COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X

PEOPLE OF THE STATE OF NEW YORK

Indictment Nos.: 1535-88/1290-88

- against -

MARTIN H. TANKLEFF,

Defendant.

----------X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SANCTIONS OR FOR A SPECIAL PROSECUTOR

On August 22, 2005, agents of the Suffolk County District Attorney's Office ("DA") traveled to Florida and attempted to coerce a seventeen-year-old witness, who has provided information inculpating Mr. Tankleff, to speak with them by threatening to arrest him if he declined to do so. Up until Tankleff filed his 440 petition, the Suffolk County District Attorney's Office ("DA") had simply refused to investigate the substantial new evidence presented to it by Tankleff's counsel. Since that time, the DA and its agents have engaged in a pattern of witness intimidation and prosecutorial misconduct. The DA's most recent action, intimidating a defense witness with threats of arrest, has so plainly crossed a line — both constitutionally and ethically — that Mr. Tankleff requests that the Court exercise its inherent authority and sanction the DA accordingly. Alternatively, Mr. Tankleff renews his motion for the appointment of a special prosecutor.

FACTUAL BACKGROUND

On August 3, 2005, Mr. Tankleff filed a second § 440 motion, presenting the Court with evidence discovered since the close of the evidentiary hearing: a sworn affidavit from Joseph Guarascio, the seventeen-year-old son of Joe Creedon, stating that during the course of several conversations, Creedon admitted to him that he murdered Seymour and Arlene Tankleff. Along with filing his motion, Tankleff asked the Court to reopen the evidentiary hearing to take Guarascio's testimony.

A few weeks later, Detectives Warkenthien and Flood, two agents of the DA's Office, traveled from New York to Florida, where they tracked Guarascio down at his girlfriend's house. They showed Guarascio their badges and said they wanted to speak with him about his affidavit. See Affidavit of Joseph Guarascio, dated Aug. 25, 2005 ("Guarascio Aff. Aug. 2005"); Affidavit of Joseph Guarascio, dated Sept. 20, 2005 ("Guarascio Aff. Sept. 2005"), at ¶ 2; Affidavit of Kelly Osha, dated Aug. 22, 2005 ("Osha Aff."). Guarascio told the two men that he did not want to talk to them without his mother present. Guarascio Aff. Aug. 2005; Guarascio Aff. Sept. 2005, at ¶ 3. Yet the men were not willing to accept Guarascio's desire to wait for his mother, and started questioning him about his affidavit. Again, Guarascio stated that he would not talk to them without his mother there. Guarascio Aff. Aug. 2005. Ultimately, the detectives lied to Guarascio, saying that defense attorney Bruce Barket and this Court had sent them to speak with him. Guarascio Aff. Aug. 2005. When Guarascio once more refused to speak with them, the detectives threatened to arrest him on the spot unless he agreed to talk. Guarascio Aff. Aug.

2005; Guarascio Aff. Sept. 2005, at ¶ 3. The arrest threat was overheard by two witnesses, including the mother of Guarascio's girlfriend. Osha Aff.[1]

ARGUMENT

In Washington v. Davis, 388 U.S. 14, 19 (1967), the United States Supreme Court held that a defendant has a constitutional right to present witnesses on his behalf. More importantly, a defendant must be allowed to do so "without fear of retaliation against the witness by the government." United States v. Dupre, 117 F.3d 810, 823 (5th Cir. 1997) (citing Webb v. Texas, 409 U.S. 95, 98 (1972)).

Although this right is specifically found in the Sixth Amendment right to compulsory process, the Supreme Court held that the right is so fundamental that it is guaranteed by the Due Process Clause of the Fourteenth Amendment. Washington v. Davis, 388 U.S. at 19. The government must afford a defendant fundamental due process rights not only at trial, but also during post-conviction proceedings. See Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (narrowest-grounds opinion of O'Connor, J.) (holding that the Due Process Clause applies to state clemency proceedings); Rohan v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003) (Due Process Clause applies to federal habeas proceedings); see also Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (discussing fundamental fairness mandated by the Due Process Clause when states provide for the avenue of collateral relief); Oken v. Warden, 233 F.3d 86, 94-95 (1st Cir. 2000) (assuming "that due process requirements of fundamental fairness apply to state post-conviction proceedings").

