LAW OFFICE
OF
MICHAEL COARD
ONE LIBERTY PLACE
1650 MARKET STREET
SUITE 3652
PHILADELPHIA, PA 19103
E-MAIL: MichaelCoard@msn.com
TELEPHONE: (215)552-8714
FACSIMILE: (215)552-8525

December 31, 2009

Senator Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Specter:

First of all, I gratefully thank you for inviting me to testify before the Senate Committee on the Judiciary- Committee on Crime and Drugs regarding "Federal Efforts to Address Witness Intimidation at the State and Local Levels." I am honored, as I am sure the other invitees are, to be here.

I have been a trial lawyer for nearly 20 years, a civic activist for more than 15 years, a local radio show host for over 10 years, and a university adjunct professor for approximately five years. And it is because of those roles that I can unequivocally say that the best way- in fact the only way- for the federal government to address witness intimidation at the state and local levels is by adhering to the Constitution of the United States of America. Stated another way, the federal government must make sure that it does not break the law in order to make the law.

The United States Constitution in the Sixth Amendment and the Pennsylvania Constitution in Article I, Section 9 mandate that a person accused of a crime has the fundamental right "to be confronted with the witnesses against him" (or her). I mention this because one of the first actions always considered in the commendable attempt to protect against witness intimidation is the condemnable attempt to allow illegal hearsay in as evidence in a trial or hearing. The erroneous rationale is that the most effective way to stop witness intimidation is to allow police officers or other persons to testify in court about what they allegedly heard someone else- who is not in court- say. Not only is that unconstitutional, it is also unfair.

In Pennsylvania, including obviously Philadelphia, there is case law and statutory law already on the books that, under certain legally sanctioned circumstances, allow for non-testifying witnesses' (i.e., hearsay issue-related witnesses') statements to be entered in to evidence. One example is Rule 803 of the Pennsylvania Rules of Evidence. Moreover,

numerous longstanding Pennsylvania appellate court decisions permit such throughout the criminal court process- most notably, inter alia, at preliminary hearings wherein hearsay objections by defense attorneys are often a complete waste of breath.

Furthermore, in cases wherein witnesses do appear in court but purportedly are so intimidated that they testify in a manner that contradicts their previous statements to police against defendants, there also are laws already on the books that, once again under certain legally sanctioned circumstances, allow for those earlier inculpatory prior inconsistent statements to be used against defendants regardless of what those witnesses later testify to in court. Two examples are Rules 607 and 613 of the aforesaid Pennsylvania Rules of Evidence. And there are longstanding Pennsylvania appellate court decisions that also allow such.

Accordingly, there is absolutely no need for federal involvement in terms of creating law or expending limited resources. Neither is there absolutely any need for creating more state law. Instead, there is simply a need to more intelligently, hence efficiently, enforce state law that already exists.

In addition to the aforementioned state laws that already permit certain hearsay statements or hearsay issue-related statements to be entered in to evidence, there are also state laws that already protect victims of witness intimidation. And those laws are found in Pennsylvania crimes code sections 4952 (Intimidation of Witnesses or Victims) and 4953 (Retaliation Against Witness, Victim, or Party), both of which can be charged as felonies.

We all must and should have genuine sympathy for victims of witness intimidation, certainly when violence results and especially when death results. But the federal government should not be in the business of engaging in unlawful (i.e., unconstitutional) behavior in an attempt to protect the public from criminals' unlawful (i.e., murderous and otherwise violent) behavior. The constitution must and should apply to the law-abiders as well as to the law-breakers. After all, this *is* America.

I would be remiss if I failed to address what actually led to this hearing. And that is the Philadelphia Inquirer's apparently well-intentioned but frightfully inflammatory and journalistically incomplete four-part series from December 13-16, 2009.

It was frightfully inflammatory in its unnecessary use of phrases such as "***blood splashed***," "witness intimidation... (as) an ***epidemic*** in Philadelphia... (that)... ***pervades*** Philadelphia criminal courts... (which are in a) ***crisis***," and also defendants "beating cases... (and) escaping convictions with ***stunning regularity***."

