



FBI Law Enforcement Bulletin

May 2004
Volume 73
Number 5

United States
Department of Justice
Federal Bureau of Investigation
Washington, DC 20535-0001

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Director

Contributors' opinions and statements should not be considered an endorsement by the FBI for any policy, program, or service.

The attorney general has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535-0001. Periodicals postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135.

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Cover Photo

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Hiding in Plain Sight A Peek into the Witness Security Program

By DOUGLAS A. KASH, J.D.

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In mid-July 2003, a fisherman on the Shenandoah River in Northern Virginia found the body of Brenda "Smiley" Paz. She was an intelligent, energetic 17-year-old who was 17 weeks pregnant and a former gang member.¹ She had an "encyclopedic knowledge" of Mara Salvatrucha (MS-13), a violent Salvadoran gang, and educated investigators of its history, structure, and operations.² Paz knew her only viable way out of MS-13 was to help put its

members in jail, and word soon spread that she was an informant, which caused her to be "green-lighted," or targeted for murder by fellow MS-13 gang members.³ Paz entered the Witness Security Program (Program) in March 2003, but, due to the lure of gang life, Paz voluntarily left the Program in June. Within 3 weeks, her body was found in the river.⁴

Prosecutors wanting to use her testimony in the September 2001 murder of a rival gang

member were faced with a dilemma—using her unsworn statements may violate the Sixth Amendment guaranteeing a defendant the right to cross-examine the witness. Prosecutors availed themselves of this highly unusual tactic by arguing that Denis Rivera, Paz's former boyfriend and member of MS-13, may have ordered Paz's execution.⁵ Rivera was facing a murder trial in which the victim was stabbed several times, his head nearly severed, and his throat



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and esophagus removed.⁶ The prosecution argued that because Rivera allegedly was involved in the witness' (Paz) execution, he cannot use the protection guaranteeing him the right to examine Paz. On October 7, 2003, the judge ruled that Paz's statements, through the recollection of the court appointed guardian, *adlitem* (for purposes of the suit) can be used, though the court had not determined other issues, such as relevancy.⁷ On November 20, 2003, Rivera and a fellow gang member were convicted of murder and later sentenced to life in prison.⁸ This case demonstrates not only the necessity of the Program but the real dangers facing those who choose to leave its protective umbrella.

The Program, also sometimes referred to as WITSEC or the Witness Protection Program, is one weapon in the war on crime that has taken even greater significance since

September 11, 2001. The U.S. Department of Justice, Criminal Division, Office of Enforcement Operations (OEO) oversees the Program. The U.S. Marshals Service (USMS) administers the day-to-day operation of the Program for witnesses relocated in the community and the Federal Bureau of Prisons administers the day-to-day operation of the Program for witnesses who are incarcerated.

Traditionally, the Program has been used to protect witnesses and their families in cases involving organized crime, narcotics, motorcycle gangs, prison gangs, and public corruption. Due to the September 11 attacks and the consequent investigations into domestic and international terrorist groups, people with pertinent terrorist-related information have undoubtedly considered availing themselves of the protection this Program offers. Due to the sensitivity of

the Program, including the identities of the protectors and witnesses, specific names and locations cannot be discussed in this article. Indeed, no agency, entity, or person associated with the Program is permitted to release any information concerning specific operations of the Program and its participants.⁹ With limited exceptions, release of Program-related information, including that which pertains to current or former protected witnesses, even to that very witness, is prohibited except at the written direction of the director of the Program, the attorney general, or the assistant attorney general.¹⁰

Judicial Protections

Somewhat ironically, the need to provide for the safety of witnesses results from the constitutional protections afforded criminal *defendants*. The Sixth Amendment of the U.S. Constitution provides, in part, that "in all criminal prosecutions, the accused shall enjoy the right...to confront the witness against him...." Such protections were extended by the U.S. Supreme Court to defendants in state prosecutions through the Due Process Clause of the Fourteenth Amendment. Some states require prosecutors to identify everyone "known by the government [who has] knowledge of the relevant facts, while other states limit such disclosure only

to persons who will testify in trial or pretrial proceedings."¹¹ Consequently, to protect witnesses pre- and posttrial and preserve the integrity and effectiveness of the criminal justice system, witnesses facing a threat to their personal safety are either incarcerated or placed under government protection.¹² However, other courts do not require that all witnesses reveal their identities.

