13-1706
United States v. Brown

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Submitted: February 17, 2015 Decided: June 14, 2016)

Docket No. 13-1706

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

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

Judge Droney dissents in a separate opinion.

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

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

POOLER, *Circuit Judge*:

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

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

BACKGROUND[1]

In February 2012, federal investigators discovered eleven images on a child-pornography website that appeared to have been uploaded by the same person. Two of the images depicted the same eight-year-old girl. By examining metadata from one of the images, investigators determined that the image had been taken using a Motorola Droid X cell phone. The metadata also revealed GPS coordinates associated with the image. With assistance from the cell phone carrier in that region for the Motorola Droid X, investigators determined the 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Each of the first three counts deal with each of the three documented victims here, Jane Does I, II[,] and III; each of [th]em contains a mandatory minimum sentence of 15 years and a statutory maximum sentence of 30 years. So, on each of Counts I through III, you're looking at 15 to 30. Counts IV and V have a statutory maximum of 10 years each, and those are the counts that deal with the photographs obtained over the internet. When I look at the first three counts and look at the specific children that are involved, then I have to say to myself[,] which one of [th]em didn't you abuse? And my answer to that is there isn't none of the three that you didn't abuse.
>
> So when I look at the mandatory minimum on each of those children, I'm not willin[g] to walk away from any of the three. And as to those three counts, it is my sentence and I hereby sentence you to 20 years on each of those three counts to be served consecutively for a total of 60 years. On each of the production counts, there are a hundred ninety plus victims on those, I sentence you to the statutory maximum of 10 years on each of those two counts to be served

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

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

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

DISCUSSION

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

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

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

I. Brown's Challenge to the Guidelines Calculation

A. Waiver

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

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

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

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

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

B. Grouping and Stacking

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

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

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

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

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

C. The Enhancement for Violent and Sadomasochistic Conduct

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

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

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

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[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

II. Procedural and Substantive Reasonableness

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

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

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

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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).

children." App'x at 100-01. The district court's explanation suggests that the individual harm suffered by each of Brown's three victims played a critical role in the district court's decision to impose three consecutive 20-year sentences. But the sentencing transcript also suggests that the district court may have misunderstood the nature of that harm as to Brown's third victim. Three times the court emphasized the mental anguish that "three specific children" would suffer as a result of Brown's abuse. App'x at 100-01. Brown's third victim, however, has "no knowledge of having been victimized by Brown." PSR ¶ 35. Her mother declined to submit a victim impact statement specifically because her daughter "was unaware of the abuse" and had experienced "no negative impact." PSR ¶ 51. To be sure, the district court was entitled to punish Brown for that abuse regardless of whether the victim was aware of it. But given the district court's repeated emphasis on the fact that Brown had destroyed the lives of "three specific children," we conclude that it is appropriate to remand for resentencing to ensure that the sentence is not based on a clearly erroneous 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

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

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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

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

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

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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)).

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

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

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

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

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

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

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

CONCLUSION

Because the sentencing transcript suggests that the district court may have based its sentence on a clearly erroneous understanding of the facts, we REMAND for resentencing in accordance with the procedures set forth in *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), and in light of this opinion.