No. 22-6807

IN THE

SUPREME COURT OF THE UNITED STATES

Antonio L. McGhee — PETITIONER
(Your Name)

vs.

State of Maryland — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals, Maryland
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antonio L McGhee #348-865 *2971730
(Your Name)

NBCI 14100 McMullen HW. SW.
(Address)

Cumberland Md. 21502
(City, State, Zip Code)

None
(Phone Number)

Question(s) Presented

I) Do Charles vs. State, 414 Md. 726 (2010), Atkins vs. State 421 Md. 434 (2011), And Stabb vs. State, 423 Md. 454 (2011), which concern the propriety of CSI effect Voir dire questions and jury instructions, Apply to cases like Mr McGhees, that became final before those decisions were issued . . . . .

A) Charles, Atkins, and Stabb apply retroactively to cases that became final before those decisions were issued including Mr. McGhees ****

II) Did the Post-Conviction court correctly conclude that Defense counsel was ineffective for failing to object to the Courts CSI effect Voir Dire question at Mr McGhees 2007 trial, And correctly overturn his conviction.

A) Mr. McGhees trial counsels failure to object to the CSI effect Voir Dire question amounted to deficient performance and Mr. McGhee's Due process of law being violated ****

III) Is there A clear conflict of law between the state appeals courts on Voir Dire and jury instruction questions. ****

A) The conflict between the State courts on the issue of voir Dire questions present violations of Due process and should be settled By Federal law ****

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Circuit court for Prince Georges County Md v. Antonio McGhee Case No. CT071096X Appeal- Antonio McGhee v. State of Maryland, September term, 2007, No. 2827 Affirmed Cert Denied Sept 14, 2009

Post Conviction filed June 10, 2014 supplemented by Counsel Oct 23, 2018. On April 17, 2019, Judge Beverly Woodard held a hearing on the Petitions. In an Order attached Granted in part and ordered a new trial.

July 6, 2020 Leave of Appeal Filed and granted on Sept 4 2020 State of Maryland v. Antonio Lonelle McGhee, CSA-ALA-0473-2020 Reversed Judgement on Nov 30, 2021 State of Maryland VS. Antonio McGhee, Court of Special Appeals Sept term 2020, No. 638.

Writ of Cert filed Granted on March 8 2022 Heard and Denied Filed On October 24, 2022

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Court of Special Appeals court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

Opinions Below

Direct Appeal

Antonio L. McGhee vs. State of Maryland CT071096X
Antonio L. McGhee vs State of Maryland, Sept term 2007 No. 2827
June 10, 2014 Post-Conviction Filed Pro se, Supplemented
Oct, 23, 2018 by counsel. On April 17, 2019 Honorable
Judge Beverly J. Woodard held hearing on Petitions
And on June 11, 2020 granted them in part and ordered
A new trial. On July 6, 2020 the State filed
An Application for Leave of Appeal, The Court of Special
Appeals granted the Application on Sept 4, 2020, State
of Maryland v. Antonio Lonelle McGhee, CSA-ALA-0473-
2020 and transferred to regular docket. There After,
that court reversed the judgement of the Circuit Court
in an unreported opinion filed Nov 30, 2021. State of
Maryland v. Antonio McGhee, Court of Special Appeals,
Sept term, 2020 no. 638. Its mandate issued on
Jan 5, 2022. Mr. McGhee filed A petition for Writ
of Certiorari to the Court of Appeals Which that court
granted on March 8, 2022. That court Affirmed the
Court of Special Appeals judgement on Oct 24, 2022
And the mandate was 90 days after that which he
recieved An extion of time beg the Clerk of the US
Court.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was Oct, 24, 2022
A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Const. Amend. VI
MD. Decl. of Rights, Art. 21

- U.S. Const. Amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Md. Decl. OR Rights, Art 21

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Statement of the Case

By charging document filed in the Circuit Court for Prince George's County, in Case No. CT-070961X, the State charged Antonio McGhee with first-degree murder. After a trial held on December 4 and 5, 2007, a jury, the Honorable James L. Lombardi presiding, convicted Mr. McGhee of first-degree murder. On Jan 18th, 2008, the court sentenced Mr. McGhee to a term of life in prison. Mr. McGhee noted an Appeal, and the Court of Special Appeals affirmed his conviction in 2009. Antonio McGhee v. State of Maryland, September Term, 2007, No. 2827. Mr. McGhee subsequently filed a petition for Writ of Certiorari which which was denied on September 14, 2009.

On June 10, 2014 Mr. McGhee file a prose petition for Post-Conviction relief, which was supplemented by counsel on October 23, 2018. On April 17th, 2019, the Honorable Beverly J. Woodard held a hearing on the petitions. In an order that was filed on June 11, 2020, Judge Woodard granted the petitions in part and ordered a new trial.

On July 6, 2020, the State filed an Application for Leave of Appeal. The court of Special Appeals granted the Application on September 4, 2020, State of Maryland v. Antonio Lorelle McGhee, CSA-ALA-0473-2020, and transferred the case to the regular docket. Thereafter, that Court reversed the judgment of the post-Conviction court in an unreported opinion that was filed on November 30, 2021. State

of Maryland v. Antonio McGhee, Court of Special Appeals September term, 2020, No. 638. Mr. McGhee filed a petition for Writ of Certiori which the Court of Appeals Granted on March 8th 2022, to hear, Antonio Mcghee v. State of Maryland Court of Appeals, No. 64, September term, 2021. The Court of Appeals denied his writ of Certeiori on October 24, 2022.

Argument For Granting Writ

I.) Charles v. State, 414 Md. 726 (2010), Atkins v. State, 421 Md. 434 (2011), and Stabb v. State, 423 Md. 454 (2011), which concern the propriety of CSI-effect voir dire questions, and jury instructions, apply to cases, like Mr. McGhee's, that became final before those decisions issued.

A.) Background

During jury selection in Mr McGhee's trial, the court posed the following question to the venire: "Does any member of this panel believe that the state has got to present fingerprint evidence, DNA, Blood sample evidence, ballistic evidence in order to convince you of the defendants guilt? In other words, do you think the State has a requirement to do that in all cases?" Although defense counsel raised objections to the other aspects of voir dire, she did not object to what has become known as a CSI-effect question.

