overcome his procedural default; and (iii) his actual innocence claim insufficiently relates to legal innocence. ECF Doc. 27 at 2-3.

2. Analysis

I agree with Warden Gray's argument that Spring's Ground Three claim is not properly before the Court. It bears noting that the court previously granted Spring leave to amend his § 2254 petition so that he could add to his Ground Two claim an argument that *appellate* counsel was ineffective for not raising a claim that trial counsel was ineffective for not forensically testing the bullets recovered from the scene of the offense. ECF Doc. 13. Spring was required to raise the claim in an amended petition by January 26, 2021. ECF Doc. 14; ECF Doc. 17. Spring never did, and he did not raise the claim – or his proposed Ground Three claim – in his belated amended § 2254 petition. ECF Doc. 26. Because Spring raises his Ground Three claim for the first time in his traverse, it is not properly before this court and I recommend that it be dismissed on that basis. *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005).

Even if the Court were to consider Spring's Ground Three claim, I would recommend that it be dismissed. Spring's Ground Three claim is non-cognizable to the extent he contests the trial court's summary dismissal of the claim in his multiple post-conviction petitions. *Orange v. Lindamood*, No. 4:12-cv-71, 2015 U.S. Dist. LEXIS 124574, at *6 (E.D. Tenn. Sept. 17, 2015) (A claim "that the trial court erred in summarily dismissing his post-conviction petition is not cognizable on federal habeas [review]."). And issues of default or cognizability aside, the claim is meritless. Only one bullet was recovered from the scene of the offense: the one retrieved from Boyer's chest during his autopsy. ECF Doc. 9 at 94-95, 200, 223. Brundage determined that bullet contained paint, which could have established that at least one of the bullets was fired through Spring's door. ECF Doc. 24 at 25-26. But the fatal wound came from the unrecovered bullet that struck Boyer in the head. ECF Doc. 9 at 254-55. The bullet Spring admitted to

shooting after he'd come "outside ... to make sure he was dead."[4] *See* ECF Doc. 8-1 at 59-60; ECF Doc. 9 at 119, 121, 139. Thus. Spring cannot establish prejudice on account of trial counsel's alleged failure to investigate the door or the bullet or on account of his appellate counsel's handling of that issue. *See Strickland*, 466 U.S. at 690. And evidence that Boyer stole Spring's pills, as discussed above, likely would not have resulted in acquittal.

3. Ground Three Summary

Because Spring raised his Ground Three claim for the first time in his traverse, I recommend that his Ground Three claim be DISMISSED. Alternatively, the Ground Three claim can be disposed of on the merits.

III. Certificate of Appealability

A. Legal Standard

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant." Rule 11(a), 28 U.S.C. foll. § § 2254. The rule tracks the requirement of § 2253(c)(3) that any grant of a certificate of appealability "state the specific issue or issues that satisfy the showing required by § 2253 (c)(2)," Rule 11(a). In light of the Rule 11 requirement that the Court either grant or deny the certificate of appealability at the time of its final adverse order, a recommendation regarding the COA issue is included here.

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a §2254 habeas petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. *Cunningham v. Shoop*, 817 F. App'x 223, 224 (6th Cir. 2020). A

[4] Spring's effort to distance himself from this admission is unavailing. It is undisputed that the admission was in the trial record as was Spring's later recantation. The jury could (and apparently did) reasonably believe the initial admission, not Spring's later version.

petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis,* 137 S. Ct. 759, 773 (2017) (quotation marks omitted); *see also Slack v. McDaniel,* 529 U.S. 473, 484 (2000). When a claim is denied on procedural grounds, the petitioner must show "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." *Slack,* 529 U.S. at 484.

B. Analysis

If the Court accepts my recommendations, Spring will not be able to show that the Court's rulings on his claims are debatable among jurists of reason. Spring's Ground One claim is meritless. His Ground Two claim is procedurally defaulted and meritless. And his Ground Three claim is not properly before the Court, non-cognizable, and meritless. Because jurists of reason would not find debatable that habeas relief is not available for any of the claims raised in Spring's petition, I recommend that no certificate of appealability issue in this case.

IV. Recommendation

Because all of Spring's claims are non-cognizable, procedurally defaulted, and/or meritless, I recommend that all of Spring's claims be DISMISSED and that his petition for writ of habeas corpus be DENIED. I further recommend that Spring not be granted a certificate of appealability.

Dated: June 22, 2021

Thomas M. Parker
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after being served with a copy of this document. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *See U.S. v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn,* 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEFFREY M. SPRING, SR.,	)	CASE NO. 4:18-cv-2920
	)	
PETITIONER,	)	JUDGE SARA LIOI
	)	
vs.	)	**MEMORANDUM OPINION AND ORDER**
WARDEN BRANDESHAWN HARRIS,	)	
	)	
RESPONDENT.	)	

On June 22, 2021, Magistrate Judge Thomas M. Parker issued a Report and Recommendation ("R&R") recommending that the Court deny the petition for writ of habeas corpus filed by pro se petitioner Jeffrey Spring ("Spring" or "petitioner") pursuant to 28 U.S.C. § 2254. (Doc. No. 29.) Spring sought and received an extension of time to file his objections to the R&R (Doc. No. 31), and Spring subsequently timely file his objections pursuant to Fed. R. Civ. P. 72(b)(2) (Doc. No. 33). Respondent has not opposed Spring's objections. Also before the Court is Spring's motion for appointment of counsel. (Doc. No. 32.)

For the reasons that follow, Spring's objections to the R&R are overruled and the petition is denied and dismissed. Spring's motion for appointment of counsel is denied.

I. Legal Standard of Review

A. 28 U.S.C. § 636(b)(1)(C)

Under 28 U.S.C. § 636(b)(1)(C), "[a] judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See also Powell v. United States*, 37 F.3d 1499 (Table), 1994 WL 532926, at

*1 (6th Cir. Sept. 30, 1994) ("Any report and recommendation by a magistrate judge that is dispositive of a claim or defense of a party shall be subject to *de novo* review by the district court in light of specific objections filed by any party."); Fed. R. Civ. P. 72(b)(3) ("[t]he district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to."). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004). After review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

B. AEDPA

Although the Court must review *de novo* any matter properly objected to, in the habeas context, it must do so under the deferential standard of the Antiterrorism and Death Penalty Act of 1996 ("AEDPA.") Under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was 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 in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

As to the first prong,

> [A] decision of the state court is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." [citation omitted]. . . . [A]n "unreasonable application" occurs when "the state court identifies the correct legal principle from [the Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." [citation omitted]. A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." [citation omitted].

Harris v. Stovall, 212 F.3d 940, 942 (6th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

With respect to the second prong, federal courts must "presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473–74, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (citing 28 U.S.C. § 2254(e)(1)).

Under AEDPA's deferential habeas review standard, the question before the Court on *de novo* review "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro*, 550 U.S. at 473 (citing *Williams,* 529 U.S. at 410). In order to obtain habeas corpus relief 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." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

This standard is difficult to meet "because it was meant to be." *Id.* "[H]abeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332, n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring in judgment)).

II. Discussion

A. The R&R

The R&R sets forth in detail the procedural history of this case, including Spring's state court conviction for murder of Stephen Boyer ("Boyer"), with a firearm specification, and for tampering with evidence (Doc. No. 29 at 2–5[1]); direct appeal (*id.* at 5–8); application to reopen his appeal, over which the Ohio Supreme Court declined to exercise jurisdiction (*id.* at 8–9); and six petitions for post-conviction relief, which were denied by the trial court and affirmed by the Ohio Court of Appeals (Spring did not pursue further review before the Ohio Supreme Court) (*id.* at 10–13). In his objections, Spring does not challenge any of these procedural descriptions in the R&R, and they are adopted and incorporated herein.

Spring's habeas petition raises two grounds for relief:

> **Ground One**: Trial counsel was ineffective for failing to: (1) file a pretrial motion to suppress Spring's statements to police; (2) object to prosecutorial misconduct during closing arguments; and (3) object to witness opinion testimony.
>
> **Ground Two**: Appellate counsel was ineffective for not raising trial counsel's failure to investigate pills found by Boyer's body.

(*Id.* at 1 (record citations omitted).)

[1] All page number references herein are to the consecutive page numbers applied to each individual document by the electronic filing system, a citation practice recently adopted by this Court despite a different directive in the Initial Standing Order for this case.

The R&R recommends that Ground One be denied as without merit because "Spring has not shown that the Ohio Court of Appeals unreasonably determined that he failed to meet the requirements of *Strickland*." (*Id.* at 20.) With respect to Ground Two, the R&R recommends it be dismissed as procedurally defaulted because the Ohio Court of Appeals determined that Spring's failure to comply with a state procedural rule precluded consideration of his claim that appellate counsel was ineffective for not raising trial counsel's failure to investigate pills found by the decedent's body and, alternatively, that Ground Two be dismissed on the merits. (*Id.* at 25.)

