

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Submitted: February 17, 2015

Decided: June 14, 2016)

Docket No. 13-1706

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UNITED STATES OF AMERICA,

Appellee,

v.

NATHAN BROWN,

Defendant-Appellant.

Before: POOLER, SACK, and DRONEY, *Circuit Judges.*

Appeal from a January 29, 2013 judgment of the United States District Court for the Northern District of New York (Sharpe, J.), sentencing Defendant-Appellant Nathan Brown to 60 years' imprisonment. The sentencing transcript

1 suggests that the district court may have based its sentence on a clearly
2 erroneous understanding of the facts. Accordingly, we remand for resentencing.

3 Judge Droney dissents in a separate opinion.

4

5 Brenda K. Sannes and Richard D. Belliss, Assistant
6 United States Attorneys, *for* Richard S. Hartunian,
7 United States Attorney for the Northern District of New
8 York, Syracuse, NY, *for Appellee*.

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10 S. Michael Musa-Obregon, Maspeth, NY, *for Defendant-*
11 *Appellant*.

12

13 POOLER, *Circuit Judge*:

14 Nathan Brown pleaded guilty to three counts of production of child
15 pornography, in violation of 18 U.S.C. § 2251(a), and two counts of possession of
16 child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). The district court
17 (Sharpe, J.) imposed a sentence of 60 years' imprisonment. Brown now
18 challenges that sentence, arguing that the district court miscalculated his
19 guidelines range and that the sentence is otherwise procedurally and
20 substantively unreasonable. We reject Brown's challenge to the guidelines

1 calculations, but we remand for resentencing to ensure that the sentence is not
2 based on a clearly erroneous understanding of the facts.

3 **BACKGROUND¹**

4 In February 2012, federal investigators discovered eleven images on a
5 child-pornography website that appeared to have been uploaded by the same
6 person. Two of the images depicted the same eight-year-old girl. By examining
7 metadata from one of the images, investigators determined that the image had
8 been taken using a Motorola Droid X cell phone. The metadata also revealed GPS
9 coordinates associated with the image. With assistance from the cell phone
10 carrier in that region for the Motorola Droid X, investigators determined the
11 approximate area where the photograph was taken. They then spoke with the

¹ We set forth the facts in detail because we think it important to a full appreciation of the rationale underlying the district court’s sentence. *See United States v. C.R.*, 792 F. Supp. 2d 343, 378-404 (E.D.N.Y. 2011) (describing in detail the injury suffered by victims as a result of the dissemination of child pornography), *vacated on other grounds sub nom. United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013); *cf. also Reingold*, 731 F.3d at 233 (Sack, J., concurring) (“I have no doubt that there are appeals in such cases that require the reviewing court to engage in a carefully, even painfully, detailed analysis of the child pornography and abuse at issue.”). We do so with some misgivings, however, as we fear that an easily accessible detailed description of the events might worsen the mental anguish suffered by the victims.

1 superintendent of schools within that area, who identified the girl after viewing a
2 sanitized version of the photograph.

3 Federal agents visited the girl's home and spoke with her mother, who
4 identified her daughter in four images of child pornography. The girl's mother
5 also recognized her thirteen-year-old niece in two of the images. The mother told
6 investigators that the two girls would sometimes spend time together at a trailer
7 home that had been rented by defendant Nathan Brown and the mother's sister.

8 Investigators interviewed the eight-year-old girl, who told them that,
9 while babysitting, Brown would "play house" with the girls, and she would play
10 the "baby" and wear a diaper. Brown would periodically "change" the diaper as
11 if it were soiled. She reported that, while doing so, Brown had touched her as he
12 "cleaned" her vaginal area with a baby wipe. Brown also took pictures of the
13 girls as this was occurring.

14 Both girls recognized themselves in the photographs that they were shown
15 by investigators, and they remembered a number of the pictures that had been
16 taken while they were awake. One of the girls told investigators that Brown

1 offered to buy her an iPad if she allowed him to take more pictures of her, which
2 she refused.

3 Based on the information provided by the girls and their parents, federal
4 agents obtained a search warrant for Brown's residence and electronic devices.
5 They executed the warrant at Brown's home and found him attempting to delete
6 child pornography from his computer. The agents arrested Brown and seized his
7 computers, cell phones, storage devices, and cameras.

8 After his arrest, Brown told investigators that he had been viewing child
9 pornography online daily using software that hid his IP address. He admitted to
10 taking nude photographs of children with his phone, including approximately
11 100 photographs of the two girls depicted on the child-pornography website that
12 he uploaded from his phone to his computer. Images of the eight-year-old girl
13 included a picture of her wearing only a shirt, with her vagina exposed, and with
14 an open diaper next to each of her legs. In another, the girl was naked in a
15 bathtub, again with her genitalia exposed. Additional pictures included close-up
16 images of the girl's vagina, an image of a male hand pulling aside the girl's
17 underwear, and an image of a child's hand holding an adult penis. The girl is

1 sleeping in several of these images. The images of the girl's cousin showed her
2 sleeping, with her underwear pulled to the side and her vagina exposed, with
3 her breast exposed, with an adult penis next to her mouth, and with an adult
4 penis on her lips. The images also included close-up pictures of her vagina.

5 Brown told investigators that he had also taken sexually explicit
6 photographs and videos of a third victim, who was eight years old at the time.
7 Investigators found images and videos of this third victim on Brown's computer.
8 One video showed Brown touching his penis to her hand and ejaculating on it.
9 Another showed him ejaculating on her feet, and a third showed him pulling
10 down her underwear and spreading her vagina with his fingers. Brown admitted
11 to pulling down her underwear and photographing her while she was sleeping.
12 The third victim was "asleep the entire time during the production of the images
13 and videos" and has "no knowledge of having been victimized by Brown." PSR
14 ¶ 35.

15 After Brown's arrest, investigators conducted forensic analysis of his
16 computers and phones. They found the eleven images that originally prompted
17 the investigation on Brown's computers. They also discovered photos that Brown

1 had taken by hiding a pinhole camera in the bathroom of a home during a pool
2 party and in the bathroom of a hotel at a public water park. The presentence
3 report indicates that Brown also produced 33 files of a “Victim #4” and 2 files of a
4 “Victim #5.” PSR ¶ 36. The images of Victim #4 “depicted a female
5 approximately eight to nine years old with black hair opening her vagina,” and
6 the images of Victim #5 “depict an unknown infant.” PSR ¶ 37.

7 Brown’s computers collectively contained over 25,000 still images and 365
8 videos of child pornography, including approximately 4 still images involving
9 torture, 60 displaying bondage, 30 depicting bestiality, 1,873 involving sexual
10 intercourse, 160 involving objects, and 18 involving infants. In total, 299 victims
11 were identified in these images.

12 A grand jury indicted Brown with three counts of producing child
13 pornography and two counts of possessing child pornography. Brown pleaded
14 guilty to all five counts pursuant to a plea agreement. Under the plea agreement,
15 Brown faced a mandatory minimum of 15 years’ imprisonment, and he reserved
16 the right to appeal any sentence greater than 405 months’ imprisonment.