On Dec 5, 2007, the jury convicted Mr. McGhee of first-degree murder, and on Jan 18, 2008, the

court sentenced Mr. McCokel to life in prison. The Court of Special Appeals affirmed Mr. McCokel's conviction in June 2009, and this Court denied his petition for writ of certiorari in September 2009.

In 2010, this Court decided Charles v. State, 414 Md. 726 (2010) and held that the trial court erred in asking a voir dire question similar to the one posed by the court in Mr McCokel's case because it used NON-Neutral language and suggested the jurys only option was to convict. In 2011, this Court decided Atkins v. State, 421 Md. 434 (2011) and Stabb v. State, 423 Md. 454 (2011) and held that trial courts abuse their discretion in preemptively giving CSI-effect jury instructions because such instructions operate to relieve the State of its burden of proof and invade the jury's fact-finding province.

On June 10, 2014, Mr McCokel filed a pro se petition for Post-Conviction Relief, which was supplemented by counsel on October 23, 2018. The petitions raised a number of allegations of ineffective assistance of counsel. Of relevance here, the supplemental petition argued that Mr. McCokel's Attorneys failure to object to the CSI-effect voir dire question, and thus preserve for appellate review the merits of it, amounted to ineffective assistance of counsel.

In support of that argument, Mr. McGhee relied on Allen v. State, 204 Md. App. 701 (2012) for the proposition that Charles, Atkins, and Stabb should be applied to his case even though they were decided after his conviction was final.

On April 17, 2019, the post-conviction court held a hearing on the petitions, and, in an order filed June 11, 2020, the post-conviction court granted Mr. McGhee's petitions in part and ordered a new trial. With respect to the Voir dire issue, the court relied on State v. Armstead, [2018) 234 Md. App 394, and ruled that Charles did "not apply retrospectively" and thus did not "apply to [Mr. McGhee's] 2007 trial. The court ~~did~~ said nothing about the applicability of Atkins and Stabb to Mr. McGhee's case. Notwithstanding that finding, the post-conviction court went on to address, and find prejudice. It noted, "In the present case, the lack of scientific evidence was material to the question of Petitioner guilt As the eye-~~witness~~ who previously identified petitioner as the ~~whom~~ one who shot the victim And the only one recanted on the stand"; And it found, "the jury instructions were woefully inadequate, and did not Ameliorate Any potential prejudice caused by the CSI instruction (sic) The court also found that Mr. McGhee's counsel rendered ineffective Assistance of counsel when she failed to object to the ommision of various jury instructions.

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After the State's Application for Leave to Appeal was granted, Mr. McGhee maintained in the Court of Special Appeals that *Charles*, *Atkins*, and *Stabb* applied to his case and that in light of those cases, his attorney was constitutionally ineffective in failing to object to the CSI-effect voir dire question. The Court of Special Appeals disagreed on both fronts. It rejected Mr. McGhee's argument that *Charles*, *Atkins*, and *Stabb* applied to his case, (E.531-532, n.4), and it held that because Mr. McGhee "presented no evidence establishing that the prevailing professional norm at the time of his trial was to object to 'CSI effect' messages to the venire or jury," he failed to prove that his counsel's failure to object to the question was constitutionally deficient, (E.531).[8]

B. *Charles*, *Atkins*, and *Stabb*.

In *Charles v. State*, two defendants were charged with murder and handgun offenses. At their trial, the trial court posed the following voir dire question to the venire: "[I]f you are currently of the opinion or belief that you cannot convict a defendant without 'scientific evidence,' regardless of other evidence in the case and regardless of the instructions that I will give you as to the law, please rise[.]" 414 Md. at 730. After the defendants were convicted, one of them challenged the voir dire question on appeal. *Id.* at 728. This Court framed the issue before it as "whether the use of the term 'convict' in the heart of the inquiry, rendered the

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[8] The Court also reversed the post-conviction court's finding that Mr. McGhee's counsel rendered ineffective assistance with respect to the jury instructions. (E.532-545). That part of the Court of Special Appeals' ruling is not before this Court.

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question untenable." *Id.* at 736. *See also id.* at 733 ("The issue before us is really the appropriateness of the language used in the inquiry.").

In analyzing that issue, the Court relied heavily on *State v. Hutchinson*, 287 Md. 198 (1980), which involved a jury instruction with "similar language." *Charles*, 414 Md. at 736. Specifically, the instruction in *Hutchinson* told the jury it could find the defendant guilty of the charges against him but did not tell the jury "it could return a 'not guilty' verdict." *Id.* The *Hutchinson* Court reversed the defendant's convictions, explaining, "'If a defendant is entitled to have a jury instructed as to all possible verdicts arising from the evidence, it seems manifest to us that he would have the right to have the jury told that it may find him not guilty. We can envision no right more fundamental to the defendant in a criminal jury trial.'" *Id.* at 737 (quoting *Hutchinson*, 287 Md. at 205-06). According to the *Charles* Court, the *Hutchinson* Court reversed Hutchinson's convictions because "the language of the jury instruction suggested that finding the defendant 'guilty' was a foregone conclusion." *Id.*

After discussing an out-of-state case that it deemed distinguishable, *id.* at 737-38, the *Charles* Court turned its attention to *Corens v. State*, 185 Md. 561 (1946), a death penalty case in which it had addressed a voir dire question that asked "whether the prospective jurors were capable of convicting the defendant based upon circumstantial evidence, rather than direct evidence[.]" *Charles*, 414 Md. at 738-39. As the *Charles* Court explained, the *Corens* Court approved of that question because it "reasoned that just as a prospective juror 'who has

conscientious scruples against capital punishment' can be challenged for cause, a prospective juror who cannot render a death sentence based upon circumstantial evidence can similarly be challenged for cause." *Id.* at 739.

Ultimately, the Court applied *Hutchinson* and *Corens* to the voir dire question before it. It explained that *Corens* was "inapposite" "because the inquiry here was not inextricably linked to the facts and circumstances of the case, but rather, preordained the result." *Id.* at 739. And, it concluded that "like the jury instruction in *Hutchinson*, the voir dire question at issue here suggested that the jury's only option was to convict, regardless of whether scientific evidence was adduced." *Id.* at 737. Accordingly, the Court held that the trial court abused its discretion in posing the question because it "poisoned the venire" and "depriv[ed] Drake and Charles of a fair and impartial jury." *Id.* at 739.

