CREATE INCENTIVES TO COOPERATE BY PROTECTING AND REWARDING COOPERATORS AND STIGMATIZE AND SEPARATELY PUNISH OBSTRUCTION OF JUSTICE

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I. INTRODUCTION: CRIMINAL CONSPIRACIES, A CODE OF SILENCE AND WITNESS INTIMIDATION

Most nations and international organizations today recognize that criminal conspiracies pose greater threats to society than the actions of individuals. We have only to scan the headlines of any major newspaper in any country to see examples of criminal organizations and their impact on our nations. From violent organizations like Italian Mafias and drug cartels, to private armies of entrenched political groups in developing countries, to smaller, but insidious conspiracies that corrupt public officials, organized criminal activity has become a fact of modern life. Almost 50 years ago the United States Supreme Court summarized the danger of criminal conspiracies as follows: *"[C]ollective criminal agreement--partnership in crime--presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often… makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise."*[1]

The damaging impact of these criminal organizations has resulted in increasing international cooperation and the adoption of international agreements such as the UN Convention Against Transnational Crime (UNTOC)[2] and the UN Convention Against Corruption (UNCAC).[3] Such Conventions recognize that if left unchallenged by law enforcement, criminal organizations pose significant dangers to the foundations of our very institutions of government.

Standing in opposition to modern criminal conspiracies are the law enforcement systems of our individual countries. As we all know, because of our strong commitment to due process and the rule of law, we require formal evidence be presented in court before someone can be convicted of a crime. So we must develop

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[1] Callanan v. U.S., 364 U.S. 587, 593-594 (1961).

[2] In the Foreword to the UNTOC, UN Secretary General Kofi-Annan described the threats to civil society by criminal conspiracies in these words: "Arrayed against these constructive forces, however, in ever greater numbers and with ever stronger weapons, are the forces of what I call "uncivil society". They are terrorists, criminals, drug dealers, traffickers in people and others who undo the good works of civil society. They take advantage of the open borders, free markets and technological advances that bring so many benefits to the world's people. They thrive in countries with weak institutions, and they show no scruple about resorting to intimidation or violence. Their ruthlessness is the very antithesis of all we regard as civil. They are powerful, representing entrenched interests and the clout of a global enterprise worth billions of dollars, but they are not invincible."

[3] The preamble to UNCAC describes some of the dangers posed by official corruption as the reason for member states joining UNCAC in these words: "concerned … about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering, Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States, Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential… [member states have acceded to UNCAC]."

systems and policies that empower our police and prosecutors to obtain the necessary judicial evidence.

It is the experience of the United States that without witness testimony from "insiders" to entrenched criminal organizations, there is little likelihood of convicting the leadership and breaking the criminal conspiracy. But the difficulties in obtaining the witnesses needed to convict the leaders of criminal conspiracies can be daunting. The leaders of organizations insulate themselves from criminal prosecution by passing orders through underlings; the criminal bosses often never personally "get their hands dirty" in the commission of criminal acts by their syndicate; and the leaders often order violence and intimidation by lower level members to prevent witnesses from testifying. The organizational structure of the American *La Cosa Nostra [Mafia] Organization* illustrates how criminal conspiracies compartmentalize their actions for the purpose of protecting and insulating the leaders from being caught by law enforcers. See Annex I, Structure of *La Cosa Nostra [Mafia] Organization*. Furthermore, these organizations impose a Code of Silence on its members and ruthlessly punish those who break the Code either by informing to the police or by testifying in court.

In order to effectively respond to the threats of these criminal organizations, our countries' law enforcers need special, coordinated tools and procedures to obtain the critical testimony of "insiders" needed to break the conspiracies and convict the leaders. This paper addresses four of the tools used by the United States.

The first tool is the protection of witnesses. This paper offers an introduction to the United States' Witness Protection Program. The Witness Protection Program is designed to provide the basic incentive for witnesses to cooperate by removing, or at least minimizing, the fears of physical harm to those who become witnesses and testify.

The second tool involves a system that provides for mitigation of punishment for those persons who offer to cooperate with United States prosecutors. Since most insiders have committed crimes, they fear being punished for their past crimes if they cooperate and testify. Law enforcement can overcome this obstacle by adopting policies that encourage cooperation by mitigation of criminal sanctions when cooperating witnesses admit their involvement in the crimes about which they testify. The United States employs a procedure referred to as a "cooperation plea agreement" that allows judges to reduce jail sentences for those who cooperate.

The third prosecution tool we will discuss involves a process to provide a witness with a form of immunity from prosecution; this process takes away the legal ability of a witness to refuse to testify. This procedure has a societal price, namely, a person who has criminal culpability may completely avoid prosecution. As a result, decisions in individual cases about whether to provide immunity are carefully reviewed by supervisors in the Department of Justice. We will explore some of the advantages and disadvantages of immunity grants later in this presentation.

The final "tool" this paper will discuss is actually multifaceted and involves ways to prosecute and punish efforts to obstruct justice. Actions that are intended to prevent witnesses from offering testimony need to be criminalized with heavy sanctions. Society as a whole must strongly condemn attacks on witnesses and their families. No nation can say it respects the Rule of Law if that nation's laws and ethics do not stigmatize and severely punish witness intimidation. Law enforcement must be empowered to aggressively investigate and prosecute those who would obstruct justice by attacking or intimidating witnesses and their family members. In support of these public policies, the United States has created specialized crimes and procedures for punishing acts that harm or threaten harm to witnesses and their families.

II. WITNESS PROTECTION

Over 40 years ago the United States' Federal Witness Protection Program ("the Protection Program") was created by an act of the U.S. Congress entitled "the Organized Crime Control Act of 1970." The Protection Program was created to obtain witness testimony in Italian Mafia cases. To this end, the law created a system to provide for the health, safety and welfare of witnesses and their families before, during and after the conclusion of the trial proceedings. In the years since it was created, the Protection Program has been expanded to other types of significant criminal conspiracy cases, not just those involving Italian

Mafia cases, and has been modified to address issues not originally foreseen, such as providing protection for incarcerated cooperating witnesses.