1 The probation office prepared a presentence investigation report in
2 advance of Brown’s sentencing. In determining Brown’s guidelines range, the
3 presentence report “grouped” Counts 1, 4, and 5, because those counts involved
4 “substantially the same harm.” U.S.S.G. § 3D1.2(b). The base offense level for this
5 group was 32. The base offense level was then increased 14 levels because of five
6 sentencing enhancements: (1) a four-level increase pursuant to Section
7 2G2.1(b)(1)(A) because “the offense involved a minor who had . . . not attained
8 the age of twelve years;” (2) a two-level increase pursuant to
9 Section 2G2.1(b)(2)(A) because “the offense involved[] the commission of . . .
10 sexual contact;” (3) a four-level increase pursuant to Section 2G2.2(b)(4) because
11 the offense “involved material that portrays sadistic or masochistic conduct or
12 other depictions of violence;” (4) a two-level increase pursuant to
13 Section 2G2.1(b)(5) because “the minor was . . . in the custody, care, or
14 supervisory control of the defendant;” and (5) a two-level increase pursuant to
15 Section 3A1.1(b)(1) because “the defendant knew or should have known that a
16 victim of the offense was a vulnerable victim.” These enhancements increased
17 Brown’s adjusted offense level for this group to 46.

1 The presentence report then repeated this process for Groups 2 and 3,
2 which corresponded to Counts 2 and 3, and determined that each of those counts
3 carried a total offense level of 42. This resulted in a “combined adjusted offense
4 level” on all counts of 49. Brown received another five-level enhancement
5 pursuant to Section 4B1.5(b) because he “engaged in a pattern of activity
6 involving prohibited sexual conduct,” raising the adjusted offense level to 54.
7 Finally, Brown received a three-level reduction pursuant to Section 3E1.1 because
8 he accepted responsibility for his crimes, resulting in a total offense level of 51.
9 This was “treated as” an offense level of 43, the maximum offense level under the
10 guidelines. *See* U.S.S.G. ch. 5, pt. A, application note 2.

11 At criminal history category I and offense level 43, Brown’s recommended
12 sentence under the guidelines was initially life imprisonment. Because each
13 count was subject to a statutory maximum, however, Brown’s recommended
14 sentence became 110 years’ imprisonment.

15 At sentencing, the government requested this maximum sentence. Defense
16 counsel requested the mandatory minimum sentence of 15 years’ imprisonment.
17 The court heard from the families of the victims, who described the significant

1 behavioral issues from which the victims suffer and how they struggled to
2 maintain relationships with family and friends. One victim's family told the
3 court that the family "fel[t] violated in the worst imaginable way" and that the
4 victim "lives in fear" and continues to "struggle with what happened." App'x at
5 83. The third victim's mother, however, did not submit a victim impact
6 statement because her daughter "was unaware of the abuse" and there was "no
7 negative impact" on her daughter. PSR ¶ 51.

8 The district court began its remarks at sentencing by discussing the various
9 sentencing enhancements that applied in Brown's case. The court then discussed
10 the seriousness of Brown's crimes, noting "the trauma to these three children [as]
11 reflected in the presentence report [and] the statements of the relatives who have
12 appeared on their behalf," which the court said "demonstrate[d] how drastic and
13 dramatic the criminal conduct [was] here." App'x at 100. With respect to the
14 possession counts, the court stated that the children depicted in the photographs
15 Brown possessed "were hijacked by people exactly like . . . Brown, put through
16 [torture, sexual intercourse, bestiality, and bondage], [and] photographed," and
17 that the children would worry "for the rest of their li[v]e[s]" that "those

1 photographs are out there forever.” App’x at 100. The court also said that
2 Brown’s crimes were “as serious . . . as federal judges confront” and that Brown
3 was “the worst kind of dangerous sex offender.” App’x at 101-02. In discussing
4 the need to protect the public from Brown, the court said to him, “[I]t may be
5 true that you could not help yourself, but it’s also true that y[ou] destroyed the
6 lives of three specific children” App’x at 101.

7 The court then imposed a sentence of 60 years’ imprisonment. It explained
8 its selection of this sentence as follows:

9 Each of the first three counts deal with each of the three documented
10 victims here, Jane Does I, II[,] and III; each of [th]em contains a
11 mandatory minimum sentence of 15 years and a statutory maximum
12 sentence of 30 years. So, on each of Counts I through III, you’re
13 looking at 15 to 30. Counts IV and V have a statutory maximum of
14 10 years each, and those are the counts that deal with the
15 photographs obtained over the internet. When I look at the first
16 three counts and look at the specific children that are involved, then
17 I have to say to myself[,] which one of [th]em didn’t you abuse? And
18 my answer to that is there isn’t none of the three that you didn’t
19 abuse.

20 So when I look at the mandatory minimum on each of those
21 children, I’m not willin[g] to walk away from any of the three. And
22 as to those three counts, it is my sentence and I hereby sentence you
23 to 20 years on each of those three counts to be served consecutively
24 for a total of 60 years. On each of the production counts, there are a
25 hundred ninety plus victims on those, I sentence you to the statutory
26 maximum of 10 years on each of those two counts to be served

1 concurrently with the 60 years I have imposed as consecutive
2 sentences on Counts I through III.

3 App'x at 102. In addition to the 60 years' imprisonment, the district court
4 sentenced Brown to a lifetime of supervised release and restitution in the amount
5 of \$10,416.00.

6 Brown now appeals from this sentence, arguing that the district court
7 miscalculated his guidelines range and that the sentence is otherwise
8 procedurally and substantively unreasonable.

9 DISCUSSION

10 "We review a sentence for procedural and substantive reasonableness,
11 which is akin to a 'deferential abuse-of-discretion standard.'" *United States v.*
12 *McCrimon*, 788 F.3d 75, 78 (2d Cir. 2015) (quoting *United States v. Cavera*, 550 F.3d
13 180, 189 (2d Cir. 2008)). We "must first ensure that the district court committed
14 no significant procedural error, such as failing to calculate (or improperly
15 calculating) the Guidelines range, treating the Guidelines as mandatory, failing
16 to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous
17 facts, or failing to adequately explain the chosen sentence—including an
18 explanation for any deviation from the Guidelines range." *Gall v. United States*,

1 552 U.S. 38, 51 (2007). “Once we have determined that the sentence is
2 procedurally sound, we then review the substantive reasonableness of the
3 sentence, reversing only when the trial court’s sentence ‘cannot be located within
4 the range of permissible decisions.’” *United States v. Dorvee*, 616 F.3d 174, 179 (2d
5 Cir. 2010) (quoting *Cavera*, 550 F.3d at 189).

6 We first address Brown’s argument that the district court miscalculated his
7 guidelines range. We then turn to whether Brown’s sentence was otherwise
8 procedurally and substantively reasonable.