In *Atkins*, this Court considered a CSI-effect jury instruction. Atkins was charged with, and ultimately convicted of, three counts of second-degree assault. 421 Md. at 437. At his trial, the State's witnesses testified that Atkins stabbed one victim and cut two other victims with a knife in the course of an altercation. *Id.* at 438. Several days after the incident, police recovered a knife with a six-inch blade from Atkins's bedroom. *Id.* at 439. Through cross-examination, defense counsel established that police had not asked for any forensic testing to be performed on the knife, which was ultimately introduced into evidence on the theory that it was the knife that was used in the incident. *Id.* at 439-40.

Atkins took the stand in his own defense. In contrast to the State's witnesses, Atkins testified that he acted in self-defense, and he explained that he used a pocketknife to swing at the victims. *Id.* at 439. His counsel thereafter argued to the jury that the knife the police located was not the knife used in the incident. *Id.*

At the end of the case, the court instructed the jury that there was "no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case." *Id.* at 441-42. Atkins thereafter challenged that instruction on appeal.

At the outset of its opinion, this Court recognized that a defendant has a constitutional right to be tried by a fair and impartial jury. *Id.* at 443. It also recognized that "it is improper for a trial judge to 'comment on a question of fact which the jury is to pass on' because such commentary invades the province of the jury," *id.* (quoting *Gore v. State*, 309 Md. 203, 213 (1987)), and reminded that "we preclude any instruction 'when [it] operate[s], ultimately, to relieve the State of its burden of persuasion in a criminal case, *i.e.*, its burden of proving beyond a reasonable doubt all the facts necessary to constitute the offense,'" *id.* (quoting *State v. Evans*, 278 Md. 197, 207 (1976)). Then, the Court acknowledged the difference between instructions that are given on "the applicable law" and those that are given on "facts and inferences." *Id.* at 445. With respect to the latter, it reiterated, "As this Court has stated in the past in regard to missing witness instructions, when the inference is communicated to the jury as part of the judge's

binding jury instructions, it creates the danger that the jury may give the inference undue weight." *Id.* (quoting *Patterson v. State*, 356 Md. 677, 684 (1999)) (emphasis by *Adkins* Court).

Applying those principles to the instruction before it, the Court held the trial court abused its discretion in giving it and reversed Atkins's convictions. First, the Court explained that its "primary concern" was that "the instruction as worded effectively undermined the defense theory of self defense, and relieved the State of its burden to prove guilt beyond a reasonable doubt." *Id.* at 451. It later elaborated, "[T]he instruction did not clearly explain to the jury the relation between the fact that the State was not required to produce specific evidence on the one hand, with the continuing obligation of the State to prove the defendant's guilt beyond a reasonable doubt on the other hand." *Id.* at 455.

Then, the Court stated that "[t]here was an insufficient basis in this case generating a need for a curative or cautionary jury instruction clarifying the State's burden of proof." *Id.* The Court explained, citing cases such as *Sample v. State*, 314 Md. 202 (1988), and *Eley v. State*, 288 Md. 548 (1980), that "a defendant has the right to raise a defense based on the lack of evidence presented by the State," and recognized that, accordingly, "defense counsel had every right to inquire about the steps the State undertook to connect the defendant and the particular knife found in Atkins's home to the crime." *Id.* at 452.

Finally, the Court found that the instruction "invaded the province of the jury and constituted commentary on the weight of the evidence[.]" *Id.* at 453. In

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its view, "the instruction directed the jury to ignore the fact that the State had not presented evidence connecting the knife to the crime, implying that the lack of such evidence is not necessary or relevant to the determination of guilt, and to disregard any argument by defense to the contrary." *Id.* It continued, "It was well within the province of the jury to infer, or not to infer, as a matter of fact, that the knife introduced by the State was the knife used to commit the crimes alleged. Through the instruction, however, the judge commented on that inference, thus invading the province of the jury." *Id.* at 453-54.

In *Stabb*, which followed *Atkins* by three months, this Court again considered a challenge to a CSI-effect instruction. Stabb was charged with third-degree sexual assault and second-degree assault in connection with an incident involving a child. 423 Md. at 457. The State's case against Stabb relied primarily on the testimony of the child and statements she had made to other people. *Id.* at 457-59. During the cross-examination of a social worker who interviewed the child, defense counsel elicited that she had not referred the child for a Sexual Assault Forensics Exam. *Id.* at 458. As in *Atkins*, based on defense counsel's cross-examination and before closing argument, the court gave a CSI-effect instruction. *Id.* at 460, 462.

When the instructional issue reached this Court, it began by re-emphasizing the constitutional nature of the right to a fair jury, "which includes a requirement that trial judges refrain from making statements that may influence improperly the jury," *id.* at 463, and by reiterating that "[a]n improper, objectionable instruction

includes one that serves to relieve the state of its burden to prove a defendant's guilt beyond a reasonable doubt," *id.* at 464. After reviewing *Atkins* and scientific literature concerning the purported "CSI effect," *id.* at 466-70, the Court addressed the instruction in the context of the facts of the case and again held that reversal was required.

Although the Court recognized that the "missing" evidence in the case before it may not have been as "critical" as the "missing" evidence in Atkins's case, *id.* at 470, it explained that one problem with the instruction was that "the lack of scientific evidence was an integral part of the defense's theories," *id.* at 471. The Court stated that the fact that the instruction "was given preemptively, *i.e.*, before any explicit argument by the defense on the absence of DNA or fingerprint testing of Kaylen J. or her clothing" was another problem. *Id.* at 471. And, the Court noted that ultimately defense counsel's closing argument was "proper," "did not 'harp' impermissibly on the lack of physical evidence," and did not "advance a 'missing evidence' argument that implied that 'missing' evidence would favor him." *Id.* at 471-72.

