
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

BRIEF OF *AMICUS CURIAE*
HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC
IN SUPPORT OF PETITIONER KELVIN SEWELL

Ajmel Quereshi
Howard University School of Law
2900 Van Ness Street, NW
Washington D.C. 20008
(202) 806-8000
ajmel.quereshi@law.howard.edu

Counsel for Amicus Curiae

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STATEMENT OF INTEREST

Howard University School of Law Civil Rights Clinic has a long tradition of fighting for civil rights and reforms to the criminal justice system. The work of the Clinic reinforces the principles ingrained in the law school's history. As part of its work, the Clinic regularly files amicus briefs in federal and state courts. These briefs have concerned various issues related to the reform of the criminal justice system. This Court's decision regarding the prosecution of Kelvin Sewell has the potential to seriously impact the communities the Clinic regularly serves. All parties have consented to the filing of this brief.

INTRODUCTION

Historically, Black residents of Maryland's Eastern Shore have experienced unwavering levels of racial discrimination. Systemic discrimination has infected every aspect of society on the Eastern Shore, including the criminal justice system, which has had a devastating impact on African Americans. Despite this history, Kelvin Sewell was able to break through these barriers and become the City of Pocomoke's first Black police chief. Unfortunately, this victory was short-lived as Mr. Sewell was terminated from his position in retaliation for his allegations regarding persistent racial discrimination in the police department.

The retaliation did not end once he was illegally removed from office. The Office of the State Prosecutor (OSP) launched a campaign to find some basis to prosecute him, eventually resulting in the case before this Court today. Mr. Sewell's story, as devastating as it is, is made even more so by the fact that it is not uncommon. African Americans are

frequently the target of prosecutorial misconduct. Although this appeal cannot single-handedly undo the generations of discrimination that have persisted on Maryland's Eastern Shore, or stop the numerous instances of prosecutorial misconduct that occur across the country, it can save one man from this cycle of discrimination and abuse.

ARGUMENT

I. KELVIN SEWELL'S TRIAL WAS INFECTED WITH PROSECUTORIAL MISCONDUCT.

Before having his life upended, Kelvin Sewell enjoyed a decorated career in law enforcement, eventually being promoted to Chief of Police in Pocomoke in 2011.¹ Before that, he spent more than two decades as a police officer in Baltimore City, rising to level of sergeant in the City's Homicide Unit.² Pocomoke City thrived under Mr. Sewell's leadership. During his five-year tenure in Pocomoke, there were no homicides in four of the five years.³ This was no regular occurrence. After Mr. Sewell's termination, homicides resumed in 2017.⁴ However, his life irrevocably changed in 2015. Mr. Sewell supported a Black officer who alleged patterns of racial discrimination and harassment after, among other things, finding a bloodied deer tail on the hood of his car.⁵ When Mr. Sewell refused

¹ Justin Fenton, *Fired Eastern Shore Police Chief to Join Baltimore State's Attorney's Office as Investigator*, BALT. SUN, Mar. 23, 2016.

² *Id.*

³ Macrotrends, *Pocomoke City MD Murder/Homicide Rate 2005-2018*, <https://www.macrotrends.net/cities/us/md/pocomoke-city/murder-homicide-rate-statistics>.

⁴ *Id.*

⁵ DeNeen L. Brown, *Pocomoke City Agrees to Consent Decree in Settlement with Black Police Officers*, WASH. POST, Mar. 28, 2019.

to terminate the Black officer, he too faced harassment.⁶ In response, Mr. Sewell filed a complaint with the Equal Employment Opportunity Commission (EEOC) against the Pocomoke City Police Department.⁷ After which, the Pocomoke Police Department terminated Mr. Sewell's employment.⁸

In addition to filing an EEOC complaint, Mr. Sewell contacted OSP to investigate threats and harassment directed towards Black officers.⁹ Instead of pursuing this issue, the Office launched a campaign to find anything Mr. Sewell did while Chief of Police that could be classified as misconduct. OSP investigated allegations that Mr. Sewell engaged in a quid pro quo with the owner of an inn concerning a handful of bottles of vodka, whether Mr. Sewell used a City gas card for personal purposes, and whether Mr. Sewell ordered officers to prematurely close a drug investigation because he allegedly had a romantic relationship with the target's elderly mother.¹⁰ All of these allegations were eventually proven false.¹¹