9 **I. Brown’s Challenge to the Guidelines Calculation**

10 **A. Waiver**

11 As an initial matter, the government argues that Brown has waived any
12 objection to the guidelines calculation because his attorney did not object to that
13 calculation in the district court. The government argues that Brown’s attorney’s
14 failure to object means that this Court cannot conduct even plain error review of
15 the district court’s guidelines calculation.

16 “[W]aiver is the ‘intentional relinquishment or abandonment of a known
17 right.’” *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*,

1 304 U.S. 458, 464 (1938)). “[C]ourts applying [the] waiver doctrine have focused
2 on strategic, deliberate decisions that litigants consciously make.” *United States v.*
3 *Dantzler*, 771 F.3d 137, 146 n.5 (2d Cir. 2014); *see also United States v. Yu-Leung*, 51
4 F.3d 1116, 1122 (2d Cir. 1995) (“If . . . the party consciously refrains from
5 objecting as a tactical matter, then that action constitutes a true ‘waiver,’ . . .”). A
6 true waiver will “extinguish” an error in the district court, precluding appellate
7 review. *Olano*, 507 U.S. at 733. By contrast, “[i]f a party’s failure to [object] is
8 simply a matter of oversight, then such oversight qualifies as a correctable
9 ‘forfeiture’ . . .” *Yu-Leung*, 51 F.3d at 1122. Where a party forfeits an argument,
10 we review for plain error. *See id.* Under that standard, an appellant must
11 demonstrate that “(1) there is an error; (2) the error is clear or obvious, rather
12 than subject to reasonable dispute; (3) the error affected the appellant’s
13 substantial rights, which in the ordinary case means it affected the outcome of
14 the district court proceedings; and (4) the error seriously affects the fairness,
15 integrity or public reputation of judicial proceedings.” *McCrimon*, 788 F.3d at 78
16 (quoting *United States v. Marcus*, 560 U.S. 258, 262 (2010)). “[T]he plain error
17 doctrine,” however, “should not be applied stringently in the sentencing context,

1 where the cost of correcting an unpreserved error is not as great as in the trial
2 context." *Id.* (alteration in original) (quoting *United States v. Wernick*, 691 F.3d 108,
3 113 (2d Cir. 2012)).

4 There appears to be some tension in our case law concerning whether a
5 defendant's failure to object to the guidelines calculation constitutes a "true
6 waiver." Compare *McCrimon*, 788 F.3d at 78 (reviewing challenge to guidelines
7 calculation not raised in district court for plain error), *Wernick*, 691 F.3d at 113
8 (same), and *Dorvee*, 616 F.3d at 179 (same), with *United States v. Jass*, 569 F.3d 47,
9 66 (2d Cir. 2009) (concluding that failure to object to enhancement constituted
10 true waiver), *United States v. Eberhard*, 525 F.3d 175, 179 (2d Cir. 2008) (same), and
11 *United States v. Soliman*, 889 F.2d 441, 445 (2d Cir. 1989) (same). We need not
12 conclusively decide whether Brown's challenge to the guidelines calculation was
13 waived or forfeited, however, because, for the reasons explained below, he fails
14 to demonstrate plain error.

15 **B. Grouping and Stacking**

16 Brown first argues that the district court erred in its application of the
17 guidelines' grouping and stacking provisions.

1 Chapter 3, Part D of the Sentencing Guidelines Manual provides rules for
2 determining a single offense level when a defendant is convicted of multiple
3 counts. *See generally United States v. Feola*, 275 F.3d 216, 219 (2d Cir. 2001)
4 (summarizing these rules). First, counts “involving substantially the same harm”
5 are “grouped” together. U.S.S.G. § 3D1.2. Next, an offense level for each group is
6 determined by using the offense level, enhanced by relevant conduct, for the
7 most serious offense within the group. *Id.* § 3D1.3(a). The combined offense level
8 is then determined by using the offense level for the group with the highest level,
9 increasing that offense level based on the offense levels of the other groups, and
10 finally decreasing the offense level as appropriate if the defendant accepts
11 responsibility for his offense. *Id.* §§ 3D1.4, 3E1.1.

12 The district court correctly applied these provisions. As noted, the district
13 court grouped Counts 1, 4, and 5 because they involved substantially the same
14 harm. The court was required to group Counts 2 and 3 separately because
15 Section 3D1.2(d) specifically prohibits grouping counts charging production of
16 child pornography. The court then determined a combined offense level by using
17 the offense level for Group 1, the group with the highest level, increasing that

1 offense level based on the levels of Groups 2 and 3, and decreasing the offense
2 level based on Brown’s acceptance of responsibility. We see no error, much less
3 plain error, in how the district court grouped Brown’s counts of convictions.

4 Nor do we see any error in the district court’s application of the stacking
5 provisions found in Chapter 5 of the Guidelines Manual. Section 5G1.2(d)
6 provides that where there are multiple counts and the guidelines range exceeds
7 the highest statutory maximum, the sentences are stacked and run consecutively
8 “to the extent necessary to produce a combined sentence equal to the total
9 punishment.” Hence, the district court correctly determined that the guidelines
10 range here was 110 years based on the stacking of the statutory maximums for
11 the three production counts, which each carried a statutory maximum of 30
12 years, and the two possession counts, which each carried a statutory maximum
13 of 10 years.

14 **C. The Enhancement for Violent and Sadomasochistic Conduct**

15 Brown next argues that the district court erred by applying a four-level
16 sentencing enhancement for an “offense involv[ing] material that portrays
17 sadistic or masochistic conduct or other depictions of violence,” U.S.S.G. §

1 2G2.2(b)(4), despite the fact that Brown did not produce any sadistic images.
2 Since it was Brown's production count that carried the highest offense level in
3 Group 1, Brown is correct that his offense level should not have been increased
4 based on the Section 2G2.2(b)(4) enhancement governing possession of child
5 pornography. *See* U.S.S.G. § 3D1.3(a) & cmt. 2.

6 Nonetheless, Brown cannot demonstrate plain error because he cannot
7 show that any error affected his substantial rights. *See McCrimon*, 788 F.3d at 78.
8 Because Brown's total offense level of 51 exceeded the highest offense level listed
9 in the sentencing table by more than four levels, Brown's guidelines range would
10 have been identical even absent this enhancement. Any misapplication was
11 therefore harmless. *See United States v. Cramer*, 777 F.3d 597, 603 (2d Cir. 2015)
12 ("An error in Guidelines calculation is harmless if correcting the error would
13 result in no change to the Guidelines offense level and sentencing range.")²

² If, on remand, the district court considers applying the parallel Section 2G2.1(b)(4) enhancement governing the production of child pornography, it must first decide whether the possession of sadomasochistic material was "relevant" to Brown's production of child pornography. *See* U.S.S.G. § 1B1.1, application note 1(H); *id.* § 1B1.3(a)(1); *see also United States v. Ahders*, 622 F.3d 115, 120 (2d Cir. 2010). To make such a finding, the district court must "provide at least some analysis of the relatedness . . . between [defendant's] possession of

1 II. Procedural and Substantive Reasonableness

2 Brown also raises a more general challenge to the procedural and
3 substantive reasonableness of his sentence.

4 As noted, in addition to ensuring that the district court properly calculated
5 the guidelines range, we must also ensure that the district court committed no
6 other significant procedural error, such as “treating the Guidelines as mandatory,
7 failing to consider the § 3553(a) factors, selecting a sentence based on clearly
8 erroneous facts, or failing to adequately explain the chosen sentence.” *Gall*, 552
9 U.S. at 51; *see also United States v. Aldeen*, 792 F.3d 247, 251 (2d Cir. 2015). We will
10 not uphold a sentence as substantively reasonable unless we can first conclude
11 that the district court adhered to these procedural requirements. *See United States*
12 *v. Sindima*, 488 F.3d 81, 85 (2d Cir. 2007).

