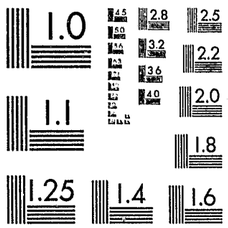

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Department of Justice

STATEMENT

OF

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BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

AMENDMENTS TO THE VICTIM AND WITNESS PROTECTION ACT OF 1982

ON

APRIL 3, 1985

Mr. Chairman, I appreciate the opportunity to appear before the Subcommittee on Criminal Justice today to discuss the obstruction of justice provisions of the Victim and Witness Protection Act of 1982 and other related provisions.

I. STATUTES

The Victim and Witness Protection Act of 1982 1/ was designed to strengthen the protection for victims and witnesses by, in part, creating new and tougher sanctions for offenses against victims and witnesses. The Act created two new prohibitions in title 18 of the United States Code. The first, 18 U.S.C. §1512, captioned "Tampering with a witness, victim, or an informant," is applicable when someone seeks to prevent a person from testifying or providing information to law enforcement officers. The second, 18 U.S.C. §1513, is applicable when someone seeks to retaliate against a person because he or she testified or provided information to law enforcement officers. Although the Victim and Witness Protection Act removed from 18 U.S.C. §§ 1503, 1505, and 1510 duplicative language which specifically pertained to witnesses, section 1503, by its omnibus clause, still contains language prohibiting corruptly influencing, obstructing, or impeding the "due administration of justice" and attempting to do so.

1/ Public Law 97-291, 96 Stat. 1248 (1982).

Recently, a number of reported decisions construing the obstruction of justice statutes in the wake of the 1982 Act have been rendered. Some of these decisions have been unfavorable or have suggested areas of ambiguity or possible gaps in coverage which, if ultimately sustained by the courts, would have the ironic effect of weakening, the federal criminal protections for victims and witnesses contrary to the evident intent of the 1982 statute. The Department of Justice is concerned by this development. We believe that prompt legislative clarification is called for, to insure that the original intent of Congress is preserved and that defendants and other persons seeking to obstruct justice by tampering with or retaliating against victims and witnesses will continue to be subject to appropriate penalties.

I will speak to four issues which have arisen from the 1982 enactment: (1) whether the omnibus clause in section 1503 still applies to conduct involving witnesses; (2) whether section 1512 prohibits non-coercive conduct like asking or persuading witnesses to lie to law enforcement agents or grand juries; (3) whether section 1513 prohibits economic retaliation against witnesses; and (4) whether violations of sections 1512 and 1513 can serve as

predicate offenses for violations of the Racketeering Influenced and Corrupt Organizations (RICO) statute. 2/ In addition, I shall point out a problem relating to venue for prosecution under the obstruction of justice statutes.

II. WHETHER THE OMNIBUS CLAUSE IN SECTION 1503 STILL APPLIES TO CONDUCT INVOLVING WITNESSES

There have been four primary court opinions concerning the reach of section 1503 after enactment of the Victim and Witness Protection Act. The first, and the main source of difficulty in administering the obstruction of justice provisions, is United States v. Hernandez. 3/

The pertinent portion of the Hernandez case involved a defendant who was charged with threatening a witness to obtain documentary evidence. He was charged with violating both section 1512 and section 1503. The Court of Appeals vacated the section 1503 conviction. It held, first, that "[C]ongress affirmatively intended to remove witnesses entirely from the scope of §1503" 4/ and, second, that "Congress intended that intimidation and harassment of witnesses should thenceforth be prosecuted under §1512 and no longer fall under §1503." 5/ The difference in language is significant, and I shall return to it later.

2/ 18 U.S.C. §1961 et seq.

3/ 730 F.2d 895 (2d Cir. 1984).

4/ Id. at 898.

5/ Id. at 899.

The next case discussing the issue was United States v. Beatty. 6/ In the Beatty case, the defendant was charged with "urging, suggesting and instructing witnesses to give false and misleading testimony before the grand jury . . . ." 7/ The District Court, which was bound by the Hernandez decision, distinguished that case and found that urging witnesses to lie before grand juries is still prohibited by 18 U.S.C. §1503.

The next case in the quadruplet is United States v. Lester, 8/ which involved witness tampering charged under section 1503. The Ninth Circuit Court of Appeals found that "Congress enacted section 1512 to prohibit specific conduct comprising various forms of coercion of witnesses, leaving the omnibus provision of section 1503 to handle more imaginative forms of criminal behavior, including forms of witness tampering, that defy enumeration." 9/ The court discussed the Hernandez decision and suggested that it only applied to "intimidation and harassment" of witnesses, (the second holding which I spoke about previously), cited the Beatty case, and found that section 1503

6/ 587 F. Supp. 1325 (E.D.N.Y. 1984).