From the very beginning of the Protection Program United States law provided that the United States Witness Protection Program would be *prosecutor-driven*. Thus, the statute gives the United States' Attorney General the authority to provide for witness relocation and protection. This authority is codified at Title 18, United States Code, Section 3521, a copy of which is attached hereto as Annex II. As noted, the approach followed in the United States gives the prosecutor the authority to decide who should be admitted into the Protection Program. Accordingly, *neither judges nor defence attorneys have a role in this decision*.

Section 3521 (a)(1) states in relevant part: "The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding."

Notice that protection is authorized not only for the witness, but also for the immediate family of the witness and others "closely associated" with the witness. Thus, parents, spouses and children are covered; as, for example, are common law spouses. Who else might be provided protection is decided on a case-by-case manner.

However, because of the expense and difficulty involved in providing protection not only for witnesses but also for family members, the Protection Program is only available for major crimes. Under Section 3521 the Attorney General can authorize protection when 1) the underlying case involves an "organized criminal offense" or "other serious offense" AND 2) the Attorney General decides it is "likely" that a crime of violence or obstruction of justice would be directed at the witness or the judicial proceeding in which the witness will testify[4] . So if the underlying crime is not a "serious offense", even if there is some chance of violence or obstruction of justice, the Witness Protection Program will not be an option.[5]

Over the last 40 years procedures and criteria have been established under the authority of the Attorney General to ensure that the Protection Program only admits people who are witnesses in important cases and who are not likely to constitute a future danger to society.[6] In practice this involves the case prosecutor submitting a detailed application for a witness which, among other things:

- describes the seriousness of the criminal case in which the witness will testify,
- gives details regarding the background of the witness and those family members who want to accompany the witness,
- discusses the criminal history of the witness and the role of the witness in criminal activities; and
- contains an assessment of the danger to the witness and family members

In the implementation of the Protection Program a special unit in the Criminal Division of the Department of Justice in Washington, known as the Office of Enforcement Operations ("OEO"), oversees and administers the operation of all phases of the Protection Program, including the decision of who should be accepted into the Protection Program. The prosecutor's request to protect a witness is submitted to OEO for decision.

In addition to the prosecutors in OEO, two other agencies have substantial roles in implementing the protection features of the Protection Program. These are the United States Marshals' Service (Marshals' Service) and the Federal Bureau of Prisons ("BOP"). The Marshals' Service handles protection for non-

[4] Section 3521(a)(2) recognizes the need to determine the details of how the Attorney General would exercise his authority in deciding when protection is appropriate.

[5] In these other cases, the danger is often short-lived, that is, it exists during the pendency of the judicial proceeding. In such cases, protection may be offered by local police units by arranging short-term housing until the case is over.

[6] It should be emphasized that the Protection Program is only available to witnesses and their families. It is not designed to provide protection to non-witnesses who may feel threatened by criminal elements.

incarcerated witnesses and their family members; BOP handles protection for witnesses who are serving jail sentences by establishing "jails within jails" that only house cooperating witnesses.

Of course, no one can be forced to go into the Protection Program. It is purely a voluntary decision on the part of a witness to request and accept protection under the umbrella of the Protection Program. Indeed, a person can decide to leave the Protection Program at any time. However, because it is expensive and complex to protect people, at the outset there is a written agreement that is signed by the witness and the Marshals' Service that details what each has agreed to do. Thus, when it has been determined that a witness is a suitable candidate for the Protection Program, the witness and his or her adult family members who are to be protected will be asked to sign a Memorandum of Understanding. The Marshals' Service agrees to satisfy each commitment set forth in the MOU as long as the witness remains in good standing in the Protection Program. On the other hand, the Marshals' Service will not be required to provide amenities or services not included in the document. Typically the Marshals' Service agrees to relocate the witness and family to another part of the United States, to provide a new identity, and to help the family start a new life, which includes basic job location assistance for the relocated witness and, as well as the payment of living expenses for a period of time.[7] On the other hand, the witness and family members must satisfy their obligations under the MOU, including cooperation in searching for new employment in the relocation area and not taking any action that may compromise their new identities and location.

The witness' obligations can be difficult to honor, especially the agreement not to take any action that might divulge the new identity and residential location. This means the witness cannot return to the "danger area,"[8] or stay in contact with friends and relatives, except through means authorized by the Marshals' Service. If the witness breaches his security, OEO will expel him from the Protection Program and no longer authorize the Marshals' Service to provide services. (This does not mean that the witness' new identity will be revoked; nor does it mean that in the event of an actual danger that the witness will not be provided appropriate protection. However, OEO may refuse to approve continued payment of subsistence or provision of other types of support.)

The restrictions on the witnesses are often as stressful as the testimony given in court. [9] Some witnesses find the Protection Program so restrictive they are unable to adjust. Some even decide to return to their old home city. There are a number of instances where witnesses who withdrew from the Protection Program and returned to the "danger area" were murdered. For example, against the advice of the Marshals' Service a man from Philadelphia, Pennsylvania who had been a cooperating witness against the LCN found the Protection Program too restrictive and decided to leave the Protection Program and return to his old hometown. He was murdered within a matter months of returning to the "danger area."

