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# Is “Relevant Conduct” Relevant? Reconsidering the Guidelines’ Approach to Real Offense Sentencing

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# PANEL REMARKS

## IS "RELEVANT CONDUCT" RELEVANT? RECONSIDERING THE GUIDELINES' APPROACH TO REAL OFFENSE SENTENCING

DAVID N. YELLEN\*

The topic of this panel is the role of relevant conduct in applying the Federal Sentencing Guidelines. For those of us who have been closely involved with the Federal Sentencing Guidelines over the years, it is interesting to see just how pervasive they have become. On the plane out here yesterday, I started reading Scott Turow's new novel.<sup>1</sup> It is about a personal injury lawyer who is engaged in some internal revenue fraud but also has a lot of information about some corrupt local judges. Within the first fifteen pages, we find out that he completely acknowledges his tax crimes and although he does not want to get involved in ratting on these judges because it will trigger negative consequences, he is essentially forced to do so because his lawyer takes him through the operation of the Federal Sentencing Guidelines. The lawyer shows just how long he is going to go away for unless he cooperates with the authorities. So if it is good enough for Scott Turow, it means we are on an interesting subject.

We are going to talk now about relevant conduct under the Guidelines. I think it is fair to say that it continues to be the most controversial aspect of the Federal Sentencing Guidelines and has been since the inception of the Guidelines. Lay people and lawyers who do not practice in the area continue to be amazed when they find out just the rough contours of how relevant conduct works. In particular, when someone has (1) not been charged with a

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\* Professor, Hofstra University School of Law.

1. SCOTT TUROW, *PERSONAL INJURIES* (1999).

particular offense that they may have committed, or (2) is charged with that offense but that charge is dropped pursuant to a plea bargain, or even (3) where a person is charged with an offense and is acquitted of that offense, in many circumstances the Sentencing Guidelines mandate that the sentencing judge take into account the conduct underlying those crimes as long as the judge believes by a preponderance of the evidence that that crime did occur. These rules shock many people.

Now, on the one hand, there is nothing new in the Guidelines taking that approach because, historically, the Supreme Court has said for many, many years that a preponderance standard of evidence at sentencing is constitutional and that therefore it is permissible to take into account acquitted conduct. After all, an acquittal does not mean that the jury is finding that the person is innocent of the crime, rather that the government did not prove the crime beyond a reasonable doubt.

So in terms of lawyerly analysis, there is nothing inconsistent with that. Judges have historically taken into account various things about offenders and offenses not proven beyond a reasonable doubt. What is really radical in my view about what the commission did with relevant conduct, however, is the way they structured it. Let me note that there are now dozens of states that have sentencing guidelines in one form or another and, to the best of my knowledge, no state has adopted anything even close to the federal approach to relevant conduct.

Now for some background. The Commission had to choose between or fashion a compromise between what is known as “offense of conviction” or “charge offense” sentencing and “real offense” sentencing. In charge offense sentencing, the entire sentence would be driven by the nature of the charge that the defendant was convicted of. There are a lot of problems with that. We have heard already about the power that prosecutors have to influence sentences today. That power would be infinitely greater if the only thing that determined a sentence was the charge of conviction; it would really be up to the prosecutor.

The other extreme is what is known as real offense sentencing where the judge can take into account anything the judge wants to about the offender. What the Commission did to really simplify things is they compromised in a variety of ways. The offense of conviction determines the starting point under the Guidelines. So in Chapter Two of the Guidelines, the judge has to apply a particular offense guideline that is determined based not on relevant conduct but based on the charge of conviction: in a typical case, the count or counts in the indictment that the defendant pleads guilty to. Once we get past there, however, there are many aspects of the sentencing process that are more real offense oriented. In other words, they apply this principle of relevant conduct, for example, the amount of money involved in a robbery or a fraud, or the amount of drugs involved or whether an injury occurred. All kinds of factors

like that that do not have to be proven or admitted in order for a defendant to be convicted. They play a role in determining what the sentence will be. That, in fact, has been a fairly noncontroversial aspect of the relevant conduct principle. The Commission tried to identify the aggravating and mitigating factors that occur most often and assign some numerical value to that.