The U.S. Supreme Court's position on the constitutionality of identification of protected witnesses began in 1931 with its review of *Alford v. United States*¹³ in which the defense was denied the opportunity to question the witness at his residence. The Supreme Court opined, without consideration of the witness' safety, that the defense must be able to place the witness in his environment and that "prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."¹⁴

In the next true test of this issue, the lower court, in *Smith v. Illinois*,¹⁵ refused to force the revelation of a witness' true identity. Upon appellate review, the U.S. Supreme Court stated that "the witness' name and address open countless avenues of in-court examination and out-of-court investigation... [forbidding

the defense from asking the "most rudimentary" questions of a witness' name and address effectively] "emasculate[s] the right of cross-examination itself."¹⁶ In his concurrence, U.S. Supreme Court Justice Byron White opined that the examination of a witness would be limited when specific questions "tend to endanger the personal

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safety of the witness."¹⁷ Although Justice White's notation to a witness' safety appears to be the first time this specific issue was raised, since that time, the balance between the need to protect a witness' identity and the right to confront a witness in court has been considered by many federal and state courts and state legislatures.

In federal courts, as a general rule, if the informant's identity is essential or even relevant, it must be provided.¹⁸ To refute this, the government must establish the existence of an actual threat.¹⁹ Similarly, New York

courts require the defense to demonstrate the necessity and materiality of witness information as it relates to guilt or innocence. The court then weighs the right of cross examination and the witness' safety concerns.²⁰ Further, some courts raise the nondisclosure standard to whether the testimony is significant or crucial, while California prohibits the concealment of witness residential information as long as the witness is providing important information.²¹

Beyond judicial protection, there is one notable statutory protective shield known as the federal Victim and Witness Protection Act of 1982, which provides for the punishment of anyone who tampers with a witness, victim, or informant.²² This protection begins from the reporting stage of a crime to the conclusion of the trial testimony. All U.S. citizens inherit a legal obligation to provide testimony in criminal and civil proceedings, and the U.S. Supreme Court has held that not even the fear of death can obviate this requirement.²³ Despite the chance that harm could result from such testimony, the government does not have any legal obligation to provide any level of protection to a witness.²⁴

Policies and Statutory Provisions

Since the creation of the Program by the Organized Crime

Control Act of 1970²⁵ and amended by the Comprehensive Crime Control Act of 1984,²⁶ more than 7,500 witnesses and 9,500 family members have been afforded protection, which includes establishing new identities in new locations.²⁷ The attorney general has the sole authority to admit witnesses and their immediate families into the Program.²⁸ Although many parts of the governing statute and policies refer to the attorney general's authority, this authority has been delegated by the attorney general and is exercised by the senior associate director of the OEO who has been designated the director of the Witness Security Program and, in his absence, the director of the OEO.²⁹

While investigative agencies maintain policies regarding the use of the Program,³⁰ the governing policy is promulgated by the OEO and can be found in the U.S. Attorney's Manual (USAM) 9-21.000 *et seq.* For time-critical situations involving imminent danger where the investigative agency cannot provide the necessary security, the USAM sections 3-7.340 and 9-21.220 provide guidance concerning the Emergency Witness Assistance Program and authorization procedures for emergency Program protection.³¹ Typically, Program protection will be authorized only after the USMS has completed a preliminary interview to determine whether the

witness would be eligible for relocation consideration, the OEO has received all of the information necessary to make a determination that the witness is essential to a significant prosecution and is endangered as a result, and no other alternative exists but to enter the Program.³² During the preliminary interview, the witness will be given a general explanation of the services provided in the Program.³³

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Each investigative agency, whether federal, state or local, must submit its initial request for placing a witness into the Program to the OEO. The investigative agency first must request such assistance through the U.S. Attorney's Office for the district in which the investigative activity is to occur or, alternatively, where charges against the target will be filed. The U.S. Department of Justice, Criminal Division Section Chiefs/Office Directors, also can submit an

application for such assistance.³⁴ Once the witness is authorized to participate in the Program, the prosecutor must contact the OEO to arrange the appearance, date, time, place, and anticipated duration of appearances for all case-related matters. All pretrial conferences and briefings involving witnesses in the Program are conducted at neutral sites determined by the USMS after OEO approval.³⁵

For example, one federal investigative agency, the DEA, recognizes two levels of protective status in the Program.³⁶ Under the "Full Program Services," name changes and relocations are provided for the witness and his family. The less often used is the "Special Limited Service" that was developed for foreign nationals who face deportation and a threat in their own country. Although this does not provide a new identity to the witness, it suspends deportation proceedings against the witness.

