IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CRIMINAL ACTION NO. 2:05-cr-00003

BERNARD E. RABY,

Defendant.

SENTENCING MEMORANDUM AND STATEMENT OF REASONS

I. Background

In 2004, as the result of an extensive international investigation, federal authorities suspected the defendant, Bernard E. Raby, of being a consumer of child pornography. On December 15, 2004, a search warrant was executed on Mr. Raby's residence in Foster, West Virginia. Mr. Raby met the authorities at his front door and agreed to be interviewed. After waiving his constitutional rights, Mr. Raby admitted to possessing, on various electronic-storage devices, approximately 2000 sexually explicit images of underage boys.[1] Some of these images depicted prepubescent boys. Mr. Raby also

[1] The government's characterization of Mr. Raby's child-pornography collection is overstated. The government states that "the Defendant's collection of child pornography was extraordinarily large. The Defendant's computer contained approximately 500 gigabytes of material." (United States' Sentencing Mem. 3.) Mr. Raby did not have a 500 gigabyte collection of child pornography, however. Rather, the case agent's testimony at sentencing revealed that Mr. Raby had approximately 500 gigabytes of pornography generally, containing images of both adult and child pornography. His collection of child pornography, although large, does not appear to have been as massive as the government suggests.

admitted to having engaged in sexual activity with juvenile boys on multiple occasions. The authorities executed the search warrant and seized Mr. Raby's computer and other related evidence.

On April 29, 2005, Mr. Raby pleaded guilty to receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A). His sentencing took place over several months. An initial sentencing hearing was held on November 28, 2005. Mr. Raby presented the testimony of Steven Dreyer, Ph.D., a clinical psychologist. Dr. Dreyer testified that Mr. Raby was in a "low risk category" of reoffending. (Nov. 28, 2005 Hr'g Tr. 26:8-14 [Docket 54].) I was concerned, however, about Mr. Raby's conduct as a middle-school teacher in New York, particularly whether he engaged in any relevant conduct during that period. The hearing was continued to allow the probation officer to investigate Mr. Raby's conduct in New York before I imposed sentence.

A second sentencing hearing took place on February 13, 2006. At that hearing, however, Mr. Raby sought and was granted a continuance so he could again be psychologically examined. A third hearing was held on May 18, 2006. That hearing was continued after the government objected to Mr. Raby's intention to seek a variance without adequate notice. On August 31, 2006, I conducted a fourth sentencing hearing. I continued that hearing so that I could determine whether, under Fourth Circuit precedent, I was constrained to sentence Mr. Raby to a within-Guidelines sentence, despite the Supreme Court's then-recently handed-down decision in *United States v. Booker*, 543 U.S. 220 (2005).

Mr. Raby was finally sentenced on September 27, 2006, nineteen months after pleading guilty, and nearly a year after his initial sentencing hearing. My interpretation of controlling precedent at the time led me to sentence Mr. Raby to a term of 210 months' imprisonment, a sentence at the bottom of the Guidelines range.

Mr. Raby appealed, and, on August 10, 2009, the Fourth Circuit vacated his sentence. *United States v. Raby*, 575 F.3d 376 (4th Cir. 2009). Writing for a unanimous panel, Judge Niemeyer explained that I had "manifested some confusion about" prior decisions by the court of appeals and had erred in "appl[ying] a presumption of reasonableness to a sentence within the properly calculated advisory Guidelines range." *Id.* at 382. The panel ordered that Mr. Raby be resentenced. It instructed me to take into account the advisory Guidelines, "'consider all of the 3553(a) factors' and 'make an *individualized assessment* based on the facts presented.'" *Id.* (emphasis in original) (quoting *Gall v. United States*, 552 U.S. 38, 49-50 (2007)).

The Fourth Circuit's mandate issued on September 1, 2009. Mr. Raby's resentencing was initially scheduled for September 23, 2009. Three motions to continue—two by Mr. Raby and one by the government—delayed resentencing until December 21, 2009.

II. The Advisory Guidelines Range

In imposing sentence, a district court must "treat the Guidelines as the starting point and initial benchmark." *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (internal quotation marks omitted). It must then consider the sentencing factors set forth in 18 U.S.C. § 3553(a). The Guidelines are advisory, and a sentencing court "may hear arguments . . . that the Guidelines sentence should not apply." *Rita v. United States*, 551 U.S. 338, 351 (2007). I will begin by calculating the advisory Guidelines sentence in this case.