Then there are other aggravating and mitigating factors in Chapter Three of the Guidelines that are essentially real offense based. Did the defendant play a leadership or minimal role in the offense? Were there vulnerable victims? Did the defendant accept responsibility? What is really at the heart of debate of relevant conduct though is the Commission's decision that in a variety of cases, principally cases where the sentence is driven by an amount (and that means drug cases and money cases which make up a substantial majority of the federal criminal cases that are prosecuted); in those kind of cases, the judge is required to base the sentence not just on the amounts involved in the count of conviction, but also the amounts involved in any similar conducts.

Section 1(B)1.3 of the Guidelines<sup>2</sup> states that the court must include this conduct if it was part of the "same course of conduct" or "common scheme or plan" as the offense of conviction. That is the critical language.

So if the defendant is a white collar defendant, pleads guilty to one count of mail fraud which involved \$5,000, but the pre-sentence report indicates and the judge finds by a preponderance of the evidence that in fact the defendant defrauded five hundred people for an amount of over a million dollars, the judge must base the sentence on that larger amount. The judge is, of course, limited by the statutory maximum applicable to the offense of conviction. In applying the Guidelines, the judge will take into account not the one offense that was admitted to or proven to at trial but rather all of this other conduct in the same course of conduct or common scheme or plan.

Two aspects of the Guidelines make this relevant conduct principle tremendously powerful. First, the sentence is based on things that are proven only by a preponderance of the evidence. Second, the way the Guidelines were written, in those kinds of cases, the quantity or amount involved is really the driving factor in the sentence. The Commission had a lot of choices to make. It could have based the sentences on role in the offense or the defendant's state of mind. In drugs and money cases, however, the principal factor driving the variance in sentences under the guidelines is quantity: the amount of money in a fraud, the amount of drugs in a narcotics case. These two things combine to make the relevant conduct principle exceptionally powerful.

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2. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1998).

## THOMAS HUTCHISON

The relevant conduct rule in some respects is a bigger bugaboo than it ought to be. In several respects, the relevant conduct rule is a defendant's friend. Over time, the Commission has sought to restrain the breadth with which the original relevant conduct was interpreted. The relevant conduct rule encompasses two factors: conduct and temporal limitations. And there are two different temporal limitations involved. The broader, more expansive one is "same course of conduct" or "common scheme or plan." Both of those concepts have subjective elements to them, and my reading of the cases suggests that the courts do not always notice the subjective elements.

"Some course of conduct" requires that the conduct be "sufficiently" connected to the offense of correction to warrant a conclusion that the conduct is part of an ongoing spree or part of a single episode. "Sufficiently" is something of a subjective judgment. "Common scheme or plan" requires a "substantial" connection by a common factor. How "substantial" a connection is, is clearly a subjective determination. As David Yellen has indicated,<sup>1</sup> I think a good share of the problem with the relevant conduct rule focuses on the Commission's choice of factor to use in determining the severity for drug trafficking—quantity.

That choice is defensible because Congress has based mandatory minimums on quantity, which is something of a signal to the Commission that Congress views quantity as a principle determinant of the harm of the crime. The problem that we have found when we combine the relevant conduct rule with the use of quantity is that relatively low-culpability defendants—minor participants in large criminal activities—are punished excessively harshly.

The federal public defenders have proposed a number of changes to limit the consequences of this in drug cases by advocating a cap on the offense level applicable to a minor or minimal participant. At one point, a majority of the Commissioners voting even agreed to that. Unfortunately, the majority of Commissioners voting was not the majority required by the statute. Nevertheless, there was interest on the part of the Commission, and the public defender's proposal is one way to ameliorate a problem in the most numerous type of cases in the federal system – drug cases.

The other problem that I see I will call "creeping real offensism." As David [Yellen] said, the basic compromise was that the offense with which the

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1. Editor's Note: *See* Professor Yellen's comments, 44 ST. LOUIS U. L.J. 409, 410 (2000), in this issue.

defendant has been convicted will determine which Guideline in Chapter Two to start with, that is, which offense Guideline to apply. If a defendant is convicted of drug trafficking, the Guideline used is § 2(d)1.1. If the defendant is convicted of bank robbery, the Guideline used is § 2(b)3.1. That decision is made on the basis of the conduct alleged in the charge of which the defendant has been convicted.