The Court then held, as it had in *Atkins*, that the CSI-effect instruction invaded the province of the jury because it "directed effectively the jurors not to consider the absence of a SAFE or corroborating physical evidence." *Id.* at 472. The Court also held, as it had in *Atkins*, that the instruction "relieved the State of its burden to prove Stabb was guilty beyond a reasonable doubt." *Id.*

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C. *Charles*, *Atkins*, and *Stabb* apply to cases that became final before those decisions issued.

1. General principles.

On a number of occasions, this Court has addressed whether a particular judicial decision should be applied retroactively, or retrospectively, to a conviction that became final before the decision issued. A review of that jurisprudence reveals two general, guiding principles. The first principle is that a decision which applies settled precedent to a new set facts applies retroactively to all convictions, even those that became final before the decision issued. That principle, which controls the instant case, was most recently articulated by this Court in *Denisyuk v. State*, 422 Md. 462 (2011). The second principle is that a decision which announces a new rule that represents a clear break with the past applies retroactively to convictions that became final before the decision issued in only a few narrow circumstances. That principle, which is not implicated in the instant case, was discussed in *Wiggins v. State*, 275 Md. 689 (1975) and *State v. Hicks*, 285 Md. 310 (1979).

In *Denisyuk*, one of the issues before this Court was whether *Padilla v. Kentucky*, 559 U.S. 356 (2010) applied to Denisyuk's conviction, which became final before *Padilla* was decided. *Denisyuk*, 422 Md. at 466, 478. At the outset of its discussion of that issue, this Court explained:

> Under Maryland law:
>
> 'the question of whether a particular judicial decision should be applied prospectively or retroactively, depends in the first instance

> on whether or not the decision overrules a prior law and declares a new principle of law. If a decision does not, . . . no question of a 'prospective only' application arises; the decision applies retroactively in the same manner as most decisions.'

Id. at 478 (quoting *State v. Daughtry*, 419 Md. 35, 78 (2011)).[9] The Court continued, "Of particular relevance to this case, we have explained that, 'where a new decision has applied settled precedent to new and different factual situations, the decision always applies retroactively[,]' and it is only 'where a new rule . . . constitutes 'a clear break with the past . . .'' that the question of prospective only application arises." *Id.* (quoting *Potts v. State*, 300 Md. 567, 577 (1984)) (in turn quoting *United States v. Johnson*, 457 U.S. 537, 549 (1982)).

The Court then applied that principle to the case before it. After reviewing *Padilla*, it concluded that *Padilla* did not announce a new rule but instead applied a "general standard" to a "specific set of facts." *Id.* at 481. *See also id.* at 481-482 ("Stated differently, the holding of *Padilla* did not 'overrule [ ] prior law and declare[ ] a new principle of law. Rather, *Padilla* applied 'settled precedent [*i.e.*, *Strickland*] to [a] new and different factual situation[ ] . . .") (internal citations omitted) (alterations in original). Thus, the Court held that it applied retroactively to Denisyuk's conviction.[10] *Id.* at 482.

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[9] At the time of *Denisyuk* and *Daughtry*, when this Court said that it was applying a holding "prospectively only," it meant that it was applying the holding to the case before it and to "all other pending cases where the relevant question" had been preserved for appellate review. *See Daughtry*, 419 Md. at 77, n.26 (quoting *Am. Trucking Ass'ns, Inc. v. Goldstein*, 312 Md. 583, 592 (1988)).

[10] In *Chaidez v. United States*, 568 U.S. 342 (2013), the Supreme Court held that *Padilla* had in fact announced a new rule and thus did not apply

In *Wiggins*, this Court had to decide whether a federal case, which held the Maryland Juvenile Causes Act was unconstitutional and thus announced a new rule, should be applied retrospectively to Wiggins's convictions, which became final well before the federal case was decided. 275 Md. at 691. In *Hicks*, the Court had to decide whether its decision, which announced a new rule by holding for the first time that a violation of the time requirement in then-Rule 746 required dismissal of a case, should be applied prospectively only. 285 Md. at 336. The *Wiggins* Court, relying on a number of Supreme Court cases, opined that there were "three circumstances in which retrospective application" of a case announcing a new rule "is mandated." 275 Md. at 701. Those circumstances are "(1) where the old rule affected the integrity of the fact-finding process, (2) where no trial was constitutionally permissible, and (3) where the punishment is not constitutionally permissible."[11] *Id.* *See also Unger v. State*, 427 Md. 383, 416

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retroactively to final convictions. In *Miller v. State*, 435 Md. 174 (2013), this Court held that Miller was not entitled to relief under *Padilla* in light of *Chaidez*. Although *Chaidez* runs contrary to the Court's conclusion in *Denisyuk* that *Padilla* did not announce a new rule, neither *Chaidez* nor *Miller* undermines the general principle that decisions that apply settled precedent to new facts apply retroactively to all cases, final or not. Thus, that portion of *Denisyuk* remains good law.

[11] In contrast, a case that announces a new interpretation of a constitutional provision, statute, or rule will always apply to cases that are not yet final. *See Kumar v. State*, 477 Md. 45, 57-58 (2021) ("[A] new interpretation of a constitutional provision, statute, or rule has included the case before us and all other pending cases where the relevant question has been preserved for appellate review."); *Kazadi v. State*, 467 Md. 1, 47 (2020) (overruling *Twining v. State*, 234 Md. 97 (1964), requiring courts to ask, upon request, certain voir dire questions, and stating "that our holding applies to this case and any other cases that are

(2012) ("It is a well-established principle of Maryland law that a new interpretation of a constitutional provision or a statute is fully retroactive if that interpretation affects the integrity of the fact-finding process."). The Court then recognized that if the new rule does not fall within one of those three categories, the court should employ a balancing test to determine whether the rule should apply retroactively to final convictions. *Wiggins*, 275 Md. at 701. The relevant considerations under that test are "(1) the purpose of the new ruling; (2) the reliance placed upon the old ruling; and (3) the effect on the administration of justice of a retrospective application of the new ruling." *Hicks*, 285 Md. at 337. "Where the purpose of the new ruling is not 'concerned with the ultimate fact-finding determination of whether the accused did or did not commit the act he is said to have committed,' *Wiggins v. State*, *supra*, 275 Md. at 708, 344 A.2d at 91 (majority opinion), . . . the new ruling is usually limited to subsequent cases." *Id.* Ultimately, the *Wiggins* Court held that the federal case should not be applied retrospectively to Wiggins's convictions, 275 Md. at 716, and the *Hicks* Court held its decision should be applied "purely prospectively," 285 Md. at 336.

