

# WITNESS PROTECTION PROGRAM



BY THE  
HAWAII CRIME COMMISSION  
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WITNESS PROTECTION PROGRAM

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Hawaii Crime Commission  
November 1980

George R. Ariyoshi  
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Jean S. King  
Lt. Governor

This report provides a study of witness protection programs, recommendations, and a model statute for consideration by the Legislature.

The Crime Commission recommends implementation of the statute to aid in the war on career and organized crime connected persons and activities.

A brief Executive Summary will allow interested persons to quickly grasp the study, understand the recommendations and statute.

A Table of Contents will allow the reader to find specific information without having to read the complete report.

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EXECUTIVE SUMMARY

## I. INTRODUCTION

### A. Scope of Study Directed.

The Commission directed the staff to conduct a study of the need for a victim/witness protection program for the State of Hawaii because the federal government had eliminated funds for the federal Marshals Service Witness Security Program for state witnesses. Where the federal government had previously paid for the costs of state witnesses being placed in its security program, state and local agencies will now have to reimburse the federal government for such costs. The staff was directed to research and to determine possible solutions to the impending problem of witness protection.

### B. Number of Witnesses Protected in Past by Federal Marshals.

Witness entry is strictly limited to those who testify in significant organized crime-related cases. Hawaii County and Honolulu County law enforcement agencies are the only ones which have placed witnesses in the U.S. Marshals Service program. About four witnesses each have been placed by Honolulu and Hawaii County officials since the inception of the Marshals Service program in 1970. Dependents have also been placed in the program.

### C. Support for a State Witness Protection Program.

Although the number of witnesses placed by Hawaii law

enforcement personnel in the federal program has been relatively low, law enforcement authorities from all islands voiced strong support for a state-sponsored victim/witness protection program. The support is generated in part because of the sharp cutbacks in federally sponsored witness protection, and in part by the perceived growing need for such a program in today's violent society.

## II. PROGRAMS STUDIED FOR POSSIBLE ADAPTATION IN HAWAII

### A. Current U.S. Marshals Service Program.

The federal program depends primarily upon witness relocation and identity changes. Because such a program established locally would require detailed and exacting administration, and would be very expensive, its benefits to the state would probably be outweighed by its administrative burdens and costs. In addition, few local witnesses have or would want to experience the disruptions in personal and family life caused by a move to the mainland. As a result, a state program modeled after the current U.S. Marshals Service program would probably not be justified by the costs and burdens of establishing it.

### B. Proposed U.S. Marshals Program.

The proposed U.S. Marshals program in Senate Bill 1722 is essentially the same as the current program in authorizing relocation and new identities for witnesses. However, it broadens acceptance of witnesses beyond those in organized crime cases to include all cases where threat or retaliation are likely. State authorities will have to pay for protection under the program.

Such a program would permit federal protection for those not currently eligible for the Marshals program, while at the same time providing an alternative to states not willing to bear the substan-

tial costs of establishing a Marshals program on a state level.

C. Other States.

Except for three states, two of which base their programs on the current federal program, none of the other states have apparently enacted a witness security program. Each of the other states has dealt with the problem administratively on an ad hoc basis.

D. Hawaii.

Hawaii law enforcement agencies have likewise dealt with witness protection on ad hoc basis, with each county responsible for its witnesses. The Career Criminal Prosecution Program has changed the situation to some degree by making state contingency funds, administered by the Attorney General, available to each county for witness protection in certain emergency situations.

### III. CONCLUSIONS AND RECOMMENDATIONS

A. U.S. Marshals Witness Security Program.

With cutbacks in federal funds, the state will now have to pay the federal government for placing local witnesses in the U.S. Marshals Service Witness Security Program. Because only a few witnesses in the past have testified in cases of sufficient significance having a relationship with organized crime activity to qualify for protection by the Marshals Service, state and county funds would probably have to be expended only infrequently in the future for this purpose, absent expanded prosecutions of alleged organized crime-related figures.

Should the Marshals Service program be significantly expanded to include a broader category of witnesses as legislatively proposed, however, more local and state funds might have to be made available for reimbursement of the federal program if the program is used.

In either case, the price required for funding of state witnesses to be placed in the Marshals Service program seems attractive when balanced against the costs and administrative burdens that would have to be undertaken if the state were to attempt to duplicate witness relocation and identity changes.

B. State Program.

County law enforcement and prosecutorial officials have generally endorsed the need for a state-sponsored and funded witness

protection program. Other less costly measures are possible short of duplicating the U.S. Marshals program. For example, the idea of "safe houses" run by the state with county assistance might be feasible. Further, cooperative arrangements among county prosecutors and police, coordinated by the state, might prove the adage that the whole is greater than its parts.

In addition, a state-funded program, similar to the Career Criminal Prosecution Program, should be dedicated solely to funding county witness protection efforts where a case of state-wide concern is involved. Cases involving organized crime, career criminals, and racketeering activity are examples. Such a program would serve at least two purposes. First, it would be a source of funds to aid individual counties in reimbursing the federal government for the costs of witnesses accepted into the U.S. Marshals Service Witness Security Program. Second, it would provide emergency funds for counties for witness protection in cases not qualifying for federal or state protection but which involve a real threat to the safety of a witness and his/her family.

C. Proposed Statute.

The following statute and commentary are proposed as a solution for the following problems:

1. Elimination of federal funding for state witnesses placed in the U.S. Marshals Witness Security Program; and

2. The growing need of state and county law enforcement and prosecutorial agencies for a state-sponsored source of aid, expertise, and funding for witness security and protection.

I. INTRODUCTION

## I. INTRODUCTION

Crime, especially violent and organized crime, casts a chilling pall over all who cross its path. Its effects are demonstrated in many ways. Many still recall with consternation the case of Kitty Genovese, the New York woman who was violently murdered in full view of her neighbors who were so reluctant to become "involved" that none of them even took the trouble to call the police.

Although Hawaii has never had a case demonstrating the magnitude of callous indifference exhibited in the Genovese case, police and prosecutors alike have all too frequently rightfully complained about the valid and legitimate charges that can never be brought because witnesses refuse to testify or even provide information anonymously because they fear to become "involved."

Many causes exist for such indifference, but the one most often given in response to violent or apparent organized crime is the fear of retaliation. People fear to become witnesses because they believe they will thereby become victims themselves.

In the past, Hawaii law enforcement authorities have attempted to deal with these fears by providing protection premised upon either or both of two basic theories. As Hawaii County prosecutor Jon Ono describes the process, "you can either hide the witness or you can protect him."<sup>1</sup> "Hiding" usually means relocating and

and possibly disguising the witness from discovery by potential attackers. Overt physical protection is kept at a minimum because the hidden witness must remain as unobtrusive as possible.

On the other hand, "protecting" usually means numerous protective barriers around the witness--successive layers of armed guards, physical barriers, electronic and mechanical devices, the availability of immediate reinforcement--to keep potential attackers powerless to get to the witness even though his location is known.

Some witness security programs attempt to combine elements of both approaches, with varying success. One such program is the U.S. Marshals Service Witness Security Program that is conducted by the Service for federal and state law enforcement agencies.

The program, which provides identity changes and relocation as part of its security services, will be described in greater detail later in this report. The program may be used only where organized crime activity is involved. Moreover, costs for providing security services can be substantial. As a result, local Hawaii law enforcement authorities have made very sparing use of the Marshals Service program.

When it has been used by Hawaii authorities, however, the high federal interest in a particular case has often resulted in the federal Marshals Service bearing the costs incurred. Sharp budgetary cutbacks, however, have recently forced the federal

government to require full compensation by the states who seek to use the program.

Because of these developments, because of growing realization that citizens throughout the state are becoming increasingly fearful of testifying as witnesses for the state, and because of legitimate concerns concerning the adequacy of existing state programs, the Crime Commission decided to research the need in Hawaii for a witness security program, similar to the federal program but run by local law enforcement officials for local witnesses and potential witnesses.

II. CURRENTLY EXISTING PROGRAMS

## II. CURRENTLY EXISTING PROGRAMS

The federal government and the states of Illinois, Arizona, and North Carolina have enacted laws that provide for witness protection programs.

### A. Federal.

#### 1. Current Statute.

Title V, of the Organized Crime Control Act of 1970,<sup>2</sup> provides:

The Attorney General of the United States is authorized to provide for the security of government witnesses, potential government witnesses, and the families of government witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Further sections authorize the Attorney General to provide "protected housing facilities," and "to otherwise offer to provide for the health, safety, and welfare" of actual and future witnesses and their families so long as the Attorney General believes these persons would be placed in jeopardy of life or person by their testimony or willingness to testify.

"Government" is further defined to include all states, commonwealths, territories, possessions, and the District of Columbia. Moreover, "the offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in

whole or in part to the United States by any state . . . of the cost of maintaining and protecting such witnesses."

In practice, the Attorney General has given the federal Marshals Service the responsibility of administering such a program. Since its enactment in 1970, the federal witness protection legislation and the operation of the program have been criticized on a number of points.<sup>3</sup>

- \* The legislation only authorized the building of protected housing facilities for witnesses and their families, and not changing identities, relocation, and finding new jobs.
- \* The Justice Department had neither the "wit nor resources" to issue up to 500 aliases per year.
- \* It is unfair to law-abiding citizens for the government to issue good names to literally hundreds of hoodlums.
- \* The government is wrongly admitting that it can only protect witnesses by changing their identities.
- \* The government should not officially adopt a program dedicated solely to telling lies-- about identities, schooling, employment, and the like.
- \* The threat of retaliation is not so real as

to justify the enormous expense of the program.

