# *APPENDIX*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JABBAR WALLACE,

Petitioner,

v.

SUPERINTENDENT OF SCI HUNTINGDON,

Respondent.

CIVIL ACTION NO. 3:14-CV-01424

(JUDGE CAPUTO)

**ORDER**

**NOW**, this 8th day of January, 2018, upon consideration of Petitioner Jabbar Wallace's Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. §2254(d) (Doc. 1), the Report and Recommendation ("R&R") of Magistrate Judge Schwab (Doc. 21), and Petitioner's objections to the R&R (Doc. 25), **IT IS HEREBY ORDERED** that:

(1) The R&R of Magistrate Judge Schwab is **APPROVED** and **ADOPTED** as supplemented;

(2) Petitioner Jabbar Wallace's Petition for a Writ of Habeas Corpus is **DENIED**;

(3) Since Petitioner Jabbar Wallace has failed to make "a substantial showing of the denial of a constitutional right," a certificate of appealability **SHALL NOT** issue.

(4) The Clerk of Court is directed to **CLOSE** this case.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JABBAR WALLACE,

Petitioner,

v.

SUPERINTENDENT OF SCI HUNTINGDON,

Respondent.

CIVIL ACTION NO. 3:14-CV-01424

(JUDGE CAPUTO)

(MAGISTRATE JUDGE SCHWAB)

**MEMORANDUM**

Presently before this Court is Magistrate Judge Schwab's Report and Recommendation ("R&R") (Doc. 21) to the Petition for Writ of Habeas Corpus filed by Petitioner Jabbar Wallace ("Wallace"). Because Wallace's claims do not satisfy the standard for relief under 28 U.S.C. §2254(d), his Petition for a Writ of Habeas Corpus will be denied. Further, a certificate of appealability will not issue because reasonable jurists could not disagree about the validity of Wallace's claims.

**I. Background**

On March 25, 2009 Jabbar Wallace was convicted of third-degree murder in the Court of Common Pleas of Luzerne County. The facts underlying his conviction were concisely set forth by the Superior Court of Pennsylvania:

> At some point late on December 14, 2007, Eric Cusaac and a female were talking and drinking together in a certain bar. [Wallace] approached the female and began speaking to her about a car accident in which she had hit his vehicle. Cusaac and [Wallace] exchanged some not entirely friendly words, although it does not appear the two had any type of significant argument or altercation.
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> Later that night, [Wallace] was present at another establishment, the

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> Glass Bar. [Wallace] entered the men's room of the bar along with his friend Cameron Little. Several other men, including Cusaac, also came to be in the bathroom. Cusaac, who had stood atop a toilet, stepped down and approached [Wallace]. [Wallace] then shot Cusaac in the abdominal area and in the head. Cusaac died from his wounds. [Wallace] was later charged with homicide.

*Commonwealth v. Wallace*, 1117 MDA 2009, slip op. at 1-2 (Pa. Super Ct. Oct. 21, 2010) (submitted as Doc. 20, at 169). Notably, jurors rejected Wallace's position that he acted in self-defense. Wallace was sentenced to sixteen to thirty-two years imprisonment.

Wallace appealed both his sentence and conviction after the trial court denied his motion for a new trial and his motion to modify his sentence. On appeal Wallace argued that the jury verdict was against the weight of the evidence presented at trial and that the court abused its discretion in denying his request for a mistrial after the district attorney elicited testimony that implicated his post-arrest silence. The Superior Court affirmed Wallace's conviction and sentence, *Commonwealth v. Wallace*, 1117 MDA 2009, slip op. (Pa. Super. Ct. Oct. 21, 2009), the Supreme Court of Pennsylvania denied Wallace's petition for allowance of appeal, *Commonwealth v. Wallace*, 17 A.3d 1254 (Pa. 2011) (Table), and the United States Supreme Court denied Wallace's Petition for Writ of Certiorari. *Wallace v. Pennsylvania*, 565 U.S. 845 (2011).

Having failed in his efforts on direct appeal, Wallace turned to the collateral proceedings available to him pursuant to the Post-Conviction Relief Act ("PCRA"). On August 5, 2011 Wallace filed a PCRA petition raising three claims: (1) trial counsel was ineffective when he failed to object as the Commonwealth elicited testimony from

a forensic pathologist about the findings of a toxicologist when the toxicologist was not available for cross-examination; (2) trial counsel was ineffective by failing to call character witnesses; and (3) the state court erred by failing to apply Pennsylvania's "Stand Your Ground" Amendment retroactively during his direct appeal. *See Commonwealth v. Wallace*, No. 241 MDA 2013, 2014 WL 10988483, at *1 (Pa. Super. Ct. Jan. 29, 2014); (Doc. 13, at 60, 63, 67.)

A hearing regarding Wallace's PCRA claims was held on June 26, 2012. (Doc. 13, at 75.) There, Wallace represented himself. Notably, while the PCRA court was prepared to provide Wallace counsel, he refused and proceeded to represent himself *pro se*. (Doc. 13, at 76-77). He called no witnesses in support of his claim, and instead relied solely on his own testimony. (Doc. 13, at 82). The Commonwealth elicited testimony from Wallace's trail counsel, Mr. William Ruzzo ("Ruzzo"). Ruzzo confirmed that he did not call any character witnesses at Wallace's trial, and noted that he did not recall ever receiving a list of such witnesses from Wallace. (Doc. 13, at 80). Additionally, Ruzzo explained that one reason he may not have called a character witness was because he feared that presenting such a witness would allow the prosecutor to elicit testimony about Wallace's prior resisting-arrest conviction. (*Id.*) Absent a witness testifying about Wallace's good character, Ruzzo believed the prior conviction would not be admitted. (*Id.*) Moreover, Ruzzo explained that he would never have called Wallace's mother as a witness because she was involved with destroying or hiding evidence after the murder. (*Id.*) While Wallace did cross-examine Ruzzo during this hearing, no testimony was elicited regarding Wallace's other claims.[1] (Doc. 13, at 81).

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[1] At the PCRA Judge's urging, Wallace repeated his claim that Ruzzo was ineffective due to a failure to object to testimony which implicated the

The PCRA court denied Wallace's petition and Wallace subsequently appealed. However, the Superior Court, yet again, affirmed Wallace's conviction and sentence. *Wallace*, 2014 WL 10988483, at *1.

On July 24, 2014, Wallace filed the instant federal habeas petition pursuant to 28 U.S.C. § 2254(d). (Doc. 1.) Wallace raises five claims in his Petition: (1) trial counsel was ineffective when he failed to object when the Commonwealth elicited testimony from a forensic pathologist about the findings of a toxocologist in violation of the Sixth Amendment's Confrontation Clause; (2) trial counsel was ineffective by failing to call character witnesses; (3) the state courts erred in failing to retroactively apply Pennsylvania's "Stand Your Ground" Amendment to Wallace's conduct; (4) the trial court erred by not declaring a mistrial after the prosecutor referenced Wallace's post-arrest silence; and (5) the jury verdict was against the weight of the evidence. (Doc. 1).

Magistrate Judge Schwab conducted an initial review of Wallace's Petition and authored an R&R dated May 20, 2016 in which Magistrate Judge Schwab recommends this Court deny Wallace's Petition for Writ of Habeas Corpus. Wallace timely[2] filed objections in response the Magistrate Judge Schwab's R&R.