When you get to the offense Guideline, there is a cross reference which says, "If the offense involved X, go to some other Guideline." This second determination is made on the basis of relevant conduct. In essence, every time there is a cross reference, you have eroded the compromise between real offense and charge offense that the Commission drew. There have been a lot of cross references put in offense Guidelines. The Commission's justification has been that defendants were plea-bargaining to lesser offenses, and had they been convicted of the that, the court (by a preponderance of the evidence) has found that they engaged in, they would have been punished more.

From the defendant's standpoint, the situation is ameliorated somewhat because, if the defendant usually will have pleaded to an offense with a lower maximum. But, if the real offense element was not in the Guideline, if there were not a cross reference, the defendant would receive an even lower sentence, comparable to the sentence of persons who have been convicted of that offense.

DAVID HARLAN\*

My viewpoint is that of a defense attorney who principally defends corporations or business people in financial crimes. Because of this, virtually every case I encounter includes relevant conduct issues, particularly the amount of money involved in the crime. It seems to me that enhancing punishment based upon relevant conduct, which is established by a preponderance of the evidence standard, is clearly contrary to the notions of fairness and due process that have been a part of criminal justice system from the beginning. It runs contrary to the presumption of innocence and to the rule that there has to be a conviction beyond a reasonable doubt. It seems to me that, at a minimum, the standard should be clear and convincing evidence, but frankly, I think beyond a reasonable doubt is the preferable standard. It would be consistent with our traditions. In addition, I think that in the process of determining relevant conduct, more attention should be paid to the issues of due process.

Let me talk briefly of some of the problems that I experience in the way the current system is administered.

Quite often the relevant conduct involves stale evidence. It is difficult for a defendant to go back and try to resurrect facts that would exculpate him of the relevant conduct. This is true particularly in the financial crimes area where schemes may go on over a long period of time. The preponderance of the evidence standard virtually dictates a government outcome. I think it is almost inevitable.

There are questions as to whether the rules of evidence apply in sentencing hearings, and I think that as a practical matter there are serious issues of the right of confrontation in evidence hearings.

Another problem – I see this particularly in the fraud and tax area, in business crimes, and in government program fraud – is that the government will frequently claim as relevant conduct, acts that would be too technical or too unclear to ever be brought as a criminal case standing on its own. But in a relevant conduct context, with a preponderance of the evidence standard, such things are fair game even though in the real world they would never form the basis for a criminal case.

Most defendants lack the resources to investigate government claims of relevant conduct, much less contest them in court. The court also lacks resources. The United States Probation Office is not equipped to conduct

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sophisticated financial investigations or indeed sophisticated criminal investigations of any sort. That is not their function. Defendants are neither equipped to conduct detailed investigations of stale conduct nor conduct extended sentencing hearings to resolve some complicated issue of fact involving, for example, the Medicare regulations. As a consequence, the government's version of relevant conduct is virtually always accepted. Moreover, I have had experiences where Assistant U.S. Attorneys tell me they will not go forward with the plea bargain if there is any dispute about the pre-sentence investigation.

I would not necessarily say that the prosecutors are the source of that problem. I think that is a reflection of judges' distaste for conducting lengthy, detailed and controversial sentencing hearings. The prosecutors are really reflecting the wishes of the district judges. On the subject of sentencing hearings, few hearings are held. I have never been involved in one, and I do not know many defense lawyers that have been. I will tell you, though, that the view is that if you choose to have an extended sentencing hearing to dispute some of these relevant conduct issues, you are going to lose whatever benefits you get from the plea bargain because you are going to be sentenced at the maximum range just as though you had gone to trial rather than pleading guilty. Is that a correct perception? I do not know. But it is a perception that is out there.

I would recommend that the Guidelines explicitly permit the government and the defense to stipulate to the relevant conduct or the lack thereof. I understand that puts more discretion in the hands of the prosecutors and the defense attorneys, but their bargain is going to reflect their assessments of the strengths of their cases. Particularly in the area of financial crimes stipulations, where the amount of money involved can be a reflection of all kinds of bargaining, I think that a stipulation of that nature should be binding upon the court unless there is a finding of a miscarriage of justice.