Prior to requesting a witness' admission into the Program, an investigative agency must consider several issues. For example, the DEA sets forth the following criteria:

- The witness must be an established (registered and vetted) DEA Confidential Source of Information before entering the Program.
- The witness' anticipated testimony must be essential

in the prosecution of the most significant violators.

- There exists a clear threat to the witness or his family or, alternatively, a documented pattern of violence by the defendants/associates.
- The witness must accept all security precautions (including a name change) mandated by the USMS.
- The witness cannot have any outstanding criminal charges against him.
- The witness understands that the Program is designed to make him legally self-sufficient.³⁷

The first step that an investigative agency must undertake to request a witness for the Program is to work with the prosecuting U.S. Attorney's Office on completion of an OEO Witness Security Unit application. The application includes the anticipated witness testimony and its necessity to a successful prosecution, the witness' cooperation and criminal history, the threat posed to the witness, and the risk the witness (and his family) may present to a new community.³⁸ The application is submitted to OEO by the U.S. Attorney's Office.³⁹ The investigative agency also must prepare a *threat assessment* to be sent to OEO. This report includes—

- a synopsis of the investigative records;

- a summary of the defendants and the criminal organization;
- the witness' involvement in the illegal activities being prosecuted;

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State and local agencies can request that a witness (and his family) involved in an organized criminal activity or other serious offense be placed into the Program.

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- details of any direct or potential threats to the witness or his family; and
- specific biographical information as to the defendants, the witness' associates and family members, and those who represent a threat to the witness.⁴⁰

A *risk assessment* also is required and must address the following issues:

- significance of the investigation or case in which the witness is cooperating;
- possible danger the witness and his family poses to the new relocation community;

- alternatives to placing the witness in the Program and why there is no alternative, or why they will not work;
- whether the prosecution can secure similar testimony from other sources;
- significance of the anticipated testimony;
- whether the need for the testimony outweighs the risk of danger he or his family poses to the public;
- any child custody issues and history of spousal abuse; and
- the witness' income and the Program's impact on this income⁴¹

There was a time when courts held that "witness protection statutes contemplate only the protection of witnesses and their families—not protection of the public from the witnesses."⁴²

The Witness Security Reform Act of 1984 changed this position by requiring the attorney general to consider the danger a protected witness poses to the relocation community.⁴³ Once the assessments are completed, the DEA Chief of Operations Management forwards the report to the OEO.⁴⁴ DEA agents do not have to prepare a risk assessment for an incarcerated witness unless that witness will remain in the Program after his release. However, all persons who may pose a threat to the prisoner/

witness must be identified and their biographical information provided to the USMS or the Federal Bureau of Prisons.⁴⁵

In addition, the USAM requires the attorney general to consider a psychological evaluation of the witness and all family members to be relocated who are 18 years of age or older.⁴⁶ The USAM also mandates that any witnesses *entering* the Program will be required to satisfy any known debt or judgment and all outstanding criminal and civil obligations (i.e., fines, restitution).⁴⁷ For those persons already in the Program, however, the governing statute only requires the attorney general to *"urge* the person to comply with the [civil] judgment (emphasis added)."⁴⁸ In the event the person does not undertake reasonable efforts to satisfy the judgment, the attorney general has the discretion, after considering the danger posed and at the request of a plaintiff seeking civil relief, to release the person's identity and location to the plaintiff, enabling the plaintiff to attempt to recover under the judgment directly. The statute also provides that the United States and its officers are exempt from any liability resulting from this disclosure.⁴⁹

The attorney general, through the USMS, can provide the necessary support to all persons in the Program. Such support includes new identities and documentation, housing and

moving expenses from the previous residence, basic living expenses, job search assistance, and any other services to assist the person to become legally self-sufficient.⁵⁰ The USMS also covers the costs (travel, housing, meals) incurred when a witness is scheduled to appear for trial or briefings. For those Program witnesses who are entitled to receive rewards for their participation, the investigative agency

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must submit a report, with the concurrence of the prosecutor, to the USMS Witness Security Program or Bureau of Prisons, Inmate Monitoring Section, along with the payment.⁵¹

Not all Program participants conduct themselves in a legal manner. In certain situations in which a participant commits a crime, a Victims Compensation Fund has been established for victims of those crimes.⁵² The OEO, as delegated by the attorney general, may make restitution or compensation (if the

crime results in death or serious bodily injury) to the victim or estate of the victim for medical and funeral costs and loss of wages.⁵³ Before such payment is made, however, the victim must have tried to secure restitution and compensation under available federal and state civil remedies.⁵⁴ Any recovery, including insurance payments, may preclude or mitigate compensation under the Victims Compensation Fund.

