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Antonio McGhee v. State of Maryland, No. 64, September Term 2021, filed October 24, 2022. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2022/64a21.pdf

CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL – "CSI-EFFECT" VOIR DIRE QUESTION

Facts:

In 2007, a jury convicted Antonio McGhee of the murder of Keith Dreher in the Circuit Court for Prince George's County. *McGhee v. State*, Sept. Term, 2007, No. 2828. After unsuccessfully appealing his conviction, *McGhee v. State*, 410 Md. 561 (2009), McGhee filed a petition seeking to vacate his convictions under the Uniform Postconviction Procedure Act.

One basis for McGhee's petition was the claim that he received ineffective assistance of counsel because his trial counsel failed to object to a "CSI-effect" question during voir dire of his jury pool.

The CSI effect describes a theorized effect of television crime scene dramas on jurors. It suggests that jurors may have higher expectations for scientific proof in criminal trials due to these popular television shows. At the time of McGhee's trial, the CSI effect was only addressed in dicta in one case from the Court of Special Appeals, which approved of the CSI-effect messaging. *Evans v. State*, 174 Md. App. 549 (2007). After McGhee's conviction became final, this Court addressed the CSI effect in a string of cases and held that CSI-effect messages from the bench can lead to reversible error because they can intrude on the jury's role to draw inferences about the State's evidence or lack of evidence. *See Charles v. State*, 414 Md. 726 (2010); *Atkins v. State*, 421 Md. 434 (2011); *Stabb v. State*, 423 Md. 454 (2011). In those cases, this Court held that, while CSI-effect messages from the bench are not per se improper, they are only permissible in limited situations, such as when they are provided as a curative instruction in response to a party's distortion of the law.

The post-conviction court granted McGhee's petition on June 11, 2020, and ordered a new trial. While the post-conviction court recognized that McGhee's trial counsel's conduct was

permissible in 2007, the post-conviction court concluded that McGhee had been prejudiced by the CSI-effect voir dire question.

The Court of Special Appeals reversed the post-conviction court's grant of a new trial in an unreported opinion. *State v. McGhee*, Sept. Term 2020, No. 638 (Md. Ct. Spec. App. Nov. 30, 2021).

Held: Affirmed.

The Court of Appeals held that because McGhee's trial occurred in 2007, his trial counsel's failure to object to a CSI-effect voir dire question was not assessed under *Charles*, *Atkins*, and *Stabb*, which were all decided in the years that followed his conviction. Under *Strickland v. Washington*'s "performance prong," counsel's effectiveness is evaluated based upon the professional norms that existed at the time of the contested action or inaction. 466 U.S. 668 (1984).

McGhee failed to demonstrate that, under the professional norms that existed at the time of his trial in 2007, his attorney provided constitutionally deficient representation by failing to object to a CSI-effect voir dire question. Trial counsel is not expected to foresee changes in the law. At the time of McGhee's trial, only one Maryland intermediate appellate court opinion had addressed the CSI effect, and that was in dicta involving a jury instruction. The fact that McGhee's counsel's trial strategy was to prove that McGhee was not the perpetrator did not overcome the presumption of effective assistance. Finally, other objective indicia, such as news articles and law review articles that existed at the time of McGhee's trial also failed to overcome this presumption.

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In the Matter of SmartEnergy Holdings, LLC, No. 1675, September Term 2021, filed October 31, 2022. Opinion by Ripken, J.

https://mdcourts.gov/data/opinions/cosa/2022/1675s21.pdf

CONSUMER PROTECTION DIVISION – MARYLAND TELEPHONE SOLICITATIONS ACT – ENFORCEMENT

CONSUMER PROTECTION DIVISION – MARYLAND TELEPHONE SOLICITATIONS ACT – IN GENERAL

CONSUMER PROTECTION DIVISION – MARYLAND TELEPHONE SOLICITATIONS ACT – PENALTIES

Facts:

From February of 2017 to May of 2019, SmartEnergy, an energy retail supplier, mailed to Marylanders six million postcards advertising its services. The postcards informed customers they were eligible for free electricity and a guaranteed-rate protection plan and indicated it was linked to the customers' then-current utility provider. However, in small print at the bottom of the postcard, customers were informed that SmartEnergy is a licensed supplier and that it was not affiliated with the customers' then-current utility company.