ROGER HAINES, JR.\*

In defense of the Relevant Conduct section of the Sentencing Guidelines, I would like to make three points: one of the charges that has been leveled against the Guidelines is that they are not individualized, and do not allow for individualized sentencing. But any fair sentencing system has to take into account more than the elements of the offense. Even in state guideline schemes that do not have a relevant conduct guideline, it is understood that in sentencing within the state range the judge will consider the individual factors of the defendant, including how much harm he caused, and what his prior record is. All these factors are laid out in the Federal Guidelines. So if you examine these state systems, you will see that in order for a sentencing system to be perceived as fair, it has to take into account some “real offense” factors.

The real complaint against the Guidelines is not that they consider “real offense” factors, but that they ordinarily prevent the judge from considering a defendant’s “specific offender characteristics,” that is, the defendant’s family background, youthfulness, drug addiction, et cetera. The reason the Guidelines generally bar these factors is that in the pre-Guideline era you had some judges who always ate hard-boiled eggs for breakfast and others who had them “over easy.”<sup>1</sup> That is, some judges thought youth was a mitigating factor, while other judges thought youth was an aggravating factor, because youthful offenders tend to recidivate most often. Likewise with addiction, some judges felt that addiction was a mitigating factor. But other judges would say addicts are more likely to recidivate, so they considered addiction an aggravating factor. The Sentencing Commission, I think very wisely, took the middle ground, deciding that judges generally cannot consider these “specific offender characteristics” at all, because these are the factors that have caused the most disparity among district judges. In short, it was proper for the Commission to include “relevant conduct” and to ordinarily exclude “specific offender characteristics,” because both of these decisions enhance the “fairness” of the guidelines.

My second point is about due process. It has been suggested that the “preponderance of the evidence” standard allows judges to sentence defendants

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\* Assistant U.S. Attorney, Southern District of California. Member, U.S. Attorney General’s Advisory Committee on Sentencing Guidelines. These views do not necessarily reflect the position of the United States Department of Justice.

1. Editor’s note *see* Professor Michael Goldsmith’s comments, 44 ST. LOUIS U. L.J. 394, 394-95 (2000) in this issue.

based on unreliable evidence. But ask any district judge, when was the last time he or she relied on evidence despite doubts about its reliability, simply because of the preponderance of the evidence standard. The judge would answer, "Never." This is because judges try to do justice. If they have substantial doubts about relevant conduct, they simply do not include it, regardless of the "preponderance" standard. One indication of this is that there are very few reversals on appeal for unreliable evidence. So the standard of review really does not make much difference. I submit that the "tail is not wagging the dog."

Thirdly, a question was asked whether drug quantity and fraud loss should drive the Guidelines. For drugs, I think the answer has been stated here many times; as long as there are statutory mandatory minimums, quantity will drive the drug Guidelines. The same is probably true for fraud cases, because it is difficult to find any other single factor that so captures the harm caused by fraud. With regard to "relevant conduct," however, it is important to remember that if you are convicted of a fraud "scheme" or a drug "conspiracy," the so-called "relevant conduct" is actually part of the offense of conviction. It is not "relevant conduct" at all. Thus, in "conspiracy" or "scheme" cases, it is not the "relevant conduct" that increases the sentence—it is the offense conduct itself. The other cases—where relevant conduct is used to increase the sentence of a defendant who is not convicted of a conspiracy or scheme—are a small part of the total number of drug and fraud cases.

THE HONORABLE HARLINGTON WOOD, JR.\*

I am part of the old school: pre-Guidelines sentencing district judges. You know, when this all started, we were referred to as “the problem.” No doubt there was some disparity in sentencing. It was almost unavoidable because all crimes, defendants, communities, judges, and other circumstances are different. But we did not realize we had done such a bad job of sentencing in those days until we heard all the noise from Washington: it was loud and it was strong. I am not confident, however, that the new experts, no matter their good intentions, could reliably measure the disparity that they are talking about. In those early days, my judicial colleagues and I viewed sentencing as a most solemn judicial responsibility. We were dealing face to face with human beings and their lives. We were trying to follow the law using our experience, our judgment, and our discretion, in an endeavor to be fair. That, no doubt, led to some troubling disparities, but they were not disparities mandated by some unseen faces.