The alleged mismanagement of the program has been starkly illustrated on many occasions. The following exchange occurred in the CBS newsprogram "60 Minutes"<sup>4</sup> between correspondent Mike Wallace and a former "protected" witness identified as "Marie," and her husband "Chris." (Safir is Howard Safir, who was brought into the program in 1978 to, in Wallace's words, "shape it up.")

WALLACE: . . . And were you able to get a job?

CHRIS: There was absolutely no help given in that respect at all. As a matter of fact, it was the last thing that anybody that had to do with the Marshals Service would initiate on their own.

WALLACE: And the marshals promised Chris and Marie they would provide them with a new background to go with their new name--new documents without which Chris could not get a job.

CHRIS: We waited month after month for this documentation to come through so that I could go out and seek employment.

WALLACE: Because you can't get a job without some credentials. Your potential employer is going to want to know about your previous background.

CHRIS: Exactly. It-- it would-- it was impossible to face any kind of an employment interview.

WALLACE: Did you ever get new birth certificates?

MARIE: No. No medical records, no school records, no marriage license, nothing.

CHRIS: The only documentation that we received besides the driver's license and the Social Security card was a DD Form 214.

WALLACE: Which is?

CHRIS: Which is proof of military service.

WALLACE: But that proof of Vietnam military service, issued to him under his new name, was not by itself sufficient to get him the GI benefits to which he was entitled.

Were Chris and Marie ever specifically told they weren't going to get that documentation, birth certificates, marriage licenses, college records, things of that nature?

SAFIR: I don't know that they were, but it would not surprise me if that happened.

WALLACE: What you seem to be saying, Mr. Safir, is that, by and large - maybe not in every detail, but by and large - the story that Chris and Marie tell is an accurate story?

SAFIR: I think what they are saying-- a-- a great many of the things that they're saying could be true.

What is startling is not just Safir's candid admission of the strong possibility of gross government mismanagement in the program, but the fact that "Marie" and "Chris" were not turncoat organized crime informers but, as Wallace put it, "an honorable young woman and her family" who believed it was her duty as a good citizen to testify about activity she believed to be criminal. If an honorable, ordinary citizen is treated like this, how then have those who turn state's evidence been treated?

"60 Minutes" concluded with the statement that "the Senate Judiciary Committee<sup>5</sup> recently took another look at the Witness Protection Program and concluded that many of its shortcomings have now been corrected." Nevertheless, the abuses of the federal Marshals program, should be carefully considered in

any determination to design an independent state program.<sup>6</sup>

## 2. Proposed Federal Law.

The Criminal Code Reform Act of 1979, which seeks to codify, revise, and reform Title 18 of the United States Code, contains a proposed codification of the provisions on relocation of witnesses that were enacted as Title V of the Organized Crime Control Act of 1970.<sup>7</sup> Because Title V of the 1970 Act was not enacted as part of the U.S. Code, the Reform Act includes a specific subchapter on Witness Relocation and Protection in Title 18 under ancillary investigative authority<sup>8</sup> where, according to the Committee, "it logically belongs." The Senate Judiciary Committee report<sup>9</sup> observes:

The subchapter continues the basic theory behind Title V . . . insuring that witnesses in organized crime cases are produced alive and unintimidated before grand juries and at trial.

The Judiciary Committee report further cites both the 1970 legislative history of Title V that "tampering with witnesses is one of organized crime's most effective counter weapons," and the 1967 report of the President's Crime Commission<sup>10</sup> that "the difficulty of obtaining witnesses because of fear of reprisal could be countered somewhat if governments had established systems for protecting cooperative witnesses."

The Senate Committee report then concludes that "seven years of experience with witness protection under the 1970 Act has amply proven both the necessity and utility of such provisions." Further:

The ability to offer protection to witnesses is virtually an absolute requirement to an effective campaign against organized crime. In addition, . . . in appropriate situations protection should be provided in cases that do not involve organized crime activity but do involve serious criminal violations and a very real presence of danger to witnesses and informants.

In recognizing that the language of Title V of the 1970 Act "may be inadequate to describe what is necessary to effectively relocate endangered witnesses and to ensure their security," the Judiciary Committee apparently acknowledges that the Attorney General has perhaps gone beyond the explicit language of Title V, without fully consulting with Congress on the policy issues involved, to "develop special procedures and techniques of protection and relocation."

Nonetheless, the Judiciary Committee observes that the redrafted proposed statutory provisions give these special procedures and techniques "greater statutory recognition" and, although "not a new grant of authority," constitute "a recognition of the current program and a reaffirmation that these techniques and procedures are fully justified and well within the contemplation of Title V of the 1970 Act."

The Judiciary Committee thus appears to acknowledge as true, the past criticisms that the program was often grossly mismanaged, confused by a lack of clear statutory guidelines, and guilty of excesses caused by an overbroad interpretation of the statute. On the other hand, the Committee also appears to reaffirm,

despite the problems they caused, these same "special techniques and procedures" of relocation and identity changes as being "fully justified and well within the contemplation" of the 1970 Act.

Nonetheless, the proposed subchapter on "Protection of Witnesses" authored by the Committee seeks to broaden the 1970 Act in a number of ways:

- \* Under current law, protection may be offered where the person against whom proceedings have been instituted is alleged to have participated in "organized crime activity." Believing such a term fails to give sufficient guidance and is, indeed, too self-limiting, the Committee's drafters propose a "more precise term" that authorizes witness protection in "an official proceeding where the Attorney General determines that . . ." the offense of tampering with a witness, victim, or an informant (section 1323) or retaliating against a witness, victim, or informant (section 1324) is likely to be committed. By referring to these two sections, the drafters intend to describe the "general kind of conduct" to be protected against with no attempt being made to limit protection to federal offenses or to organized crime-related

cases. The Attorney General would also continue to order protection for state witnesses on a reimbursable basis if he so desires.

- \* Current law allows protection only for witnesses in "legal proceedings." The proposed law has substituted the term "official proceedings." By so doing, the Committee drafters intend that "the statute remain applicable in civil and administrative proceedings, where warranted, as well as in criminal proceedings."
- \* Current law provides relocation and protection for government witnesses and potential witnesses, along with their immediate families. The proposed statute expands coverage to include "a person otherwise closely associated with" such witnesses and potential witnesses. Such "closely associated" persons might include a fiance, children of the fiance, and others, who might be endangered.
- \* Current law does not spell out the measures the Attorney General may take to ensure witness protection or

relocation; it merely authorizes the Attorney General to provide for security, to provide protected housing facilities, and to otherwise provide for the health, safety, and welfare of those protected. Under the proposed statutory provisions, on the other hand, the drafters give recognition to the general concept developed by the Attorney General that protection is to be achieved by relocation and establishment of a new identity, or by other appropriate means short of relocation.

Although the proposed provisions continue to give the Attorney General wide latitude in determining both the continuing need and the actions deemed necessary for protection, the drafters outline six measures that may be involved in relocation to "guide the exercise of his discretion." These measures that the Attorney General should consider as necessary for the person(s) protected are:

- a. official documents to establish a new identity;

- b. housing;
- c. transportation of household furniture and other personal property;
- d. tax-free subsistence allowance;
- e. assistance in obtaining employment;
- f. non-disclosure of identity or location.

The Committee report, however, gives the caveat that the list "is not intended to be all-inclusive and for the most part reflects procedures already developed to implement the current statute." Presumably, past failures to follow such procedures necessitate their formal enumeration.

\* Current law makes no provision to allow civil process to be served upon the Attorney General on behalf of the protected person for a civil cause of action arising prior to a protected person's relocation, for damages resulting from bodily injury, property damage, or injury to business. Subsection (c) of § 3121 would allow such service of process. As the Committee report notes, "the Attorney General is required to make reasonable efforts to

serve a copy of the process on the relocated person at his last known address." Moreover, if a judgment is entered against the relocated person, the Attorney General must "determine if the person has made reasonable efforts to comply with the provisions of the judgment and, if the person can still be located, . . . take affirmative steps to urge compliance . . . with the judgment." Upon a determination that the person failed to make reasonable efforts to comply with the judgment, the Attorney General, after giving appropriate weight to the danger that will result, has discretion to reveal the identity and location of the protected person to the plaintiff. The subsection finally provides that any disclosure or nondisclosure by the Attorney General will not subject the government to liability in any action based thereon.

In conclusion, the proposed subchapter C concerning the Protection of Witnesses appears to embody the findings of the Senate that while there exist valid complaints that the witness protection program conducted by the Justice Department has grown far beyond what was envisioned in 1970 without any further

congressional consideration of the policy issues that developed, the need for such a program remains unquestioned. Thus the proposed subchapter allows the program to be continued, but provides for more specific standards concerning selection for the program and the specific rights and treatment afforded to persons protected under the program.