The humorous (and grossly inaccurate) portrayal of the Protection Program in the comedic movie *My Blue Heaven* does catch one element many familiar with the Protection Program have experienced. The principal character in the movie describes his attitude toward the changes required by participation in the Protection Program as follows: *I get to never see my parents again or my loved ones. I get to live in a place ... it's okay don't get me wrong ... the air is clean, the people are nice ... but for a guy like me raised on the sidewalks of the city that never sleeps, it's a living hell.*[10]

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[7] Some of the specific assistance that 18 USC Section 3521 [see Annex II] authorizes when a witness and his family have to be relocated to another part of the United States include:
(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;
(B) provide housing for the person;
(C) provide for the transportation of household furniture and other personal property to a new residence of the person;
(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;
(E) assist the person in obtaining employment; and
(F) provide other services necessary to assist the person in becoming self-sustaining.

[8] The "danger area" is the broadly considered to be the areas where the witness is likely to be known or recognized, and therefore potentially targeted for violent retribution. Thus, for example, the "danger area" for a witness from New York City could include a large area of the East Coast of the United States since that is the geographic area in which he is most likely to be recognized.

[9] It is not uncommon for a wife of a prospective witness to break down in tears when told that she will not be able to attend her mother's funeral in the "danger area" when/if her mother should die.

[10] From dialogue of "Todd Wilkerson", a fictional participant in the Witness Protection Program, as portrayed by Steve Martin

Perhaps as a result of its strict rules, it is undeniable that the Protection Program has been a tremendous success. No relocated witness who followed the Marshals' Service rules has been harmed, and there have been thousands of successful prosecutions throughout the United States as a result of courtroom testimony from protected witnesses. Most noteworthy, the entrenched leadership of the LCN organizations, which justified the original creation of the Protection Program, has been convicted in cities throughout the United States based upon the testimony of "insiders" who were protected by the Protection Program.

III. COOPERATION GUILTY PLEA AGREEMENTS - MITIGATION IN RETURN FOR COOPERATION

The United States experience is that there are two types of fears that deter would-be cooperating witnesses from testifying. The first is the fear of physical violence from the people they can expose through testimony. As discussed in Part II above, in the United States we deal with this fear by making available the Witness Protection Program. However, would-be witnesses often have a second fear that deters them from cooperating. This is the fear of being prosecuted and incarcerated for their acts as part of the criminal organization.

This fear of being prosecuted has been "institutionalized" by the United States' Italian Mafia, known as *La Cosa Nostra* (LCN). As a prerequisite to full "membership" in the organization, the LCN requires a prospective member to participate in a murder. In addition to demonstrating that the member has the "qualities" desired by this vicious organization, it was believed that participation in the murder also made future cooperation impossible. Since the penalties for murder were so great and the societal repulsion to murder was so strong, the LCN believed that those who participated in murders would never become cooperating witnesses.[11] In response the United States has developed another "tool" to minimize the fear of prosecution by cooperating witnesses.

This other "tool", which works hand-in-glove with the Witness Protection Program, is the "Cooperation Plea Agreement." It is a fact that most "insiders" in serious criminal conspiracies have personally committed criminal acts. The Cooperation Plea Agreement is a mechanism which allows criminal "insiders" to plead guilty and to receive reduced jail sentences if they provide "substantial assistance" to the prosecution by cooperating and testifying.

It is the policy of the United States, incorporated in statutory law, to encourage such cooperation by allowing judges to impose jail sentences that are less than the sentences they would have received if the defendant had not cooperated. This policy recognizes that persons who have committed serious crimes should not be allowed to avoid all penal sanctions by agreeing to testify. At the same time, the policy gives the "insider" hope that at the end of the process, the insider will still have the opportunity to start a new life. It is the collective judgment of the United States that the cost of allowing reduced sentences for cooperation against leaders of the criminal organization is justified by the need to defeat the criminal organizations that pose such serious threats to civil society.[12]

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in MY BLUE HEAVEN (Warner Brothers Pictures 1990).

[11] After a new, would-be member has participated in a murder, the LCN has a special "ceremony" where a man who is considered "qualified" to be a full or "made" member of the organization swears an oath of allegiance, i.e., the oath of Omertà, the Mafia code of silence. Though the ceremony varies from family to family, it usually involves the pricking of the trigger finger of the inductee, then dripping blood onto a picture of a Saint, which is then set afire in his hand and kept burning until the inductee has sworn the oath of loyalty to his new "family." The oath is along the lines of "[a]s this card burns, may my soul burn in Hell if I betray the oath of Omertà," or "As burns this saint, so will burn my soul. I enter alive and I will have to get out dead."

[12] Under Title 28 United States Code, Section 994 the United States Sentencing Commission is required to adopt Sentencing Guidelines that all United States federal courts will apply when sentencing persons convicted of a crime. Section 994(n) states:
"The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, *to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."*
This policy is re-enforced by Title 18 United States Code Section 3553(e) which specifically authorizes a judge "upon motion by the Government" to impose a sentence below the mandatory minimum sentence if the convicted person has provided "substantial assistance" in the investigation or prosecution of another person who has committed an offence.

Prosecutors desiring the testimony of "insiders" always need to weigh the importance and public value of the insider testimony in the specific case against the risk that a serious criminal will not receive appropriate punishment. The Cooperation Plea Agreement is the balancing mechanism that allows both testimony and appropriate penal sanctions. Over the past thirty years the United States has developed considerable experience in the use of Cooperation Plea Agreements. It is now common to require criminal-witnesses to plea d guilty to representative criminal violations and face the likelihood of jail sentences.

The potential of severe criminal sentences, including mandatory minimum sentences for certain drug offenses, provide incentive for criminals to turn on their criminal associates and "flip". As discussed below, a man facing a mandatory 20 years in jail, can receive a lesser sentence if he provides the police and prosecutor "substantial assistance' by providing information and testifying against his drug associates. Likewise, a man facing life in jail for participating in murders for a criminal syndicate can also have a chance to receive a lesser jail sentence if he testifies against the leadership of the organization for which he worked.