My views have developed over the years, being on both sides of the counsel table in the federal court and on the district bench. Today, sentencing judges do not have quite the same responsibility over people’s lives that we had. It is now more a matter of categories, points, graphs, departures, mandatory sentencing, and all that. I have one colleague who refers to this business as “that green-eyeshade business.” Today’s judges, except within narrow limits, are mere conduits of sentencing decisions made by faceless persons who profess to have come up with all the right answers for almost all situations. It seems to me we have only cured one type of disparity in exchange for another. The next step would be to computerize it all.

It is hard for sentencing judges these days to be charged with any significant disparity in view of the mandatory minimums, and also because the credit for any disparity that there may be belongs to the Sentencing Commission, the prosecutors, and other non-judges. One interesting case from the Seventh Circuit, *United States v. Zendeli*,<sup>1</sup> had what we felt was an unconscionable disparity. Last year there were two successive opinions in this case, and it was not the fault of the district judge. He characterized the required sentences between each of the defendants as being absolutely “out of whack,” and he would not do it. So he said, “We’ll let the Court of Appeals

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\* United States Circuit Judge for the Seventh Circuit (1976-); United States District Judge for the Southern District of Illinois (1974-1976).

1. 180 F.3d 879 (7th Cir. 1999) and 195 F.3d 314 (7th Cir. 1999).

straighten it out." That is one reason we are here. We agreed with him, but there was nothing we could do about it either. The outcome really depended on mandatory sentences, the charging decisions of the U.S. Attorney, and the plea-bargaining. Fortunately, after our first opinion, the U.S. Attorney came to our assistance and dismissed several counts and brought the sentences down more within reason. I hope the U.S. Attorney saw then how it should be handled in the future to avoid new disparities. The judges had no discretion to alleviate the problem. They were absolutely bound by the actions of others, all non-judges.

I did not realize why I was opposed to the Sentencing Guidelines – and I am – until I read *Fear of Judging*<sup>2</sup> and Professor Yellen's article in the 1993 issue of the *Minnesota Law Review*.<sup>3</sup> In 1991, Chief Justice Rehnquist appointed me along with eight other federal judges from all over the country to the Long-Range Planning Committee for the Federal Courts. After several years of studying all aspects of the federal courts, we filed a report in which the Sentencing Guidelines were one of the matters considered. One problem, in the view of that committee, was that the disparities originally complained about have been replaced by new disparities – disparities born of uniformity. Offenders are as different as their crimes, but often they may be treated the same, which creates a new breed of disparity. I think if *Fear of Judging* and Professor Yellen's article had been in existence when we filed our report, we would have attached those publications as exhibits in support of our own views.

But today judges are learning to live with the Guidelines and doing their best to apply them, as far as they can understand them, and not quarrel with them. Even though I do not know her views about the Guidelines, I am encouraged by the appointment of Circuit Judge Diana Murphy as chairperson of the new Sentencing Commission.<sup>4</sup> She is known and respected from coast to coast. Also, Judge Ruben Castillo from the Northern District of Illinois, highly regarded in the Seventh Circuit, has been named to the new Commission.

Since the Guidelines were adopted in 1987, my court has had about 2,000 Guidelines appeals. The Ninth Circuit, the largest circuit, has heard over 4,000. To my amazement, I find that I contributed to Guidelines jurisprudence by writing the first opinion on relevant conduct in our circuit. I cannot assure you, however, that I really understood what I was doing. There have been 140

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2. KATE STITH & JOSE CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURT* (1998).

3. David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993).

4. Editor's note: See Judge Murphy's comments regarding the Sentencing Commission, 44 ST. LOUIS U. L.J. 279 (2000), in this issue.

other opinions to date on relevant conduct; every judge on our court has had a say about it. My feeling is that our Sentencing Guidelines jurisprudence will not have a long-lasting life and that is just as well.

I have been particularly concerned about other relevant conduct issues, such as the use of charges of which a defendant was acquitted, criminal conduct with which the defendant was never charged, or criminal conduct which was dropped as part of a plea bargain. The burden of proof for sentencing purposes is lower, and no grand or petit jury has had a say. Relevant conduct is now more controlled by the U.S. Attorney and the probation office, as I see it, not by the judges. Also, plea-bargaining can be dangerous, as evidenced by *Zendeli*.

