

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 5, 2017

Elisabeth A. Shumaker
Clerk of Court

DAMON DARES KEYS,

Petitioner - Appellant,

v.

JAMES FAULK; CYNTHIA COFFMAN,
Attorney General of the State of Colorado,

Respondents - Appellees.

No. 17-1144
(D.C. No. 1:16-CV-01072-RM)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO, BACHARACH, and MORITZ**, Circuit Judges.

Damon Keys, a Colorado prisoner proceeding pro se, seeks a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 habeas petition. We deny a COA and dismiss the appeal.

I

Keys was convicted in 1995 of two counts of attempted first degree murder, two counts of first degree assault, two counts of aggravated robbery, and one count of theft. The crimes were committed by a masked assailant at a drive-in movie theater in Aurora, Colorado. The victims were theater employees. Keys was sentenced to

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

ninety-six years' imprisonment. The Colorado Court of Appeals ("CCA") reversed his conviction and remanded for a new trial based on its conclusion that Keys was denied his right to representation by conflict-free counsel. In that appeal, Keys contended that the trial court should have suppressed evidence because an arrest warrant was signed by a court clerk. The CCA concluded that Keys had waived his right to contest the validity of the warrant on appeal because he had not advanced that argument in the trial court.

On retrial, Keys was convicted. In his subsequent appeal, the CCA again reversed and remanded, this time because the trial court erred in concluding that the law of the case precluded it from considering Keys' argument as to his arrest warrant. The CCA directed the trial court to conduct a hearing on Keys' suppression motion and to deny the motion to suppress if it determined that the warrant was not void ab initio. After an evidentiary hearing, the trial court ruled that the arrest warrant was not void ab initio. Keys appealed, and the CCA affirmed. He then unsuccessfully sought post-conviction relief in state court.

Keys filed a § 2254 petition, raising three claims: (1) evidence should have been suppressed because it was the product of an arrest made pursuant to a void arrest warrant; (2) police officers violated his Fourth Amendment rights when they engaged in a pretextual arrest to seize his shoes; and (3) ineffective assistance of counsel. The district court dismissed the second claim as procedurally barred, denied the remainder of the petition, and denied a COA.

II

A petitioner may not appeal the district court's denial of § 2254 relief absent a COA. § 2253(c)(1)(A). We will issue a COA only if a petitioner shows "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotation omitted). As to claims dismissed on procedural grounds, a petitioner must demonstrate 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.

In applying this standard, we must consider "AEDPA's deferential treatment of state court decisions." Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004). If a state court has rejected a claim on the merits, § 2254 relief is available only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or 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). Because Keys proceeds pro se, we construe his filings liberally but do not act as his advocate. Yang v. Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

A

In his first claim, Keys argues that police violated his Fourth Amendment rights by seizing his sneakers, which contained traces of the victims' blood, while executing an arrest warrant that was void ab initio. The district court concluded that relief was barred by Stone v. Powell, 428 U.S. 465 (1976), which holds that if a "[s]tate has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial," id. at 494 (footnote omitted).

Keys contends that the trial court—the Arapahoe County District Court—lacked jurisdiction to consider the validity of the warrant because it was issued by the Denver District Court and concerned an offense that occurred in Denver County. The district court rejected that argument because it was wholly unsupported by case law, observing that the trial court simply ruled on a motion to suppress that was filed in a case before it. We agree that Keys has not shown the state court contravened clearly established federal law on this issue.

Additionally, Keys argues that he did not have a fair opportunity to litigate his claim because the state courts misinterpreted the facts and the law. However, the CCA recognized and made a colorable application of the correct Fourth Amendment standards, which is all that is required for a full and fair opportunity to litigate under Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978). Substantive

disagreement with the outcome of a state court proceeding is insufficient to warrant habeas relief. See Matthews v. Workman, 577 F.3d 1175, 1194 (10th Cir. 2009).

B

In his second claim, Keys asserts that police officers violated his Fourth Amendment rights when they arrested him as a pretext for seizing his shoes. In support of this argument, he contends that a Denver District Court clerk issued the arrest warrant on the day of his arrest, August 11, but backdated it to August 2. The district court dismissed this claim as procedurally barred.

In ruling on his first appeal, the CCA stated Keys abandoned this argument. Keys presented a pretextual-arrest claim in his motion to suppress following the second remand, but was prevented from raising it at the hearing on that motion. He did not advance the issue when he appealed the denial of his suppression motion to the CCA in his third appeal. The claim was thus never fairly presented to the CCA. See Ellis v. Raemisch, 872 F.3d 1064, 1077, 1082 (10th Cir. 2017) (holding that Colorado Appellate Rule 51.1(a) “renders [Colorado Supreme Court] review ‘unavailable’ for purposes of AEDPA exhaustion” and therefore in Colorado a § 2254 petitioner need only fairly present his claim to the CCA), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Oct. 5, 2017) (No. 17-6323).

First, Keys asserts that in their pre-answer response, respondents argued only that he failed to raise this claim before the state courts, and thus the district court should have construed respondents’ defense as limited to whether he had raised the

claim at all. We disagree. The scope of respondents' exhaustion argument was not limited to whether he had ever raised the claim before any state court.

Keys also argues that he did not abandon his pretextual-arrest claim in his first appeal to the CCA because, he asserts, the CCA wrote a five-page ruling on that claim. But the ruling that Keys points to concerns an alternative to his void-ab-initio argument—that it was unlawful for officers to seize his shoes for testing because the shoes bore no relationship to his failure to appear and officers failed to act in accordance with procedures. In his habeas claim, however, he alleged that the arrest itself was unlawful, a different and distinct theory. See Williams v. Trammell, 782 F.3d 1184, 1210 (10th Cir. 2015) (fair presentation requires a petitioner to raise the “substance of his federal claims,” including “the constitutional guarantee at issue” and “the underlying facts that entitle a petitioner to relief” (quotation omitted)); Jones v. Hess, 681 F.2d 688, 694 (10th Cir. 1982) (concluding that a habeas claim is unexhausted “where the factual basis for [it] was not presented to the state courts”).

C

Keys advances six subclaims related to ineffective assistance of counsel:

(1) the retrial court denied his requests to substitute conflict-free counsel; (2) counsel failed to investigate, independently test, and challenge forensic evidence; (3) counsel ineffectively investigated and cross-examined one of the victims; (4) counsel ineffectively investigated and cross-examined Keys' girlfriend; (5) counsel failed to

advance a reasonable-doubt defense; and (6) counsel failed to object to prosecutorial misconduct.¹ We conclude that none of these subclaims warrants a COA.

