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**In the  
United States Court of Appeals  
For the Second Circuit**

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August Term, 2014  
No. 13-1706-cr

UNITED STATES,  
*Appellee,*

*v.*

NATHAN BROWN,  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Northern District of New York.  
No. 12-cr-145 – Gary L. Sharpe, *Judge.*

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SUBMITTED: FEBRUARY 17, 2015  
DECIDED: DECEMBER 6, 2016

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

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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 for producing and possessing child pornography. We **AFFIRM**.

Judge SACK concurs in the result in a separate opinion.

Judge POOLER dissents in a separate opinion.

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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*.

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1 DRONEY, *Circuit Judge*:

2

3 Nathan Brown pleaded guilty to three counts of production of  
4 child pornography in violation of 18 U.S.C. § 2251(a) and two counts  
5 of possession of child pornography in violation of 18 U.S.C.  
6 § 2252A(a)(5)(B). The district court (Sharpe, J.) imposed a sentence  
7 of 240 months for each of the three counts of production of child  
8 pornography (to be served consecutively) and 120 months for each  
9 of the two counts of possession of child pornography (to be served  
10 concurrently with the other sentences) for a total effective sentence  
11 of 60 years' imprisonment. Brown challenges his sentence, arguing  
12 the district court miscalculated his Guidelines range and that his  
13 sentence is substantively unreasonable.

14 We **AFFIRM** the judgment of the district court.

15 **BACKGROUND**

16 Brown has never objected to the factual portions of his Pre-  
17 Sentence Report ("PSR") prepared by the United States Probation

1 Office. In addition, as part of his plea agreement, he expressly  
2 admitted certain details of his criminal conduct. The facts—  
3 undisputed by Brown—are the following.

4 In February 2012, the United States Department of Homeland  
5 Security Investigations (“HSI”) discovered eleven images on a child  
6 pornography website that appeared to have been uploaded by the  
7 same person. Several of the images depicted the same girl, referred  
8 to here as “Jane Doe 1.” It was later determined that Jane Doe 1 was  
9 eight years old at the time the images were taken. In one image,  
10 Jane Doe 1 was pictured with only a shirt on, with her vagina  
11 exposed, and with an open diaper next to each of her legs. In  
12 another, she was naked in a bathtub, again with her genitalia  
13 exposed. Additional pictures contained close-up images of her  
14 vagina, and one showed a male hand pulling aside her underwear.  
15 In several of the images, Jane Doe 1 was sleeping. Among these

1 photographs was a picture of her hand holding an adult penis and  
2 two images of semen on her hand.

3         The pictures on the website also included images of another  
4 young girl, who was ten or eleven years old at the time the images  
5 were taken, (“Jane Doe 2”). The photographs showed Jane Doe 2  
6 with her underwear pulled to the side and her vagina exposed; with  
7 her breast exposed; with an adult penis next to her mouth; and with  
8 an adult penis on her lips. Like Jane Doe 1, the images also included  
9 close-up pictures of her vagina. Jane Doe 2 was also sleeping in  
10 several of the pictures.

11         By examining metadata<sup>1</sup> from one of the images, investigators  
12 were able to determine that the image had been taken using a

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<sup>1</sup> Metadata is “[d]ata typically stored electronically that describes characteristics of [electronically stored information (‘ESI’)], . . . [such as] how, when, and by whom ESI was collected, created, accessed, modified, and how it is formatted.” The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management* 34 (Sherry B. Harris & Paul H. McVoy, eds., 3d ed. 2010). Here, the metadata associated with the image that the HSI found online consisted of the date, time, and GPS coordinates registered by the recording device at the time the image was captured and the type of recording device (*i.e.*, a Motorola Droid X cell phone) that was used.

1 Motorola Droid X cell phone. The metadata also revealed global  
2 positioning system (“GPS”) coordinates associated with the image.  
3 With assistance from the cell phone carrier in that region for the  
4 Motorola Droid X, investigators were able to determine the  
5 approximate area where the photograph was taken. Investigators  
6 then spoke with the superintendent for schools within that area,  
7 who identified a sanitized image of Jane Doe 1.

8         The HSI agents visited Jane Doe 1’s home and spoke with her  
9 parents. Through these interviews, the HSI learned that Jane Doe 1  
10 and Jane Doe 2 were cousins. Investigators then spoke to Jane Doe  
11 2’s mother as well. The HSI learned that Brown—the former  
12 boyfriend of Jane Doe 2’s mother—had frequently babysat both girls  
13 at Jane Doe 2’s trailer home, where the photographs were taken.

14         Jane Doe 1 and Jane Doe 2 were interviewed. The girls  
15 reported that while babysitting Brown would “play house” with  
16 them, and Jane Doe 1 would play the “baby” and wear a diaper.

1 PSR ¶¶ 18, 20, 31-33. According to Jane Doe 1, Brown would  
2 periodically “change” the diaper as if it were soiled. PSR ¶ 33. Jane  
3 Doe 1 reported that, while doing so, Brown had touched her as he  
4 “clean[ed]” her vaginal area with a baby wipe. PSR ¶ 33. Brown  
5 also took pictures of the girls as this was occurring.

6 Both girls were able to recognize themselves in the  
7 photographs that they were shown by investigators, and they  
8 remembered a number of the pictures which had been taken while  
9 they were awake. Jane Doe 1 told investigators that Brown had  
10 offered to buy her an iPad if she allowed him to take more pictures  
11 of her, which she refused.

12 Based on the information provided by the girls and their  
13 parents, the HSI agents obtained a search warrant for Brown’s  
14 residence and electronic devices. On March 9, 2012, law  
15 enforcement officers executed the warrant at Brown’s trailer home,  
16 and found him attempting to delete child pornography from his

1 computer. Brown was arrested. Among the items seized from  
2 Brown's apartment were multiple computers, cell phones, storage  
3 devices, and a pinhole camera.

4 After his arrest, Brown told investigators that he had been  
5 viewing child pornography online daily using software that hid his  
6 IP address. He admitted to taking nude photographs of children  
7 with his phone, including approximately 100 photographs of Jane  
8 Doe 1 and Jane Doe 2 that he uploaded from his phone to his  
9 computer. Brown told investigators that he had taken the pictures  
10 of Jane Doe 1 because the "opportunity was there." PSR ¶ 26.

11 Brown told investigators that he had also taken sexually-  
12 explicit photographs and videos of a third victim ("Jane Doe 3"),  
13 who was nine years old at the time. Jane Doe 3 was his ex-wife's  
14 sister. Images and videos of Jane Doe 3 were also found on Brown's  
15 computers. One video showed Brown touching his penis to her  
16 hand and ejaculating on it. Another showed him ejaculating on her

1 feet, and a third showed him pulling down her underwear and  
2 spreading her vagina with his fingers. Brown admitted to pulling  
3 down Jane Doe 3's underwear and photographing her while she was  
4 sleeping during a family trip to Lake George in December 2011. Jane  
5 Doe 3 currently has no knowledge that the photographs were taken;  
6 she was asleep at the time.