2. Application to the instant case.

As noted above, Mr. McGhee's case is controlled by the first principle. *Charles*, *Atkins*, and *Stabb* did not overrule prior law and declare new principles of law. To the contrary, those decisions merely applied settled precedent to new and

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pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review").

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different factual situations. Accordingly, they apply retroactively to Mr. McGhee's post-conviction proceeding, even though his conviction became final before the decisions issued.[12]

In *Atkins* and *Stabb*, this Court was asked to consider whether a CSI-effect jury instruction invaded the province of the jury, was a "non-neutral commentary on the evidence," and had the effect of lowering the State's burden of proof. *Atkins*, 421 Md. at 437; *Stabb*, 456 Md. at 472. To resolve those questions, the Court relied on well-known constitutional principles. For example, the Court noted that defendants have a constitutional right to a fair trial, a constitutional right "to be tried by a fair and impartial jury," and a constitutional right to have the State prove its case beyond a reasonable doubt, and it recognized that together those rights require that a trial judge "refrain from making statement[s] that may influence improperly the jury," refrain from commenting "on a question of fact" because "such commentary invades the province of the jury," and refrain from giving an instruction that "serves to relieve the State of its burden of proof." *Atkins*, 421 Md. at 443; *Stabb*, 423 Md. at 463-65. The Court also relied on older cases like *Gore v. State*, 309 Md. 203 (1987), *Dempsey v. State*, 277 Md. 134 (1976), and *State v. Evans*, 278 Md. 197 (1976), that had applied those same

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[12] A conviction becomes final when "the right to a direct appeal has been exhausted." *Kumar*, 477 Md. 45, 54 n.4. As explained above, the intermediate court affirmed Mr. McGhee's conviction on direct appeal on June 23, 2009, (E.369-382), and this Court denied Mr. McGhee's petition for writ of certiorari on September 14, 2009, (E.8). Thus, by 2010 and 2011 when *Charles*, *Atkins*, and *Stabb* were decided, Mr. McGhee's conviction was final.

principles to other alleged instructional errors.[13] *Atkins*, 421 Md. at 443-46, 452; *Stabb*, 423 Md. at 463-65, Applying those principles and cases to the CSI-effect jury instructions before it, the *Atkins* and *Stabb* Courts concluded that the instructions were error because they could have impermissibly influenced the jury's ability to draw inferences from the lack of scientific evidence, because they improperly invaded the province of the jury, and because they had the effect of lowering the State's burden of proof. *Atkins*, 421 Md. at 451-55; *Stabb*, 423 Md. at 471-72. Far from announcing a new rule or principle that constituted a clear break with the past, *Atkins* and *Stabb* are quintessential examples of cases that applied settled precedent and principles to a new and different factual situation. *See also Yates v. Aiken*, 484 U.S. 211, 216 (1988) (discussing whether *Francis v. Franklin*, 471 U.S. 307 (1985) applied retroactively to Yates's case which was on collateral review when *Francis* was decided, explaining that "[f]irst, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law," and determining that *Francis* applied to Yates

[13] In *Gore*, this Court held that a trial court erred when it instructed the jury that the court had already determined that the evidence was sufficient as a matter of law, finding the instruction to be an improper comment on the evidence. 309 Md. at 209-14. In *Dempsey*, this Court considered a trial court's instruction to the jury on the voluntariness of a defendant's confession and held that the instruction, which told the jury that the court had determined the confession was voluntary, had the effect of improperly influencing the jury. 277 Md. at 150. In *Evans*, this Court reviewed an instruction that told the jury that malice could be presumed and held the instruction relieved the State of its burden of proof. 278 Md. at 205-06

because it "was merely an application of the principle that governed" an earlier decision); *Daughtry*, 419 Md. at 80-81 (concluding that "[o]ur decision in the present case in no way 'overrules prior law and declares a new principle of law" and instead "is consistent entirely with Rule 4-242(c), its predecessor, and attendant caselaw" and stating that the decision "must be given full retrospective effect"); *Walker v. State*, 343 Md. 629, 634, 640 (1996) (holding that *State v. Jenkins*, 307 Md. 501 (1986) did not announce a new rule of law and affirming circuit court's conclusion that *Jenkins* applied to Walker's conviction, which became final before *Jenkins* was decided); *Jones v. State*, 297 Md. 7, 24-25 (1983) (concluding, in a case where the State asked the Court to determine whether its holding should be given prospective or retrospective application, that its holding did not represent a change in the law and therefore "the issue of retroactivity is not presented"); *Twigg v. State*, 219 Md. App. 259, 280 (2014) (holding that *Nightingale v. State*, 312 Md. 699 (1988), in which the Court "applied the principles of the required evidence test under *Blockburger* to sexual offenses that formed the factual basis for a conviction for sexual child abuse," was an application of settled precedent to a new set of facts and thus applied to Twigg's conduct which occurred prior to the issuance of *Nightingale*, and holding that *White v. State*, 318 Md. 740 (1990), in which the Court "used the principles of statutory construction to ascertain whether the legislative intent of the child abuse statute supported separate punishments for murder and child abuse where both convictions were based on the same act or acts," also was an application of settled

precedent to a new set of facts and thus applied to Twigg's conduct which occurred prior to the issuance of *White*), *aff'd in part, rev'd in part*, 447 Md. 1 (2016).

The Court of Special Appeals' decision in *Allen v. State*, 204 Md. App. 701 (2012) supports the conclusion that *Atkins* and *Stabb* should be applied retroactively to Mr. McGhee's conviction. In that case, the defendant challenged the trial court's decision to give a CSI-effect jury instruction, and he argued that *Atkins* and *Stabb*, which were decided after his trial, should be applied to his direct appeal. 204 Md. App. at 703, 706. After the intermediate Court engaged in a thorough review of Supreme Court and Maryland jurisprudence on retroactivity, it summarized some of the relevant principles:

> [U]nder current Maryland law, the question of whether a new constitutional or statutory decision in the criminal law area should be applied prospectively or retroactively arises only when the decision declares a new principle of law, as distinguished from applying settled principles to new facts. If it does not declare a new principle, it is fully retroactive and applies to all cases. *Denisyuk*, 422 Md. at 478-79, 30 A.3d 914. A new constitutional or statutory ruling, in the criminal law context, ordinarily applies to the facts in the case announcing the change and those cases pending on direct review in which the issue was preserved. A new constitutional or statutory decision will also be fully retroactive, *i.e.*, apply to convictions which were final, when the change affected the integrity of the fact finding process or the change involved the ability to try a defendant or impose punishment.