On subclaim one, the CCA reasonably concluded that any actual conflict did not have an adverse effect on Keys' counsel, as required to meet the deficient-performance prong of the familiar test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984).² The CCA reasonably held that Keys' second subclaim failed because there is no indication that further investigation or testing of forensic evidence would have been exculpatory.

The district court reviewed subclaims three, four, and five de novo. Although Keys did not present the factual bases for these subclaims to the state courts (and thus the state courts never ruled on the merits), respondents did not raise an affirmative exhaustion defense. Keys claimed that counsel failed to expose the fact that one of the victims knew Keys prior to the assault but did not identify him when seeking help. But the victim, whose skull was fractured during the attack, testified that he did not even remember seeking help. Keys also asserted that counsel should have discovered that Keys' girlfriend attempted to obtain a telephone confession from him while he was in jail. But counsel did cross-examine the girlfriend about inconsistent

¹ At the district court level, Keys advanced two additional subclaims that are forfeited on appeal.

² With regard to a possible presumption of prejudice for claims involving an actual conflict of interest, Keys has not made a threshold showing of clearly established federal law by the Supreme Court, which ends the inquiry under § 2254(d)(1). See House v. Hatch, 527 F.3d 1010, 1018 (10th Cir. 2008).

statements to the police and immunity she had been granted for her role in the crimes, and the prosecution did not present any evidence of a jailhouse confession. And Keys argues that counsel foreclosed a reasonable-doubt defense by arguing that police had arrested the wrong suspect. But as the district court noted, this statement was entirely consistent with a reasonable-doubt defense given that identification of the assailant was the only real issue at trial. Accordingly, Keys cannot show deficient performance or prejudice under Strickland on any of these subclaims.³

Finally, in subclaim six, Keys contends that defense counsel was ineffective for failing to object when the prosecution referred to an area mentioned during the case as Keys' "hood" and allegedly imitated "a stereotypical African-American dialect, while smirking." The CCA reasonably rejected this claim because Keys admitted that it was not fully developed in the record. See Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (review under § 2254 "is limited to the record that was before the state court that adjudicated the claim").

³ To the extent Keys reasserts the factually dissimilar claims he exhausted in the state courts (that counsel inadequately impeached the victim's voice and mask identification, and that the communication difficulty between Keys and his defense counsel deprived them of information necessary to effectively examine the girlfriend), the CCA reasonably concluded that Keys had nothing but speculation regarding what might have been revealed through more effective cross-examination. And if Keys is reasserting a related claim he raised in state court (that counsel was ineffective by failing to assert a reasonable-doubt defense), the CCA reasonably rejected it because the jury was instructed that the prosecution must prove each element of each offense beyond a reasonable doubt, and defense counsel specifically argued during closing that the jury should have a reasonable doubt about the prosecution's version of events.

III

For the foregoing reasons, we **DENY** a COA and **DISMISS** this appeal. We **GRANT** Keys' motion to proceed on appeal without prepayment of costs or fees and remind him of his obligation to pay those costs and fees in full to the Clerk of the District Court for the District of Colorado. See 28 U.S.C. § 1915(a).

Entered for the Court

Carlos F. Lucero
Circuit Judge

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

FILED
**United States Court of Appeals
Tenth Circuit**

January 5, 2018

**Elisabeth A. Shumaker
Clerk of Court**

DAMON DARES KEYS,

Petitioner - Appellant,

v.

No. 17-1144

JAMES FAULK, et al.,

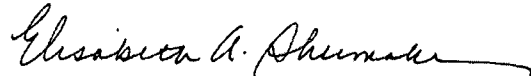
Respondents - Appellees.

ORDER

Before **LUCERO, BACHARACH, and MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore**

Civil Action No. 16-cv-01072-RM

DAMON DARES KEYS,

Applicant,

v.

JAMES FAULK, and
CYNTHIA COFFMAN, Attorney General of the State of Colorado,

Respondents.

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

This matter is before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) (the “Application”) filed *pro se* by Applicant, Damon Dares Keys, on May 11, 2016. Mr. Keys challenges the validity of his conviction in Arapahoe County District Court case number 95CR284. Respondents have filed an Answer (ECF No. 32) and Mr. Keys has filed a Traverse to Answer of Respondents (ECF No. 46) (“the Traverse”). Mr. Keys also has filed a Clarification Motion Regarding Excessive Words (ECF No. 47) asking the Court to accept the Traverse in its entirety. That motion will be granted.

After reviewing the record, including the Application, the Answer, the Traverse, and the state court record, the Court FINDS and CONCLUDES that the Application should be denied and the case dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Keys was convicted in the Arapahoe County District Court on two counts of attempted first degree murder, two counts of first degree assault, two counts of aggravated robbery, and one

APP-13

count of theft stemming from an assault and robbery at a drive-in theater. He was sentenced to ninety-six years in prison.

Testimony by the male victim and by defendant's girlfriend established that defendant approached the two victims, demanded money, and after obtaining the money, directed that they lie on the ground. He then stabbed both of them. In doing so, he broke the knife, and upon hearing an approaching vehicle, he ran behind a fence. Later, he returned to the victims carrying a rock, and he beat the male victim about the head with that rock and with a pole.

People v. Keys, No. 96CA0964, slip op. at 3 (Colo. App. June 11, 1998) (unpublished) (ECF No. 12-5 at 4.)

The relevant procedural history is complex. In 2006, the Colorado Court of Appeals described the history to that point as follows:

In May 1994, defendant was arrested [in a Denver case] on a charge of possession of a controlled substance. He was released on a personal recognizance bond and ordered to appear in county court on August 2, 1994, for a preliminary hearing on the charge. When defendant failed to appear in court on that date, the county court judge ordered that a bench warrant issue for defendant's arrest, set bond at \$20,000, and bound the case over to the district court.

Acting on the county court judge's order in the file, a district court clerk filled out and signed a form "warrant for arrest." The warrant indicated that it was issued based on defendant's failure to appear in county court, but it also referenced the substantive offense with which he was charged. The warrant stated that there was no bond. It was signed by the clerk on August 2, 1994.