Although not raised in the petition, Spring purports to raise a third ground for relief in his traverse—that the trial court violated his due process rights by denying his petition for post-conviction relief when Spring presented evidence that trial counsel was ineffective for not investigating his front door, bullets found at the scene of the shooting, and pills found by the decedent's body. (*Id.* at 25.) The R&R recommends that ground three be dismissed as not properly before the Court and, alternatively, on the merits. (*Id.* at 27.)

Lastly, should the Court accept the R&R that the petition be dismissed and denied, the R&R also recommends that Spring not be granted a certificate of appealability. (*Id.* at 28.)

B. Spring's Objections

1. Improper "objections"

Spring begins his objections by listing Grounds One and Two of his habeas petition in their entirety. (*See* Doc. No. 33 at 2.) To the extent that Spring is generally objecting to the entirety of the R&R with respect to Grounds One and Two, that objection is disregarded. General objections do not satisfy the specific objection requirement of the statute. "Overly general objections do not

satisfy the objection requirement. . . . 'The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious.'" *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006) (quoting *Miller v. Currie,* 50 F.3d 373, 380 (6th Cir. 1995)) *abrogated in on other grounds by Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 28 798 (2007).

In addition, Spring "objects" to a laundry list of facts which he characterizes as "unreasonable determination of facts in light of the evidence presented in the state courts." (Doc. No. 33 at 6–8.)

> This section of the objections will address the unreasonable determination of the facts in light of the evidence presented in the state courts.
>
> 1. This was a rushed trial process, the jury was picked, we had the trial and I [was] sentenced all in the same day.
>
> 2. My court appointed attorney did not show up for scheduled pre-trial hearing on 6-22-15 Ineffective Assistance of Counsel hear after [sic] (IEAC)
>
> 3. Prosecutor played only the portion of an interview with me that the prosecutor wanted the jury to see rather than the entire interview, my trial attorney failed to object to this. (IEAC) Trial transcript Page ID# 458
>
> 4. The sheriff lied at trial about whether or not victims [sic] finger prints or DNA were on the knife (PageID#: 751) Counsel failed to object to or challenge this misinformation. (IEAC)
>
> 5. The door was not used as evidence, this would have shown where the bullets passed through and that the door was closed at the time. (IEAC)
>
> 6. The evidence does not show that the victim was shot in the abdomen, it shows that he was shot in the upper chest, (PageID #:756 lines 23-25)
>
> 7. BCI investigator testifies that the body was never moved, the statement about a 90 degree shot required to hit victim was a false statement made up by the prosecution. (PageID#:753-754)
>
> 8. Trial counsel failed to object at any point in the trial proceedings.

> 9. Evidence as shown on (PageID#'s 763-764) that there was no evidence that the victim was shot at close range, no fouling, no stippling or other evidence of close range wounds.
>
> 10. Some wounds on the victim were from his forcible removal from the home prior to the shooting.
>
> 11. Prosecutors [sic] inflammatory remarks at trial included statements that Mr. Spring was a drunk, a murderer and a snake. These statements were used to inflame the jury and improperly play on the jury's emotions.
>
> 12. Spring told jury that he fired through the door after the verdict, PageID# 634

To the extent that Spring is contending in this "objection" that the evidence does not support his conviction and counsel was ineffective for reasons not contained in his habeas petition and not before the magistrate judge, Spring cannot raise new claims or arguments in an objection that were not raised before the magistrate judge. *Pryor v. Erdos*, No. 5:20-cv-2863, 2021 WL 4245038, at *8 (N.D. Ohio Sept. 17, 2021) ("It is well-established that a habeas petitioner cannot raise new claims or arguments in an objection that were not presented to the Magistrate Judge.") (collecting cases). Such "objections" are improper and are overruled.

To the extent that Spring's "objection" list simply repeats without elaboration issues raised in his habeas petition and addressed by the magistrate judge, he has not raised a proper objection under the statute or the rule. Spring's mere identification of these issues on a list may indicate disagreement and/or disappointment with the magistrate judge's recommendation but does not constitute a proper objection under the statute or rules. *Aldrich,* 327 F. Supp. 2d at 747 ("An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context."); *Enyart v. Coleman*, 29 F. Supp. 3d 1059, 1068 (N.D. Ohio 2014) (A

party disappointed with the magistrate judge's recommendation has a "'duty to pinpoint those portions of the magistrate's report that the district court must specially consider.'") (quoting *Mira v. Marshall,* 806 F.2d 636, 637 (6th Cir. 1986)).

2. Ground One[2]

a. Ineffective assistance of trial counsel— failing to move to suppress Miranda-defective statements

Boyer was shot and killed at Spring's home. Spring called 911. The police arrived and Spring was provided with the *Miranda* warnings at the scene, after which Spring admitted that he shot and killed Boyer and gave other statements to the police regarding the events that transpired. Approximately ten hours later, while in the custody of the sheriff, Spring was again provided with the *Miranda* warnings and indicated that he understood his rights and wished to waive them, after which he admitted to the sheriff that he shot Boyer. *State v. Spring*, 85 N.E.3d 1080, 1083–84 (Ohio Ct. App. 2017). Spring claims that he was impaired by drugs and alcohol when he made these statements to the police and sheriff and, therefore, could not give a valid *Miranda* waiver. Trial counsel did not move to suppress Spring's statements.

Spring filed a direct appeal on the issue of whether trial counsel was ineffective because counsel did not seek to suppress his confession to the police that he shot the victim. Spring did not dispute on appeal that he was provided the *Miranda* warnings, but rather claims that "he could not have validly waived those rights because he was intoxicated." *Id.* at 1085. Spring contends that

[2] Spring does not assert any specific objections with respect to his claims in Ground One that trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments or for failing to object to witness opinion testimony. Accordingly, the Court adopts the magistrate judge's report and recommendation with respect to those issues in Ground One of Spring's habeas petition.

both the state court on direct appeal and the magistrate judge on habeas review erred in ruling that his trial counsel was not ineffective for failing to move to suppress his confessions because they relied upon (i) case law suggesting that impairments from drugs, alcohol, and similar substances could not be considered to negatively impact his ability to waive his *Miranda* rights, and (ii) the outcome of a hypothetical suppression hearing. (*See* Doc. No. 33 at 2–3.)

b. Miranda v. Arizona

In *Miranda v. Arizona*, the Supreme Court held that under the Fifth Amendment of the United States Constitution, a person taken into custody or otherwise deprived of their freedom must be advised of certain rights prior to questioning, including their right to remain silent. *See Miranda v. Arizona*, 384 U.S. 436, 444, 471–78, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Statements made by a defendant without being advised of his rights and a valid waiver cannot be used against the defendant in a criminal trial. *Id.* at 479. Whether a defendant's waiver of his *Miranda* rights is valid depends upon the totality of the circumstances. Relevant here, the "Supreme Court has never said that impairments from drugs, alcohol, or other similar substances can negatively impact a suspect's waiver of his *Miranda* rights." *Treesh v. Bagley*, 612 F.3d 424, 434 (6th Cir. 2010) (internal quotation marks and citation omitted). And under Ohio law, "[t]he presence of alcohol will not, by itself, make a statement *per se* inadmissible." *State v. Stewart*, 598 N.E.2d 1275, 1279 (Ohio Ct. App. 1991) (internal quotation marks and citation omitted).

c. Strickland v. Washington

Under the constitution, "the proper standard for attorney performance is that of reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 80 L. Ed. 2d

674 (1984) (citation omitted). A claim for ineffective assistance of counsel has two components. First, "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, "defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

On habeas review of a claim for ineffective assistance of counsel:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.' *Williams,*[529 U.S. at 410,*supra,* at 410]. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Harrington, 562 U.S. at 101.

d. Analysis

Because Spring has raised a specific objection to the R&R on this issue, the Court will conduct a *de novo* review. Spring maintains that alcohol, hydrocodone, oxycodone, valium, and Zanaflex, were all present in his system at the time he was provided with the *Miranda* warnings and it is the "combination of all of these powerful drugs with the inclusion of a significant amount of alcohol" (Doc. No. 33 at 3) that is at issue, not the effect of a single substance on his ability to reason with respect to the waiver of his *Miranda* rights. Spring argues that, had trial counsel moved for a suppression hearing, "it would very be difficult" (*id.*) to conclude that he was not impaired

and was able to make a free and rational choice not to speak with the police and "highly likely" that those statements would have been suppressed, "having a substantial effect on the outcome of the trial." (*Id.* at 4.) In support, of this argument, Spring cites *State v. Freeman*, No. 95511, 2011 WL 2176168 (Ohio Ct. App. June 2, 2011) for the proposition that an individual may be in an alcohol induced blackout, but still able to perform ordinary functions.[3] (Doc. No. 33 at 3–4.) Thus, Spring concludes that "[i]t is clear from the evidence presented at trial that the cumulative effect of these drugs rendered [him] unable to make a free and rational choice with regards to making a statement to the police." (*Id.* at 4.)

