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Perspectives

It's Time to Amend the Jencks Act

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"[I]t may remind us of the historical inadequacies of criminal discovery in this country that, according to Justice Jackson, Soviet prosecutors at the War Crimes Trials at Nuremberg protested against adoption of American procedures on the ground that they were not fair to defendants."

—Justice Brennan

Criminal justice reform is afoot in Albany, where there are hopeful prospects for legislation that would bring change to the criminal discovery rules in New York state courts. Among other things, the bill, as currently contemplated, would require that prosecutors, within 15 days of arraignment, identify potential witnesses and provide the defense with all statements in the government's possession made by any person who has information relevant to the charged offense. It seems that New York may finally join the growing number of states recognizing that withholding witness statements until trial is unfair, inefficient, and, in the vast majority of cases, unnecessary to protect the safety and integrity of the government's witnesses.

This is good for justice in New York. But as regular practitioners in the federal courts, we are left to wonder: When will change come to the federal system?

Almost 60 years ago, the great trial lawyer Edward Bennett Williams lamented the state of criminal discovery and called for reform "to end the concept of a trial as 'a game of combat by surprise' and to make it a search for truth." Edward Bennett Williams, One Man's Freedom 185 (1st ed. 1962). It was remarkable, he pointed out, that the liberal discovery afforded a defendant when property is at issue, in a civil suit—pretrial identification of witnesses, depositions, and the other procedures designed to ensure a fair trial—remained entirely unknown to the criminal defendant, whose very livelihood and liberty are at stake.

Williams wrote at a time when the Supreme Court was bringing reform to federal criminal procedure, and indeed had begun to do so with regard to discovery practice. In *Jencks v. United States*, the court ruled that a defendant is entitled to review the prior statements of the government's witnesses where they are relevant to that witness's testimony. 353 U.S. 657, 672 (1957). But Congress balked at change, and promptly limited the impact of the ruling. Just three months after the *Jencks* opinion, Congress passed the so-called "Jencks Act," codified at 18 U.S.C. §3500. Subsection (a) of the Jencks Act provides that no statement of a government witness "shall be the subject of subp[o]ena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." That statute remains the law today.

Thus, in every federal criminal matter, a defendant has no right to learn, prior to testimony at trial, the substance of the prior statements to law enforcement by the witnesses against him. Indeed, he is prohibited by statute from compelling production of witness statements. This is the law even where there is no allegation or realistic prospect of violence, obstruction, or witness intimidation. A defendant is kept in the dark, until he is engaged in the crucible of trial, regarding what is often the most critical evidence—what the witnesses against him say. The statute's impact has been marginally softened in some jurisdictions, including the Eastern and Southern Districts of New York, where the government typically agrees to provide witness statements a week or two before trial. But this concession, which is at the discretion of the government, provides not nearly enough time, particularly in complex cases, where the charges span many years and millions of pages of documents have been produced. Defense lawyers spend months or years preparing to defend such cases, only to receive, on the eve of trial, reports and notes reflecting the statements of witnesses over the course of dozens of meetings with the government. There is precious little time to prepare to cross-examine the government's witnesses, much less investigate the veracity of their statements or follow up on new leads.

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In addition to being unfair, the Jencks Act creates great inefficiencies in our system. A case remains pending for months, even years, and defense counsel is often not in a position to advise her client whether to take a plea until trial is upon her. Cases that might have been resolved within weeks, had witness statements been disclosed, remain on the docket for far longer.

Opponents of reform have long argued that early disclosure of witness statements will lead to subversion by defendants of the judicial process. But other than with respect to a small minority of cases (involving, for example, violent criminal enterprises or specific witness-tampering concerns), there is no reason to believe, much less actual evidence, that this will follow. Where such concerns are present, the government can seek a protective order delaying disclosure under Federal Rule of Criminal Procedure 16(d).

Indeed, in this regard the wheels of justice are turning just fine in the many jurisdictions that now require early disclosure of witness statements. Several states now require prosecutors to disclose the statements of prosecution witnesses shortly after indictment and well before trial. See, e.g., Ariz. R. Crim. P. 15.1 (no later than 30 days after arraignment in the superior court); Cal. Penal Code §§1054.1, 1054.7 (at least 30 days prior to trial); Fla. R. Crim. P. 3.220 (within 15 days of the prosecutor being served with a "notice of discovery" after the filing of the charging document); Haw. R. Penal P. 16 (within 10 days following arraignment and plea); Minn. R. Crim. P. 9.01 (before omnibus pretrial hearing). Numerous states also have laws requiring prosecutors to

disclose the names of witnesses prior to trial and many of these states, including Georgia, Kansas, Kentucky, South Dakota, Tennessee, and Texas, require that this information be provided to the defense upon the filing of an indictment, information, or complaint. See New York State Bar Association, NYSBA Report of the Task Force on Criminal Discovery at 9 nn.16-17 (2015). Other states, such as Arizona and Florida, go even further and provide for pre-trial depositions in criminal cases. See Ariz. R. Crim. P. 15.3(a)(2) (permitting a party or a witness to move to depose any person whose "testimony is material to the case or necessary to adequately prepare a defense or investigate the offense"); Fla. R. Crim. P. 3.220(h)(1)(A) (providing that the defendant may, without leave of court, take the deposition of any eye witnesses, alibi witnesses, investigating officers, and witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, among other categories of witnesses).

According to a 2015 report by the New York State Bar Association, "[n]o State that has enacted more open discovery rules has later gone back to impose restrictive ones." NYSBA Report of the Task Force on Criminal Discovery at 2-3. The laws of other common law countries, including England, Canada, and Australia, have also long required early production of witness statements.

Notwithstanding this, there has been apparently little appetite in Congress to amend the Jencks Act. The last congressional effort was in 1985, when Representative John Conyers Jr. (D-MI) sponsored H.R. 4007, the Jencks Act Amendments Act of 1985. The bill's stated purpose was "to provide more useful discovery rights for defendants in criminal cases." H.R. 4007, 99th Cong. (1985). It would have required the government, "on request of a defendant," to "promptly … make available" the names and addresses of "each person known by the [g]overnment to have knowledge of facts relevant to the offense charged," along with a copy of any related witness statements. Id. at §(a)(1)-(2). Under the proposed bill, the government would have been able make an ex parte application for a protective order and if the court found that disclosure would "constitute an imminent danger to another person" or "constitute a threat to the integrity of the judicial process," the court could have denied, restricted, or deferred such disclosure until after the witness had testified on direct examination at trial. Id. at §(b)(1)-(2). The bill had support from the American Bar Association, as well as the National Association of Criminal Defense Lawyers, among other groups.

The Department of Justice opposed the legislation, on the grounds that the bill was "not necessary to ensure the fairness of criminal trials" and "would have the effect of placing witnesses in physical danger and of impairing the integrity of the judicial process, for example, by allowing the defendant to fabricate a defense through perjured testimony." See id. at 166 (testimony of James I.K. Knapp, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice). The bill never made it out of committee.

The claim that early production of witness statements threatens to engender perjury and obstruction is based on the notion—inimical to our system of justice—that every person charged with a crime is guilty and likely to flout the law in order to escape punishment. A statute that rests on this presumption is, in 2019, long overdue for reform.

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