IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 0854

September Term, 2019

KELVIN SEWELL,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

On Appeal from the Circuit Court for Worcester County, Maryland

Hon. W. Newton Jackson III, Judge

Case No. 23-K-16-000289

BRIEF OF AMICUS CURIAE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF PETITIONER KELVIN D. SEWELL

Jonathan Smith
Dennis Corkery
Washington Lawyers Committee for
Civil Rights and Urban Affairs
11 Dupont Circle NW, Suite 400
Washington, D.C. 20036
(202) 319-1000
dennis_corkery@washlaw.org

David A. Goldenberg
David A. Miller
Alice A. Wang
Joshua W. Moore
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8400
alice.wang@sidley.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Scholarly Authorities

Other Authorities

STATEMENT OF INTEREST

Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) works to create legal, economic and social equity through litigation, client and public education and public policy advocacy since 1968. Although the WLC fights discrimination against all people, it recognizes the central role that current and historic race discrimination plays in sustaining inequity. The WLC often files amicus briefs on significant issues important to its mission, including police and prosecutorial misconduct. The WLC filed an amicus curiae brief in the prior appeal of this case and was co-counsel for Chief Sewell in his related federal civil rights lawsuit.

INTRODUCTION

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This right is fundamental because the heart of our judicial system is the premise that a full disclosure of facts is vital to justice. *See United States v. Nobles*, 422 U.S. 225, 231 (1975) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts.").

Prosecutors have enormous power in shaping the disclosure of facts at trial. If abused, prosecutorial power can significantly interfere with a defendant's rights to present his own witnesses. Prosecutors can use threats of perjury charges and grand jury hearings to intimidate defense witnesses into invoking their right against self-incrimination and refusing to testify. A prosecutor's "substantial government interference with a defense witness' free and unhampered choice to testify" violates the defendant's due process rights.

United States v. Tzeuton, 370 F. App'x 415, 419 (4th Cir. 2010) (quoting *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991)).

The risks and consequences surrounding prosecutorial interference with defense witness testimony cannot be overstated. By taking relevant and exculpatory information off the table for trial, such interference not only violates a defendant's procedural rights, but also heightens the risk that the defendant is wrongfully convicted based on a partial and biased disclosure of facts. The result is the erroneous convictions of innocent people, as well as an erosion of public confidence in the criminal justice system to produce just results through a fair process. Courts have a unique power and responsibility to safeguard against such prosecutorial misconduct. Because the court below failed to take adequate steps to protect the defendant's due process rights in this case, reversal is merited. The prosecution clearly intimidated a key defense witness, Kedrick Scribner, into refusing to testify. A new trial is necessary.

BACKGROUND

At Chief Sewell's first trial, Officer Tanya Barnes repeatedly testified that things were "unusual" the night that she and other officers responded to a call regarding a traffic incident in which Douglas Matthews, a local correctional officer, had struck two unoccupied vehicles several blocks from his house. *Sewell v. State*, 239 Md. App. 571, 581, 592 (2018). Barnes testified that Chief Sewell "'look[ed] directly at [her] . . . implying that he wanted [her] to take the call,'" and suggested that she had been pressured into taking the call to respond. *Id.* at 592. She also testified that, during a subsequent interview of Matthews at his home, Chief Sewell stepped in to answer two questions she had directed

at Matthews, and finally, that Chief Sewell directed her "to write [the report] as an accident report," telling her "that it wasn't a hit and run, and that the driver of the vehicle was not intoxicated or impaired." *Id.* This testimony was key to the prosecution's case because the conduct Barnes testified to formed the basis for the charge of interfering with the investigation of an accident for the personal benefit of Matthews, and "[t]he State Prosecutor's proof of Sewell's corrupt intent depended largely on two subordinate officers, McGlotten and Barnes, who testified that Sewell's handling of the Matthews' investigation was out of the ordinary and strongly implied that they disagreed with Sewell's decisions." *Id.* at 627.

