

Defense lawyer turns to stats in bid to clear Timothy Flaherty

By: Brandon Gee July 23, 2015



Boston's Martin G. Weinberg is employing an interesting bit of data analysis in an attempt to scuttle the federal prosecution of fellow prominent criminal defense lawyer Timothy R. Flaherty of Cambridge.

According to federal prosecutors, Flaherty — on behalf of a client accused of a hate crime — paid the purported victim \$2,500 to tell state prosecutors he was no longer interested in pursuing the case and to ignore their calls. The victim alerted law enforcement

instead and participated in a sting operation.

Flaherty allegedly continued to tell the victim to continue to “blow off” prosecutors and investigators, even as the victim progressively told Flaherty that he was receiving calls not only from state authorities, but also the U.S. Attorney's Office and FBI.

Flaherty was indicted May 26 on “tampering with a witness to a *possible* federal civil rights offense,” according to a news release (emphasis added).

In a filing, Weinberg argues that the Supreme Court's 2011 ruling in *Fowler v. United States* requires a “reasonable likelihood” that an *actual* federal investigation or prosecution would in fact be impeded or interfered with before someone can be prosecuted for violating the federal witness tampering statute.

“Strikingly, the United States Sentencing Commission reports that in the years 2012-2014 there was only a single prosecution in the District of Massachusetts for civil rights violations, and only three in all of the district courts within the First Circuit,” Weinberg's motion states. “Nationally, there were only 58 civil rights prosecutions in 2014, 58 in 2013 and 53 in 2012.”

Furthermore, Weinberg's motion continues, the federal hate crimes statute “prohibits prosecution under the statute ‘except under the certification in writing of the Attorney General, or a designee’ that the State does not have jurisdiction, the State has requested that the federal government assume jurisdiction, or that a state verdict left ‘demonstrably unvindicated’ federal interests in eradicating violence motivated by bias, or that a federal prosecution is in the public interest and necessary to secure substantial justice.”

The motion adds: “The underlying reality is that the alleged ‘hate’ crime was being prosecuted by the Middlesex District Attorney's Office, that the prosecution was pending at all times that correspond to each communication alleged in the above-captioned indictment, that the state prosecution had not resulted in a trial, verdict or sentence that could be viewed as leaving federal interests unvindicated, and, further, that the context of the underlying offense — a 1:1 verbal dispute where the alleged assault occurred as the state defendant drove off and where the evidence of ‘hate’ came only from the victim's allegations of what the state defendant said as they communicated does not, inherently, evoke ‘substantial’ federal interests.”

On that basis, Weinberg is requesting records from the U.S. Attorney's Office “demonstrating the unlikelihood of any federal investigation and/or prosecution.”

In a letter responding to Weinberg's request for additional discovery, Assistant U.S. Attorneys Robert A. Fisher and S. Theodore Merritt write that “*Fowler* does not apply to the present case because there was an investigation commenced by federal authorities on December 23, 2014. Relevant communications had already reached federal authorities and, therefore, the *Fowler* ‘reasonable likelihood’ standard established to address hypotheticals and unknowns is not applicable.”

The case is scheduled for an Aug. 19 status conference.