Unlike the Witness Protection Program that is controlled by the prosecutor, a Cooperation Plea Agreement requires *the active involvement of the defence attorney and the judge, as well as the prosecutor.* First, the prosecutor discusses the case with his or her supervisors and obtains approval from the leadership of the prosecution office to consider a Cooperation Plea Agreement with the specific defendant in the specific case. Next, the prosecutor and defence attorney discuss the proposed plea agreement and its likely meaning in the specific case. If the agreement is acceptable to the defence attorney and the client, the plea agreement must be set forth in writing and signed by the prosecutor, the defence attorney and the defendant. Next, the agreement is presented to the judge who can accept or refuse the agreement. Moreover, all parties understand and agree that the decision as to what sentence will be imposed is *solely* the decision of the judge. Cooperation Plea Agreements used by the US Department of Justice expressly state that the agreement does *not* bind the judge with respect to what sentence ought to be imposed. Thus, it is the judge, informed by his or her training and by having a full understanding of the case, who decides what sentence to impose.

If the judge decides to accept the agreement, the judge will require the defendant-cooperator to plead guilty in open court to the charges covered by the plea agreement. In most cases the defendant-cooperator will testify for the prosecution after the judge has accepted the plea agreement and after the defendant-cooperator has pled guilty. Thus, sentencing is deferred until the defendant-cooperator has completed cooperating with the prosecutor so that the judge may consider the significance of the cooperation. The expected cooperation can often involve several trials and different crimes, depending on the knowledge of the defendant-cooperator. In most violent criminal conspiracy or drug cases, the defendant-cooperator will be held in jail without bail and will be incarcerated in a Bureau of Prisons Protected Witness jail while cooperating and awaiting sentence.[13]

When the time comes to sentence the cooperating defendant, the judge is required by law to consider and evaluate these five factors:

(1) the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
(5) the timeliness of the defendant's assistance.

Section 5K1.1 of the United States Sentencing Guidelines.[14]

Applying these five factors, the judge decides a) whether to reduce the jail sentence the cooperating witness would otherwise be imposed and b) by how much to reduce the sentence.

[13] The time spent in jail will count toward whatever jail sentence is ultimately imposed.

[14] In the United States sentencing in Federal Court is guided by Sentencing Guidelines. The provision of these guidelines applicable in sentencing cooperators is Section 5K1.1. A copy of this provision is attached in Annex III.

The positive effects of a cooperation plea bargaining system is that law enforcement has something to offer to overcome the fear of the potential witness that he will receive the same jail sentence he would have received if he did not cooperate. Together with the Protection Program, the Cooperation Plea Agreement offers hope to the cooperating insider that he or she may have a new life free from the influences of the criminal syndicate they are exposing.

A. Witness Protection Program and Cooperation Plea Agreements in Practice

One example of the effectiveness of these two tools, taken from our experience in prosecuting the LCN in Philadelphia, Pennsylvania illustrates this. In the period between 1991 and 1993 a war broke out between two competing factions of the LCN. During this period there were a series of murders and attempted murders, including a brazen motor vehicle ambush on a major expressway at the height of rush-hour. These competing acts of violence were ordered by the LCN "boss" and by his rival. Neither of the men actually pulled a trigger or was near the scenes of the violent crimes. Indeed, the LCN structure, depicted in Annex I, is designed to insulate the leadership from the commission of crimes ordered by those leaders. As a result of investigation, prosecutors learned the identity of three men who were "shooters" in three LCN murders and built prosecutable cases against them. After much thought, prosecutors approached their defense attorneys and entered into separate cooperation plea agreements with the each of the three conspirators AND sponsored them for the Witness Protection Program. Each man was required to plead guilty to his participation in the murders. Based upon their testimony, together with other evidence developed in a two year investigation, prosecutors charged the entire leadership of the Philadelphia LCN, including the boss and 22 others, with the crime of Racketeering and multiple acts of murder and extortion. After a three month trial, interrupted at one point by the murder of a brother of one of the insider-witnesses, all were convicted. At sentencing the boss and his "underboss" were sentenced to life in jail without the possibility of parole. The three cooperating witnesses were sentenced respectively to 10, 12½ and 15 years in jail for their role as "shooters" in murders ordered by the "boss." Without the Cooperation Plea Agreements they would have been sentenced to life in jail. Each served his sentence in a Bureau of Prisons Witness Protection facility in different federal jails, and thereafter was protected by the Protection Program.

IV. WITNESS IMMUNITY: A WAY TO COMPEL TESTIMONY

Our prior discussions about Witness Protection and Cooperation Plea Agreements were based upon a common assumption, namely that the prosecutor was dealing with a witness who was willing to testify. Sometimes, however, the prosecutor will face the situation where a critical witness refuses to testify. The refusal to testify could arise from a number of motives. For example, the witness may fear for his safety but not want to enter the Witness Protection Program because of its stringent rules; or the witness does not want to plead guilty as part of a Cooperation Plea Agreement; or the witness does not want to testify against his criminal friends and associates. What tools does a United States prosecutor have to obtain testimony when facing a reluctant witness? One answer under United States law is for the prosecutor to apply to the court for a grant of "use immunity."

A. Overview of the Operation of a Grant of Compelled Use Immunity

Under United States law a person has a Constitutional right not to testify in a judicial proceeding if the testimony might tend to incriminate him in a criminal offence. See Fifth Amendment to the U.S. Constitution. However, the U.S. Supreme Court has long held that a grant of "use immunity" [15] to a witness provides the equivalent protection offered by the Fifth Amendment.[16] Thus, if a witness is granted "use immunity" the witness no longer has a Fifth Amendment right to refuse to testify.