B. States.

1. Arizona.

a. Introduction. Arizona is one of apparently only three states that have statutes that provide specifically for the protection of witnesses. The program was implemented when as part of a Street Crime Suppression Package,<sup>11</sup> the Arizona State Legislature appropriated \$500,000 to be administered by the Criminal Investigation Bureau, Department of Public Safety. In addition to reducing street crimes, and increasing witness protection, the funds are to be used for developing cooperative state and federal agency programs in investigating organized crime activity, especially in theft, burglary, fencing, and related crimes.

Of the half million dollars, \$75,000 was initially allotted for use in protecting witnesses through one of several methods, including guarding or relocating, depending on the requested needs, as provided for in Arizona's statute concerning "witness protection."<sup>12</sup>

b. Witness protection statute. This Arizona statute

appears to be similar to the current federal witness protection statute. The Arizona statute provides that the "director of the department of public safety with the concurrence of the attorney general" may at the request of any county attorney or law enforcement agency or on the director's own initiative provide witness protection.

Those eligible for protection are "government witnesses, potential government witnesses and their immediate families in official criminal proceedings instituted or investigations pending against a person alleged to have engaged in a violation of the law."

Security provided to these authorized persons may include: housing facilities, and measures for their health, safety, and welfare. Such security continues so long as testimony by a witness "might subject the witness or a member of his immediate family to a danger of bodily injury." Security would continue so long as the danger exists.

In providing witness security, the director of the department of public safety, with the attorney general's concurrence, is empowered:

- 1) to authorize the purchase, rental, or modification of protected housing facilities; and
- 2) to contract with any government or department of government to obtain or provide the facilities or services to provide witness protection.

Finally, the director can condition any offer of protection upon reimbursement in whole or in part to the state for the cost of maintaining and protecting a witness and his immediate family.

c. Implementation. Unlike regular project funding requests that must be processed in accordance with a detailed fund administration manual, witness protection fund requests are considered special project requests that are specifically governed by statute. As a result, witness protection funds are normally requested by means of routine letters of application which are considered solely by the director of the department of public safety, with the concurrence of the state attorney general. Regular fund requests, on the other hand, must be reviewed by the Governor's Organized Crime Prevention Council as part of the approval process.<sup>13</sup>

## 2. Illinois.

a. Introduction. The Illinois "Witness Protection Act,"<sup>14</sup> providing for grants to protect witnesses in criminal investigations and prosecutions, was enacted effective December 9, 1971.

It authorizes the Illinois Law Enforcement Commission to make grants to Illinois' state attorneys, upon application, to protect witnesses, their families, and their property, when the witness is involved in criminal investigations and prosecutions.

The protection afforded may include salaries and costs of personal guards, protective custody, and relocation costs. The witness must consent in writing to being protected. In addition, the Illinois Law Enforcement Commission is required to draft rules

and regulations to govern the awarding of grants.

b. Implementation. Although authorized to do so since 1971, the Illinois Law Enforcement Commission has only provided reimbursement money to the state's county prosecutors for the protection of witnesses since 1976. Moreover, the program is not publicized by the Commission, is conducted clandestinely, and is used on an ad hoc basis for emergencies only.<sup>15</sup>

Grants to the prosecutors for witness protection are considered reimbursements for services that may include relocation, emergency housing, care, and physical protection. There are no rules or regulations governing the awarding of grants, although the Commission requires that the funds given to prosecutors be used for emergency relocation or protection and that the prosecutor submit a list of expenditures in order to be reimbursed.

Because of the secrecy involved, such funds are not publicly earmarked for witness protection when they come from the Commission. As a result, the money used for the program comes from state general revenues that are appropriated to match funds from the LEAA. More than the ten percent amount required for matching state funds is therefore appropriated to the Law Enforcement Commission.

The procedure followed in awarding funds is dictated by practical considerations. Most of the municipal, county, and state law enforcement agencies in Illinois already provide various kinds of witness protection. For example, the State

Department of Law Enforcement has a Division of Investigation that provides protection for witnesses when requested by county prosecutors.

The Investigations Division is usually the first line of defense. If it cannot provide protection, then the county prosecutor will seek emergency, ad hoc assistance from the Law Enforcement Commission, which has accepted all witnesses recommended by the county prosecutors. Since 1976, two to three persons a year have been provided protection with funds from the Commission. The most spent on any witness was \$20,000.

### 3. North Carolina.

North Carolina's statute<sup>16</sup> provides that a witness may voluntarily request to be placed into protective custody. Upon such a request, a state superior court judge must then determine whether the requestor is a material witness. If the judge so finds, he may order that the witness be placed in custody: (1) in a confinement facility; or (2) in a place other than a penal institution; or (3) of a law enforcement official or under other custody provisions appropriate to the circumstances of the case.

Once placed into custody, the witness may not be released without his consent unless the superior court so directs or the original custody order so provides. The Official Commentary gives the following explanation for the statute:

Although it may seem farfetched in North Carolina, the basis for this section sprang from the fear that members of organized crime might attempt to obtain the release of a witness who would prefer to remain in custody.

Because of the uniqueness of the situation that the statute attempts to deal with, its use by North Carolina officials is believed to be infrequent.

Notwithstanding the existence of this statute, a North Carolina law enforcement official has stated that the state does not have a formalized witness protection program such as the federal government's Witness Security Program.

According to Haywood Starling, Director of North Carolina's State Bureau of Investigation, arrangements for the protection of witnesses, when they become necessary, are made on an ad hoc basis.<sup>17</sup> Indeed, the approach taken by the North Carolina Governor's Crime Commission seems to concentrate on strengthening laws protecting witnesses from intimidation rather than on establishing a state witness protection program.

To illustrate, the Governor's Crime Commission published "An Agenda in Pursuit of Justice"<sup>18</sup> with proposed legislation that included a bill for "An Act . . . to Increase Protection to Witnesses, Victims, and Jurors." The operative sections of the proposed act prohibit "Hindering apprehension or prosecution of criminals." The sections most relevant with regard to witness protection are § 14-226.3(9) and (11) which provide:<sup>19</sup>

Any person shall be guilty of an offense under

this section if, with intent to hinder the apprehension, prosecution, conviction or punishment of himself or another for any criminal offense, he:

. . .  
(9) Intimidates, prevents, or dissuades in any manner, anyone from performing an act which might aid in the apprehension or prosecution of any person for a crime, including intimidation or interference with any witness or victim, which would prevent such persons from giving testimony at any trial, proceeding, or legally authorized inquiry.

. . .  
(11) Intimidates, prevents, or dissuades a witness, victim, person acting in behalf of a witness or victim, or juror from:

- a. Reporting the intimidation, prevention or dissuasion to a law enforcement officer or correctional officer, or to a prosecuting agency or any judge;
- b. Seeking criminal process to establish a probation or parole violation or assisting in such action; or
- c. Arresting or seeking the arrest or any person connected with any of the activities prohibited by this section; . . .

Violations are misdemeanors which in North Carolina are punishable by a sentence of two years/\$1,000. Those who use threats of force, who conspire, who have violated similar laws previously, or who do so for monetary gain, are guilty of felonies.

The proposed statute is designed to update and strengthen North Carolina's laws concerning "Obstructing Justice." As such, it appears to serve a deterrent or retribution function rather

than as a method of physically protecting witnesses and victims when the need actually arises.

#### 4. Other States.

According to a circa 1974 survey of the states conducted by the Committee of the Office of Attorney General, National Association of Attorneys General: "no state had legislation comparable to the federal law" concerning witness protection.<sup>20</sup> With the exception of recent Arizona legislation, the situation appears to be the same today. Illinois' witness protection program has been authorized since 1971, but has been funded only since 1976. North Carolina's statute is unique, and apparently little used, in providing for voluntary protective custody.

As appears to be the case in North Carolina today, moreover, the approach of many states to the problem of witness protection has been to enact or to strengthen laws regarding tampering with, intimidating, or retaliating against witnesses and victims. The Hawaii Crime Commission has recommendations in this regard.<sup>21</sup> However, the Commission also believes that a coordinated legislative effort is necessary to improve the lot of victims and witnesses in our society, and a specific witness protection program, in the same spirit as Arizona's, be enacted as part of the overall solution to the real and immediate protection needs of witnesses and victims.

III. WITNESS PROTECTION IN HAWAII

### III. WITNESS PROTECTION IN HAWAII

Hawaii does not have a witness protection law, although, as a Model Penal Code state, it has numerous provisions concerning Obstruction of Justice, which protects witnesses and jurors alike from intimidation and tampering. As is the situation with most of the other states, witness security in Hawaii has been conducted on an ad hoc basis.

#### A. The County Programs.

##### 1. Honolulu.

The most populous jurisdiction in the State is the City and County of Honolulu. Honolulu Police Department (HPD) records reflect that since 1977, witness security has been provided for approximately 21 witnesses.<sup>24</sup> Most of the witnesses have been "secured" at the HPD cell block. Others have been protected at military bases or in rented homes.

Although exact figures of the costs of protecting individual witnesses are not readily available, the HPD is spending \$2,200 a month for food and housing, of a total \$20,000 budgeted for witness protection in fiscal year 1979-1980. These costs, of course, do not include the salaries of police officers assigned to protect witnesses.

