UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

V. Case No. 3:09cr207 (JBA)

DOUGLAS PERLITZ,
Defendant. DECEMBER 10, 2010

DEFENDANT'S MEMORANDUM IN AID OF SENTENCING

Defendant Douglas Perlitz respectfully submits this memorandum as an aid to the Court in connection with his upcoming sentence, scheduled for December 21, 2010 at 10:00 a.m. Defendant pleaded guilty on August 18, 2010 to one count of traveling in foreign commerce for the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b).

As we discuss below, this case is a tragedy of many facets. It is most tragic, of course, for the young men of Haiti with whom defendant has admitted engaging in illegal sexual conduct. It is also a tragedy for hundreds of other Haitian children, who were lifted from the poor streets by Project Pierre Toussaint, the charity Doug Perlitz founded and built up over 12 years in Cap Haitien, which was forced to close in the wake of the investigation that led to defendant's arrest. And, finally, it is a tragedy for the defendant himself, who, despite a lifetime of selfless devotion to helping others, including some of the neediest citizens of the world, among whom he lived for most of his adult life, now finds himself

facing a substantial prison sentence for crimes committed against some of those he set out to help. Doug Perlitz freely acknowledges that he is responsible and answerable for his misconduct, but that fact does not make his current circumstance any less tragic.

In imposing sentence, the Court is called upon to balance the duty and obligation to punish the defendant for his actions with the need to fashion a punishment that properly takes into account all the good Doug Perlitz has done throughout his life, as well as the complex forces that led him to stray from his normally sound moral footing. As we set forth in this memorandum, we believe that the proper punishment under all the circumstances is a sentence of 97 months imprisonment -- the bottom of the guideline range we believe applies in this case.

I. SENTENCING GUIDELINE ISSUES

There are many complex and compelling human factors at work in this case, which we discuss below as part of our argument as to the appropriate sentence in this case. The threshold issue that must be addressed, however, is the application of the Sentencing Guidelines, and specifically what level applies in this case. We address these technical, mechanical issues first.

Doug Perlitz, as noted, is before the Court to be sentenced on one count of unlawful travel in foreign commerce for sexual purposes, in violation of Section 2423(b) of the United States Code. The parties agree that the applicable sentencing guideline is U.S.S.G. § 2G1.3, which provides for a base offense level of 24. See U.S.S.G. § 2G1.3(a)(4). In addition, the parties have agreed in their plea agreement that a 2-point enhancement is

appropriate under Section 2G1.3(b)(1) based on the fact that the minors in question were in defendant's custody, care or supervisory control. The parties further agree that another 2-point enhancement applies under Section 2G1.3(b)(4), based on defendant's admission of actual sexual conduct. Finally, the parties agree that the maximum 5-point "grouping" enhancement is appropriate under U.S.S.G. § 3D1.4, based on defendant's admission that his conduct affected more than 5 victims.

These agreed guideline calculations yield an offense level of 31, which, after a 3-point reduction for acceptance of responsibility under Section 3E1.1, yields a total offense level of 28, and a sentencing range of 97-121 months.

The government, as the plea agreement states, takes the position that three additional 2-point guideline enhancements apply in this case: for the "vulnerable" nature of the victims, under Section 3A1.1(b)(1); for use of a computer to "entice, encourage, offer or solicit a person to engage in prohibited sexual conduct," under Section 2G1.3(b)(3)(B); and "obstruction of justice", under Section 3C1.1.

The Pre-Sentence Report ("PSR") prepared by the Probation Office recommends a total offense level of 34, and a sentencing range of 151 to 188 months. PSR, ¶¶ 27-37, 72. The Probation Office calculations include an enhancement for "vulnerable victim" and "obstruction of justice", but not for use of a computer in connection with the offense. PSR, ¶¶ 24, 31-32.

We discuss below the three contested guideline calculation issues. As noted, defendant submits that, in each case, the facts and the law do not support the relevant enhancement.

A. Vulnerable Victim Enhancement – Section 3A1.1(b)(1)

Section 3A1.1 of the Guidelines provides that "if the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by **2** levels." U.S.S.G. § 3A1.1(b)(1). The accompanying commentary states as follows:

> For purposes of subsection (b), "vulnerable victim" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 . . . ; and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

Id., Application Note 2. The commentary further indicates, however, that the 2-point enhancement should not be applied in all cases of potentially "vulnerable" victims:

> Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

Id.

