2018 WL 5284718
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.
FRANK D. KEYSER, Petitioner,
v.
SUPERINTENDENT SMITH, et al., Respondents.
CIVIL ACTION NO. 17-cv-04022-TJS
Filed 09/06/2018

REPORT AND RECOMMENDATION

RICHARD A. LLORET U.S. Magistrate Judge

*1 **September 4, 2018**

Before me is the Petition for Writ of Habeas Corpus of Frank Keyser pursuant to 28 U.S.C. § 2254. Keyser raises four separate claims of ineffective assistance of counsel in his petition: (1) that his trial counsel failed to suppress or object to an unduly suggestive photo array and in-court identifications; (2) that his trial counsel failed to suppress a coerced, involuntary confession by Keyser; (3) that his trial counsel failed to impeach a co-defendant for inconsistent statements during trial testimony, and (4) that Keyser was entitled to relief because of the cumulative effect of his trial counsel's errors. *See* Petitioner's Federal Habeas Corpus Petition, Doc. No. 1, pp. 5-11. The Commonwealth's response argues that the state courts' decisions denying relief were neither unreasonable nor contrary to federal law. *See* Commonwealth's Answer to Federal Petition for Writ of Habeas Corpus, Doc. No. 9. After careful review, I find no grounds for relief, and respectfully recommend that Keyser's petition be dismissed with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from Petitioner's convictions of three counts each of criminal trespass, burglary, conspiracy to commit burglary, and one count of theft by unlawful taking. The Superior Court of Pennsylvania summarized the facts of the case as follows:

[A]t 8:30 a.m. on June 3, 2011, Chief Rockenbach of the Clifton Heights Borough Police Department was off duty outside his residence in the 1000 block of Green Lane in Secane when he heard an alarm ringing in his neighbors' residence at 1006 Green Lane, directly across the street from his residence. 1006 Green Lane is a single family home. He had never heard this alarm before and was not aware his neighbors had an alarm.

Chief Rockenbach observed two men walking from the rear of the 1006 Green Lane residence: an older man with grayish hair holding a tape measure (later identified as William Profeto) and a younger male (later identified as Keyser). The younger male, Keyser, had dark hair and wore a blue shirt with a number 13 on the back. Chief Rockenbach had never seen either man before and did not believe they had any legal connection to the 1006 Green Lane residence. The chief did not see the neighbors who lived at 1006 Green Lane.

The men walked down the driveway, turned left on Green Lane towards Ashland Avenue, and turned right on Ashland Avenue. Concerned about possible criminal activity, Chief Rockenbach followed the men in his own truck and never lost sight of them. The men entered a blue pickup truck with white doors parked on Ashland Avenue. It seemed very unusual that the men went from a house with the alarm blaring to a side street where a truck was parked. The men drove around neighborhood side streets in a “convoluted” path with no apparent purpose. Keyser looked back at Chief Rockenbach several times with a “very nervous” expression as he followed “right behind them.” [sic]

Chief Rockenbach called the police dispatcher on his cellphone to report the events, including a description of the pickup truck and direction of travel. Moments later, Upper Darby Officer Morris, who was in uniform and in a marked car, received a radio dispatch that an off duty police officer was following a vehicle that possibly was involved in a burglary. Shortly after receiving the radio call, Officer Morris saw the pickup truck pass by followed by Chief Rockenbach's truck, and he stopped the pickup truck on Rhodes Avenue in Secane, near Ashland Avenue. Chief Rockenbach exited his truck and explained to Officer Morris that he had been following the truck because he had observed the two men on Green Lane possibly involved in a burglary. After the stop, Officer Morris was asked whether either individual had cuts. Officer Morris observed that Keyser had fresh, bleeding cuts on his right hand, and he conveyed this information over the radio to Upper Darby Officer Sides, whom Officer Morris knew was investigating the scene at Green Lane. Officer Sides told Officer Morris over the radio that there was fresh blood on the driveway at Green Lane. Officer Sides testified that he found several drops of fresh blood in the driveway at 1006 Green Lane and a trail of fresh blood from the middle of the driveway to the front porch. Ten minutes after

initiating the stop, and upon learning about the blood on the driveway, Officer Morris placed Keyser under arrest.

*2 Officer Sides continued his investigation at Green Lane and found that the sliding door in the rear of the house was open. The resident, Mr. Sacka, was not home when the officer arrived, but he returned home shortly thereafter and told the officer that nobody else had permission to be at his house. After inspecting the house, the owner told the officer that nothing was missing.

Chief Rockenbach returned to Green Lane after Officer Morris detained the two men in their pickup truck. The chief observed what appeared to be fresh blood on the part of the driveway of 1006 Green Lane where he had seen Keyser and the other man walking.

For the next 45 minutes, Officer Sides canvassed the neighborhood and learned that the two men had entered two other residences in the same block. Mr. Holland, who resides at 629 Ashland Avenue, a single family home, stated that when he entered his living room, he encountered a white male in his twenties wearing a blue shirt with a number 13 on the back (the same shirt that Chief Rockenbach saw the young male wearing outside of 1006 Green Lane) and a second male in the doorway. The young male asked him if he needed landscaping or yard work. Mr. Holland said no, and the males left. The male had entered his house through an unlocked front door. Ms. Persia, an 11 or 12-year-old female who resides at 1024 Green Lane, another single family home, stated that a white male in his teens or twenties wearing a blue shirt had entered her house through an unlocked front door. Ms. Persia was alone in her bedroom when the male opened her bedroom door and asked if this was a certain address (which it obviously was not). Later that day, Ms. Persia picked Keyser's photograph out of a photo array prepared by Upper Darby police officers.