7/ Id. at 1329.

8/ 749 F.2d 1288 (9th Cir. 1984).

9/ Id. at 1294.

still covered witness tampering, at least if such tampering is not found within section 1512. 10/

The final case for the purpose of this discussion is United States v. Wesley. 11/ There the Court of Appeals for the Fifth Circuit suggested in dictum that a person can be convicted of violating both section 1503 and section 1512 for threatening a witness, thereby setting the stage for a conflict with Hernandez. 12/

In summary, the cases fall into three broad categories. First, in Hernandez the court suggests that conduct involving witnesses is no longer covered by section 1503. Second, in Lester and Beatty the courts suggest that obstruction-type conduct involving threats, intimidation, harassment, and misleading activity are now solely within section 1512 while remaining kinds of conduct are prohibited by section 1503. Third, in Wesley the court suggests that the omnibus clause in section 1503 retains all its former vitality and continues to prohibit threats and intimidation directed at witnesses. The Department of Justice believes that the Wesley case correctly interprets the

10/ Id. at 1295-96.

11/ 748 F.2d 962 (5th Cir. 1984).

12/ See also United States v. Davis, 752 F.2d 963, 973 n. 11 (5th Cir. 1985).

statutes. 13/ However, it is plainly undesirable that, in so basic an area of the criminal law as witness obstruction of justice, there exist uncertainty not only as to whether certain clearly culpable (and previously punishable) acts can be prosecuted, but also as to the appropriate vehicle for doing so.

III. WHETHER SECTION 1512 PROHIBITS NON-COERCIVE CONDUCT SUCH AS ASKING WITNESSES TO LIE TO LAW ENFORCEMENT AGENTS OR GRAND JURIES

Section 1512 prohibits a person from engaging "in misleading conduct toward another person, with intent to" influence a person's testimony in an official proceeding; cause a person not to testify; or hinder, delay, or prevent communication of information to a law enforcement officer. "Misleading conduct" is defined to mean making a false statement, omitting information, inviting reliance on a false writing or other false object, or "using a trick, scheme, or device with intent to mislead .... " 14/

If witness tampering no longer falls under section 1503, which is what Hernandez seems to say, the question arises whether asking a witness to lie to law enforcement agents or the grand jury is "misleading conduct" within the meaning of section 1512.

13/ See United States Attorneys' Manual §9-69.134 at 20.

14/ 18 U.S.C. §1515(3).

If not, the end result of the 1982 amendments would be that many forms of non-violent obstruction of justice involving witnesses could no longer be prosecuted. This would be a serious adverse development and one plainly not intended by Congress. Yet one court has in effect so held. In United States v. King, 15/ a case arising in the Second Circuit, the defendant "simply and flat-out, tried to persuade [a witness] to lie," 16/ and the court found that such persuasion, which is not "misleading" to the witness, is in turn not prohibited by section 1512.

The Department of Justice disagrees with the decision in the King case. Prior to the enactment of the Victim and Witness Protection Act, asking a witness to lie could be punished under 18 U.S.C. §1503 if the lie were to be directed to a court or grand jury 17/ or under section 1510 if the lie were to be directed to a federal criminal investigator. 18/

15/ 597 F. Supp. 1228 (W.D.N.Y. 1984).

16/ Id. at 1231.

17/ See, e.g., Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956) (any corrupt endeavor to influence a witness whether successful or not constitutes obstruction of justice under section 1503).

18/ See United States v. Fitterer, 710 F.2d 1328 (9th Cir. 1983), cert. denied, 104 S. Ct. (1983) ("misrepresentation" provision of section 1510 applies to situations where defendant asks a third party to lie to a federal criminal investigator); United States v. St. Clair, 552 F.2d 57 (2d Cir.) (per curiam)

(Footnote Continued)

The legislative history shows that the bill which became section 1512 [19] was intended to "expand" the existing offenses, [20] and the language deleted from section 1510 "is covered in new sections 1512 and 1513." [21] Since the conduct involved in the King case was prohibited prior to enactment of the Victim and Witness Protection Act and since Congress intended to expand the protection already afforded by section 1510, it follows, in our view, that section 1512 must prohibit such misrepresentation and that the King court erred. The United States has appealed.

