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

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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.¹

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.²

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.