7         After Brown's arrest, investigators conducted a forensic  
8 analysis of his computers and phones. The eleven images that  
9 originally prompted the investigation were found on Brown's  
10 computers. The search also revealed that Brown had produced  
11 pornographic images of at least *five* children—Jane Does 1, 2, and 3,  
12 and two additional unidentified victims. The unidentified victims  
13 were a young girl (age eight or nine) and an infant.<sup>2</sup> Investigators

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<sup>2</sup> There was some confusion at sentencing as to the content of the images of the unidentified victims. 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

1 also discovered photographs that Brown had taken by hiding his  
2 pinhole camera (1) in the bathroom of a home where a pool party  
3 was being held and (2) in the bathroom of a public water park in  
4 Lake George. The pinhole camera had captured images of children  
5 changing their clothes.

6 Brown possessed an extraordinary quantity of other child  
7 pornography not involving these five victims. His computers  
8 collectively contained over 25,000 still images and 365 videos,  
9 including approximately 4 still images involving torture, 60  
10 displaying bondage, 30 depicting bestiality, 1,873 involving sexual

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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 sentencing as Victims #6 and 7, depicted in images and videos obtained by Brown of the pinhole cameras. Rather they are victims depicted similarly to Jane Does 1, 2, and 3.

1 intercourse, 160 involving objects, and 18 involving infants. In total,  
2 294 victims were identified in these images.

3         On March 21, 2012, Brown was indicted in the Northern  
4 District of New York on five counts: three counts of production of  
5 child pornography in violation of 18 U.S.C. §§ 2251(a), (e) and  
6 2256(8) (Counts One to Three), and two counts of possession of child  
7 pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2) and  
8 2256(8)(A) (Counts Four and Five).<sup>3</sup> The three production counts  
9 were based on the separate conduct involving Jane Does 1, 2, and 3.  
10 Brown pled guilty to all counts of the indictment.

11         At sentencing, the district court accepted the PSR's Guidelines  
12 calculation. In determining Brown's Guideline range, the PSR  
13 grouped Counts 1, 4, and 5 pursuant to U.S.S.G. § 3D1.2. The base  
14 offense level for this group ("Group 1") was calculated under  
15 U.S.S.G. § 2G2.1(a) to be 32. This base offense level was then

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<sup>3</sup> There were two counts for possession of child pornography because images were found on two computers. App. 11-13.

1 increased by a total of 14 levels because of five sentencing  
2 enhancements: (1) a four-level enhancement pursuant to U.S.S.G.  
3 § 2G2.1(b)(1)(A) because Jane Doe 1 was under twelve years old, (2)  
4 a two-level enhancement pursuant to U.S.S.G. § 2G2.1(b)(2)(A)  
5 because the offense conduct “involved the commission of a sexual  
6 act or sexual contact,” (3) a four-level enhancement pursuant to  
7 U.S.S.G. § 2G2.2(b)(4) because “the offense involved material that  
8 portrays sadistic or masochistic conduct or other depictions of  
9 violence,” (4) a two-level enhancement pursuant to U.S.S.G.  
10 § 2G2.1(b)(5) because Jane Doe 1 was in the “custody, care or  
11 supervisory control” of Brown, and (5) a two-level enhancement  
12 pursuant to U.S.S.G. § 3A1.1(b)(1) because Brown “knew or should  
13 have known” that the conduct involved a vulnerable victim. These  
14 enhancements amounted to an offense level of 46 for Group 1.

15 Counts 2 and 3 were placed in two separate groups because of  
16 the separate harm to Jane Does 2 and 3. The offense level calculated

1 for Groups 2 and 3 was 42. The offense level calculations for these  
2 groups were identical to the calculation in Group 1, except that no  
3 enhancements for depictions of sadistic or masochistic conducted  
4 were applied, as the possession counts were not included in Groups  
5 2 and 3. To combine the groups, the PSR took the greatest offense  
6 level of the groupings—46 from Group 1—and increased that  
7 offense level by 3 pursuant to U.S.S.G. § 3D1.4. Brown’s combined  
8 adjusted offense level on all counts was 49. Brown received a final  
9 five-level enhancement pursuant to U.S.S.G. § 4B1.5(b) for having  
10 “engaged in a pattern of activity involving prohibited sexual  
11 conduct.” Finally, Brown received a three-level reduction for  
12 acceptance of responsibility. The total offense level was then  
13 “treated as level 43,” the maximum offense level under the  
14 Guidelines. *See* U.S.S.G. ch. 5, pt. A, application note 2 (“An offense  
15 level of more than 43 is to be treated as an offense level of 43.”).

1           At Criminal History Category I and offense level 43, Brown’s  
2 recommended sentence under the Guidelines was initially life  
3 imprisonment. However, because each count was subject to a  
4 statutory maximum, Brown’s recommended Guidelines sentence  
5 became 110 years.

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

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

19 PSR at 36-37. In the words of another victim, “[b]eing sexually  
20 abused is something you never forget, . . . . [b]ut when you have

1 photographs of your abuse on the Internet, . . . it makes it even more  
2 impossible to keep it in your past and move on from it. It is like the  
3 abuse is still happening.” PSR at 41.

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

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

8           Brown did not object to the Guidelines calculations or to the  
9 factual matters set forth in the PSR, but asked for a non-Guidelines  
10 sentence of fifteen years’ imprisonment. The district court sentenced  
11 Brown to 60 years’ imprisonment, imposing 20-year consecutive  
12 terms on Counts One through Three (the production counts related  
13 to victims Jane Does 1 through 3), and 10-year terms on Counts Four  
14 and Five (the possession counts) to be served concurrently with one  
15 another and with its sentence on the production counts.<sup>4</sup>

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<sup>4</sup> A supervised release term of life was also imposed, as well as a restitution award of \$10,416.



1 decisions.” *United States v. Dorvee*, 616 F.3d 174, 179 (2d Cir. 2010)  
2 (quoting *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008)).

3 A sentence is substantively unreasonable if, for instance, it  
4 would “damage the administration of justice because the sentence  
5 imposed was shockingly high.” *United States v. Rigas*, 583 F.3d 108,  
6 123 (2d Cir. 2009). Upon review for substantive unreasonableness,  
7 we “take into account the totality of the circumstances, giving due  
8 deference to the sentencing judge’s exercise of discretion, and  
9 bearing in mind the institutional advantages of district courts.”  
10 *Cavera*, 550 F.3d at 190.

11 I first address Brown’s argument that the district court  
12 miscalculated his Guidelines range, and then turn to whether  
13 Brown’s sentence was substantively reasonable.

#### 14 **I. Procedural Reasonableness**

15 On appeal, Brown raises—for the first time—two challenges to  
16 his Guidelines calculation: (1) that the district court misapplied the

1 Guidelines’ grouping and stacking provisions and (2) that the court  
2 erroneously applied an enhancement for material depicting sadistic  
3 or masochistic conduct.<sup>5</sup> The government argues that Brown has  
4 waived these objections to the district court’s Guidelines calculations  
5 by failing to object to the PSR.