13 At sentencing, the district court noted “the trauma to these three children,”
14 the fact that “three children” would have to “worry for the rest of their li[v]e[s]”
15 about the photographs, and that Brown “destroyed the lives of three specific

the images and his production of child pornography” and “point to facts in the
record supporting its conclusion.” *Ahders*, 622 F.3d at 122; *see also id.* at 123
(listing relevant factors for the district court to consider).

1 children.” App’x at 100-01. The district court’s explanation suggests that the
2 individual harm suffered by each of Brown’s three victims played a critical role
3 in the district court’s decision to impose three consecutive 20-year sentences. But
4 the sentencing transcript also suggests that the district court may have
5 misunderstood the nature of that harm as to Brown’s third victim. Three times
6 the court emphasized the mental anguish that “three specific children” would
7 suffer as a result of Brown’s abuse. App’x at 100-01. Brown’s third victim,
8 however, has “no knowledge of having been victimized by Brown.” PSR ¶ 35.
9 Her mother declined to submit a victim impact statement specifically because her
10 daughter “was unaware of the abuse” and had experienced “no negative
11 impact.” PSR ¶ 51. To be sure, the district court was entitled to punish Brown for
12 that abuse regardless of whether the victim was aware of it. But given the district
13 court’s repeated emphasis on the fact that Brown had destroyed the lives of
14 “three specific children,” we conclude that it is appropriate to remand for
15 resentencing to ensure that the sentence is not based on a clearly erroneous
16 understanding of the facts.³ See, e.g., *United States v. Corsey*, 723 F.3d 366, 376 (2d

³ Our concern is not simply, as the dissent suggests, that the district court “did

1 Cir. 2013) (remanding for resentencing because record was ambiguous as to
2 whether district court improperly treated the statutory maximum as the only
3 reasonable sentence); *United States v. Cossey*, 632 F.3d 82, 88-89 (2d Cir. 2011)
4 (remanding for resentencing where it was unclear whether district court
5 sentenced defendant based on an appropriate or inappropriate consideration);
6 *United States v. Juwa*, 508 F.3d 694, 699 (2d Cir. 2007) (remanding for resentencing
7 where there was “uncertainty from both the sentencing transcript and the
8 written order surrounding whether and to what extent the district judge based
9 his sentencing enhancement on the assumption that Juwa had engaged in
10 multiple instances of sexual abuse, as opposed to the single instance to which
11 Juwa had anticipated pleading guilty in state court” (emphasis omitted)).⁴

not acknowledge” that the third victim “was sleeping at the time she was
abused.” Dissenting Op., *post* at 6. Rather, our concern is that the district court
imposed a 20-year, consecutive sentence on Count Three because the court was
under the mistaken impression that the third victim’s life had been “destroyed,”
App’x at 101, when in fact she has “no knowledge of having been victimized by
Brown,” PSR ¶ 35, and, in the words of her mother, has suffered “no negative
impact,” PSR ¶ 51.

⁴ The dissent contends that Brown did not sufficiently present this issue on
appeal. Dissenting Op., *post* at 7-8. But, as the dissent acknowledges, we have
discretion to consider arguments outside of an appellant’s brief where “manifest

1 It is possible that, on remand, the district court will reimpose the same 60-
2 year sentence that it imposed at the original sentencing. Although we express no
3 definitive view on the substantive reasonableness of that sentence at this time,
4 we respectfully suggest that the district court consider whether an effective life
5 sentence is warranted in this case. *See United States v. Craig*, 703 F.3d 1001, 1002-
6 04 (7th Cir. 2012) (Posner, *J.*, concurring) (expressing “the importance of careful
7 consideration of the wisdom of imposing de facto life sentences”).

8 We understand and emphatically endorse the need to condemn Brown’s
9 crimes in the strongest of terms. But the Supreme Court has recognized that
10 “defendants who do not kill, intend to kill, or foresee that life will be taken are
11 categorically less deserving of the most serious forms of punishment than are
12 murderers.” *Graham v. Florida*, 560 U.S. 48, 69 (2010). As the Court explained in
13 *Graham*,

injustice otherwise would result.” *See United States v. Babwah*, 972 F.2d 30, 35 (2d
Cir. 1992). Here, it is necessary to ensure that the sentence is not based on a
clearly erroneous understanding of the facts before we can adequately review the
substantive reasonableness of Brown’s sentence. *See Sindima*, 488 F.3d at 85 (“Our
ability to uphold a sentence as reasonable will be informed by the district court’s
statement of reasons (or lack thereof) for the sentence that it elects to impose.”
(alterations and internal quotation marks omitted)).

1 There is a line between homicide and other serious violent offenses
2 against the individual. Serious nonhomicide crimes may be
3 devastating in their harm[,] but in terms of moral depravity and of
4 the injury to the person and to the public, they cannot be compared
5 to murder in their severity and irrevocability. This is because life is
6 over for the victim of the murderer, but for the victim of even a very
7 serious nonhomicide crime, life is not over and normally is not
8 beyond repair. Although an offense like robbery or rape is a serious
9 crime deserving serious punishment, those crimes differ from
10 homicide crimes in a moral sense.

11 *Id.* (citations, alterations, and internal quotation marks omitted). The sentencing
12 transcript suggests that the district court may have seen no moral difference
13 between Brown and a defendant who murders or violently rapes children,
14 stating that Brown's crime was "as serious a crime as federal judges confront,"
15 App'x at 101, that Brown was "the worst kind of dangerous sex offender," App'x
16 at 102, and that he was "exactly like" sex offenders who rape and torture
17 children, App'x at 100.