After prodding from the State's Attorney, OSP pursued an investigation into Mr. Sewell's and a lieutenant's alleged misconduct during a 2014 traffic accident.¹² Throughout the investigation and subsequent trial, Mr. Sewell maintained that he handled

⁶ DeNeen L. Brown, *Racial Turmoil in Md.'s 'Friendliest Town' After Black Police Chief Is Fired*, WASH. POST, July 28, 2015.

⁷ *Sewell v. State*, No. 23-K-16-000289, slip op. at 1 (Md. Ct. Spec. App. Nov. 29, 2018).

⁸ *Id.*

⁹ Plaintiff-Intervenor's Complaint, *Savage, et al. v. Pocomoke City, et al.*, No. 16cv201 (D. Md. filed Oct. 19, 2016), at ¶ 41, <https://www.justice.gov/crt/case-document/file/923781/download>.

¹⁰ Appellant's Br., *Sewell v. State*, No. 0854 (Md. Ct. Spec. App.), at 17.

¹¹ *Id.*

¹² *Sewell*, slip op. at 1.

the traffic incident reasonably and consistent with the routine discretion afforded a police chief.¹³ As he highlighted, it is common for police chiefs to exercise discretion when determining whether to issue a traffic citation, detain a person, or test an individual for alcohol or other impairing substances.¹⁴ However, OSP ignored these points.¹⁵

The unusual nature of OSP's decision to pursue charges against Mr. Sewell is further highlighted by the fact that OSP has almost never pursued misconduct charges against police officers.¹⁶ Furthermore, of the cases investigated, almost all have involved concrete allegations of wrongdoing, rather than the pursuit of vague, unsubstantiated rumors.¹⁷ On the rare occasion that misconduct charges have been filed relating to a discretionary decision made by an officer, OSP has never pursued them.¹⁸ Until the prosecution of Mr. Sewell, OSP had prosecuted only one other police officer in the last twenty-five years for a non-financial crime.¹⁹ Finally, OSP's pursuit of Ms. Sewell contradicted the office's regular practice of closing an investigation once an officer has resigned.²⁰

¹³ *Id.* at 2.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 2.

¹⁶ Brief for National Organization of Black Law Enforcement Executives, et. al. as *Amici Curiae* Supporting Appellant, *Sewell v. State*, No. 23-K-16-000289 (Md. Ct. Spec. App. Nov. 29, 2018), at 12-13, http://washlaw.org/pdf/sewell_amicus.PDF.

¹⁷ See *id.* at 13 (stating that a police officer was prosecuted for violating the constitutional rights of two murder suspects, lying about this action to other law enforcement, and perjuring himself).

¹⁸ See *id.* at 13 (stating that “the ACLU is [not] aware of [any] other instance in which OSP prosecuted a police official for a decision about whether or how to charge an individual with a particular offense”).

¹⁹ *Id.* at 13.

²⁰ *Id.* at 13-14.

The misconduct continued once trial commenced, including during Mr. Sewell’s re-trial. OSP repeatedly elicited expert testimony regarding Mr. Sewell’s state of mind – the ultimate issue before the Court – in violation of established case law and Maryland Rule 5-704(b).²¹ In doing so, OSP repeatedly presumed facts not in evidence and moved for the admission of testimony based on nothing more than rank speculation.²² These tactics, though brazen, were consistent with the motivation behind OSP’s initial decision to prosecute – the punishment of Mr. Sewell at all costs.

II. Worcester County Has a Long and Troubling History of Racial Discrimination That Persists Today.

While OSP’s zealous pursuit of Mr. Sewell is relatively uncommon among investigations of other officers, its conduct falls in line with the history of racial discrimination against Black residents of Pocomoke City and greater Worcester County – including those who, like Mr. Sewell, raise complaints.