A few days later, Aurora police officers investigating an assault and robbery at a drive-in theater learned information indicating that defendant might have been involved in that incident. Upon determining that a warrant had been issued in Denver for defendant's arrest, the police obtained a copy of the warrant and arrested defendant.

Defendant was subsequently charged with and convicted of two counts of attempted first degree murder, two counts of first degree assault, two counts of aggravated robbery, and one count of theft, all arising out of the robbery and assault at the drive-in theater.

On appeal, a division of this court concluded that defendant was denied his right to representation by conflict-free counsel and, accordingly, reversed his conviction and remanded for a new trial. People v. Keys, (Colo. App. No. 96CA0964, June 11, 1998) (not published pursuant to C.A.R. 35(f)) (Keys I). The Keys I division also noted defendant's contention that, because his arrest was based on an invalid warrant, the trial court should have suppressed evidence that shoes he was wearing at the time of the arrest had the victims' blood on them. However, the division concluded that, because defendant had not so argued in the trial court, he had waived his right to contest the validity of the warrant on appeal.

A new trial was held, and defendant was again convicted of the charged offenses. On appeal, defendant argued that the trial court had erred in concluding that the law of the case doctrine precluded it from addressing the claimed invalidity of the arrest warrant. A division of this court agreed and remanded with directions to the trial court to conduct a hearing on defendant's suppression motion. If the trial court determined on remand that the warrant was not void ab initio, it was to deny defendant's motion, and defendant's judgment of conviction would stand affirmed. People v. Keys, (Colo. App. No. 01CA0007, Sept. 5, 2002) (not published pursuant to C.A.R. 35(f)).

At the hearing on remand, the court heard testimony from Aurora and Denver police detectives regarding the circumstances leading to defendant's arrest. Two Denver judges and two Denver court clerks also testified. The county court judge testified that he had ordered issuance of a warrant based on defendant's failure to appear, had cancelled the personal recognizance bond and set bond at \$20,000, and had ordered the matter bound over to district court for further orders. He also stated that, at that time, the customary practice was for the district court to "confirm and issue out the warrant" on cases bound over for failure to appear.

The deputy clerk who had filled out the warrant testified that she did so based on the judge's order in the file before her. The clerk testified that, during the period in question, she was responsible for issuing warrants in cases that came in from county court, and that she would do so as soon as she received the files. She did not know why the file was stamped as received in the district court on August 3, 1994, even though her signature indicated the warrant was signed on August 2. She agreed that the reference to "no bond" was not consistent with the bond amount reflected in the county court file.

At the conclusion of the hearing, the trial court found that defendant was arrested based on a warrant authorized by the county court judge on August 2, 1994; that the warrant was issued in the normal course of the county court's business; that any clerical errors or improper references to the underlying substantive charges did not render the warrant void ab initio; and that the warrant was not the product of collusion between the clerk and the police department, as defendant had argued. Therefore, the motion to suppress was denied, no new trial was required, and defendant's judgment of conviction would stand.

People v. Keys, No. 04CA2500, slip op. at 1-5 (Colo. App. Dec. 28, 2006) (unpublished) (ECF No. 12-13 at 2-6.) The trial court's order denying the motion to suppress was affirmed on appeal. (*See id.*)

Mr. Keys next sought postconviction relief in state court pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure. On July 7, 2009, the trial court denied the Rule 35(c) motion. (*See* ECF No. 12-16.) The order denying the Rule 35(c) motion was affirmed on appeal. (*See* ECF No. 12-21.) On February 8, 2016, the Colorado Supreme Court denied Mr. Keys' petition for writ of certiorari in the postconviction proceedings. (*See* ECF No. 12-23.)

Mr. Keys asserts three claims for relief in the Application. He first claims his shoes and forensic evidence derived from the shoes were the product of an unlawful arrest and should have been suppressed because he was arrested pursuant to a void arrest warrant. Mr. Keys contends in his second claim that his Fourth Amendment rights were violated when officers engaged "in a pretextual, subterfuge arrest, in order to seize, keep, test and destroy shoes belonging to Petitioner merely by executing a Denver arrest warrant wholly unrelated to an investigation for which the shoes were sought." (ECF No. 1 at 17 (capitalization altered).) He contends in claim three that his Sixth Amendment rights were violated on retrial because (a) he was denied conflict-free counsel; (b) counsel failed to investigate, independently test, and challenge forensic evidence; (c)

counsel was ineffective in investigating and cross-examining the male victim (Donald Staats); (d) counsel was ineffective in investigating and cross-examining his girlfriend (Disa Tonkin); (e) counsel was ineffective by failing to advance a reasonable doubt defense; (f) counsel was ineffective by failing to object to prosecutorial misconduct; and (g) the cumulative effect of counsel's errors demonstrates counsel was constitutionally ineffective.

On September 13, 2016, the Court entered an Order to Dismiss in Part (ECF No. 26) dismissing claim two because that claim is unexhausted and procedurally barred.

II. STANDARDS OF REVIEW

The Court must construe the Application and other papers filed by Mr. Keys liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

- (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). Mr. Keys bears the burden of proof under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

The Court reviews claims of legal error and mixed questions of law and fact pursuant to 28

U.S.C. § 2254(d)(1). *See Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003). The threshold question the Court must answer under § 2254(d)(1) is whether Mr. Keys seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). Clearly established federal law “refers to the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.” *Id.* at 412. Furthermore,

clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). If there is no clearly established federal law, that is the end of the Court’s inquiry under § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, the Court must determine whether the state court’s decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

A state-court decision is contrary to clearly established federal law if: (a) “the state court applies a rule that contradicts the governing law set forth in Supreme Court cases”; or (b) “the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent.” *Maynard [v. Boone]*, 468 F.3d [665,] 669 [(10th Cir. 2006)] (internal quotation marks and brackets omitted) (quoting *Williams*, 529 U.S. at 405). “The word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character or nature,’ or ‘mutually opposed.’” *Williams*, 529 U.S. at 405 (citation omitted).

A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08.

House, 527 F.3d at 1018.

The Court's inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. Furthermore,

[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. [I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.

Harrington v. Richter, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted).

In conducting this analysis, the Court "must determine what arguments or theories supported or . . . could have supported[] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102. In addition, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard*, 468 F.3d at 671; *see also Richter*, 562 U.S. at

102 (stating “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable”).

As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 562 U.S. at 103.