6 “[W]aiver is the “intentional relinquishment or abandonment  
7 of a known right.” *United States v. Olano*, 507 U.S. 725, 733 (1993)  
8 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). “[C]ourts  
9 applying [the] waiver doctrine have focused on strategic, deliberate

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<sup>5</sup> The dissent suggests a third problem with Brown’s Guidelines calculation—raised neither here nor below—that the conduct underlying certain sentencing enhancements “cannot justify such a dramatic departure from the sentence that would have been recommended based solely on the offense itself.” Dissenting Op., *post* at 5. However, each of the three enhancements highlighted in the dissent arose from distinct harms inflicted by Brown’s criminal conduct, specifically: (1) that the victims were in Brown’s care at the time of the abuse, U.S.S.G. § 2G2.1(b)(5); (2) that the victims were asleep during some of the abuse and therefore especially vulnerable, U.S.S.G. § 3A1.1(b)(1); and (3) that the victims were of a particularly young age, U.S.S.G. § 2G2.1(b)(1). These enhancements increased Brown’s Guidelines range, but the resulting increase is not error—even if it were properly before us—because each enhancement accounted for separate harms. See *United States v. Volpe*, 224 F.3d 72, 76 (2d Cir. 2000) (“[M]ultiple adjustments may properly be imposed when they aim at different harms emanating from the same conduct.”).

1 decisions that litigants consciously make.” *United States v. Dantzler*,  
2 771 F.3d 137, 146 n.5 (2d Cir. 2014). A true waiver will “extinguish”  
3 an error in the district court, precluding appellate review. *Olano*, 507  
4 U.S. at 733. By contrast, “[i]f a party's failure to [object] is simply a  
5 matter of oversight, then such oversight qualifies as a correctable  
6 ‘forfeiture’ . . . .” *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir.  
7 1995). If a party forfeits an argument, we review for plain error. *Id.*  
8 Under the plain error standard, an appellant must demonstrate that  
9 “(1) there is an error; (2) the error is clear or obvious, rather than  
10 subject to reasonable dispute; (3) the error affected the appellant's  
11 substantial rights, which in the ordinary case means it affected the  
12 outcome of the district court proceedings; and (4) the error seriously  
13 affects the fairness, integrity or public reputation of judicial  
14 proceedings.” *United States v. Marcus*, 560 U.S. 258, 262 (2010)  
15 (internal alteration and quotation marks omitted).

1           There is some tension in our case law concerning the  
2 application of plain error review and waiver in the sentencing  
3 context. *Compare United States v. McCrimon*, 788 F.3d 75, 78 (2d Cir.  
4 2015) (“The plain error doctrine should not be applied stringently in  
5 the sentencing context, where the cost of correcting an unpreserved  
6 error is not as great as in the trial context.” (alteration and internal  
7 quotation marks omitted)), *United States v. Wernick*, 691 F.3d 108, 113  
8 (2d Cir. 2012) (same), *with United States v. Jass*, 569 F.3d 47, 66 (2d  
9 Cir. 2009) (concluding that failure to object to sentencing  
10 enhancement constituted forfeiture), *and United States v. Eberhard*,  
11 525 F.3d 175, 179 (2d Cir. 2008) (same). It is not necessary to decide  
12 whether Brown’s challenges to the Guidelines calculation were  
13 waived or forfeited, or whether the plain error doctrine should be  
14 applied stringently, however, because, for the reasons discussed  
15 below, he fails to demonstrate any error whatsoever.

16

1                   **A. Grouping and Stacking**

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

4                   Chapter 3, Part D of the Sentencing Guidelines Manual  
5 provides rules for determining a single offense level when a  
6 defendant is convicted of multiple counts. *See generally United States*  
7 *v. Feola*, 275 F.3d 216, 219 (2d Cir. 2001). First, under the Guidelines,  
8 “[a]ll counts involving substantially the same harm shall be grouped  
9 together into a single Group. Counts involve substantially the same  
10 harm within the meaning of this rule . . . [w]hen counts involve the  
11 same victim and two or more acts or transactions connected by a  
12 common criminal objective or constituting part of a common scheme  
13 or plan.” U.S.S.G. § 3D1.2(b). Next, an offense level for each group  
14 is determined by using the offense level, enhanced by relevant  
15 conduct, for the most serious offense within the group. *Id.*  
16 § 3D1.3(a). The combined offense level is then determined by using

1 the offense level of the group with the highest offense level,  
2 adjusting that level upward based on the offense levels of the other  
3 groups, and finally decreasing the offense level as appropriate if the  
4 defendant accepts responsibility for his offenses. *Id.* §§ 3D1.4, 3E1.1.

5 The district court correctly applied these provisions. As  
6 noted, the district court combined Counts 1, 4, and 5 (Group 1). The  
7 court was required to group Counts 2 and 3 separately because  
8 Section 3D1.2(d) specifically prohibits counts charging production of  
9 child pornography to be grouped together. The court then  
10 determined a combined offense level by using the offense level for  
11 Group 1—the group with the highest level—increasing that offense  
12 level based on the levels of Groups 2 and 3, and decreasing the  
13 offense level based on Brown’s acceptance of responsibility. There is  
14 no error, much less plain error, in how the district court grouped  
15 Brown’s convictions counts.

1 Nor is there any error in the district court's application of the  
2 stacking provisions in Chapter 5 of the Guidelines Manual. Section  
3 5G1.2(d) provides, "[i]f the sentence imposed on the count carrying  
4 the highest statutory maximum is less than the total punishment,  
5 then the sentence imposed on one or more of the other counts shall  
6 run consecutively, but only to the extent necessary to produce a  
7 combined sentence equal to the total punishment." The district  
8 court correctly determined that the Guidelines range was 110 years  
9 based on the stacking maximums for the three production counts,  
10 which each carried a statutory maximum of 30 years, and the two  
11 possession counts, which each carried a statutory maximum of 10  
12 years. The district court also appropriately applied Section 5G1.2 in  
13 arriving at the sentence imposed.

14 **B. Enhancement for Violent and Sadomasochistic**  
15 **Conduct**

16  
17 Brown next argues that the district court erred by applying a  
18 four-level sentencing enhancement to Group 1 for an "offense

1 involv[ing] material that portrays sadistic or masochistic conduct or  
2 other depictions of violence,” U.S.S.G. § 2G2.2(b)(4), despite the fact  
3 that Brown did not produce any sadistic images. Brown apparently  
4 contends that although the materials underlying the possession  
5 counts contained such images, that enhancement should not apply  
6 because the possession counts were not relevant conduct for the  
7 production counts.<sup>6</sup>

8       It is not necessary to address Brown’s argument because any  
9 error would necessarily be harmless. Because Brown’s total offense  
10 level exceeded the highest offense level listed in the sentencing table  
11 by more than four levels, Brown’s Guidelines range would have  
12 been identical even absent this enhancement. Any misapplication  
13 was therefore harmless. *United States v. Cramer*, 777 F.3d 597, 603 (2d  
14 Cir. 2015) (“An error in Guidelines calculation is harmless if

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<sup>6</sup> Brown also claims that the district court misunderstood that this type of material was only involved in the possession counts, not the production counts. The transcript of the sentencing reflects that the district court understood this distinction, however.

1 correcting the error would result in no change to the Guidelines  
2 offense level and sentencing range.”).

3 **II. Substantive Reasonableness**

4 Brown argues his sentence of 720 months is unreasonable  
5 because it results in a *de facto* life sentence. He also argues the  
6 district court abused its discretion in concluding Brown lacked  
7 remorse.