## II. Legal Standard

### A. Report and Recommendation

Where objections to a magistrate judge's R&R are filed, the Court must conduct a

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Sixth Amendment's Confrontation Clause. But, again, no testimony or evidence was offered to suggest he was prejudiced by Ruzzo's failure to object.

[2] This Court granted Wallace leave to allow him the opportunity to file an objection to the R&R *nunc pro tunc*. Thus, Wallace's objections filed on July 14, 2016 were timely.

*de novo* review of the contested portions. *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989) (citing 28 U.S.C. § 636(b)(1)(c)). This only applies to the extent that a party's objections are both timely and specific. *Goney v. Clark*, 749 F.2d 5, 6-7 (3d Cir. 1984). Conversely, for those sections of the R&R to which no objection is made, the court should "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. *See Univac Dental Co. V. Dentsply Int'l, Inc.*, 702 F. Supp. 2d 465, 469 (M.D. Pa. 2010) (citing *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987)); *see also* FED. R. CIV. P. 72(b)(1) advisory committee's notes.

In conducting a *de novo* review, a court may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the magistrate judge. *See* 28 U.S.C. § 636(b)(1); *Owens v. Beard*, 829 F. Supp. 736, 738 (M.D. Pa. 1993). Although the review is *de novo*, the law permits the court to rely on the recommendations of the magistrate judge to the extent it deems proper. *See United States v. Raddatz*, 447 U.S. 667, 675–76 (1980); *Goney*, 749 F.2d at 7; *Ball v. United States Parole Comm'n*, 849 F. Supp. 328, 330 (M.D. Pa. 1994). Uncontested portions of the report may be reviewed at a standard determined by the district court. *See Thomas v. Arn*, 474 U.S. 140, 154 (1985); *Goney*, 749 F.2d at 7. At the least, the court should review uncontested portions for clear error or manifest injustice. *See, e.g., Cruz v. Chater*, 990 F. Supp. 375, 376-77 (M.D. Pa. 1998).

**B. 28 U.S.C. §2254**

A habeas corpus petition pursuant to 28 U.S.C. §2254 is the proper mechanism for a prisoner to challenge the "fact or duration" of her confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 498-99 (1973). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Rather, federal habeas review is restricted to

claims based "on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Estelle*, 502 U.S. at 67-68; *see also Johnson v. Rosemeyer*, 117 F.3d 104, 109 (3d Cir. 1997).

## III. Discussion

### A. Ineffective Assistance of Counsel

The Sixth Amendment guarantees the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Due to the existence of such a right, a criminal defendant will have his conviction overturned if: (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Id.* at 687; *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003). An attorney's performance is deficient when it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The benchmark for this objective standard "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). A court must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;" that is, the petitioner must overcome the presumption that, under the totality of the circumstances, the challenged action "might be considered sound trial strategy." *Id.* at 688-89, 690-92. To show prejudice, the defendant must show that there was a reasonable probability that but for counsel's hapless performance, the outcome of the proceeding would have been different. *Id.* at 694. The prejudice standard "is not a stringent one;" it is less demanding than the preponderance standard. *Baker v. Barbo*, 177 F.3d 149 (3d Cir. 1999). Notably, it is the defendant-petitioner's burden to establish both deficient performance and resulting prejudice. *See Jacobs v. Horn*, 395 F.3d 92, 102 (3d Cir. 2005).

The Third Circuit has repeatedly emphasized the need to address the question of

prejudice first, acting on the assumption that counsel's conduct was deficient, prior to considering whether counsel's performance was deficient. *See, e.g.*, *McAleese v. Mazurkiewicz*, 1 F.3d 159, 170-71 (3d Cir. 1992); *United States v. Fulford*, 825 F.2d 3, 8 (3d Cir. 1987); *see also Strickland*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

The relevant "clearly established" federal precedent for an ineffectiveness claim is *Strickland*. Thus, the question before this court is whether the decision of the state court was "contrary to" the *Strickland* standard[3], involved an "unreasonable application" of *Strickland*, or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. §2254(d)."Surmounting *Strickland*'s high bar is never an easy task," and "[e]stablishing that a state court's application of *Strickland* was unreasonable under §2254(d) is all the more difficult." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010); *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Here, Wallace asserts that his trial counsel was ineffective because he (1) did not object to questioning that may have implicated the Sixth Amendment's Confrontation Clause, and (2) he did not elicit character testimony from a number of Wallace's family members. Magistrate Judge Schwab recommends denying Wallace's Petition on both grounds as counsel's alleged failings were either the result of trial strategy or did not prejudice Wallace.

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[3] Under Pennsylvania law, a three-prong test is applied to ineffective assistance of counsel claims. This test is substantively identical to the *Strickland* test. *See, e.g.*, *Commonwealth v. Pierce*, 527 A.2d 973, 975-77 (Pa. 1987). The Third Circuit has held that Pennsylvania's test for assessing ineffective assistance of counsel claims is not contrary to *Strickland*. *See Jacobs*, 395 F.3d at 107 n.9; *Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000).

(1) Failure to Object: Confrontation Clause

First, Wallace claims that his trial counsel, Ruzzo, was ineffective because he failed to object to testimony elicited by the Commonwealth regarding a toxicology report when the toxicologist was not available for cross-examination. Wallace believes this testimony violated the Sixth Amendment's Confrontation Clause. Magistrate Judge Schwab disagreed. Specifically, Magistrate Judge Schwab explained that Wallace had failed to show that prejudice resulted from Ruzzo's failure to object. Because Wallace did fail to demonstrate that he was prejudiced due to Ruzzo's failure to object as required by *Strickland*, his Petition will be denied on this ground.

The Confrontation Clause of the Sixth Amendment generally operates to exclude "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 36 (2004). Testimonial statements are those used "to establish or prove past events potentially relevant to [a] later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). For example, in *Crawford v. Washington* the trial court allowed a statement procured by police from defendant's wife to be read to the jury even though defendant's wife did not testify. 541 U.S. at 36. Since the defendant could not cross-examine the author of the letter–his wife–and the statements made in the letter constituted testimonial statements, inclusion of the letter in the record before the jury violated the Confrontation Clause. *Id.* Of particular relevance here, courts construe forensic reports as testimonial statements subject to scrutiny under the Confrontation Clause. *See, e.g., Melendez-Davis v. Massachusetts*, 557 U.S. 305, 307-311 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011); *United States v. Hadaway*, 466 Fed. App'x 154, 158 (3d Cir. 2012). In fact, the Supreme Court recently held that an accused has that "right to be confronted with the analyst who [certified a forensic report], unless that analyst is

unavailable at trial and the accused had the opportunity, pretrial, to cross-examine that particular scientist." *Bullcoming*, 564 U.S. at 652.

Here, the Commonwealth elicited testimony from Doctor Mary Frances Pascucci, who performed the autopsy on the victim, Mr. Cusaac. Dr. Pascucci was a qualified expert in pathology and she opined that the cause of Mr. Cusaac's death was "multiple gunshot injuries" which was consistent with a finding that the "manner of death was homicide." *Wallace*, 241 2014 WL 10988483, at *5. Dr. Pascucci also testified that she had sent samples of Mr. Cusaac's blood to a laboratory to be tested. The results of that testing indicated that his blood contained nicotine and .284% alcohol. *Id.* On cross-examination, Ruzzo had Dr. Pascucci clarify her opinion to include that the victim's blood alcohol level could have "possibly" led to aggressive behavior. *Id.*

At bottom, Wallace now claims that this discussion should not have occurred because his counsel should have objected to Dr. Pascucci's first mention of the lab results. Wallace contends that this failure to object rendered his counsel's performance deficient, which resulted in prejudice.