The PSR does not elaborate on the basis on which the victims in this case were found to be "unusually vulnerable." PSR, ¶ 31. All victims in this case were students in the Project Pierre Toussaint program. The two most obvious factors that made them "vulnerable" were (1) their age, and (2) the fact that defendant enjoyed a position of trust and authority over them, as the head of PPT, the program established to assist them (and

many others) in a variety of ways. Under the Guidelines, however, both factors have already incorporated in the offense guideline, and reflected in the calculation of defendant's adjusted offense level. A victim's youthful age is, by definition, part of the base offense level under Section 2G1.3, since the offense to which Mr. Perlitz pleaded guilty requires at minimum an intent to engage in sexual conduct with a minor. More importantly, defendant's unique position of authority and trust is reflected as a "Specific Offense Characteristic", in Section 2G1.3(b)(1), which adds 2 points to the total offense level. This is the precise situation in which, under the relevant Application Note, the "vulnerable victim" enhancement should not be applied. Increasing defendant's sentencing range under Section 3A1.1(b) amounts to impermissible double-counting, and should not be allowed.

In United States v. Castaneda, 239 F.3d 978 (9th Cir. 2001), the court reached a similar conclusion, and held that a vulnerable victim enhancement had been improperly applied. In Castaneda, the defendant was convicted under the Mann Act of enticing women to travel abroad for the purpose of engaging in prostitution. The trial judge applied a vulnerable victim enhancement, on the theory that the women in question were financially needy, and therefore vulnerable to the defendant's false promises that enticed them to travel, and ultimately enter the sex trade. The Ninth Circuit reversed. The court observed that "[t]he theory behind the vulnerable victim enhancement is that conduct against the particular victim or group of victims is more blameworthy than the conduct of other offenders and thus deserves greater punishment." Id. at 980. The court followed a First Circuit decision in a similar Mann Act case, United States v. Sabatino, 943 F.2d 94 (1st Cir.

1991), and concluded that none of the "vulnerable" characteristics cited by the trial court, such as low income, distinguished them from typical victims of a Mann Act violator. Id. at 982.

The same logic applies here. The characteristics of the victims in this case did not differ in any material way from the characteristics of other PPT minors under defendant's custody, care or supervisory control. Defendant is already being punished for the fact that he occupied a special position as to these minors – who were in the PPT program because of their status as "street children" at the lowest levels of Haitian society. Additional punishment on the basis of their "vulnerability" is unwarranted, unfair, and contrary to the express dictates of the Sentencing Guidelines.

The Second Circuit case of United States v. Irving, 554 F.3d 64 (2d Cir. 2009), upon which the government has relied, does not require a different result. The defendant in Irving was convicted of traveling to Mexico for the purpose of engaging in sexual conduct with young boys. The district court applied the 2-point enhancement under Section 3A1.1(b) because the young boys in question were "street urchins" who, in his view, were especially susceptible to an approach on account of their economic and social circumstance. Id. at 75. This case is clearly distinguishable. The defendant in Irving, unlike Mr. Perlitz, enjoyed no special position of trust with his victims; he did not live in Mexico, but instead had traveled there for a short stay, solely so he could engage in sexual activity. The 2-point enhancement under Section 2G1.3(b)(1) did not apply to him. His "double counting" argument was based solely on the fact that the age of his victims had

already been taken into account. The court in Irving correctly concluded that the district court had focused on special factors that distinguished the victims, other than mere age. Here, special factors beyond mere age have already been factored into defendant's offense level, and there is no basis for an additional 2-point enhancement.

B. Obstruction of Justice Enhancement – Section 3C1.1

The PSR also recommends a 2-point enhancement under Section 3C1.1 of the Guidelines. PSR, ¶ 24. The Section 3C1.1 enhancement applies if the defendant

> willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and ay relevant conduct; or (ii) a closely related offense . . . .

U.S.S.G. § 3C1.1.

In this case the government has advanced two alleged bases for an obstruction enhancement: a supposed threat to harm a federal prosecutor, made during recorded conversations from the detention facility where he has been housed since his arrival in the District of Connecticut, and an alleged attempt to conceal evidence, by having a Haiti Fund board member remove property from Haiti, including two computers. The PSR relies on both of these theories in recommending the enhancement. PSR, ¶ 24.

We discuss each theory of obstruction separately below. Neither theory of enhancement is supported by the law or the facts. With respect to the alleged threats, the recorded comments in question do not reveal any plot to harm a prosecutor, or even an attempt to do so; instead, when considered in context, they simply reveal the frustration

and anger that often accompanies a high-stakes criminal prosecution, where an individual's liberty is at stake. More importantly, the most troublesome and offensive comments were not made by the defendant, and overall he comes across on these calls as a moderating, rather than threatening, influence. With respect to the computer claims, the government's flawed argument focuses on conduct undertaken long before the start of any criminal investigation, and not motivated in a.