For example, during September, 1980, the HPD reported providing protection and security for three witnesses at a cost of

\$44,000 per month. In addition to expenses incurred for food and housing, the total includes the salaries for one sergeant, twelve motor patrol officers, and six foot patrol officers.

2. Maui.

Maui County is possibly the fastest growing neighbor island jurisdiction with all the problems that rapid growth often brings. This fact is not surprisingly also reflected in the increased need for witness security. As Maui Prosecuting Attorney Boyd P. Mossman informed the Crime Commission:<sup>25</sup>

As far as we can recall, it has not been necessary for us to provide witnesses with protection until approximately last year /1979/.

Although Mossman qualified his statement by noting that witness protection may have been provided in previous years, he reemphasized that most witness protection has been conducted "within the last year or two."

In this time period, for example, there have been at least five different murder cases in which protection for witnesses has been required. The protection provided has ranged from full-time, armed guards on a 24-hour basis, to providing transportation out of the state. Because of what Mossman termed his "shoestring budget," Maui law enforcement officials have sometimes even been required to ensconce witnesses in apartments and hotels alone except for a police radio with which to call for help. Mossman has also had to send witnesses to the mainland or to other

islands because of budgetary problems that precluded police from providing around-the-clock protection.

Although he did not have exact cost figures available, Mossman estimated that the minimum cost for protecting a witness has been about \$500 and the maximum between \$5,000 to \$10,000. The cost, of course, depends directly upon the nature of the services provided.

3. Hawaii.

Hawaii County, geographically the largest in the State, has also been the neighbor island jurisdiction that has made the most extensive use of witness security. Hawaii County Prosecuting Attorney Jon R. Ono estimates that it has been necessary to provide witness protection in five to ten cases,<sup>26</sup> while Acting County Chief of Police Martin K.L. Kaaua gave an approximation of six cases.<sup>27</sup> Acting Chief Kaaua also states that protection provided includes hotel accommodations, meals, transportation, and other ancillary expenses.

The average cost per witness, in Kaaua's estimation, has averaged \$4,000. Ono also noted that costs of up to \$1,000 have been incurred where the County has provided air transportation and occasionally paid for more expenses to another island or to the mainland.

Funds for witness protection are provided from within the prosecutor and police budgets, although Kaaua notes that police have no set budget for witness protection per se. Should funds

available from the prosecutor's or police's budget be used up, both agencies, according to Ono, could request special funding from the Mayor and County Council. If such special funding is used up, both agencies would go to State officials for funding.

For example, Kaaua states that the police have gone to the state-sponsored Hawaii Career Criminal Prosecuting Program (HCCPP) to seek funds by letters of request and meetings by staff members. The witnesses for which funds are needed are selectively screened both with regard to the importance of the case and the witness's testimony. In addition, Ono states that the prosecutor has a Witness Protection Fund for emergency use.

#### 4. Kauai.

On Kauai, according to County Prosecuting Attorney Gerald Matsunaga,<sup>28</sup> witness protection is a joint effort by the prosecutor and the police, and is funded by the County through special appropriations. There has been little, if any, need to seek witness protection in the past. Kauai Police Chief Roy K. Hiram states, for example, that:<sup>29</sup>

We have implemented only one witness protection program. We have not asked for any other witness to be protected. Type of protection: twenty-four (24) hours protection.

The approximate cost of the protection is estimated by Hiram to be \$3,500 for 13 days, with approximately \$2,600 going for personnel overtime.

Matsunaga also noted that Kauai businessmen have helped to

defray the high costs of witness protection by providing out-of-town witnesses with complimentary accommodations and such assistance could be offered as part of any witness protection program. Matsunaga sees a greater need for witness protection programs in the future, especially because, for small counties like Kauai, placement of witnesses in the federal Marshals Service program has been difficult both because of strict qualification requirements and substantial costs.

Both Matsunaga and Hiram believe that the State Career Criminal Prosecuting Program funds earmarked specifically for witness protection should be expanded to give greater assistance to county needs.

#### B. State Program: The Career Criminal Program.

Chapter 845, Hawaii Revised Statutes, reflects the legislature's finding that

/A/ substantial and disproportionate amount of serious crime is committed against the people by a relatively small number of multiple and repeat felony offenders, commonly known as career criminals.

Haw. Rev. Stat. § 845-1 (Supp. 1979). As a result, the legislature authorized resources for "increased efforts by prosecuting attorneys' offices to prosecute career criminals through organizational and operational techniques that have been proven effective in selected counties in other states." Id.

The office of the attorney general is charged with directing

and administering the program and for developing a "plan of financial and technical assistance for prosecuting attorneys' offices." The attorney general will be guided in his allocation and awarding of funds to the counties in accordance with policies and criteria he shall establish. Haw. Rev. Stat. § 845-2(b) (Supp. 1979).

Witness security and protection is one purpose for which career criminal program funds may be awarded by the attorney general. At the present time, witness security and protection funds for the career criminal program are provided by the attorney general from a "contingency reserve fund" of \$10,000 that is budgeted for that purpose for fiscal year 1979-80. No formal rules have been established for distribution of these funds.<sup>30</sup>

Just as all other funds in the career criminal program, these contingency funds are initially and tentatively allocated to each county roughly proportionate to their sizes and populations. County prosecutors who seek witness security funds for their career criminal programs must then satisfy the following requirements:

- 1) The person prosecuted is a career criminal as defined by Chapter 845, Hawaii Revised Statutes; and
- 2) The person is being prosecuted by the county prosecutor's career criminal unit; and
- 3) There is sufficient justification for the award of funds.

- a) The funds are to defray "reasonable expenses" involved in witness security; and
- b) The need for funds is unanticipated and not provided for in the requesting agency's budget; or
- c) The county council has failed to provide for or refused a request for funds, and the attorney general determines there is a justified need for the funds. In this case, the attorney general may ignore his tentative allocation and provide funds on an "as needed" basis.

As of October of fiscal year 1979-80, neither Honolulu nor Kauai had requested or been granted career criminal funds for witness security. Hawaii County, on the other hand, has received \$7,400 and Maui County \$1,100. Because the contingency fund is limited to \$10,000, the attorney general is more rigid in his distribution to the various counties early in the fiscal year but less so near its end.

An advantage of the fund is the quickness of the award process. Because of its minimal "red tape," county prosecutors are often able to receive funds within a day or two of their requests. Another strength of the fund is the broad definition given to the term "career criminal." Haw. Rev. Stat. § 843-3, as amended by Act 166, 1980 Haw. Sess. Laws, provides that a person shall be prosecuted as a career criminal if he has had:

(1) two or more felony convictions within the last five years; or (2) one or more felonies and two or more misdemeanors (limited to prostitution, theft, and place to keep firearm) convictions and/or arrests, or three or more misdemeanor convictions and/or arrests, within the last three years; or (3) one conviction and/or arrest for the offense of "felon in possession of a firearm" within the last five years.

Moreover, a person may be subject to prosecution as a career criminal if he: (1) is on parole; (2) is on probation; (3) is on bond waiting appeal; (4) is on bond awaiting trial; (5) is known or suspected to be an associate of organized crime; (6) is known or suspected of recurring or ongoing criminal activity; (7) has no adult record but has an extensive juvenile record; (8) is a juvenile with an extensive record who has been waived to the circuit court for trial.

The statutory definition of career criminal appears broad enough to encompass almost all types of cases requiring witness protection. A person such as a one-time extortionist or other criminal without a record or organized crime ties might, however, not fall within the present definition of career criminal. Thus, for purposes of allocating witness security funds, a slightly broader definition may be required.

C. Federal Program: The Marshals Service Witness Security Program.

As discussed previously, the Attorney General of the United States has been authorized since 1970 to offer the Witness Security Program of the United States Marshals Service, to the states on a reimbursable basis at the Attorney General's discretion.

In practical terms, these services have been offered in the past to Hawaii law enforcement authorities at little or no cost. For example, the Honolulu Police Department estimates that it has had about four witnesses under the program, and no reimbursement was required. Hawaii County law enforcement officials also have placed four persons under the Marshals Service program at little or no cost. On the other hand, Maui prosecutors have never used the Marshals Service program, although they are currently exploring this option. Kauai prosecutors have not used the Marshals program, apparently believing the possible costs involved are prohibitive and qualification of witnesses extremely difficult.

The past practice of the federal government has been to bear all or part of the cost of the Marshals Service program in Hawaii if:

- 1) the witness also qualifies as a possible federal witness; or
- 2) the person prosecuted is an important figure in the organized crime hierarchy, thus giving the case a statewide or national impact; or
- 3) sufficient U.S. Marshals Service personnel, federal

funds, and other resources have been available to permit acceptance of witnesses into the security program.

To illustrate the application of these standards, Hilo prosecutors state that they have had two applicants for the federal program turned down because the cases involved were either not sufficiently related to organized crime or the organized crime-connected defendant was not important enough for his prosecution to have a great enough statewide or national impact.

At the present time,<sup>22</sup> the county prosecutor can seek admission of a witness into the Marshals Service program by applying to the U.S. Organized Crime and Racketeering Strike Force Attorney in Honolulu for federal protection for a witness. The prosecutor must document in writing why he believes the witness must be protected.