8 This Court will “set aside a district court’s substantive  
9 determination only in exceptional cases where the trial court’s  
10 decision ‘cannot be located within the range of permissible  
11 decisions.’” *Cavera*, 550 F.3d at 189 (quoting *Rigas*, 490 F.3d at 238).  
12 Brown has not shown that the district court’s decision is such an  
13 exceptional case. Given the seriousness of the crimes involved here,  
14 a 60 year sentence—which was below the Guidelines range—is  
15 within the realm of punishments that this Court has upheld as  
16 reasonable for production of child pornography, even considering

1 that there may be, as Brown argues, “more serious” crimes such as  
2 intentional murder. *See, e.g., United States v. Hamilton*, 548 F. App’x  
3 728, 730 (2d Cir. 2013) (summary order) (“Insofar as Hamilton  
4 argues that . . . [life] sentences should be ‘reserved [for] intentional  
5 murder,’ we find such an argument unavailing. Nor are we  
6 persuaded that a life sentence in the case at bar overstates the  
7 ‘seriousness of the offense,’ *see* 18 U.S.C. § 3553(a)(2)(A), given  
8 Hamilton’s role in producing graphic child pornography by filming  
9 himself sexually abusing children as young as four years old.”).

10       Additionally, the district court did not abuse its discretion in  
11 determining Brown had not demonstrated remorse. First, the  
12 district court, having adopted the Guidelines calculation in the PSR,  
13 accepted a three-level reduction in Brown’s offense level for  
14 acceptance of responsibility. Second, the district court based its  
15 conclusion that Brown showed “no true serious remorse,” App. 101,

1 on Brown's behavior at sentencing as well as his statements to the  
2 Probation Office contained in the PSR.

3 As to the substantive reasonableness of the sentence, this case  
4 is not, as Brown argues and the dissent maintains, *United States v.*  
5 *Dorvee*, 616 F.3d 174 (2d Cir. 2010). In *Dorvee*, the defendant was  
6 sentenced to the statutory maximum of 240 months' imprisonment  
7 after pleading guilty to one count of *distribution* of child  
8 pornography. *See id.* at 176. Dorvee's conviction arose from  
9 sexually-explicit conversations that he had online with two  
10 undercover police officers that he believed to be teenage boys. *Id.*  
11 Dorvee was arrested when he arrived at a meeting with one of the  
12 "boys," after indicating that he wanted to photograph and engage in  
13 sexual conduct with the "boy." *Id.* A search of Dorvee's computers  
14 revealed several thousand still images and approximately 100 to 125  
15 videos of minors engaging in sexually explicit conduct. *Id.*

1           We found Dorvee’s within-Guidelines sentence to be  
2 substantively unreasonable. *Id.* at 188. The district court had  
3 “apparent[ly] assum[ed] that Dorvee was likely to actually sexually  
4 assault a child,” but this assumption was “unsupported by the  
5 record evidence,” which demonstrated that Dorvee had never had  
6 any actual sexual contact with children. *Id.* at 183-84. The record  
7 also contained medical and psychiatric expert reports that Dorvee  
8 was unlikely to initiate a relationship with a child. *Id.* at 183. We  
9 found that application of the Guidelines in Dorvee’s case led to an  
10 irrational result, observing that the Guidelines resulted in a greater  
11 sentence than had he been convicted of “actually engag[ing] in  
12 sexual conduct with a minor.” *Id.* at 187.

13           Brown *did* have actual sexual contact—repeatedly—with  
14 multiple young victims, and Brown engaged in the *production* of  
15 child pornography during the course of this abuse. We have  
16 repeatedly upheld lengthy sentences in production cases post-

1 *Dorvee*, recognizing a distinction between production and  
2 possession, particularly in production cases involving sexual contact  
3 with victims. *See United States v. Oehne*, 698 F.3d 119, 125 (2d Cir.  
4 2012) (per curiam) (“*Dorvee* is readily distinguishable . . . . Unlike the  
5 defendant in *Dorvee*, Oehne actually sexually assaulted a  
6 child. . . . He photographed the abuse and distributed the images  
7 over the internet, where they have been viewed by thousands  
8 worldwide.”); *United States v. Broxmeyer*, 699 F.3d 265, 291 (2d Cir.  
9 2012) (“[T]his case is distinguishable [from *Dorvee*] in presenting  
10 ample record evidence of Broxmeyer actively engaging minors in  
11 sexual conduct, for purposes of both photographing it and  
12 participating in it.”).

13       Moreover, the fact that the victims were asleep when some of  
14 the photographs and videos were taken of them does not, as the  
15 dissent suggests, make Brown’s conduct any less serious. *See*  
16 *Dissenting Op.*, *post* at 5, 8, 10. Simply because they did not know of

1 Brown’s actions when they were sleeping does not diminish the  
2 harm they suffered. As to Jane Doe 3, the fact that she was asleep  
3 for all of the sexual abuse does not mean that she will never learn of  
4 it, or that she will not suffer the emotional and psychological harm  
5 described by the other victims.<sup>7</sup>

6 Given the seriousness of Brown’s offenses and the need to  
7 protect the public from further crimes of this defendant and others,  
8 as well as the application by the district court of the other sentencing  
9 factors set forth in 18 U.S.C. § 3553(a), the sentence imposed in this  
10 case was “within the range of permissible decisions.” *Cavera*, 550  
11 F.3d at 191.

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<sup>7</sup> In fact, under the Guidelines, an offense is *more* serious when the victim is “unusually vulnerable due to . . . physical or mental condition” or “otherwise particularly susceptible to the criminal conduct.” U.S.S.G. § 3A1.1 cmt. n.2. Other circuits have specifically upheld applying this enhancement in child pornography and sexual abuse cases where victims were vulnerable because they were asleep at the time of the abuse. *See United States v. Kapordelis*, 569 F.3d 1291, 1316 (11th Cir. 2009); *United States v. Newsom*, 402 F.3d 780, 785 (7th Cir. 2005); *United States v. Wetchie*, 207 F.3d 632, 633-36 (9th Cir. 2000); *see also United States v. Finley*, 726 F.3d 483, 495 (3d Cir. 2013) (noting that sleeping children are “considerably more vulnerable” in context of child pornography production offenses).

1 **CONCLUSION**

2 For the foregoing reasons, Brown's 720 month sentence was  
3 procedurally and substantively reasonable. Accordingly, we  
4 **AFFIRM** the judgment of the district court.

3  
4 SACK, *Circuit Judge*, concurring:

5 I respectfully concur in the result proffered by the opinion of Judge  
6 Droney: I vote to affirm the judgment of the district court, concluding that the  
7 sentence imposed is procedurally and substantively reasonable. I write  
8 separately, however, to reflect on an aspect of these proceedings that I find  
9 troubling.

10 I have read and heard observations by many trial judges over the course of  
11 many years about the challenges inherent in imposing sentences. As articulated  
12 by my colleague Denny Chin:

13 Sentencing is perhaps the most important responsibility of a trial  
14 judge, and surely the most difficult. Emotion is one reason it is so  
15 difficult. The competing considerations evoke strong sentiments—  
16 anger, indignation, shame, sorrow, grief, despondency, and hope.  
17 The sentencing judge is not immune from these emotions.<sup>1</sup>

18 "[A]ppellate courts play an important but clearly secondary role in the process of  
19 determining an appropriate sentence[:] We review the work of district courts[,  
20 but] under a 'deferential abuse-of-discretion standard.'" *United States v. Cavera*,

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<sup>1</sup> Hon. Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1579 (2012) (footnote omitted).