Recently, Senator Charles Schumer (D-NY) introduced legislation creating a "Short-Term State Witness Protection Service" within the USMS.⁵⁵ This new unit would be created to provide protection for witnesses in state and local trials involving major violent crimes.⁵⁶ The legislation also would provide grant money to state and local prosecutors whose states had at least 100 murders per year during the previous 5-year period.⁵⁷

State and Local Agency Usage

State and local agencies can request that a witness (and his family) involved in an organized criminal activity or other serious offense be placed into the Program. The initial request is transmitted to the U.S. Attorneys Office which, after its own review, forwards the request to the OEO, with its endorsement.⁵⁸ The witness' placement is predicated on

the attorney general's finding that the witness and his family may suffer a crime of violence in connection to the witness' anticipated testimony.⁵⁹ In this scenario, the state or local agency must surrender its supervision of the witness to federal authorities and, according to the US AM, is *requested* to reimburse the federal government. However, pursuant to the governing statute, the attorney general may enter into an agreement with a state government that requests the use of the Program "in which that government *agrees to reimburse* the United States for expenses incurred in providing protection. . . ."⁶⁰ The USMS will calculate the terms of any reimbursement, which will be set forth in a Memorandum of Understanding.⁶¹ Rarely are state cases taken without reimbursement unless there is a nexus to a federal investigation.

Recent State Developments

Individual states recently have undertaken legislative action to strengthen their respective witness protection programs. The U.S. attorney for the District of Columbia, who handles criminal matters throughout the federal district, recently stated that the intimidation of witnesses was the biggest problem in prosecuting city gangs.⁶² Across the river, both Houses of Congress for the Commonwealth of Virginia re-

cently introduced bills to increase the penalty to a felony for anyone who knowingly obstructs justice or who, by threat or force, intimidates a witness.⁶³ Similarly, Maryland's Congress introduced legislation to increase penalties for intimidating a witness to a felony and making first-degree murder of a witness a capitol crime.⁶⁴ These changes may forecast a wave of legislative fixes to come throughout the United States due to this growing problem.

Conclusion

Since its inception more than 30 years ago, the Witness Security Program has become an integral part in the war on crime with a newly found greater emphasis on terrorism. Despite a U.S. population of approximately 280 million people, covertly relocating a person and his family, as well as providing legal name changes, employment and medical assistance, personal protection when necessary, and ensuring that the witness and his family are respecting the Program mandates, is not an easy task. If history is any indication, there will be problems with participants in the Program committing crimes. In light of the number of persons who have entered the Program, the comparatively limited number of such problems is a testament to the dedication and professionalism of the persons responsible

for the Program. Indeed, it is these very people and the program they administer that may be the one viable option that can persuade a person with information about another September 11 type attack to provide that information and prevent the slaughter of many innocent Americans and punish those who seek to do this country harm. •

Endnotes

¹ Jerry Markon and Maria Glod, "Giving Up a New Life for a Gang Death," *The Washington Post*, August 10, 2003, sec. A, p. 1.

² *Id.*

³ *Id.* at sec. A, p. 16.

⁴ *Id.*

⁵ Jerry Markon and Maria Glod, "Prosecutors Hope to Quote Dead Witness," *The Washington Post*, August 16, 2003, sec. B, p. 4.

⁶ *Id.*

⁷ Maria Glod, "Gang Trial to Allow Statements of Deceased," *The Washington Post*, Oct. 7, 2003, sec. B, p. 1-2.

⁸ Maria Glod and Jerry Markon, "2 MS-13 Members Convicted of Slaying," *The Washington Post*, November 21, 2003, sec. B, p. 1. See also Jerry Markon, "2 MS-13 Members Get Life in Prison," *The Washington Post*, February 18, 2004, sec. B, p. 1.

⁹ 18 U.S.C. § 3521(b)(1) and (3)(2003), 28 C.F.R. 0.111B(b)(2003).

¹⁰ See "Release of Federal Witness Security Program Information," Stephen J. T'Kach, Director Witness Security Program, July 15, 2002. See also 18 U.S.C. § 3521(b)(1) and (3) and 28 C.F.R. 0.111B(b).