This Court need not address whether Ruzzo's performance was deficient[4], because even if it was, Wallace has offered nothing more than mere speculation that he suffered prejudice. Specifically, Wallace asserts that if the toxicologist had testified he would have been able to establish that the victim was the aggressor, was "out of his mind," and was "hell-bent on hurting or killing" him. (Doc. 1, at 12-13). Not only is there no evidence suggesting this would have been the case, but Ruzzo was able to elicit testimony from Dr.

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[4] Counsel's performance is presumed reasonable, and Wallace has not alleged anything to rebut that presumption. *See Thomas v. Varner*, 428 F.3d 491, 499-500 (3d Cir. 2005). Specifically, counsel has not alleged any reason to believe that the non-objection was not part of a reasonable trial strategy.

Pascucci that an individual with an elevated blood alcohol level was "possibly" more aggressive than normal. Thus, it appears the information sought by Wallace from the toxicologist–at least in part–was produced during the cross-examination of Dr. Pascucci. Additionally, Wallace seems to argue that a violation of the Confrontation Clause results in prejudice *per se*. This too is incorrect.[5]

This Court will find that Wallace has failed to establish that there was a "reasonable probability" that the outcome would have been different but for the lack of objection by Ruzzo. Accordingly, his Petition for a Writ of Habeas Corpus will be denied.

(2) Failure to Elicit Character Testimony

Next, Wallace objects to Magistrate Judge Schwab's recommendation that trial counsel's failure to call character witnesses does not render counsel's performance ineffective. Specifically, Wallace claims that counsel should have called his father, brother and aunt to testify about his "non-aggressive and peaceful character." (Doc. 25, at 4-5.) However, the Superior Court was correct when it concluded that counsel's decision not to call a character witness did not render his performance ineffective. Thus, the Superior Court's decision was not "contrary to" the *Strickland* standard, did not involve an "unreasonable application" of *Strickland*, and did not result "in a decision that was based

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[5] There are a limited number of circumstances under which a presumption of prejudice may be applied, but none of these circumstances exist in the record before this Court. *See United States v. Cronic*, 466 U.S. 648 (1984) (establishing a narrow exception to the *Strickland* standard permitting a presumption of prejudice); *Davenport v. Diguglielmo*, 215 F. App'x 175, 182 (3d Cir. 2007) (identifying three situations in which courts should apply the prejudice presumption: (1) where there is a "complete denial of counsel"; (2) where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; (3) where "counsel could not render competent assistance.") Put simply, no court has held that failing to object, absent additional circumstances, amounts to *per se* prejudice.

on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. §2254(d).

When "evaluating counsel's performance [courts] are 'highly deferential' and 'indulge in a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound trial strategy." *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999) (citing *Strickland*, 466 U.S. at 689). And, a claim that counsel was ineffective due to a failure to call a witness is "precisely the type of strategic decision which the court in *Strickland* held to be protected from second-guessing." *Sanders v. Trickey*, 875 F.3d 205, 212 (8th Cir. 1989); *see also Henderson v. DiGuglielmo*, 138 Fed. App'x 463, 469 (3d Cir. 2005); *see also Philson v. Barbo*, 77 Fed. App'x 123, 127 (3d Cir. 2003); *LaFrank v. Rowley*, 340 F.3d 685 (8th Cir. 2003); *Castillo v. Matesanz*, 348 F.3d 1, 15 (1st Cir. 2003). In fact, courts have specifically held that the failure to call a character witness on behalf of the defendant, even if the defendant has requested such a witness, does not alone amount to ineffective assistance. *See United States v. DeJesus*, 57 Fed. App'x 474, 478 (2d Cir. 2003); *see also Sanchez v. Tennis*, No. 04-cv-4005, 2005 WL 645926, at *9 (E.D. Pa. Mar. 18, 2005) (report and recommendation adopted).

Here, Wallace claims he instructed Ruzzo to call a number of character witnesses. Ruzzo, however, did not call a single character witness. According to Ruzzo, no such witness was called because doing so would have opened the door for the admission of Wallace's resisting arrest conviction. (Doc. 13, at 80.) This concern was reasonable. *See United States v. Logan*, 717 F.2d 84, 88 (3d Cir. 1983) ("By introducing evidence of his good character, the defendant throws open the entire subject of his character and, consequently allows the prosecutor to penetrate a previously proscribed preserve, to produce contrary evidence, to cross-examine the defendant's character witnesses and to probe the extent and source of their opinions."). In other words, counsel made a strategy

decision: the rebuttal evidence to good character testimony would do more harm than good. *See Sanchez*, 2005 WL 645926, at *9. Further, when faced with a similar dilemma during his PCRA hearing, Wallace made the same decision: no character witnesses were called on his behalf. (Doc. 13, at 82.)

Because the facts presented here offer no justification to overcome the strong presumption that counsel's decision was a part of a larger trial strategy, Wallace's Petition will be denied on this ground.

**B. Pennsylvania's "Stand Your Ground" Amendment**

Next, Magistrate Judge Schwab recommends that Wallace's Petition be denied because Pennsylvania's "Stand Your Ground" Amendment was not codified until 2011 and was never deemed to apply retroactively by the Pennsylvania Supreme Court or the Pennsylvania legislature. Wallace objects to this recommendation because he believes the failure of the state court to apply Pennsylvania's Stand Your Ground Amendment offends his federal due process rights. However, this Court will adopt Magistrate Judge Schwab's recommendation because Wallace's position is at odds with the Supreme Court's longstanding position that "the federal constitution has no voice upon the subject" of retroactivity. *Great Northern R.R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932); *see also Warren v. Kyler*, 422 F.3d 132, 136 (3d Cir. 2005).

The Superior Court held that the "Stand Your Ground" Amendment was not to be applied retroactively to Wallace's conduct for two reasons. First, the Superior Court explained that Pennsylvania "recognizes a presumption against retroactive application of [a] statute and a law amending a statute." *Commonwealth v. Wallace*, No. 241 MDA 2013, 2014 WL 10988483, at *3 (Pa. Super. Jan. 29, 2014) (citing *Commonwealth v. Estman*, 868 A.2d 1210, 1211-12 (Pa. Super 2005), aff'd, 915 A.2d 1191 (Pa. 2007)). Specifically, this presumption stems from a state statute that notes: "no statute shall be construed to be

retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa. C.S. §1926. Since the "Stand Your Ground" Amendment had not been explicitly rendered retroactive by the General Assembly, the Superior Court held it was not to be applied retroactively, and therefore did not apply to Wallace's conduct. Second, the Superior Court explained that legislation that defines substantive rights are not applied retroactively in Pennsylvania. *Wallace*, 2014 WL 10988483, at *3-4 (citing *Commonwealth v. Estman*, 915 A.2d at 1194-96). The "Stand Your Ground" Amendment defined an individual's right to use force, and thus defined a substantive right as opposed to a procedural right. As such, the Superior Court refused to apply the Amendment to Wallace's Conduct.