1 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*) (quoting *Gall v. United States*, 552 U.S. 38,  
2 41 (2007)), *cert. denied*, 556 U.S. 1268 (2009).

3 In addressing this appeal, the members of the panel start on what I  
4 understand to be common ground: The defendant pled guilty to reprehensible  
5 crimes, recounted at length in several opinions rendered in this appeal, including  
6 Judge Droney's issued today. The offenses for which the defendant was  
7 sentenced after pleading guilty to them involved a deeply disturbing  
8 combination of child molestation and the making, watching, and circulation of  
9 obscene child pornography. The details of the charged conduct challenge the  
10 adequacy of English-language adjectives to characterize them.

11 Notwithstanding the horrific nature of the crimes of conviction, we are  
12 nonetheless required, of course, to ensure the legal propriety of the sentence  
13 imposed by the district court. As Judge Pooler recognizes in her dissent, the  
14 district court imposed the practical equivalent of a life sentence without the  
15 possibility of parole. *See post* at [1, 12]. The size of that sentence alone counsels  
16 our careful, searching review of it. But the extreme nature of the offenses  
17 compels, I think, particularly meticulous scrutiny.

1           This is not the first time that I have been troubled by our appellate review  
2 in the context of the sexual abuse and exploitation of children—including the  
3 uploading and downloading of child pornography. In *United States v. Reingold*,  
4 731 F.3d 204 (2d Cir. 2013), a panel of the Court on which I sat addressed a  
5 district court's sentence in a case involving generally similar criminal conduct. In  
6 that case, after sharing videos and a still image with an undercover federal agent,  
7 the defendant pleaded guilty to one count of distributing child pornography and  
8 was sentenced below the statutorily mandated five-year minimum to a term of  
9 thirty months' imprisonment. *Id.* at 207-10. The majority opinion on review  
10 briefly described the pornography the defendant had distributed. *Id.* at 216-17.  
11 It also recounted in some detail prior sexual conduct with minors in which the  
12 relatively young defendant had engaged but for which he was not charged in the  
13 underlying indictment. This included the defendant's molestation of his half-  
14 sister, *id.* at 207-08, 218, 225, and sexual activities with three underage friends, *id.*  
15 at 208 n.4. We determined that the applicable statutory minimum did not  
16 amount to "cruel and unusual punishment" in violation of the Eighth  
17 Amendment, and that the district court therefore erred in arriving at a contrary

1 conclusion and imposing a lesser sentence. *Id.* at 206, 230. We then remanded  
2 for resentencing. *Id.* at 230.

3 I concurred in the opinion and judgment of the Court. I was concerned,  
4 though, that enumerating the details of the defendant's actions was in some  
5 respects unnecessary and unwarranted:

6 [T]o borrow a phrase from death-penalty cases and twist it, child  
7 pornography is different.<sup>2</sup> Focusing on subjects that are associated  
8 with our most powerful taboos, these cases evoke uniquely strong, if  
9 differing, emotional, moral, and cultural reactions from judges,  
10 necessarily based on the differing beliefs, values, sensitivities, and  
11 life experiences of those judges. . . .

12  
13 [W]hen we go beyond what is necessary to resolve this sort of  
14 case, . . . we risk the appearance of explicitly or implicitly voicing  
15 our moral indignation rather than exercising our legal judgment,  
16 which is of course our only charge.

17

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<sup>2</sup> While reporting on Yahoo's modification of a "system intended to scan emails for child pornography and spam," *New York Times* reporters recently observed that "[t]echnology companies like Yahoo, Google and Microsoft scan for child pornography and are required to report any discoveries to the National Center for Missing and Exploited Children." Charlie Savage & Nicole Perlroth, *Yahoo Said to Have Adapted Email Scanner to Aid U.S. Surveillance*, N.Y. TIMES, Oct. 6, 2016, at B1, B6. In this regard, it would appear that when compared with the subjects of most other crimes, child pornography is indeed different. And as I noted in my concurrence in *Reingold*, "Violence against children strikes most people as a uniquely terrible phenomenon, which may be why filmmakers are so fond of it." 731 F.3d at 232 n.7 (Sack, J., concurring) (quoting A.O. Scott, *After Two Children Vanish, Agony Begets Recklessness*, N.Y. TIMES, Sept. 20, 2013, at C12).

1 *Id.* at 232-33 (Sack, J., concurring) (footnotes in original omitted).

2 I dare say that none of my colleagues would disagree with the proposition  
3 that our review of *all* sentences should be careful and objective—it is the lives  
4 and welfare of human beings with which we are dealing. But when we review a  
5 sentence in a case involving the production, distribution, or possession of child  
6 pornography, or some combination thereof—and even more so when the offense  
7 conduct includes child molestation—we are confronted with behavior that  
8 generates an especially strong, visceral revulsion in most, or perhaps all, of us. It  
9 is our certain, intense sympathy for the *victims* of such offenses, I think, that  
10 requires special care to guard our own objectivity and to ensure that the  
11 sentencing judge has done the same.

12 I do not mean to suggest that disgust is not relevant to the imposition and  
13 review of a sentence—it may well be. Its severity may, for example, reflect the  
14 depth of emotional harm, both present and future, that a defendant has inflicted  
15 upon a victim and his or her family and friends. The public's natural revulsion  
16 matters too, I think, insofar as its members suffer by empathizing with the  
17 victim, and in light of their more general legitimate interest in seeing that the  
18 offender receives just punishment.

1           It seems to me, however, that the emotions of a judge, standing alone—his  
2   or her personal outrage—should be as far removed from sentencing decisions as  
3   can practically be achieved. Those emotions, when unconnected to those of the  
4   victim, his or her loved ones, or the public, should not influence the severity of a  
5   sentence. Sentencing judges must apply the law to the facts (including the fact of  
6   how others have emotionally responded to the crime), not vindicate their own  
7   anger and agitation or appear to be doing so. Similarly, part of our job as  
8   reviewing judges is to avoid losing our own objectivity or focus because of our  
9   own disgust. Because of the reaction such a crime evokes in us and in the trial  
10  court, we must be particularly assiduous in assuring objectivity and propriety in  
11  assessing the sentence imposed.

12           In that light, I find this appeal to be a difficult one. As a panel of this Court  
13  recently pointed out (albeit in a non-precedential order), "We have in the past  
14  ordered cases reassigned when it appeared that a judge had made a 'visceral  
15  judgment' about a party that might make it difficult for the judge to assess the  
16  case dispassionately." *United States v. Mangone*, 652 F. App'x 15, 18 (2d Cir. 2016)  
17  (summary order) (quoting *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130,  
18  142 (2d Cir. 2007)); *cf. United States v. Cossey*, 632 F.3d 82, 87-89 (2d Cir. 2011) (*per*

1 *curiam*) (reversing and remanding for resentencing before a different judge on  
2 plain error review of a sentence for possession of child pornography, in part  
3 because the district court's "unsupported belief that [the defendant] was  
4 prevented from controlling his behavior due to a genetic inability to do so"  
5 formed part of the court's analysis of the defendant's propensity to re-offend).