In analyzing this issue, the Ohio Court of Appeals set out the law concerning ineffective assistance of counsel and the two-prong test of *Strickland*, and concerning *Miranda* warnings, waiver, and the State's burden in the face of a challenge that a confession was involuntary—"the state must prove a knowing, intelligent, and voluntary waiver by a preponderance of the evidence." In order to determine whether a valid *Miranda* waiver occurred, the Court must consider the "totality of the circumstances[.]" *Spring*, 85 N.E.3d at 1085–86 (citations omitted). In his habeas petition, Spring does not claim that the Ohio Court of Appeals erred in articulating the law with respect to *Strickland* or *Miranda*.

---

[3] *State v. Freeman* is inapposite to the Court's analysis. In *Freeman*, the issue of impairment was addressed in the context of a victim's ability to resist or consent to sexual conduct and defendant's knowledge of the victim's impairment. In that case, the victim was young and had consumed marijuana provided to her by the defendant. Based on the evidence in the record, the court of appeals concluded that there was substantial evidence in the record establishing beyond a reasonable doubt that the victim was substantially impaired because she was "zoned out" and "zombie like" and did not grasp the realization of where she was. *Freeman*, 2011 WL 2176168, at *5. Even were Freeman apposite to the Court's analysis, unlike the victim in Freeman, there is no evidence in the record with respect to Spring that he was "zoned out" or "zombie like" or did not grasp the realization of his situation. Rather, the evidence in this case is to the contrary.

The court of appeals then addressed the specific issue of intoxication and its effect on the waiver of *Miranda* rights—"The presence of drugs and/or alcohol does not render a statement inadmissible per se. *** Rather, while their presence should be considered, 'the amount must sufficiently impair the confessor's ability to reason.'" *Id.* at 1086 (citations omitted) (alteration in original). The appellate court went on to consider caselaw wherein defendants had consumed various combinations of drugs and/or alcohol, but their *Miranda* waivers were found to be valid because there was evidence in the record that they understood their rights and were not confused about their rights under *Miranda*. *Id.* at 1086–87 (citing *State v. Fairley*, No. 5-03-41, 2004 WL 1146530 (Ohio Ct. App. May 24, 2004) (defendant was drunk and had used cocaine); *State v. West*, No. 23547, 2010 WL 1632316 (Ohio Ct. App. Apr. 23, 2010) (breathalyzer test produce a result nearly three times the legal limit); *State v. Stanberry*, No. 2002 -L-028, 2003 WL 22427922 (Ohio Ct. App. Oct. 24, 2003) (defendant ingested nine Valiums, three doses of acid, and eight beers but no evidence to suggest defendants' ability to reason was sufficiently impaired so as to invalidate his Miranda waiver)).

Against this background, the court of appeals specifically acknowledged that, although Spring stated that he was "pretty drunk" and had also taken painkillers, Zanaflex, and Valium, both waivers of his *Miranda* rights were valid. With respect to Spring's waiver of his *Miranda* rights at the scene when the police arrived after Spring called 911 to report that he had shot and killed the victim, the court of appeals considered Spring's 911 call in which, although his speech was slurred, Spring was coherent and calm and able to accurately report his name, phone number and address, and the victim's name. The officers at the scene indicated that Spring was calm and

appeared to be able to understand their questions. About ten hours later after Spring's arrest in a videotaped interview, the interviewing officer stated that he was reading Spring his *Miranda* rights for the third time, and Spring corrected the officer that it was the second (not third) time he was being read his rights and, on the videotape, he was not slurring his speech, did not appear intoxicated or suffering from memory loss or confusion, and indicated that he understood the rights he was waiving by making a statement. (*Id.* at 1087.)

Based upon these facts and the pertinent caselaw, the court of appeals found that a motion to suppress Spring's statements to the police would have been without merit and not succeeded. Thus, the court of appeals concluded that Spring's counsel was not constitutionally ineffective because counsel is not required to file a meritless motion. *Id.* at 1087–88.

Spring disagrees with the court of appeals' conclusion that, given the applicable law and totality of the circumstances in the instant action, a motion to suppress his statements to the police on the grounds of an invalid *Miranda* waiver due to the mixture of drugs and alcohol he consumed would not have succeeded. But Spring has not established that the state court's application of the law concerning ineffective assistance of counsel or waiver of his *Miranda* rights was contrary to or an unreasonable application of clearly established law. Nor has Spring established that the court of appeals' determination regarding Spring's impairment and ability to waive his *Miranda* rights was unreasonable based upon the record evidence.

While fair-minded jurists may disagree regarding the level of Spring's impairment both at the scene and later at the jail, that disagreement is not the standard for granting habeas relief. *Harrington*, 562 U.S. at 101 ("A state court's determination that a claim lacks merit precludes

federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of [the state court's] decision.") (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). Here, the state court's conclusion that a motion to suppress would have been denied and, therefore, counsel was not ineffective for failing to bring a meritless motion is not so lacking in justification that it was beyond possibility for fair-minded disagreement. *Id.* at 103 (In order to obtain habeas corpus relief 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."); *Brown v. McKee*, 231 F. App'x 469, 475 (6th Cir. 2007) (failure to bring a meritless suppression motion cannot constitute ineffective assistance) (citation omitted).

Thus, the Court concludes the state court's holding that trial counsel was not ineffective for failing to move to suppress Spring's statements to the police was not an unreasonable application of the *Strickland* standard. *See Harrington,* 562 U.S. at 101. Accordingly, Spring's objection is overruled.

3. Ground Two

In Ground Two, Spring claims that appellate counsel was ineffective for not raising on appeal trial counsel's failure to investigate pills found near the victim's body. The magistrate judge recommended that this ground for habeas relief be dismissed and denied as procedurally defaulted and for lack of merit. (Doc. No. 29 at 20–25.) In his objection, Spring does not specifically address that recommendation. Rather, he generally states that "[a]ll of the Grounds for relief are substantively all related to both Ineffective Assistance of Trial Counsel and Ineffective Assistance

of Appellate Counsel and are subject to review under the *Martinez/Trevino* framework as announced in *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270." (Doc. No. 33 at 5.) Spring reasserts the argument in his traverse drawing the Court's attention to *White*, and the *Martinez/Trevino* framework that he contends provides a basis for excusing his procedural default (*see* Doc. No. 25 at 4–10), which the magistrate judge addressed in analyzing Ground Two of the petition. (Doc. No. 29 at 21 ("[Spring] argues that he can overcome his procedural default under *Martinez v. Ryan*[.]")).

To the extent that Spring's generalized statement regarding the magistrate judge's recommendation regarding Ground Two may constitute a proper objection, the Court will conduct a *de novo* review.

a. Procedural default

Procedural default occurs when a petitioner fails to comply with a state procedural rule and as a result the state did not review a petitioner's claim on the merits, or when a petitioner fails to fairly present the claim to state courts when state court remedies were available. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (citations omitted). In the first instance, procedural default occurs when (1) the petitioner failed to comply with an applicable state procedural rule, (2) the state court enforced the rule, (3) the rule constitutes an "adequate and independent state ground" justifying foreclosure of the federal constitutional claim. *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986). A procedural default may nevertheless be excused if the petitioner has shown cause for violating the state procedural rule and prejudice resulting from the alleged constitutional error. *Id.*

Spring's claim that appellate counsel was ineffective for not raising on appeal trial counsel's failure to investigate pills found near the victim's body is procedurally defaulted. Spring raised this claim for ineffective assistance of appellate counsel in his Ohio App. R. 26(B)(1) application to reopen his appeal. (*See* Doc. No. 8-1 at 128 ("**Ground raised on Application for Reopening** - Appellant raised the single ground of counsel being ineffective for failing to test the pills found immediately next to the body. Had the pills been tested, the trial court would have found the pills were the stolen property of the Appellant.").) Under Rule 26(B)(1), applications to reopen appeals must be filed within 90 days from the date the challenged appellate judgment is journalized, unless the applicant makes a showing of good cause:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

State v. Spring, 15 JE 0019, 2017 WL 2839160, at *1 (Ohio Ct. App. June 29, 2017) (quoting Rule 26(B)(1)).