Additional details connected Keyser to a fourth burglary on the same block. During the traffic stop, Officer Morris observed an old green bike in the back of the pickup truck. After Keyser's arrest, Upper Darby Detective Lanni learned of another burglary at 822 Green Lane in Secane several days earlier on May 28, 2011. In that incident, the homeowner, Mr. Perry, discovered a male at the residence who fled the scene on a green bicycle. Mr. Perry discovered that $3,000 in cash plus coins and jewelry were missing from his bedroom. Detective Lanni spoke with Officer Morris, who stated that there were two bikes in the back of the pickup truck that he stopped on June 3, one of which was the green one that matched the description provided by Mr. Perry on May 28th. Mr. Perry visited the police station and identified the green bike as the one he witnessed Keyser riding on May 28th. He also selected Keyser's photograph from a photo array prepared by Upper Darby police officers.

Commonwealth v. Keyser, Trial Court Opinion, 4/25/2013, at 3-7 (Record citations omitted), (hereafter *Keyser I*)[1] reproduced at No. 2420 EDA, 2016 WL 5266600 at *1-2 (Pa. Super. July 20, 2016), and No. 3428 EDA 2012 (Pa. Super. November 26, 2013). Keyser's trial counsel filed pretrial motions to suppress evidence, to suppress photo arrays for failure to have counsel present during identifications, and to sever the three counts of burglary.[2] Following two suppression hearings on May 10, 2012 and June 12, 2012, the trial court denied the motions. *See* Order by Judge Patricia H. Jenkins, filed August 22, 2012; *see also* Transcript of Suppression Hearings, found at Comm. App'x. Vol. 1, pp. 23-185.[3] Keyser was tried by a jury on October 10 and 11, 2012, and the jury convicted him of ten of the twelve counts in which he was charged. Comm. App'x. Vol. 3, pp. 597-600. On November 19, 2012, the trial court sentenced Keyser to an aggregate term of thirteen to twenty-six years imprisonment, followed by four years of probation. Comm. App'x. Vol. 4, pp. 615-59.

*3 The trial court first addressed the five issues raised by Keyser on direct appeal in an opinion dated April 25, 2013, one of those issues being whether Keyser's objection to the photographic array was devoid of merit. *Keyser I*, pp. 660-76; *see also* Concise Statement Pursuant to Rule 1925(b), filed December 17, 2012.[4] The Pennsylvania Superior Court affirmed the trial court's conviction and sentence on November 26, 2013,[5] and the Pennsylvania Supreme Court denied Keyser's Petition for Allowance of Appeal on May 7, 2014. *Commonwealth v. Keyser*, No. 3428 EDA 2012, 2013 WL 11250891 (Pa. Super. Nov. 26, 2013); 91 A.3d 162 (Pa. 2014).

Keyser timely filed a pro se PCRA petition on December 14, 2014[6] alleging seven claims of ineffective counsel: (1) that trial counsel failed to move for a mistrial, or object to or suppress an unduly suggestive photo array and in-court identifications; (2) that trial counsel failed to suppress an allegedly involuntary confession from Keyser made thirteen hours after arrest; (3) that trial counsel failed to impeach co-defendant William Profeto for inconsistent statements and testimony; (4) that trial counsel failed to investigate and prepare for trial; (5) that preliminary hearing counsel was ineffective for not conveying an offer to Keyser;[7] (6) that trial counsel was ineffective for making false disclaimers on a Waiver of Arraignment form, and (7) that Keyser was prejudiced by the cumulative effect of his counsels' errors

during the preliminary hearing, pretrial and trial phases. *See* Comm. App'x. Vol. 4, pp. 724-26, *Turner*/*Finley* No-Merit Letter, filed June 9, 2015. *See also* Comm. App'x. Vol. 4, pp. 744-748, Trial Court Opinion, dated October 5, 2015.

Scott D. Galloway, Esq., who was appointed by the PCRA court to review Keyser's PCRA Petition, filed a *Turner*/*Finley* "No Merit Letter"[8] on June 9, 2015. Comm. App'x. Vol. 4, pp. 724-26. The PCRA court issued a Notice of Intent to Dismiss on June 11, 2015, to which Keyser responded on June 25, 2015. Comm. App'x. Vol. 4, pp. 727-40. Keyser's Petition was dismissed without a hearing by the PCRA court on July 8, 2015. App'x. Vol. 4, p. 741. In response, Keyser filed a timely appeal of the denial of his PCRA Petition. Comm. App'x. Vol. 4, pp. 742-43, Concise Statement of Matters Complained on Appeal pursuant to Rules of Appellate Procedure Rule 1925(b).