The Strike Force Attorney will then make a recommendation to the Justice Department after considering the involvement of organized crime, the degree of danger to the witness, and the necessity for such protection. If the Strike Force Attorney recommends approval and the Justice Department approves, the U.S. Marshals Service will interview the applicant to determine his cooperativeness and his suitability for the program. Upon approval by the Marshals Service, the witness is placed in the Service's protective custody and work begins to relocate the witness and to provide the witness with a new identity.

Once a witness's entry has been approved, the United States Marshals Service has sole responsibility for the actual operation of the program. The sponsoring attorney has no authority after entry occurs. If the prosecutor seeks to interview the witness, he must request the Marshals Service to make arrangements to meet with the witness. Neither the prosecutor nor police will be informed about the witness's location or identity.

Because of the extremely complex logistics involved, costs for the program are correspondingly high. For example, the Marshals Service estimates the average personnel and maintenance costs for one witness for approximately one year would be \$37,161. In addition to personnel costs, item costs would include hotel/motel accommodations, subsistence, travel, one-time relocation, monthly maintenance, documentation, and miscellaneous expenses.<sup>23</sup>

These estimates assume that no household goods are moved, that there are no major medical expenses, and that the Marshals Service need not provide protection in the "danger area" (e.g., the local area when the witness is brought back to testify). Further, because the estimate is based on the Marshals Service's overall experience, the travel expenses for a state such as Hawaii are understated.

The estimated cost for a family of two of \$39,600 varies little from the cost for one witness. However, the cost for a family of six is estimated at \$49,534. Again, however, costs for Hawaii witnesses may be more, especially for transportation.

Because of these cost factors, a strong attempt has always been made by the federal government to secure reimbursement by the requesting state or local agency. As discussed above, however, the experience of local agencies in Hawaii has been that the federal government has generally paid for witness protection where it has accepted a witness into the Marshals program.

Our state prosecutors and police departments have recently been advised by the U.S. Marshals Service through the Honolulu Strike Force that in the future, because of severe federal budgetary constraints, state and local witnesses will no longer be admitted into the federal program under any circumstances without full reimbursement for the cost of federal protection. As a result, state or county agencies will be required to pay for witnesses entered into the federal witness protection program, and unless local funds are made available, few Hawaii prosecutors will be able to afford the witness protection of the U.S. Marshals Service.

#### IV. DISCUSSION

#### IV. DISCUSSION

##### A. Introduction.

A number of factors were identified as specific considerations in establishing a viable state-sponsored witness security program. Michael A. Sterrett, attorney in charge of the Organized Crime and Racketeering Section of the U.S. San Francisco Strike Force, and former strike force attorney in Hawaii, has mentioned at least three factors to be considered:<sup>31</sup>

- 1) Policy;
- 2) Cost; and
- 3) Administration.

In addition, other factors were identified through research and interviews for consideration in planning and implementing a state witness protection program.

Each factor will be considered in turn.

##### B. Policy.

Sterrett believes that "from a prosecutor's standpoint, . . . it is sound policy to create or have available, a witness protection program. Such a device may well determine if certain types of prosecutions can be brought at all."

As has Sterrett, all but one county prosecutor and all county police departments in the State have endorsed the general

concept of the establishment of a State witness protection program.

1. Criteria for Entry.

a. Introduction. A major aspect of policy is the establishment of criteria for entry into a witness protection program. Sterrett observes that entry criteria "would have to be narrow enough to discourage wholesale use of the program in non-essential cases, yet flexible enough to permit entry of unusual or one-time cases."

A number of factors must be considered. They include: the type of case and proceeding involved and the persons who can be protected. To illustrate, the following items should be considered in fashioning standards that will determine the type of cases that are eligible for a witness security program.

1) Organized crime cases, as defined by federal law.

Included might be cases that the federal government cannot handle because of inadequate resources or lack of local or federal importance, even though the case involves organized crime as defined by federal law.

2) Organized crime cases, as defined by state law.

Included might be cases that do not meet the federal definition of organized crime, but which would fall within a broader definition of organized crime under state law now existing or to be enacted.

3) Career criminals, as defined by state law.

Included might be cases that do not fall within the definition, state or federal, of organized crime, but which involve defendants

who are considered "career criminals" under state law.

4) Violent crimes such as murder, extortion, kidnapping, rape, robbery, and others. Included might be cases where a serious violent crime is involved, thus justifying the need to protect the witnesses from further potential violence or intimidation or retaliation.

A more limited definition might include all capital crimes and all class A felonies perpetrated through force, violence, or intimidation.

5) Other special circumstances which demonstrate clearly and affirmatively the need for witness protection. Included would be all other cases that do not meet other specifically stated criteria, but because of special or unusual circumstances that can be clearly and affirmatively shown should be granted witness protection.

In addition to the type of cases involved, the nature of the proceeding must also be established. Should entry be limited to those witnesses involved in cases where criminal charges have formally been brought? Or should entry be allowed whenever the administering authority determines that the protected persons are merely likely to be endangered by criminal acts to tamper with or retaliate against them? Moreover, should protection be limited to cases of a criminal nature or should it be expanded to include all civil and administrative hearings? Each of these questions must be addressed and answered.

Finally, thought must be given to the persons who can be protected under a witness protection program. Is a witness the only person to be protected? What about potential witnesses? The families of witnesses and potential witnesses? Their close associates? How far must the umbrella of witness protection be extended? While most protected persons will tend to be witnesses, care should be taken not to exclude unnecessarily others worthy of protection.

In the paragraphs that follow, current laws governing eligibility for witness protection are outlined. Eligibility based upon type of case and proceeding involved, as well as persons eligible for protection are discussed.

b. Eligibility: cases and proceedings.

1) Current federal law. Federal statute currently provides that to be eligible for witness protection, a person must be a witness or potential witness in "legal proceedings instituted against any person alleged to have participated in an organized criminal activity." [Emphases added.]

In addition to statutory limitations, local U.S. attorneys also limit entry into the program to witnesses involved in the most significant cases. What constitutes "most significant" varies around the country and would depend on local conditions and national impact. In Hawaii, for example, local witnesses accepted into the federal program have tended to be those who testified in cases against alleged important figures in local organized crime circles.

2) Proposed federal law. Senate Bill 1722 proposes that the protected witness be involved "in an official proceeding where the Attorney General determines that an offense described in section 1323 (Tampering With a Witness, Victim, or an Informant) or 1324 (Retaliating Against a Witness or an Informant) is likely to be committed." [Emphasis added.]

As mentioned previously, the proposed change in language from "legal proceedings instituted" as found in current federal law, to "an official proceeding" in the proposed draft, is aimed at making the statute applicable to civil and administrative hearings, as well as criminal proceedings. Moreover, allowing a determination of likeliness of an offense against the witness makes it clear that protection is possible prior to formal charges being brought against a specific defendant.

3) Other state laws. Arizona requires that its statutorily authorized witness protection funds be limited to "official criminal proceedings instituted or investigations pending against a person alleged to have engaged in a violation of the law."

Illinois' statutorily authorized funds require only that the witness be involved in criminal investigations and prosecutions.

North Carolina's voluntary protective custody provisions are silent on the type of proceeding involved, but imply the need for a proceeding in which a "material witness" is required. The Official Commentary also states that the danger to be protected

against is from "members of organized crime."

4) Hawaii. As noted, Hawaii does not have a witness protection statute. The Career Criminal Program, however, does provide contingency funds for witness security for the prosecution of statutorily defined career criminals.

c. Eligibility: persons.

1) Current federal law. Under current federal law, government witnesses, potential government witnesses, and the families of government witnesses and potential government witnesses are eligible for entry into the witness protection program conducted by the federal Marshals Service. "Government" includes state and local agencies, as well as federal ones.

2) Proposed federal law. Proposed federal law as drafted in Senate Bill 1722, expands present coverage under federal law to include "a person otherwise closely associated with" a protected witness or potential witness. Such a "closely associated" person might include a fiance, a child of a fiance, as well as other persons of like nature.

3) Other state laws. Arizona and Illinois laws provide coverage to essentially the same persons who are protected under current federal law. North Carolina, on the other hand, simply requires that persons who voluntarily seek protective custody be judicially determined to be "material witnesses."

It should be noted that while these three states were the only ones that were identified as having specific witness protection

statutes, other states have witness security programs that have been administratively created and funded under the auspices of existing agencies.

4) Hawaii. Hawaii does not have a legislatively created witness protection statute. Local witness protection has been conducted, as in many other states, on an ad hoc, local basis, with protection provided usually to victims or witnesses who actually testify. In other words, protection is provided or withheld at the sole discretion of the law enforcement authorities involved.

d. Conclusion. In the past, Hawaii law enforcement officials have, on occasion, used the witness security program administered by the federal Marshals Service. While satisfied in general with the program, county prosecutors have expressed concern that current standards of entry, requiring a significant, organized crime-related case, result in many applicants for protection being refused entry into the program. With the new federal policy that all state users of the program must reimburse the federal government for the costs incurred, the problem of restrictive access is exacerbated.

To avoid similar entry problems in a local/state program, entry criteria should be as broad as possible while still maintaining some level of control in the hands of administrators. Thus, like the proposed federal statute, a local program should allow for entry by all witnesses or potential witnesses, their

families, and those closely associated with them. Further, all types of cases should be authorized for inclusion where the administering authority determines that the person seeking protection is likely to be the victim of tampering or of retaliation by force, threat, or otherwise.