6 In this context, some of the statements made by the district court in the  
7 course of imposing sentence in the case before us give me pause.<sup>3</sup> Here is how  
8 Judge Pooler put it in her since-withdrawn opinion for a majority of this panel,  
9 *United States v. Brown*, 826 F.3d 51 (2d Cir. 2016),<sup>4</sup> in which I had joined:

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

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<sup>3</sup> Judge Pooler identifies most of these statements in her dissent. *See post* at [7-9].

<sup>4</sup> Although that opinion, which remanded the case for resentencing, has been withdrawn to make way for today's, to the best of my knowledge, its description of the proceedings in the district court remains accurate.

1 also said that Brown's crimes were "as serious . . . as federal judges  
2 confront" and that Brown was "the worst kind of dangerous sex  
3 offender." App'x at 101-02. In discussing the need to protect the  
4 public from Brown, the court said to him, "[I]t may be true that you  
5 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  
8 *Id.* at 56 (first ellipsis and brackets added; other brackets and ellipses in the  
9 original).

10 None of those statements was strictly true. The record discloses no  
11 reason to conclude that the children depicted in the photographs taken by  
12 others that Brown possessed were "hijacked" by people "exactly like" him  
13 or that Brown subjected his victims to torture, sexual intercourse,  
14 bestiality, and bondage, and then photographed them. Nor could the  
15 district court have actually believed that Brown's crimes were "as serious  
16 . . . as federal judges confront," as any judge who has dealt with deadly  
17 terrorists attacks can likely attest. I am also skeptical that Brown qualifies  
18 as the "worst kind of dangerous sex offender" when compared with, say, a  
19 serial child rapist. Finally, it is not necessarily accurate to say that Brown  
20 destroyed the lives of "three specific children" who will worry "for the rest  
21 of their lives" that the photographs will be available to persons seeking

1 them "forever." As Judge Pooler observes, one of the girls was asleep at  
2 the time of Brown's abuse and, as of sentencing, remained unaware that  
3 she was a victim of his crimes. *Post* at [8]. This child's lack of knowledge  
4 that Brown violated her in an atrocious manner does not mean that she is  
5 any less a victim of his crimes. Of course she is. But her life, hopefully,  
6 has not been "destroyed."

7 I find the district court's rhetorical excess disturbing. However, do  
8 this language and the accompanying sentence reflect "a 'visceral judgment'  
9 about a party that might make it difficult for the judge to assess the case  
10 dispassionately"? *Mangone*, 652 F. App'x at 18. It is, in my opinion, an  
11 uncomfortably close call. Therefore, heeding my own warning about the  
12 dangers inherent in this sort of appeal, and the need to be watchfully  
13 meticulous because of our probable visceral reaction to the case, I had  
14 thought it the wiser course to dot our "i"s and cross our "t"s. It was  
15 principally for that reason that, in joining in Judge Pooler's original  
16 opinion, I thought it was appropriate to remand for resentencing—to  
17 ensure that that the defendant's severe sentence was not based in any  
18 meaningful part on inappropriate emotional considerations.

1 I think my concerns were sound. I have now been convinced, however,  
2 that my conclusion that a remand was therefore required was not. For the  
3 reasons spelled out by Judge Droney in today's opinion, I agree that the  
4 sentence—although strikingly lengthy, as Judge Pooler points out—was, as a  
5 legal matter, both procedurally and substantively reasonable. I am sufficiently  
6 assured that the district judge's overstatements at the time of sentencing were  
7 rhetorical overkill (which, incidentally, is not terribly unusual in the run of  
8 transcripts of sentencing proceedings that we review from time to time). And I  
9 have no reason to think that Brown's sentence must or would be reduced on  
10 remand. Nor do I think that encouraging a conclusion to this appeal through  
11 our rarely employed en banc procedures, if it were to come to that, would be  
12 helpful to Brown or to the Court.<sup>5</sup>

13 Therefore, mindful of Judge Chin's reflection that "[s]entencing is perhaps  
14 the most important responsibility of a trial judge, and surely the most difficult,"<sup>6</sup>  
15 and in light of our "clearly secondary role in the process of determining an

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<sup>5</sup> Brown is, of course, presumably able to petition the Court to review this appeal en banc himself if he so chooses.

<sup>6</sup> Chin, *supra* note 1.

1 appropriate sentence," *Cavera*, 550 F.3d at 189, I join Judge Droney in deferring to  
2 the discretion of the district court.

3 I join in the judgment this Court affirming the judgment of the district  
4 court.

1 POOLER, *Circuit Judge*, dissenting:

2 The district court's 60-year sentence all but ensures that Nathan Brown, a  
3 first-time offender who was 32 when arrested, will die in prison. Brown could  
4 have murdered his victims, and he would not have received a harsher sentence.

5 What is more, Brown suffers this fate only because he was unlucky enough  
6 to be sentenced under federal law. Under New York state law, by contrast, the  
7 crime of "promoting an obscene sexual performance by a child" is punishable by  
8 up to seven years' imprisonment. *See* N.Y. Penal Law § 263.10 (providing that the  
9 crime is a class D felony), *id.* § 70(2)(d) (providing that the maximum term of  
10 imprisonment for class D felonies "shall not exceed seven years"). If Brown had  
11 been charged with three counts of that crime, he would have received, at most,  
12 21 years' imprisonment.

13 The district court nonetheless concluded that the sentence was  
14 "necessary." The majority ratifies it as "reasonable." I cannot agree. Therefore, I  
15 respectfully dissent.

16 Any discussion of the reasonableness of Brown's sentence must begin with  
17 the sentencing guidelines that produced it. *See generally United States v. Dorvee*,  
18 616 F.3d 174 (2d Cir. 2010); *United States v. Tutty*, 612 F.3d 128 (2d Cir. 2010). In

1 *Dorvee*, we explained that the child-pornography guidelines are “fundamentally  
2 different from most[,] and . . . unless applied with great care, can lead to  
3 unreasonable sentences.” *Dorvee*, 616 F.3d at 184. This is because, although the  
4 guidelines are “typically developed by the Sentencing Commission using an  
5 empirical approach based on data about past sentencing practices,” the  
6 Commission “did not use this empirical approach in formulating the [g]uidelines  
7 for child pornography.” *Id.* “Instead, at the direction of Congress, the Sentencing  
8 Commission has amended the [g]uidelines under [Section] 2G2.2 several times  
9 since their introduction in 1987, each time recommending harsher penalties.” *Id.*

10 The current enhancements “routinely result in [g]uidelines projections  
11 near or exceeding the statutory maximum, even in run-of-the-mill cases.” *Id.* at  
12 186. For example, a first-time offender guilty of possessing child pornography is  
13 “likely to qualify for a sentence . . . rapidly approaching the statutory maximum,  
14 based solely on sentencing enhancements that are all but inherent to the crime of  
15 conviction.” *Id.*

16 In *Dorvee*, these enhancements resulted in a guidelines range of 20 years’  
17 imprisonment for distribution of child pornography. *Id.* at 181. We held that,

1 notwithstanding that the district court's 20-year sentence was within the  
2 guidelines, the sentence was substantively unreasonable. *Id.* at 182-88.