It was journalistically incomplete in its failure to fairly acknowledge an essential principle of American criminal jurisprudence, which is that a person who is arrested is always presumed innocent. As stated to me by Troy H. Wilson, Esquire, a noted criminal and civil court litigator and the former chairman of the Philadelphia Bar Association's Criminal Justice Section, "The Inquirer's articles were based on a flawed premise, which is that people released on so-called technicalities were guilty. However, the presumption of innocence is paramount and continues even after a person's case has been discharged whether due to the District Attorney's delay or any other reason." In addition, asserted Wilson, defendants do not automatically get off scot-free during those (actually) relatively few times when cases are dismissed as a result of witnesses' failure to appear. As he makes clear, "The District Attorney has the legal wherewithal to merely and easily file a motion to re-arrest a defendant on the very same dismissed charges in such cases. It's as simple as that."

The Inquirer directed most of the blame for this supposed epidemic and crisis on criminal defense attorneys- the men and women who serve as vigilant watchdogs to make sure that the state and federal constitutions are respected and that the local, state, and federal governments are barred from unconstitutional violations. The newspaper claimed that "defense lawyers routinely exploit the court system's chaos... by delay(ing) cases to wear down victims and witnesses and seek spurious postponements if they know prosecution witnesses are in court and ready to go." The moniker "Philadelphia special" was used in part four of the series to describe this kind of unethical tactic. However, prominent defense counsel George H. Newman, Esquire, indicated to me that in his more than three decades as a criminal trial lawyer, he has never heard of such a name or concept. And in my nearly two decades, neither have I. And that is because it does not exist. Mr. Newman made another and much more key point about the series in general when he said that "The Inquirer's statistical analysis is unrealistic, since it includes preliminary hearings. As all lawyers and judges know, the District Attorney consistently overcharged arrested persons, filed baseless criminal accusations, and prosecuted unprovable cases." Moreover, remarked Newman, the articles "are filled with statistical misrepresentations, panicky innuendos, and some worst-case anecdotes."

In connection with baseless criminal accusations and unprovable cases, another distinguished criminal trial attorney, namely Charles A. Cunningham who is the First Assistant in the Defender Association of Philadelphia and has been a member of the Pennsylvania bar for 35 years, pointed out to me that the District Attorney often accuses and jails factually innocent people. He noted the recent case wherein someone allegedly claimed to have been attacked by three persons, which resulted in three men being arrested, detained, and jailed when they could not afford to pay bail. However, after three months- i.e., about 90 days- when the preliminary hearing was finally held, the complainant identified only one of the three as an attacker. The second defendant was

actually a good Samaritan who had attempted to intervene on behalf of the victim and the third defendant was merely present with 20 others near the scene. Why didn't the District Attorney investigate the facts before, in effect, sentencing these two defendants to unwarranted and lengthy jail time? Although these two were ultimately released as a result of the unrebutted exculpatory evidence at the preliminary hearing, they lost a quarter of a year of their lives that can never be replaced and for which they will never be compensated. And they, as well as many other similarly situated persons, are cavalierly lumped in to the Inquirer's gang of defendants who are supposedly "beating cases... (and) escaping convictions with ***stunning regularity***."

As mentioned in Mr. Cunningham's final comments, even if the criminal justice system is completely broken it is not because of what the Inquirer contends. Instead, it is because of the system that refuses to address "the real issues that cause crime to occur in the first place"- obvious issues such as the lack of education and employment.

While there is no crisis, there is a problem, even if just a comparatively few witnesses are intimidated. But with every problem, there is always a solution. And that solution- without the need for journalistic "hair on fire, sky is falling" alarmism- is quite simple. In fact, any, some, or all of the following could immediately be implemented:
1) Housing, transportation, protection, and/or financial incentives for witnesses before trial;
2) Relocation for witnesses after trial;
3) Separate courtroom waiting rooms for witnesses;
4) Community policing/community prosecuting, coalition-building with ex-cons, local athletes, and local Hip Hop celebrities in order to persuade citizens (especially those in the approximately 15-25 age range) that cooperating with law-enforcement to protect one's own neighborhood does not constitute "snitching"; and/or
5) Education, job training, employment opportunities in high crime neighborhoods in order to discourage criminality, which would reduce crime and which in turn would reduce even the need for witnesses.

In conclusion, I again thank the esteemed Senator Specter for inviting me to testify at this committee hearing regarding primarily the purported crisis of witness intimidation in Philadelphia. And I end my testimony with a question: If there is so much witness intimidation- meaning evidence ostensibly substantial enough to justify arresting, charging, and jailing so many persons with that serious crime, why then are more than seven out of ten persons accused of that offense found not guilty or otherwise freed?

Respectfully submitted,

MICHAEL COARD
MC/ic