18 Punishing Brown as harshly as a murderer arguably frustrates the goal of
19 marginal deterrence, "that is, that the harshest sentences should be reserved for
20 the most culpable behavior." *United States v. Newsom*, 402 F.3d 780, 785-786 (7th
21 Cir. 2005). And "[t]hose who think that the idea of marginal deterrence should
22 play some part in criminal sentences . . . might find little room left above

1 [Brown's] sentence for the child abuser who physically harms his victims, who
2 abuses many different children, or who in other ways inflicts greater harm on his
3 victims and society." *Id.* at 781, 785-86 (ordering limited remand for
4 consideration of whether 324-month sentence imposed would be affected by
5 *United States v. Booker*, 543 U.S. 220 (2005), where father produced child
6 pornography of his daughter and his ex-girlfriend's daughter); *cf. also United*
7 *States v. Aleo*, 681 F.3d 290, 293-95 (6th Cir. 2012) (vacating 60-year sentence for
8 child pornography offenses as substantively unreasonable where grandfather
9 filmed himself digitally penetrating his granddaughter). Moreover, while the
10 district court appropriately recognized the need for the sentence imposed to
11 afford adequate general deterrence, "sentencing judges should try to be realistic
12 about the *incremental* deterrent effect of extremely long sentences." *Craig*, 703
13 F.3d at 1004 (Posner, J., concurring).

14 Finally, to the extent that the district court believed it necessary to
15 incapacitate Brown for the rest of his life because of the danger he poses to the
16 public, we note that defendants such as Brown are generally less likely to
17 reoffend as they get older. *See id.* at 1003-04 (citing studies showing that "[o]nly

1 1.1 percent of perpetrators of all forms of crime against children are between 70
2 and 75 years old and 1.3 percent between 60 and 69"). If Brown were ever
3 released, he would still be subject to a lifetime term of supervised release and be
4 required to register as a sex offender, further reducing his risk of recidivism.

5 We understand that balancing these and other concerns to arrive at a just
6 sentence is a difficult and delicate task, and one that our system places primarily
7 in the hands of district court judges. Our role as an appellate court is to
8 determine only whether the sentence can be located within the "range of
9 permissible decisions," and we will vacate a sentence as substantively
10 unreasonable only when it is "so shockingly high, shockingly low, or otherwise
11 unsupportable as a matter of law that allowing [it] to stand would damage the
12 administration of justice." *Aldeen*, 792 F.3d at 255 (internal quotation marks
13 omitted). Again, we express no view at this time as to whether a 60-year sentence
14 for Brown's crimes meets this high standard. We will revisit that issue should the
15 district court decide to reimpose the same 60-year sentence on remand.

CONCLUSION

1

2

Because the sentencing transcript suggests that the district court may have

3

based its sentence on a clearly erroneous understanding of the facts, we

4

REMAND for resentencing in accordance with the procedures set forth in *United*

5

States v. Jacobson, 15 F.3d 19 (2d Cir. 1994), and in light of this opinion.

1 DRONEY, *Circuit Judge*, dissenting:

2 The majority simply disagrees with the length of the
3 imprisonment imposed upon the defendant by the district court, yet
4 it cloaks that disagreement as procedural error. There was no
5 procedural error, and the sentence was well within the discretion of
6 the district court. It was also appropriate. The defendant sexually
7 abused at least three very young girls, recorded that abuse, installed
8 secret cameras in public areas where children changed clothes, and
9 possessed over 25,000 images of child pornography on his
10 computers, including many scenes of bestiality and sadistic
11 treatment. No doubt this was a lengthy sentence, but it was
12 warranted.

13 I dissent. The district judge committed no error whatsoever—
14 procedural or substantive.

1 **I. Background**

2 On March 21, 2012, Brown was indicted in the Northern
3 District of New York on five counts: three counts of production of
4 child pornography in violation of 18 U.S.C. §§ 2251(a), (e) and
5 2256(8) (Counts One to Three), and two counts of possession of child
6 pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2) and
7 2256(8)(A) (Counts Four and Five).

8 Brown was sentenced to 60 years’ imprisonment after
9 pleading guilty to the three counts of production of child
10 pornography—each in connection with a different young female
11 victim—and the two counts of possession of child pornography.
12 The three child victims in the production counts were identified as
13 Jane Does 1 through 3. This was a below-Guidelines sentence;
14 Brown’s sentence calculated under the Guidelines was 110 years.

15 Brown has never objected to the factual portions of the Pre-
16 Sentence Report (“PSR”). In addition, as part of his plea agreement,

1 he expressly admitted certain details of his criminal conduct.
2 Although the majority gives a description of the nature of Brown's
3 crimes, Majority Op. 3-8, a fuller description of the impact of
4 Brown's crimes on the victims is important.

5 Many of the victims identified in the images that related to the
6 two possession counts provided Victim Impact Letters to the district
7 court prior to sentencing. In those letters, the victims recounted
8 feelings of helplessness, depression, shame, and fear. In the words
9 of one victim,

10 My privacy and myself ha[ve] been violated and my
11 pictures are on the internet all over the world. . . . Even
12 though I've tried so hard to forget there's not a day that
13 goes by that it doesn't affect me. . . . I break down into
14 tears all of a sudden, I don't talk for a day, I get random
15 flashbacks, I have horrible nightmares. . . . Now the
16 pictures are spread all over the internet, and
17 unfortunately it's beyond my control.

18 PSR at 36-37. In the words of another victim, "[b]eing sexually
19 abused is something you never forget, [b]ut when you have
20 photographs of your abuse on the Internet, . . . it makes it even more

1 impossible to keep it in your past and move on from it. It is like the
2 abuse is still happening.” PSR at 41.

3 As to the three counts of the indictment which charged
4 production of child pornography, the families of Jane Doe 1 and Jane
5 Doe 2 spoke at Brown’s sentencing. They described the significant
6 behavioral issues that these girls suffer, and how the girls struggle to
7 maintain relationships with family and friends. For example, Jane
8 Doe 1’s family explained that Jane Doe 1 blames herself for what
9 happened. She experiences frequent nightmares in which Brown
10 “chas[es] her with [his] phone and camera.” App. 84. Jane Doe 1’s
11 grandmother recounted witnessing these nightmares and hearing
12 Jane Doe 1 scream, “Get him off me, get him off me.” App. 84. Jane
13 Doe 1 was nearly held back in school and required one-on-one
14 tutoring and counseling services. Jane Doe 2’s family similarly
15 described how Jane Doe 2 suffers from guilt and nightmares, has
16 difficulty trusting other people, and has required extensive

1 treatment, including medication and counseling. The families told
2 the district court that both they and the girls “feel violated in the
3 worst imaginable way” and that the girls “live in fear” and continue
4 to “struggle[] with what happened.” App. 83. Jane Doe 3, Brown’s
5 ex-wife’s sister, PSR ¶ 61, did not submit a Victim Impact Statement
6 or speak at sentencing.

7 At sentencing, the district court accepted the PSR’s Guidelines
8 calculation. At Criminal History Category I and offense level 43,
9 Brown’s recommended sentence under the Guidelines was initially
10 life imprisonment. However, because each count was subject to a
11 statutory maximum, Brown’s Guidelines sentence became 110 years.
12 Brown’s counsel stated that Brown had no objection to this
13 calculation.

14 The district court sentenced Brown to 60 years’ imprisonment,
15 imposing 20-year consecutive terms on Counts One through Three
16 (the production counts related to victims Jane Does 1 through 3),

1 and 10-year terms on Counts Four and Five (the possession counts)
2 to be served concurrently with one another and with its sentence on
3 the production counts.