The decision of the Superior Court will not be disturbed because the Third Circuit has repeatedly held that a state is under no federal constitutional obligation to apply its own law retroactively. *See, e.g.*, *Kyler*, 422 F.3d at 141; *Fiore v. White*, 149 F.3d 221, 224-25 (1998); *see also Gladney v. Pollard*, 799 F.3d 889, 897-98 (7th Cir. 2015) ("States are free to choose whether a change in state law is retroactive without running afoul of the federal Constitution."). In *Warren v. Kyler*, a habeas-petitioner challenged the decision of the Pennsylvania Superior Court not to retroactively apply a decision of the Pennsylvania Supreme Court during his collateral proceedings. *Kyler*, 422 F.3d at 133. The Circuit refused to undertake a review of petitioner's retroactivity challenge because "nothing in the federal Constitution compels a State to apply its criminal decisions retroactively." *Id.* at 141. Additionally, the Circuit believed it "lack[ed] the authority to review a state's own application of its retroactivity principles" due to the Supreme Court's pronouncement that "[f]ederal habeas corpus relief does not lie for errors of state law." *Id.*; *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *see also Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir. 1995) ("No federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively.") Specifically, the *Kyler* Court explained that the

principle flowing from *Estelle* "requires [that federal courts] heed the state court's application of its own retroactivity principles." *Kyler*, 422 F.3d at 137.

For these reasons, Magistrate Judge Schwab's R&R will be adopted with respect to this claim and Wallace's Petition will be denied.

**C. Post-Arrest Silence**

Finally, Wallace objects to Magistrate Judge Schwab's recommendation that his Petition be denied because the trial court did not err when it refused to declare a mistrial after the prosecutor referenced, albeit tangentially, Wallace's post-arrest silence. Wallace contends that the prosecutor's use of his post-arrest silence constituted a violation of the Fourteenth Amendment's Due Process Clause. The applicable federal precedent governing the use of a defendant's post-arrest silence is *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle*, the Court made clear that the Fourteenth Amendment's Due Process Clause bars state prosecutors from using a defendant's post-arrest, post-*Miranda* silence to impeach a his testimony. *Id.* at 618-19. Further, the Court explained that because the *Miranda* warnings carry an implicit assurance "that silence will carry no penalty . . . it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* In other words, "it does not comport with due process to permit the prosecution during the trial to call attention to [a defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony." *Id.* at 619 (White, J., *concurring*).

The principle set in *Doyle* is not contravened when a defendant's post-arrest silence was not "submitted to the jury as evidence from which it was allowed to draw any permissible inference." Greer v. Miller, 483 U.S. 756, 765 (1987). In *Greer v. Miller*, a

defendant testified on direct examination that he was not involved in the crimes alleged. 483 U.S. at 758-60. On cross-examination, the prosecutor pointedly asked the defendant, "Why didn't you tell this story to anyone when you were arrested?" *Id.* at 759. Defendant's counsel objected, and the objection was sustained. *Id.* Further, the jury was instructed to ignore the question. *Id.* No mistrial followed. The Supreme Court agreed that no mistrial was warranted because while the question may have implicated defendant's post-arrest silence, the jury had specifically been instructed to ignore the question, and the defendant was never required to answer the question.

Here, Wallace claims that *Doyle* was violated during the testimony of Corporal Gerald Williams, a trooper with the Pennsylvania State Police. During Williams' testimony, the prosecutor asked: "On December 20, 2007, [the day Wallace was arrested] did you have an opportunity to interview Jabbar Wallace?" Williams answered, "[Wallace] was present at the station. I had the opportunity, but there was no interview conducted." The prosecutor began to ask a follow up question, "And can I ask why there was no–," but was interrupted by an objection from Ruzzo. Following the objection, the trial court held a lengthy discussion at side bar where counsel made his concerns about a potential *Doyle* violation known and moved for a mistrial. While the trial court denied Ruzzo's motion for a mistrial, it did sustain the original objection and prohibited the prosecutor from asking the follow up question. Additionally, the jury was specifically instructed to disregard the question at issue. Because the jury was specifically instructed to disregard the offending statement, there is no *Doyle* violation here, and Wallace's Petition may be denied on this ground.

Even if a *Doyle* violation had occurred, the fact that the jury heard half of a question that may have implicated Wallace's post-arrest silence does not rise above the level of harmless error. *See Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (explaining that a *Doyle* violation is subject to harmless-error analysis) In order for a trial error to support the

grant of a Writ of Habeas Corpus, that error must have had "a substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting *Brecht*, 507 U.S. 619, 637 (1993)). In fact, to rise above harmless error, "there must be more than a reasonable probability that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2197-98 (2015) (citing *Brecht*, 507 U.S. at 637). Wallace has offered no evidence, or even a cogent allegation, that there was more than a reasonable probability that the alleged *Doyle* violation was harmful.

For these reasons, Wallace's objection is baseless and Magistrate Judge Schwab's R&R will be adopted on this ground.

**D. Claims Without Objection**

Finally, Magistrate Judge Schwab noted that Wallace's claim that his conviction was against the weight of the evidence is not cognizable under Section 2254. Wallace has not objected to this recommendation. Because Magistrate Judge Schwab's recommendation is absent plain error, it will be adopted. *See Henderson*, 812 F.2d at 878.

## IV. Conclusion

For the above stated reasons, Magistrate Schwab's Report and Recommendation will be adopted and Wallace's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254(d) will be denied. Further, in proceedings brought pursuant to 28 U.S.C. § 2254, an applicant cannot appeal to the circuit court unless a certificate of appealability has been issued. *See* 3d Cir. L.A.R. 111.3(b) (2011). Under 28 U.S.C. § 2253(c)(2), a court may not issue a certificate of appealability unless "the applicant has made a substantial showing of the denial of a constitutional right." Restated, a certificate of appealability should not be issued unless "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As reasonable jurists would not disagree with the resolution of Wallace's § 2254 petition,

a certificate of appealability will not issue.

An appropriate order follows.

January 8, 2018
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| JABBAR WALLACE, | : | CIVIL NO: 3:14-CV-01424 |
| Petitioner, | : | (Judge Caputo) |
| v. | : | (Magistrate Judge Schwab) |
| SUPERINTENDANT OF SCI HUNTINGDON, | : | |
| Respondent | : | |

**REPORT AND RECOMMENDATION**

## I. Introduction.

In 2009, the petitioner, Jabbar Wallace, was convicted in the Court of Common Pleas of Luzerne County of third degree murder. He was sentenced to 16 to 32 years in prison. In this habeas corpus case, Wallace claims that his counsel provided ineffective assistance of counsel during his state criminal trial. He also claims that the state courts erred in not applying a change in Pennsylvania's self-defense law that became effective when his case was pending on direct appeal, that the trial court erred in not granting a mistrial after the prosecutor referenced his post-arrest silence, and that the verdict was against the weight of the evidence. For the reasons discussed below, we recommend that the petition for a writ of habeas corpus be denied.

## II. Background and Procedural History.

### A. The Trial and Verdict.

The Superior Court of Pennsylvania aptly summarized the facts underlying Wallace's conviction:

> At some point late on December 14, 2007, Eric Cusaac and a female were talking and drinking together in a certain bar. [Wallace] approached the female and began speaking to her about a car accident in which she had hit his vehicle. Cusaac and [Wallace] exchanged some not entirely friendly words, although it does not appear the two had any type of significant argument or altercation.
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> Later that night, [Wallace] was present at another establishment, the Glass Bar. [Wallace] entered the men's room of the bar along with his friend Cameron Little. Several other men, including Cusaac, also came to be in the bathroom. Cusaac, who had stood atop a toilet, stepped down and approached [Wallace]. [Wallace] then shot Cusaac in the abdominal area and in the head. Cusaac died from his wounds. [Wallace] was later charged with homicide.