In Spring's case, the court of appeals journalized its judgment entry and opinion in Spring's direct appeal on March 6, 2017. (Doc. No. 8-1 at 58.) *See* also *Spring*, 2017 WL 2839160, at *1. Spring's application to reopen was filed on June 6, 2017, one day late. (Doc. No. 8-1 at 179.) *See also Spring*, 2017 WL 2839160, at *1. The court of appeals denied Spring's motion to reopen on two grounds: (1) his application to reopen was untimely under Rule 26(B)(1) and he failed to make a showing of good cause for his untimely filing, and (2) he did not provide the portions of the record upon which he relied as required by App. R. 26(B)(2)(e). *Spring*, 2017 WL 2839160, at *1.

The state court enforced its timeliness and procedural rules, each of which is an adequate and independent basis for foreclosing habeas relief. *See Fox v. Gray*, No. 20-3188, 2020 WL 8513904, at *3 (6th Cir. Oct. 16, 2020) (collecting cases), *cert. denied,* 141 S. Ct. 1717, 209 L. Ed. 2d 482 (2021); *Baker v. Bradshaw*, 495 F. App'x 560, 565 (6th Cir. 2012) ("This court has held that violation of the timeliness requirements of an application for reopening an appeal . . . constitute[s an] adequate and independent state ground[] to preclude hearing an untimely claim on the merits.") (citations omitted); *Gooden v. Bradshaw*, No. 5:12-cv-2139, 2014 WL 4245951, at *10 (N.D. Ohio Aug. 25, 2014) ("[T]his Court has found App. R. 26 (B)(2)(e) to be an adequate and independent state ground to foreclose federal review.") (citation omitted).

Spring's procedural default of Ground Two of his habeas petition may be excused if he can establish cause and prejudice, but he has not done so. Spring contends that he deposited his application to reopen with the prison mail room on June 1, 2007, days in advance of the 90-day application deadline. But Ohio has rejected application of the prison mailbox rule to excuse untimely filings and, therefore, it cannot be applied by this Court to find that Spring's application to reopen was timely filed. *See Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003) (citing cases). Spring does not offer any other reason not attributable to his own actions to establish cause for the untimely filing. With respect to his failure to satisfy the requirements of Rule 26(B)(2)(e), Spring contends that he was unable to provide the portions of the record to support his application to reopen because he never received them from appellate counsel. (*See* Doc. No. 8-1 at 114–15.) But counsel is not required to provide the record and Spring did not indicate any other efforts on his part to obtain the record. *See State v. Marcum*, CA96-03-049, 2002 WL 42894, at *2 (Ohio Ct.

App. Jan. 14, 2002); *see also State v. Sweeney*, 723 N.E.2d 655, 657 (Ohio Ct. App. 1999) ("[R]egarding the particular circumstances of the present case, we note that Sweeney has not said what parts of the transcript he lacked, why he lacked access, what efforts he made to obtain the transcript, or how he was hampered in [timely] filing by the lack of access. Accordingly, Sweeney has given us no reason to even consider whether good cause exists."). Because Spring has not established cause for failing to comply with Ohio's procedural rules, the Court need not consider prejudice.

b. Fundamental miscarriage of justice

Even in the absence of cause and prejudice, a petitioner may be able to overcome a procedural default that would otherwise bar habeas review if the petitioner can establish that failure to review his habeas claim will result in a "fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). The exception for a fundamental miscarriage of justice has been explicitly tied to a petitioner's ability to demonstrate actual innocence. *Schlup v. Delo,* 513 U.S. 298, 321, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Spring claims that he is actually innocent of murder and his default should be excused because he was intoxicated by the combination of drugs he ingested and lacked the capacity to understand his conduct and/or to form the required *mens rea* for murder but may be "guilty of a lesser offense with a far less onerous sentence and stigma associated with the [m]urder conviction." (*See* Doc. No. 33 at 4; Doc. No. 25 at 7.)

Actual innocence requires a showing of factual innocence, not mere legal insufficiency. *Schlup*, 513 U.S. at 324; *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (to establish actual innocence, a habeas petitioner must show "factual innocence, not mere legal insufficiency[]"). "To succeed on a claim of 'actual innocence,' a petitioner must offer 'new reliable evidence' showing that a 'fundamentally unjust incarceration' has occurred." *Keith v. Voorhies*, No. 1:06-cv-2360, 2009 WL 185765, at *7 (N.D. Ohio Jan. 23, 2009) (citing among authority *House v. Bell,* 547 U.S. 518, 536–37, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006)).

Spring's argument that he is actually innocent because intoxication prevented him from understanding his conduct was wrong or forming the *mens* rea required for murder is unavailing. As an initial matter, his alleged intoxication is not new evidence. Spring was aware of his alleged level of intoxication at the time of trial and, indeed, argues that impairment should have been the basis for a motion suppress. Moreover, even if Spring's intoxication were new evidence, it would be insufficient to establish actual innocence.

> [A] habeas petitioner may not show his "actual innocence" under *Schlup* by presenting new evidence that might have led a jury to convict him of a lesser offense. In *Harvey v. Jones*, 179 F. App'x 294, 298 (6th Cir. 2006), the Sixth Circuit found that petitioner could not avail himself of *Schlup*'s actual innocence exception because his challenge was based on allegedly defective jury instructions, not "new reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," and that he therefore was claiming, at most, "legal innocence," not "actual innocence." *Harvey* cited approvingly the Tenth Circuit's statement in *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000), that the petitioner in that case did not show actual innocence by admitting to killing his victim but "claim[ing] he is not guilty of first degree murder because he was intoxicated and acted in self defense," as "these arguments go to legal innocence, as opposed to factual innocence." Further, this Court, in *Robinson v. Morrow*, No. 08-cv-00235, 2015 WL 5773422, at *18 (M.D. Tenn. Sept. 30, 2015), cited extensive case authority for the proposition that "a petitioner does not establish

> actual innocence by asserting that new evidence shows he is guilty only of a lesser degree of homicide."

Wolfe v. Westbrooks, No. 3:14-cv-1575, 2019 WL 1242701, at *2 (M.D. Tenn. Mar. 18, 2019).

c. Martinez/Trevino

Finally, Spring argues that his claim for ineffective assistance of appellate counsel should be considered on the merits under the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) and *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) as explained in *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 273 (6th Cir. 2019). (Doc. No. 33 at 5–6.) But those Supreme Court's decisions address habeas claims for ineffective assistance of *trial* counsel, and the Supreme Court has expressly declined to extend *Martinez* to procedurally defaulted claims for ineffective assistance of *appellate* counsel, which is the basis for Ground Two of Spring's petition. *See Davila v. Davis*, -- U.S. --, 137 S. Ct. 2058, 2065–70, 198 L. Ed. 2d 603 (2017); *see also Young v. Westbrooks*, 702 F. App'x 255, 268 (6th Cir. 2017) (citing *Davila*, 137 S. Ct. at 2062-63 (holding that the *Martinez* exception only applies to excuse ineffective assistance of trial counsel and declining to extend that exception to allow federal courts to consider a different kind of defaulted claim—ineffective assistance of appellate counsel)).

Spring's Second Ground for relief is procedurally defaulted and his objection is overruled.

4. Ground Three

Although Spring raised only two grounds for relief in the petition, he raised a third ground for relief in the traverse. In his purported Ground Three, Spring claims that the trial court deprived him of due process by denying his petitions for post-conviction relief when he presented evidence

that trial counsel was ineffective for failing to investigate evidence related to the door at his home, the bullets at the scene, and pills near the victim's body. (Doc. No. 25 at 3–4.) The magistrate judge recommended that Spring's purported Ground Three be dismissed as not properly before the Court (being raised for the first and only time in the traverse), non-cognizable, and without merit. (*See* Doc. No. 29 at 25–27.)

Spring's objection to the magistrate judge's recommendation concerning his purported third ground for relief is difficult to discern and an improper objection that need not be reviewed *de novo* by this Court. *See United States v. West*, No. 2:16-cr-117, 2017 WL 1397420, at *1 (E.D. Tenn. Apr. 18, 2017) ("Poorly drafted objections, general objections, or objections that require a judge's interpretation are ineffective and insufficient to preserve the right of appeal.") (citation omitted), *aff'd,* 789 F. App'x 520 (6th Cir. 2019). To the extent that Spring has asserted a proper objection, his objection is overruled upon *de novo* review.