4 **II. Procedural Reasonableness**

5 On appeal, Brown raises—for the first time—two challenges to
6 his Guidelines calculation: (1) that the district court misapplied the
7 Guidelines’ grouping and stacking provisions and (2) that the court
8 erroneously applied an enhancement for material depicting sadistic
9 or masochistic conduct. Despite rejecting these challenges, *see*
10 Majority Op. 15-18, the majority nonetheless concludes that Brown’s
11 sentence was procedurally unreasonable on a basis not raised before
12 the district court or on appeal: that Jane Doe 3 was sleeping at the
13 time she was abused and recorded by the Defendant, and the district
14 court did not acknowledge that at sentencing. Because the district
15 court imposed a consecutive sentence of 20 years for the production

1 count related to Jane Doe 3, the majority concludes, the sentence
2 must be vacated.

3 While the majority faults the district court for
4 “misunderst[anding] the nature of [the] harm as to Brown’s third
5 victim,” Majority Op. 20, Brown’s only discussion of any factual
6 error by the district court appears in his brief’s description of the
7 case’s procedural history, where he writes that “Judge Sharpe
8 erroneously emphasized the pictures’ supposedly violent and or
9 sadistic aspects.” Appellant’s Br. at 10. This has nothing to do with
10 the district court’s understanding of the harm inflicted upon Jane
11 Doe 3. And while Brown quotes portions of the district court’s
12 statement at sentencing which the majority finds troubling,
13 Appellant’s Br. at 40, Brown does so only in the context of an
14 unrelated challenge to the substantive reasonableness of his
15 sentence. This is insufficient to raise the issue on appeal. *See Norton*
16 *v. Sam’s Club*, 145 F.3d 114, 117 (2d Cir. 1998) (“Issues not sufficiently

1 argued in the briefs are considered waived and normally will not be
2 addressed on appeal.”).

3 While we have discretion to consider arguments outside an
4 appellant’s brief where “manifest injustice would otherwise result,”
5 *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d
6 418, 428 (2d Cir. 2005), no such extreme circumstances warrant
7 exercise of that discretion here.¹

¹ In addition to the arguments discussed above, Brown also argues that the district court erred by (1) finding that he had not demonstrated remorse for his crimes and (2) “erron[e]ously believ[ing] that [Brown] produced violent or sadomasochistic child pornography.” Appellant’s Br. 31. The majority did not rely on these arguments as a basis for vacatur, and for good reason. As to the first argument, the district court’s finding did not affect Brown’s Guidelines range; in accepting the PSR’s Guidelines calculation, the district court in fact reduced Brown’s offense level by three levels for acceptance of responsibility. Moreover, the assessment of whether Brown had demonstrated remorse was well within the province of the district court, and there was no clear error in the court’s finding. *Cf. United States v. Cousineau*, 929 F.2d 64, 69 (2d Cir. 1991) (“[T]he district court[’s] [conclusion that the defendant] . . . had not shown remorse or acknowledged the wrongfulness of the conduct for which he was convicted is entitled to great deference”). As to the second argument, although the images Brown possessed on his computer but did not produce were the ones that depicted violent or sadomasochistic conduct, the district court’s remarks at sentencing demonstrate that the court distinguished between the production and possession counts, *see* App. 100 (discussing production counts and stating that those counts did not “obviate the last counts of the indictment, which [are] the possession of the child pornography”), and was aware that the sadistic and violent images at issue were *produced* by other individuals and

1 Even assuming that the majority properly reached this issue, I
2 cannot agree that the district court procedurally erred by stating that
3 Brown “destroyed the lives of three specific children,” App. 101,
4 simply because Jane Doe 3 was asleep at the time Brown sexually
5 abused and photographed her. *See* Majority Op. 20. The majority
6 concludes that the district court’s “repeated emphasis on the fact
7 that Brown had destroyed the lives of ‘three specific children,’” is
8 reason “to remand for resentencing to ensure that the sentence is not
9 based on a clearly erroneous understanding of the facts.” *Id.*

10 Unlike the majority, I do not find that the court’s comments
11 “suggest[] that the district court may have misunderstood the nature
12 of that harm as to Brown’s third victim.” *Id.* In making the
13 comment about the “three specific children,” the court was

possessed by Brown, *see id.* (“[T]he possession of the child pornography [counts] . . . result[] in identifying 294 additional victims and a hundred ninety-four known victim series, . . . and those pictures involving torture, sexual intercourse, bestiality and bondage. . . . The children depicted in . . . those photographs, did not volunteer to participate in torture, sexual intercourse, bestiality and bondage.”).

1 discussing the need for specific deterrence in light of the significant
2 harm Brown caused to the victims in both the child pornography
3 that he produced and possessed. *See* App. 101-02. However, when
4 discussing the severity of Brown’s actions toward Jane Does 1, 2,
5 and 3, and its relationship to the severity of the sentence imposed,
6 the court explained, “When I look at the first three counts and look
7 at the specific children that are involved, then I have to say to myself
8 which one of [them] didn’t you abuse? And my answer to that is
9 there isn’t none of the three that you didn’t abuse.” App. 102. Not
10 only did the district court specifically note that a factor important to
11 it in imposing Brown’s sentence was “Jane Doe III, [and that Brown]
12 ejaculate[ed] on her *while she was sleeping,*” App. 100 (emphasis
13 added), but also said that it had read the presentence report, App.
14 77, 101, which specifically states that Jane Doe 3 was asleep, PSR
15 ¶¶ 27, 35, and presently unaware of the abuse. PSR ¶ 51.

1 While it is true that Jane Doe 3 may have been unaware that
2 Brown molested her and recorded it, this does not mean that the
3 court committed procedural error by concluding that Brown
4 “abuse[d]” her, App. 102, or that a significant sentence was not
5 warranted on Count Three. That Jane Doe 3 was asleep does not
6 change the fact that Brown placed his penis on her hand, ejaculated
7 on her hands and feet, and pulled aside her underwear to touch her
8 vagina, all while taking pictures and videos that he later uploaded to
9 his computer for future viewing.² Simply because Jane Doe 3 did
10 not know of Brown’s actions then does not mean she will not learn
11 of them in the future. When she does discover what occurred, she
12 will have to live with the fact that she was violated in a deplorable
13 way by a close family member.

² Although the images of Jane Doe 3—like the images of Jane Doe 1 and Jane Doe 2—were produced by Brown and uploaded to his computer, it is not clear whether images of Jane Doe 3 were shared on the Internet, as the images of Jane Doe 1 and Jane Doe 2 were. It is also not clear, however, that they were *not* shared.

1 Like Jane Doe 1, Jane Doe 2, and the many other victims
2 represented in the Victim Impact Letters that were before the district
3 court for the counts of possession of child pornography, Jane Doe 3
4 will also be exposed to the fear and uncertainty of whether the
5 photographs that Brown produced will be viewed by others. The
6 district court correctly recognized this fear when it stated “the three
7 children here worry [] for the rest of their li[ves],” App. 100, about
8 whether photographs of their abuse have or will be viewed by
9 others. Jane Doe 3 is as likely to experience this uncertainty and fear
10 as the other victims, regardless of whether she currently remembers
11 the abuse.