In January 2019, following this Court's remand of Chief Sewell's first trial, Barnes recanted her testimony. Barnes told Chief Sewell: "I am so sorry for lying on you, Chief. Those two investigators told me that if I didn't lie, they were going to charge me with stealing five hundred dollars." Appellant's Br. at 19 (citing Sewell Aff. ¶ 5, Vol. 8, R. 145). Several weeks later, in February 2019, Barnes repeated her prior statements that she had been pressured into lying at the first trial, this time in the presence of Kedrick Scribner from the Baltimore City State's Attorney's Office, as well as Chief Sewell. *Id.* Scribner submitted an affidavit in which he recounted what Barnes had said: "I'm not going to let [the investigators] make me lie again. You're a good Chief, and you treated me good." *Id.* (citing Scribner Aff., Vol. 8, R. 151). After defense counsel alerted the State to these statements from Barnes recanting her previous testimony, the State convened a grand jury and called Scribner to testify.

After Scribner had already begun testifying before the grand jury, the prosecutors stopped questioning him in the middle of his testimony. Appellant's Br. at 20. Then, outside of the grand jury room, the prosecutors told Scribner's counsel, in front of Scribner, that they did not believe he was being truthful, and that they "felt it best" for him to speak with his counsel, offering Scribner the opportunity to go back to the grand jury to "amend his testimony"—implying he would face perjury charges if he did not. *Id.* (quoting Vol. 8, R. 185–186, State Opp. to Supp. Mot. to Dismiss at 4–5). Unsurprisingly, Scribner chose to invoke his Fifth Amendment privilege against self-incrimination and became unavailable as a defense witness. Although defense counsel raised this issue multiple times before the trial court, the trial court refused to hold an evidentiary hearing. *Id.* at 20–21. At the second trial, Barnes again testified for the prosecution. She again suggested that she was pressured to write the accident report by Chief Sewell and testified that Chief Sewell had answered two questions she had directed at Matthews, and that Chief Sewell had told her the incident was an accident and should be written up as such. Appellant's Br. at 6–7.

ARGUMENT

I. PROSECUTORIAL THREATS THAT PREVENT A DEFENSE WITNESS FROM TESTIFYING INTERFERE WITH THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

Threatening a defense witness with perjury is a violation of both a defendant's Sixth Amendment right to present witnesses in his favor and his due process right to present a defense at trial. *See Webb v. Texas*, 409 U.S. 95, 98 (1972) (Due Process); *State v. Stanley*, 351 Md. 733, 742 (1998) (Sixth Amendment). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present

a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). Specifically, a defendant's due process rights are violated when "governmental intimidation of a witness amounts to 'substantial government interference with a defense witness['s] free and unhampered choice to testify.'" *United States v. Moore*, 11 F.3d 475, 479 (4th Cir. 1993) (quoting *United States v. Saunders,* 943 F.2d 388, 392 (4th Cir. 1991)).

A. Intimidating Defense Witnesses to Refuse to Testify Constitutes Prosecutorial Misconduct.

Statements to a defense witness that they would be prosecuted for perjury can rise to the level of a constitutional violation if they are "intimidating or coercive." *Archer v. State*, 383 Md. 329, 355 (2004). When a defendant "demonstrates an improper threat or intimidation, the court must determine if the error was harmful or prejudicial." *Walker v. United States*, 2013 WL 5781579, at *7 (D. Md. Oct. 24, 2013). The error is harmless if the defendant was "not deprived of any favorable witness testimony by the prosecutor's actions." *Id.* This inquiry is a fact-specific one. *Stanley*, 351 Md. at 746.

Courts should look to three factors to determine whether a prosecutor's statements regarding perjury are intimidating or coercive. First, courts should determine whether the admonishment of perjury was general in nature or specifically designed to "quash significant testimony." *Id.* A general warning regarding perjury is likely not intimidating, but when a warning is specific or in response to particular testimony, it can be coercive. *See United States v. Vavages*, 151 F.3d 1185, 1190-91 (9th Cir. 1998) (holding that the

testimony's contradiction of the government's own witnesses "does not form a sufficient basis for the prosecutor's warning" of perjury). A warning made directly to or in the presence of a witness carries a higher risk of coercion than a warning only relayed through counsel. *See Campbell v. State*, 37 Md. App. 89, 100 (1977).