*4 Trial Judge George A. Pagano[9] issued an opinion on October 5, 2015 finding Keyser's claims meritless. *Comm. v. Keyser*, No. CP-23-CR-5850-2011, Pagano, J. (Ct. of Common Pleas Del. Cty. October 5, 2015), Comm. App'x. Vol. 4, pp. 744-748 (hereafter *Keyser II*). On July 20, 2016, the Pennsylvania Superior Court affirmed the Common Pleas Court's dismissal of Keyser's PCRA petition. *Comm. v. Keyser*, No. 2420 EDA 2015 (Pa. Super. July 20, 2016), Comm. App'x. Vol. 4, pp. 787-808 (hereafter *Keyser III*). Keyser filed a *pro se* Application For Reargument En Banc with the Superior Court at 2420 EDA 2015, which was denied on August 3, 2016. Comm. App'x. Vol. 4, pp. 809-13. The Pennsylvania Supreme Court denied Keyser's subsequent Petition for Allowance of Appeal by *per curium* order on May 16, 2017 at 767 MAL 2016. *Comm. v. Keyser*, 169 A.3d 529 (Pa. 2014); *see also* Comm. App'x. Vol. 4, pp. 814-828, Petition for Allowance of Appeal. Keyser filed his timely federal habeas petition with this Court on September 7, 2017. Doc. No. 1.

STANDARD OF REVIEW

This petition for writ of habeas corpus has been referred to me for a report and recommendation pursuant to 28 U.S.C. § 2254 ("A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636."). Under the AEDPA, a prerequisite to the issuance of a writ of habeas corpus on behalf of a person in state custody pursuant to a state court judgment is that the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). In order to satisfy this requirement, a petitioner must have "fairly presented" the merits of his federal claims during "one complete round of the established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A federal claim is fairly presented to the state courts where the petitioner has raised "the same factual and legal basis for the claim to the state courts." *See Nara v. Frank*, 488 F.3d 188, 198-99 (3d Cir. 2007). A petitioner who has raised an issue on direct appeal is not required to raise it again in a state post-conviction proceeding. *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) (citations omitted).

If a petitioner fairly presents a claim to the state courts, but it was denied on a state-law ground that is "independent of the federal question and adequate to support the judgment," the claim is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A claim is also procedurally defaulted if the petitioner failed to present it in state court and would now be barred from doing so under state procedural rules. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). Where a claim is procedurally defaulted, it cannot provide a basis for federal habeas relief unless the petitioner shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Where the federal court reviews a claim that has been adjudicated on the merits by the state court, 28 U.S.C. § 2254(d) permits the federal court to grant a petition for habeas relief only if: (1) the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or if (2) the adjudication "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); *see Parker v. Matthews*, 567 U.S. 37, 42-45 (2012) (reiterating that the standard under 2254(d)(1) is highly deferential to state court decisions, and overturning a Sixth Circuit decision granting habeas relief because the state court's decision denying relief was not objectively unreasonable).[10] Factual determinations made by the state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009) (citing to 28 U.S.C. § 2254(e)(1)).

*5 Where a defendant alleges a claim for ineffective assistance of counsel, the Supreme Court's analysis in *Strickland v. Washington*, 466 U.S. 668 (1984) is the governing standard. To prevail on any of his ineffective assistance of counsel claims, the Petitioner "must show counsel's performance was deficient,"

that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Id.* at 687.
Ineffectiveness may be shown by evidence of "ineptitude, inexperience, lack of preparation, [or] unfamiliarity with basic legal principles" on the part of counsel. *See* *Gov't of Virgin Islands v. Weatherwax*, 20 F.3d 572, 579 (3d Cir. 1994). The Petitioner also must demonstrate that he was prejudiced by the deficient performance to the point of being deprived of a fair trial. *Strickland*, 466 U.S. at 687. To establish this, the Petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Absent establishing these two prongs, "it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.
In the habeas context, establishing ineffective assistance of counsel is all the more challenging. "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal citations omitted). Importantly, "[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.*

DISCUSSION

A. The state courts reasonably rejected Keyser's claims regarding ineffective assistance of counsel during suppression.

Keyser's first two claims concern his counsel's choice of suppression arguments. The PCRA and Superior Court addressed these claims in tandem. While the PCRA court held that the claims were previously litigated, *Keyser II*, pp. 744-48, the Superior Court disagreed, finding instead that Keyser suffered no prejudice from counsel's failure to argue that the photo array was suggestive, or his failure to argue that Keyser's confession was improperly obtained. *Keyser III*, pp. 793-801.
In reviewing these arguments, the Superior Court first rejected the PCRA court's ruling that Keyser's two arguments regarding suppression were previously litigated. *Keyser III*, p. 794. The Superior Court stated the following with respect to its finding that the issues were, in fact, raised below, and how they would analyze an ineffective assistance of counsel claim on appeal:
[Petitioner's] *pro se* petition raised these issues and set forth the alternative suppression motion theories. Since no evidentiary hearing was held, we do not address whether counsel's litigation of one theory satisfied the reasonable strategic basis prong. "[A] court will not find counsel to be ineffective if the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest. If counsel's chosen course had some reasonable basis, the inquiry ends and counsel's assistance is deemed effective." *Comm. v. Williams*, 899 A.2d 1060, 1063-64 (Pa. 2006) (citations omitted). Nor do we find a need to remand for an evidentiary hearing as it is clear [Petitioner] cannot establish prejudice.
*6 *Id.*