[1] The fact that the detectives improperly threatened Guarascio with arrest is evidenced by two sworn statements and is undisputed at this point. If the DA in response to this motion provides sworn statements denying the threat was made, there would then be a disputed issue of fact and the Court should hold an evidentiary hearing to resolve the dispute.

While a due process violation does not arise when the prosecution merely interviews a potential defense witness in hopes of obtaining his testimony, Webb v. Texas, 409 U.S. at 98, prosecutors cannot be permitted to harass or threaten witnesses. See People v. Webb, 601 N.Y.S.2d 127 (N.Y. App. Div. 1993) (stating that when the government emphasizes warnings to the point "where they are transformed instead into instruments of intimidation," it violates due process). Indeed, threats against witnesses are "intolerable." United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980).

Such intimidation need not result in the witness refusing to testify to rise to the level of a due process violation. See People v. Arocho, 379 N.Y.S.2d 366, 368-69 (N.Y. Sup. Ct. 1976) (finding misconduct when a prosecutor threatened a defense witness with jail and a fine for failure to appear at the district attorney's office for an interview); see also People v. Maynard, 337 N.Y.S.2d 644, 649-50 (N.Y. App. Div. 1972) (Stevens, P.J. and Murphy, J., dissenting) (arguing that threatening a defense witness with arrest could only result in intimidation and was "calculated to have a chilling effect on their attitudes and testimony," warranting reversal of defendant's conviction). Instead, governmental interference occurs where a defense witness may reasonably interpret a government official's comments as a threat of prosecution. See United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979). Moreover, it is clearly established that "law enforcement officers cannot threaten a defense witness with prosecution or with adverse legal consequences. Any action by officers which a reasonable witness could interpret as a threat of prosecution amounts to a constitutional violation." McMillan v. Johnson, 878 F.Supp. 1473, 1514 (M.D. Ala. 1995) (rev'd in part on other grounds, 88 F.3d 1554 (11th Cir. 1996)).

These restrictions on prosecutorial conduct merely comport with a prosecutor's ethical obligations. A prosecutor is more than a mere advocate for an ordinary party to a controversy.

Instead, a prosecutor represents a sovereignty "whose obligation to govern impartially is as compelling as its obligation to govern at all." Berger v. United States, 295 U.S. 78, 88 (1935). A prosecutor's interest, therefore, "is not that it shall win a case, but that justice shall be done." Id. And in insuring justice, he "must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness." People v. Zimmer, 51 N.Y.2d 390, 393 (N.Y. 1980).

Accordingly, prosecutors are "charged with the responsibility of presenting competent evidence fairly and temperately, not to get a conviction at all costs." People v. Mott, 94 A.D.2d 415, 418 (N.Y. App. Div. 1983). Thus, a prosecutor may investigate facts and interrogate witnesses with "earnestness and vigor" and while he may "strike hard blows," he "is not at liberty to strike foul ones." Berger, 295 U.S. at 88. It is as much a prosecutor's duty to refrain from using improper methods as it is to use legitimate ones. Id.

In this case, Mr. Tankleff is entitled to fair post-conviction proceedings that afford him all of the protections of due process and that comport with all of the DA's ethical obligations. Instead, by threatening Joseph Guarascio with arrest, the DA has violated Tankleff's fundamental due process right to present witnesses without governmental interference and it has lost sight of the fact that Mr. Tankleff is entitled to a full measure of fairness.

The DA was well aware that Mr. Tankleff had filed a motion with this Court, seeking to call Mr. Guarascio as a witness to testify to his sworn statement that Joseph Creedon told him that Creedon had murdered Seymour and Arlene Tankleff. And yet, the DA's agents traveled from New York to Florida, to track down seventeen-year-old Guarascio at his girlfriend's house and threatened to arrest Guarascio unless he agreed to talk. This threat was a transparent attempt to influence Guarascio's impending testimony. Nothing could have been more calculated to

have a chilling effect on Guarascio's attitude and testimony than threatening to arrest him if he declined to comply with the dictates of the DA's agents. And any reasonable witness, much less an impressionable seventeen-year-old, would have interpreted an arrest threat as a threat of prosecution.