Id. at 721 (emphasis added). It then applied those principles and, for any one of three different reasons, held that *Atkins* and *Stabb* applied to Allen's case. The second reason is relevant here:

> Second, it is not clear that a retroactivity analysis is implicated. The *Atkins* and *Stabb* holdings are clearly based on constitutional principles, *Atkins*, 421 Md. at 443, *Stabb*, 423 Md. at 472, but we read the decisions not as creating new constitutionally based principles but rather as applying settled federal and State constitutional guarantees to 'new and different factual situations.' *Potts*, 300 Md. 567, 577, 479 S.2d 1335 (1984). The Court of Appeals did not overrule our decision in *Evans*; it clarified and distinguished it. In such a case, 'the decision always applies retroactively.' *Id.*

Id. at 722 (emphasis added).

Although not necessary to decide the case before it, the Court went on to consider "whether *Atkins* and *Stabb* apply to collateral review, *i.e.*, to cases in which convictions were final prior to the decisions." *Id.* After reviewing this Court's decision *Denisyuk*, it concluded, "The *Denisyuk* analysis and result appears to be applicable to *Atkins* and *Stabb*." *Id.* at 723.

A review of *Charles* reveals that it too should be applied to Mr. McGhee's conviction. The *Charles* Court relied on a defendant's "fundamental right" to have the jury told that it may find him not guilty and on *Hutchinson*, a case which involved a jury instruction that used "similar language," to hold that the voir dire question before it was prejudicial and thus erroneous. Like *Atkins* and *Stabb*, *Charles* did not announce a new rule that constituted a clear break with the past; rather, it applied settled principles and precedent to a new set of facts. The case therefore applies to Mr. McGhee's conviction.

As noted earlier, the post-conviction court and the Court of Special Appeals concluded that *Charles*, *Atkins*, and *Stabb* did not apply to Mr. McGhee's case.

Both courts relied on *State v. Armstead*, 235 Md. App. 392 (2018) for that conclusion. A brief review of *Armstead* reveals that its analysis is flawed.

In a post-conviction proceeding, Armstead alleged his trial attorney was ineffective for failing to object at his 2009 trial to a CSI-effect voir dire question. *Id.* at 397-98. The post-conviction court agreed and granted relief. One of the issues on appeal was whether *Charles*, *Atkins*, and *Stabb*, which were decided after Armstead's convictions became final, should be applied to his claim of ineffective assistance. *Id.* at 407. Armstead, of course, argued that the cases should be applied to his case, and cited *Allen* in support. *Id.*

The Court of Special Appeals disagreed:

> Armstead demands the benefit of *Charles & Drake* (2010) and *McFadden & Miles* (2011); that is, their holdings and reasoning should apply retrospectively to the ineffective counsel analysis in his post-conviction case, based on *Allen*, 204 Md. App. 701, 42 A.3d 708. We disagree. First, Armstead's reliance on *Allen* is misplaced. We held in *Allen* that *Atkins* and *Stabb* would apply retrospectively to then pending direct appeal cases where objections preserved a challenge. *See Allen*, 204 Md. App. at 721-22, 42 A.3d at 720-21. Further, *Atkins* and *Stabb* considered CSI jury instructions, not voir dire questions.

Id. at 423-424. After explaining that voir dire questions and jury instructions serve different purposes and after noting that the prejudice from an erroneous voir dire question may be less than the prejudice from an erroneous jury instruction, the Court said, "Armstead's present case is a 2014-16 post-conviction, not a direct appeal from his 2009 conviction. Moreover, the critical issue, as noted above, is unpreserved for our review. Armstead's current case fails each predicate of

Allen's analysis to support retrospective application of the relevant post-2009 case law." *Id.* at 425. The Court then explained that Armstead's counsel was not "ineffective for failing to object," and said, "Even were we to assume for the moment, that Armstead's invocation of Maryland's post-2009 reported, direct appeal jurisprudence regarding a trial court's use of CSI effect voir dire questions (or instructions) were applicable here, we find no prejudice (the other component of Strickland) on this record." *Id.*

In rejecting Armstead's claim that *Charles*, *Atkins*, and *Stabb* should be applied to his post-conviction claim, the Court of Special Appeals completely ignored the actual reasoning of *Allen*: that *Atkins* and *Stabb* did not announce a new rule and instead merely applied settled principles to a new set of facts. If that reasoning is correct, which it is, then under established retroactivity principles, *Atkins* and *Stabb* (and for the same reason, *Charles*) apply to all cases, even those where the convictions became final before the trilogy issued. Thus, it is irrelevant that *Allen* was a direct appeal while *Armstead* was a collateral proceeding, and, although it might have a bearing on whether counsel should have known to object to the voir dire question, it matters not that *Atkins and Stabb* involved a challenge to a jury instruction while *Armstead* involved a challenge to a voir dire question.

Charles, *Atkins*, and *Stabb* should be applied retroactively, or retrospectively, to Mr. McGhee's case and to his ineffective assistance claim because those cases did not overrule prior law and declare new principles of law but instead applied settled precedent and principles to new factual situations. As

explained below, when trial counsel's failure to object to the CSI-effect voir dire question is viewed through the lens of that trilogy of cases, it is evident that counsel's performance was deficient and that the deficient performance prejudiced Mr. McGhee.

II. Mr. McGhee's trial counsel rendered ineffective assistance of counsel when at Mr. McGhee's 2007 trial, she failed to object to a CSI-effect voir dire question.