1. Keyser has failed to show prejudice regarding the photo array.

Keyser's first claim in his habeas petition is phrased as follows:
Counsel's failure to object to or suppress unduly suggestive photo array and in-court identifications (6th Amendment) + 14th [Amendment].
Supporting facts: Two witnesses stated perpetrator as white male with specific characteristics that don't match me. A (sic) eight person array is shown with me in position #1 along with 7 other non-caucasion (sic) men (shown in color). J-NET symbol is directly above position #1 and trial judge allows prosecution to use array and then states it's prejudicial and doesn't allow jury to view it.
Doc. No. 1, p. 5. *See also* Comm. App'x. Vol. 4, pp. 763-64.[11]
Keyser argued pre-trial and on direct appeal that the photo array should be suppressed for failure to have defense counsel present at the time of the witness' identifications. *See* Comm. App'x. Vol. 4, pp. 683, 695-96, Petitioner's brief on direct appeal. *See also Comm. v. Keyser*, No. 5850-11, Jenkins, J. (April 25, 2013) Opinion of Trial Court on Direct Appeal, Comm. App'x. Vol. 4, pp. 660-76 (hereafter *Keyser I*). After losing this claim on direct appeal, Keyser raised a new argument in his PCRA petition, that trial counsel's failure to move to suppress the arrays for suggestiveness constituted ineffective assistance of counsel. The PCRA court dismissed this claim for being previously litigated. *Keyser II*, pp. 3-4, Comm. App'x. Vol. 4, pp. 746-47. On appeal of the PCRA denial, Keyser challenged this finding, and also argued that trial counsel "failed to request a *Wade* hearing to investigate and challenge the suggestiveness of the photo array shown to witnesses."[12] Comm. App'x. Vol. 4, p. 742.

The Superior Court noted that Keyser's argument regarding the pre-trial use of a photo array was difficult to decipher.

[Keyser] asserts that counsel should have sought suppression of identifications made pre-trial through the use of a photo array shown to witness Ms. Persia, as well as subsequent in-court identifications.... [Petitioner's] argument in this regard is confusing. He claims the array was unduly suggestive because he was the only white male, he was placed first, in a prominent position, and the array contained Pennsylvania Justice Network identifiers directly above [Petitioner's] photo. In conjunction with this claim, he states he qualified for a hearing, pursuant to *United States v. Wade*, 388 U.S. 218 (1967), to screen for the reliability of the identification procedures, and his pretrial counsel was ineffective for failing to motion the trial court for that hearing. Left unexplained is what this *Wade* hearing would have encompassed.

*7 *Keyser III*, p. 796-97.

The Superior Court appropriately found that Keyser's reliance on *Wade* was misplaced, as that case is wholly inapplicable to these facts.

[Petitioner] concedes trial counsel attempted to suppress the array on the grounds "that the photo arrays were presented to witnesses without the benefit of counsel[.]" [Petitioner's] brief at 11 (emphasis omitted). It is not clear why [Petitioner] invokes a case involving the right to counsel when that theory was already pursued. Moreover, *Wade* is inapposite for two additional reasons: a police lineup is not the same as a photo array, and, even if it were, the challenged photo array presentation did not occur post-indictment. *Comm. v. DeHart*, 516 A.2d 656, 665 (Pa. 1986) ("To extend the Sixth Amendment right to counsel during photographic identification proceedings to any person merely suspected of a crime would be an unreasonable burden on law enforcement officials and on the taxpayer, who in many instances must ultimately underwrite the cost of such representation.")

Id. at pp. 797-98.

Next, the Superior Court addressed Keyser's argument that the photo array was physically suggestive. Citing *Perry v. New Hampshire*, 565 U.S. 228 (2012), the court noted that the admission of evidence in state trials is governed by state law, and the reliability of relevant testimony usually falls within the province of the jury to determine, subject to the tenets of the Sixth Amendment, which "guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution.... This Court has recognized, in addition, a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime" *Id.* at 232. The Superior Court found that Keyser conflated the concepts of the Sixth Amendment right to counsel's presence at an array with Due Process rights to challenge the manner in which an array is presented to a witness. He then failed "to elaborate on how the array was suggestive." *Keyser III*, at p. 799.

"To violate due process, an identification procedure used by the police must be unnecessarily suggestive and create a substantial risk of misidentification."[13] *Government of Virgin Islands v. Riley*, 973 F.2d 224, 228 (3d Cir. 1992) (citing to *Neil v. Biggers*, 409 U.S. 188 (1972)); *see United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995) (citations omitted). "The suggestiveness of a photographic array depends on several factors, including the size of the array, its manner of presentation, and its contents. If there is no prejudice in the manner of presentation, the primary question is whether the suspect's picture is so different from the rest that it suggests culpability." *Reese v. Fulcomer*, 946 F.2d 247, 260 (3d Cir. 1991).

*8 Photo arrays composed of obvious mug shots are not innately suggestive. *Id.* (citing *United States v. L'Allier*, 838 F.2d 234 (7th Cir. 1988)). Similarly, an array composed of multiple photographs reproduced onto a single page, as opposed to a sequential ordering of individual pictures, can be considered a "very fair way to proceed depending on all circumstances surrounding the identification." *Keyser III*, p. 799, n. 4 (quoting *United States v. Lawrence*, 349 F.3d 109, 115 (3d Cir. 2003)).