*Commonwealth v. Wallace,* 1117 MDA 2009,slip op. at 1–2 (Pa.Super. Ct. Oct. 21, 2010) (submitted as *Doc. 20* at 169-170).

At trial, Wallace did not deny that he killed Cusaac. Rather, he contended that he did so in self-defense. The jury, however, found him guilty of third degree murder, and the judge sentenced him to 16 to 32 years imprisonment.

### B. Direct Appeal.

After the trial judge denied Wallace's motion for a new trial and his motion to modify his sentence, Wallace filed an appeal claiming that the verdict was

against the weight of the evidence and that the court abused its discretion in denying his request for a mistrial after the prosecution elicited a response from a witness commenting on his post-arrest silence. *See Doc. 20* at 148-159. The Superior Court of Pennsylvania affirmed Wallace's judgment of sentence, *Commonwealth v. Wallace,* 1117 MDA 2009, slip op. (Pa. Super. Ct. Oct. 21, 2010), and the Supreme Court of Pennsylvania then denied Wallace's petition for allowance of appeal, *Com. v. Wallace*, 17 A.3d 1254 (Pa. 2011) (Table). On October 3, 2011, the United States Supreme Court denied Wallace's petition for a writ of certiorari. *Wallace v. Pennsylvania*, 132 S. Ct. 162 (2011).

**C. State Collateral Proceedings.**

On August 5, 2011, before the United States Supreme Court denied his petition for certiorari with respect to his direct appeal, Wallace filed a Post-Conviction Relief Act (PCRA) petition. *Commonwealth v. Wallace*, No. 241 MDA 2013, 2014 WL 10988483, at *1 (Pa. Super. Ct. Jan. 29, 2014). The PCRA court appointed counsel for Wallace, but Wallace later requested to proceed *pro se* and waived his right to counsel. *Id.* Wallace raised three claims in his PCRA petition: (1) trial counsel was ineffective by failing to object based on the Sixth Amendment's Confrontation Clause when the Commonwealth elicited testimony from a forensic pathologist about the findings of a toxicologist even though the

toxicologist was not available at trial for cross-examination; (2) trial counsel was ineffective by failing to call character witnesses; and (3) the state courts erred by failing to apply Pennsylvania's recently enacted "Stand Your Ground" amendment to its self-defense law retroactively to Wallace's case when that amendment became effective while Wallace's case was on direct appeal. *See Doc. 13* at 4-71.

In June of 2012, the PCRA court held a hearing on Wallace's PCRA petition, at which hearing Wallace confirmed that he was waiving his right to counsel. *See Doc. 13* at 78-87. Wallace argued and testified in support of his claims. *Id.* He explained his position regarding the statutory amendment and his confrontation clause claim. *Id.* at 80-81 (*PCRA Transcript* at 7-13). He also identified his mother, his father, his brother, his girlfriend, two of his aunts, and a cousin as character witnesses that he wanted to call at trial. *Id.* at 80-81 (*PCRA Transcript* at 9-10). He testified that he had made his counsel aware of those witnesses, that they were available and willing to testify at the time of trial, and that they would have testified as to the kind of person that he was, i.e., that he was not aggressive. *Id.* at 81 (*PCRA Transcript* at 10). He did not, however, call any of those witnesses at the PCRA hearing. *Id.* at 80-81 & 85 (*PCRA Transcript* at 9-11 & 27).

The Commonwealth called Wallace's trial counsel, William Ruzzo, Esquire, as a witness at the PCRA hearing. *Id.* at 82 (*PCRA Transcript* at 17). Ruzzo

confirmed that he did not call any character witnesses at Wallace's trial, and he testified that he did not recall Wallace providing him with a list of potential character witnesses. *Id.* at 83 (*PCRA Transcript* at 19). While Ruzzo testified that he did not have a present recollection of why he did not call character witnesses, he testified that one reason he would not have called character witnesses is because he knew that Wallace had a resisting-arrest conviction and he would have been afraid that if he called character witnesses, the prosecutor would have asked those witnesses about that conviction, which would have caused speculation on the part of the jury. *Id.* at 83 (*PCRA Transcript* at 19-20). Ruzzo also testified that he would not have called Wallace's mother since she was involved with destroying or hiding evidence after the murder. *Id.* at 83 (*PCRA Transcript* at 20). He testified that he uses character witnesses as much as or more than most attorneys, and he would have called character witnesses at Wallace's trial if he thought doing so "would meet with our trial strategy." *Id.* at 83 (*PCRA Transcript* at 21). Ruzzo explained that the theme of the defense was self-defense and that Wallace had an honest, even if unreasonable, belief that his life was in danger. *Id.* at 83-84 (*PCRA Transcript* at 21-22).

The PCRA court denied Wallace's PCRA petition. *See Doc. 13* at 92-105. Wallace appealed to the Superior Court, which affirmed the PCRA court.

*Commonwealth v. Wallace*, No. 241 MDA 2013, 2014 WL 10988483, at *1 (Pa. Super. Ct. Jan. 29, 2014).

**D. The Habeas Petition and Proceedings.**

On July 24, 2014, Wallace filed the federal habeas corpus petition under review here. *Doc. 1.* In his federal habeas corpus petition, Wallace raises the following five claims: (1) trial counsel was ineffective by failing to object based on the Sixth Amendment's Confrontation Clause when the Commonwealth elicited testimony from a forensic pathologist about the findings of a toxicologist even though the toxicologist was not available at trial for cross examination; (2) trial counsel was ineffective by failing to call character witnesses; (3) the state courts erred by failing to apply Pennsylvania's recently enacted "Stand Your Ground" amendment to its self-defense law retroactively to Wallace's case when that amendment became effective while Wallace's case was on direct appeal; (4) the trial court erred by not declaring a mistrial after the prosecutor referenced Wallace's post-arrest silence; and (5) the verdict was against the weight of the evidence. *Doc.* 1. Wallace seeks to have his conviction overturned. *Id.*

After Wallace was given the notice required by *Mason v. Meyers*, 208 F.3d 414 (3d Cir. 2000), regarding the effects of filing a 28 U.S.C. § 2254 petition in light of the Antiterrorism and Effective Death Penalty Act, he elected to proceed

with his petition as filed, and the respondent filed a response to the petition. On May 22, 2015, the case was referred to the undersigned.

## III. Discussion.

Wallace raised his post-arrest silence and weight-of-the-evidence claims on direct appeal and his ineffective assistance of counsel claims and his claim that the state courts should have applied the "Stand Your Ground" amendment to his case in his PCRA petition. The PCRA court and the Pennsylvania Superior Court addressed all of those claims on the merits. As discussed below, after reviewing the claims under the rubric of 28 U.S.C. § 2254(d), we conclude that Wallace is not entitled to habeas corpus relief.

### A. The Standard for Addressing Habeas Claims on the Merits.

In addition to overcoming procedural hurdles, a state prisoner must meet exacting substantive standards in order to obtain habeas corpus relief. As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 limits the power of a federal court to grant a state prisoner's petition for a writ of habeas corpus. *Cullen v. Pinholster,* 563 U.S. 170, 181 (2011). A federal

court may not grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court unless the state court's 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
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> (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).

The standard under Section 2254(d) is highly deferential and difficult to meet. *Cullen,* 563 U.S. at 181. It "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter,* 562 U.S. 86, 102-103 (2011) (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). State courts are presumed to know and follow the law, *Woods v. Donald,* 135 S.Ct. 1372, 1376 (2015), and Section 2254(d) "'demands that state-court decisions be given the benefit of the doubt.'" *Cullen,* 563 U.S. at 181 (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002)).