The Court reviews claims of factual errors pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson*, 278 F.3d 1145, 1154 n.4 (10th Cir. 2002). Section 2254(d)(2) allows the Court to grant a writ of habeas corpus only if the relevant state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court. Pursuant to § 2254(e)(1), the Court must presume that the state court’s factual determinations are correct and Mr. Keys bears the burden of rebutting the presumption by clear and convincing evidence. “The standard is demanding but not insatiable . . . [because] ‘[d]eference does not by definition preclude relief.’” *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

If a claim was not adjudicated on the merits in state court, and if the claim also is not procedurally barred, the Court must review the claim *de novo* and the deferential standards of § 2254(d) do not apply. *See Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

Finally, the Court’s analysis is not complete “[e]ven if the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law.” *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006). “Unless the error is a structural defect in the trial that defies harmless-error analysis, [the Court] must apply the harmless error standard of *Brecht v.*

Abrahamson, 507 U.S. 619 (1993)” *Id.*; see also *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (providing that a federal court must conduct harmless error analysis under *Brecht* anytime it finds constitutional error in a state court proceeding regardless of whether the state court found error or conducted harmless error review). Under *Brecht*, a constitutional error does not warrant habeas relief unless the Court concludes it “had substantial and injurious effect” on the jury’s verdict. *Brecht*, 507 U.S. at 637. “A ‘substantial and injurious effect’ exists when the court finds itself in ‘grave doubt’ about the effect of the error on the jury’s verdict.” *Bland*, 459 F.3d at 1009 (citing *O’Neal v. McAninch*, 513 U.S. 432, 435 (1995)). “Grave doubt” exists when “the matter is so evenly balanced that [the Court is] in virtual equipoise as to the harmlessness of the error.” *O’Neal*, 513 U.S. at 435. The Court makes this harmless error determination based upon a review of the entire state court record. See *Herrera v. Lemaster*, 225 F.3d 1176, 1179 (10th Cir. 2000).

III. MERITS OF APPLICANT’S REMAINING CLAIMS

A. Claim One

Mr. Keys first claims his rights were violated because his shoes and forensic evidence derived from the shoes were the product of an unlawful arrest and should have been suppressed due to the fact that he was arrested pursuant to a void arrest warrant. According to Mr. Keys, the arrest warrant was void ab initio because the warrant was issued by a deputy clerk without judicial authority. As noted above, the trial court disagreed and found after a hearing

that defendant was arrested based on a warrant authorized by the county court judge on August 2, 1994; that the warrant was issued in the normal course of the county court’s business; that any clerical errors or improper references to the underlying substantive charges did not render the warrant void ab initio; and that the warrant was not the product of collusion between the clerk and the police department, as defendant had argued.

(ECF No. 12-13 at 5.) The Colorado Court of Appeals affirmed the trial court's order denying the motion to suppress. (*See id.*)

Although Mr. Keys does not identify in the Application the specific federal constitutional right allegedly violated with respect to claim one, he raised the claim in his opening brief to the Colorado Court of Appeals as a Fourth Amendment claim. (*See* ECF No. 12-10.) Therefore, the Court construes claim one in the Application as a Fourth Amendment claim.

Respondents argue that claim one must be dismissed because, pursuant to *Stone v. Powell*, 428 U.S. 465 (1976), the claim is not cognizable in a habeas corpus action. Under *Stone*, “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.” *Id.* at 494 (footnotes omitted); *see also Miranda v. Cooper*, 967 F.2d 392, 401 (10th Cir. 1992). A full and fair opportunity to litigate a Fourth Amendment claim in state court includes the procedural opportunity to litigate the claim as well as a full and fair evidentiary hearing. *See Miranda*, 967 F.2d at 401. A full and fair opportunity to litigate also “contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards.” *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978). It is Mr. Keys’ burden to demonstrate he was denied a full and fair opportunity to litigate his Fourth Amendment claim in state court. *See Young v. Conway*, 715 F.3d 79, 92 (2d Cir. 2013) (Raggi, Circuit J., dissenting from denial of reh’g en banc); *Peoples v. Campbell*, 377 F.3d 1208, 1224 (11th Cir. 2004); *Sanna v. Dipaolo*, 265 F.3d 1, 8 (1st Cir. 2001); *Woolery v. Arave*, 8 F.3d 1325, 1328 (9th Cir. 1993); *Davis v. Blackburn*, 803

F.2d 1371, 1372 (5th Cir. 1986) (per curiam); *Doleman v. Muncy*, 579 F.2d 1258, 1266 (4th Cir. 1978).

Mr. Keys first contends he did not have a full and fair opportunity to litigate this Fourth Amendment claim in the state court proceedings because the trial court that ruled on his motion to suppress, the Arapahoe County District Court, did not have jurisdiction over the Denver arrest warrant. The Court rejects this jurisdictional argument because Mr. Keys presents no authority to support his assertion that the Arapahoe County District Court lacked jurisdiction to consider his motion to suppress filed in his Arapahoe County District Court case.

Mr. Keys also contends that his opportunity to litigate this Fourth Amendment claim in state court was not fair “because of the misinterpretation of facts and law by the post-conviction court and court of appeals.” (ECF No. 46 at 7.) The Court is not persuaded.

The record demonstrates Mr. Keys had a procedural opportunity to litigate his Fourth Amendment claim in state court and that he took advantage of that opportunity. In particular, Mr. Keys filed a motion to suppress in the trial court arguing the arrest warrant was void ab initio in violation of his Fourth Amendment rights, the trial court held a hearing on the motion to suppress, and Mr. Keys raised the Fourth Amendment claim on appeal. Mr. Keys also fails to demonstrate that the state courts failed to make colorable application of the correct Fourth Amendment standards. Once again, the record before the Court demonstrates the Colorado Court of Appeals thoughtfully considered and applied appropriate Supreme Court precedent to conclude the motion to suppress properly was denied “even if the defects cited by defendant were deemed sufficient to invalidate the warrant after its issuance.” (See ECF No. 12-13 at 9.) In particular, the state court noted that, because the exclusionary rule “is a judicially created remedy designed to safeguard

Fourth Amendment rights by deterring police misconduct[,] suppression of evidence is not required where the arrest was unlawful because of clerical errors by court employees [and] no police misconduct was involved.” (*Id.* at 10.) Under these circumstances, consideration of claim one in the Application is barred by *Stone*. See *Smallwood v. Gibson*, 191 F.3d 1257, 1265 (10th Cir. 1999) (*Stone* bar applied when the state courts “thoughtfully considered the facts underlying [the] Fourth Amendment claim and rejected the claim on its merits, applying appropriate Supreme Court precedent”).