Second, courts should consider whether the witness was actually coerced to change his behavior. *See People v. Mancilla*, 250 Ill. App. 3d 353, 359 (1993). The prosecutor need not be the sole cause of the witness' refusal to testify but must be a "substantial cause." *In re Martin*, 44 Cal. 3d 1, 31 (1987). If a witness was willing and able to testify but decides to invoke his Fifth Amendment rights after the prosecutor's warnings about perjury, it is highly likely the prosecutor's statements caused the witness to decline to testify. *Cf. Archer*, 383 Md. at 355; *see also Webb,* 409 U.S. at 98 (holding that the trial judge's threatening remarks to refrain from lying effectively drove witness off of the witness stand and deprived the accused of due process under the Fourteenth Amendment). It is not the court's role to "speculate that the witness would have invoked his Fifth Amendment privilege regardless of the State's threat[,]" and it "must presume that the [] prosecutor's threat made the witness unavailable to testify." *State v. Feaster*, 184 N.J. 235, 261 (2005).

Third, courts look at the attendant circumstances surrounding the warning. *See Stanley*, 351 Md. at 746. For example, there is less justification for warning a witness who has legal counsel than an unrepresented witness. *See Feaster*, 184 N.J. 235 (noting that a perjury warning was unnecessary because, in part, the defendant had an appointed attorney). The circumstances may also extend to a prosecutor's refusal to grant immunity

to a witness where the witness clearly offers material exculpatory testimony. *See People v. Shapiro*, 50 N.Y.2d 747, 761 (1980) (finding the prosecutor's refusal to grant immunity "clearly erroneous" where the refusal, along with the prosecutor's remarks, procured witnesses' unavailability); *United States v. Chitty*, 760 F.2d 425, 429 (2d Cir. 1985).

State v. Feaster illustrates these principles. In *Feaster*, a key witness for the prosecution recanted his testimony before trial; the prosecutor then told the witness's attorney that there would be "considerations" if his client testified consistent with his recantation statement. 184 N.J. at 240. Thereafter, the witness withdrew his certified statement and invoked his privilege against self-incrimination. *Id.* The court held that the prosecutor's statements were a "thinly veiled threat to prosecute [the witness] for perjury if he testified in defendant's favor" and that such "interference with that witness's decision to testify violated defendant's state constitutional due process and compulsory process rights." *Id.* The court noted that "it is not the function of the State to save a defense witness from himself or to spare the court a supposed falsehood, at the expense of denying the court critical testimony." *Id.* at 259. Thus, the presumption is for material testimony to be presented for the factfinder. *Id.* at 259–60 ("The State may think that it alone knows the truth, but it is for the court to decide the truth, after both sides have presented their cases.").

B. Prosecutorial Misconduct, Particularly in the Form of Implicit Threats That Silence Witnesses, Interferes with Defendants' Right to a Fair Trial and Creates a Substantial Risk of Wrongful Convictions.

Prosecutorial misconduct is a grave issue, and interference with a defense witness's free and unhampered testimony is particularly serious because it infringes on a defendant's fundamental right to present witnesses in his own defense. Although our justice system is

fundamentally an adversarial one, the distribution of power in the criminal justice system is by no means equal. Prosecutors uniquely have the power to bring criminal charges against witnesses, including those for the defense. The defense has no comparable power against state witnesses.

Moreover, prosecutor's power and influence are heightened in certain settings such as the grand jury. *See* Honorable William J. Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1973) ("Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."). The grand jury is a closed setting in which prosecutors run the show, and "the rights of witnesses, when balanced against the broad powers of the grand jury, are severely attenuated." Bennett L. Gershman, *The "Perjury Trap,"* 129 U. PA. L. REV. 624, 634 (1981) (explaining that a witness summoned before a grand jury generally cannot challenge the questions as irrelevant or otherwise object to them). In such a setting, how the prosecutor interacts with witnesses, and what the prosecutor chooses to say to defense witnesses in particular, can be more coercive than interactions during a public, meaningfully adversarial setting such as trial. *See id.* at 631–32 (noting that the grand jury has "an unmistakable emphasis on ex parte investigation"). In such a setting, any implicit threat of a perjury prosecution or other retaliation, made face-to-face with a defense witness, can very easily turn a witness who willingly submitted an affidavit into one who invokes his Fifth Amendment right and refuses to testify.