A. African Americans in Worcester County Have Been Discriminated Against for Over 300 Years.

Worcester County has a long, and unfortunate history of racial discrimination, dating back more than 300 years. In colonial Worcester County, slavery was the dominant source of labor.²³ After the ratification of the Thirteenth Amendment to the U.S. Constitution, racial tensions continued to increase as white Marylanders worried about the

²¹ Appellant’s Brief, at 23-33; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 5-704(b).

²² Appellant’s Brief, at 23-33.

²³ Barry Neville & Edward Jones, *Slavery in Worcester County Maryland, 1688–1766*, 89 MD. HIST. MAG. 319, 326 (1994).

growing population of free Blacks.²⁴ In response, whites erected barriers to social and economic improvement for Blacks which, in turn, kept black residents in a subservient position.²⁵ For example, white elites only hired Blacks for what they considered “[B]lack jobs – typically agricultural labor, semiskilled industrial labor, or domestic service work.”²⁶ These practices forced many Black residents into low-paying jobs.²⁷ As a result, Black residents could only socially and economically advance in predominantly Black communities.²⁸

The barriers were not limited to employment. For example, Black residents, through an 1867 legislative act, were barred from testifying, thereby excluding them from participating in the judicial process.²⁹ Likewise, in 1962, the Eastern Shore delegation to the Maryland legislature ensured that Black residents would remain excluded from public

²⁴ KEVIN CONLEY RUFFNER, *MARYLAND’S BLUE AND GRAY: A BORDER STATE’S UNION AND CONFEDERATE JUNIOR OFFICER CORPS* 21 (1997).

²⁵ See Martin Ruef & Ben Fletcher, *Legacies of American Slavery: Status Attainment Among Southern Blacks after Emancipation*, 82 SOC. FORCES 445, 446 (2003) (“This institutional stability was reflected in the postbellum South by the employment of ex-slaves on the plantations of former masters, in oppressive sharecropping arrangements, and in other forms of agricultural peonage.”); see also Margaret L. Andersen, *Discovering the Past/Considering the Future: Lessons from the Eastern Shore* (University of Delaware: Oct. 2019), www1.udel.edu/BlackHistory/discoveringthepast.html (stating that new patterns quickly began to emerge that perpetuated a racially oppressive system of labor and instigated new forms of racial violence).

²⁶ Ruef and Fletcher, *supra* note 25, at 453.

²⁷ *Id.* at 447.

²⁸ *Id.* at 453.

²⁹ Andersen, *supra* note 25.

accommodations by amending legislation prohibiting race discrimination in public accommodations to exclude counties on the Eastern Shore.³⁰

B. African Americans Continue to Face Discrimination in Government in Pocomoke City and Worcester County.

Were this not enough, Black residents have been perpetually excluded from participating in local government. Until 2017, a Black individual had never been elected to a countywide position in Worcester County's 250-year history.³¹ As the twenty-first century began, there was hope that racial barriers would begin to fall, but African Americans continue to confront many of the same problems.

In 2015, Pocomoke unlawfully cancelled a City Council election after Sheila Palmer, a black woman, declared her candidacy to represent a majority Black District.³² Ms. Palmer attempted to run after the previous candidate withdrew.³³ Rather than extending the deadline for candidates to file the necessary papers, as the City's Charter requires, the city installed Dale Trotter, a white man, to sit as councilmember for the District.³⁴

³⁰ Peter B. Levy, *Civil War on Race Street: The Black Freedom Struggle and White Resistance in Cambridge, Maryland, 1960-1964*, 89 MD. HIST. MAG. 291, 299 (1994).

³¹ Charlene Sharpe, *Worcester's First Black Elected Official Profiled in Autobiography*, THE DISPATCH, Sept. 26, 2017, <https://mdcoastdispatch.com/2017/09/26/worcesters-first-black-elected-official-profiled-in-biography/>.

³² Amended Complaint, *Savage v. Pocomoke City*, No. 1:16-cv-00201-JFM (D. Md. Mar. 16, 2016) (No. 23), at ¶ 40, n. 2, <https://www.courtlistener.com/recap/gov.uscourts.mdd.340475/gov.uscourts.mdd.340475.23.0.pdf>.