By way of background, before the traverse was filed on May 24, 2021, Spring sought to amend his petition for habeas relief to amend Ground Two to include a claim that appellate counsel was ineffective for failing to raise on appeal that trial counsel was ineffective for failing investigate and forensically test the recovered bullets for metal, paint, or primer that would support Spring's contention that he shot through the door of his home unaware that the victim was on the other side. At the time Spring sought to amend his petition, Spring's petitions for post-conviction relief were still pending. The magistrate judge granted Spring's motion to amend the petition and stayed the case to permit Spring to exhaust these claims. (*See* Doc. No. 13.) Spring was required to file his amended petition by January 26, 2021, but he did not do so. (Doc. No. 17.) Spring filed a belated

amended petition on June 1, 2021. (Doc. No. 26.) But the amended petition did not amend Ground Two or add the third ground for relief advanced in his traverse filed earlier on May 24, 2021. (*See id.*)

Because Spring's purported third ground for relief was first presented in his traverse and not in his habeas petition (or his amended petition), it is not properly before the Court. *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005) ("Because the penalty-phase insufficiency argument was first presented in Tyler's traverse rather than in his habeas petition, it was not properly before the district court, and the district court did not err in declining to address it.") (collecting cases). "It is axiomatic that a habeas petitioner may not add a new claim as part of a traverse." *Williams v. Forshey*, No. 2:20-cv-5460, 2021 WL 2102504, at *2 (S.D. Ohio May 25, 2021) (citing *Jalowiec v. Bradshaw*, 657 F.3d 293 (6th Cir. 2011) (citing *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005))). Accordingly, even if Spring raised a proper objection to his purported Ground Three, his objection is overruled.

III. Conclusion

To the extent that Spring did not object to the magistrate judge's report and recommendation, Spring waived his right to a *de novo* review. With respect to the issues to which Spring filed a proper objection, the Court conducted a *de novo* review. Spring's objections are overruled and the recommendations of the R&R are adopted. Accordingly, Spring's petition is denied and dismissed in its entirety. Spring's motion for appointment of counsel (Doc. No. 32) is denied.

The magistrate judge recommended that, because all of Spring's claims are non-cognizable, procedurally defaulted, and/or without merit, Spring not be granted a certificate of appealability. Spring did not object to this recommendation. The Court certifies that an appeal from this decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. §§ 1915(a)(3), 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: March 23, 2022

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEFFREY M. SPRING, SR.,	)	CASE NO. 4:18-cv-2920
	)	
	)	
PETITIONER,	)	JUDGE SARA LIOI
	)	
vs.	)	**MEMORANDUM OPINION**
	)	**AND ORDER**
WARDEN BRANDESHAWN HARRIS,	)	
	)	
	)	
RESPONDENT.	)	

On June 22, 2021, Magistrate Judge Thomas M. Parker issued a Report and Recommendation ("R&R") recommending that the Court deny the petition for writ of habeas corpus filed by pro se petitioner Jeffrey Spring ("Spring" or "petitioner") pursuant to 28 U.S.C. § 2254. (Doc. No. 29.) Spring sought and received an extension of time to file his objections to the R&R (Doc. No. 31), and Spring subsequently timely file his objections pursuant to Fed. R. Civ. P. 72(b)(2) (Doc. No. 33). Respondent has not opposed Spring's objections. Also before the Court is Spring's motion for appointment of counsel. (Doc. No. 32.)

For the reasons that follow, Spring's objections to the R&R are overruled and the petition is denied and dismissed. Spring's motion for appointment of counsel is denied.

I. Legal Standard of Review

A. 28 U.S.C. § 636(b)(1)(C)

Under 28 U.S.C. § 636(b)(1)(C), "[a] judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See also Powell v. United States*, 37 F.3d 1499 (Table), 1994 WL 532926, at

*1 (6th Cir. Sept. 30, 1994) ("Any report and recommendation by a magistrate judge that is dispositive of a claim or defense of a party shall be subject to *de novo* review by the district court in light of specific objections filed by any party."); Fed. R. Civ. P. 72(b)(3) ("[t]he district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to."). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004). After review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

B. AEDPA

Although the Court must review *de novo* any matter properly objected to, in the habeas context, it must do so under the deferential standard of the Antiterrorism and Death Penalty Act of 1996 ("AEDPA.") Under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was 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 in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

As to the first prong,

> [A] decision of the state court is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." [citation omitted]. . . . [A]n "unreasonable application" occurs when "the state court identifies the correct legal principle from [the Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." [citation omitted]. A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." [citation omitted].

Harris v. Stovall, 212 F.3d 940, 942 (6th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

With respect to the second prong, federal courts must "presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473–74, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (citing 28 U.S.C. § 2254(e)(1)).

Under AEDPA's deferential habeas review standard, the question before the Court on *de novo* review "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro*, 550 U.S. at 473 (citing *Williams,* 529 U.S. at 410). In order to obtain habeas corpus relief 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." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

This standard is difficult to meet "because it was meant to be." *Id.* "[H]abeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332, n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring in judgment)).

II. Discussion

A. The R&R

The R&R sets forth in detail the procedural history of this case, including Spring's state court conviction for murder of Stephen Boyer ("Boyer"), with a firearm specification, and for tampering with evidence (Doc. No. 29 at 2–5[1]); direct appeal (*id.* at 5–8); application to reopen his appeal, over which the Ohio Supreme Court declined to exercise jurisdiction (*id.* at 8–9); and six petitions for post-conviction relief, which were denied by the trial court and affirmed by the Ohio Court of Appeals (Spring did not pursue further review before the Ohio Supreme Court) (*id.* at 10–13). In his objections, Spring does not challenge any of these procedural descriptions in the R&R, and they are adopted and incorporated herein.

Spring's habeas petition raises two grounds for relief:

> **Ground One**: Trial counsel was ineffective for failing to: (1) file a pretrial motion to suppress Spring's statements to police; (2) object to prosecutorial misconduct during closing arguments; and (3) object to witness opinion testimony.
>
> **Ground Two**: Appellate counsel was ineffective for not raising trial counsel's failure to investigate pills found by Boyer's body.

(*Id.* at 1 (record citations omitted).)

[1] All page number references herein are to the consecutive page numbers applied to each individual document by the electronic filing system, a citation practice recently adopted by this Court despite a different directive in the Initial Standing Order for this case.

The R&R recommends that Ground One be denied as without merit because "Spring has not shown that the Ohio Court of Appeals unreasonably determined that he failed to meet the requirements of *Strickland*." (*Id.* at 20.) With respect to Ground Two, the R&R recommends it be dismissed as procedurally defaulted because the Ohio Court of Appeals determined that Spring's failure to comply with a state procedural rule precluded consideration of his claim that appellate counsel was ineffective for not raising trial counsel's failure to investigate pills found by the decedent's body and, alternatively, that Ground Two be dismissed on the merits. (*Id.* at 25.)

Although not raised in the petition, Spring purports to raise a third ground for relief in his traverse—that the trial court violated his due process rights by denying his petition for post-conviction relief when Spring presented evidence that trial counsel was ineffective for not investigating his front door, bullets found at the scene of the shooting, and pills found by the decedent's body. (*Id.* at 25.) The R&R recommends that ground three be dismissed as not properly before the Court and, alternatively, on the merits. (*Id.* at 27.)

Lastly, should the Court accept the R&R that the petition be dismissed and denied, the R&R also recommends that Spring not be granted a certificate of appealability. (*Id.* at 28.)

B. Spring's Objections

1. Improper "objections"

Spring begins his objections by listing Grounds One and Two of his habeas petition in their entirety. (*See* Doc. No. 33 at 2.) To the extent that Spring is generally objecting to the entirety of the R&R with respect to Grounds One and Two, that objection is disregarded. General objections do not satisfy the specific objection requirement of the statute. "Overly general objections do not

satisfy the objection requirement. . . . 'The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious.'" *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006) (quoting *Miller v. Currie,* 50 F.3d 373, 380 (6th Cir. 1995)) *abrogated in on other grounds by Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 28 798 (2007).

In addition, Spring "objects" to a laundry list of facts which he characterizes as "unreasonable determination of facts in light of the evidence presented in the state courts." (Doc. No. 33 at 6–8.)

> This section of the objections will address the unreasonable determination of the facts in light of the evidence presented in the state courts.
>
> 1. This was a rushed trial process, the jury was picked, we had the trial and I [was] sentenced all in the same day.
>
> 2. My court appointed attorney did not show up for scheduled pre-trial hearing on 6-22-15 Ineffective Assistance of Counsel hear after [sic] (IEAC)
>
> 3. Prosecutor played only the portion of an interview with me that the prosecutor wanted the jury to see rather than the entire interview, my trial attorney failed to object to this. (IEAC) Trial transcript Page ID# 458
>
> 4. The sheriff lied at trial about whether or not victims [sic] finger prints or DNA were on the knife (PageID#: 751) Counsel failed to object to or challenge this misinformation. (IEAC)
>
> 5. The door was not used as evidence, this would have shown where the bullets passed through and that the door was closed at the time. (IEAC)
>
> 6. The evidence does not show that the victim was shot in the abdomen, it shows that he was shot in the upper chest, (PageID #:756 lines 23-25)
>
> 7. BCI investigator testifies that the body was never moved, the statement about a 90 degree shot required to hit victim was a false statement made up by the prosecution. (PageID#:753-754)
>
> 8. Trial counsel failed to object at any point in the trial proceedings.