In its independent review of the array's suggestiveness, the Pennsylvania Superior Court did not find Keyser's photograph to stand out more than the others, noting that:

The background of each photograph is similar, and the men depicted have similar complexions, facial features, facial hair, and hair style. Nor do we find the Pennsylvania Justice Network insignia suggestive in any way. The phrase does not refer to a database of previously-convicted individuals nor does it suggest the pictures are mugshots. The background of the pictures and the clothing of the men do not suggest the pictures were taken as part of any booking process. The symbol next to the phrase shows the familiar keystone, which has no inherent association with any criminal justice agency. Hence, the claim that counsel should have challenged the identifications on these grounds lacks arguable merit and he suffered no prejudice by the failure to raise them.

Keyser III, p. 800. Considering the totality of the circumstances, the court appropriately considered all the relevant evidence, including Judge Jenkin's refusal to present the arrays to the jury,[14] which by her own admission, was partly influenced by the jury never "ask[ing] for [the arrays]" during their deliberations. N.T. 10/11/12, at 213, 216; *see also* Comm. App'x. Vol. 4, p. 793. Additionally, the record contains the suppression hearing testimony of Detective Cunningham, which was uncontroverted, in which he detailed how the photo array was generated.[15] *See* Comm. App'x. Vol. 4, pp. 763-64; N.T. 05/10/12, at 55-57. The Superior Court correctly found that Keyser failed to establish that the photo arrays were unnecessarily suggestive, and therefore, his due process rights were not violated. Keyser presents nothing in his habeas petition to change this finding. Because the state court's adjudication of the claim did not result 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, nor did it result 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); *Parker v. Matthews*, 567 U.S. at 40-45, there is no reason for the state court finding to be disturbed. Because Keyser has not established that the array was unreasonably suggestive, there is no basis for a claim that his counsel was ineffective for failing to object to the array on those grounds. Given the "doubly deferential" standard that I must apply, *Harrington*, 562 U.S. at 105, I respectfully recommend that this claim be denied.

*9 Keyser also contended in the state court that the witnesses' in-court identifications were tainted by the pre-trial photo arrays. *See* Pet. at 8; Comm. App'x. Vol. 4, pp. 814-28. The Pennsylvania Superior Court quotes *Comm. v. Johnson*, 668 A.2d 97, 103 (Pa. 1995) in response, where an identical argument was rejected "[b]ecause the out-of-court [photographic] identifications were not tainted, [so] we need not address appellant's argument that the in-court identifications lacked an independent basis." *Keyser III*, p. 800. In his habeas petition, Keyser makes no new argument, only mentioning "in-court identifications (6th Amend) + 14th," in Ground One of the petition. I respectfully recommend that this claim also be denied, as there is no constitutional error in the state court's ruling on this issue under state law. *Stone v. Powell*, 428 U.S. 465, 489-95 (Evidentiary claims that were adjudicated under state law are generally not cognizable on writ of habeas corpus).

2. Keyser's claim that trial counsel failed to protect him from a coerced, involuntary confession was reasonably rejected by the state court.

Keyser's second ground in his habeas petition is phrased:

Counsel's failure to protect [Petitioner] of (sic) a coerced, involuntary confession (5th, 6th, 14th Amendment violations).

Supporting facts: [Petitioner's] confession was given 13+ hours after arrest; after two prior attempts by police; and after being denied food, drink, and medical attention for a finger that was bleeding for hours. Arraignment was postponed until the following day to coerce and break the will of [Petitioner]. [Petitioner's] Parole Officer violated me for drug use after a visit to holding cell.

Doc. No. 1, p. 7. The Commonwealth argues that this claim is waived due to its vagueness. Doc. No. 9, pp. 20-24. They note that it is impossible to tell from Keyser's argument whether he is contending ineffective assistance of counsel for failing to challenge the taking of the confession, or if Keyser is challenging the conduct of the police in a substantive claim. While Petitioner's *pro se* claim is inartfully worded and lacks a compelling legal argument, I find that the claim in his habeas petition is not so vague as to be waived. Keyser states that his claim is one of "counsel's failure to protect appellant," plainly indicating that Keyser is arguing ineffective assistance of counsel. Additionally, Keyser cites the same factual basis that he stated in his PCRA filings: the length of his detention, and denial of food, water, and medical attention for a cut finger. The Superior Court reviewed these same allegations, reviewed the record, and found them to be lacking. A federal claim is fairly presented to the state courts where the petitioner has raised "the same factual and legal basis for the claim to the state courts." *See Nara v. Frank*, 488 F.3d 188, 198–99 (3d Cir. 2007).

The Superior Court reviewed the record, and began its review "with the statement given to Detective Brad Ross on the evening of June 3, 2011." *Keyser III*, p. 794. This was the "confession" that Keyser argued was "coerced, [and] involuntary." Doc. No. 1, p. 7. The court rejected Keyser's contention that his counsel, "either in addition to or instead of the grounds chosen, *i.e.*, lack of probable cause to arrest, should have sought suppression on the basis of involuntariness." *Id.* Citing Pennsylvania state law, the court enumerated a non-exclusive list of factors to consider in assessing the totality of circumstances that may be examined when determining a constitutionally permissible interrogation. "[T]he ultimate test of voluntariness is whether the confession is the product of an essentially free and unconstrained choice ... we must consider

the totality of the circumstances, including the accused's mental and physical condition." *Comm. v. Johnson*, 107 A.3d 52, 93 (Pa. 2014). Factors that may be considered include:

*10 The duration and means of interrogation, including whether questioning was repeated, prolonged, or accompanied by physical abuse or threats thereof; the length of the accused's detention prior to the confession, whether the accused was advised of his or her constitutional rights; the attitude exhibited by the police during the interrogation; the accused's physical and psychological state, including whether he or she was injured, ill, drugged, or intoxicated; the conditions attendant to the detention, including whether the accused was deprived of food, drink, sleep, or medical attention; the age, education, and intelligence of the accused; the experience of the accused with law enforcement and the criminal justice system; and any other factors which might serve to drain one's powers of resistance to suggestion and coercion.