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[15] "Use immunity" means that, while the government may prosecute witness for offences related to subject matter of witness' testimony, the witness' testimony itself and any fruits there from, may not be used against witness in any criminal case except prosecution for perjury arising out of testimony. "Use immunity" should be differentiated from "transactional immunity" which provides complete protection from prosecution for certain criminal acts. In theory a person given "use immunity" could still be prosecuted for a crime he testified about, if the prosecutor had independent evidence that was not derived from the immunized testimony. See, *U.S. v. Apfelbaum*, 445 U.S. 115 (1980). Such prosecutions are rare.

[16] Law authorizing compulsion of self-incrimination through grant of immunity from prosecution is constitutional, because scope of immunity it provides is coextensive with scope of constitutional privilege against self-incrimination. *U.S. v. Hubbell,* 530 U.S. 27 (2000); *Kastigar v*. U.S., 406 U.S. 441 (1972).

The procedure for giving a witness "use immunity" is contained in statutory law at Title 18 U.S.C. Sections 6002 and 6003. These provisions are set forth in Annex IV. Under Section 6003, a U.S. prosecutor, with the approval of the Attorney General or his designees, can apply to the court for an order giving a specific witness "use immunity." Section 6002 specifically states that if a court has issued an order giving use immunity to a witness, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Under the above process, if a prosecutor obtains a grant of "use immunity" for a witness and then subpoenas the witness to appear in court to answer questions, the witness has no legal right to refuse to testify. [17] A failure to answer questions after being granted use immunity will result in the witness being found in civil contempt of court and incarcerated until the witness agrees to answer questions, or until the conclusion of the judicial proceeding in which the witness has been called to testify (but not more than 18 months in all). Title 28 United States Code, Section 1826. We sometimes refer to this as a situation where the witness has the key to the jail door – all he has to do to get out of jail is agree to testify. [18]

B. Practical Considerations involving Grants of Immunity

There are a number of considerations and practical difficulties related to obtaining compelled testimony using a grant of immunity. Some of the following may be present in specific cases.

First, there are basic moral considerations involved in forcing a witness to testify that will create actual risks of serious danger to the witness and/or family members. Sometimes, because of fear, a witness will invoke his Fifth Amendment Right and refuse to testify when the witness did not commit a crime or where there is little likelihood to be prosecuted. Thus, a grant of immunity will traumatize a witness. United States law enforcers do not want to create victims of new crimes; and we also believe there is a moral obligation to consider the safety of witnesses. There are many instances where the prosecutor will forego and not use the immunity power because it will jeopardize innocents. Obviously, this decision may hinder development of the criminal prosecution under investigation.

Second, all trial lawyers know the maxim of not asking a question when you do not know the answer. With an unwilling witness who is being forced to testify, the prosecutor will often find himself not knowing what the answer to his questions may be or if the answer will be what he expects. This is particularly a concern where a frightened witness may lie rather than incriminate a criminal who may hurt the witness or the witness' family. A frightened immunized witness is an unknown quantity for a prosecutor.

Third, with a grant of immunity the prosecution gives up its ability to prosecute a criminal. In this connection, a prosecutor must be very careful not to immunize a person who is more culpable than the person against whom testimony will be given.

Each case presents its own set of problems and issues. Whether to seek a grant of use immunity is a question that can only be answered in a case-by-case determination.

V. OBSTRUCTION OF JUSTICE

A. Introduction

It is the strongly-held view of the United States Department of Justice that the protection of our witnesses involves much more than taking a witness into the protective shield of a witness protection program. It must also include law enforcers' aggressive use of criminal sanctions against all unlawful efforts

[17] It must be acknowledged that certain evidentiary privileges could support a refusal to testify, such as the spousal privilege or an attorney-client privilege. But absent such an evidentiary privilege, the witness is legally required to answer questions truthfully.

[18] 28 U.S.C. Section 1826 states in relevant part: "Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information …the court… may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information."

to prevent witnessed from testifying and from obstructing the administration of justice. Potential witnesses need to know that the law criminalizes obstruction; that law enforcers actively look to protect witnesses by investigating and arresting where appropriate; and that the courts take obstruction of justice seriously by imposing significant sentences on violators.

In the United States we have two methods of imposing criminal sanctions on those who obstruct justice. The first consists of specialized criminal violations addressing various types of obstruction; and the second requires sentencing courts *in all criminal cases* to focus on whether there were efforts to obstruction of justice and if so to enhance, that is to increase, jail sentences.

B. Obstruction of Justice Crimes

The federal laws criminalizing obstruction of justice in the United States have evolved over the years as our experience has grown. If you examine the United States' federal criminal code, you will see that there are twenty-two separate laws all grouped under the label "Obstruction of Justice."[19] In our earlier years the United States responded to specific problems that obstructed the criminal justice system by enacting legislation directed to the specific problem. See for example, 18 U.S.C. Section 1501 which is captioned "Assault of a Process Server" and 18 U.S. C. Section 1502 which is captioned "Resistance to Extradition Agent." These statutes are largely historical and seldom relevant to the modern world. Others laws are directed at protecting officials within the justice system, namely, judges, court personnel and jurors who decide cases. These laws are obviously still viable and important.

However in the mid-1980s we recognized limitations and gaps existed in the laws pertaining to witnesses. As a result, we enacted two very broad obstruction of justice laws to supplement existing laws. These new laws were intended to respond to modern dangers and sophisticated methods that can be used to threaten witnesses and impede judicial proceedings. These two laws are codified at Title 18 U.S.C. Section 1512 ("Tampering with a witness, victim or an informant") and Section 1513 ("Retaliating against a witness, victim or an informant"). Copies of these laws are appended at Annexes V and VI, together with Title 18 U.S.C. Section 1515 at Annex VII which contains relevant definitions.

There are several features of these laws that are noteworthy.

