



mentioned. The detectives identified themselves as detectives who were from Suffolk County and who were investigating the Tankleff case, and that they wanted to ask Mr. Guarascio some questions concerning the affidavit he provided in support of defendant's motion to reopen the hearing. Mr. Guarascio indicated that he would not speak to them without his mother present. The detectives asked Mr. Guarascio if he would step outside so that they could speak in private, but Mr. Guarascio refused. Mr. Guarascio alleges that the detectives said they were sent there by Mr. Barket, defendant's attorney, and by the court, and that Mr. Guarascio would be arrested if he refused to speak with them. Mr. Guarascio's mother eventually arrived and told the detectives that her son refused to speak with them.

The People have provided an affidavit by one of the detectives which in essence says that they never threatened to arrest Mr. Guarascio if he refused to speak with them.

Mr. Guarascio did testify at the hearing, and it would appear that even if there was any attempt at overreaching or intimidation by the detectives, it had no effect on Mr. Guarascio's willingness to testify, or on his testimony.

As was held in People v. Webb, 195 A.D.2d 614:

Although a defendant has the right to present witnesses in his defense (see, Washington v Texas, 388 US 14), and government conduct which substantially interferes with the free and unhampered decision of a potential defense witness to testify violates due process (see, People v Shapiro, 50 NY2d 747), not every contact between a government agent and a potential defense witness constitutes a "substantial interference" with the choice to testify (cf., People v Booker, 145 AD2d 564; People v Kuss, 122 AD2d 599; People v McRoy, 121 AD2d 566). Due process is violated only when warnings by a government agent to a potential defense witness are "emphasized to the point where they are transformed instead into instruments of intimidation" (People v Shapiro, *supra*, 50 NY2d, at 762).

The court does not see that the defendant has made a sufficient showing that the witness was intimidated to the point where it

actually affected his willingness to testify. To the contrary, this witness appeared twice for this hearing, the first time when it was postponed due to the assistant district attorney's sudden illness, and again for the hearing at which he testified. Indeed, at the hearing it only appeared to this court that this witness was afraid of retribution by his father against him and his family. There was no indication at all that this witness was or could be intimidated by the detectives. In fact, during his cross examination, he appeared to enjoy attempting to toy with the assistant district attorney over which lines of a document he was asked to review and about the details of his criminal record<sup>1</sup>. This is not characteristic of a person who can be intimidated by law enforcement officials.

The defendant also argues that this incident coupled with their past allegations of witness intimidation and other alleged transgressions by the DA and his agents, all compel this court to disqualify the DA.

The detectives in this incident did what the defense has been asking the DA to do, and that is to investigate their assertions that others committed the murders for which the defendant was convicted. Here it would start with interviewing the witness who allegedly had evidence which could exculpate the defendant. However, the detectives were met with a stone wall when they attempted to interview Mr. Guarascio. Even if they may have tried to aggressively coax the witness into telling them what he knows is not viewed by this court as an attempt to prevent this witness from testifying. They were not threatening the witness with prosecution or some other penalty if he did testify.

Moreover, there has been no assertion that the witness, who is seventeen years old had a right to have his mother present when being questioned by the detectives. The defendant has not pointed to any Florida law which would provide the witness with any such protection. Indeed, at under New York law, he has no such right.

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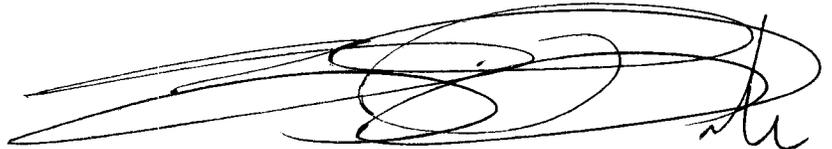
<sup>1</sup>Mr. Guarascio's record is relatively minor consisting of being convicted of stealing a compact disc with a friend of his. He was sentenced to probation which he apparently violated and was then sentenced to participate in a "boot camp" type of program.

Contrary to defendant's assertions, the conduct as alleged by the defendant, even if accepted as true, coupled with what the defendant has alleged as past transgressions by the DA and his agents, does not warrant the disqualification of the Office of the Suffolk County District Attorney in these proceedings.

Accordingly, the motion is denied.

The foregoing shall constitute the decision and order of the court.

ENTER,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

STEPHEN L. BRASLOW - J.C.C.