Keyser III, p. 795-96, quoting *Comm. v. Bryant*, 67 A.3d 716, 724 (Pa. 2013).

Upon review of the suppression hearing testimony of Detective Ross, the court found that Keyser failed to establish that his "powers of resistance to suggestion and coercion" were overcome due to mistreatment at the hands of the police. Indeed, the court noted that Detective Ross' uncontradicted testimony established that "[Petitioner] appeared fine and did not have any complaints." *Id.* at 796.[16] The court reviewed the *Miranda*[17] rights form in conjunction with the Detective's testimony, noting that Petitioner had been read the form, then reviewed and signed it, and there was nothing in the documents or Petitioner's handwriting to indicate duress. Additionally, the court noted that Petitioner provided the name, address, and telephone number of his mother, indicating a lucid mind, and initialed each question and answer as transcribed by the Detective during the interview, separate from his signature on the *Miranda* form. *Id.* Given the totality of the circumstances found by the Superior Court, they held that "[t]here is no arguable merit to this alternative theory [that the totality of the circumstances supported a finding that Keyser's confession was involuntary] and [Petitioner] suffered no prejudice by counsel's failure to pursue this tactic." *Id.*

I respectfully recommend that the Superior Court's finding not be disturbed. Given the "doubly deferential" standard with which I review an ineffective assistance of counsel claim already decided by a state court, *Harrington*, 562 U.S. at 105, and the fact that federal law comports with the state law cited by the Superior Court concerning the voluntariness of confessions, *see*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (involuntariness of a confession is determined by the totality of the circumstances), the Superior Court properly denied Keyser's claim.

B. The state court reasonably rejected Keyser's PCRA claim that trial counsel failed to impeach co-defendant William Profeto for inconsistent statements and testimony.

*11 Keyser's fourth claim is phrased as "counsel's failure to impeach 'Profeto' for inconsistent statements/testimony." Doc. No. 1, p. 10.[18] This claim is procedurally defaulted, as Keyser failed to properly develop the claim on appeal, and the Superior Court denied the claim as waived for that reason. *Keyser III*, p. 801. "A federal habeas court will not review a claim rejected by a state court if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 314 (2011) quoting *Coleman v. Thompson*, 501 U.S. 722, 720 (1991). The Superior Court found:

[Petitioner] states, "[Profeto]'s testimony was inconsistent with prior statements he made on June 3, 2011 and June 27, 2012 (fifteen days following the pretrial suppression hearing in this case and one year after arrest)" [Petitioner's] brief at 21. He fails to cite to any portion of the record containing these statements, let alone elaborate on how trial counsel was ineffective. "Where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived." *Comm. v. Johnson*, 985 A.2d 915 (Pa. 2009).

Keyser III, p. 801-2.

The Pennsylvania courts consistently apply Pa. R. A. P. 2119(a), which requires that "each point treated in an argument must be 'followed by such discussion and citation of authorities as are deemed pertinent.' " *Johnson*, 985 A.2d at 924. Even in capital cases (which Keyser's case is not), the Pennsylvania courts have consistently held that it is not the obligation of the courts to formulate an appellant's arguments for him. *See, e.g., Comm. v. Wright*, 961 A.2d 119, 135 (Pa. 2008); *Comm. v. Thomas*, 717 A.2d 468, 482-83 (Pa. 1998).

The Superior Court nevertheless reviewed the record with regard to Keyser's counsel's cross-examination of co-conspirator William Profeto, and found that, even if they had reached the merits of the claim, they would have found no prejudice. *Keyser III*, p. 802. They found that the "inconsistencies" complained of by Keyser, that is, Profeto's testimony was somehow inconsistent with that of Commonwealth witnesses Ms. Persia and Mr. Holland, were nothing more than slightly different versions of events that may, or may not,

present a credibility issue for the jury to resolve. The single instance cited by Keyser that appeared to create such a credibility issue, the court noted, was argued by defense counsel during his closing argument. *Id.* Keyser has failed to remedy the procedural default on this claim. He makes the identical claim to that cited by the Superior Court, "[c]o-defendant William Profeto's trial testimony was inconsistent with prior statements he made on June 3, 2011 and June 27, 2012." Doc. No. 1, pp. 10-11; *Keyser III*, p. 802. As in his brief to the Superior Court on the appeal of his PCRA, Keyser does not cite to the portion or portions of Profeto's testimony that he claims is inconsistent, nor does the record contain Profeto's statements of June 3, 2011 or June 27, 2012, if such statements exist.

Given that this claim was procedurally defaulted in the state court, and the state court's examination of the merits found no ground for relief, I respectfully recommend that this claim be denied as procedurally defaulted.