Ultimately, Mr. Keys’ real argument with respect to claim one is a substantive disagreement with the resolution of that claim by the state courts. However, disagreement with the state courts’ resolution of a Fourth Amendment claim is not enough to overcome the bar in *Stone*. See *Matthews v. Workman*, 577 F.3d 1175, 1194 (10th Cir. 2009) (rejecting petitioner’s argument that state court misapplied Fourth Amendment doctrine in reaching wrong conclusions about probable cause because that was not the proper question under *Stone*); see also *Pickens v. Workman*, 373 F. App’x 847, 850 (10th Cir. 2010) (stating that “[t]he opportunity for full and fair litigation is not defeated merely because a participant might prefer a different outcome”). Thus, consideration of the merits of claim one in the Application is barred by *Stone*.

B. Claim Three

Claim three in the Application is a Sixth Amendment claim premised primarily on the alleged ineffectiveness of counsel. Clearly established federal law provides that a defendant in a criminal case has a Sixth Amendment right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984). Ineffective assistance of counsel claims are mixed questions of law and fact. See *id.* at 698.

To establish counsel was ineffective Mr. Keys must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice to his defense. *See id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. There is "a strong presumption" that counsel's performance falls within the range of "reasonable professional assistance." *Id.* It is Mr. Keys' burden to overcome this presumption by showing that the alleged errors were not sound strategy under the circumstances. *See id.* "For counsel's performance to be constitutionally ineffective, it must have been completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999).

Under the prejudice prong Mr. Keys must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Richter*, 562 U.S. at 112 (stating that "[t]he likelihood of a different result must be substantial, not just conceivable."). In determining whether Mr. Keys has established prejudice, the Court must look at the totality of the evidence and not just the evidence that is helpful to Mr. Keys. *See Boyd*, 179 F.3d at 914.

Conclusory allegations that counsel was ineffective are not sufficient to warrant habeas relief. *See Humphreys v. Gibson*, 261 F.3d 1016, 1022 n.2 (10th Cir. 2001). If Mr. Keys fails to satisfy either prong of the *Strickland* test, the ineffective assistance of counsel claim must be dismissed. *See Strickland*, 466 U.S. at 697. Finally, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

1. **Claim 3(a)**

Mr. Keys contends in claim 3(a) that his Sixth Amendment rights were violated because he was denied conflict-free counsel at his retrial. The Colorado Court of Appeals correctly observed that Mr. Keys requested substitution of counsel several times during and after his retrial.

- On the first day of trial, defendant requested conflict-free counsel, stating that he no longer trusted his counsel because his counsel had, without receiving defendant's input, agreed with the prosecution about the admissibility of certain testimony by a witness. After allowing defendant to discuss the matter with his attorneys, the court inquired into the reasons for defendant's dissatisfaction with his counsel, explained that tactical decisions about the trial were for his attorneys to make, and asked whether he wished to keep his counsel or represent himself. *See People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989). Defendant stated that he wished to keep his counsel. His counsel stated that although there had been some difficulty in communicating and working with defendant, they were prepared and would be able to represent him effectively.
- On the fourth day of trial, defendant again expressed dissatisfaction with and requested dismissal of his counsel. Believing that defendant's allegations created a conflict of interest, his counsel moved to withdraw. The court held a hearing, outside of the jury's presence, to address defendant's new assertion that he was not given the opportunity to decide whether to accept a twelve-year plea offer he claimed was made by the prosecution because defense counsel had not informed him about it. After hearing defendant's testimony, and statements from the prosecution and defense counsel, the court found that no such offer had been made. It further found that defense counsel were zealously representing defendant and that it did not perceive any detrimental effect on their representation due to alleged communication issues. The court ordered defense counsel to continue representing defendant.
- On the sixth day of trial, defendant filed three interrelated, pro se motions – a motion for a mistrial, a motion to dismiss his trial counsel, and a motion requesting an evidentiary hearing – all of which related to the allegedly ineffective assistance he received from his counsel. The court addressed and rejected the three

motions on the following day. In addition, as a result of defendant's handing both defense counsel notices of intent to sue them for millions of dollars, defense counsel again moved to withdraw. The court denied the motion, finding that the intent to sue letters constituted an attempt to create a conflict with defense counsel in the eleventh hour, just before closing arguments.

- After the jury returned its verdicts, defendant filed a pro se postconviction motion and, later, a supplemental motion. In the combined motions, he alleged that [the] trial court had erred by failing to appoint conflict-free counsel because he had shown that an irreparable breakdown in communication with his counsel had occurred. The court denied the motion in a written order, finding that any communication issues between defendant and his counsel did not rise to the level of a complete breakdown or a conflict of interest.

(ECF No. 12-21 at 5-8.)

“In the normal course, defendants claiming ineffective assistance of counsel must satisfy the familiar framework of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), which requires a showing that ‘counsel’s performance was deficient’ and ‘that the deficient performance prejudiced the defense.’” *Woods v. Donald*, 135 S. Ct. 1372, 1375 (2015) (per curiam). However, a different analysis applies and prejudice is presumed “if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected [counsel’s] performance.’” *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980)). Under *Cuyler*, “the possibility of conflict is insufficient to impugn a criminal conviction.” *Cuyler*, 446 U.S. at 350. “An actual conflict of interest exists only if counsel was forced to make choices advancing . . . interests to the detriment of his client.” *Workman v. Mullin*, 342 F.3d 1100, 1107 (10th Cir. 2003) (internal quotation marks omitted). “Furthermore, the petitioner must be able to point to specific instances

in the record that suggest his interests were damaged for the benefit of another party.” *Id.* (internal quotation marks omitted).

