Federal Sentencing and the First Step Act

By Behzad Mirhashem

A federal criminal trial is much like a criminal trial in a New Hampshire superior court. Federal sentencing, however, is quite different from its state court analogue. This article provides an overview of federal sentencing laws, and discusses some of the reforms implemented through the First Step Act, signed into law on December 21, 2018.

Prior to the Sentencing Reform Act of 1984, sentencing in federal cases proceeded in a fashion quite similar to current state sentencing practices in New Hampshire state courts: a statute specified the maximum sentence for a given crime, and the judge had tremendous discretion in choosing any sentence at or below that maximum. One factor that drove passage of the Sentencing Reform Act was concern about wide disparities among sentences imposed by different federal judges on similarly situated individuals who were convicted of similar crimes. Another factor was a growing skepticism among lawmakers about rehabilitation as the principal objective of sentencing.

The Sentencing Reform Act instituted a system of "sentencing guidelines." Despite their name, these guidelines were, as originally conceived, essentially mandatory. The Act created a new entity, the United States Sentencing Commission, tasked with drafting the guidelines. This seven-member body set about creating guidelines that, in accordance with its mandate, would specify a narrow range of possible sentences in any given case. In the ordinary case, the judge would have to pick a sentence from this narrow range. Infrequently, federal courts were authorized to "depart" from the guidelines. Departures were not ad hoc; rather, the guidelines themselves provided the only acceptable bases for such departures, with the most common being cooperation by the defendant in the prosecution of others.

Over the years, the guidelines have changed in many ways, but their basic structure has remained the same. A defendant's guideline sentencing range is read off a two-dimensional grid. The vertical axis specifies an "offense level," calculated according to rules provided by the Sentencing Commission in an annually revised manual. For example, conviction after trial of a federal fraud offense generally corresponds to an offense level of 7. But this offense level is increased based on the amount of financial loss. For example, if the fraud involved a financial loss more than $95,000, but less than $150,000, the offense level increases by eight levels to 15. If the fraud involved 10 or more victims, was committed through mass-marketing, or caused significant financial hardship to one or more victims, the offense level is increased further to 17. These increases are examples of the many enhancements provided in the fraud guideline based on various "specific offense characteristics."

The horizontal axis of the grid is determined from the defendant's criminal history. Each prior conviction is assigned "criminal history points" based on the length of the sentence. For example, a sentence involving no jail time is assigned one point. The horizontal axis ranges from Criminal History Category I, corresponding to 0 or 1 point, to Criminal History Category VI, corresponding to 13 or more points. In our fraud example, for an offense level of 17 and Criminal History Category I, the guideline sentencing range is 24-30 months. Thus, the Sentencing Reform Act often reduced the judge's sentencing function to ensuring that the guidelines were correctly calculated.

Mandatory guidelines are no longer in effect. The seeds of their demise were sown in a landmark decision of the Supreme Court, issued in 2000. In *Apprendi v. New Jersey*, the defendant was convicted of unlawful possession of firearm, an offense usually punishable by no more than 10 years. At sentencing, however, the judge had determined that the defendant was motivated by racial bias, and sentenced him to 12 years, in accordance with a New Jersey statute that provided for an extended term of imprisonment in such circumstances.

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The Government's Disclosure Requirements in the District of NH

By Patrick Queenan

In federal criminal cases, the Government's discovery obligations are generally dictated by the Jenks Act, the Federal Rules of Criminal Procedure 16 and 26.2 (to include LCrR 16.1), and the constitutionally mandated disclosure requirements related to impeachment and exculpatory evidence established in *Brady v. Maryland*, *Giglio v. United States*, and their respective progeny. In New Hampshire, however, like many other judicial districts, federal prosecutors are subject to more expansive disclosure requirements under the Rules of Professional Conduct as well as their agency's discovery policies.

Recently, the Department of Justice (DOJ) released an updated Justice Manual (formerly referred to as the United States Attorney's Manual). It is touted as the first comprehensive review and overhaul of the DOJ's pubic policies and procedures in more than 20 years. It includes the Policy Regarding Disclosure of Exculpatory and Impeachment Information (9-5.001) and a section on Criminal Discovery (9-5.002). Additionally, the United States Attorney's Office for the District of NH (USAO) has its own local discovery policy (the DNH Policy), which is currently available on the DOJ's website.

Although the guidance set forth in the Justice Manual remains largely unchanged from prior versions, it is nonetheless necessary to review the discovery policies to appraise whether the practice in our district truly conforms to the controlling policies and other applicable disclosure requirements.

This article outlines the Government's disclosure requirements in the District of NH related to witness statements and *Brady* and *Giglio* material in both the guilt and sentencing phase of a criminal case.

Witness Statements

Under both Rule 26.2 and the Jenks Act, the Government is required to produce prior statements from a testifying witness *after* the witness has testified on direct examination. Fortunately, our local rule mandates that the Government produce the witness statements "at least seven (7) days prior to the commencement of the proceeding." The rule allows for an exception when "the government determines that circumstances call for later disclosure as allowed by Rule 26.2 and [the Jenks Act]." Likely the late disclosure exception is triggered only in circumstances when disclosure would compromise national security, witness safety, or the integrity of a truly ongoing investigation.