During this timeframe, SmartEnergy received over 100,000 calls from prospective customers in response to the postcards. Customers who enrolled in SmartEnergy's services were not provided with written contracts or contract summaries. Thereafter, the Public Service Commission ("Commission") received numerous complaints that SmartEnergy switched customers' utility service without their authorization, that their representatives portrayed themselves as being affiliated with the customers' then-current provider, that the bills were excessive, and that the customers were unable to cancel their service.

The Commission filed a complaint against SmartEnergy, contending that it systematically violated consumer protection laws. The complaint alleged that SmartEnergy sent misleading and deceptive mailing materials to customers that solicited phone calls, that SmartEnergy utilized a

misleading sales script over the phone, that it failed to monitor its agents' phone calls, and that it enrolled customers without reducing the agreement to a written contract signed by the customer.

Following an evidentiary hearing, a Public Utility Law Judge proposed an order to the Commission finding that SmartEnergy engaged in unfair, false, misleading, and deceptive marketing, advertisement, and trade practices. SmartEnergy appealed that proposed order, and the Commission affirmed the PULJ's findings of violations, in addition to finding that the Maryland Telephone Solicitations Act ("MTSA") was applicable. The Commission ordered SmartEnergy to issue refunds to all of the Maryland retail supply customers who were enrolled during the violation time period. SmartEnergy petitioned for judicial review in the Circuit Court for Montgomery County. That court affirmed the Commission's findings.

Held: Affirmed.

The Court of Special Appeals affirmed the Commission's holding that SmartEnergy violated the MTSA and that it engaged in systemic violations of Maryland consumer protection laws.

In concluding SmartEnergy's conduct was "telephone solicitation" as defined by the MTSA, the Court examined the legislative intent and purpose behind the statute, which is codified in CL § 14-2201(f). The statute provides that a telephone solicitation is an attempt by a merchant to sell goods or services to a consumer that is "(1) Made entirely by telephone; and (2) Initiated by the merchant." The Court noted the plain language of the MTSA requires two distinct elements to have taken place, only one of which specifies the requirement that the solicitation be by telephone. Therefore, the Court reasoned the language indicates that the initiation by the merchant is not limited to telephone and was applicable to SmartEnergy's conduct.

The Court further rejected SmartEnergy's arguments that its conduct was exempt from the MTSA's requirements because the consumer goods were purchased pursuant to a mailing material and there was a preexisting business relationship. The Court explained that, although the consumers called SmartEnergy in response to an examination of postcards received in the mail, the contents of those postcards did not contain the requisite information to be exempt from the MTSA. The Court similarly found there to be no preexisting business relationship despite SmartEnergy's assertion that its customers had an opportunity to review the postcards and conduct research before deciding to call them. Finally, the Court held that the Commission's penalty was not arbitrary or capricious.

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State of Maryland v. Niran Marquise Henry, et al., No. 1499, September Term, 2021; *State of Maryland v. Lateekqua Jackson,* No. 1500, September Term 2021; *State of Maryland v. Garrick L. Powell, Jr.*, No. 1501, September Term 2021, filed October 25, 2022. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2022/1499s21.pdf

CRIMINAL LAW – TIME OF TRIAL – CONSENT TO OR WAIVER OF DELAY

Facts:

Niran Marquise Henry, Lateekqua Jackson, and Garrick L. Powell, Jr., were charged with related criminal offenses and consented to consolidate their trials. Their joint trial in the Circuit Court for Anne Arundel County was scheduled for October 26, 2021, one day past the 180-day Hicks deadline. At the time the date was set, the parties, their attorneys, and the court all were unaware of the precise *Hicks* date due to COVID-19 shutdowns and confusion over whether the *Hicks* date was tolled. Moreover, coordinating the schedules of multiple attorneys and co-defendants made finding an agreeable trial date difficult.

At the status conference to set the trial date, Mr. Henry agreed to the date expressly through counsel while Mr. Powell stayed silent. The third co-defendant, Ms. Jackson, appeared later in the day and was informed of the date the others had chosen and agreed to the October 26 trial date expressly. Later, on the appointed trial date itself, all parties appeared. But when the State moved to postpone for good cause, the co-defendants moved to dismiss the indictments for failure to comply with the *Hicks* rule.

At a hearing after written briefing on the issue, the court granted the motions and dismissed all three indictments with prejudice, holding that the co-defendants needed to know the *Hicks* date in order to effectuate a knowing and voluntary waiver of the rule. The State noted this appeal, arguing that *State v. Lattisaw*, 48 Md. App. 20, 28–29 (1981), controls and the co-defendants consented expressly to the trial date.