1. Alleged Threats During Phone Calls

There is no dispute that certain types of threatening conduct against participants in the judicial process may provide a legitimate basis for an enhancement under Section 3C1.1. However, before examining the allegedly threatening conduct upon which the government relies here, it is useful to examine other cases in which the adjustment has been held to apply.

In United States v. Wahlstrom, 588 F.3d 538 (8th Cir. 2009), the court upheld an obstruction enhancement against a defendant who had "attempted to hire someone to murder the wife of the Assistant United States Attorney prosecuting his case." Id. at 541. The defendant inquired of another inmate whether he knew of anyone who could help him carry out a "hit", and was caught on tape speaking with the inmate's brother about performing the hit in exchange for an automobile worth $70,000. Similarly, in United States v. Bellrichard, 801 F. Supp. 263 (D. Minn. 1992), the court imposed an obstruction enhancement based on threatening letters the defendant had sent to the prosecutor and court personnel. The court distinguished the careful, deliberative process of sending a

letter with the act of "making a single oral threat on the spur of the moment." Id. at 266. See also United States v. Dehghani, 550 F.3d 716 (8th Cir. 2008)(obstruction enhancement based on defendant's threatening letter to judge; letter threatened judge's life and cited location of judge's home).

This prong of the government's obstruction claim rests on 4 recorded phone calls involving Mr. Perlitz, all made from the Wyatt Detention facility in Rhode Island. The comments made in these calls do not begin to approach the type of deliberative, threatening conduct found in the authorities cited above, and certainly do not support a finding that the defendant threatened, or attempted to threaten, any member of law enforcement. We understand complete recordings of the four calls in question have been submitted to the Court, and urge the Court to review each phone call in its entirety, rather than focus on the selected snippets culled out by the government. We are confident that such a review will lead to the conclusion that the record does not support a finding of obstruction under Section 3C1.1, and that there is no basis for a 2-point guideline increase on this theory.

While we believe the calls largely speak for themselves, a few observations are appropriate. First, the most offensive and potentially threatening statements were made not by the defendant, but by his younger brother, who lives in Colorado. The two phone calls with this brother took place on June 12 and 17, 2010. There is no doubt that defendant's younger brother makes brief offensive and ill-considered comments in these calls. The brother in Colorado has expressed great remorse and regret about his

statements, which he indicated were motivated simply by his passionate support for his brother Doug, who he believed at that point to be innocent. It is our understanding that he has conveyed an apology to the government, through his counsel, and may also submit a written letter of apology directly to government counsel. Most important for purposes of the issue before the Court is the fact that Doug Perlitz does not join his brother in the threatening or offensive talk; indeed, in one call he admonishes his younger brother that he should not say things like that. (Call of June 17, 2010). There is simply no way to listen to these conversations and come away with a concrete conclusion that a serious plot to do harm to anyone is being hatched.

Second, it is critical to bear in mind the timing of the two later calls with people the government has described as supporters – July 14 and 15, 2010. These calls followed directly on the heels of the Court's ruling granting the defendant's motion to dismiss based on improper venue. That ruling issued on July 14th. It set in motion a series of events that put the defendant on an emotional roller coaster, where he went from the highest of highs – thinking he might be granted freedom because his case had been dismissed – to the lowest of lows, when he learned that the Court's dismissal had been stayed so the government could pursue substitute charges in the Eastern District of New York. When viewed through this prism, anything the defendant said is rightly recognized as the product of understandable frustration, rather than rational and deliberative thought. See, e.g., Bellrichard, 801 F. Supp. at 266. And, despite these isolated manifestations of frustration, the calls as a whole show Mr. Perlitz to be rational and reasonable.

In sum, there is no basis for a "threatening" obstruction enhancement.

2. Alleged Pre-Indictment Acts of Obstruction

The government's argument about pre-indictment activity rests on an application note to Section 3C1.1, which reads in relevant part as follows:

> Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.

U.S.S.G. § 3C1.1, Application Note 1. Application Note 4 lists examples of conduct to which the adjustment is intended to apply; subsection (d) speaks of "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding. U.S.S.G. § 3C1.1, Application Note 4(d) (emphasis added). The PSR bases the obstruction enhancement in part on the government's claim that defendant attempted to conceal evidence of his criminal conduct by instructing a Haiti Fund board member to remove computers from Haiti, and subsequently attempting to delete contents from them. PSR, ¶ 24.

In order to properly evaluate this claim, some factual background is appropriate. Allegations about Mr. Perlitz first began to surface on a radio program in Cap Haitien, in August or September of 2007. Ultimately, the Board of Directors of the Haiti Fund engaged a law firm to conduct an internal investigation into the allegations. An investigative report was submitted on April 15, 2008, finding no basis for the allegations. At this time, Mr.