D. The state court reasonably found no cumulative prejudice.

*12 Keyser's third claim alleges that he suffered prejudice from the cumulative effect of his counsel's errors, specifically referring to Profeto's "inconsisten[t] statements, the identification, and confession claim."Doc. No. 1, p. 9. The Commonwealth contends that Keyser is not entitled to collective relief because each individual claim lacks arguable merit. Comm. Resp. at 22-24. I agree.

Keyser first raised his cumulative error claim in his PCRA Petition. *See Keyser III*, pp. 807-08.[19] Following dismissal of his Petition by the trial court, the Superior Court issued the first ruling on this argument, adopting the following standard of review from the Pennsylvania Supreme Court.

We have often held that "no number of failed [ ] claims may collectively warrant relief if they fail to do so individually." However, we have clarified that this principle applies to claims that fail because of lack of merit or arguable merit. When the failure of individual claims is grounded in lack of prejudice, then the cumulative prejudice from these individual claims may properly be assessed.

We have denied most of Appellant's claims based on lack of merit, and there is no basis for a claim of cumulative error with regard to these claims. With regard to the few claims that we have denied based on lack of prejudice, we are satisfied that there is no cumulative prejudice warranting relief. These claims are independent factually and legally, with no reasonable and logical connection that would have caused the jury to assess them cumulatively.

Keyser III, pp. 807-08, quoting *Comm. v. Spotz*, 18 A.3d 244, 321 (Pa. 2011).

The Court rejected Keyser's cumulative prejudice claim, noting that it had "rejected most of these claims as lacking underlying legal merit." *Id.* Although it found a Waiver of Arraignment claim raised in his PCRA Petition to be harmless error, "because Appellant was guilty beyond a reasonable doubt, that alleged error is immaterial with respect to the trial." *Id.* at 808.

Under the applicable federal standards, "[t]he cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so undermined the verdict as to constitute a denial of his constitutional right to due process." *Collins v. Sec'y of Pa. Dept. of Corrections*, 742 F.3d 528, 542 (3d Cir. 2014). The claim "aggregates all the errors that individually have been found to be harmless and therefore not reversible" for a determination as to whether all errors taken together created prejudice. *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007).

However, the cumulative effect of a series of non-errors is still a non-error. In this case, Keyser's claims were individually rejected for lacking merit. The photo array was untainted, the confession un-coerced, and Keyser procedurally defaulted his failure to impeach argument by failing to point out anything in the record supporting the claim. Keyser does not introduce any new facts or case law to support his cumulative error claim. My review of this record reveals that Keyser was literally caught "red handed" in this case, the evidence against him was overwhelming and appropriately presented, and his trial contained no errors of constitutional magnitude. His cumulative error argument lacks merit, and should be rejected.

*13 I also conclude that the Superior Court reasonably determined that Keyser did not establish cumulative prejudice from his counsel's decisions not to move to suppress the photographic array, Keyser's confession, and his counsel's supposed failure to impeach William Profeto. I respectfully recommend that Keyser's claim of cumulative error be denied.

RECOMMENDATION

Based upon the discussion above, I respectfully recommend Keyser's petition be dismissed with prejudice. I recommend that no certificate of appealability issue because "the applicant has [not] made a substantial showing of the denial of a constitutional right[,]" under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or

wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262-63 (3d Cir. 2000), *abrogated on other grounds by Gonzalez v. Thaler*, 32 S. Ct. 641 (2012).
The parties may object to this report and recommendation under 28 U.S.C. 636(b)(1)(B) and Local Rule of Civil Procedure 72.1 within fourteen (14) days after being served with this document. An objecting party shall file and serve written objections that specifically identify the portions of the report or recommendations to which objection is made and shall provide an explanation on the basis for the objection. A party wishing to respond to objections shall file a response within fourteen (14) days of the date the objections were served.
BY THE COURT:

All Citations

Slip Copy, 2018 WL 5284718

Footnotes

1
The various Keyser opinions will be designated as, "*I, II, and III*" and the page citations will be to the designated Commonwealth Appendix page numbers.
2
See Motion to Suppress Identification, filed January 11, 2012. Keyser claimed the initial stop ultimately leading to arrest was unlawful. Therefore, evidence of the green bike and tape measure, in addition to an allegedly involuntary statement and waiver of Miranda rights by Keyser following arrest, were all inadmissible. *See* Motion to Suppress Evidence, filed November 28, 2011. Keyser's trial counsel filed an addendum to the motion to suppress evidence, averring that "[Keyser's] arrest, independent of the vehicle stop, ... was unlawful ... Thus, the evidence that followed as a result, specifically Defendant's statement, [was] required to be suppressed." Addendum to Motion to Suppress Evidence, filed February 21, 2012.
3
The Commonwealth's response includes a four-volume appendix in which all available relevant documents are included. I will cite to documents therein as "Comm. App'x. Vol. __, p. __."
4
The four remaining claims concerned (1) whether police had probable cause to arrest Keyser for all four burglaries, (2) whether the trial court properly denied Keyser's attempt during the suppression hearing to submit a Department of Justice article concerning false alarms into evidence, (3) whether the trial court properly denied Keyser's pretrial motion to sever, and (4) whether the trial court erred in admitting into evidence portions of a witness' testimony from a preliminary hearing where the witness died before trial. *See Keyser*, 2013 WL 8695623 at *7.
5
Keyser did not reargue his DOJ article claim before the Pennsylvania Superior Court. *See* Comm. App'x. Vol. 1, pp. 677-702, Brief for Appellant and Appendix.
6
Petitioner's PCRA petition is missing from the state record. Although I am unable to review this document directly, it is summarized in the subsequent filings in the record.
7
Keyser was represented by Patrick Lomax, Esq., during the September 13, 2011 preliminary hearing where the Commonwealth offered to reduce Keyser's three burglary charges in exchange for his waiver of the preliminary hearing. On September 16, 2011, the court appointed Jay Stillman, Esq., as Keyser's counsel after Lomax moved to withdraw his representation.
8
Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (en banc).
9