The Court notes initially that claim 3(a) must be dismissed because the Supreme Court has not applied *Cuyler*’s presumption of prejudice outside the context of defense counsel’s concurrent representation of multiple defendants in the same criminal proceeding. *See Mickens v. Taylor*, 535 U.S. 162, 175-76 (stating it is “an open question” whether the holding in *Cuyler* applies outside the context of concurrent representation of multiple defendants). Because Mr. Keys’ conflict of interest claim is not premised on concurrent representation of multiple defendants, there is no clearly established federal law to be applied under § 2254(d)(1). *See Schwab v. Crosby*, 451 F.3d 1308, 1328 (11th Cir. 2006) (a decision that *Cuyler*’s presumption of prejudice does not apply outside the context of concurrent multiple legal representation is not contrary to or an unreasonable application of clearly established federal law); *Smith v. Hofbauer*, 312 F.3d 809, 818 (6th Cir. 2002) (Petitioner’s claim does not rest upon clearly established federal law because *Cuyler* applies “only to joint representation and the Supreme Court has yet to extend [*Cuyler*’s] reach to any other type of conflict.”). As noted above, the absence of clearly established federal law ends the Court’s inquiry under § 2254(d)(1). *See House*, 527 F.3d at 1018.

In any event, even assuming *Cuyler*’s presumption of prejudice could apply to the particular conflict alleged by Mr. Keys, the claim still would lack merit. The Colorado Court of explained its rejection of the conflict claim as follows:

We conclude that the record supports the trial court’s findings that no actual conflict existed. Rather, it appears defendant was intentionally attempting to create a conflict of interest with his counsel as a means to secure a change of counsel.

Moreover, even if defendant could establish an actual conflict, he has made no showing of an adverse effect on his counsel's performance. *See West*, 2015 CO at ¶ 57. Defendant has not identified a plausible alternative defense strategy or tactic which his counsel might have pursued, much less an objectively reasonable one. As noted by the trial court, defendant's apparent dissatisfaction over the fact that evidence presented at his previous trial was not being presented in the current one was misplaced, given that the previous trial resulted in a conviction. Nor has he made any showing that such an alternative strategy inherently conflicted with his counsel's other loyalties or interests, or that record evidence strongly indicates that his counsel failed to pursue such a strategy due to a conflict between their interests and that of defendant. *See id.* at ¶ 63 ("Where there is no inherent conflict, but problematic circumstances exist, a defendant must prove that the alternative strategy or tactic was not pursued *due to* the attorney's other loyalties or interests."). Indeed, the trial court repeatedly found during the course of the trial (and in response to defendant's protestations about his counsel) that defense counsel were prepared to go forward with the trial, that they were zealously and competently representing defendant, that they were vigorously cross-examining prosecution witnesses, and that any alleged breakdown of trust or communication had not affected their representation.

Therefore, we conclude that the district court did not err by denying defendant's combined postconviction motions on the ground that no actual conflict of interest adversely affected his trial counsel's performance.

(ECF No. 12-21 at 8-9.)

Mr. Keys fails to demonstrate the state court's rejection of his conflict claim is contrary to or an unreasonable application of clearly established federal law. In particular, it was not unreasonable to reject the conflict claim based on Mr. Keys' failure to demonstrate the existence of an objectively reasonable alternative defense strategy that was not pursued as a result of the alleged conflict. *See United States v. Nicholson*, 611 F.3d 191, 205-06 (4th Cir. 2010) (describing a nearly identical test for reviewing a conflict of interest claim); *United States v. Bowie*, 892 F.2d

1494, 1500 (10th Cir. 1990) (“[D]efense counsel’s performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests.”).

For these reasons, Mr. Keys is not entitled to relief with respect to claim 3(a).

2. Claim 3(b)

Mr. Keys contends in claim 3(b) that counsel failed to investigate, independently test, and challenge forensic evidence. In particular, Mr. Keys contends “[c]ounsel failed to independently test crime scene evidence (blood, hair fibers and fingernail scrapings – which did not match the DNA profile of petitioner)” and “chose to cross-examine witnesses in an attempt to discredit the testing process or reliability of DNA (in general), rather than independently test the crime scene forensic evidence and/or hire experts to testify on petitioner’s behalf.” (ECF No. 1 at 28.)

The Colorado Court of Appeals applied *Strickland* and rejected this claim for the following reasons:

The prosecution presented DNA evidence through two expert witnesses. According to their testimony, DNA from one of the victims was found on the shoes defendant was wearing at the time of his arrest. Defendant contends that his trial counsel were ineffective because they failed to hire or consult their own forensic experts or to have the evidence tested independently. However, in the absence of any indication that further examination of the forensic evidence would have produced exculpatory evidence, his counsel’s choice to forgo such testing was not unreasonable. *See Aguilar*, ¶ 12 (“[C]ounsel’s decision whether or not to call his own DNA expert was a matter of trial strategy.”). Moreover, defendant makes no showing of what another expert would have said about the evidence that would have affected the outcome of his case. *See id.* (Defendant’s assertion that an expert could have contradicted the prosecution’s evidence is facially speculative.”); *People v. Zuniga*, 80 P.3d 965, 973 (Colo. App. 2003) (conclusory allegations

insufficient to demonstrate ineffective assistance). His conviction did not depend on DNA evidence alone. Thus, with respect to this contention, he can satisfy neither prong of the *Strickland* test.

(ECF No. 12-21 at 12-13.)

Mr. Keys does not cite any contradictory governing law set forth in Supreme Court cases or any materially indistinguishable Supreme Court decision that would compel a different result.

See House, 527 F.3d at 1018. Therefore, he fails to demonstrate that the state court's determination with respect to claim 3(b) was contrary to clearly established federal law under § 2254(d)(1).

Mr. Keys also fails to demonstrate that the state court's rejection of claim 3(b) was based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2) or an unreasonable application of clearly established federal law under § 2254(d)(1). In particular, it was not unreasonable to conclude that Mr. Keys failed to establish he was denied the effective assistance of counsel "in the absence of any indication that further examination of the forensic evidence would have produced exculpatory evidence." (ECF No. 12-21 at 12.) Mr. Keys' speculation that further investigation or independent testing of the forensic evidence would demonstrate the evidence was fabricated is not sufficient to demonstrate he was prejudiced as a result of counsel's alleged ineffectiveness. *See Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002) ("[S]peculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.") (quoting *Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985)). To the extent Mr. Keys bases claim 3(b) on counsel's failure to introduce at his second trial the same expert testimony the defense introduced at his first trial regarding hair and fiber samples recovered at the crime scene that could not be linked to Mr. Keys,

the Court notes that Mr. Keys was convicted at his first trial. Thus, the Court is not persuaded that there is a reasonably probability of a different result if the same evidence was introduced at his second trial.