3 Although *Dorvee* did not produce child pornography, much of the *Dorvee*  
4 court's criticism of the child pornography guidelines applies to the guidelines for  
5 production offenses as well. As with the guidelines for trafficking in child  
6 pornography found in Section 2G2.2, the Sentencing Commission did not use an  
7 empirical approach to develop the production guidelines found in Section 2G2.1.  
8 Instead, the Commission has increased the base offense level and added  
9 enhancements for production offenses "usually as a result of congressional  
10 directives." See U.S. Sentencing Comm'n, *Federal Child Pornography Offenses* 249  
11 (2012) (hereinafter "2012 Commission Report"),  
12 [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf)  
13 [reports/sex-offense-topics/201212-federal-child-pornography-](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf)  
14 [offenses/Full\\_Report\\_to\\_Congress.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf).

15 Though the enhancements for production offenses are not applied as  
16 commonly as the enhancements for possession and distribution, they are very  
17 frequently applied,<sup>1</sup> and they quickly add up to recommended sentences at or

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<sup>1</sup> In 2015, 47.1% of sentences under Section 2G2.1 involved a victim under the age of 12, 58.1% involved the commission of a sexual act or sexual contact, and 44.5%

1 above the 30-year statutory maximum.<sup>2</sup> Brown’s case illustrates the point. The  
2 base offense level for one of Brown’s production offenses was 32, corresponding  
3 to a guidelines range of about 10 to 13 years for a first-time offender such as  
4 Brown.<sup>3</sup> When Brown’s three production counts are then “stacked” together  
5 under the guidelines, his base offense level for all three counts becomes 35, *see*  
6 U.S.S.G. § 3D1.4, corresponding to a guidelines range of about 14 to 18 years.<sup>4</sup>

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involved a victim in the custody, care, or control of the defendant. *See* U. S. Sentencing Comm’n, *Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based, Fiscal Year 2015* 44 (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2015/Use\\_of\\_SOC\\_Guideline\\_Based.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2015/Use_of_SOC_Guideline_Based.pdf).

<sup>2</sup> Because of these enhancements, defendants convicted of child pornography offenses in federal court often receive sentences far exceeding the maximum punishments allowed by state law. *See generally* 2012 Commission Report at App’x F (listing penalties for possession, receipt, distribution, and production of child pornography under state statutes). As noted, New York punishes the crime of promoting an obscene sexual performance by a child with up to seven years’ imprisonment. *See id.* at F-15; *see also* N.Y. Penal Law §§ 263.10, 70(2)(d). According to the Sentencing Commission, the range in New Jersey is 5-10 years; in California, 3-8. *See* 2012 Commission Report at F-2, F-14.

<sup>3</sup> The base offense level of 32 was itself imposed by Congress; the original base offense level was 25, corresponding to a guidelines range of about 5 to 6 years for a first-time offender. *See* 2012 Commission Report at 249.

<sup>4</sup> Brown was also charged with two counts of possessing child pornography. Those counts did not affect Brown’s guidelines range because they “involve substantially the same harm” within the meaning of Section 3D1.2 of the guidelines and are therefore “grouped” with one of Brown’s production counts.

1 Brown’s offense level then increased, however, by virtue of six separate  
2 sentencing enhancements. Taken together, these enhancements catapulted  
3 Brown’s guidelines range to the statutory maximum on all counts—110 years in  
4 total.

5         The conduct giving rise to these enhancements cannot justify such a  
6 dramatic departure from the sentence that would have been recommended based  
7 solely on the offense itself. For example, Brown received a two-level  
8 enhancement because Jane Doe 1 was in his “custody, care, or supervisory  
9 control.” *See* U.S.S.G. § 2G2.1(b)(5). He received another two-level enhancement  
10 because the offense involved a “vulnerable victim,” as Jane Doe 1 was sleeping in  
11 some of the pictures. *See* U.S.S.G. 3A1.1(b)(1). These two enhancements alone  
12 increased Brown’s offense level to 39 and his guidelines range to 22-27 years.  
13 Thus, according to the guidelines, the fact that Brown was babysitting Jane Doe  
14 1, and took pictures while she was sleeping, warrants an additional eight to nine  
15 years of imprisonment. Had Brown taken pictures of a stranger while she was  
16 awake, however, no additional punishment would have been imposed. It is  
17 doubtful that these distinctions can justify nearly a decade of additional

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The base offense level of the “group” is the highest offense level of the counts in the group—here, the production count. *See* U.S.S.G. § 3D1.3.

1 imprisonment. Brown also received a four-level enhancement because Jane Doe 1  
2 was under the age of twelve. *See* U.S.S.G. § 2G2.1(b)(1). To be sure, Jane Doe 1's  
3 age was relevant to the seriousness of the offense and ought to be considered in  
4 fashioning an appropriate sentence. But the four-level enhancement, when  
5 considered with the two enhancements just discussed, increased Brown's offense  
6 level to 43 and thus his guidelines range to the statutory maximum of 110 years.<sup>5</sup>

7         Particularly because of the abnormalities of the Sentencing Guidelines  
8 covering child pornography crimes, we must be especially careful in reviewing  
9 the substantive reasonableness of sentences assigned for these offenses. A key  
10 duty in that endeavor is to "consider whether [the] factor[s] relied on by a

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<sup>5</sup> The majority believes that these enhancements are justifiable because they reflect "distinct harms," and cites the opinion in *United States v. Volpe*, 224 F.3d 72, 76 (2d Cir. 2000), to support that proposition. Majority Op. at 19 n.5. In *Volpe*, we ruled that a police officer who sexually abused a victim inflicted additional, separate harms by doing so "under color of law," and while the victim was in his "custody, care, or supervisory control." 224 F.3d at 76 (internal quotation marks and citations omitted). The difference between *Volpe* and this case is that *Volpe* did not involve a statute that criminalized only conduct between adults and children. *Id.* at 74. Where, as here, the statute applies *only* to conduct taken by an adult against a child, several enhancements purport to punish as "distinct harms" conduct that is all but inherent in the situations and relationships necessary to give rise to the crime. For example, it is difficult to think of a child victim who is not "vulnerable." The fact that children are vulnerable to adults' sexual abuse is very likely the reason that this crime carries such high guidelines recommendations even without enhancements. The enhancement for a "vulnerable victim" thus does not, in my view, punish any distinct harm.

1 sentencing court can bear the weight assigned to [them].” *United States v. Cavera*,  
2 550 F.3d 180, 191 (2d Cir. 2008); *see also United States v. Rigas*, 583 F.3d 108, 122 (2d  
3 Cir. 2009). I am particularly concerned that the district court in this case  
4 misunderstood the effects of Brown’s actions, and thus relied too heavily on the  
5 perceived harm to victims and the public in sentencing Brown.

6 To begin, the district court sentenced Brown to the same number of years  
7 for the harm he inflicted upon each of the three victims, even though the record  
8 showed serious differences among them. In the proceedings below, the district  
9 court stated:

10 [T]he *three children* here [will] worry . . . for the rest of their life, [that]  
11 those photographs are out there forever . . . . [You] destroyed the  
12 lives of *three specific children* . . . . You are the worst kind of  
13 dangerous sex offender. You’re not just one who looks at  
14 photographs obtained over the internet. . . . And for those reasons,  
15 there is a serious penalty to pay. . . .