> 9. Evidence as shown on (PageID#'s 763-764) that there was no evidence that the victim was shot at close range, no fouling, no stippling or other evidence of close range wounds.
>
> 10. Some wounds on the victim were from his forcible removal from the home prior to the shooting.
>
> 11. Prosecutors [sic] inflammatory remarks at trial included statements that Mr. Spring was a drunk, a murderer and a snake. These statements were used to inflame the jury and improperly play on the jury's emotions.
>
> 12. Spring told jury that he fired through the door after the verdict, PageID# 634

To the extent that Spring is contending in this "objection" that the evidence does not support his conviction and counsel was ineffective for reasons not contained in his habeas petition and not before the magistrate judge, Spring cannot raise new claims or arguments in an objection that were not raised before the magistrate judge. *Pryor v. Erdos*, No. 5:20-cv-2863, 2021 WL 4245038, at *8 (N.D. Ohio Sept. 17, 2021) ("It is well-established that a habeas petitioner cannot raise new claims or arguments in an objection that were not presented to the Magistrate Judge.") (collecting cases). Such "objections" are improper and are overruled.

To the extent that Spring's "objection" list simply repeats without elaboration issues raised in his habeas petition and addressed by the magistrate judge, he has not raised a proper objection under the statute or the rule. Spring's mere identification of these issues on a list may indicate disagreement and/or disappointment with the magistrate judge's recommendation but does not constitute a proper objection under the statute or rules. *Aldrich,* 327 F. Supp. 2d at 747 ("An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context."); *Enyart v. Coleman*, 29 F. Supp. 3d 1059, 1068 (N.D. Ohio 2014) (A

party disappointed with the magistrate judge's recommendation has a "'duty to pinpoint those portions of the magistrate's report that the district court must specially consider.'") (quoting *Mira v. Marshall,* 806 F.2d 636, 637 (6th Cir. 1986)).

2. Ground One[2]

a. Ineffective assistance of trial counsel— failing to move to suppress Miranda-defective statements

Boyer was shot and killed at Spring's home. Spring called 911. The police arrived and Spring was provided with the *Miranda* warnings at the scene, after which Spring admitted that he shot and killed Boyer and gave other statements to the police regarding the events that transpired. Approximately ten hours later, while in the custody of the sheriff, Spring was again provided with the *Miranda* warnings and indicated that he understood his rights and wished to waive them, after which he admitted to the sheriff that he shot Boyer. *State v. Spring*, 85 N.E.3d 1080, 1083–84 (Ohio Ct. App. 2017). Spring claims that he was impaired by drugs and alcohol when he made these statements to the police and sheriff and, therefore, could not give a valid *Miranda* waiver. Trial counsel did not move to suppress Spring's statements.

Spring filed a direct appeal on the issue of whether trial counsel was ineffective because counsel did not seek to suppress his confession to the police that he shot the victim. Spring did not dispute on appeal that he was provided the *Miranda* warnings, but rather claims that "he could not have validly waived those rights because he was intoxicated." *Id.* at 1085. Spring contends that

[2] Spring does not assert any specific objections with respect to his claims in Ground One that trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments or for failing to object to witness opinion testimony. Accordingly, the Court adopts the magistrate judge's report and recommendation with respect to those issues in Ground One of Spring's habeas petition.

both the state court on direct appeal and the magistrate judge on habeas review erred in ruling that his trial counsel was not ineffective for failing to move to suppress his confessions because they relied upon (i) case law suggesting that impairments from drugs, alcohol, and similar substances could not be considered to negatively impact his ability to waive his *Miranda* rights, and (ii) the outcome of a hypothetical suppression hearing. (*See* Doc. No. 33 at 2–3.)

b. Miranda v. Arizona

In *Miranda v. Arizona*, the Supreme Court held that under the Fifth Amendment of the United States Constitution, a person taken into custody or otherwise deprived of their freedom must be advised of certain rights prior to questioning, including their right to remain silent. *See Miranda v. Arizona*, 384 U.S. 436, 444, 471–78, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Statements made by a defendant without being advised of his rights and a valid waiver cannot be used against the defendant in a criminal trial. *Id.* at 479. Whether a defendant's waiver of his *Miranda* rights is valid depends upon the totality of the circumstances. Relevant here, the "Supreme Court has never said that impairments from drugs, alcohol, or other similar substances can negatively impact a suspect's waiver of his *Miranda* rights." *Treesh v. Bagley*, 612 F.3d 424, 434 (6th Cir. 2010) (internal quotation marks and citation omitted). And under Ohio law, "[t]he presence of alcohol will not, by itself, make a statement *per se* inadmissible." *State v. Stewart*, 598 N.E.2d 1275, 1279 (Ohio Ct. App. 1991) (internal quotation marks and citation omitted).

c. Strickland v. Washington

Under the constitution, "the proper standard for attorney performance is that of reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 80 L. Ed. 2d

674 (1984) (citation omitted). A claim for ineffective assistance of counsel has two components. First, "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, "defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

On habeas review of a claim for ineffective assistance of counsel:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.' *Williams,*[529 U.S. at 410,*supra,* at 410]. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Harrington, 562 U.S. at 101.

d. Analysis

Because Spring has raised a specific objection to the R&R on this issue, the Court will conduct a *de novo* review. Spring maintains that alcohol, hydrocodone, oxycodone, valium, and Zanaflex, were all present in his system at the time he was provided with the *Miranda* warnings and it is the "combination of all of these powerful drugs with the inclusion of a significant amount of alcohol" (Doc. No. 33 at 3) that is at issue, not the effect of a single substance on his ability to reason with respect to the waiver of his *Miranda* rights. Spring argues that, had trial counsel moved for a suppression hearing, "it would very be difficult" (*id.*) to conclude that he was not impaired

and was able to make a free and rational choice not to speak with the police and "highly likely" that those statements would have been suppressed, "having a substantial effect on the outcome of the trial." (*Id.* at 4.) In support, of this argument, Spring cites *State v. Freeman*, No. 95511, 2011 WL 2176168 (Ohio Ct. App. June 2, 2011) for the proposition that an individual may be in an alcohol induced blackout, but still able to perform ordinary functions.[3] (Doc. No. 33 at 3–4.) Thus, Spring concludes that "[i]t is clear from the evidence presented at trial that the cumulative effect of these drugs rendered [him] unable to make a free and rational choice with regards to making a statement to the police." (*Id.* at 4.)

In analyzing this issue, the Ohio Court of Appeals set out the law concerning ineffective assistance of counsel and the two-prong test of *Strickland*, and concerning *Miranda* warnings, waiver, and the State's burden in the face of a challenge that a confession was involuntary—"the state must prove a knowing, intelligent, and voluntary waiver by a preponderance of the evidence." In order to determine whether a valid *Miranda* waiver occurred, the Court must consider the "totality of the circumstances[.]" *Spring*, 85 N.E.3d at 1085–86 (citations omitted). In his habeas petition, Spring does not claim that the Ohio Court of Appeals erred in articulating the law with respect to *Strickland* or *Miranda*.

---

[3] *State v. Freeman* is inapposite to the Court's analysis. In *Freeman*, the issue of impairment was addressed in the context of a victim's ability to resist or consent to sexual conduct and defendant's knowledge of the victim's impairment. In that case, the victim was young and had consumed marijuana provided to her by the defendant. Based on the evidence in the record, the court of appeals concluded that there was substantial evidence in the record establishing beyond a reasonable doubt that the victim was substantially impaired because she was "zoned out" and "zombie like" and did not grasp the realization of where she was. *Freeman*, 2011 WL 2176168, at *5. Even were Freeman apposite to the Court's analysis, unlike the victim in Freeman, there is no evidence in the record with respect to Spring that he was "zoned out" or "zombie like" or did not grasp the realization of his situation. Rather, the evidence in this case is to the contrary.

The court of appeals then addressed the specific issue of intoxication and its effect on the waiver of *Miranda* rights—"The presence of drugs and/or alcohol does not render a statement inadmissible per se. *** Rather, while their presence should be considered, 'the amount must sufficiently impair the confessor's ability to reason.'" *Id.* at 1086 (citations omitted) (alteration in original). The appellate court went on to consider caselaw wherein defendants had consumed various combinations of drugs and/or alcohol, but their *Miranda* waivers were found to be valid because there was evidence in the record that they understood their rights and were not confused about their rights under *Miranda*. *Id.* at 1086–87 (citing *State v. Fairley*, No. 5-03-41, 2004 WL 1146530 (Ohio Ct. App. May 24, 2004) (defendant was drunk and had used cocaine); *State v. West*, No. 23547, 2010 WL 1632316 (Ohio Ct. App. Apr. 23, 2010) (breathalyzer test produce a result nearly three times the legal limit); *State v. Stanberry*, No. 2002 -L-028, 2003 WL 22427922 (Ohio Ct. App. Oct. 24, 2003) (defendant ingested nine Valiums, three doses of acid, and eight beers but no evidence to suggest defendants' ability to reason was sufficiently impaired so as to invalidate his Miranda waiver)).