Under Section 2254(d)(1), only the holdings, not the dicta, of the Supreme Court constitute "clearly established Federal law." *Howes v. Fields,* 132 S.Ct. 1181, 1187 (2012). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen,* 563 U.S. at 181. Under the "contrary to" clause of § 2254(d)(1), 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, 412 (2000).

Under the "unreasonable application" clause of § 2254(d)(1), 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. But federal habeas relief may be granted only if the state court's application of clearly established federal law was objectively unreasonable. *Keller v. Larkins*, 251 F.3d 408, 418 (3d Cir. 2001). "[A]n incorrect application of federal law alone does not warrant relief." *Id.* "[I]f the state-court decision was reasonable, it cannot be disturbed." *Hardy v. Cross,* 132 S.Ct. 490, 495 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter,* 562 U.S. at 101 (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). "When assessing whether a state court's application of federal law is unreasonable, 'the range of reasonable judgment can depend in part on the nature of the relevant rule' that the state court must apply." *Renico v. Lett*, 559 U.S. 766, 776 (2010) (quoting *Yarborough,* 541 U.S. at 664). "Because AEDPA authorizes federal courts to grant relief only when

466 U.S. at 693). Rather, the issue is whether there is a reasonable probability of a different result. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. "That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen,* 563 U.S. at 189 (quoting *Harrington,* 562 U.S. at 112).

To prevail on an ineffective-assistance claim, a petitioner must satisfy both prongs of *Strickland.* But a court can choose which prong of the standard to apply first, and it may reject an ineffectiveness claim on the ground that the petitioner was not prejudiced without addressing whether counsel's performance was deficient. *Strickland,* 466 U.S. at 697.

"Surmounting *Strickland*'s high bar is never an easy task," *Padilla v. Kentucky,* 559 U.S. 356, 371 (2010), and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105. When the state court has decided the claim on the merits, "[t]he question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). "And, 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." *Id.*

The Superior Court addressed Wallace's ineffective-assistance-of-counsel claims under the standard for deciding such claims under the PCRA. Although the Pennsylvania courts use slightly different language to articulate the ineffectiveness standard, the standard used by the Pennsylvania courts is consistent with the *Strickland* standard. *Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000) (concluding that the Pennsylvania courts applying the standard from Pennsylvania cases did not apply a rule of law that contradicts *Strickland* and finding that the state court's decision was not contrary to established Supreme Court precedent). Thus, the Superior Court's decision on Wallace's ineffective-assistance-of-counsel claims was not contrary to clearly established federal law. So we turn to whether its decision resulted in a decision that involved an unreasonable application of clearly established federal law, *i.e., Strickland.*

**1. Confrontation Clause.**

Wallace claims that his trial counsel was ineffective by failing to object based on the Sixth Amendment's Confrontation Clause when the Commonwealth elicited testimony from a forensic pathologist about the finding of a toxicologist even though the toxicologist was not available at trial for cross-examination.

Because the Superior Court's determination that Wallace was not prejudiced by counsel's failure to object was reasonable, Wallace is not entitled to habeas relief on this claim.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821 (2006) (quoting *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004)). The Supreme Court has applied the Confrontation Clause to forensic reports prepared for use at trial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307-311 (2009) (holding that affidavits by forensic analysts reporting that material seized by the police was cocaine were "testimonial" and thus, unless the analysts were unavailable at trial and the defendant had a prior opportunity to cross examine them, the defendant had a right under the Confrontation Clause to confront the analysts at trial); *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (holding in connection with a laboratory report regarding the defendant's blood-alcohol concentration, that the Confrontation Clause does not permit "the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of

proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification" unless the analyst who prepared the report is unavailable at trial and the defendant had a prior opportunity to cross-examine that particular analyst).

Here, the Superior Court rejected Wallace's claim that his trial counsel was ineffective by failing to raise a Confrontation-Clause objection because Wallace did not show that he was prejudiced:

> At trial, the Commonwealth called Doctor Mary Frances Pascucci, D .O., F.C.A.P., who performed the autopsy on the victim. N.T., 3/23/09, at 71, 74. Dr. Pascucci was qualified as an expert in pathology and opined that the cause of the victim's death was "multiple gunshot injuries" and that the "manner of death was homicide." *Id.* at 73. During direct examination by the Commonwealth, the doctor further stated that she took blood samples from the victim, which were sent to a laboratory. *Id.* at 83–84. She testified that the laboratory results indicated that the victim's blood contained nicotine and .284% alcohol, but that no other drugs were detected. *Id.* at 84.
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> On cross-examination by [Wallace], Dr. Pascucci clarified that her opinions on the cause and manner of death did not rule out justification or self-defense. *Id.* at 88. Additionally, counsel noted the victim's blood alcohol level and elicited concessions from the doctor that the victim would have been exhibiting signs of intoxication including impaired judgment and "[p]ossibly" aggressive behavior. *Id.* at 90–91.
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> Instantly, [Wallace] casts his claim of ineffectiveness in terms of a violation of the Confrontation Clause. However, it is apparent that the passing reference to the victim's blood-alcohol level was not prejudicial. Indeed, had trial counsel objected and the testimony been stricken, there is no indication that the outcome at trial would have been different. *See Dennis,* 17 A.3d at 301.

*Com. v. Wallace*, No. 241 MDA 2013, 2014 WL 10988483, at *5 (Pa. Super. Ct. Jan. 29, 2014). Moreover, the Superior Court recognized that Wallace's contention was not really that he was prejudiced by the testimony of the pathologist regarding the toxicologist's findings, but that if the toxicologist had testified, he may have provided additional evidence that the victim was the aggressor. *Id.* The Superior Court, however, rejected that contention as pure speculation. *Id.*

In his habeas petition, Wallace also contends that if the toxicologist had testified, he would have been able to establish that the victim was the aggressor, was "out of his mind," and was "hell-bent on hurting or killing" him. *Doc. 1* at 12-13. More specifically, he asserts that the toxicologist could have testified that the victim "was not able to think clearly, and was prone to be mean and aggressive," that the victim "had serious impairment, diminished reasoning ability, and that such impairment more often than not, when mixed with nicotine, would have increased the aggressiveness of the decedent" *Doc. 1* at 12-13 (emphasis in original). According to Wallace, without the toxicologist to cross examine, the toxicologist's findings presented through the forensic pathologist, "came across as if—[he] took advantage of some poor, helpless, drunk," when, in fact, he was merely defending himself, and this caused him to be convicted. *Id.* at 13.

Despite any Confrontation Clause violation, we cannot say that the Superior Court's determination that Wallace was not prejudiced by his attorney's failure to

object is contrary to or an unreasonable application of clearly established law. This is especially so since Wallace does not contend that had he been able to cross-examine the toxicologist, he would have cast doubt on the toxicologist's findings regarding what was in the victim's blood, and although he wanted to show that the victim was the aggressor, he did not provide any evidence that the toxicologist's testimony would, in fact, have cast the victim as the aggressor. Accordingly, Wallace is not entitled to a writ of habeas corpus on this claim.

**2. Character Witnesses.**

Wallace claims that his trial counsel was ineffective by failing to call character witnesses. More specifically, in his habeas petition, Wallace contends that counsel should have called his brother, father, and aunt as character witnesses. *See Doc. 1* at 15-16.