By using an all inclusive approach for entry, no worthy case will be excluded by a too restrictive law. On the other hand, the administering authority will have discretion in making his determination of need for protection. Moreover, the administering authority may rank cases in order of priority for protection. Such administrative determinations can be done by internal, but uniformly applied, procedures.

## 2. Protection Provided.

a. Federal law. The currently existing federal statute that is the basis for the U.S. Marshals Service Witness Security Program was originally intended to provide protected facilities for housing government witnesses. The federal government was also authorized, almost as an afterthought, "to otherwise offer to provide for the health, safety, and welfare" of the persons protected.

The federal government thereupon inferred broad authority on the basis of the latter provision to establish a program of witness relocation, identity changes, aid in seeking employment, tax-free subsistence allowances, and so forth. Because of abuses in the program, as discussed previously, improvements were

made internally to strengthen the program administratively, and new, more explicit legislation was proposed to replace the current law.

b. Proposed federal law. Six measures are enumerated as aids to the Attorney General and, in turn, the federal Marshals Service, to guide their discretion in providing protective measures in relocating witnesses. As previously mentioned, they include:

- 1) official documents to establish a new identity;
- 2) housing;
- 3) transportation of household furniture and other personal property;
- 4) tax-free subsistence allowance;
- 5) assistance in obtaining employment;
- 6) non-disclosure of new identity or location.

c. Other state laws. Arizona's witness protection laws authorize the state to provide housing facilities and other measures for the health, safety, and welfare of persons protected. Security would be provided so long as there exists a danger of bodily injury to a protected person.

Illinois' statute authorizes the payment for salaries and costs of personal guards, protective custody, and relocation costs.

North Carolina's statute authorizes voluntary protective custody by: placement in a confinement facility; placement in other than a penal institution; a law enforcement official; or

other appropriate custody provisions.

d. Hawaii. As most other states, local law enforcement authorities have approached witness security on an ad hoc basis. Honolulu police, for example, have had resources to provide around-the-clock protection to certain witnesses, while Maui police have been forced on occasion, because of a "shoestring budget," to lend a witness a police radio to summon help if the need arose.

All local authorities have placed witnesses in hotel rooms or rented homes, with Honolulu police also having access to housing facilities at military installations. In some instances, local authorities have also made use of "plane ticket" protection, by paying for plane fare for witnesses going off-island or out-of-state. Little coordination between counties appears to have taken place with regard to witness protection.

e. Conclusion. All law enforcement officials who spoke to the Commission recognized the value of the protective services provided by the U.S. Marshals. The greatest limitation in using the program in Hawaii, apart from those of eligibility and cost, is that the protected person is relocated and given a new identity. Few witnesses who would qualify for the federal program may wish to take such a drastic step and less comprehensive measures may be more effective. As a result, the federal program as now established is of limited use in a local context.

Even if the State were to attempt to duplicate the federal program and to broaden eligibility requirements for entry, the

administrative and legal problems that would have to be overcome to allow identity changes and relocation in out-of-state communities would be gargantuan. The federal Marshals Service still experiences difficulties in providing relocation and identity changes even after years of experience.

Until the proposed redraft of the federal witness protection statute is enacted into law, it is unlikely that state law enforcement agencies will be able to provide witnesses in non-organized crime-related cases with new identities and relocation now available under the Marshals program in organized crime-related cases.

What local jurisdictions may still do, of course, is to provide housing, personal and property transportation, a tax-free subsistence allowance, assistance in obtaining new employment, and non-disclosure of the relocation of the witness. Each, however, can be a serious and complex task to provide without extensive coordination between the sending and receiving jurisdictions. There is little formal coordination between county law enforcement agencies, much less between agencies in Hawaii and other states. Thus, given current local conditions, there appears little likelihood that any individual county would be able to match the program of the U.S. Marshals Service for witness security. On the other hand, a state unit may provide local county law enforcement agencies with resources, advice, equipment, or temporary manpower to meet short-term witness protection needs.

C. Cost.

1. General Considerations.

Sterrett believes the cost "would probably be very high for a quality program, and, from a witness psychology standpoint, a slipshod program is probably worse than none at all."

This philosophy has been reflected at both the federal and local levels. As mentioned above, for example, Honolulu police recently provided around-the-clock security for three witnesses at a cost of \$44,000 per month. The major cost items were the salaries for 19 police officers.

On the other hand, the U.S. Marshals Service Witness Security Program does not rely upon around-the-clock protection, but upon relocation and identity changes for protected witnesses. Thus, in contrast, the Service has estimated that the cost of witness security and maintenance for a family of six for one year would be just under \$50,000. This estimate, however, does not take into consideration any unique costs associated with a move from Hawaii such as higher airfares nor the movement of household goods, major medical expenses, or protection in the state itself. (Costs for one witness is estimated similarly at \$37,000 and for a family of two at just under \$40,000 for one year.)

While the average monthly cost of the Marshals Service program seems to be less, the program is currently available only for important organized crime cases. Also, as mentioned, few witnesses are willing to relocate themselves and their families

to the mainland. Finally, few local cases require the lengthy protection and security offered by the Marshals Service for organized crime cases.

As a result, local jurisdictions have had to provide service on an ad hoc basis given local limitations of budget, geography, the nature of the case, and the type of witness. Honolulu police, for instance, state that a protection program must be "tailored" for the witness involved in the case. A victim of an offense or a witness who observed the offense requires greater protection at a greater cost, while a co-defendant, whether indicted or unindicted, who is testifying for the state, may be protected at a lesser cost because the person may have to be placed in a detention facility not only for his own safety but because he may attempt to flee prior to trial.\*

Other cases require less than 24-hour protection of the victim/witness and the cost of security may simply involve the purchase of a round-trip plane ticket to another island or the renting of an apartment or hotel room for a short duration for the witness.

In summary, a quality program is one in which the protection provided is "tailored" to fit the security needs of each person

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\*The abuse to be avoided is the one in which a victim of a rape was kept in a police cell block for her own safety because resources were not available for 24-hour protection that was made necessary because her accused assailants had been released after posting bail.

protected. Thus, costs for a security program would vary widely for each individual depending upon the circumstances involved in the case.

2. State Funding for Current Programs.

To justify full funding for a witness security program by the state legislature there should exist a legitimate statewide concern in the type and the nature of the case involved. Otherwise, funding might more appropriately be the concern and responsibility of the local county governments. The following are programs that should continue to receive state funds.

a. U.S. Marshals program. Current federal policies limit entry into the U.S. Marshals program to witnesses in organized crime-related cases having a significant statewide impact. As a result, where local witnesses are eligible for, need, and are agreeable to protection by the U.S. Marshals Service, state and county law enforcement agencies should be provided with state funds to obtain and pay for such federal protection.

b. Career Criminal Program. Prosecution of "career criminals" has already been identified as a matter of statewide concern. Indeed, state funds have already been appropriated in a limited degree for witness protection in career criminal prosecutions. Funds should continue to be appropriated in the future based upon the reasonable projections of need by career criminal prosecutors. Because persons with organized crime ties may be prosecuted as career criminals, funds may be appropriated

to the program to reimburse the costs of those accepted into the U.S. Marshals Service program.

3. Other Potential Recipients for State Funding.

Where witnesses require limited protection for short durations, county law enforcement agencies should continue to take primary responsibility for providing and paying for such security. However, where witnesses require full protection for an extended duration, but are not accepted by the federal program or are not eligible for career criminal funds, the costs of witness security may severely tax the resources and capabilities of county law enforcement agencies.

a. Increased coordination. For such cases, the state government could be the focal point for cooperation, coordination, and interaction among the counties to develop and implement a network of witness protection resources throughout the state. By pooling county resources together in a cooperative arrangement, each county would be able to offer a more effective and cost-effective protection program to its witnesses. Organizational and administrative expenses for such coordination and interaction would be underwritten by the state.

b. State witness security program. Only the state government may have the resources to provide a comprehensive witness security program in an efficient and cost-effective manner.

1) "Safe houses". A statewide safe-house system with facilities on one or two islands, maintained by the state, and to

be used by all county police and prosecutors, might be beyond the resources of an individual county, but within the means of the state.

2) Military bases. Arrangements for the use of federal military base facilities by county law enforcement agencies could be negotiated by the state either as part of a comprehensive program or for individual cases.

3) Manpower loans. Loans of qualified state law enforcement personnel could be authorized to augment and meet county manpower needs for witness protection.

4) Increased state funding. State involvement in witness protection could simply involve funneling additional funds on an as needed basis to county agencies. Where organized crime or career criminal prosecutions are concerned, state funds could be released without qualification provided a bona fide need is determined to exist. On the other hand, where a case involves a crime--murder, rape, and so forth--the prosecution of which has traditionally been a primary county concern, state funds could be released on a matching basis with the county providing a portion of the funds for witness protection in the case. Alternatively, emergency state loans of witness protection funds to counties could be authorized with the proviso that funds be reimbursed at the earliest practicable opportunity.