A. The law on ineffective assistance of counsel.

"Under the Sixth Amendment to the Constitution of the United States and Article 21 of the Maryland Declaration of Rights, a defendant in a criminal case has 'a right to effective assistance of counsel.'" *Ramirez v. State*, 464 Md. 532, 538-39 (2019), *cert. denied*, 140 S. Ct. 1134 (2020) (quoting *Newton v. State*, 455 Md. 341, 355 (2017)). In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court articulated a "two-prong test for resolving a claim of ineffective assistance of counsel." *State v. Mann*, 466 Md. 473, 490 (2019), *cert. denied*, 141 S.Ct. 337 (2020). "The first prong is known as 'the performance prong.'" *Ramirez*, 464 Md. at 560. To satisfy this prong, "a [defendant] 'must show that counsel's performance was deficient,'" which requires a showing "'that counsel's representation fell below an objective standard of reasonableness ... under prevailing professional norms.'" *Id.* at 560-62 (quoting *Strickland*, 466 U.S. at 687-88). In making this showing, a defendant "'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Id.* at 561 (quoting *Strickland*, 466 U.S. at 689-90).

The second prong of the *Strickland* test is the "prejudice prong." *Mann*, 466 Md. at 490. To satisfy this prong, a defendant must show that "there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different [ ] or ... that the result of the proceeding was fundamentally unfair or unreliable.'" *Wallace v. State*, 475 Md. 639, 656 (2021) (quoting *Newton*, 455 Md. at 355). A reasonable probability means "'there was a substantial or significant possibility that the verdict . . . would have been affected." *Mann*, 466 Md. at 491 (quoting *State v. Syed*, 463 Md. 60, 86-87 (2019)).

In the instant case, Mr. McGhee alleged that his attorney was ineffective for failing to object to the CSI-effect voir dire question, and thus for failing to preserve the issue for appeal. (E.395-403). When presented with a claim that counsel was ineffective because they failed to preserve an issue for appellate review, "*Strickland's* performance and prejudice prongs naturally overlap because the questions of whether counsel's performance was adequate and whether it prejudiced the petitioner both will turn on the viability of the omitted claims[.]" *Gross v. State*, 371 Md. 334, 350 (2002). This is so because the failure to preserve "an issue that is without merit does not constitute ineffective assistance of counsel." *Id.* "An advocate does render ineffective assistance of counsel, however, by failing to preserve . . . a claim that would have had a substantial possibility of resulting in a reversal of petitioner's convictions." *Id.* *See also State v. Thomas*, 325 Md. 160, 188 (1992) (holding, in a case where the petitioner

alleged that his trial attorney was ineffective for failing to preserve for appellate review the trial court's refusal to strike certain venire members for cause, that petitioner had not shown "an abuse of discretion by the trial judge that would have resulted in a reversal of his convictions on direct appeal"); *Testerman v. State*, 170 Md. App. 324, 343 (2006) (holding, in a case where the defendant alleged that his trial attorney was ineffective for failing to preserve a meritorious sufficiency argument for appellate review, that the defendant had proven prejudice because he had demonstrated that "in this appeal we would have directly reviewed and reversed the sufficiency of the evidence of appellant's conviction").

B. Standard of review.

"In reviewing a trial court's ruling on a petition for post-conviction relief, an appellate court reviews for clear error the [post-conviction] court's findings of fact." *Ramirez*, 464 Md. at 560. The post-conviction court's legal conclusions, on the other hand, are reviewed *de novo*. *Wallace*, 475 Md. at 653. Stated differently, this Court exercises its "own independent analysis as to the reasonableness, and prejudice therein, of counsel's conduct." *Id.* (quoting *Syed*, 463 Md. at 73).

C. Mr. McGhee's trial counsel's failure to object to the CSI-effect voir dire question amounted to deficient performance.

As explained previously, *Charles*, *Atkins*, and *Stabb* apply to all cases, including to cases that became final before those opinions issued. When counsel's conduct is viewed through the prism of those cases, none of which announced a

new rule or principle, the inevitable conclusion is that her performance was deficient.[14] *See Unger*, 427 Md. at 408 (explaining that if *Stevenson v. State*, 289 Md. 167 (1980) and *Montgomery v. State*, 292 Md. 84 (1981), which concerned the propriety of advisory-only jury instructions and which issued after Unger's convictions became final, had *not* announced a new rule, Unger would have had a "sound basis" for arguing that his trial attorney should have objected to the advisory-only instructions in his case and that the failure to object was deficient).

In *Charles*, the court asked the venire to rise "if you are currently of the opinion or belief that you cannot convict a defendant without 'scientific evidence,' regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law[.]" 414 Md. at 730. In this case, the court asked the venire: "Does any member of this panel believe that the State has got to present fingerprint evidence, DNA, blood sample evidence, ballistic evidence, any scientific evidence in order to convince you of the defendant's guilt? In other words, do you think the State has a requirement to do that in all cases?" (E.75). Like the question in *Charles*, the first part of the question posed in this case

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[14] The post-conviction court was not convinced by the argument that *Charles*, *Atkins*, and *Stabb* applied to Mr. McGhee's case and thus did not reach the deficiency prong with respect to this allegation of ineffective assistance. (E.513) ("Although at the time of Petitioner's trial, the CSI question was allowed, the Court believes the question must still be analyzed based on its prejudicial effect on the jury.") Because this Court's review of the deficiency prong is *de novo*, *Wallace*, 475 Md. at 653, and because this Court can affirm the post-conviction court's decision on any ground supported by the record, *Unger v. State*, 427 Md. 383, 403-04 (2012), it can review the deficiency prong of *Strickland* in light of *Charles*, *Atkins*, and *Stabb* even though the post-conviction court did not do so.

suggested that the jury's only option was to find Mr. McGhee guilty, regardless of whether the State produced certain scientific evidence, and its language was "not neutral," using the term guilty, rather than its alternative, "not guilty." Indeed in *Stringfellow v. State*, 199 Md. App. 141, 152-153 (2011), the Court of Special Appeals recognized that a voir dire question which asked, "Does any member of the panel believe that the State is required to utilize specific investigative or scientific techniques such as fingerprint examination in order for the defendant to be found guilty beyond a reasonable doubt?" ran afoul of *Charles*.[15]