Mr. Raby pleaded guilty to violating 18 U.S.C. § 2252A(a)(2)(A). The Base Offense Level for violating that statute is found at U.S.S.G. section 2G2.2. Section 2G2.2(a)(2) provides a Base Offense Level of 22.

Several specific offense characteristics call for upward adjustments to Raby's offense level. Section 2G2.2(b)(2) provides for a two-level increase if the material involved a prepubescent minor or a minor under the age of twelve. Mr. Raby admits that his child-pornography collection contained images of prepubescent minors. That increases the offense level to 24. Section 2G2.2(b)(3)(B) provides a five-level increase if the offense involved "[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain." The court finds this enhancement applies, increasing the offense level to 29. Section 2G2.2(b)(4) provides a four-level increase if the offense involved material portraying sadistic or masochistic conduct or depictions of violence. Based on the defendant's admission, the court finds this enhancement applies, raising the offense level to 33. Section 2G2.2(b)(6) provides a two-level enhancement if the defendant used a computer or interactive computer service to commit the offense. Because the court finds this enhancement applies, the offense level rises to 35. Finally, section 2G2.2(b)(7)(D) provides an enhancement based on the number of images received by the defendant. Mr. Raby has admitted to receiving over 600 qualifying images, which correlates to a five-level increase. This results in an offense level of 40.

Mr. Raby accepted responsibility for the offense by pleading guilty before trial and truthfully admitting the conduct comprising the offense. Additionally, the offense level was greater than 16 prior to the adjustment for acceptance of responsibility, and Mr. Raby assisted authorities in the investigation and prosecution of his misconduct. Therefore, the two-level decrease in U.S.S.G. section 3E1.1(a) and the one-level decrease in section 3E1.1(b)—which was moved for by the government—apply. This gives a Total Offense Level of 37.

Mr. Raby has no criminal history, establishing a Criminal History Category of I. Given a Total Offense Level of 37 and a Criminal History Category of I, the advisory Guidelines range is as

follows: a term of imprisonment of 210 to 240 months;[2] supervised release for a term of two years to life; a fine of $20,000 to $200,000; restitution; and a $100 special assessment.

III. Statement of Reasons

Congress has identified four "purposes" of sentencing: punishment, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a)(2). To achieve these ends, § 3553(a) requires sentencing courts to consider not only the advisory Guidelines range, but also the facts of the specific case through the lens of seven factors. *Id.* § 3553(a)(1)-(7).

A. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

1. The nature and circumstances of the offense

Mr. Raby's offense is serious. Child pornography "is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved." Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 119 Stat. 3009, 3009-26 (1996) (codified as amended at 18 U.S.C. § 2251). Once confined to underground magazines and hard-copy photographs, advancing technology has breathed new life into this poisonous market, as access to online materials and relative anonymity have made obtaining these horrifying images easier. *See* Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1028 (2001) ("Whereas a piece of child pornography once might have only reached a few thousand people who bought a magazine, with the internet it can reach millions very quickly.").

[2] The statutory maximum sentence for this offense is twenty years (240 months). 18 U.S.C. § 2252A(b)(1). While a Total Offense Level of 37 and a Criminal History Category of I provide for a 210 to 262 month range, the statutory maximum caps the Guidelines range in this case.

Over several years, Mr. Raby stored child pornography on various electronic-storage devices. Many of the images portrayed children being raped and brutalized. Mr. Raby admitted to trading these images online. Mr. Raby has stipulated that his child-pornography collection contained over 600 images of child pornography and that some depicted sadomasochistic behavior, as well as prepubescent children.

Because Mr. Raby pleaded guilty early in his prosecution, however, the government did not calculate the exact number of images of child pornography that Mr. Raby had stored electronically. Instead, the case agent took a representative sample of images—roughly twenty-five percent—and examined them. Of that selection, 1364 were suspected images of child pornography. The agent sent those images to the National Center for Missing and Exploited Children, which identified thirty-six known images depicting thirteen known victims, as well as twenty-three magazines. Of those images, the agent approximated, less than ten percent—around three—depicted prepubescent children.

In addition to receiving child pornography, Mr. Raby engaged in reprehensible relevant conduct. Mr. Raby admits that he paid numerous teenage boys—boys as young as fourteen—for sex. In particular, the government has identified a teenage boy, "DG," who was fourteen or fifteen years of age when Mr. Raby began paying him for sex. DG and another boy of about the same age, "JE," often stayed at the home of a convicted sex offender, James Hanna. Mr. Raby would arrange with Hanna to have sex with DG and JE. Mr. Raby paid DG for sex (between $40 and $60) about once or twice per week for several years. DG ultimately dropped out of school after junior high school.