Perlitz was in Bhutan, on a planned sabbatical from PPT. He had left for Bhutan in early April 2008.

Within a week or two of the first internal investigative report, the Haiti Fund board decided to undertake a new investigation, in response to additional information and allegations that had been called to its attention. Again, this was an internal investigation done by counsel for the Fund; there was no referral to United States law enforcement. This report setting forth the findings of this second investigation was not submitted until November 17, 2008. Early on in the investigation, however, Mr. Perlitz was informed by a board member that he was not going to be allowed to return to the Project. This communication occurred in early May, when defendant was still in Bhutan.[1] Defendant, understandably, was very upset and confused, since he had not been given any formal notice of the accusations against him, or an opportunity to respond to them. On a more practical level, defendant at that point had resided in Haiti since 1996; most if not all of his personal effects were in the Cap Haitien home where he lived.

It is our understanding that in mid-May 2008, a long-time board member and respected member of the community who made frequent trips to Haiti in support of PPT retrieved certain personal effects of the defendant's, including at least one computer. This board member told government agents that Mr. Perlitz had not asked her to retrieve any of his effects in Haiti. Later in 2008, after consultation with his counsel at the time, defendant

[1] The Board later formally discharged Mr. Perlitz from his position, in July 2008, several months before the second internal investigation report was concluded.

returned a computer to the Haiti Fund board. Another computer, which had been purchased with defendant's own funds, was later seized by the government after defendant's arrest in Colorado in September 2009.

Defendant's conduct, when viewed against this backdrop, does not warrant the obstruction enhancement. First, when viewed in context, the conduct at issue is not nearly so sinister as the government suggests. The board member has denied acting on any instructions from Mr. Perlitz; even if there had been such a request, defendant can hardly be faulted for wanting to retrieve important personal effects from a country where he had resided for the past 12 years, and from which he had suddenly and without explanation been barred from by the Haiti Fund board. There is no indication that an official investigation – the focus of Section 3C1.1 – was ongoing, or even imminent, in May 2008. Indeed, though the government has failed to specify a date, all indications suggest that the matter was not taken up by the federal government until some point in 2009. Mr. Perlitz – and his counsel at the time – remained totally unaware of any official government investigation until defendant was arrested in Colorado.

It also bears noting that the "offense of conviction" – 18 U.S.C. § 2423(b) – does not relate to computer conduct. Throughout this case, the government has made much of defendant's computer browser and search activity, and no doubt will again in connection with this sentencing. What is notable is what the government does not allege: that the computer activity was illegal in any way; that defendant possessed child pornography; or that any computer to which the defendant had access contained illegal images of the

victims in this case, or other minors under his supervision. The charges in this case sprang not from computer evidence, but rather from witness statements. Indeed, defendant was indicted and arrested without the benefit of any computer evidence; it appears that the computer defendant returned to the Haiti Fund board in 2008 was not even analyzed by the government until some point in 2010. This is an indication of the relative importance, or lack of importance, this evidence had to the offenses charged against Mr. Perlitz.

In short, the record supports a conclusion that the defendant's conduct was not "purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction." This is not the type of situation in which Section 3C1.1 was intended to apply.

C. Adjustment for Use of a Computer – Section 2G1.3(b)(3)

The government has also argued for an enhancement under Section 2G1.3(b)(3), which provides for a 2-level guideline increase if the offense involved "use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor . . . ." U.S.S.G. § 2G1.3(b)(3).

The PSR does not recommend an enhancement under this subsection, and therefore we do not address it at length in this filing. We note, however, that the application notes fully support the Probation Office's position: "Subsection (b)(3) is intended to apply only to the use of a computer to communicate directly with a minor or with a person who

exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site." U.S.S.G. § 2G1.3, Application Note 4 (emphasis added). It seems clear from this note, as well as the text of the guideline itself, that this enhancement was intended to apply only to the familiar situation where potential illegal sexual contact is arranged, or attempted to be arranged, through an internet chat room or other web-based communication with prospective victims.

Based on the foregoing legal arguments, defendant contends that the correct guideline range for his offense conduct is Level 30. Level 30 calls for a sentencing range of 97-121 months imprisonment.

II. GENERAL LAW APPLCABLE TO SENTENCING

This Court is more than familiar with the law of sentencing and repeatedly receives, in memoranda like this, legal analyses that boil down to the following principles:

(1) the Guidelines are no longer mandatory but advisory;

(2) District Court sentences are reviewed on an abuse of discretion basis for reasonableness;

(3) a guidelines sentence is not presumed to be reasonable; and

(4) in imposing a non-guideline sentence the Court is required to comply with the considerations set forth in 18 U.S.C. 3553(a) and is free to afford whatever weight it believes is appropriate to each of the factors outlined in the statute.