1. Obstructions aimed at Preventing Testimony - Section 1512

From the criminal's point of view, preventing testimony by witnesses is the critical goal. The greatest danger to a witness or a family member of a witness exists before the witness has appeared in court. Examples of fearsome violence against family members of government witnesses are too common. Two examples drawn from our experience involves the murder of a government witness' brother early on the morning he was scheduled to testify against members of the La Cosa Nostra (LCN). Another involves the arson murder of five female family members of a witness against the leader of a violent drug organization; murders arranged by the drug leader from jail. [20] In each of these two cases, despite the awful violence, the witnesses testified and did so effectively.

In recognition of this pre-testimony danger, Section 1512 focuses on conduct occurring *before* the witness has testified. Section 1512's scope is very broad and not only protects witnesses, but also victims of crime, informants and family members of witnesses. Thus, violence directed against a family member of a witness or a victim is covered when the family member is targeted *because of the relationship to the witness or victim.* In sum, the protective scope of 1512 covers *any person* who is intimidated, harassed, or killed on account of his or her relation to, a victim, witness or informant.[21]

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[19] See Title 18 United States Code, Sections 1501 through 1521, including 1514A.

[20] The drug boss is currently facing federal charges in Philadelphia, Pennsylvania relating to these cruel murders.

[21] The legislative history is clear that the purpose was to reach family members. The Congressional Record states: " Although the former law protected witnesses, parties, and informants, it was unclear whether that law reached the intimidation of third parties (for example, the spouse of a witness) for the purpose of intimidating the principal party. Section § 1512 of Title 18 plainly covers such conduct, for it speaks of conduct directed toward "another person." *See* 128 Congressional Record House Report 8203 (daily ed. Sept. 30, 1982).

There are many different ways a criminal can try to prevent a witness from giving testimony. Section 1512 was written broadly to outlaw as many different methods of preventing testimony as possible. Thus, Section 1512 prohibits the use of intimidation, harassment, threats or physical force, including killing or attempts to kill, when the conduct is aimed at "affecting the presentation of evidence in official proceedings", or "at impeding the communication of information" to Federal law enforcement officers.[22]

The last provision above makes it clear that the law prohibits conduct which tries to stop a witness from talking to an investigator – not just to stop courtroom testimony. This is the purpose of the phrase "impeding the communication of information to a law enforcement officer." Because, the law applies to the investigatory stage it is *not necessary* to show that an official proceeding is pending or about to be instituted at the time of the offense. The logic of this approach is clear; the best way to impede or obstruct a criminal case is to prevent it from ever being investigated. Therefore the law is violated if the defendant's intent is to prevent someone from testifying at some point in the future. Criminals who keep witnesses from talking to the police can avoid arrests and trials altogether.

To state this differently, Section 1512 protects potential as well as actual witnesses. With the addition of the words "any person," it is clear that a witness is "one who knew or was expected to know material facts and was expected to testify to them before pending judicial proceedings

The U.S. Congress also recognized that transnational criminals attempt to prevent witnesses from providing information and testimony in U.S. proceedings. As a result, to provide the maximum coverage permitted by United States' law, the U.S. Congress also provided that 1512 applies to acts occurring outside the United States as well as inside, when the intent is to influence the proceeding in the United States' jurisdiction. So an international criminal who attempts to obstruct a United States proceeding, will violate Section 1512.

2. Retaliating for Testimony - Section 1513

Although criminals prefer to prevent witnesses from testifying, there are many cases involving after-testimony retaliation against witnesses and family members. So Section 1513 was designed to fill a gap in federal law by proscribing threats of retaliation and attempts to retaliate.

In the United States criminal organizations will retaliate against those who have testified against members of the syndicate. Section 1513 give prosecutors a strong tool by specifying that a violation occurs if person causes or threatens to cause a) bodily injury or b) damage to tangible property of a witness, victim or informant who participated in an official proceeding or who communicated information to law enforcement officers.

Like § 1512, the Federal courts have extraterritorial jurisdiction over acts occurring outside the United States.

3. Attempts – Not Necessary to Actually Harm a Witness

It is important that obstruction of justice crimes must contain a provision outlawing "attempted" acts of obstruction. I am certain that each nation represented at this conference has laws which punish murder and assaults. So if a witness is assaulted or murdered, the laws of our nations could use those statutes to impose serious sanctions. But often obstruction involves intimidation and threats that fall short of actual violence. To be effective in obtaining cooperating witnesses, the law must deter obstruction of justice as much as possible. Thus, a critical component in a national strategy to obtain cooperating witnesses is enactment of special laws that criminalize *attempts* to obstruct justice by threatening or harming witnesses and members of their families, as we have discussed previously. As you see from Annexes V and VI, both Section 1512 and 1513 do criminalize attempts.

4. Punishment for Violations of Section 1512 or 1513

In the United States the severity of punishment for obstruction of justice crimes depends on the amount of violence involved and the nature of the obstructive conduct. The punishment provisions can be found at Section 1512(3) and 1513(2) of Annexes V and VI. If Section 1512 is violated, for example and:

- a witness was killed, the death penalty or life imprisonment can be imposed; or

[22] U.S. Department of Justice Resource Manual, Section 1720.

- if there was an attempted murder or the attempted use of force, a maximum of 30 years in jail can be imposed; or
- if there was the use of intimidation and threats, or the destruction of evidence, a maximum of 20 years in jail can be imposed.

B. The Second Way to Punish Obstruction - United States Sentencing Guidelines – Look for Obstruction in All Cases

In addition to specialized crimes for obstruction of justice discussed above, there is a second way the U.S. criminal law imposes sanctions for obstruction of justice. Even if a criminal is not convicted of an obstruction of justice crime, if the criminal obstructed or attempted to obstruct justice he can still be punished for the obstructive conduct. We do this through sentencing procedures established by the United States Federal Sentencing Guidelines.

