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

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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.