Moreover, this latest act does not stand alone. Defense counsel has previously described for the Court the laundry list of improper conduct on the part of the DA, including its intimidation of Glenn Harris and Brian Scott Glass and its refusal to collect evidence. See Reply Memorandum of Law In Support of Defendant's Motion To Vacate His Convictions Pursuant to C.P.L. § 440, September 21, 2005. But litigation does not end merely because the DA does not like the fact that defense counsel has the temerity to investigate who actually murdered Seymour and Arlene Tankleff and to produce evidence of Marty Tankleff's innocence to this Court, or because the DA apparently likes even less that Tankleff has brought to the Court's attention evidence of improper and over-zealous conduct by the DA and its agents. See Letter from Leonard Lato to the Honorable Stephen L. Braslow, September 26, 2005 (in unauthorized filing with the Court, the DA pleads with the Court to end this litigation, because it takes offense with the fact that Tankleff's counsel have called the Court's attention to improper tactics by the DA). Unless and until Marty's convictions are vacated and he is released or granted a new trial, the defense will continue to represent him by producing new evidence as it becomes available and by demanding that the DA comply with its obligations.[2]

[2] This includes continuing to point out the DA's attempts at revisionist history. As just one example, in its June 2005 Post-Hearing Memorandum in Opposition to Martin Tankleff's C.P.L. § 440 Motion to Vacate His Murder Convictions ("DA Opp."), the DA asserted that Robert Gottlieb, Tankleff's trial attorney, misled Creedon into falsely signing a sworn affidavit, and asked the Court to credit Creedon's hearing testimony over Gottlieb's hearing testimony. See DA Opp. at 108-09, n.52. This can only mean that the DA was asking the Court to find Gottlieb's testimony, which he gave under oath, to have been false. And yet in its recent letter to the Court, the DA claims it has never suggested Gottlieb committed perjury and is shocked and surprised that Tankleff's counsel would say that it had done so. See Letter from Leonard Lato to the Honorable Stephen L. Braslow, September 26, 2005, at 2.

Because Mr. Tankleff's constitutional rights have been violated, the situation calls for a "stern rebuke and repressive measures." Berger v. United States 295 U.S. at 85. As this Court has the authority to punish attorney misconduct and to devise and make new processes to carry into effect its powers, see Judiciary Law §§ 2-b(3), 90(2), 753(A), it should sanction the DA for this egregious misconduct. See In re Wong, 710 N.Y.S.2d 57, 60-61 (N.Y. App. Div. 2000) ("The principle that attorneys are subject in the first instance to the power and control of the courts is also firmly embedded in New York jurisprudence, as an inherent power recognized by our Constitution as well as a statutory power reflected in the regulations by which attorneys are disciplined"). Numerous courts have dismissed indictments (at trial) and overturned convictions (on appeal) when the government has interfered with defense witnesses. See, e.g. People v. Levandowski, 780 N.Y.S.2d 384, 386 (N.Y. App. Div. 2004) (reversing defendant's convictions and ordering a new trial based on the prosecutor's "pervasive" misconduct); People v. Mott, 465 N.Y.S.2d 307, 308 (N.Y. App. Div. 1983) ("The deliberate and pervasive pattern of prosecutorial misconduct…compels reversal and a new trial").

Here, Mr. Tankleff asks the Court to sanction the DA by granting his motion for a new trial. In the alternative, since this latest example of improper and over-zealous conduct by the DA – threatening to arrest a witness – demonstrates the DA's lack of objectivity, Tankleff asks that the Court grant his prior motion for a special prosecutor. See Memorandum in Support of Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor, dated Aug. 9, 2004; Memorandum in Support of Renewed Motion to Disqualify District Attorney Thomas J. Spota and the Office of the District Attorney and to Appoint a Special Prosecutor, dated March 21, 2005 (detailing DA's conflicts of interest

and improper conduct prior to this most recent egregious example of interference with a witness).

Respectfully submitted,

STEPHEN L. BRAGA
COURTNEY GILLIGAN
BAKER BOTTS LLP
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
(202) 639-7700

BARRY J. POLLACK
DAWN E. MURPHY-JOHNSON
Collier Shannon Scott, PLLC
Washington Harbour, Suite 400
3050 K St., N.W.
Washington, D.C. 20007-5108
(202) 342-8472

BRUCE BARKET
666 Old Country Road
Garden City, N.Y. 11530
(516) 745-0101