Judge Pagano was appointed after Judge Jenkins moved to the Superior Court. *See* Comm. App'x. Vol. 4, p. 793, n. 2. (*Comm. v. Keyser*, No. 2429 EDA 2015 (Pa. Super. July 20, 2016)).

10

Interpreting this statutory language, the Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ 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." *Williams v. Taylor*, 529 U.S. 362 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000) (citing *Williams*, 529 U.S. at 411).

11

Keyser has not filed a memorandum of law in this court. He did, however, file a brief in the Superior Court of Pennsylvania in *Comm. v. Keyser*, No. 2420 EDA 2015, and included in the Comm. App'x Vol. 4 at pp. 749-86, where he provided some legal argument concerning the claims raised here.

12

In *United States v. Wade*, 388 U.S. 218 (1967), "the United States Supreme Court considered the right to counsel in the context of a post-indictment lineup and ultimately concluded that the right of counsel did attach to a post-indictment lineup procedure." *Comm. v. Ciccola*, 894 A.2d 744, 748 (Pa. Super. 2006).

13

Multiple factors bear on the evaluation of the second part of the test: whether the display created a substantial risk of misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). Because the state court's determination that the array was not unnecessarily suggestive was reasonable, there is no need to evaluate the second part of the Constitutional test.

14

Judge Jenkins stated that the JNET insignia "might ... suggest that these are photographs taken in the context of some criminal activity," while also expressing concern that the photograph's placement in the first position of the array may be prejudicial. N.T. 10/11/12, at 213, 216.

15

The relevant testimony was proffered during the prosecution's questioning:

Q. And by preparing that [photographic array], what action did you take? What do you do to prepare such a document?

A. Detective Lanni asked me to prepare two photo arrays. This is one of them. Basically he gives me – he gave me a person that he wanted in the array. I found that person's photograph and then searched for filler photographs to place in the array, which is done through the CPIN system. It's essentially an automated process, but we do put in criteria.

Q. And was that done in this particular case also?

A. Yes ...

Q. And then you indicate the CPIN system then essentially picks out its own selections from photographs of other individuals given the parameters?

A. No sir. We – essentially I look at the photograph of the person that I was asked to put in the array. I then do search for filler photographs based on the person I was asked to put in the array. So, if it's a white male with short hair and a goatee or whatever, glasses, I look for a similar photos that match or that have the same characteristics as the person that's ...

Q. Did you do that in this particular case then ...

A. Yes, sir.

Q. ... also? And are the other individuals based upon the description of the person in number one?

A. Yeah. Yes.

Q. Okay. Then how is the document physically put together?

A. The – once you put a search criteria and it returns candidates. It could be anywhere from a small amount to hundreds of thousands. Its [sic] depends on how broad or how narrow the search perimeters are. I then

select the individuals that, you know, I think look similar to the person that was given to me. Once all eight are put in, the system itself randomly positions them. It puts them in where it – the computer decides where they go.
Q. Was all that done in this particular case ...
A. Yes ...
N.T. 05/10/12, at 55-57.
16
The Superior Court cited to N.T. Suppression, 5/10/12, at 84, as establishing that, "[Petitioner] declined the detective's offer of food, medication, or any other accommodation." The transcript reads:
Q. What was his condition at the time that you did the interview?
A. He appeared fine.
Q. Did he have any complaints or ask for anything, any food, medical attention, any ...
A. He did not.
Q. ... medicines? Anything at all?
A. He did not.
Q. Was his conversation with you coherent and understanding (sic)?
A. Yes, sir, it was.
Q. Was it responsive to the questions that you asked?
A. Yes, sir, it was.
Id. at 83-84. While I believe the Superior Court may have overstated the Detective's attempt to "accommodate" Keyser, I do not believe that, given the totality of the circumstances relayed in Detective Ross' uncontradicted testimony, this record contains any evidence that Keyser was mistreated such that he was coerced into a false confession.
17
Miranda v. Arizona, 384 U.S. 436 (1966).
18
While not completely clear, it appears that Keyser's "cumulative error" claim, listed as the third ground for relief in his petition, encompasses his claim of ineffective assistance of counsel related to the cross-examination of William Profeto, which is listed in the petition as "ground four." I therefore reverse the order of grounds three and four.
19
In addition to the claims contained in Keyser's cumulative error ground in his habeas petition, he included in his state court cumulative error argument, claims that his prior counsel failed to properly convey an offer from the Commonwealth made during the preliminary hearing; and that his counsel made "false disclaimers" on the waiver of arraignment form during pretrial proceedings. *See Keyser III*, pp. 802-08.
End of Document