2. The history and characteristics of the defendant

Mr. Raby is forty-five years old. Born and raised in New York City, he attended college in Buffalo, New York. He states that he has never been sexually victimized.

Mr. Raby has held steady employment throughout his adult life. From 1987 until 1998, he taught middle- and high-school students in New York. He moved to West Virginia in 1998 to be near his mother and brother, who had moved to Boone County, West Virginia. Most recently, Mr. Raby worked as an instructor at a community college. At the time of this incident, Mr. Raby lived with his mother. While he is not married and has no children, his family is supportive. He was an active member of his church. He has no criminal history. Aside from this offense, Mr. Raby has been a productive member of society.

The parties have presented two psychological evaluations of Mr. Raby. While the evaluations do not directly conflict, they do paint different pictures of Mr. Raby's psychological state and his likelihood of reoffending.

At the first sentencing hearing in 2005, Dr. Dreyer presented a sex-offender risk assessment of Mr. Raby, stating that Mr. Raby was a low risk for reoffending. Dr. Dreyer observed, among other things, that Mr. Raby took responsibility for his acts, that he was remorseful, that he was not impulsive, that he had a strong support system, and that he was willing to participate in sex-offender treatment. Dr. Dreyer observed that Mr. Raby had been a productive member of society. Dr. Dreyer also explained that there was no evidence that Mr. Raby abused a child while he was a teacher in New York, which he "weighed . . . as a strong factor in terms of future risk." (Nov. 28, 2005 Hr'g Tr. 22:6-7.) Ultimately, Dr. Dreyer concluded, "look[ing] at numerical estimates on the formulas based on his responses and his past behavior and activity, [Raby] falls in the low risk range" of reoffending. (*Id.* at 26:11-14.)

More recently, however, Mr. Raby was examined by Ralph Smith, M.D., a psychiatrist who prepared an evaluation for the court (the "Smith Report").[3] After conducting a multi-axis assessment of Mr. Raby known as the Abel Assessment of Sexual Interest (the "Abel Assessment"),[4] Dr. Smith diagnosed Mr. Raby with paraphilia not otherwise specified,[5] depression, and a personality disorder. Acknowledging Dr. Dreyer's risk assessment, Dr. Smith explained that "[t]he risk is always high for

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[3] The Smith Report is available at Docket 120, Attachment 7.

[4] The Abel Assessment purportedly measures the examinee's level of sexual interest in certain persons. The examinee is shown a slideshow depicting a range of people, including children, teens, and adults. The test measures the examinee's interest in an image by how long the examinee looks at each image. The examinee also rates his arousal to the same pictures. The results of the test are then sent to Dr. Gene Abel, the creator of the Abel Assessment, in Atlanta, Georgia. Dr. Abel then analyzes the data and returns the results to the test administrator. There has been a good deal of controversy surrounding the reliability of the Abel Assessment. Dr. Abel claims a proprietary interest in the assessment and will not allow peer review of the formulas involved in the assessment. *See, e.g.*, *United States v. Birdsbill*, 243 F.Supp.2d 1128, 1132-36 (D. Mont. 2003) (concluding that the Abel Assessment is not reliable and not admissible in federal court). Mr. Raby's Abel Assessment results, however, are not being presented to the court for trial, but for sentencing. Therefore, they need not be admissible. *See* Fed. R. Evid. 1101(d)(3) (explaining that the Federal Rules of Evidence do not apply to sentencing proceedings). I have considered the criticism of the Abel Assessment and will accord Mr. Raby's assessment the weight it is due.

[5] Paraphilia is defined by the Diagnostic and Statistical Manual of Mental Disorders IV ("DSM-IV-TR") as a sexual disorder generally involving "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving: 1. nonhuman objects, or 2. the suffering or humiliation of oneself or one's partner, or 3. children or other nonconsenting persons [,] that occur over a period of 6 months." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text rev.) (2000). DSM-IV-TR provides eight specific classifications of paraphilia (exhibitionism, fetishism, frotteurism, pedophilia, masochism, sadism, voyeurism, and transvestic fetishism). Paraphilia not otherwise specified is a residual category for those fitting the general definition of paraphilia, but not falling within one of the eight specific categories. I note, however, that the DSM-IV classification of deviant sexual behavior is not without its critics. *See, e.g.*, Charles Moser & Peggy J. Kleinplatz, *DSM-IV-TR and the Paraphilias: An Argument for Removal*, J. PSYCHOL. & HUM. SEXUALITY, 17(3/4), 91-109 (2005) (arguing that the Paraphilia section of DSM-IV-TR is severely flawed and should be removed). Mr. Raby has been convicted of receiving child pornography. Dr. Smith's diagnosis is relevant only to Mr. Raby's criminal conduct and any likelihood that Mr. Raby might reoffend. Mr. Raby is not being prosecuted for his private thoughts, and I will not permit this evidence to become a predicate for such a punishment.