Under the Sentencing Guidelines, if the sentencing judge finds that the defendant engaged in acts that were intended to obstruct justice, the defendant can have his jail sentence increased. At the sentencing hearing following a conviction the U.S. prosecutor is permitted to introduce evidence to establish facts showing a defendant attempted to obstruct justice, and therefore should receive a greater jail sentence. If the judge agrees, the judge can increase the defendant's jail sentence.

The relevant Sentencing Guideline states: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels. [This results in a greater period of incarceration.]" United States Sentencing Guideline 3C1.1.

In order to help judges apply this Guideline, the Sentencing Commission has given the judges examples of conduct that can result in an increase in the jail sentence. These include:

- threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
- committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offence of conviction;
- producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
- destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;
- escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
- providing materially false information to a judge or magistrate judge;
- providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offence;
- providing materially false information to a probation officer in respect to a presentence or other investigation for the court;
- threatening the victim of the offence in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

C. Should the Prosecutor charge Obstruction of Justice or seek Enhanced Jail Sentence?

Under United States law, when an obstruction occurs, the prosecutor has a choice to make. In most cases whenever there is an act to obstruct justice, the criminal is trying to prevent law enforcement learning about a "core crime." By "core crime" we mean, a criminal who tries to prevent the witness from testifying has already committed a crime, such as a theft, drug dealing, or some other crime. This past crime I call the

"core crime." So the intent of the criminal obstructing justice is to prevent being prosecuted for the "core crime." However, as we have seen above in the discussion of Sections 1512 and 1513, when the criminal threatens a witness, he has committed a new crime.

When this happens the United States prosecutor has options. The prosecutor can either bring a separate prosecution for obstruction of justice or the prosecutor can bypass a trial on the crime of obstruction of justice and seek to increase the jail sentence that would be imposed after conviction for the "core crime."

Thus, for example, assume a United States prosecutor has a multiple defendant drug case for selling methamphetamine. Assume further that one of the defendants by himself threatened a drug courier with harm if he testified or provided information to law enforcement. The prosecutor could decide to add another charge against the one defendant for obstruction of justice. However, as we shall discuss, the prosecutor could decide that it is easier to convict all of the defendants beyond reasonable doubt on the drug charge and at sentencing present the facts of the obstruction to the sentencing court

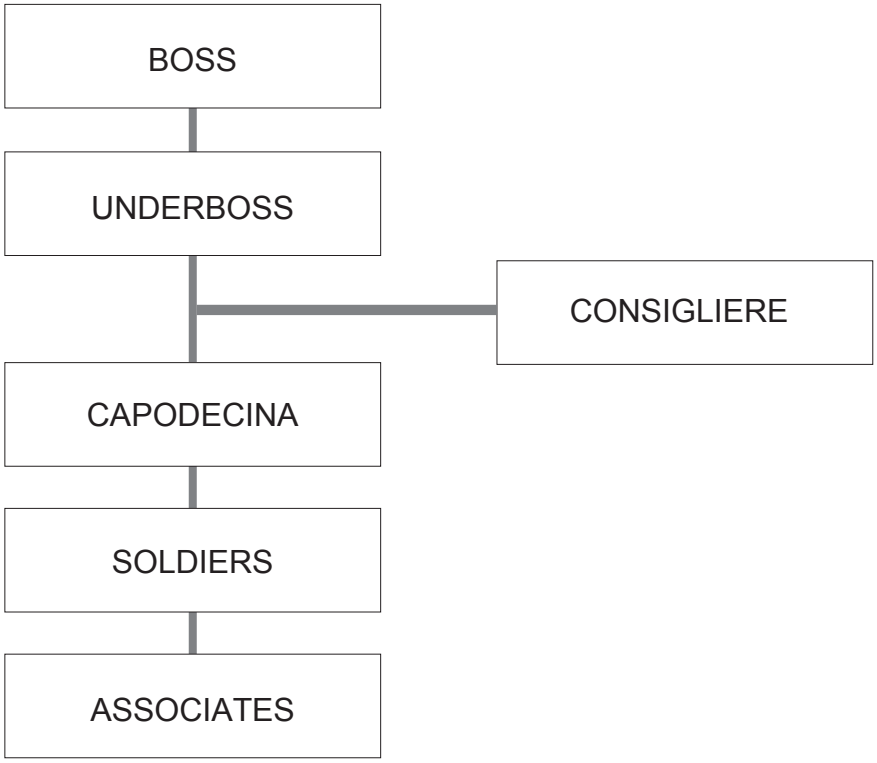
VI. CONCLUSION

In order to defeat modern criminal organizations, law enforcement needs to adapt to the challenges posed by these sophisticated criminal syndicates. This means civil society must realize that tools appropriate for dealing with individual criminal acts are not adequate when dealing with the modern, sophisticated criminal organizations. Accordingly, our nations must provide law enforcement with the tools necessary to obtain testimony from members of these criminal conspiracies. This testimony will protect society from criminal organizations and at the same time provide due process in the legal proceedings against the leaders of these conspiracies. In the United States the Witness Protection Program, Cooperation Plea Agreement and strong Obstruction of Justice laws have been effective tools in eliminating and minimizing entrenched criminal organizations. The United States' experience can offer a baseline that other countries may reference when considering how to deal with modern criminal organizations.