4. Private Funding.

The possibility of private contributions, assistance,

donations, and gifts in establishing a witness security program should not be overlooked, especially when prosecution of a case uniquely involves the local business community. Even now, local business groups such as S.T.E.M.,\* which aids in education to deter shoplifting, or the Waikiki Improvement Association, which actually pays witness travel expenses, or the airlines--United, Northwest Orient, and others--that provide transportation, are actively supporting the fight against crime.

Such groups, in the same way, might prove to be a potent force in funding a witness protection program.

D. Administration.

Sterrett states that administering a state witness protection program requires "an agency with total public trust" because the witness and his family recognize that they are literally putting their lives in the hands of those who administer the program.

In addition, he observes that "the administration of such a program is far more complicated and time-consuming than is generally believed." He cites, "ā's a modest example, . . . all of the tasks to be done when moving a family from Hawaii to San Francisco. Then add on to that the requirements of secrecy, speed, protection, and continual follow-up and monitoring, and I think you see what I mean."

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\*"Shoplifters Take Everybody's Money."

To illustrate his point, Sterrett cites the mundane problem of shipping the witness's car. The car is worth \$1,000 but the witness owes the bank \$1,200 on it. Should the car be moved? How should registration at both ends be handled? How should payments be handled? Should the car be sold? By whom? Who makes up the difference in its value and the lien? Sterrett thus observes: "It's these kinds of situations, multiplied by one hundred, that require such mature and exacting administration."

At the present time, no state agencies are geared for the exacting administration required of such a statewide witness protection program. The program most similar in nature is the Hawaii Career Criminal Prosecution Program administered by the Attorney General. The primary administrative function of the program appears to be the disbursement of funds to local law enforcement authorities pursuant to career criminal legislation.

Under a state program, a state agency must logically supervise and administer the distribution of state witness security funds and if a statewide witness security task force is also established, the administration and operation of such a unit. Logically, the chief law enforcement officer of the state, the Attorney General, should take the responsibility for such a program.

Only the Attorney General would have the statewide jurisdiction and the resources to lead a cooperative effort concerning witness protection. In addition, the Attorney General would be

able to rely upon the good offices of the Hawaii Prosecuting Attorneys Association and the Crime Commission to aid in the "nuts-and-bolts" planning and coordination necessary to set up a cooperative statewide program. County police departments would, of course, have the major responsibility and leadership in actually planning and providing the witness security required.

V. RECOMMENDATIONS

## V. RECOMMENDATIONS

The Commission's study on witness protection was originally proposed to find solutions to meet the problems of federal budgetary cutbacks that will require the State to pay for all costs of witness protection under the U.S. Marshals Service Witness Security Program. After research, however, the Commission learned that only eight witnesses and seven dependents from Hawaii had been provided protection by the Marshals Service since the federal witness protection statute was enacted in 1970.

Nonetheless, all county prosecutors and police departments generally endorse the idea of a statewide witness security program because of what they perceive to be an increasing need for such a program. Ideas differ, however, as to what the program should actually do.

Some prosecutors and police believe that a state agency should simply provide funds for county law enforcement officials to use for witness protection. Others believe the State should also develop facilities and other resources for use by county agencies. One prosecutor suggested that the State should work directly in conjunction with federal authorities to provide witness security.

After consideration, the Commission believes that the need for a statewide witness security program is and will become increasingly necessary for the effective prosecution and conviction

of those in organized crime, racketeering activity, or who are career criminals. Additionally, where county law enforcement agencies are in need of emergency witness protection in certain individual cases, the State should be able to provide or fund such protection.

Thus, the Commission recommends that the Legislature pass and the Governor sign into law the following proposed witness security and protection law. A proposed COMMENTARY explains the provisions of the proposed act in greater detail.

PROPOSED STATUTE:  
WITNESS SECURITY AND PROTECTION

## WITNESS SECURITY AND PROTECTION

§ \_\_\_ - \_\_\_ Witness Security and Protection. (a) The Attorney General shall establish a statewide witness program through which he may fund or provide for the security and protection of a government witness or a potential government witness in an official proceeding or investigation where the Attorney General determines that an offense such as those described in Haw. Rev. Stat. §§ 710-1071 (Intimidating a witness), 701-1072 (Tampering with a witness), or 710-\_\_\_ (Retaliating against a witness) is likely to be committed. The Attorney General may also fund or provide for the security and 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. In determining whether such security and protection or funds therefor are provided, the Attorney General shall give greatest priority to official proceedings or investigations involving pending or potential organized crime, racketeering activity, or career criminal prosecutions.

(b) In connection with the security and protection of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General may fund or take any action he determines to be necessary to protect such person from bodily injury, and otherwise to assure his health, safety, and welfare, for as long as, in the

judgment of the Attorney General, such danger exists.

(c) Any county or state prosecuting attorney or law enforcement agency may request the security and protection provided by the Attorney General or funding from the Attorney General for the purpose of implementing county witness security and protection, or for contracting or arranging for security provided by other state or federal agencies such as the United States Marshals Service. Requests shall be made and approved in a timely and equitable manner as established by the Attorney General.

(d) The Attorney General may condition the provision of security and protection or funding upon reimbursement in whole or in part to the State by a county government of the cost of such witness security and protection or of the funds granted. Such reimbursement shall be appropriate when security is provided or funding granted on an emergency basis for protection the provision of which is primarily a local county responsibility.

(e) The county prosecuting attorneys, the county police departments, and all other law enforcement agencies in the State shall cooperate with the Attorney General to implement a state-wide witness security program. Appropriations for the purposes authorized by this section shall be made to and administered by the Attorney General, who may also receive and use gifts, money, services, or assistance from any private source to implement the purposes of this statute.

COMMENTARY

#### COMMENTARY

This section draws from the witness protection provisions of the federal law, as well as from those of other states such as Arizona and Illinois. The statute is a reflection on a local level of the basic theory of Title V of the federal Organized Crime Control Act of 1970 of insuring that witnesses in organized crime cases are produced alive and unintimidated before grand juries and at trial. This statute, however, goes beyond this theory.

(a) Subsection a directs the Attorney General to establish a statewide witness security program to perform two major functions: (1) to fund witness security and protection efforts; and (2) to provide witness security and protection. A statewide program may take many different directions, some of which are outlined in the Hawaii Crime Commission's excellent report on this subject. Cooperation and coordination among state and local prosecutors and law enforcement agencies are encouraged.

Witness security may be funded or provided if the Attorney General determines that an offense such as intimidation of, tampering with, or retaliation against a witness, is likely to be committed. Although these offenses will most frequently be the basis for witness protection and security efforts, protection and security are not precluded where another similar offense against a witness is likely to be committed. Additionally, the witness

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**1 OF 2**

protected may be a "potential witness" in an ongoing "official proceeding or investigation." This language is used to ensure that protection may be provided even though formal charges have yet to be brought against a specific defendant. Further, the use of "official proceeding" is intended to make the statute applicable in all judicial, legislative, or administrative proceedings. Haw. Rev. Stat. § 710-1000(12) (1976).

Experience has shown that, especially in Hawaii's culture of the ohana and the extended family, the physical danger to a witness or potential witness may extend both to his immediate family as well as those "otherwise closely associated with" him. Subsection a thus authorizes protection and security for such persons if warranted.

Finally, the subsection recognizes that funds for a state-wide witness security program may be limited. Thus the Attorney General is instructed to give priority to pending or potential prosecutions that are of the greatest concern when viewed from the perspective of the state as a whole. These include prosecutions of organized crime, racketeering activity, and career criminals, all of which are already defined in state law.

(b) Subsection b addresses two major issues. First, the Attorney General is authorized to "fund or take any action he determines to be necessary to protect such person from bodily injury, and otherwise to assure his health, safety, and welfare . . . ." [Emphasis added.] No legitimate effort to protect an

endangered person is prohibited. However, the statute is not intended to duplicate witness relocation and identity change services available from the federal Marshals Service. Existing services provided by other states or the federal government should therefore be used whenever appropriate. Indeed, pending federal legislation on this subject, if enacted, will make any state witness eligible for federal protection provided only that the state reimburse the federal government for its expenses. The potential amendment notwithstanding, state witnesses today are often not accepted for federal protection. To the extent warranted, therefore, the Attorney General may provide for or fund: relocation and change of identity for such persons; purchase or rental of protected housing facilities; a tax-free subsistence allowance; transportation for persons and property; assistance in finding employment; armed security and protection; and other appropriate measures.

Second, the issue of how long security and protection must be provided is a crucial one. To be avoided is the removal of protection immediately after the witness testifies in court without a determination by the Attorney General of whether a danger of bodily injury continues to exist. All information available, including the opinions of all parties concerned, should be considered.

(c) Subsection c authorizes the Attorney General to award grants upon the request of state or county prosecuting attorneys

or law enforcement agencies to pay for local witness security efforts. Witness protection is often most effectively provided at the local county level, so long as adequate funds are available. Further, the Attorney General may fund the cost of arranging for witness security provided by a non-state agency such as the U.S. Marshals Service. Because the Marshals Service currently accepts only witnesses in significant organized crime-related cases that, almost by definition, are of great statewide concern, the expenditure of funds for federal protection is specifically provided for.