Held:

Reversed as to Mr. Henry and Ms. Jackson; affirmed as to Mr. Powell.

The Court of Special Appeals reversed as to Mr. Henry and Ms. Jackson, holding that dismissal of their indictments was not an appropriate sanction for a violation of the *Hicks* rule requiring that defendants be brought to trial within 180 days after first appearance of counsel where a defendant, individually or through counsel, consented expressly to a trial date one day beyond

the 180-day period even though they were not actually aware that the date agreed to was beyond the 180-day period.

The Court of Special Appeals affirmed as to Mr. Powell, holding dismissal of his indictment was an appropriate sanction, even though he rejected proposed trial dates that fell before the 180-day deadline, and acquiesced silently when the court set the trial date that fell one day beyond the 180-day period. The *Hicks* rule requires express consent to go beyond the 180-day period, not implied or tacit consent.

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Jonathan D. Smith, Sr. v. State of Maryland, No. 283, September Term 2021, filed September 28, 2022. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2022/0283s21.pdf

CRIMINAL PROCEDURE – PROPER REMEDY – BRADY VIOLATION

Facts:

In 2001, appellant was convicted of felony murder and daytime house breaking, in connection with the murder of Ms. Adeline Wilford, in Talbot County, Maryland. In 2020, the Court of Appeals granted appellant's petition for a writ of actual innocence, based on newly discovered evidence, and remanded for a new trial. Appellant subsequently filed a motion to dismiss the charges against him. He asserted that the State's "willful misconduct" in suppressing favorable evidence that was material to the case violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) and "no lesser remedy would adequately cure the violations." He also contended that the charges should be dismissed under the federal Double Jeopardy Clause. The circuit court held a hearing and denied appellant's motion to dismiss, finding that a new trial was the proper remedy. In 2021, appellant agreed to a conditional *Alford* plea to the charges, with the right to appeal the circuit court's denial of the motion to dismiss. This appeal followed.

Held: Affirmed.

When there is a *Brady* violation, a new trial typically is the most severe sanction available. The extreme sanction of dismissal of an indictment is warranted only in rare cases. Even in the situation where a defendant shows willful misconduct by the State, dismissal is appropriate only when: (1) the misconduct results in irreparable prejudice; and (2) no less drastic alternative is available. Appellant did not show that the State's suppression of evidence at his new trial caused irreparable prejudice that could not be corrected by a new trial. The evidence that was suppressed has not been destroyed. Rather, it has now been turned over to appellant, who would be free to use it in a new trial.

Where an appellant's trial is reversed for a reason other than the legal sufficiency of the evidence, there is no double jeopardy bar to a retrial.

The circuit court properly determined that appellant was not entitled to dismissal of the charges on due process or double jeopardy grounds.

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Gwendolyn Nesbitt, et al. v. Mid-Atlantic Builders of Davenport, Inc., No. 895, September Term 2021, filed September 28, 2022. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2022/0895s21.pdf

VOLUNTARY DISMISSAL – STAY PENDING ARBITRATION

COLLATERAL ISSUES – CONFIRMATION OF ARBITRATION AWARD – ATTORNEYS' FEES

Facts:

Gwendolyn Nesbitt and Leeroy Nesbitt entered into a contract with Mid-Atlantic Builders of Davenport, Inc., for the purchase of residential property. Nearly three years later, the Nesbitts filed a complaint in the Circuit Court for Prince George's County alleging that the contract violated the disclosure requirements set forth in Md. Code (1974, 2015 Repl. Vol.), § 14-117(a)(3) of the Real Property Article ("RP"). Mid-Atlantic filed a motion requesting that the court either dismiss the case or compel arbitration. Mid-Atlantic also requested attorneys' fees pursuant to the arbitration provision in the contract.

The circuit court issued an order compelling arbitration and staying the case without deciding the attorneys' fees issue. During arbitration, Mid-Atlantic filed a counterclaim, again requesting attorneys' fees. The arbitrator concluded that Mid-Atlantic did not violate RP § 14-117, but did not decide the attorneys' fees issue, instead deferring to the court to decide when the confirmation award was confirmed.

Shortly after the arbitration decision was issued, the Nesbitts filed a notice of dismissal in the circuit court. Mid-Atlantic filed a motion requesting that the court strike the notice of dismissal, confirm the arbitration award, and award attorneys' fees to Mid-Atlantic.