It is quite true that, prior to the Guidelines, we did take into consideration relevant conduct, but more in human terms, considering each defendant and the circumstances of the defendant and the crime as a whole. I think we almost always explained to the defendant where that sentence came from and what was involved and why. I heard the explanation this morning from one of the pro-Guidelines speakers that some of the disparities from the pre-Guidelines district judges must have been because we were all on Fruit Loops.<sup>5</sup> I do not think there were any Fruit Loops in those days, but there are now. We district judges just did our best, based on our own experiences and the law, endeavoring to be fair and to tailor the sentence to that particular defendant.

One thing the Guidelines do not consider are the characteristics of the particular defendant. For example, rehabilitation was considered pre-Guidelines. I have seen it work beautifully and am very proud of the successful rehabilitations we were sometimes able to accomplish. And I believe military service is not now considered. I cannot see myself giving a defendant who had been awarded the Medal of Honor the same sentence I might give to another defendant in a similar situation. Under the Guidelines, the Medal of Honor recipient would have to be sentenced, as I see it now, the same as someone who had not served his country at all.

You can tell I am from the old school, as I said, and I do not apologize for it. Where this is all going to end I do not know, but I hope the solution will possibly be like that set out in *Fear of Judging*, that gives a district judge more judicial discretion, guided by advisory – not mandatory – principles, and requires the judge to give some explanation for the sentence. Either party can then seek appellate review.

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5. Editor's note: See Professor Michael Goldsmith's comments, 44 ST. LOUIS U. L.J. 394, 395 (2000) in this issue.

It is a complex, controversial area, and I cannot begin to know all the answers. This occasion offered by the Saint Louis University School of Law for all of us to get together and exchange views, has, I am sure, been most helpful to all of us.

MYLES J. JONES\*

As a probation officer, I deal with relevant conduct on a daily basis and I lead a pretty boring life. But on a lighter side I would like to say that I ate Kurt Warner's Crunch for breakfast this morning, and I feel pretty strong.<sup>1</sup>

In August 1996, we adopted a new format with respect to relevant conduct in our pre-sentence reports. If you bear with me a second I will read the new format and comment a little:

The probation office will continue to compose pre-sentence reports that provide the total scope of the offense. Or in other words, relevant conduct in the narrative portion in the offense conduct section of the pre-sentence report. Importantly, this is a departure from our previous pre-sentence report format because the guideline calculation as included in the offense level computation section of the pre-sentence will be based, when applicable, upon the scope of the offense as contained in the stipulation and plea agreement. In those cases in which the stipulations are in dispute, inadequate, incomplete, vague, misleading, or incorrect the probation office will complete the offense level computation based on the information available. Through the pre-sentence report disclosure process, the offense level computation prepared under these circumstances will be subject to revision based upon the subsequent negotiations of the parties.<sup>2</sup>

Now, in those cases in which the defendant is found guilty, the probation officer conducting the pre-sentence report, will, as in the past, develop the offense conduct section detailing the total scope of the offense upon which Guideline calculations will be based. Contrarily, where we do have trial convictions, it seems we receive more objections with respect to relevant conduct than when there is a plea agreement. In fact, we have cases where the entire offense conduct is objected to and we have to address every paragraph of it when we in the probation office determine that there may be an aspect of relevant conduct that was not taken into account in the plea agreement.

A good example would be something such as "more than minimal planning," a specific offense characteristic that comes under the realm of relevant conduct. We will note in our impact to plea agreement that this specific offense characteristic be used in the calculation of the Guidelines. The

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1. Editor's note, *see* Professor Michael Goldsmith's comments 44 St. LOUIS U. L.J. 394-97 (2000), in this issue.

2. Probation Office, United States District Court for the Eastern District of Missouri, *Presentence Report Format*, Aug. 5, 1996, revised Nov. 18, 1996.

resulting Guideline or imprisonment range would have been X. So in other words, what we are doing is presenting all the information to the court and letting the court decide what information should be used in sentencing the defendant.