In its recent en banc decision in United States v. Cavera, 550 F.3d 180 (2d Cir. 2008), the Second Circuit discussed the parameters of federal sentencing law in the wake of United States v. Booker, 543 U.S. 220, 226-27 (2005), which held that mandatory application of the Sentencing Guidelines was unconstitutional under the Sixth Amendment. The Court in Booker ruled that the Sentencing Guidelines were effectively advisory, and that sentencing courts were permitted to fashion appropriate sentences for each offense taking into consideration not only the Guidelines range, but also the factors enumerated by Congress in 18 U.S.C. §3553(a). Further, such sentences would be reviewed for "unreasonableness." Booker, 543 U.S. at 261. "Review for 'unreasonableness' amounts to review for abuse of discretion." Cavera, 550 F.3d at 187 (citing Gall v. United States, 552 U.S. 38 (2007)).

As the Cavera court recognized:

> A sentencing judge has very wide latitude to decide the proper degree of punishment for an individual offender and a particular crime. In addition to taking into account the Guidelines range, the district court must form its own view of the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The sentencing judge is directed, moreover, to consider: a) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for that offense; b) the need to afford adequate deterrence to criminal conduct; c) the need to protect the public from further crimes by the defendant; and d) the need for rehabilitation. *Id.* § 3553(a)(2). Additionally, district courts must take into account: the kinds of sentences available, *id.* § 3553(a)(3); any pertinent Sentencing Commission policy statement, *id.* § 3553(a)(5); the need to avoid unwarranted sentence disparities among similarly situated defendants, *id.* § 3553(a)(6); and, where applicable, the need to provide restitution to any victims of the offense, *id.* § 3553(a)(7).

Id. at 187-88.[2]

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[2] In its entirety, 18 U.S.C. §3553(a) provides:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of

The Sentencing Guidelines provide the "starting point and the initial benchmark" for sentencing, and district courts must "remain cognizant of them throughout the sentencing process." Cavera, 550 F.3d at 189 (citing Gall, 552 U.S. at 49). "It is now, however, emphatically clear that the Guidelines are guidelines - - that is, they are truly advisory." Id. A district court may not presume that a Guidelines sentence is reasonable, but instead must conduct its own independent review of the §3553(a) sentencing factors. Id. Although the district court must consider each §3553(a) factor in choosing a sentence, United States v. Campanelli, 479 F.3d 163, 165 (2d Cir. 2007), the weight to be afforded any single §3553(a) factor is a matter firmly committed to the discretion of the sentencing judge. Id.; United States v. Verkhoglyad, 516 F.3d 122, 131 (2d Cir. 2008).

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title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [FN1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Accordingly, it is well within the sentencing court's discretion to select a sentence below the Guidelines range:

> District judges are, as a result, generally free to impose sentences outside the recommended range. When they do so, however, they "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 597. **In this way, the district court reaches an informed and individualized judgment in each case as to what is "sufficient, but not greater than necessary" to fulfill the purposes of sentencing.**

Cavera, 550 F.3d at 189 (citing 18 U.S.C. § 3553(a)) (emphasis added). Further, district courts are free to vary from the Guidelines on the basis of a policy disagreement with the Guidelines, even where that policy disagreement applies to a wide class of offenders or offenses. Id. (citing Kimbrough v. United States, 552 U.S. 85 (2007)).

Indeed, "[t]he object is always to fashion a sentence 'sufficient, but not greater than necessary' to accomplish the purposes set forth in 18 U.S.C. 3553(a)." United States v. Stewart, 590 F.3d 93, 143 (2d Cir. 2009). The Second Circuit does not presume that a sentence within the Guidelines range is reasonable, nor does it presume that a non-Guidelines sentence is unreasonable. Cavera, 550 F.3d at 190. Moreover, this Circuit does not require extraordinary circumstances to justify a deviation from the Guidelines range. Id.

We have argued in Section I that the correct punishment range called for by the criminal conduct that Mr. Perlitz has admitted is 97-121 months. If the Court accepts this argument, the sentence we believe is appropriate – 97 months – may be imposed within the framework of the Guidelines. Even if the Court concludes a higher guideline range

applies, under the authorities cited above there is amply legal basis for the Court to impose a sentence of 97 months, either as non-Guideline sentence, or as a departure from the Guidelines.

III. PERSONAL BACKGROUND

Doug Perlitz has prepared an exceptionally detailed personal statement/statement of the offense, which discusses his personal background and the many factors that bring him before the Court for sentencing. We will not repeat that lengthy narrative, but instead will highlight certain salient points that are germane to our sentencing arguments.

