Witness Statements — Why Reform To The Jencks Act Is Necessary

BY JOHN F. MCCAFFREY & ADRIENNE KIRSHNER

It is a strange anomaly of our justice system — discovery is easier to obtain in civil matters where the major dispute is monetary, than in criminal matters where an individual's liberty is at stake. What a potential witness has told the government may be the most critical information to trial preparation. However, in federal criminal cases it is difficult for a defendant to receive witness statements early enough to effectively use them at trial.

In 2013, a record number of exonerations of convicted individuals were recorded in the U.S. justice system. Thirty percent of those exonerations involved circumstances where no crime in fact was committed, and seventeen percent of exonerations were based on prior guilty pleas. *See www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.*

Change is needed in order to ensure individuals do not plead guilty to crimes they did not commit, and that individuals charged with offenses obtain the evidence against them in time to prepare a defense that may well establish their innocence. Since many defendants are convicted on the testimony of a government witness alone, one of the best places to start with needed change is through the timely disclosure of witness statements — specifically through reform of the Jencks Act.

This article will discuss what the Jencks Act is, why it needs to be reformed, why arguments against reform are not persuasive, and how reform of the Jencks Act can be accomplished in a way that balances competing interests of the government and a defendant.

The Jenks Act Limits One's Ability to Obtain Necessary Evidence

The Jencks Act is codified at 18 U.S.C. § 3500. It states, in pertinent part, as follows:

> **§ 3500. Demands for production of statement and reports of witnesses**
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

The Jencks Act was enacted in rushed response to the U.S. Supreme Court decision in *Jencks v. United States*, 353 U.S. 657 (1957). *Jencks* held that the government must disclose to the defendant a trial witness's relevant prior statements, but failed to define "statement" or to specify when the disclosure needed to occur. Taking advantage of *Jencks*' failure to address these important issues, Congress enacted the Jencks Act, and sharply limited access to government files. The Jencks Act defines "statement" as narrowly as possible, and specifies that the timing of disclosure need not occur until *after* the witness testifies on direct examination.

A number of U.S. Attorney's offices go beyond the Jencks Act requirement and voluntarily disclose government witness statements in advance of trial. Unfortunately, other U.S. Attorney's offices hold back pretrial disclosure of statements, or only do so at the last minute, leaving insufficient time for investigation and adequate trial preparation. A court is powerless to compel the disclosure of government witness statements until after the conclusion of a witness's direct examination.

The criminal prosecution of the late U.S. Senator Ted Stevens keenly demonstrated that the Jencks Act can actually hinder a fair trial. Denying timely access to witness statements is tantamount to denying access to the most basic tool necessary to effectively cross-examine a witness — the written record reflecting a shifting story that mimics the government's interpretation of the facts. Cooperating witnesses, which constitute the majority of government witnesses, are susceptible to extraneous influences when formulating their testimony. Cooperating witnesses have proven to be: (1) easily manipulated by coercive and suggestive interview techniques; (2) capable of giving false and embellished versions of a story with the government's knowledge, acquiescence, indifference, or ignorance; (3) able to create false impressions by omissions or changes in memory; and (4) able to present their testimony to a jury in a convincing manner. Cooperating witnesses have a selfish motive in shading their version of events. The United States Sentencing Guidelines create an incentive to cooperate, and the very value of that cooperation is left to the exclusive determination of the prosecuting authority.

Murray & Murray
Lawyers who mean business.
Serving businesses and individuals since 1931.
Business & Commercial Dispute Resolution
MURRAY & MURRAY
EXPERIENCED TRIAL LAWYERS
111 East Shoreline Drive • Sandusky, OH 44870
800.624.3009 • www.murrayandmurray.com

Arguments Against Early Disclosure of Government Witness Statements

So if the Jencks Act hinders a defendant's right to a fair trial, why has it not already been reformed? Simply stated, concern over what a defendant might do with the witness statements (*e.g.,* obstruction of justice, tampering with a witness, and unfair advantage to the defendant). Appropriate protections can be instituted to deal with these concerns by means less detrimental to criminal defendants.

The first argument against greater and earlier disclosure of witness statements is that disclosing such statements to a defendant will facilitate perjury and falsification of evidence. However, as Justice Brennan stated "[this] fallacy has been starkly exposed through the extensive and analogous experience in civil cases where liberal discovery has been allowed and perjury has not been fostered. Indeed, this experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication." *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279, at 289, 291 (1963).