12 That Jane Doe 3 was asleep when she was abused must also be
13 considered in the context of Brown’s other abuse and misconduct.
14 Brown admitted to sexually assaulting three victims; Jane Does 1, 2,
15 and 3. The presentence report also indicated that there were two
16 additional victims, Victims 4 and 5. PSR ¶ 37. Brown had numerous

1 computer files of these two additional victims. PSR ¶ 36. However,
2 law enforcement was unable to establish the identities of these two
3 minors, and Brown’s production of these images was not charged in
4 the Indictment. But Brown did not object to the presentence report
5 before sentencing and the district court specifically inquired
6 whether there were any objections to the PSR at sentencing; there
7 were none. App. 78. Victim #4 was eight or nine years old and was
8 photographed opening her vagina, and Victim #5 was an unknown
9 infant.³ PSR ¶ 37. The identified victims Brown abused ranged in

³ At sentencing, the government provided that the nature of the images of Victims #4 and 5 “were different” as “they involved a hidden camera where the images may not be considered sexually explicit, but they captured two minors changing in and out of their clothing.” App. 80-81. The government continued, stating “there were two additional victims, Jane Doe VI and VII” who were “also secretly filmed with a hidden camera changing in and out of their clothes.” App. 81. The government appears to have made this statement in error as the PSR states that “images of Victim #4 depicted a female approximately eight to nine years old with black hair opening her vagina and wearing a cartoon t-shirt” and that images of Victim #5 “depict an unknown infant.” PSR ¶ 37. The PSR goes on to provide that “[i]mages were *also* located of unknowing victims obtained by the defendant hiding a pinhole camera at various locations.” PSR ¶ 38 (emphasis added). The PSR provides that four children were filmed by the pinhole camera: an identified minor female who was unaware she was a victim, Brown’s son, and two unidentified children who were taped changing out of their swimwear. PSR ¶ 38. Victims #4 and 5 are not those children, identified by the government at

1 age from eight to eleven years old. Forensic analysis of Brown’s
2 computer revealed 44 files of child pornography produced of Jane
3 Doe 1, 12 files of Jane Doe 2, 39 files of Jane Doe 3, 33 files of Victim
4 #4, and 2 files of Victim #5. In addition, over 25,000 images of child
5 pornography, including depictions of bondage, bestiality, and what
6 appeared to be an intoxicated minor, were recovered on Brown’s
7 computers. PSR ¶¶ 36, 41. Brown also placed a pinhole camera in
8 various locations, including in a hamper at a pool party and at a
9 hotel bathroom in a Lake George waterpark, which recorded
10 children changing out of their swimwear. PSR ¶ 38.

11 I therefore cannot conclude from either Brown’s sentence or
12 the district court’s explanation for that sentence that the court
13 “misunderstood” the harm to Jane Doe 3 when it imposed a
14 consecutive sentence of 240 months’ imprisonment on Count Three.

sentencing as Victims #6 and 7, depicted in images and videos obtained by
Brown’s placement of the pinhole cameras.

1 **III. Substantive Reasonableness**

2 Although the majority purports not to express a “definitive
3 view on the substantive reasonableness of [the] sentence,” Majority
4 Op. 22, it nonetheless urges the district court to consider whether the
5 imposed sentence is truly warranted and suggests that a lesser
6 sentence is required. Based on the court’s statements analogizing
7 Brown to “the worst kind of dangerous sex offender,” App. 102, and
8 his offense conduct as “as serious a crime as federal judges
9 confront,” App. 101, the majority suspects “the district court may
10 have seen no moral difference between Brown and a defendant who
11 murders or violently rapes children.” Majority Op. 23. The majority
12 also faults the district court in stating that Brown “was ‘exactly like’
13 sex offenders who rape and torture children.” Majority Op. 23
14 (quoting App. 100).

1 I disagree. The district court did not say that Brown was
2 “exactly like” sex offenders who rape and torture children, as the
3 majority suggests. The court’s remarks were as follows:

4 The possession of child pornography is not a victimless
5 crime. The children depicted in . . . those photographs,
6 did not volunteer to participate in torture, sexual
7 intercourse, bestiality and bondage. They were hijacked
8 by people exactly like you, Mr. Brown, put through
9 those events, had them photographed, and as the three
10 children here worry about for the rest of their life, those
11 photographs are out there forever, as is demonstrated
12 by the fact that somebody like you can retrieve [them]
13 and continue to victimize [them].

14 App. 100-101. Thus, the court did not indicate that Brown was as
15 morally culpable as an individual who rapes or tortures children.
16 Rather, in making these statements, the court was emphasizing that
17 Brown not only committed the serious crime of *possessing* over
18 25,000 images of child pornography, but also committed the even
19 more serious crimes of *producing* child pornography of multiple
20 child victims forced to engage in sexual acts. It was in this sense—

1 that he was a “producer” of child pornography—that Brown was
2 “exactly like” those who created the images that he possessed.

3 The other statements cited by the majority do not show that
4 the district court, in fact, viewed Brown’s conduct as the worst crime
5 a defendant could commit. On the broad spectrum of criminal
6 conduct, Brown’s conduct was not as severe as that of a murderer or
7 an individual who rapes or tortures a child. *See* Majority Op. 23-24.
8 The district court’s comments—read in context—were meant to
9 emphasize the severity of Brown’s many crimes in contrast to crimes
10 of lesser severity, rather than to suggest that his crimes were in fact
11 the “most severe” he could have committed. Thus, in describing
12 Brown as the “worst kind of dangerous sex offender,” the district
13 court explained, “You’re not just one who looks at photographs
14 obtained over the internet. You’re one who puts that penchant in
15 action, as is demonstrated here.” App. 102. The court therefore was
16 simply explaining that Brown’s conduct was more serious than that

1 of an individual who possesses, but does not produce, child
2 pornography.

3 While the court did not expressly compare Brown’s crimes to
4 more severe offenses—such as murder, torture, or rape—an express
5 discussion was not required. *See United States v. Pereira*, 465 F.3d
6 515, 523 (2d Cir. 2006) (finding no error where the district court did
7 not expressly consider certain § 3553(a) factors). I therefore disagree
8 that the district court’s language signaled error or an inability to see
9 a “moral difference” between Brown and a defendant who murders
10 or violently rapes children. Nor do I believe this is one of those
11 “exceptional cases where the trial court’s decision ‘cannot be located
12 within the range of permissible decisions.’” *United States v. Cavera*,
13 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (quoting *United States v.*
14 *Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)).

15 Brown repeatedly engaged in sexual contact with at least
16 three young girls between the ages of eight and eleven while he

1 photographed and videotaped the abuse. This contact is captured in
2 the images themselves, which show each victim's underwear being
3 pulled aside while her genital area is touched; an adult penis in one
4 victim's hand, next to one victim's mouth, and on one victim's lips;
5 and Brown ejaculating onto one victim's hands and feet.