If misused, the prosecution's power to bring perjury charges against defense witnesses deprives the defense of material evidence and leads to unfair trials. The consequences for a defendant can be extremely dire when a witness with significant

exculpatory information is coerced into silence as a result of threats of a perjury prosecution. Prosecutorial misconduct is "one of the most common factors that causes or contributes to wrongful convictions." Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for A Broken System*, 2006 WIS. L. REV. 399, 403 (2006) (citing studies); *See also* Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 577 (2017). As a recent example, a federal conviction in Kansas of a man who was imprisoned for nearly 23 years was recently overturned because the prosecutor in his case implicitly threatened a key exculpatory witness, telling him that she would "create complications for him" if he "got in her way." *Judge Dismisses Drug Case, Citing Prosecutor's Misconduct*, THE SEATTLE TIMES (Dec. 7, 2017), https://www.seattletimes.com/nation-world/judge-dismisses-drug-case-citing-prosecutors-misconduct. The witness did not testify, and the man was convicted. *Id.*

The effects of such prosecutorial abuse do not end with grave injustice in individual cases; it reverberates throughout the criminal justice system. It erodes public confidence in the judicial system by not only "undercut[ting] the fairness of the process" but "also call[ing] into question the legitimacy of substantive outcomes." Sarma, *supra*, at 576–77 ("When prosecutors infringe upon individual defendants' rights without recourse, respect for the system's integrity corrodes—and ethical prosecutors suffer the consequences ushered in by those who fail to abide by the rules."); *see* H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and A Modest Proposal*, 63 CATH. U. L.

REV. 51, 54 (2013) ("In a civil society, a prosecutor's deliberate decision to misuse his power usurps foundational trust in the judicial system.").

The risk of prosecutorial intimidation of defense witnesses is particularly pernicious because there are few checks on prosecutors' exercise of their discretionary power. There is widespread concern among scholars that it is too difficult for prosecutorial misconduct to come to light, and so few consequences attach when they do, that there is insufficient deterrence of future unethical conduct. *Id.*("[W]hen prosecutors abuse their power . . . they too often go unpunished and are therefore encouraged to repeat the unethical conduct."); *see id.* at 55 (noting that prosecutors "are rarely punished for their misdeeds through the traditional channels, such as by judicial condemnation, bar association sanctions, or criminal prosecution"); Sarma, *supra*, at 577 ("But, why does the problem of misconduct persist? The simple answer is that prosecutors who have violated ethical rules have not been held accountable.").

Thus, courts are in a unique position—and have a unique responsibility—to be vigilant and take appropriate steps to protect against the potential for such abuse, including by inquiring into legitimate allegations of such misconduct. *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. REV. 275, 289 (2004) (positing that the primary reason for other organizations' "'hands off' approach" to prosecutors is "the belief that internal controls and judicial oversight effectively and adequately regulate prosecutorial misconduct"); Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Supression, Dismissal, or Disipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1089 (1994).

II. REVERSAL IS REQUIRED IN THIS CASE.

The undisputed facts in this case, in conjunction with the verifiable facts proffered by the defense, show improper prosecutorial coercion against defense witness Scribner, and merit reversal of Chief Sewell's conviction. At the very least, the evidence was sufficient to trigger an independent inquiry by the trial court, which should have held an evidentiary hearing as requested by the defense.

First, the prosecution's motive behind the warning was to quash the specific testimony. *See Stanley*, 351 Md. at 746. Scribner had already been sworn in and had been testifying before the grand jury. The prosecution stopped questioning Scribner once it became clear that he was testifying to facts that were highly exculpatory for Chief Sewell and also indicated misconduct by the prosecutors and investigators in coercing Barnes to testify against Chief Sewell in the first trial. The prosecutors admonished Scribner, telling him they did not believe he was being truthful in his testimony, and even suggested that he go back into the grand jury to amend his testimony—in other words, change his story or else. *See* Appellant's Br. at 38.

Second, Scribner's refusal to testify was a direct consequence of the prosecution's threats of perjury. Scribner had already shown a willingness to speak through first providing an affidavit to the defense, and then by appearing before the grand jury and beginning testimony under oath. It was only after his conversation with prosecutors, who stopped him before his testimony concluded, that Scribner changed his mind and decided to invoke his Fifth Amendment right and refuse to testify further. This sequence of events strongly suggests that the prosecutors' conduct was the cause of Scribner's refusal

to testify. *See Webb*, 409 U.S. at 97 ("The fact that [the witness] was willing to come to court to testify in the [defendant's] behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of the witness's refusal to testify.").

Third and finally, the circumstances of the interaction further weigh toward prosecutorial misconduct. The prosecutors delivered their admonishment directly in the presence of Scribner despite his representation by counsel. Their conduct of first convening the grand jury, and then pulling him out of the grand jury to admonish him when his testimony supported Chief Sewell, was plainly threatening.