Doug Perlitz is the second of three sons born to Cheryl Perlitz and the late Thomas Perlitz, Sr. He is currently 40 years of age. His older brother resides in Connecticut, and his younger brother in Colorado.

Most of his childhood was spent in suburban Chicago. When he was about 10 years old, the family moved to Colorado, after his father took a job with the Coors Brewery. Doug recalls this as the happiest time of his childhood, and all members of the family recall their years in Colorado with great fondness. After two years, however, his father lost his job and the family had to re-locate back to the Chicago area. Doug was in early adolescence at that point, and it was a difficult period of his life.

Doug attended the local public middle school for 7th and 8th grade; he was generally miserable, on account of bullying and other mistreatment by his fellow students. Beginning in 9th grade, he attended Carmel High School, a private Catholic school outside of Chicago where his older brother was also enrolled. Doug describes his high school experience in

glowing terms; he formed many close friendships, some of which continue to this day. Several of his high school classmates have written to the Court to share their memories and impressions of Doug.[3]

During his high school years, Doug first experienced the type of work that would occupy much of the next 20+ years of his life: public service of the less fortunate. He had been raised in a family environment that placed great importance on community service and "giving back"; his father was very active in local charities. Doug's first personal experience was helping an elderly woman who had a 50-year-old handicapped daughter who also needed substantial living assistance. Many fellow students were called upon to do similar "service" work, and approached it as a chore. Doug embraced it with a passion, finding it gave him great energy and happiness. He continued this work throughout the balance of his high school years, regularly driving a great distance to work at a shelter for battered women on Chicago's rough South side. The women served by St. Martin de Porres, where he worked, were often the victims of drug dealers and gang members. Doug undertook this on his own, keeping it secret even from his parents, and it brought him great joy and fulfillment.

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[3] We expect to deliver a package of supportive letters to the Probation Office on Monday, for distribution to the Court and the government. As the Court can imagine, given the nature of the charges in this case and the substantial media attention it has received to date and no doubt will receive in the future, we would ask that the letters, and the identity of the writers, be kept confidential, in keeping with any other material that is part of a Pre-Sentence Report. All the writers are happy to share their knowledge of and observations about Doug with the Court and the parties. Some, however, understandably are wary of being dragged into the public glare. For this reason, we would ask that the identities of the letter writers be kept confidential.

After high school, Doug enrolled at Fairfield University, beginning in the fall of 1988. Again, he formed friendships that endure to this day; classmates from Fairfield have also written to the Court to share their feelings about him. Much of his life at Fairfield centered on the campus ministry program.

Two significant points bear mention at this point in Doug's life. First, he was struggling with issues of sexual identity, and had been for several years. He was blessed with loving and supportive parents, but also felt the sting of unwitting comments that he took as disapproval of homosexuality. This added to his confusion and discomfort. Second, within days of his arrival at Fairfield, a priest began a relationship with Doug that would continue for many years, including during all of his work in Haiti. As Doug describes in his statement, this relationship with an authority figure ultimately took on a dark aspect, both physically and spiritually, that had significant and long-lasting impact on him.

Doug's first exposure to Haiti came toward the end of his time at Fairfield. He traveled with a campus group (including the priest) for a 10-day project, working in the community. He found the work – on the "margins" of society – incredibly challenging and fulfilling. This experience helped crystallize his decision to devote his life to service work on behalf of those in need.

Upon graduation, Doug worked in Belize for 2 years in a program run by the Jesuit Volunteers. He lived in a rural area with another volunteer, teaching Mayan Indian students who lived in thatched villages. The work was stressful, but once again fulfilling and exciting.

Doug left Belize in 1994, and enrolled in graduate school at Boston College to pursue a Master's Degree in Theology. He finished his degree work in the spring of 1996. He worked while in graduate school in order to pay his own way. In addition, consistent with his pattern, he also made time to volunteer as a teacher at a center for refugees and immigrants in a rough neighborhood in Boston. Early on in his Boston College years, Doug's father passed away suddenly at the age of 50. The entire family was rocked by his sudden and tragic passing. Doug took it especially hard; he'd viewed his father as a superhero, yet continued to struggle with the idea that he disapproved of Doug's still-secret sexual identity.

Doug's experience in Haiti, coupled with his years in Belize, left him determined to return to and work in Haiti. He received a grant from the Order of Malta, a religious organization with a Westchester-Fairfield County branch that ran a hospital in Milot, on Haiti's north coast. He immersed himself in Haitian culture and language, and began work as a lay chaplain at the Sacre-Coeur Hospital in Milot.