6 Brown's actions were calculated. He produced the images of
7 Jane Doe 1 and Jane Doe 2 at Jane Doe 2's mother's trailer home
8 when they were entrusted to his care on various occasions. He also
9 sought to bring the girls to Lake George just weeks after producing
10 pornographic images and videos of Jane Doe 3 in the same location.
11 He even offered to buy Jane Doe 1 an iPad in exchange for the ability
12 to take additional photographs. Brown also admitted to hiding a
13 pinhole camera in bathrooms at specific locations where they were
14 likely to capture images of children nude, including a public
15 waterpark, and did not object to the PSR's description of the
16 production of child pornography of Victims #4 and 5.

1 Brown’s conduct resulted in the production of 145 still images
2 and three videos of the identified victims and additional images of
3 two unidentified victims. Several of the pornographic images of
4 Jane Doe 1 and Jane Doe 2 were uploaded to the Internet.⁴ Brown
5 also downloaded over 25,000 still images and 365 videos of child
6 pornography, including still images depicting torture, bondage, and
7 bestiality.

8 All of these undisputed facts, taken together, weighed in favor
9 of a particularly severe sentence for Brown’s convictions on the three
10 production and two possession counts. Nevertheless, the district
11 court imposed a sentence that was well-below Brown’s
12 recommended Guidelines range.

13 This case is not *United States v. Dorvee*, 616 F.3d 174 (2d Cir.
14 2010). In *Dorvee*, the defendant was sentenced to the statutory
15 maximum of 240 months’ imprisonment after pleading guilty to one

⁴ Brown has denied uploading the images but acknowledged that no one else had access to the images or was aware of their existence, such that someone else could have uploaded them.

1 count of *distribution* of child pornography. *See id.* at 176. Dorvee's
2 conviction arose from sexually-explicit conversations that he had
3 online with two undercover police officers that he believed to be
4 teenage boys. *Id.* Dorvee was arrested when he arrived at a meeting
5 with one of the "boys," after indicating that he wanted to
6 photograph and engage in sexual conduct with the "boy." *Id.* A
7 search of Dorvee's computers revealed several thousand still images
8 and approximately 100 to 125 videos of minors engaging in sexually
9 explicit conduct. *Id.*

10 We found Dorvee's within-Guidelines sentence to be
11 substantively unreasonable. *Id.* at 188. The district court had
12 "apparent[ly] assum[ed] that Dorvee was likely to actually sexually
13 assault a child," but this assumption was "unsupported by the
14 record evidence," which demonstrated that Dorvee had never had
15 any actual sexual contact with children. *Id.* at 183-84. The record
16 also contained medical and psychiatric expert reports that Dorvee

1 was unlikely to initiate a relationship with a child. *Id.* at 183. We
2 found that application of the Guidelines as applied in *Dorvee*'s case
3 led to an irrational result, observing that the Guidelines resulted in a
4 greater sentence than had he been convicted of "actually engag[ing]
5 in sexual conduct with a minor." *Id.* at 187.

6 Brown *did* have actual sexual contact—repeatedly—with
7 multiple young victims, and Brown engaged in the *production* of
8 child pornography during the course of this abuse. We have
9 repeatedly upheld lengthy sentences in production cases post-
10 *Dorvee*, recognizing a distinction between production and
11 possession, particularly in production cases involving sexual contact
12 with victims. See *United States v. Oehne*, 698 F.3d 119, 125 (2d Cir.
13 2012) (per curiam) ("*Dorvee* is readily distinguishable Unlike the
14 defendant in *Dorvee*, Oehne actually sexually assaulted a
15 child. . . . He photographed the abuse and distributed the images
16 over the internet, where they have been viewed by thousands

1 worldwide. . . ."); *United States v. Broxmeyer*, 699 F.3d 265, 291 (2d
2 Cir. 2012) ("[T]his case is distinguishable [from *Dorvee*] in presenting
3 ample record evidence of Broxmeyer actively engaging minors in
4 sexual conduct, for purposes of both photographing it and
5 participating in it."); *see also United States v. Hamilton*, 548 F. App'x
6 728, 730 (2d Cir. 2013) (summary order) ("Insofar as Hamilton
7 argues that such lengthy sentences should be 'reserved [for]
8 intentional murder,' we find such an argument unavailing. Nor are
9 we persuaded that a life sentence in the case at bar overstates the
10 'seriousness of the offense,' *see* 18 U.S.C. § 3553(a)(2)(A), given
11 Hamilton's role in producing graphic child pornography by filming
12 himself sexually abusing children as young as four years old.").

13 The record at Brown's sentencing amply demonstrates that
14 the district court considered all of the § 3553(a) factors, and gave
15 particular weight to the seriousness of Brown's criminal conduct.
16 *Cf. United States v. Snyder*, 425 F. App'x 64, 65 (2d Cir. 2011)

1 (summary order) (“While the district court did make reference to the
2 circumstances of the crime and expressed anger and disgust, a
3 reading of the record as a whole indicates the district court
4 considered all of the Section 3553(a) factors.”). The court’s emphasis
5 on the severity of Brown’s crimes and emphatic language was
6 warranted. *See United States v. Flores-Machicote*, 706 F.3d 16, 23 (1st
7 Cir. 2013) (“Sentencing judges are not automatons, and a judge is
8 entitled to view certain types of crime as particularly heinous.”).

9 Given the seriousness of Brown’s offenses and the need to
10 protect the public from further crimes of this defendant⁵ and others,
11 the below-Guidelines sentence imposed in this case was well
12 “within the range of permissible decisions.” *Cavera*, 550 F.3d at 191;
13 *see, e.g., United States v. Brown*, 613 F. App’x 58, 60 (2d Cir. 2015)

⁵ The majority takes note of Brown’s age and states that “defendants such as Brown are generally less likely to reoffend as they get older,” and cites to an opinion by Judge Posner for support. Majority Op. 24-25. But Judge Posner noted in the same concurrence that “sex offenders are more likely to recidivate than other criminals.” *United States v. Craig*, 703 F.3d 1001, 1004 (7th Cir. 2012) (Posner, J., concurring).

1 (summary order) (upholding 720-month sentence as substantively
2 reasonable in conspiracy to produce child pornography case); *United*
3 *States v. Rafferty*, 529 F. App'x 10, 13-14 (2d Cir. 2013) (summary
4 order) (upholding 720-month sentence as substantively reasonable
5 for four counts of producing child pornography and one count of
6 possessing child pornography); *cf. United States v. Klug*, 670 F.3d 797,
7 801 (7th Cir. 2012) (“[T]his court has upheld lengthy sentences for
8 defendants involved in producing child pornography, even where
9 the victims were not molested in the process. [For example,] . . . an
10 80-year sentence was affirmed [where a] defendant . . . babysat
11 the young son of his stepbrother but abused his position of trust by
12 taking nude photos of the child while he slept.”). I would therefore
13 find Brown’s sentence to be substantively reasonable.