³³ Julian Sadur, *Pocomoke Residents Hold Press Conference Calling for Mayor's Resignation*, WMDT.COM, July 25, 2015, <https://www.wmdt.com/2015/07/pocomoke-residents-hold-press-conference-calling-for-mayors-resignation/>.

³⁴ *Id.*; Amended Complaint, *supra* note 32, at ¶ 40.

C. Complaints of Racial Discrimination Are Ignored by Government Officials.

When residents attempt to counteract racially discriminatory practices, they face blockades and backlash. The case of Fredrick Demby is a prime example. Mr. Demby alleged that he had experienced racial discrimination at his workplace, a trucking company in Worcester County, after he was repeatedly called the “n-word” by white co-workers, was forced to take on more work than his white counterparts, and was harassed for bringing these concerns to superiors.³⁵ As the Court noted, the Worcester County Sherriff’s Office ignored his complaints and misrepresented doing so in an official report on the matter.³⁶ The Court described the report as a “classic example of a carefully-constructed document designed to give the appearance that care was taken to conduct a thorough investigation when in truth, the report was just for cover.”³⁷ In the words of the Court, the case involved “the ugliest and most distressing incident of racial bigotry and hatred[.]”³⁸ The *Demby* case symbolizes a malicious pattern within Worcester County, where government officials minimize, cover up, or deny blatant racial hostility and discrimination.

One of the more recent cases exposing this pattern involved former Pocomoke City Police Officer Franklin Savage. Mr. Savage, along with several other officers, filed suit against multiple state and local agencies alleging widespread racial discrimination and retaliation in their workplace.³⁹ Mr. Savage highlighted the conduct of State Attorney Beau

³⁵ *Demby v. Preston Trucking Co.*, 961 F. Supp. 873, 876-77 (D. Md. 1997).

³⁶ *Id.* at 878.

³⁷ *Id.* at 878, n. 9.

³⁸ *Id.* at 877.

³⁹ *Savage v. Maryland*, 896 F.3d 260, 267 (4th Cir. 2018).

Oglesby during an April 2014 meeting in which Mr. Oglesby repeatedly used the “n-word.”⁴⁰ Mr. Oglesby, in turn, prohibited Mr. Savage from testifying in any future cases.⁴¹ This decision directly interfered with Mr. Savage’s ability to properly perform his job as the ability to testify in court is vital to an officer’s performance of his duties.⁴² The following month, the police department fired Mr. Savage.⁴³ Nonetheless, Mr. Oglesby was not held liable for violating Mr. Savage’s rights.⁴⁴

Mr. Sewell is just one of many Black residents in Worcester County who have been silenced due to the mishandling of racially discriminatory claims. When racism perpetuated by government officials is not adequately addressed, it sends a clear message to residents of color that their voices are not heard, their rights are not valued, and they are not worthy of justice.

III. The Failure to Address Prosecutorial Misconduct Has Severe Consequences, Particularly for African Americans.

A. Prosecutorial Misconduct Seriously Threatens the Legitimacy of the American Criminal Justice System.

Prosecutorial misconduct constitutes a serious threat to the legitimacy of the American criminal justice system. As the dissent in *United States v. Olsen* stated: “[t]here is an epidemic of *Brady* violations abroad in the land.”⁴⁵ This understanding is not unique.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 266.

⁴⁴ *Id.* at 270.

⁴⁵ *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting).

A former prosecutor, remarking on the epidemic of prosecutorial misconduct, stated that: “[t]he concept of fairness...is generally no longer found in the prosecutor’s office.”⁴⁶

Numerous statistics justify these sentiments. Between 2002 and 2013, the Department of Justice (“DOJ”) investigated more than 650 cases of misconduct, characterizing more than 400 as “reckless[]” or “intentional.”⁴⁷ These violations have serious consequences for victims. The National Registry of Exonerations found that in 2018, exonerated defendants spent a record number of years in prison for crimes they did not commit.⁴⁸ Official misconduct contributed to 107 of the 151 exonerations recorded in 2018, which is a record for a single year.⁴⁹

According to the Center for Prosecutor Integrity, despite the prevalence of prosecutorial misconduct, the likelihood that those responsible will be held accountable in these cases is less than two percent.⁵⁰ A separate study on prosecutorial misconduct in

⁴⁶ CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 4 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf>.