Doug did not move to Haiti with the idea, or intent, of founding what ultimately became Project Pierre Toussaint. As he describes in his narrative, during time off he would travel from Milot to Cap Haitien, Haiti's second largest city. He encountered one of Haiti's "street children", 'Wilnaud', and started a regular soccer game with him and other young men relegated to the streets. (Haitian street children are predominantly male, as they typically are turned out by their families either because the family is unable to support them, or in the hope that they can scrape by on the streets and help the family). As Doug

describes, this 'soccer game' ultimately evolved into PPT, which began with an informal school and later a bathing program. By 2001, PPT had evolved into a large organization, with 2 campuses; a residential 10-acre walled village comprised of many buildings, where the former street children could live, eat and attend school; 35 employees and over 200 kids. Dozens, if not hundreds, of youths who had entered the program "drugged out" and homeless evolved into respectful, productive students with the help of PPT.

With the growth of the program, however, came additional pressures, and additional forces that, coupled with the many other stresses of everyday life in Haiti, took their toll on Doug Perlitz. The program was supported largely by donations from well-to-do residents in Connecticut and New York, through the Haiti Fund. Doug was elevated and lauded by supporters of the program, as well as by the priest who had been such an integral part of his life since his earliest days at Fairfield. He had remained intertwined in Doug's life following his graduation, and played a major role in PPT as well. As time went on, Doug found that the necessary fund-raising efforts were focused as much on him as the Project; he was literally the "face" of PPT. In 2002 – when he was only 10 years removed from college – he was selected to receive an honorary degree from Fairfield, and invited to give an address at the University's commencement proceeding. His 'ascent', and the extent to which supporters of PPT placed Doug on a pedestal, was truly extraordinary.

Some supporters of PPT have in the past described Doug Perlitz as the "face of Christ on Earth." This is a vivid illustration of the high regard in which he was held, but also the magnitude of the impossibly high burden Doug faced as the Project evolved and grew.

The 'Christ' ideal is far beyond what anyone can reasonably be expected to live up to, and certainly too much to expect of a fundamentally good but flawed young man.

Ultimately, of course, defendant's flaws led him to commit the terrible crimes that bring him before the Court for sentence.

IV. THE OFFENSE CONDUCT – WHAT HAPPENED?

Douglas Perlitz has admitted engaging in sexual misconduct with 8[4] minors in their later teens who were part of the PPT program. He has accepted full responsibility for his crimes, apologized to his victims, and recognizes that he must receive a substantial punishment for what he has done.

Dozens of people who have known Doug Perlitz in all aspects of his life, including his years in Haiti, have written to the Court in connection with this sentencing. One of the great difficulties in this case is how to reconcile the Douglas Perlitz who is described in such exceptional and glowing terms in those letters with the Douglas Perlitz who has admitted engaging in terrible sexual misconduct. The government's likely explanation is that the 'good' Doug Perlitz is simply a fraud. The government has consistently painted him as a monster who descended on Haiti, and founded PPT, simply so he could prey upon the unfortunate souls of the Western Hemisphere's most impoverished country. This theory is facile, but ultimately overly simplistic and unpersuasive.

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[4] The government contends that the number of victims is higher. We will address those claims in our reply papers, after seeing the exact contours of the government's position.

Doug has explained in his narrative to the best of his ability how the criminal conduct in this case came about. His statements are put forth as an explanation, not an excuse; he knows that there is no excuse and stands ready to accept the price he must pay for his conduct. All indications are that Doug Perlitz moved to Haiti in 1996 with the best of intentions. Embracing the challenge of Haiti was consistent with, and in many ways the culmination of, the work he had done since his mid-teens, trying to help those on the margins of society. Those who have spent any time in Haiti universally describe it as a place unto itself, with poverty and despair unimaginable even by third world standards. For Doug, who had always sought out and been energized by such challenges, it was perfect.

Over time, however, a number of factors coalesced which eventually led him to "cross the line", as he puts it, and engage in sexual misconduct. As the years wore on, the stress and never-ending responsibility of his job no longer energized him, and instead sapped energy from him. In retrospect, it is clear he became burned out. Increasingly, he turned to alcohol, a habit that had begun in Belize, as a means to cope with the unrelenting pressure of everyday life. He recognizes now that, at this point, he should have left the country and the project. But the thought of doing so raised additional pressures, as he feared, rightly, that without him PPT would collapse, and all the people dependent on the project would suffer.

He also continued to struggle with his sexual identity, and a lack of intimacy in his life. Intimacy is a basic human need; Doug's solution for years was to try to suppress this need, and pour himself more and more into his work. The young adults in his care

presented both opportunity and temptation. As he describes in his narrative, one night, overwhelmed by a variety of factors, he first "crossed the line" with one of these young men. This pattern would repeat itself over a period of years, as he became more unhinged from the core values with which he was raised, and which had guided so much of his life.

