

In the
United States Court of Appeals
For the Seventh Circuit

No. 22-2167

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS VIVIRITO,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 19 CR 728 — **Virginia M. Kendall**, *Judge*.

ARGUED FEBRUARY 28, 2023 — DECIDED APRIL 13, 2023

Before EASTERBROOK, WOOD, and ST. EVE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Thomas Vivirito solicited sexual images and videos from young girls. One of them, called Minor A in this litigation, was 12 at the time. When Minor A expressed reluctance to provide videos, Vivirito threatened to expose their sexual text exchanges unless she complied. He also threatened to kill himself. That prompted Minor A to send Vivirito videos of herself penetrating her vagina and anus with the handle of a hairbrush.

Vivirito pleaded guilty to receiving child pornography, 18 U.S.C. §2252A(a)(2)(A), and was sentenced to 216 months' imprisonment. When calculating the offense level under the Sentencing Guidelines, the district judge added four based on a conclusion that the videos of Minor A portray "sadistic or masochistic" conduct. U.S.S.G. §2G2.1(b)(4)(A). Neither the Guideline nor the accompanying commentary defines those words. We held in *United States v. Johnson*, 784 F.3d 1070 (7th Cir. 2015), that, under an objective standard, pictures of a minor penetrating her vagina with the handle of a screwdriver qualify for this enhancement. Vivirito asks us to distinguish hairbrushes from screwdrivers on the ground that young girls often use hairbrushes, while they view screwdrivers as tools that do not belong in bedrooms or body cavities. The district judge was not persuaded by this proposed distinction.

According to Vivirito, because "sadistic or masochistic" is a legal phrase (at least as it appears in the Guidelines), a court of appeals must make an independent decision whether screwdrivers and hairbrushes should be treated identically. Yet judicial decisions applying the Guidelines to particular facts normally receive deferential appellate review, see *United States v. Ford*, 22 F.4th 687, 691 (7th Cir. 2022). The meaning of "sadistic or masochistic" is a question of law, perhaps best resolved by consulting *Les 120 journées de Sodome, ou l'École du libertinage* and other works of the Marquis de Sade, but how facts are classified *under* any given standard is what lawyers call a "mixed question of law and fact." A district judge's handling of a mixed question usually is reviewed deferentially, even when that decision resolves the ultimate issue in a case. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).

U.S. Bank N.A. v. Village at Lakeridge, LLC, 138 S. Ct. 960, 966–68 (2018), tells us that mixed questions should be handled deferentially on appeal when the principal issue concerns fact-specific application of a legal rule, while the appellate court should make an independent decision when fixing the rule’s meaning to establish a precedent. By that standard, our review today is deferential. The legal rule comes from the Guidelines, as understood in *Johnson*; how that rule applies to every item that can be found in a bedroom, toolbox, kitchen, den, or dungeon concerns case-by-case implementation.

The district judge did not commit clear error or abuse her discretion in finding that these videos depict sadistic or masochistic conduct. A district judge need not decide whether a given incident actually was painful or could have caused long-term injury, because much sadomasochism harms the psyche rather than the body. The district judge was entitled to take mental harm into account. That is enough to resolve this case.

AFFIRMED