A second argument against disclosure of witness statements is a criminal defendant will inappropriately interfere with and possibly harm the government witness. Justice Brennan appropriately responded to that claim as well: "[d]angers and other abuses of this kind are clearly a matter of legitimate concern — they argue however not for wholesale prohibition of criminal discovery but only for circumspection and for appropriate sanctions tailored to dealing with apprehended abuses in the particular case." *Id.* As federal judge H. Lee Sarokin wrote in 1991: "[d]enying all defendants access to pretrial statements made by government witnesses out of the fear that some will use such information wrongfully can be likened to outlawing the institution of bail on the theory that some of those arrested might commit further crimes." *See* H. Lee Sarokin and William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption,* 43 Rutgers L. Rev. 1089 (1991).

A third argument advanced against disclosure is simply a fallacy — the scales are already tipped in favor of the defendant because of the burden of proof imposed on the government and privileges afforded the defendant. The government begins its discovery process long before a case commences. The government may utilize grand jury subpoenas to compel testimony and secure materials. The government may obtain and execute search warrants and seize evidence. And, the government may deceive a witness to convince them to cooperate, offer inducements to cooperate such as cash payments, reduced sentences, and even avoidance of criminal charges altogether. A defendant would be charged with bribery or obstruction of justice if he engaged in such conduct.

Proposed Revision to the Jencks Act

So what can be done to provide a defendant with the evidence needed to make informed decisions relating to plea negotiations or allow sufficient time to investigate and prepare for trial, while taking into consideration any real concern relating to witness safety? An American Bar Association draft resolution has the answer. The ABA draft resolution recommends three basic changes: (1) require, upon request in any criminal action, that the government, without delay and prior to the entry of any guilty plea, disclose to the defense all statements made by any prospective government witness; (2) provide that the government may withhold a prospective witness's statement pursuant to a protective order entered by the court based upon a judicial finding that no other feasible alternative is available to assure the safety of the witness; and (3) define "statement" to include any written notation or electronic record containing, in whole or in part, the substance of any statement made by a witness that might be reasonably considered relevant to either the prosecution or the defense of the defendant, including impeachment evidence.

These revisions to the Jencks Act will assist in the fair and effective administration of justice. A trial with fewer prolonged recesses necessitated by defense counsel requiring time to review prior witness statements disclosed to them only after the witness testified on direct examination. These proposed revisions to the Jencks Act will end the gamesmanship in withholding the production of witness statements until the last minute. Importantly, the revisions will provide defendants the effective assistance of counsel they have a constitutional right to receive.

The proposed Jencks Act revisions take seriously the concern of a potential witness being threatened, bribed, or harmed, by allowing the government to withhold a witness statement pursuant to a protective order entered by the court. The court determines when risks rise to the level requiring statements to be withheld, or if a less extreme alternative is available, such as statements being available to counsel only, or requiring counsel not disclose the name of the government witness to the client.

Conclusion

The Jencks Act needs to be revised. Early disclosure of witness statements is necessary to adequately and timely asses the strengths and weaknesses of the government's case. The revisions recognize that in some small number of cases a real risk of a witness being subjected to intimidation or retaliation is possible, but not in every case. Revising the Jencks Act will help ensure that innocent individuals do not plead guilty out of fear, or that innocent individuals are not wrongfully convicted at trial. Significant advances have occurred to ensure only the guilty are convicted. Revising the Jencks Act is another needed reform to that end.

John McCaffrey in a former FBI Special Agent and Prosecutor. He is a partner with Tucker Ellis LLP where his practice focuses on white collar criminal defense and business litigation. He is a Fellow of the American College of Trial Lawyers. He has been a CMBA member since 1994. He can be reached at john.mccaffrey@tuckerellis.com.

Adrienne Kirshner is an associate with Tucker Ellis LLP where her practice focuses on white collar criminal defense and business litigation. She has been a CMBA since 2003. She can be reached at adrienne.kirshner@tuckerellis.com.

Micro Systems Management
TECHNOLOGY CONSULTANTS
Randall W. Zinn
randy@msmctech.com
Certified Forensic Examiner
222 Gemini Tower I
1991 Crocker Road
Westlake, OH 44145
440-892-9997
Technology Solutions • Managed Services
Forensic Examination
www.msmctech.com
NWBOC