Against this background, the court of appeals specifically acknowledged that, although Spring stated that he was "pretty drunk" and had also taken painkillers, Zanaflex, and Valium, both waivers of his *Miranda* rights were valid. With respect to Spring's waiver of his *Miranda* rights at the scene when the police arrived after Spring called 911 to report that he had shot and killed the victim, the court of appeals considered Spring's 911 call in which, although his speech was slurred, Spring was coherent and calm and able to accurately report his name, phone number and address, and the victim's name. The officers at the scene indicated that Spring was calm and

appeared to be able to understand their questions. About ten hours later after Spring's arrest in a videotaped interview, the interviewing officer stated that he was reading Spring his *Miranda* rights for the third time, and Spring corrected the officer that it was the second (not third) time he was being read his rights and, on the videotape, he was not slurring his speech, did not appear intoxicated or suffering from memory loss or confusion, and indicated that he understood the rights he was waiving by making a statement. (*Id.* at 1087.)

Based upon these facts and the pertinent caselaw, the court of appeals found that a motion to suppress Spring's statements to the police would have been without merit and not succeeded. Thus, the court of appeals concluded that Spring's counsel was not constitutionally ineffective because counsel is not required to file a meritless motion. *Id.* at 1087–88.

Spring disagrees with the court of appeals' conclusion that, given the applicable law and totality of the circumstances in the instant action, a motion to suppress his statements to the police on the grounds of an invalid *Miranda* waiver due to the mixture of drugs and alcohol he consumed would not have succeeded. But Spring has not established that the state court's application of the law concerning ineffective assistance of counsel or waiver of his *Miranda* rights was contrary to or an unreasonable application of clearly established law. Nor has Spring established that the court of appeals' determination regarding Spring's impairment and ability to waive his *Miranda* rights was unreasonable based upon the record evidence.

While fair-minded jurists may disagree regarding the level of Spring's impairment both at the scene and later at the jail, that disagreement is not the standard for granting habeas relief. *Harrington*, 562 U.S. at 101 ("A state court's determination that a claim lacks merit precludes

federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of [the state court's] decision.") (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). Here, the state court's conclusion that a motion to suppress would have been denied and, therefore, counsel was not ineffective for failing to bring a meritless motion is not so lacking in justification that it was beyond possibility for fair-minded disagreement. *Id.* at 103 (In order to obtain habeas corpus relief 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."); *Brown v. McKee*, 231 F. App'x 469, 475 (6th Cir. 2007) (failure to bring a meritless suppression motion cannot constitute ineffective assistance) (citation omitted).

Thus, the Court concludes the state court's holding that trial counsel was not ineffective for failing to move to suppress Spring's statements to the police was not an unreasonable application of the *Strickland* standard. *See Harrington*, 562 U.S. at 101. Accordingly, Spring's objection is overruled.

3. Ground Two

In Ground Two, Spring claims that appellate counsel was ineffective for not raising on appeal trial counsel's failure to investigate pills found near the victim's body. The magistrate judge recommended that this ground for habeas relief be dismissed and denied as procedurally defaulted and for lack of merit. (Doc. No. 29 at 20–25.) In his objection, Spring does not specifically address that recommendation. Rather, he generally states that "[a]ll of the Grounds for relief are substantively all related to both Ineffective Assistance of Trial Counsel and Ineffective Assistance

of Appellate Counsel and are subject to review under the *Martinez/Trevino* framework as announced in *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270." (Doc. No. 33 at 5.) Spring reasserts the argument in his traverse drawing the Court's attention to *White*, and the *Martinez/Trevino* framework that he contends provides a basis for excusing his procedural default (*see* Doc. No. 25 at 4–10), which the magistrate judge addressed in analyzing Ground Two of the petition. (Doc. No. 29 at 21 ("[Spring] argues that he can overcome his procedural default under *Martinez v. Ryan*[.]")).

To the extent that Spring's generalized statement regarding the magistrate judge's recommendation regarding Ground Two may constitute a proper objection, the Court will conduct a *de novo* review.

a. Procedural default

Procedural default occurs when a petitioner fails to comply with a state procedural rule and as a result the state did not review a petitioner's claim on the merits, or when a petitioner fails to fairly present the claim to state courts when state court remedies were available. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (citations omitted). In the first instance, procedural default occurs when (1) the petitioner failed to comply with an applicable state procedural rule, (2) the state court enforced the rule, (3) the rule constitutes an "adequate and independent state ground" justifying foreclosure of the federal constitutional claim. *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986). A procedural default may nevertheless be excused if the petitioner has shown cause for violating the state procedural rule and prejudice resulting from the alleged constitutional error. *Id.*

Spring's claim that appellate counsel was ineffective for not raising on appeal trial counsel's failure to investigate pills found near the victim's body is procedurally defaulted. Spring raised this claim for ineffective assistance of appellate counsel in his Ohio App. R. 26(B)(1) application to reopen his appeal. (*See* Doc. No. 8-1 at 128 ("**Ground raised on Application for Reopening** - Appellant raised the single ground of counsel being ineffective for failing to test the pills found immediately next to the body. Had the pills been tested, the trial court would have found the pills were the stolen property of the Appellant.").) Under Rule 26(B)(1), applications to reopen appeals must be filed within 90 days from the date the challenged appellate judgment is journalized, unless the applicant makes a showing of good cause:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

State v. Spring, 15 JE 0019, 2017 WL 2839160, at *1 (Ohio Ct. App. June 29, 2017) (quoting Rule 26(B)(1)).

In Spring's case, the court of appeals journalized its judgment entry and opinion in Spring's direct appeal on March 6, 2017. (Doc. No. 8-1 at 58.) *See* also *Spring*, 2017 WL 2839160, at *1. Spring's application to reopen was filed on June 6, 2017, one day late. (Doc. No. 8-1 at 179.) *See also Spring*, 2017 WL 2839160, at *1. The court of appeals denied Spring's motion to reopen on two grounds: (1) his application to reopen was untimely under Rule 26(B)(1) and he failed to make a showing of good cause for his untimely filing, and (2) he did not provide the portions of the record upon which he relied as required by App. R. 26(B)(2)(e). *Spring*, 2017 WL 2839160, at *1.

The state court enforced its timeliness and procedural rules, each of which is an adequate and independent basis for foreclosing habeas relief. *See Fox v. Gray*, No. 20-3188, 2020 WL 8513904, at *3 (6th Cir. Oct. 16, 2020) (collecting cases), *cert. denied,* 141 S. Ct. 1717, 209 L. Ed. 2d 482 (2021); *Baker v. Bradshaw*, 495 F. App'x 560, 565 (6th Cir. 2012) ("This court has held that violation of the timeliness requirements of an application for reopening an appeal . . . constitute[s an] adequate and independent state ground[] to preclude hearing an untimely claim on the merits.") (citations omitted); *Gooden v. Bradshaw*, No. 5:12-cv-2139, 2014 WL 4245951, at *10 (N.D. Ohio Aug. 25, 2014) ("[T]his Court has found App. R. 26 (B)(2)(e) to be an adequate and independent state ground to foreclose federal review.") (citation omitted).

Spring's procedural default of Ground Two of his habeas petition may be excused if he can establish cause and prejudice, but he has not done so. Spring contends that he deposited his application to reopen with the prison mail room on June 1, 2007, days in advance of the 90-day application deadline. But Ohio has rejected application of the prison mailbox rule to excuse untimely filings and, therefore, it cannot be applied by this Court to find that Spring's application to reopen was timely filed. *See Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003) (citing cases). Spring does not offer any other reason not attributable to his own actions to establish cause for the untimely filing. With respect to his failure to satisfy the requirements of Rule 26(B)(2)(e), Spring contends that he was unable to provide the portions of the record to support his application to reopen because he never received them from appellate counsel. (*See* Doc. No. 8-1 at 114–15.) But counsel is not required to provide the record and Spring did not indicate any other efforts on his part to obtain the record. *See State v. Marcum*, CA96-03-049, 2002 WL 42894, at *2 (Ohio Ct.