someone *untreated* with Mr. Raby's condition." (Smith Report 7 (emphasis added).) Furthermore, Dr. Smith stated that Mr. Raby "would be at a high risk to re-offend *should he be exposed to children in the workplace or where he lives after release*." (*Id*. at 8 (emphasis added).) Dr. Smith's evaluation highlights Mr. Raby's strong need for counseling and treatment. I note, however, that Dr. Smith has testified that Mr. Raby's "deviant sexual interest" is limited to postpubescent teens and that Raby is a candidate for treatment.

B. The Need for the Sentence Imposed

1. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense

Consuming child pornography is a serious crime. A child is not only injured when he or she is sexually abused, but the permanent memorial of the abuse preserves the abuse and forces the child to suffer repeated harm. Consumers of child pornography perpetuate this abuse by driving demand for its creation and distribution. Severe sentences are needed to dry up the market for this material. Moreover, Mr. Raby's was not only a consumer of child pornography. He was also a "contact offender"—he had sexual relations with underage children—which greatly underscores the seriousness of his offense.

2. to afford adequate deterrence to criminal conduct

A lengthy prison sentence is needed to deter others from entering the child-pornography market. The Supreme Court has explained that "it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." *Osborne v. Ohio*, 495 U.S. 103, 110 (1990). Consumers must also be punished.

3. to protect the public from further crimes of the defendant

Mr. Raby's behavior, particularly his relevant history of preying on desperate teenage prostitutes, is deeply troubling. I hope that the sentence I impose will impress upon Mr. Raby respect for the law and deter him from engaging in the offense and relevant conduct in the future.

> *4. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner*

Mr. Raby is in need of significant mental-health therapy and sex-offender treatment. I strongly recommend that the Bureau of Prisons allow Mr. Raby to participate in the Sex Offender Treatment Program.

C. The Kinds of Sentences Available

I have considered the kinds of sentences available in imposing this sentence.

D. The Need to Avoid Unwarranted Sentence Disparities

Sentences for child-pornography offenses have varied greatly from case to case. *See* Douglas A. Berman, *Another Puzzling Report on Federal Child Porn Sentence*, SENTENCING LAW & POLICY, Oct. 7, 2008, http://sentencing.typepad.com/sentencing_law_and_policy/2008/10/another-puzzlin.html ("There is every reason to fear that child porn downloading is being subject to wildly disparate sentencing consequences nationwide perhaps due solely to disparate prosecutorial charging and bargaining policies."). And I have previously highlighted the fact that sentencing courts have been more likely to vary sentences downward from the advisory Guidelines range in child-pornography prosecutions. *United States v. Cruikshank*, ___ F.Supp.2d ___, 2009 WL 3673096 at *4 (S.D. W. Va. 2009). I have taken this into account in determining a just sentence in this case.

III. Discussion

The Supreme Court has explained that "the Guidelines are not the only consideration" in imposing sentence and that "the district judge should [also] consider all of the § 3553(a) factors" to determine the appropriate sentence in any given case. *Gall*, 552 U.S. at 49-50. This admonition is particularly apt here.

The advisory Guidelines range in this case—210 to 262 months—is disproportionate in light of the § 3553(a) factors applied in this case. As I have previously explained,

> Section 2G2.2—the child pornography Guideline—is not entitled to the usual deference due the Guidelines. The Sentencing Commission was established to eliminate gross disparities in sentencing, to control crime through incapacitation and deterrence, and to rehabilitate offenders. *See United States v. Booker*, 543 U.S. 220, 253 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."). The Sentencing Guidelines are generally "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall v. United States*, 128 S. Ct. 586, 594 (2007). Some, however, like § 2G2.2, are not grounded in empirical analysis, but rather on statutory directive. [Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* 4-24, July 3, 2008, http://www.fd.org/odstb_SentencingResource3.htm (discussing studies)] (detailing the legislative history of the child pornography Guidelines). The Supreme Court has recognized that such Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough*, 128 S. Ct. at 574.