16 When I look at the first three counts and look at the specific children  
17 that are involved, then I have to say to myself[,] which one of ‘em  
18 didn’t you abuse? And my answer to that is there isn’t none of the  
19 three that you didn’t abuse.

20 So when I look at the mandatory minimum on each of those  
21 children, I’m not willin’ to walk away from *any of the three*. And as to  
22 those three counts, it is my sentence and I hereby sentence you to 20  
23 years on each of those three counts to be served consecutively for a  
24 total of 60 years.

1 App'x at 100-02 (emphases added). The district court emphasized, repeatedly,  
2 that Brown "destroyed the lives of *three* specific children," who the district court  
3 said would "worry . . . for the rest of their li[v]e[s]" that their "photographs are  
4 out there forever." App'x at 100-01 (emphasis added). Although Brown abused  
5 three children, his third victim was "asleep the entire time during the production  
6 of the images and videos" and has "no knowledge of having been victimized by  
7 Brown." PSR ¶ 35. There is no evidence that Brown uploaded images or videos  
8 of the third victim. Her mother refused to submit a victim impact statement  
9 because her daughter "was unaware of the abuse" and suffered "no negative  
10 impact." PSR ¶ 51. That does not mean that Brown's abuse of this victim should  
11 be ignored, that it could not support some part of his sentence, or that the third  
12 victim was unharmed. It does mean, however, that the district court erred in  
13 giving Brown the *same sentence* for his conduct with respect to the third victim as  
14 for his conduct with respect to the other two victims, even though the other two  
15 had suffered severe psychological damage, and thus had been harmed far more  
16 seriously.

17 The majority is unconcerned that the district court based a third of Brown's  
18 60-year sentence on his having "destroyed the li[fe]" of a victim, despite an

1 undisputed lack of evidence that the victim’s life had been affected at all. Seeking  
2 to brush away the district court’s major oversight, the majority suggests that the  
3 third victim will perhaps *later* learn of the abuse, and may, *at that time*, be  
4 damaged as severely as the others. Majority Op. at 31. That is nothing but  
5 speculation. Defendants have a constitutional right to be sentenced based on  
6 “accurate information” rather than guesses, *see, e.g., United States v. Juwa*, 508  
7 F.3d 694, 700 (2d Cir. 2007), a right that was surely violated in this case if the  
8 district court actually relied on the majority’s proposed rationale.

9         The district court also demonstrated its overreliance on Brown’s damage to  
10 the victims and society by declaring that he is “the worst kind of dangerous sex  
11 offender,” App’x at 102, and that he is “exactly like” sex offenders who rape and  
12 torture children in order to produce child pornography. App’x at 100. Although  
13 Brown’s offenses are serious, he clearly does not fit either of those descriptions.  
14 In discussing a thirty-year sentence for a child pornography charge in a recent  
15 case, one of our colleagues correctly observed the following regarding the “worst  
16 offenders” charged with this type of crime:

17             They are people who force small children to engage in sexual and  
18             sadoomasochistic acts, who photograph or video the scene, and who  
19             broadcast it to the world, leaving the children with the pain of the

1 experience and the anguish of knowing that degenerates are  
2 gloating over their abuse and humiliation.

3 *United States v. Broxmeyer*, 699 F.3d 265, 303 (2d Cir. 2012) (Jacobs, J., dissenting).

4 Brown did not forcibly rape his victims or subject them to physical harm. He  
5 took pictures of the genitalia of three girls, usually while they were sleeping, by  
6 moving their underwear to the side. His offense did not involve penetration,  
7 extreme violence, abduction, or trafficking.

8 The majority likewise spends substantial time describing, in great detail,  
9 Brown's offense and its harm to the victims. Majority Op. at 4-7, 9-11, 15-17. The  
10 majority seems not to appreciate, however, that we are confronted here with  
11 actions far less depraved than those in many cases where defendants receive  
12 sentences decades shorter than Brown's. *See, e.g., United States v. Gilmore*, 599  
13 F.3d 160, 162 (2d Cir. 2010) (30-year sentence for defendant who repeatedly  
14 raped his eight-year old daughter for two years); *United States v. Swackhammer*,  
15 400 F. App'x 615, 616 (2d Cir. 2010) (summary order) (168-month sentence for  
16 defendant who repeatedly molested his children); *see also United States v. Irey*, 612  
17 F.3d 1160 (11th Cir. 2010) (en banc) (determining that 30-year sentence should be  
18 imposed on one-count indictment where defendant "raped, sodomized, and  
19 sexually tortured fifty or more little girls, some as young as four years of age, on

1 many occasions over a four- or five-year period,” and “scripted, cast, starred in,  
2 produced, and distributed worldwide some of the most graphic and disturbing  
3 child pornography that has ever turned up on the internet”); *United States v.*  
4 *Castro-Valenzuela*, 304 F. App’x 986, 988 (3d Cir. 2008) (summary order) (220-  
5 month sentence for defendant who videotaped himself violently sexually  
6 assaulting his girlfriend’s seven-year-old niece). Moreover, Brown’s 60-year  
7 sentence was exorbitant compared to those issued to typical federal defendants  
8 convicted of production offenses. In 2010—the most recent year for which data is  
9 available—the average sentence for production of child pornography was 267.1  
10 months, or approximately 22 years. *See* 2012 Commission Report at 253. There is  
11 no reason to think that Brown’s conduct was substantially worse than that of a  
12 typical defendant convicted under this statute.

13 Punishing Brown as harshly as a murderer also frustrates the goal of  
14 marginal deterrence, “that is, that the harshest sentences should be reserved for  
15 the most culpable behavior.” *United States v. Newsom*, 402 F.3d 780, 785-786 (7th  
16 Cir. 2005). And “[t]hose who think that the idea of marginal deterrence should  
17 play some part in criminal sentences . . . might find little room left above  
18 [Brown’s] sentence for the child abuser who physically harms his victims, who

1 abuses many different children, or who in other ways inflicts greater harm on his  
2 victims and society." *Id.* at 785-86.

3 Most importantly, in my view, is the clear injustice inherent in a *de facto* life  
4 sentence for Brown. As the Supreme Court has recognized,

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

15 *Graham v. Florida*, 560 U.S. 48, 69 (2010) (citations, alterations, and internal  
16 quotation marks omitted). Although Brown's crimes "differ from homicide  
17 crimes in a moral sense," he received the same sentence as a murderer. He  
18 received a sentence that "deprives [him] of the most basic liberties without  
19 giving hope for restoration." *Id.* at 69-70. It is a sentence that "means denial of  
20 hope," that "good behavior and character improvement are immaterial," that  
21 "whatever the future might hold in store for the mind and spirit . . . , [he] will  
22 remain in prison for the rest of his days." *Id.* at 70 (alterations and internal  
23 quotation marks omitted).

1           Much has been written in recent years about the problem of mass  
2 incarceration. But commuting the sentences of nonviolent drug offenders will  
3 only go so far. If we are truly to confront the problem, we must take a hard look  
4 at how we punish defendants like Nathan Brown. The role of federal appellate  
5 judges in this endeavor is, to be sure, circumscribed. Still, we have a  
6 responsibility not to stand idly by in cases when it would be “manifestly unjust  
7 to let [the] sentence stand.” *Dorvee*, 616 F.3d at 188. In my view, this is one of  
8 those cases. I respectfully dissent.