⁴⁷ Nick Schwellenbach, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, Project on Gov’t Oversight, Mar. 13, 2014, <https://www.pogo.org/report/2014/03/hundreds-of-justice-department-attorneys-violated-professional-rules-laws-or-ethical-standards/>.

⁴⁸ NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2018 1 (2019), <https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf>.

⁴⁹ *Id.* at 1-2.

⁵⁰ *See* Center for Prosecutor Integrity, www.prosecutorintegrity.org/registry/database (last visited Nov. 12, 2019).

Massachusetts found over 100 incidents that led to the reversal of a conviction, but only 2 instances in which prosecutors were punished for their unlawful conduct.⁵¹

This lack of accountability can be illustrated through various other examples. In Billings, Montana, former federal prosecutor James Seykora had an extensive history of misconduct, including making secret deals with key witnesses in exchange for cooperation and testimony.⁵² In spite of these deals, he allowed witnesses to testify that they did not remember “any promises” in exchange for their testimony.⁵³ LaShawn Jermaine Johnson, a Black man, served nine years for cocaine trafficking as a result.⁵⁴ Yet, Mr. Seykora was allowed to prosecute federal drug offenses until he voluntarily retired to become a municipal judge.⁵⁵ Six years after Mr. Seykora’s retirement, the only discipline he received was a \$313 fine and a public letter of reprimand.⁵⁶

Similarly, in Kern County, California, former District Attorney Ed Jagels conducted a campaign of prosecutorial misconduct with minimal consequences.⁵⁷ During the 1980’s,

⁵¹ Shawn Musgrave, *Scant Discipline Follows Prosecutors’ Impropriety in Massachusetts*, New Eng. Ctr. for Investigative Reporting, Mar. 6, 2017, <https://necir.org/2017/03/06/scant-discipline-follows-prosecutors-impropriety-massachusetts/>.

⁵² Brooke Williams et al., *How the Secretive “Discipline” Process for Federal Prosecutors Buries Misconduct Cases*, THE INTERCEPT, Oct. 10, 2019, <https://theintercept.com/2019/10/10/justice-department-federal-prosecutors-accountability/>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Giovanna Luevano, *Wrongful Convictions and Prosecutorial Misconduct*, Cal. Innocence Project, June 19, 2018, <https://californiainnocenceproject.org/2018/06/wrongful-convictions-and-prosecutorial-misconduct/>.

Mr. Jagels prosecuted approximately fifty people as his office created a “mass child molestation hysteria.”⁵⁸ As part of the campaign, law enforcement officers, social workers, and prosecutors coerced false testimony from young children.⁵⁹ In most cases, the prosecution presented no physical evidence to support the convictions.⁶⁰ Of the fifty people arrested, thirty were convicted or pled guilty.⁶¹ Vicente Benavides Figueroa, who spent twenty-five years on death row before his conviction was finally overturned, was the “[twenty-sixth] completely innocent person wrongfully convicted by Mr. Jagels’s office.”⁶² Despite the overwhelming number of wrongful convictions, Mr. Jagels was never removed from office or disciplined.⁶³ Instead, he retired in 2009 with the title “the prosecutor’s prosecutor.”⁶⁴

The substance, as well as the frequency, of the conduct is deeply troubling. In Mr. Sewell’s case, OSP abused its authority when it departed from its regular practice to pursue a frivolous misconduct claim against Mr. Sewell. This misconduct continued through the trial below as the prosecution knowingly introduced facts not in evidence and repeatedly elicited improper testimony. OSP’s retaliatory actions have deprived him of his job and reputation, and now threaten him with further harm if his conviction is upheld. To allow

⁵⁸ Gary Hunter, *California DA Says Incarceration Rate a Measure of His Success – Despite Wrongful Convictions, Prosecutorial Misconduct*, Prison Legal News, June 15, 2009, <https://www.prisonlegalnews.org/news/2009/jun/15/california-da-says-incarceration-rate-a-8232measure-of-his-success-despite-wrongful-convictions-prosecutorial-misconduct/>.