The CSI-effect question in the instant case was also objectionable under *Atkins* and *Stabb*. Although those cases concerned jury instructions, their holdings are applicable to the voir dire context, as both this Court and the Court of Special Appeals have recognized. In its *Stringfellow* decision, this Court explained, "*Stabb* and *Atkins* discuss when it may be permissible for courts to pose a voir dire question or a jury instruction to counter what has been referred to popularly as the 'anti-CSI effect.' Suffice it to say, these cases hold that it is error to pose such a question or instruction as a pre-emptive measure (as was done in this case)." 425 Md. at 474, n.4. And, in *Armstead*, the Court of Special Appeals recognized that *Stabb* and *Atkins* "make clear, based on the 'inconclusive state of the scholarly legal and/or scientific research [ ] taken as a whole,' that Maryland disapproves of

[15] This Court overruled the Court of Special Appeals' preservation and harmless error holdings in its *Stringfellow* decision. It did not discuss the wording of the challenged voir dire question, however. Instead, it assumed for purposes of its harmless error analysis that the court erred in asking the question. *State v. Stringfellow*, 425 Md. 461, 469 (2012).

preemptive anti-CSI messages to the venire or the empaneled jury. There must be, at a minimum, some form of relevant misstatement(s) of the law or conduct by counsel for the court to issue an appropriate and curative CSI effect jury instruction or similar anticipatory grounds to ask a voir dire question." 235 Md. App. at 413-14. *Armstead* also recognized that *Stabb* clarified that even when an anti-CSI message is appropriate, "the message must be neutral, *i.e.*, the message must not convey to the jury that their only option is to convict, even if no forensic evidence linking the defendant to the crime(s) is adduced by the State. The message should (at least) include language indicating that a not guilty verdict is an alternative." *Id.* at 414-15.

The question the court posed to Mr. McGhee's venire was not neutral and did not include language indicating that a not guilty verdict was an acceptable alternative. It was also given preemptively: no one, including defense counsel, had misstated the law such that court needed to take curative steps. Furthermore, the question had the effect of minimizing the State's burden of proof and invading the province of the jury because it signaled to the venire before they were even seated that they could disregard the lack of forensic evidence.

Because the voir dire question in this case was objectionable under *Charles*, *Atkins*, and *Stabb*, defense counsel's failure to object amounted to deficient performance. At the post-conviction hearing, defense counsel was not asked why she did not object to the voir dire question. She did, however, testify that her theory of the case was that, in light of the lack of DNA evidence and fingerprint

evidence, the State did not have "conclusive evidence" that Mr. McGhee was the shooter, and she explained that her strategy was "to focus on the fact that the State didn't have enough to put Mr. McGhee there." (E.450-452, 458-460). That theory and strategy were directly undermined by the voir dire question, which among other things, told the jury it could disregard the lack of fingerprint and DNA evidence. Although it is true that there is "a presumption that counsel rendered reasonable assistance," *State v. Syed*, 463 Md. 60, 75 (2019), the failure of counsel to object to a voir dire question whose impact was to undermine her defense plainly fell below "prevailing professional norms," *id.*, and could not be justified by any trial strategy. Similarly, counsel's failure to object to a question whose impact was to poison members of the venire who might end up on the seated jury fell below professional norms and could not be justified by trial strategy. Accordingly, this Court must find that counsel's failure to object, and thus to preserve a meritorious issue for appellate review, was deficient.

The Court of Special Appeals concluded that Mr. McGhee had not met his burden of proving that his attorney's performance was deficient. In reaching that conclusion, the Court did not analyze his counsel's failure to object in light of *Charles*, *Atkins*, and *Stabb* because it did not believe those cases applied retroactively. (E.531-532, n.4). Rather, the Court noted that *Evans v. State*, 174 Md. App. 549 (2007), which involved the propriety of a CSI-effect jury instruction, was the only reported decision at the time of Mr. McGhee's trial, and it noted that Mr. McGhee had not presented any evidence "that the prevailing

professional norm at the time of his trial was to object to "CSI effect" messages to the venire or jury." (E.531).

As an initial matter, the intermediate Court's holding is fatally flawed because it did not take into account, as it should have, the fact that *Charles*, *Atkins*, and *Stabb* do in fact apply retroactively and therefore bear on the deficiency analysis. Furthermore, to the extent that *Evans* affects how this Court views counsel's conduct, it supports the conclusion that counsel's failure to object to the voir dire question amounted to deficient performance.

In *Evans*, the issue before the Court of Special Appeals was whether the trial court abused its discretion when it gave a CSI-effect instruction that was identical to the instructions at issue in *Atkins* and *Stabb*. 174 Md. App. at 562-71. Although the Court ultimately held that the trial court did not abuse its discretion in propounding the instruction, it did not put its stamp of approval on CSI-effect messages in all cases. Instead, its holding was limited to the facts of the case before it. Specifically, the Court explicitly relied on the fact that defense counsel suggested in their "robust and vehement" closing arguments that the State was required to produce certain scientific evidence. *Id.* at 570. Thus, the instruction served a curative function. Moreover, the Court cautioned that a CSI-effect instruction "will run afoul of the prohibition against relieving the State of its burden of proof where the instruction is predominant in the overall instructions and its relation to the reasonable doubt standard unclear." *Id.* at 571.

Obviously, at the voir dire stage of trial, Mr. McGhee's counsel had not suggested to the jury (nor did she suggest at a later time) that the State was required to produce scientific evidence; therefore, a curative message was unwarranted. Likewise, at the voir dire stage, the jury had not been instructed on reasonable doubt; therefore, the relation of CSI-effect message to the reasonable doubt standard was unclear. Given the emphasis the *Evans*' Court placed on the misleading nature of defense counsel's argument and given its caution that a CSI-effect instruction could in some instances relieve the State of its burden of proof, that case does not undermine Mr. McGhee's argument that his counsel's failure to object to the question was deficient; rather, it supports it. Any reasonably competent attorney should have extrapolated from *Evans* that the voir dire question was problematic and thus worthy of an objection.[16]

[16] It is worth noting that trial counsel in *Charles* objected to the CSI-effect voir dire question in 2006, well before Mr. McGhee's trial. *See Armstead*, 235 Md. App. at 422, n.15.

APPENDIX