Cruikshank, ___ F.Supp.2d at ___, 2009 WL 3673096 at *5. The sentences recommended by section 2G2.2 are simply too long.

While I do not categorically reject the child-pornography Guidelines, I do not give them the same weight that I accord other Guidelines. In particular, I disagree with section 2G2.2(b)(7), which dramatically enhances an offender's sentence based solely on the number of images that he received. That enhancement calls for a two-level increase if the offense involved between 10 and 149 images, a three-level increase if the offense involved between 150 and 300 images, a four-level increase if

there were between 301 and 599 images, and a five-level increase for over 600 images. As I have explained regarding this number-of-images enhancement,

> I fail to understand how an offender with 9 images of children being sexually abused is less culpable than one with 601 such images. While both offenders have committed the same crime—the only difference being a marginal increase of demand on the market—they will have Guidelines sentences that could vary by several years. In an instance of troubling irony, an individual who, sitting alone, obtained images of sexually exploited children on his computer, could receive a higher sentence than the Guidelines would recommend for an offender who actually rapes a child. *See* Stabenow at 27-29.

Id. I see little connection between the number of images received by a child pornographer and his moral culpability in committing an offense.

Basic economics justifies criminalizing the consumption of child pornography. Unable to eliminate the supply of these horrible images, we prosecute consumers to lower demand. Although each individual offender's child-pornography collection may have little or no effect on the worldwide market, viewed in the aggregate, the impact is significant.

But this market-based justification does not support the number-of-images enhancement in section 2G2.2(b)(7). The worldwide market for child pornography is so vast that the the relative market impact of an having even 592 additional images is miniscule. Yet, in this case, the five-level number-of-images enhancement alone raised Mr. Raby's advisory Guidelines sentence from 121 to151 months in prison to 210 to 262 months, effectively doubling his sentence. The de minimis market effect of a few hundred images simply does not justify sentencing a man to additional decade in prison. While the size of Mr. Raby's child-pornography collection is certainly a part of the nature

and circumstances of his offense, adhering to this rigid calculus in this case would be unjust and would ignore the mandate of § 3553(a).[6]

Despite the growing criticism of section 2G2.2, the government insists that Mr. Raby deserves a within-Guidelines sentence. It contends that "[i]n addition to actively trading thousands of images of child pornography over a period of years, the Defendant, a teacher by profession, an unofficial 'Big Brother,' and an active member in his church, engaged in predatory sexual molestation of postpubescent boys on a weekly, if not daily, basis." (United States' Sentencing Mem. 4.) The government also speculates, contrary to all the evidence before the court, that Mr. Raby sexually abused children as a teacher in New York. It states, "Although there is no known evidence that the Defendant sexually molested his students during his tenure in New York, that is hardly surprising. It is not uncommon for children to hide abuse." (*Id.* at 7.)

To support its argument, the government relies on *United States v. Grubbs*, 585 F.3d 793 (4th Cir. 2009). Grubbs had been a middle-school language-arts teacher and coach, in addition to being a Sunday-school instructor and Boy Scouts volunteer. Numerous underage victims provided

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[6] The statute giving rise to Mr. Raby's offense also presents issues of fairness. Section 2252A(a)(2)(A) criminalizes "knowingly receiv[ing] . . . any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer." A violation of that section carries a mandatory minimum sentence of five years. 18 U.S.C. § 2252A(b)(1). Section 2252A(a)(5)(B) criminalizes "knowingly possess[ing] . . . child pornography that has been mailed, or shipped or transported" in interstate commerce. This latter statute, however, does not carry a mandatory minimum sentence. But one struggles to imagine a situation in which a person can possess an image of child pornography without first receiving it. Thus, § 2252A "effectively places in the prosecutor the ability to determine the defendant's sentence, a role reserved for the judiciary. In short, a prosecutor through a charging decision controls the sentencing range in cases involving the possession and/or receipt of child pornography." *United States v. Syzmanski*, 2009 WL 1212252 at *5 (N.D. Ohio April 30, 2009).

evidence that Grubbs had sexually assaulted them after school, on weekends, and on out-of-state trips. He would give his victims gifts, as well as better grades, in exchange for their sexual acts. Grubbs was indicted and convicted on six counts of transporting a minor in interstate commerce with the intent to engage in sexual activity, and six counts of traveling in interstate commerce for the purpose of engaging in a sexual act with a minor.