The circuit court granted Mid-Atlantic's requests, and the Nesbitts appealed.

Held: Affirmed.

Although there is no case in Maryland directly on point, Md. Rule 2-506(a) is substantively similar to Fed. Rule 41(a)(1), and Maryland courts may therefore consider federal cases as persuasive authority in interpreting the rule. Additionally, both the Maryland Uniform Arbitration Act and the Federal Arbitration Act contemplate that, in the absence of a motion to vacate, modify, or correct the award, the court shall confirm the arbitration award. An Eleventh Circuit case, *PTA-FLA, Inc. v. ZTE USA, Inc.*, 844 F.3d 1299 (11th Cir. 2016), concerned a nearly identical fact pattern. In that case, the Eleventh Circuit held that, although the plaintiff could voluntarily dismiss its claims under Fed. Rule 41(a)(1), such dismissal did not divest the

trial court of jurisdiction to confirm the arbitration award. The Eleventh Circuit's interpretation of the federal rules and statutes is consistent with a reasoned interpretation of the relevant Maryland rules and statutes. Thus, confirmation of an arbitration award is a collateral issue which may be decided after the principal suit has been terminated. Accordingly, although the circuit court may have erred in striking the notice of dismissal, the court retained jurisdiction to confirm the arbitration award and consider Mid-Atlantic's counterclaim for attorneys' fees.

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Timothy P. Brower v. Carrie M. Ward, et al., No. 1720, September Term 2021, filed October 31, 2022. Opinion by Ripken, J.

https://mdcourts.gov/data/opinions/cosa/2022/1720s21.pdf

MORTGAGES AND DEEDS OF TRUST – FORECLOSURE – PROCEEDS OF SALE; TIMELINESS

JUDGMENT – FORM AND REQUISITES OF APPLICATION – IN GENERAL

JUDGMENT – REVISORY POWER

Facts:

Following the sale of his residential property at a foreclosure proceeding in April of 2021,

Timothy Brower ("Brower"), submitted a petition for payment of the sale's surplus proceeds. The Circuit Court for Worcester County granted Brower's petition, subject to any claims filed by persons or entities who hold superior interests in the sale's surplus proceeds. The Auditor of the Court submitted the report of the sale, documenting a surplus payable to Brower. The court subsequently entered an order ratifying the auditor's report. Thereafter, the U.S. Department of Housing and Urban Development ("HUD") filed a motion to reopen to intervene and claim the surplus proceeds. The court modified its order and allowed HUD to file a claim for the surplus. The auditor submitted a new report to distribute the surplus proceeds to HUD. Brower filed exceptions to that report, and the court overruled those exceptions and ratified the order.

Held: Affirmed.

The Court of Special Appeals held that the circuit court could exercise its revisory power to allow HUD to file a claim for surplus proceeds notwithstanding Md. Rule 14-216. Moreover, the Court concluded that because HUD's motion was timely pursuant to Md. Rule 2-535(a), the circuit court was permitted to exercise its discretion in reopening the judgment without first determining there to be fraud, mistake, or irregularity, as outlined in Md. 2-535(b). Finally, the Court found that the circuit court did nor err in granting HUD's motion due to equitable considerations.

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Parkway Neuroscience and Spine Institute, LLC v. Katz, Abosch, Windesheim, Gershman & Freedman, P.A., et al., No. 658, September Term 2021, filed September 30, 2022. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/cosa/2022/0658s21.pdf

EVIDENCE – EXPERT TESTIMONY – *DAUBERT-ROCHKIND* – MARYLAND RULE 5-702

Facts:

In June 2018, Parkway Neuroscience and Spine Institute, LLC ("PNSI" or "Appellant") sued its accounting firm—Katz, Abosch, Windesheim, Gershman & Freedman, P.A. ("Katz Absoch")—and its primary accountant—Mark Rapson (collectively, "Appellees") for accountant malpractice and negligent misrepresentation. PNSI is a mixed-specialty medical practice that provides treatment for brain, spine, and peripheral nervous system disorders. It hired Katz Abosch to provide tax, accounting, and other financial services. According to PNSI, Katz Absoch's negligence caused financial hardship that resulted in the departure of seven doctors from the medical practice. PNSI sought lost profits as a damages remedy. To establish lost profits, PNSI offered the testimony of Meghan Cardell—a Certified Public Accountant ("CPA")—as an expert in lost profits calculations. Appellees filed motions to depose Ms. Cardell, strike the lost profits claims, and exclude Ms. Cardell's testimony—all of which were denied.