ANNEX I

Structure of La Cosa Nostra [Mafia]

Organization



ANNEX II

CRIMES AND CRIMINAL PROCEDURE
TITLE 18, United States Code, Section 3521
WITNESS PROTECTION

§ 3521. Witness relocation and protection

(a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

(b)(1) In connection with the protection under this chapter of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General shall take such action as the Attorney General determines to be necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person, including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists. The Attorney General may, by regulation—

(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

(B) provide housing for the person;

(C) provide for the transportation of household furniture and other personal property to a new residence of the person;

(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(E) assist the person in obtaining employment;

(F) provide other services necessary to assist the person in becoming self-sustaining;

(G) disclose or refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure, except that the Attorney General shall, upon the request of State or local law enforcement officials or pursuant to a court order, without undue delay, disclose to such officials the identity, location, criminal records, and fingerprints relating to the person relocated or protected when the Attorney General knows or the request indicates that the person is under

investigation for or has been arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence;

(H) protect the confidentiality of the identity and location of persons subject to registration requirements as convicted offenders under Federal or State law, including prescribing alternative procedures to those otherwise provided by Federal or State law for registration and tracking of such persons; and

(I) exempt procurement for services, materials, and supplies, and the renovation and construction of safe sites within existing buildings from other provisions of law as may be required to maintain the security of protective witnesses and the integrity of the Witness Security Program.

The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph (G).

(b)(2) Deductions shall be made from any payment made to a person pursuant to paragraph (1)(D) to satisfy obligations of that person for family support payments pursuant to a State court order.

(b)(3) Any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General under paragraph (1)(G) shall be fined $5,000 or imprisoned five years, or both.

(c) Before providing protection to any person under this chapter, the Attorney General shall, to the extent practicable, obtain information relating to the suitability of the person for inclusion in the program, including the criminal history, if any, and a psychological evaluation of, the person. The Attorney General shall also make a written assessment in each case of the seriousness of the investigation or case in which the person's information or testimony has been or will be provided and the possible risk of danger to other persons and property in the community where the person is to be relocated and shall determine whether the need for that person's testimony outweighs the risk of danger to the public. In assessing whether a person should be provided protection under this chapter, the Attorney General shall consider the person's criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for protecting the person, the relative importance of the person's testimony, results of psychological examinations, whether providing such protection will substantially infringe upon the relationship between a child who would be relocated in connection with such protection and that child's parent who would not be so relocated, and such other factors as the Attorney General considers appropriate. The Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.

(d)(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including—

(A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings;

(B) the agreement of the person not to commit any crime;

(C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter;

(D) the agreement of the person to comply with legal obligations and civil judgments against that person;

(E) the agreement of the person to cooperate with all reasonable requests of officers and employees of the Government who are providing protection under this chapter;

(F) the agreement of the person to designate another person to act as agent for the service of process;

(G) the agreement of the person to make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation;

(H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title; and

(I) the agreement of the person to regularly inform the appropriate program official of the activities and current address of such person.

Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person under this chapter, and the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include a procedure for filing and resolution of grievances of persons provided protection under this chapter regarding the administration of the program. This procedure shall include the opportunity for resolution of a grievance by a person who was not involved in the case.

(d)(2) The Attorney General shall enter into a separate memorandum of understanding pursuant to this subsection with each person protected under this chapter who is eighteen years of age or older. The memorandum of understanding shall be signed by the Attorney General and the person protected.

(d)(3) The Attorney General may delegate the responsibility initially to authorize protection under this chapter only to the Deputy Attorney General, to the Associate Attorney General, to any Assistant Attorney General in charge of the Criminal Division or National Security Division of the Department of Justice, to the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice (insofar as the delegation relates to a criminal civil rights case), and to one other officer or employee of the Department of Justice.

(e) If the Attorney General determines that harm to a person for whom protection may be provided under section 3521 of this title is imminent or that failure to provide immediate protection would otherwise seriously jeopardize an ongoing investigation, the Attorney General may provide temporary protection to such person under this chapter before making the written assessment and determination required by subsection (c) of this section or entering into the memorandum of understanding required by subsection (d) of this section. In such a case the Attorney General shall make such assessment and determination and enter into such memorandum of understanding without undue delay after the protection is initiated.

(f) The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter, including information with respect to the nature and circumstances concerning child custody and visitation. Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision of the Attorney General to terminate such protection shall not be subject to judicial review.

ANNEX III

2010 FEDERAL SENTENCING GUIDELINE MANUAL

MITIGATION OF SENTENCE

FOR COOPERATING WITNESSES

CHAPTER FIVE - DETERMINING THE SENTENCE

PART K - DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background. A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

(EFFECTIVE November 1, 2010)

United States Sentencing Commission

ANNEX III-A

CRIMES AND CRIMINAL PROCEDURE
TITLE 18, United States Code, Section 3553(e)

MITIGATION OF SENTENCE
FOR COOPERATING WITNESSES

§ 3553. Imposition of a sentence

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum.—
Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

ANNEX IV

CRIMES AND CRIMINAL PROCEDURE
TITLE 18, United States Code, Sections 6002, 6003

IMMUNITY OF WITNESSES

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or 28 U.S. C. § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both.

ANNEX V

CRIMES AND CRIMINAL PROCEDURE
TITLE 18, United States Code, Section 1512

OBSTRUCTION OF JUSTICE
BEFORE TESTIMONY BY WITNESS

§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

(a)(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

(a)(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;
(B) in the case of—

(i) an attempt to murder; or
(ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and
(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.
(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(b)(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(b)(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(b)(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation [1] supervised release,,[1] parole, or release pending judicial proceedings;
shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation [1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

ANNEX VI

CRIMES AND CRIMINAL PROCEDURE

TITLE 18, United States Code, Section 1513

OBSTRUCTION OF JUSTICE

RETALIATION FOR TESTIMONY

§ 1513. Retaliating against a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for—

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings, shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 30 years.

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(d) There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

(f) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(g) A prosecution under this section may be brought in the district in which the official proceeding (whether pending, about to be instituted, or completed) was intended to be affected, or in which the conduct constituting the alleged offense occurred.

ANNEX VII

CRIMES AND CRIMINAL PROCEDURE

TITLE 18, United States Code, Section 1515

OBSTRUCTION OF JUSTICE

DEFINITIONS

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(a)(2) the term "physical force" means physical action against another, and includes confinement;

(a)(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(a)(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(a)(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(a)(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.