The presentence investigation report calculated Grubbs's total offense level to be 34, and his criminal history category to be I, which equated to a Guidelines-range sentence of 151 to 188 months in prison. Concluding that the Guidelines calculation in the PSR failed to adequately reflect the crime, however, the district court determined two upward departures were required. Based on evidence presented at sentencing, the court adjusted Grubbs's criminal history category from I to III, and it added an additional level to Grubbs's offense level. Using an offense level of 35 and a criminal history category of III, the Guidelines recommended a sentence of 210 to 262 months' imprisonment. The district court imposed a 240-month sentence, which the Fourth Circuit affirmed. *Grubbs*, 585 F.3d at 806.

"Aside from the offenses of conviction and the fact that Grubbs' victims were students under his care," the government asserts, "the facts of [*Grubbs*] are practically indistinguishable from the case at hand." (United States' Sentencing Mem. 10.) I disagree. If anything, *Grubbs* highlights the skewed sentences offered by the child-pornography Guidelines. Grubbs was convicted on *twelve counts* of transporting minors in interstate commerce with the intent to have sex with them. Mr. Raby, on the other hand, has been convicted on one count of receiving child pornography. While Raby has admitted to having sex with teenage prostitutes, that is not the offense of conviction.

Moreover, Grubbs had a criminal history category of III, while Mr. Raby has a criminal history category of I. Yet the Guidelines recommend the same sentence for each defendant.[7]

Relevant conduct must be considered appropriately. As the Supreme Court has cautioned, sentencing factors should not be elevated to the "tail which wags the dog of the substantive offense." *Blakely v. Washington*, 542 U.S. 296, 307 (2004) (internal quotation marks and citation omitted). In this case, the government has proven beyond a preponderance of the evidence that Mr. Raby had paid underage boys for sex. While this conduct is important to the determination of a just sentence, however, it should not be the primary reason for the length of Raby's sentence. If the government wants Mr. Raby to be principally punished for committing other criminal acts, then it should charge him with those acts. But the United States is not entitled to indict an individual on one charge, and then after conviction seek to punish him for other crimes.

Mr. Raby is far from a sympathetic character. His behavior shocks our societal conscience and jars our sense of the world. The fact that there are men like Mr. Raby who are in positions of trust and authority in our society, such as teachers and church members, who prey on the weak and vulnerable to satisfy their prurient interests is horrifying. We read about them in newspapers and hear about them on television. Men like Raby cause parents and grandparents to live in fear. Society's reaction is to seek to exile them for as long as possible. But the role of sentencing courts is not to act

[7] The government has also argued that Mr. Raby "has not participated in any counseling programs since his initial incarceration." (United States' Sentencing Mem. 8 n.6.) This is misleading. Despite my strong recommendation otherwise, Mr. Raby has been incarcerated at the Federal Correctional Institution in Elkton, West Virginia ("FCI-Elkton"), since his initial sentencing. The Bureau of Prisons does not provide the Sex Offender Treatment Program at FCI-Elkton. Therefore, Mr. Raby cannot be blamed for not taking part in such treatment. That failure lies squarely on the shoulders of the Bureau of Prisons for not assigning Mr. Raby to the appropriate institution.

as a hooded executioner for an outraged populace. District judges are instructed to consider the facts of the case before us and "impose a sentence sufficient but not greater than necessary" to achieve sentencing goals. *Kimbrough*, 552 U.S. at 111 (internal quotation marks omitted).

I **FIND** that a sentence of 120 months' imprisonment followed by lifetime supervised release is a sufficient and just punishment in this case. Ten years is a long time to serve in prison. This sentence will serve the goals of sentencing and provide Mr. Raby with the opportunity to receive treatment. Furthermore, a lifetime of supervised release will significantly restrain Mr. Raby's liberty after he is released from prison. He will have to register as a sex offender. His ability to find a place to live and to work will be severely limited. *Cf. Gall*, 552 U.S. at 48 ("Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty."). In light of the advisory Guidelines range and the factors of § 3553(a), I conclude that this sentence is sufficient, but no more than necessary, to serve the ends of justice.

IV. Conclusion

The court **DIRECTS** the Clerk to send a copy of this Order to the defendant and counsel, the United States Attorney, the United States Probation Office, and the United States Marshal. The court further **DIRECTS** the Clerk to post this published opinion at *http://wvsd.uscourts.gov*.

ENTER: December 30, 2009

Joseph R. Goodwin, Chief Judge