As he indicates in his statement, Doug recognizes now with painful clarity that the idea of true "intimacy" with any of the young men under his supervision and care was impossible, even crazy. He held power over them, and abused that power. Tragically, he was unable to recognize that at the time of his crimes. The disconnect between his thinking at the time and the reality of his actions is further proof of how adrift he was from the moral compass that had guided him throughout his life.

Another key factor in understanding how Doug ended up violating the law, and the trust of the young men in his care, is found in his own history with the priest. In many ways, the abuse of power and trust that manifested itself in Doug's own painful relationship with the priest recurred in his own conduct with some of the young adults of PPT. Our purpose is not to compare the Haitian street children in this case with a teenage Doug Perlitz. However, it is a sad and all-too-true fact that abusive behavior has a painful circularity to it. Doug does not seek to blame the priest for his criminal conduct, and takes full responsibility for his own actions. However, there is no doubt that this dark and abusive relationship played a significant role in his loss of control, and descent into criminal conduct.

V. SENTENCING CONSIDERATIONS

We recognize that the Court faces an exceptionally difficult task in fashioning a sentence in this case. The crimes to which Douglas Perlitz has pleaded are awful, and demand a stern punishment. On the other hand, the Court has before it a unique and gifted individual, with an extraordinary life record of selfless work in service of others. Does the seriousness of the charges compel us to cast aside all the good defendant has done throughout the course of his life – including his many years in Haiti? We submit that the proper sentence must recognize both the terrible suffering of the victims in this case, and the exemplary manner in which Doug Perlitz has lived his life.

The government's consistent answer has been to paint the defendant as a one-dimensional monster, preying on the youth of Haiti. Defendant has admitted his crimes, and is fully prepared to accept the punishment he knows he deserves. But there is another side to the story. Several former students of PPT – some of the earliest participants in the program – have written to the Court to share their observations about Doug. They have also spoken on videotape, describing the extraordinary impact that Doug had on their lives; most say they owe their lives to him, and the help he gave them.[5]

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[5] We had planned to submit these videotaped statements to the Court contemporaneously with this filing. However, the video team was trapped in Haiti earlier this week on account of street riots and violence, which shut down transportation in and out of Cap Haitien. Thanks to emergency measures they were able to make their way to the Dominican Republic, and ultimately back to the United States, but this delayed the project. We anticipate receiving the video on Monday, and it will be submitted to the Court and opposing counsel.

Dozens of others, from Haiti and elsewhere, speak of Doug in glowing terms and ask the Court to extend mercy to him based on his fundamentally good nature. Several describe how they were themselves inspired to careers oriented toward public service by virtue of their relationships with Doug. One of the former PPT employees writes in moving terms of the enormous sacrifices Doug made to help her native country, and her first-hand observation of the great things Doug did for the street kids of Haiti. Others who have kept in contact with Doug since his incarceration speak of how he has retained his spirit, determined to overcome any adversity that lies ahead and continue to make a positive contribution to society, whether inside or outside of prison.

The United States Sentencing Commission has prescribed the punishment that it believes should apply here – in our view, 97-121 months. We urge the Court to impose a sentence at the bottom of that guideline range, in recognition of the defendant's many good qualities.

Even if the Court determines that the guideline range is higher, however, we submit that a sentence of 97 months in nonetheless warranted. The Court may arrive at such a sentence as part of a "heartland" departure, Koon v. United States, 518 U.S. 81, 92-96 (1996), in recognition of the many ways that Doug Perlitz's case differs from the typical "sex tourism" prosecution. Simply put, the guidelines at issue were not formulated with a case like this in mind. Whatever else one may say about Doug Perlitz's conduct in Haiti, it

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With respect to the letters, they are in Creole and are being translated. They will be provided as soon as possible.

certainly does not fit anyone's common definition of "sex tourism". It is hard to imagine another case in which a criminal defendant moved to a blighted, impoverished country and lived there for 12 years as a means to gain access to a victim population. If that is one's sole desire, there are far easier ways to satisfy that desire than to embark on the course Mr. Perlitz did. Simply put, this is an atypical case, and it calls for an atypical – though necessarily stern – sentence.

Although we have touched on many of the Section 3553(a) factors in this memorandum, we have not separately discussed Section 3553(a), as our position is that the Court should impose a sentence within the Guideline range of 97-121 months. If necessary we will set forth such an analysis in response to the government's sentencing submission.

Conclusion

For the foregoing reasons, defendant urges the Court to find the applicable Guideline range to be 97-121 months, and to impose a sentence of 121 months.

THE DEFENDANT,

By */s/David T. Grudberg*

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CERTIFICATION OF SERVICE

I hereby certify that on December 10, 2010 the attached Reply Memorandum in Support of Motion to Continue Sentencing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

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