⁵⁹ *Id.*

⁶⁰ Luevano, *supra* note 57.

⁶¹ Hunter, *supra* note 58.

⁶² Luevano, *supra* note 57.

⁶³ *Id.*

⁶⁴ *Id.*

Mr. Sewell’s conviction to stand would constitute an acquiescence to a troubling national trend.

B. African Americans, Like Mr. Sewell, Are Particularly Vulnerable to the Consequences of Prosecutorial Misconduct.

While prosecutorial misconduct is far-reaching, African Americans are particularly vulnerable, as they are disproportionately present at almost all stages of the criminal justice system due to over-policing, implicit bias, and mass incarceration. Although African Americans represent only 13 percent of the population, they account for 37.5 percent of those sentenced to prison.⁶⁵ Likewise, although 7.7 percent of Black men between the ages of 25 and 54 are incarcerated, only 1.6 percent of their white counterparts face the same fate.⁶⁶

Prosecutorial misconduct perpetuates African Americans’ overrepresentation in the criminal justice system, burdening them at every stage of the process; in many cases, even before the trial commences. For example, in *Connick v. Thompson*, John Thompson, an African American man, was charged with the murder of a prominent businessman in Louisiana.⁶⁷ Due to the amount of publicity the murder charge received, victims of an

⁶⁵ United States Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Nov. 13, 2019); Fed. Bureau of Prisons, *Inmate Race*, Nov. 2, 2019, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

⁶⁶ Jeff Guo, *America Has Locked Up So Many Black People It Has Warped Our Sense of Reality*, WASH. POST, Feb. 26, 2016, <https://www.washingtonpost.com/news/wonk/wp/2016/02/26/america-has-locked-up-so-many-black-people-it-has-warped-our-sense-of-reality/>.

⁶⁷ *Connick v. Thompson*, 563 U.S. 51, 54 (2011).

unrelated robbery accused Mr. Thompson of their attack.⁶⁸ To prosecute Mr. Thompson, the State took a swath of fabric from the robbery victim's pants with the robber's blood on it and had it tested.⁶⁹ The test revealed that the robber's blood type was B; Thompson's blood type was O.⁷⁰ The prosecutor withheld the then-potentially exculpatory evidence from Mr. Thompson's counsel, and he was subsequently convicted of the robbery.⁷¹

Concerned with his perceived credibility as someone convicted of robbery, Mr. Thompson's counsel decided that he should not testify in his own defense at his murder trial, which resulted in a murder conviction and death sentence.⁷² One month before Mr. Thompson was scheduled to be executed, a private investigator discovered the undisclosed evidence, tested Mr. Thompson's blood, and found it did not match the blood from the victim's pants in the robbery case.⁷³ As Mr. Thompson explained, "[i]f a private investigator hired by a generous law firm hadn't found the blood evidence, I'd be dead today."⁷⁴

Prosecutorial misconduct affecting African Americans is also prevalent in jury selection. Despite the prohibition on race discrimination in jury selection, prosecutors continue to strike qualified Black jurors at disproportionate rates. A recent and poignant

⁶⁸ *Id.* at 54–55.

⁶⁹ *Id.* at 55.

⁷⁰ *Id.* at 55–56.

⁷¹ *Id.* at 55.

⁷² *Id.*

⁷³ *Id.* at 56.