The Superior Court rejected Wallace's claim regarding his character witnesses on the basis that Wallace did not produce any evidentiary support for his claim. In this regard, it noted that although Wallace's mother was present at the PCRA hearing, Wallace elected not to call her to testify, and he did not present any other evidentiary support for his claim. We disagree that Wallace did not provide **any** evidentiary support for his claim—while under oath at the PCRA hearing, Wallace stated that he had made his counsel aware of those witnesses, that they

were available and willing to testify at the time of trial, and that they would have testified as to the kind of person that he was, i.e., that he was not aggressive. *Id.* at 81 (Dep. Tr. at 10). Nevertheless, the Superior Court's determination that Wallace failed to present evidence to establish his claim was reasonable given that Wallace did not present evidence from any of the witnesses themselves as to how they would have testified. Moreover, Wallace's trial counsel provided a strategic reason for not calling character witnesses, i.e., that doing so would have opened the door to the admission of Wallace's resisting-arrest conviction. A reasonable attorney could decide to forgo calling character witnesses in that situation.

Under the "doubly deferential" standard that applies to a *Strickland* claim evaluated under 28 U.S.C. § 2254(d)(1), *Knowles*, 556 U.S. at 123, the Superior Court's decision was not unreasonable. Accordingly, Wallace is not entitled to habeas relief on this claim of ineffective assistance of counsel.

**C. "Stand Your Ground" Statutory Amendment.**

At the time of the murder and at the time of Wallace's trial, the Pennsylvania law on the use of deadly force in self-defense and the duty to retreat provided:

> (2) The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping, or sexual intercourse compelled by force or threat; nor is it justifiable if:
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> . . .

> (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . except that:
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> (A) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.

18 Pa.C.S. § 505(b)(2)(ii)(A). In 2011, Pennsylvania amended its self-defense statute by, among other things, adding a "Stand Your Ground" provision, the effect of which "was to negate the common law duty to retreat in certain circumstances." *Com. v. Riera*, No. 556 MDA 2013, 2014 WL 10896787, at *23 (Pa. Super. Ct. Aug. 25, 2014). The "Stand Your Ground" provision, which took effect on August 29, 2011, provides:

> An actor who is not engaged in a criminal activity, who is not in illegal possession of a firearm and who is attacked in any place where the actor would have a duty to retreat under paragraph (2)(ii) has no duty to retreat and has the right to stand his ground and use force, including deadly force, if:
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> (i) the actor has a right to be in the place where he was attacked;
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> (ii) the actor believes it is immediately necessary to do so to protect himself against death, serious bodily injury, kidnapping or sexual intercourse by force or threat; and
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> (iii) the person against whom the force is used displays or otherwise uses:
>
> (A) a firearm or replica of a firearm as defined in 42 Pa.C.S. § 9712 (relating to sentences for offenses committed with firearms); or
>
> (B) any other weapon readily or apparently capable of lethal use.

18 Pa.C.S. § 505(b)(2.3).

conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Thus, federal habeas corpus relief does not lie for errors of state law. *Id.* at 67.

"States are free to choose whether a change in state law is retroactive without running afoul of the federal Constitution." *Gladney v. Pollard*, 799 F.3d 889, 897-98 (7th Cir. 2015). "[J]ust as the Supreme Court has fashioned retroactivity rules for the federal courts based on principles of judicial integrity, fairness, and finality, *see Teague v. Lane,* 489 U.S. 288, 304-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the state courts are free to adopt their own retroactivity rules after independent consideration of these and other relevant principles." *Fiore v. White*, 149 F.3d 221, 224-25 (3d Cir. 1998), *rev'd on other grounds*, *Fiore v. White,* 531 U.S. 225 (2001) (per curiam); *see also Warren v. Kyler*, 422 F.3d 132, 141 (3d Cir. 2005) (recognizing that the Supreme Court reversed its decision in *Fiore* but concluding that the Supreme Court's decision did not "call into question the validity of the retroactivity analysis" it expressed there). "Nothing in the federal Constitution compels a State to apply its criminal decisions retroactively, and we lack the authority to review the State's own application of its retroactivity principles." *Warren*, 422 F.3d at 141 (3d Cir. 2005); *Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir. 1995) ("No federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied

retroactively."). Thus, whether the state correctly determined as a matter of state law that the "Stand Your Ground" amendment was not retroactive is not cognizable as a federal habeas corpus claim.[1] Even if such a claim were cognizable, the Superior Court's decision was not contrary to or an unreasonable application of clearly established federal law. Accordingly, Wallace is not entitled to a writ of habeas corpus based on this claim.

**D. Post-Arrest Silence.**

Wallace claims that the trial court erred by not declaring a mistrial after the prosecutor referenced Wallace's post-arrest silence. In *Doyle v. Ohio*, the Supreme court held "that the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." 426 U.S. 610, 619 (1976). "This rule 'rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will

[1] Because due process requires that a state prove all the elements of a crime beyond a reasonable doubt, when a state's later interpretation of a statute merely clarifies what the law provided at the time of the conviction, due process requires that a petitioner be given "the benefit of that subsequent interpretation." *Gladney v. Pollard*, 799 F.3d 889, 898 n. 2 (7th Cir. 2015) (citing See *Fiore v. White,* 531 U.S. 225, 228–29 (2001) (per curiam); *Bunkley v. Florida,* 538 U.S. 835, 839–842 (2003) (per curiam)). That is not, however, the situation here as the "Stand Your Ground" amendment to Pennsylvania's self-defense law changed the law rather than merely clarified what the law had provided at the time of Wallace's conviction.

THE COURT: Okay. We're going to go back on the record. Okay. Defense has made a motion for a mistrial based upon the question that was posed, Mr. Vough, your response.

MR. VOUGH: Judge, I think that the question was not answered by the witness. I think the Court can clearly give a corrective instruction to disregard the question, disregard any inference from the question, and inform them that the question is not evidence. I believe granting a mistrial at this time is not appropriate. The Court can cure the mistake of the question being asked by a curative instruction.

THE COURT: What was the intent of the question?

MR. VOUGH: It was a question, Judge, that was answered--it was asked--it was a mistake by me on that part, Judge. I never should have asked that question. I forgot that there was a warrant issued in this case.

Mr. Wallace turned himself in. He was immediately placed under arrest. The Question should not have been asked, and I ask that you--you can correct that by--because it wasn't answered. You can correct that. The question is not evidence in the case. Mr. Ruzzo's going to try and argue inference, but you can clearly correct that mistaken question by giving an instruction, and the jury can disregard it totally.

MR. RUZZO: Your Honor, I will take Mr. Vough's word that he asked the question without realizing the danger. That does not mean that the danger is not there. His intent's not at issue here. He's an honorable man, and I'm not asking for prosecutorial misconduct. I'm not asking for that. What I'm saying is that the damage is irreparable. The question was asked, and given my defense, that--the theme of my defense is that he was cooperative and turned himself in, that he didn't flee the jurisdiction, that he didn't flee the scene, that everyone in his family was cooperative, That the question asked, Did you have an opportunity to interview him, you can tell the jury the question wasn't asked--you could tell them to disregard the inference.

Jurors can--certain things jurors can disregard. For example, if jurors can follow every instruction, Bruton would have never been decided the way it was because they could have just instructed the jury to disregard the statements of a co-Defendant.