When this litigation began in 2018, Maryland followed the *Frye-Reed* standard for admissibility of expert testimony. While this case was pending, the Court of Appeals replaced the *Frye-Reed* standard with the *Daubert* standard in 2020 with its opinion in *Rochkind v. Stevenson*. The *Daubert* standard considers the reliability of an expert's methodology as opposed to its general acceptance within the expert's professional community. Following the adoption of the *Daubert* standard, Appellees renewed their motions to strike the lost profits claim and exclude Ms. Cardell's expert testimony. The circuit court held a *Daubert-Rochkind* hearing to determine the admissibility of Ms. Cardell's expert testimony.

At the hearing, Ms. Cardell explained her qualifications and methodology. In addition to her education and CPA certification, Ms. Cardell had performed dozens of economic damages calculations, at least one of which for a medical practice. She used the "before-and-after" method to calculate lost profits. Under that method, she compared PNSI's performance before and after a certain benchmark period. She chose 2015 as the benchmark period because it reflected PNSI's profits prior to the departure of the doctors from the practice. Following the hearing, the circuit court granted Appellees' motion to exclude Ms. Cardell's expert testimony. The court first took issue with Ms. Cardell's lack of specialized experience calculating lost profits for unique medical practices. The court was also concerned with Ms. Cardell's selection of 2015 as the benchmark period, calling it "speculative." The court further questioned the quality of the information made available to Ms. Cardell and her testimony's usefulness to the jury.

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Held: Reversed.

The Court of Special Appeals held that the circuit court abused its discretion by incorrectly applying the *Daubert-Rochkind* standard to Ms. Cardell's testimony. While the admissibility of expert testimony is largely left to the discretion of the trial court, the court's decision may be reversed if it commits an error of law in exercising that discretion. In this case, the circuit court abused its discretion in finding Ms. Cardell unqualified to render an opinion based on her lack of specialized experience with limited liability company medical practices, finding Ms. Cardell's selection of 2015 as the benchmark unreliable, and assessing the adequacy of the available data against the admissibility rather than the weight of the evidence.

First reviewing Ms. Cardell's qualifications, the Court determined that Ms. Cardell was sufficiently qualified to express an opinion in this case based on her education and experience conducting economic damages—including lost profits—calculations. The Court explained that the trial court should not exclude an expert solely because the proposed expert is not the most qualified in the field or lacks specialization the court thinks appropriate. The Court rejected the notion that the knowledge required to assess a limited liability company medical practice was so vastly different than other business entities that it required exclusion of Ms. Cardell's testimony.

Next examining Ms. Cardell's methodology, the Court concluded that the before-and-after method of calculating lost profits was reliable. The circuit court took issue with Ms. Cardell's benchmark selection, failure to consider the impact of insurance reimbursement changes, failure to articulate accounting standards, changing calculations, and failure to calculate the lost profits attributable to each departing doctor individually. The Court reasoned that, unless the expert's data and assumptions are unrealistic and contradictory such that they suggest bad faith, an expert's testimony should be admissible. As opposed to impacting the admissibility of expert testimony, the soundness of data impacts the weight of the evidence. The trial judge's role in determining the reliability of an expert is primarily concerned with establishing the validity of his or her methodology—not the quality of data or conclusions reached. Since the before-and-after method used by Ms. Cardell is a reliable methodology, Appellees may explore such other issues with Ms. Cardell's data and assumptions on cross-examination.

Finally considering the connection between Ms. Cardell's methodology and her conclusions, the Court found that there was no "analytical gap" between the two. A failure to connect the dots between methodology used and conclusions reached can render an expert opinion inadmissible. Appellees' issues with the selection of the benchmark, consideration of insurance reimbursement rates, and accounting opinions, however, relate to Ms. Cardell's opinion itself—not the process by which Ms. Cardell reached her conclusions from the chosen methodology.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated October 4, 2022, the following attorney has been temporarily suspended:

GARY DON WRIGHT

*

This is to certify that the name of

MATTHEW EVAN FOX

has been replaced upon the register of attorneys in this State as of October 6, 2022.

*

By an Order of the Court of Appeals dated October 12, 2022 the following attorney has been disbarred by consent, effective October 31, 2022:

RACHAEL LEE ROBERTS

*

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