App. Jan. 14, 2002); *see also State v. Sweeney*, 723 N.E.2d 655, 657 (Ohio Ct. App. 1999) ("[R]egarding the particular circumstances of the present case, we note that Sweeney has not said what parts of the transcript he lacked, why he lacked access, what efforts he made to obtain the transcript, or how he was hampered in [timely] filing by the lack of access. Accordingly, Sweeney has given us no reason to even consider whether good cause exists."). Because Spring has not established cause for failing to comply with Ohio's procedural rules, the Court need not consider prejudice.

b. Fundamental miscarriage of justice

Even in the absence of cause and prejudice, a petitioner may be able to overcome a procedural default that would otherwise bar habeas review if the petitioner can establish that failure to review his habeas claim will result in a "fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). The exception for a fundamental miscarriage of justice has been explicitly tied to a petitioner's ability to demonstrate actual innocence. *Schlup v. Delo,* 513 U.S. 298, 321, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Spring claims that he is actually innocent of murder and his default should be excused because he was intoxicated by the combination of drugs he ingested and lacked the capacity to understand his conduct and/or to form the required *mens rea* for murder but may be "guilty of a lesser offense with a far less onerous sentence and stigma associated with the [m]urder conviction." (*See* Doc. No. 33 at 4; Doc. No. 25 at 7.)

Actual innocence requires a showing of factual innocence, not mere legal insufficiency. *Schlup*, 513 U.S. at 324; *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (to establish actual innocence, a habeas petitioner must show "factual innocence, not mere legal insufficiency[]"). "To succeed on a claim of 'actual innocence,' a petitioner must offer 'new reliable evidence' showing that a 'fundamentally unjust incarceration' has occurred." *Keith v. Voorhies*, No. 1:06-cv-2360, 2009 WL 185765, at *7 (N.D. Ohio Jan. 23, 2009) (citing among authority *House v. Bell,* 547 U.S. 518, 536–37, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006)).

Spring's argument that he is actually innocent because intoxication prevented him from understanding his conduct was wrong or forming the *mens* rea required for murder is unavailing. As an initial matter, his alleged intoxication is not new evidence. Spring was aware of his alleged level of intoxication at the time of trial and, indeed, argues that impairment should have been the basis for a motion suppress. Moreover, even if Spring's intoxication were new evidence, it would be insufficient to establish actual innocence.

> [A] habeas petitioner may not show his "actual innocence" under *Schlup* by presenting new evidence that might have led a jury to convict him of a lesser offense. In *Harvey v. Jones*, 179 F. App'x 294, 298 (6th Cir. 2006), the Sixth Circuit found that petitioner could not avail himself of *Schlup*'s actual innocence exception because his challenge was based on allegedly defective jury instructions, not "new reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," and that he therefore was claiming, at most, "legal innocence," not "actual innocence." *Harvey* cited approvingly the Tenth Circuit's statement in *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000), that the petitioner in that case did not show actual innocence by admitting to killing his victim but "claim[ing] he is not guilty of first degree murder because he was intoxicated and acted in self defense," as "these arguments go to legal innocence, as opposed to factual innocence." Further, this Court, in *Robinson v. Morrow*, No. 08-cv-00235, 2015 WL 5773422, at *18 (M.D. Tenn. Sept. 30, 2015), cited extensive case authority for the proposition that "a petitioner does not establish

> actual innocence by asserting that new evidence shows he is guilty only of a lesser degree of homicide."

Wolfe v. Westbrooks, No. 3:14-cv-1575, 2019 WL 1242701, at *2 (M.D. Tenn. Mar. 18, 2019).

c. Martinez/Trevino

Finally, Spring argues that his claim for ineffective assistance of appellate counsel should be considered on the merits under the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) and *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) as explained in *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 273 (6th Cir. 2019). (Doc. No. 33 at 5–6.) But those Supreme Court's decisions address habeas claims for ineffective assistance of *trial* counsel, and the Supreme Court has expressly declined to extend *Martinez* to procedurally defaulted claims for ineffective assistance of *appellate* counsel, which is the basis for Ground Two of Spring's petition. *See Davila v. Davis*, -- U.S. --, 137 S. Ct. 2058, 2065–70, 198 L. Ed. 2d 603 (2017); *see also Young v. Westbrooks*, 702 F. App'x 255, 268 (6th Cir. 2017) (citing *Davila*, 137 S. Ct. at 2062-63 (holding that the *Martinez* exception only applies to excuse ineffective assistance of trial counsel and declining to extend that exception to allow federal courts to consider a different kind of defaulted claim—ineffective assistance of appellate counsel)).

Spring's Second Ground for relief is procedurally defaulted and his objection is overruled.

4. Ground Three

Although Spring raised only two grounds for relief in the petition, he raised a third ground for relief in the traverse. In his purported Ground Three, Spring claims that the trial court deprived him of due process by denying his petitions for post-conviction relief when he presented evidence

that trial counsel was ineffective for failing to investigate evidence related to the door at his home, the bullets at the scene, and pills near the victim's body. (Doc. No. 25 at 3–4.) The magistrate judge recommended that Spring's purported Ground Three be dismissed as not properly before the Court (being raised for the first and only time in the traverse), non-cognizable, and without merit. (*See* Doc. No. 29 at 25–27.)

Spring's objection to the magistrate judge's recommendation concerning his purported third ground for relief is difficult to discern and an improper objection that need not be reviewed *de novo* by this Court. *See United States v. West*, No. 2:16-cr-117, 2017 WL 1397420, at *1 (E.D. Tenn. Apr. 18, 2017) ("Poorly drafted objections, general objections, or objections that require a judge's interpretation are ineffective and insufficient to preserve the right of appeal.") (citation omitted), *aff'd,* 789 F. App'x 520 (6th Cir. 2019). To the extent that Spring has asserted a proper objection, his objection is overruled upon *de novo* review.

By way of background, before the traverse was filed on May 24, 2021, Spring sought to amend his petition for habeas relief to amend Ground Two to include a claim that appellate counsel was ineffective for failing to raise on appeal that trial counsel was ineffective for failing investigate and forensically test the recovered bullets for metal, paint, or primer that would support Spring's contention that he shot through the door of his home unaware that the victim was on the other side. At the time Spring sought to amend his petition, Spring's petitions for post-conviction relief were still pending. The magistrate judge granted Spring's motion to amend the petition and stayed the case to permit Spring to exhaust these claims. (*See* Doc. No. 13.) Spring was required to file his amended petition by January 26, 2021, but he did not do so. (Doc. No. 17.) Spring filed a belated

amended petition on June 1, 2021. (Doc. No. 26.) But the amended petition did not amend Ground Two or add the third ground for relief advanced in his traverse filed earlier on May 24, 2021. (*See id.*)

Because Spring's purported third ground for relief was first presented in his traverse and not in his habeas petition (or his amended petition), it is not properly before the Court. *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005) ("Because the penalty-phase insufficiency argument was first presented in Tyler's traverse rather than in his habeas petition, it was not properly before the district court, and the district court did not err in declining to address it.") (collecting cases). "It is axiomatic that a habeas petitioner may not add a new claim as part of a traverse." *Williams v. Forshey*, No. 2:20-cv-5460, 2021 WL 2102504, at *2 (S.D. Ohio May 25, 2021) (citing *Jalowiec v. Bradshaw*, 657 F.3d 293 (6th Cir. 2011) (citing *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005))). Accordingly, even if Spring raised a proper objection to his purported Ground Three, his objection is overruled.

III. Conclusion

To the extent that Spring did not object to the magistrate judge's report and recommendation, Spring waived his right to a *de novo* review. With respect to the issues to which Spring filed a proper objection, the Court conducted a *de novo* review. Spring's objections are overruled and the recommendations of the R&R are adopted. Accordingly, Spring's petition is denied and dismissed in its entirety. Spring's motion for appointment of counsel (Doc. No. 32) is denied.

The magistrate judge recommended that, because all of Spring's claims are non-cognizable, procedurally defaulted, and/or without merit, Spring not be granted a certificate of appealability. Spring did not object to this recommendation. The Court certifies that an appeal from this decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. §§ 1915(a)(3), 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: March 23, 2022

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

No. 22-3421

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 26, 2023
DEBORAH S. HUNT, Clerk

JEFFREY M. SPRING, SR.,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
DAVID W. GRAY, WARDEN,)
)
Respondent-Appellee.)

Before: GUY, KETHLEDGE, and BUSH, Circuit Judges.

Jeffrey M. Spring, Sr., petitions for rehearing en banc of this court's order entered on October 12, 2022, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Murphy recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: July 26, 2023

Mr. Jeffrey M. Spring Sr.
Belmont Correctional Institution
P.O. Box 540
St. Clairsville, OH 43950

Re: Case No. 22-3421, Jeffrey Spring, Sr. v. David Gray
Originating Case No.: 4:18-cv-02920

Dear Mr. Spring,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Jerri L. Fosnaught

Enclosure