

5-2-2000

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### Recommended Citation

David N. Yellen, *Is “Relevant Conduct” Relevant? Reconsidering the Guidelines’ Approach to Real Offense Sentencing*, 44 St. Louis U. L.J. (2000).

Available at: <https://scholarship.law.slu.edu/lj/vol44/iss2/16>

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## PANEL REMARKS

### IS “RELEVANT CONDUCT” RELEVANT? RECONSIDERING THE GUIDELINES’ APPROACH TO REAL OFFENSE SENTENCING

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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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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).