The DNH Policy, however, calls for disclosure "well before the deadlines" set forth in the applicable rules. Specifically, according to the DNH Policy, the USAO's "general practice will be to produce witness statements as recorded in police reports, FBI 302s, DEA 6s and similar law enforcement reports of interviews within *14 days of the defendant's arraignment*." (Emphasis added). According to the DNH Policy, the USAO provides "early production" of witness statements and other discovery material in order to "facilitate negotiated dispositions of cases, to prevent the need for a continuance of criminal cases, to enhance the truth-seeking mission of the office, and to ensure the fair administration of justice." It is also district policy to "produce in discovery statements made by or attributed to witnesses that are not going to be called to testify."

Exculpatory & Impeachment Information

Under *Brady* and *Giglio*, government disclosure of exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. This disclosure requirement extends to evidence material to guilt or punishment.

As to guilt, evidence is material when there is a reasonable probability that effective use of the evidence will result in an acquittal. The Justice Manual — which the DNH Policy explicitly incorporates — recognizes this is often a difficult assessment and provides that "prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." The Justice Manual requires disclosure of:

a) information beyond that which is "material" to guilt;

b) information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless as to whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime; and

c) information that either casts a sub-

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to provide information to prosecutors, implicating others. This happens for a number of reasons beyond the already mentioned guidelines departures resulting from cooperation in the prosecution of others. A person who allegedly distributed, or possessed with the intent to distribute, drugs in a quantity sufficient to trigger a mandatory sentence is actually subject to such a sentence only if the prosecutor chooses to charge the triggering amount in the indictment. Also, a person who is potentially subject to an enhanced minimum sentence actually faces such a sentence only if the prosecutor elects to file written notice of the prior convictions.

Moreover, despite being referred to as mandatory sentences, it is actually possible to avoid such sentences. A federal statute provides that, if the government files an appropriate motion, "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Thus, pleading guilty and testifying against others is the ticket to avoiding lengthy mandatory sentences.

Aside from cooperation, the other way to avoid a mandatory minimum drug sentence is through the so-called "safety-valve" provision. This statute authorizes a judge to sentence below the mandatory minimum so long as its multiple, stringent requirements are met. These include the defendant having only a minor prior record, if any. The First Step Act modestly expands the range of prior records under which a defendant is eligible for the safety valve.

The First Step Act would make no change in the provisions that give prosecutors the upper hand when it comes to mandatory sentences. As currently proposed, however, the Act would make a modest change in another provision — the so-called "safety valve." Aside from cooperation with the government in the prosecution of others, the only other way to avoid a mandatory minimum sentence is to meet the stringent requirements of the safety valve statute. This statute authorizes a judge to sentence below the mandatory minimum so long as its multiple requirements are met. These include the defendant having only an extremely minor prior record, if any. The First Step Act modestly expands the range of prior records under which a defendant would be eligible for the safety valve.

The First Step Act also includes some provisions aimed at the Bureau of Prisons. For example, the Act undoes the Bureau's stingy interpretations of a law that provides for good behavior sentence reductions and directs the Bureau to place prisoners within 500 miles of their families' residence. In all, the First Step Act is a modest but real first step towards sentencing reform in the federal system.

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stantial doubt upon the accuracy of the evidence, the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence

Although LCrR 16.1(c) requires the disclosure of evidence material to issues of guilt or sentencing at least 20 days before trial, the DNH Policy requires disclosure "within 10 days of the defendant's arraignment and to provide prompt disclosure of exculpatory information on a continuing basis through the end of the case." And the DNH Policy requires disclosure of impeachment evidence "at least 20 days before trial."

The exculpatory evidence and impeachment disclosure requirements also extend to punishment. This continued disclosure obligation should not be overlooked or neglected as most hotly litigated issues within our district relate to the application of sentencing factors, as opposed to issues surrounding guilt or innocence. The sentencing guidelines require the Court to make factual findings related to the defendant's role in the offense. Often, the parties will dispute the application of certain aggravating adjustments, such as whether sophisticated means are used, the quantity of drugs, the amount of financial loss, and the defendant's role in a conspiracy.

Under *Brady* and *Giglio*, the defendant is entitled to exculpatory or impeachment evidence favorable to her position as to each relevant sentencing factor at issue. Additionally, federal prosecutors are mandated by the McDade Amendment (28 U.S.C. § 530B) to comply with all state and federal laws and rules governing attorney conduct. In New Hampshire, prosecutors are subject to New Hampshire Rule of Professional Conduct 3.8. (Special Responsibilities of a Prosecutor) and the applicable disclosure obligations adopted from the ABA's Criminal Justice Standards for the Prosecution Function.

Among other requirements, Rule 3.8 requires prosecutors to:

[M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor ...

Arguably, the materiality standard at sentencing is whether the evidence would alter a finding of preponderance of the evidence required to prove any of the sentencing guideline adjustments. Often, this favorable information will be found in law enforcement reports or witness statements.

The Justice Manual requires prosecutors to disclose exculpatory and impeachment information "that casts doubt upon proof of an aggravating factor at sentencing ... no later than the court's initial presentence investigation."

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