And importantly, given the context of this case, Scribner had ample reason to interpret the prosecutors' statements as threats. Chief Sewell's case did not start on a blank slate. This was the retrial of a highly publicized case in which there were already allegations of investigator misconduct in retaliation for a highly publicized civil rights suit that ultimately succeeded. *See* Appellant's Br. 11-18; Sheryl Gay Stolberg*, A Maryland Town Fires Its Black Chief, Exposing a Racial Rift*, N.Y. TIMES (Aug. 2, 2015). Because Scribner was aware of this history as a colleague of Chief Sewell's, he would have been in an especially vulnerable position to any attempts to silence him and would have had reason to be alert to any implicit suggestions by the prosecutors. Given the history of this case, Scribner had good reason to interpret the prosecutors' words to be a threat that he would be prosecuted for perjury—not for lying, but for coming to Chief Sewell's defense as an exculpatory witness. *See* Appellant's Br. 43–44 (describing a relationship between investigators in this case and colleagues at the Maryland State

Police against whom Chief Sewell and his co-plaintiffs had leveled charges of race-related misconduct, which could give rise to a retaliatory motive).

Moreover, the content of Scribner's testimony directly implicated prosecutorial misconduct in the first trial: Scribner had evidence that Barnes, "the State's most significant witness," had been coerced into making up false testimony against Chief Sewell. Appellant's Br. 2. That fact alone should have been cause for the court to make its own evidentiary inquiry into the issue, rather than rely solely on the discretion and statements of the prosecutor to assure itself that nothing untoward had occurred.

Scribner's absence as a defense witness was undoubtedly prejudicial to Chief Sewell. Scribner's testimony would have corroborated Chief Sewell's account that Officer Barnes had recanted her testimony, which bore directly on the charged conduct. It would have also supported the defense's concerns about misconduct in the entire investigation and prosecution of Chief Sewell. Facts such as these could have altered the entire course of trial, or even resulted in the dismissal of this case altogether.

Under these circumstances, at the very least, the court should have granted the defense an evidentiary hearing on these issues. *McNeil v. State*, 112 Md. App. 434, 465 (1996) ("[A] defendant is entitled to a hearing, if timely requested, to prove or dispel his claim of misconduct if he proffers *verifiable facts* amounting to 'some evidence tending to show the existence of' the State's bad faith"); *see Earp v. Ornoski*, 431 F.3d 1158, 1172 (9th Cir. 2005) (remanding case on habeas review for an evidentiary hearing where "the facts [the defendant] alleged may show that the prosecutor committed a constitutional due process violation by prejudicially dissuading [an important defense witness] from

testifying"). Instead, the court repeatedly and summarily dismissed defense's requests. *See* Appellant's Br. 21, 36. Based on the undisputed and proffered facts in this case, the defense more than met its burden and the trial judge erred in not holding an evidentiary hearing to inquire into the prosecutorial conduct that led to Scribner's refusing to testify.

CONCLUSION

Amicus respectfully urges this Court to grant Mr. Sewell's request to reverse and vacate the conviction below for the reasons in his opening brief.

Respectfully submitted,

Jonathan Smith
Dennis Corkery
Washington Lawyers Committee for
Civil Rights and Urban Affairs
11 Dupont Circle NW, Suite 400
Washington, D.C. 20036
(202) 319-1000
dennis_corkery@washlaw.org

David A. Goldenberg
David A. Miller
Alice A. Wang
Joshua W. Moore
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8400
alice.wang@sidley.com

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,783 words, excluding those sections exempted by Rule 8-503.

2. This brief was prepared in a proportionally spaced typeface in 13-point, Times font in compliance with Rule 8-112.

_____
David A. Goldenberg

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, the foregoing brief of *amicus curiae* was served electronically by the MDEC system and that two copies were sent via first-class mail, postage prepaid, to:

Barry Coburn, Esq.
1710 Rhode Island Avenue, NW
Second Floor
Washington, D.C. 20036
(202) 643-9472
barry@coburngreenbaum.com

Counsel for Appellant

Sarah David, Esq.
Office of the State Prosecutor
300 East Joppa Rd.
Towson, MD 21286

Criminal Appeals Division
Office of the Attorney General
200 Saint Paul Place, 17th Floor
Baltimore, MD 21202

Counsel for Appellees

_____
David A. Goldenberg