Ultimately, Mr. Keys is not entitled to relief with respect to claim 3(b) because he fails to demonstrate the likelihood of a different result is substantial and not just conceivable. *See Richter*, 562 U.S. at 112. As a result, he fails to demonstrate the state court ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

3. Claims 3(c) and (d)

Mr. Keys contends in claims 3(c) and (d) that counsel were ineffective with respect to the investigations and cross-examinations of Donald Staats and Disa Tonkin. With respect to Donald Staats, Mr. Keys contends counsel failed to expose the fact that Donald Staats knew Mr. Keys prior to the assault and was familiar with his face but did not identify Mr. Keys as the assailant on the night of the assault when he sought help from an eyewitness or when he called 911. With respect to Disa Tonkin, Mr. Keys apparently contends counsel was ineffective in failing to discover she had attempted to obtain a telephone confession from Mr. Keys on behalf of the prosecution while he was in jail, but he concedes “[i]t may not be entirely counsel’s fault for being ineffective when it comes to the investigation and trial testimony of Disa Tonkin.” (ECF No. 1 at 30.)

Mr. Keys’ factual allegations in support of claims 3(c) and (d) differ from the factual allegations he presented in state court with respect to the cross-examinations of Donald Staats and Disa Tonkin. He argued on appeal from the denial of his postconviction Rule 35(c) motion in the

state court proceedings that “counsel provided ineffective representation when cross-examining his former girlfriend, Tonkin, because their failure to communicate with their client deprived them of information necessary to examine her effectively” and that “counsel was ineffective for failing to impeach Staats’ voice and mask identification testimony adequately to demonstrate its infirmities.” (ECF No. 12-17 at 43-44.) The Colorado Court of Appeals rejected these arguments for the following reasons:

Defendant contends that his trial counsel failed to impeach effectively through cross-examination either his girlfriend or the male victim. However, he has not specified what might have been revealed through more effective cross-examination. *See People v. Osorio*, 170 P.3d 796, 801 (Colo. App. 2007) (“[C]onclusory allegations are insufficient to demonstrate that [the defendant] may be entitled to postconviction relief and that the record might contain specific facts that would substantiate his claim.”). Further, on issues of trial strategy such as the scope of cross-examination, defense counsel is “captain of the ship.” *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008). Again, with respect to this contention, defendant has failed to satisfy either prong of *Strickland*.

(ECF No. 12-21 at 13 (brackets in original).)

It appears that claims 3(c) and (d) in the Application are not exhausted because the factual allegations in support of the claims are new, but Respondents did not raise that affirmative defense in their Pre-Answer Response with respect to these claims. Because the new factual allegations were not raised and exhausted in the state court proceedings, claims 3(c) and (d) in the Application were not adjudicated on the merits and the deferential standards in § 2254(d) do not apply. However, even reviewing claims de novo, the Court finds that the claims lack merit.

The state court record demonstrates defense counsel extensively and thoroughly cross-examined both Donald Staats and Disa Tonkin. With respect to Donald Staats, he testified that he did not even remember speaking to the eyewitness or calling 911. (Trial Tr. (10/3/00) at

225.) As a result, Mr. Keys fails to demonstrate counsel was ineffective by failing to cross-examine Donald Staats about his failure to identify Mr. Keys as the assailant to the eyewitness or the 911 operator. Mr. Keys also fails to demonstrate he suffered any prejudice. With respect to Disa Tonkin, the ineffective assistance of counsel claim fails because, as noted above, Mr. Keys concedes that counsel was not entirely at fault. Furthermore, counsel cross-examined Disa Tonkin regarding her inconsistent statements to the police and her grant of immunity and no evidence was presented by the prosecution regarding a jailhouse confession. Therefore, Mr. Keys fails to demonstrate either that counsel was ineffective with respect to the cross-examination of Disa Tonkin or that he suffered any prejudice.

Finally, to the extent claims 3(c) and (d) in the Application could be construed as reasserting the same claims Mr. Keys actually raised and exhausted in state court regarding the cross-examinations of Donald Staats and Disa Tonkin, the Court finds that the state court's decision is neither contrary to, nor an unreasonable application of, clearly established federal law and also is not based on an unreasonable determination of the facts in light of the evidence presented.

For all of these reasons, Mr. Keys is not entitled to relief with respect to claims 3(c) and (d).

4. Claim 3(e)

Mr. Keys asserts in claim 3(e) that counsel was ineffective by failing to advance a reasonable doubt defense. Mr. Keys alleges in support of claim 3(e) that counsel asserted in his Opening Statement that the police got the "wrong guy," which prevented counsel from simply relying on reasonable doubt as a defense and required counsel to "produce reliable evidence to support the assertion" and prove Mr. Keys' innocence. (ECF No. 1 at 31.) In other words,

according to Mr. Keys, counsel's statement that the police got the "wrong guy" meant "[t]he jury is expecting [counsel] to exonerate petitioner, not to create reasonable doubt." (*Id.*)

Similar to claims 3(c) and (d) discussed above, Mr. Keys' argument in support of claim 3(e) in the Application differs from the argument he presented in state court in support of his claim that counsel was ineffective by failing to advance a reasonable doubt defense. Mr. Keys argued in state court on appeal from the denial of his Rule 35(c) motion only "that counsel was ineffective for failing to advance a reasonable doubt defense and to require the State to meet its burden of proving his guilt beyond a reasonable doubt." (ECF No. 12-17 at 44-45.) He did not reference counsel's Opening Statement and he did not argue that counsel's Opening Statement prevented the defense from relying on reasonable doubt as a defense. The Colorado Court of Appeals rejected the conclusory claim Mr. Keys raised in state court for the following reasons:

Defendant contends that defense counsel were ineffective "for failing to advance a reasonable doubt defense and to require the State to meet its burden of proving his guilt beyond a reasonable doubt." However, the jury was instructed that the prosecution must prove every element of each offense beyond a reasonable doubt, and defense counsel specifically argued in closing that the jury should have reasonable doubt about the prosecution's version of events. This is not a case where defense counsel utterly failed to raise a defense. *Cf. Fisher v. Gibson*, 282 F.3d 1283, 1306 (10th Cir. 2002) (Counsel "failed in general to advance any defense theory, even that of reasonable doubt."). Thus, this basis for defendant's ineffective assistance claim also fails.

(ECF No. 12-21 at 13-14.)