IV. WHETHER SECTION 1513 PROHIBITS ECONOMIC RETALIATION AGAINST WITNESSES

Section 1513 prohibits engaging in conduct which causes bodily injury to, or damages the tangible property of, another person in retaliation for that person attending a federal proceeding or giving information to a federal law enforcement officer. The issue is whether damaging "tangible property" can

(Footnote Continued)
cert. denied, 433 U.S. 909 (1977) (section 1510 is violated by attempt to induce another person to make material misrepresentation to federal criminal investigator).

19/ H.R. 7191, 97th Cong., 2d Sess. (1982).

20/ 128 Cong. Rec. H8209 (daily ed., Sept. 30, 1982).

21/ 128 Cong. Rec. H8205 (daily ed., Sept. 30, 1982).

be construed to mean either "employment" deprivation or the logical results of such deprivation.

A review of the pertinent legislative history reveals that an argument can be made that section 1513 does not prohibit economic retaliation. [22] Nevertheless, the Department of Justice has decided to interpret section 1513 as extending to cases of economic retaliation. Depriving a person of a job is taking his or her money; the necessary and logical consequence is the damaging of the victim's tangible property, an act prohibited by the section.

Again, our view is fortified by the overall congressional purpose to strengthen the law pertaining to victim and witness protection. Since economic retaliation against witnesses was prohibited by 18 U.S.C. §1503 prior to enactment of the Victim and Witness Protection Act [23] and since Congress intended to enhance protection of witnesses by passing the Act, [24] it follows that economic retaliation should be construed as

22/ See S.1630, 97th Cong., 2d Sess. (1982); S. Rep. No. 97-307, 97th Cong., 1st Sess. 356 (1981); S. Rep. No. 97-532, 97th Cong., 2d Sess. 21 (1982).

23/ See United States v. Campanale, 518 F.2d 352, 366 (9th Cir.), cert. denied, 423 U.S. 1050 (1975).

24/ See, e.g., 96 Stat. 1249 (1982) (§ 2(b)); 128 Cong. Rec. H8204 (Daily ed., Sept. 30, 1982) (Section 1513 was designed to preclude not only relatiatory conduct prohibited by existing law (18 U.S.C. §§ 1503, 1505, and 1510) but more than what existing law precluded).

prohibited by the Act. Like the issue relating to "misleading" conduct, however, the language of the statute could benefit from clarification in order to more clearly protect witnesses from economic reprisal.

V. WHETHER VIOLATIONS OF SECTIONS 1512 AND 1513 CAN SERVE AS PREDICATE OFFENSES FOR VIOLATIONS OF THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) STATUTE

Section 1961(a) of title 18, United States Code, which defines "racketeering activity" for purposes of the RICO law, includes violations of sections 1503 and 1510 but not sections 1512 and 1513. The omission of sections 1512 and 1513 from section 1961 was obviously inadvertent and should be remedied. Clearly, obstruction of justice offenses pertaining to witnesses and victims are characteristic of and commonplace among organized criminal syndicates. When Congress in 1982 removed some victim-witness offenses from sections 1503 and 1510 in order to create new and more protective offenses in section 1512 and 1513, it surely intended to extend similarly the RICO coverage which formerly applied to those crimes. An amendment restoring such coverage should be promptly enacted.

VI. PROBLEMS RELATING TO VENUE UNDER SECTIONS 1503 AND 1512

An additional issue meriting Congressional attention concerns the appropriate venue for bringing a prosecution under

18 U.S.C. 1503 and 1512. The courts of appeals are divided as to the appropriate venue in a case in which a witness is tampered with in one district but the official proceeding sought to be affected is in another district. Four courts have held under section 1503 that prosecution is proper only in the district in which the act occurred; while three have held that venue is proper only in the district in which the proceeding exists or perhaps in either district. See, collecting the cases, United States v. Moore, 582 F. Supp. 1575 (D.D.C. 1984). Recently, two district courts have indicated that the same venue problems that have plagued the courts under section 1503 are applicable to the new witness tampering offense in section 1512. See United States v. Moore, supra; United States v. Wilson, 565 F. Supp. 1416, 1423-1425 (S.D.N.Y. 1984). In our view, this needless confusion and conflict should be resolved by Congress and the appropriate resolution is an amendment indicating that prosecution may be brought either in the district in which the act occurs or in the district of the proceeding to be affected.

VII. CONCLUSION

While we intend to litigate most of the foregoing issues, some future litigation can be avoided if the provisions are promptly and appropriately amended. If the Subcommittee desires, we shall be pleased to work with its staff to fashion legislation to amend the Victim and Witness Protection Act's obstruction of justice provisions.

Mr. Chairman, that concludes my prepared statement and I would be happy to answer any questions at this time.

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