Requests for funds from the Attorney General will be made and approved in a manner established by the Attorney General to ensure that each request is treated in a uniform and fair manner consistent with the funds available and the priorities established by this statute. Formal administrative rules may be established, but only in the Attorney General's discretion, and only so long as they aid in minimizing undue delays. The need for immediate protection is often essential for a witness's safety and should not be compromised by unnecessary administrative procedures.

(d) Subsection d authorizes the Attorney General to condition the funding or provision of witness security and protection upon reimbursement by a county government. The situation envisioned is a county prosecutor who must provide witness security immediately but has inadequate local manpower or resources to do so. Further, the case does not involve

organized crime, racketeering activity, a career criminal, or any other matter of statewide concern to which the Attorney General would normally give priority assistance. Nevertheless, because of the pressing need for protection, the Attorney General may provide assistance on an emergency basis but require reimbursement when the county agency is subsequently able to go through normal channels for funding. In this way, funds for cases of greater statewide concern will be replenished.

(e) Subsection e. A statewide witness security program can be successful only with the cooperation and goodwill of all law enforcement and prosecutorial agencies in Hawaii. Nevertheless, the Attorney General is believed to be the person most appropriately situated to lead the formation of such a program and is thus the person authorized to receive and administer funds for such a program. Gifts, assistance, money, or services from private sources are also authorized to implement the purpose of this statute.

NOTES

NOTES

1. Comments at the September 26, 1980, meeting of the Hawaii Prosecuting Attorneys Association in Honolulu.
2. P.L. No. 91-452, 84 Stat. 933. The title was not enacted as part of title 18, but appears in headnote fashion in chapter 223 of title 18 just preceding 18 U.S.C. 3481. The statute is reproduced as Appendix A.
3. E.g., F. GRAHAM, ALIAS PROGRAM (1977).
4. "60 Minutes," CBS telecast, June 17, 1979: "Protecting the Witness." Narrator, Mike Wallace.
5. Witness Protection Program: Hearings before the Senate Subcomm. on Administrative Practice and Procedure, 95th Cong., 2d Sess. (Mar. 20, 23, and Apr. 24, 1978); Dep't of Justice Authorization--U.S. Marshals Service Witness Security Program: Hearings before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (Apr. 6, 1979).
6. See also "20/20," ABC telecast, Oct. 2, 1980: "Hostages of Fear." Narrator, Geraldo Rivera.
7. See supra, note 2.
8. S. 1722, 96th Cong., 1st Sess., Subchapt. C, §§ 3121-3123 (1980).
9. S. REP. No. 96-553, 96th Cong., 2d Sess., 1038-43 (1980).
10. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (Feb. 1967).
11. House Bill 2301, House of Rep., 34th Leg., 2d Reg. Sess. (Ariz. 1980).
12. Ariz. Rev. Stat. § 41-196 (Supp. 1980). The statute is reproduced as Appendix B.
13. Arizona Dep't of Public Safety, Administration of House Bill 2301, (Street Crime Suppression Funds), Fund Administration Manual (Jul. 1980).
14. Ill. Ann. Stat. §§ 155-21 to -24 (Smith-Hurd 1973). The statute is reproduced as Appendix C.

15. The information in this section was obtained by a telephone interview with William Holland, Acting Director, Illinois Law Enforcement Comm'n (Oct. 15, 1980).
16. N.C. Gen. Stat. § 15A-804 (1978). The statute is reproduced as Appendix D.
17. Quoted in letter from Conrad Airall, Staff Attorney, North Carolina Legislative Services Office, to Crime Commission (Sept. 29, 1980).
18. GOVERNOR'S CRIME COMM'N, AN AGENDA IN PURSUIT OF JUSTICE: THE 1981 LEGISLATIVE PROGRAM OF THE GOVERNOR'S CRIME COMMISSION (North Carolina 1980).
19. Id. at 30-37.
20. NAT'L ASS'N OF ATT'YS GEN., COMM. ON THE OFFICE OF THE ATT'Y GEN., ORGANIZED CRIME CONTROL LEGISLATION 113-114 (Jan. 1975).
21. HAWAII CRIME COMM'N, OBSTRUCTION OF JUSTICE (1980).
22. Much of the information in this section was obtained as a result of an interview with Arthur J. Banks, Inspector, and James Propotnick, Chief Deputy, U.S. Marshals Service, Honolulu, Hawaii (Aug. 14, 1980).
23. Cost information was provided in a letter from Daniel A. Bent, Special Attorney, Organized Crime and Racketeering Section, U.S. Dep't of Justice, Honolulu, Hawaii (Sept. 18, 1980).
24. Letter from Major Lester Akeo, Criminal Investigation Div'n, Honolulu Police Dep't, to Crime Comm'n (Sept. 25, 1980).
25. Letter from Boyd P. Mossman, Prosecuting Attorney, County of Maui, to Crime Comm'n (Sept. 23, 1980). (See addendum following notes.)
26. Letter from Jon R. Ono, Prosecuting Attorney, County of Hawaii (Oct. 8, 1980); also, telephone interview with Mr. Ono (Sept. 11, 1980).
27. Letter from Martin K.L. Kaaua, Acting Chief of Police, County of Hawaii (Oct. 28, 1980).
28. Telephone interview (Sept. 12, 1980) and interview (Oct. 24, 1980) with Gerald Matsunaga, Prosecuting Attorney, County of Kauai.
29. Letter from Roy K. Hiram, Chief of Police, County of Kauai, to Crime Comm'n (Nov. 10, 1980).

30. Information about the Attorney General's role in the Career Criminal Prosecution Program was obtained from Ass't Att'y Gen. Larry L. Zenker, in a telephone interview (Oct. 21, 1980).

31. Letter from Michael A. Sterrett, attorney in charge, San Francisco Strike Force, U.S. Dep't of Justice (Sept. 19, 1980).

Addendum:

Information from Maui County Chief of Police John S. San Diego, Sr., was received too late to include in the body of this report. Chief San Diego stated that Maui police have provided fully-armed, 24-hour a day witness protection in four murder cases. The cost of witness security for the four cases were as follows: \$2,540, \$3,494, \$3,909, and \$22,926. Chief San Diego believes that state funding should be provided for all cases, not just career criminal cases, but that state funds should be disbursed to the counties to run their own programs. The prosecuting attorney would then set up a county program. Maui police have not asked either the federal Marshals Service or the State Career Criminal Prosecution Program for any assistance. Letter from John S. San Diego, Sr., Chief of Police, County of Maui, to Crime Comm'n (Dec. 5, 1980).

APPENDICES

APPENDIX A

TITLE V OF THE ORGANIZED CRIME ACT OF 1970,

P.L. No. 91-452, 84 STAT. 933

Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

Sec. 503. As used in this title, 'Government' means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

APPENDIX B

ARIZONA REVISED STATUTES (WEST SUPP. 1979-80)

§41-196. Witness protection.

A. The director of the department of public safety with the concurrence of the attorney general may upon the director's own initiative or at the request of any county attorney or law enforcement agency provide for the security of government witnesses, potential government witnesses and their immediate families in official criminal or civil proceedings instituted or investigations pending against a person alleged to have engaged in a violation of the law. Providing for this security of witnesses may include provision of housing facilities and for the health, safety and welfare of such witnesses and their immediate families, if testimony by such a witness might subject the witness or a member of his immediate family to a danger of bodily injury, and may continue so long as such danger exists. The director of the department of public safety with the concurrence of the attorney general may authorize the purchase, rental or modification of protected housing facilities for the purpose of this section. He may also with the concurrence of the attorney general contract with any government or department of government to obtain or to provide the facilities or services to carry out this section. Any appropriation for witness protection shall be made to and administered by the department of public safety.

B. The offer of protection to a person may be conditioned by the director of the department of public safety upon reimbursement in whole or part to the state by a government of the cost of maintaining and protecting such person.

APPENDIX C

ILLINOIS ANNOTATED STATUTES (SMITH-HURD 1973)

§155-21 Short title

This Act shall be known and may be cited as the "Witness Protection Act."

§ 155-2 Law Enforcement Commission--Grants to states attorneys

The Illinois Law Enforcement Commission may make grants to the several states attorney's of the State of Illinois. Such grants may be made to any states attorney who applies for funds to provide for protection of witnesses and the families and property of witnesses involved in criminal investigations and prosecutions.

§155-23 Salaries and costs--Consent of witness

The protection which may be provided includes, but is not limited to the salaries and related costs of personal guards, protective custody and relocation costs. No such protection may be provided without the written consent of the witness.

§155-24 Rules and regulations

All grants made pursuant to this Act shall be made in accordance with the rules and regulations to be established by the Illinois Law Enforcement Commission and those set forth in this Act.

APPENDIX D

GENERAL STATUTES OF NORTH CAROLINA (1978)

§ 15A-804. Voluntary protective custody. (a) Upon request of a witness, a judge of superior court may determine whether he is a material witness, and may order his protective custody. The order may provide for confinement, custody in other than a penal institution, release to the custody of a law enforcement officer or other person, or other provisions appropriate to the circumstances.

(b) A person having custody of the witness may not release him without his consent unless directed to do so by a superior court judge, or unless the order so provides.

(c) The issuance of either a material witness order or an order for voluntary protective custody does not preclude the issuance of the other order.

(d) An order for voluntary protective custody may be modified or vacated as appropriate by a superior court judge upon the request of the witness or upon the court's own motion.

**END**