It appears claim 3(e) in the Application also is unexhausted, but Respondents did not raise that affirmative defense in their Pre-Answer Response. However, once again, even reviewing claim 3(e) de novo, the Court finds that the claim lacks merit. Simply put, the Court is not persuaded that counsel's assertion in his Opening Statement that the police got the "wrong guy"

meant counsel could be effective only by presenting affirmative evidence that Mr. Keys was innocent. Instead, counsel's statement that "[t]hey got the wrong guy" was entirely consistent with a reasonable doubt defense in this case where the only real issue was the identification of the assailant.

To the extent claim 3(e) in the Application could be construed as being premised on the same argument Mr. Keys raised in state court, the Court finds that the state court's decision is neither contrary to, nor an unreasonable application of, clearly established federal law and also is not based on an unreasonable determination of the facts in light of the evidence presented.

Therefore, Mr. Keys also is not entitled to relief with respect to claim 3(e).

5. Claim 3(f)

Mr. Keys contends in claim 3(f) that counsel was ineffective by failing to object to prosecutorial misconduct. Mr. Keys describes the alleged misconduct as follows:

During rebuttal, the prosecutor defended his charging decision as one that *allegedly* was neither based on race, nor on the decision [of] the district attorney's office to prosecute an innocent man. During the same argument, however, the prosecutor, referred to an area mentioned in this case, as petitioner's "hood." In his post-conviction motion, petitioner stated that the prosecutor made the remark imitating a stereotypical African-American dialect, while smirking. Petitioner's assertion is that the prosecutor committed reversible misconduct by injecting racial overtones into a trial that would be decided by an all-white jury.

(ECF No. 1 at 32 (citations to the record omitted).)

The Colorado Court of Appeals rejected this ineffective assistance of counsel claim for the following reasons:

Defendant, who is black, contends that his counsel were ineffective for failing to seek sanctions against the prosecution for "injecting racial overtones into a trial that would be decided by an

all-white jury.” However, he concedes that his allegation of prosecutorial misconduct “is not completely borne out in the record and requires factual development to determine the gravity of the contended misconduct.” Moreover, we note that defense counsel interjected the notion of racism into the case in both opening and closing arguments. As a result, there is no showing that had defense counsel made an objection it would have been sustained. Such allegations fall far short of meeting the *Strickland* test.

(ECF No. 12-21 at 14.)

Mr. Keys fails to demonstrate the state court’s decision was contrary to *Strickland*. In other words, he does not cite any contradictory governing law set forth in Supreme Court cases or any materially indistinguishable Supreme Court decision that would compel a different result.

See House, 527 F.3d at 1018.

Mr. Keys also fails to demonstrate the state court’s ruling with respect to this ineffective assistance of counsel claim was based on an unreasonable determination of the facts in light of the evidence presented to the state court under § 2254(d)(2). Pursuant to § 2254(e)(1), the Court presumes the state court’s factual findings that the defense interjected the notion of racism into the trial during both opening statement and closing argument is correct. Mr. Keys has not presented any evidence, let alone clear and convincing evidence, to overcome the presumption of correctness and, in any event, the Court’s review of the state court record confirms that it was defense counsel who introduced the notion of racism into the trial. (*See* Trial Tr. (10/3/00) at 85-86; Trial Tr. (10/11/00) at 35, 79-80, 82.)

Finally, Mr. Keys fails to demonstrate the state court’s ruling with respect to this ineffective assistance of counsel claim was an unreasonable application of *Strickland* under § 2254(d)(1). First, the Court’s review ‘is limited to the record that was before the state court that adjudicated the claim on the merits’ *Cullen*, 563 U.S. at 181, and, as noted above, Mr. Keys

acknowledged in state court that his allegation of prosecutorial misconduct requires further factual development. Likewise, he concedes in the Application that this ineffective assistance of counsel claim is premised on an “allegation of prosecutorial misconduct that is not completely borne out in the record and requires factual development to determine the gravity of the contended misconduct.” (ECF No. 1 at 32-33.) Under these circumstances, Mr. Keys fails to demonstrate the state court unreasonably applied *Strickland*.

Furthermore, in considering a claim of prosecutorial misconduct, the Supreme Court has recognized that comments made during closing argument are less likely to be improper when the comments are made in response to specific defense arguments. *See United States v. Young*, 470 U.S. 1, 12 (1985) (a reviewing court “must also take into account defense counsel’s opening salvo”). Considered in context, it was not unreasonable for the state court to conclude a defense objection to the prosecution’s isolated reference to Mr. Keys’ “hood” would not have been sustained because it was defense counsel who introduced the notion of racism at Mr. Keys’ trial. Therefore, because it was not unreasonable to conclude the reference was not objectionable, it also was not unreasonable to conclude defense counsel’s failure to object was not ineffective assistance. *See Lafler v. Cooper*, 566 U.S. 156, 167 (2012) (“Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, [petitioner] could not demonstrate an error entitling him to relief.”); *Neill v. Gibson*, 278 F.3d 1044, 1058-59 (10th Cir. 2001) (trial counsel’s failure to object to prosecutorial statements could not support ineffective assistance claim if the statements were not improper).

Ultimately, Mr. Keys fails to demonstrate the state court’s ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any

possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103. Therefore, he is not entitled to relief with respect to claim 3(f).

6. Claim 3(g)

Mr. Keys finally claims the cumulative effect of counsel’s errors demonstrates counsel was constitutionally ineffective. The Colorado Court of Appeals rejected this claim because, “[h]aving rejected defendant’s allegations of error, we do not agree that defendant is entitled to relief based on the cumulative effect of any errors.” (ECF No. 12-21 at 15.) Because the Court agrees that Mr. Keys fails to demonstrate any of his ineffective assistance of counsel claims have merit, the Court also finds that the state court’s rejection of his cumulative error claim is not contrary to or an unreasonable application of clearly established federal law and was not based on an unreasonable determination of the facts in light of the evidence presented.

IV. CONCLUSION

In summary, the Court finds that Mr. Keys is not entitled to relief on any of his remaining claims. Accordingly, it is

ORDERED that the Clarification Motion Regarding Excessive Words (ECF No. 47) is granted. It is further

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied and this case is dismissed with prejudice. It is further

ORDERED that there is no basis on which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

DATED this 10th day of April, 2017.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Raymond P. Moore", written over a horizontal line.

RAYMOND P. MOORE
United States District Judge