¹¹ Nora V. Demeleitner, "Section V: Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?" *American J. of Comp. Law*, 1998 Supp. 641,643.

¹² *Id.*
¹³ 282 U.S. 687 (1931). *See also* Demeleitner, *supra* note 11, at 643.
¹⁴ *Id.* at 692.
¹⁵ 390 U.S. 129 (1968).
¹⁶ *Id.* at 131.
¹⁷ *Id.* at 133-34. (White, I, concurring).
¹⁸ *Roviarov. United States*, 353 U.S. 53, 60-61 (1957).
¹⁹ Demeleitner, *supra* note 11, at 652. *See* 28 C.F.R. § 16.26(b)(4)(2003), the agency and the informant must consent to the disclosure. Note that typically mere "tipsters" would not have their identities revealed.
²⁰ *Id.* citing *People v. Stanard*, 365 N.E. 2d 857, 863 (NY 1977).
²¹ *Id.* citing Friedman, Annotation, *Right to Cross-Examine Witness As to His Place of Residence*, 85 A.L.R. 3d 541, 569-70 (1978 and Supp. 1997).
²² 18 U.S.C. § 1512(2003).
²³ *Piemonte v. United States*, 367 U.S. 556, 559 (1961).
²⁴ *Piechowicz v. United States*, 885 F.2d 1207 (4th Cir. 1989).
²⁵ Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 938.
²⁶ Witness Security Reform Act of 1984, Pub.L. No. 98-473, 98 Stat. 1837 (1984).
²⁷ Retrieved on October 16, 2003, from <http://www.usmarshals.gov/factsheets/witsec>.
²⁸ 18 U.S.C. § 3076(2003).
²⁹ 18 U.S.C. § 3521(d)(3)(2003). *See also* USAM 9-21.200 (citing A.G. Order No. 1072-84).
³⁰ *See e.g.*, *DEA Special Agents Manual* § 6612.82.
³¹ *See also* 18 U.S.C. § 3521(e)(2003).
³² USAM 9-21.100, 9-21.300, 9-21.330, 9-21.400.
³³ USAM 9-21.300.
³⁴ USAM 9-21.400.
³⁵ USAM 9-21.700.
³⁶ *DEA Special Agents Manual* § 6612.82.H.
³⁷ *Id.* at § 6612.82A.
³⁸ USAM at 9-21.100. A psychological profile will be conducted to assess the

danger a witness or his family may present to the community. *Id.* at 9-21.330.
³⁹ USAM 9-21.100 and *DEA Special Agents Manual* § 6612.82.B.
⁴⁰ *DEA Special Agents Manual* § 6612.82.E.1.
⁴¹ *Id.* at § 6612.82.E.2.
⁴² *Taittv. United States*, 770 F. 2d 890 at 894 (10th Cir. 1985), citing *Bergmann v. United States* 689 F.2d 789 (8th Cir. 1982).
⁴³ 18 U.S.C. § 3521(c)(2003).
⁴⁴ *DEA Special Agents Manual* § 6612.82.E.
⁴⁵ *Id.* at § 6612.82.F.
⁴⁶ USAM 9-21.330.
⁴⁷ USAM 9-21.100.
⁴⁸ 18 U.S.C. § 3523 (a)(2003).
⁴⁹ *Id.*
⁵⁰ 18 U.S.C. § 3521(2003).
⁵¹ USAM 9-21.910 and 9-21.920.
⁵² 18 U.S.C. § 3525(2003).
⁵³ *Id.* at § 3525(a) and USAM 9-21.1020.
⁵⁴ *Id.* at § 3525(d).
⁵⁵ S. 1982, 108th Cong. 1st Sess. (December 9, 2003).
⁵⁶ *Id.* at § 570 (a).
⁵⁷ *Id.* at § 570 (b).
⁵⁸ USAM at 9-21.140.
⁵⁹ 18 U.S.C. § 3521(a)(1)(2003).
⁶⁰ 18 U.S.C. § 3526(b)(1)(2003).
⁶¹ USAM at 9-21.140.
⁶² Neely Tucker, "Girl's Slaying Opens Window on Intimidation," *The Washington Post*, February 2, 2004, sec. A, p. 1 and 10.
⁶³ K.B. 571, 2004 Sess., S.B. 321, 2004 Sess. (VA 2004).
⁶⁴ H.B. 263, 418th Sess. (MD 2004), S.B. 181 and 185, 418th Sess. (MD 2004).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.