⁷⁴ John Thompson, *The Prosecution Rests, But I Can't*, N.Y. TIMES, April 9, 2011, <http://www.nytimes.com/2011/04/10/opinion/10thompson.html>.

example was discussed in the Supreme Court’s decision in *Flowers v. Mississippi*.⁷⁵ The defendant, Curtis Flowers was tried six times by the same prosecutor for four murders that occurred in 1996.⁷⁶ After the first three trials, the Mississippi Supreme Court reversed each conviction due to “numerous instances of prosecutorial misconduct”, including repeated acts of racial discrimination against Black jurors.⁷⁷ During the sixth trial, which was reviewed by the U.S. Supreme Court, Flowers was convicted again after the State “struck five of the six Black prospective jurors.”⁷⁸ The Mississippi Supreme Court affirmed the conviction in a 5-4 decision.⁷⁹

The Supreme Court held that the Mississippi Supreme Court clearly erred when it found that the State’s peremptory strikes were not “motivated in substantial part by discriminatory intent.”⁸⁰ The Court relied on several critical facts, namely that the State struck forty-one of the forty-two prospective Black jurors over the course of the six trials; it struck five out of six Black jurors during the sixth trial; and it “engaged in dramatically disparate questioning of Black and white prospective jurors[.]”⁸¹

Racially motivated prosecutorial misconduct pervades courtrooms once trial commences. In a recent Fourth Circuit case, the prosecutor referred to an African American defendant as “King Kong” to an all-white jury during his opening and closing statements.⁸²

⁷⁵ 139 S. Ct. 2228 (2019).

⁷⁶ *Id.* at 2234.

⁷⁷ *Id.* at 2235.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Bennett v. Stirling*, 842 F.3d 319, 321 (4th Cir. 2016).

The prosecutor continued, referring to the defendant as “caveman,” a “mountain man,” a “monster,” a “big old tiger,” and “[t]he beast of burden.”⁸³ As the court noted, the “King Kong” comment was “especially” problematic, for it “drew on longtime staples of racial denigration.”⁸⁴

Like Mr. Flowers’s case, OSP has spent years relentlessly pursuing charges against Mr. Sewell. While Mr. Sewell has not yet lost two decades of his life to this case, OSP has shown that it will continue to pursue Mr. Sewell under the guise of fighting corruption unless the prosecutorial misconduct in this case is addressed and his conviction is overturned.

At every stage of the criminal justice system, African Americans are vulnerable to the harms of prosecutorial misconduct. Despite his background in law enforcement and esteemed reputation, Mr. Sewell was not immune to this phenomenon. By charging Mr. Sewell with criminal misconduct, the Office of the State Prosecutor acted in accordance with Worcester County’s long-standing tradition of systemic racial discrimination and prejudice. The prosecution intended to punish Mr. Sewell for daring to challenge the barriers that have long excluded African Americans from prominent positions on Maryland’s Eastern Shore. Given the pervasiveness of prosecutorial misconduct throughout the nation and African Americans’ particular vulnerability to its adverse effects, it is imperative that the Court examine OSP’s decision to pursue this case, as well as its conduct once the case commenced, with the utmost scrutiny.

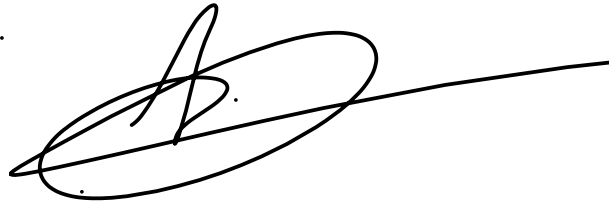
⁸³ *Id.*

⁸⁴ *Id.* at 325.

CONCLUSION

For the reasons discussed above, *amicus curiae* respectfully request that the Court of Special Appeals overturn Mr. Sewell's conviction.

Date: March 23, 2020

A handwritten signature in black ink, appearing to read 'Ajmel A. Quereshi', written over a horizontal line.

Ajmel A. Quereshi
Civil Rights Clinic
Howard University School of Law
2900 Van Ness Street, NW
Washington, DC 20008
Phone: (202) 806-8000
Email: ajmel.quereshi@howard.edu

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,899 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
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Ajmel A. Quereshi

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2020, the foregoing brief of *amicus curiae* was served electronically by the MDEC, and within one business day, two paper copies will be mailed to:

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

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



Ajmel A. Quereshi