> THE COURT: Okay.
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> MR. RUZZO: The premise of the jurors to disregard the—there is no premise that jurors disregard everything. Jurors can disregard certain things, but something as basic as a Defendant's right to silence and then a reference to the fact that the Defendant remained silent cannot be cured by a mere instruction to tell them to disregard it, because I was in a--obviously it's his choice--to allow him to answer. Obviously, he was going to say he had the opportunity and didn't do so because the Defendant invoked his right to silence. He came in with a lawyer. I mean--
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> THE COURT: Okay, the Defendant's request for a mistrial is denied. I certainly do not believe that the question was in any way intentionally designed to prejudice the Defendant, number one. Number two, no answer was given. Number three, under no circumstances--I do not believe that this Defendant has been prejudiced in any way, shape, or form. I believe that a curative instruction can resolve the problem. And, once again, I'll ask Mr. Ruzzo for a proposed instruction.
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> MR. RUZZO: Your Honor, my response is I can't think of an instruction that would cure that.
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> THE COURT: Okay. I'll give them one.

*Doc. 20* at 81-82 (trial transcript at 302-304). The Court then instructed the jury as follows:

> THE COURT: Okay. Ladies and gentlemen, the Defendant's objection to that last question asked by Mr. Vough is sustained.
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> As you already know, questions do not constitute demonstrative evidence, and you are specifically instructed to disregard the question and any inference the question may have posed. Disregard the question as well as any inference the question may have posed.

*Doc. 20* at 82 (trial transcript at 305).

Wallace claims that the trial court erred by not granting a mistrial after the prosecutor referenced his post-arrest silence.[2] More specifically, Wallace asserts that the prosecutor elicited responses from the Trooper regarding his post-arrest silence, i.e, the Trooper testified that he had an opportunity to interview Wallace, but no interview was conducted. *Doc. 1* at 22.

Noting the confusing nature of the sidebar discussions at trial, the Superior Court concluded that defense counsel's objection only preserved for review the final question asked by the prosecution:

> The objection and the ensuing on-the-record discussion were less than perfectly clear as to whether [Wallace] was objecting to the first, the last, or both of the foregoing questions. As the discussion continued, however, the trial court focused on the last question and [Wallace] did nothing to indicate the court's focus was incorrect. We are thus unpersuaded that [Wallace] preserved an objection to the first question or its answer. As such, we are concerned only with the final question attempted by the Commonwealth.

*Commonwealth v. Wallace,* 1117 MDA 2009, slip op. at 3 n.1 (Pa.Super. Ct. Oct. 21, 2010). As to that final question—the unanswered "why" question—the

[2] "By 'post-arrest' silence, we mean [Wallace's] silence following his arrest and receipt of the attendant warnings under *Miranda v. Arizona* of his right to remain silent." *United States v. Shannon*, 766 F.3d 346, 348 (3d Cir. 2014). Although the record in this case, shows that Wallace was arrested on December 20, 2007, it does not show when, or if, he received *Miranda* warnings. But the parties and the state courts seemed to have assumed that he did receive *Miranda* warnings at the time of his arrest. We will do the same.

verdict, i.e., it was harmless given that: (1) it was only one brief question and answer; (2) the question and answer only obliquely, at best, raised a suggestion that Wallace invoked his right to remain silent after his arrest; (3) the prosecution did not mention in its closing anything about Wallace's post-arrest silence; and (4) the reference was cumulative in light of the unobjected to and unobjectionable[3] references to Wallace's prearrest silence (*see e.g. doc. 20* at 107-108, 112, 124 (trial transcript at 407-408, 426, 473-474)). Accordingly, Wallace is not entitled to a writ of habeas corpus.

**E. Weight-of-the-Evidence Claim.**

Wallace claims that the verdict was against the weight of the evidence. In this regard, he contends that the evidence shows that the decedent was the attacker and that he acted merely in self-defense.[4]

A claim that the evidence at trial was against the weight of the evidence is not a cognizable federal habeas corpus claim. Such a claim would require the

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[3] "Not every reference to a defendant's silence . . . results in a *Doyle* violation." *Virgin Islands v. Martinez*, 620 F.3d 321, 335 (3d Cir. 2010). "Where "no governmental action induce[s] the defendant to remain silent," the *Miranda*-based fairness rationale does not control." *Id.* (citations omitted). Thus, "the Government permissibly may impeach a defendant's testimony using his pre-arrest silence, his post-arrest, pre-*Miranda* warning silence, and any voluntary post-*Miranda* warning statements." *Id.* at 335-336 (citations and footnote omitted).

[4] Wallace also references the "Stand Your Ground" amendment, but we have already determined that he is not entitled to habeas corpus relief as to the claim based on that provision.

habeas court to reassess the credibility of the evidence presented at trial, but "[f]ederal habeas courts are prevented from conducting such credibility reassessment." *Lockhart v. Patrick*, No. 3:CV-06-1291, 2014 WL 4231233, at *22 (M.D. Pa. Aug. 26, 2014). Thus, "[a] federal court does not have the authority to grant habeas corpus relief because it finds that the state conviction is against the "weight" of the evidence." *Id.; see also Cruz v. Wagner*, No. 1:11-CV-01473, 2015 WL 3466133, at *6 (M.D. Pa. June 1, 2015) ("Challenges regarding the weight, rather than the sufficiency, of the evidence are not cognizable under habeas review."); *Dove v. York Cty., PA*, No. CIV.A. 3:12-1517, 2013 WL 6055226, at *18 (M.D. Pa. Nov. 15, 2013) ("A federal habeas court has no power to grant habeas relief because it finds that the state conviction is against the weight of the evidence."). Accordingly, Wallace is not entitled to a writ of habeas corpus based on his weight-of-the-evidence claim.

## IV. Recommendation.

For the foregoing reasons, we recommend that Wallace's petition for a writ of habeas corpus be **DENIED**.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within

fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 20th day of May, 2016.

***S/ Susan E. Schwab***
Susan E. Schwab
United States Magistrate Judge

BLD-193 May 3, 2018

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

C.A. No. **18-1146**

JABBAR WALLACE, Appellant

v.

SUPERINTENDENT HUNTINGDON SCI, ET AL.

(M.D. Pa. Civ. No. 3:14-cv-01424)

Present: RESTREPO, BIBAS, and NYGAARD, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellees' response

in the above-captioned case.

Respectfully,

Clerk

ORDER

Wallace's request for a certificate of appealability is denied. Jurists of reason would agree with the District Court's conclusion that all of Wallace's claims lack merit. See 28 U.S.C. §§ 2253(c)(2). In particular, he has not shown that his trial counsel's performance was arguably deficient in failing to call character witnesses at trial or that he was arguably prejudiced when his counsel did not object to the introduction of the findings of a toxicologist who was not available at trial for cross-examination. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Jurists of reason would also agree that Wallace suffered no due process violation per Doyle v. Ohio, 426 U.S. 610 (1976), where the trial court sustained his counsel's objection to a prosecutor's question implicating Wallace's post-arrest silence and provided a curative instruction to the jury, preventing the fact of Wallace's silence from being submitted to the jury. See Greer v. Miller, 483 U.S. 756, 764-65 (1987). Finally, jurists of reason would not debate whether Wallace's due process rights were violated when the state courts refused to apply an amendment to Pennsylvania's

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self-defense law retroactively because "nothing in the Constitution requires states to apply their own decisions retroactively." See Warren v. Kyler, 422 F.3d 132, 137 (3d Cir. 2005).

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: May 7, 2018
CLW/cc: Mr. Jabbar Wallace

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate