APPENDIX A

United States v. Sawyer, 907 F.3d 121 (2d Cir. 2018)

ARGUED: APRIL 12, 2018

DECIDED: OCTOBER 26, 2018

Before: JACOBS, POOLER, Circuit Judges, CRAWFORD, Chief District Judge.

Appeal from an amended judgment of the United States District Court for the Northern District of New York (D'Agostino, J.) resentencing Appellant Jesse Sawyer subject to our previous decision finding his original sentence substantively unreasonable. Sawyer challenges his new sentence on reasonableness and law-of-the-case grounds. By order of July 30, 2018, we affirmed the decision. We now explain why we did so. Affirmed.

1 Geoffrey W. Crawford, Chief Judge of the United States District Court for the District of Vermont, sitting by designation. Case 15-2276, Document 152, 10/26/2018, 2419014, Page1 of 7 2 Chief District Judge Crawford dissents in a separate opinion.

BRUCE R. BRYAN, Syracuse, N.Y., for Defendant- Appellant.

STEVEN D. CLYMER, Assistant United States Attorney (Lisa M. Fletcher and Michael D. Gadarian, Assistant United States Attorneys, on the brief), for Grant C. Jaquith, United States Attorney for the Northern District of New York, New York, N.Y., for Appellee.

DENNIS JACOBS, Circuit Judge:

Jesse Sawyer, having pled guilty to sexual exploitation of children and receipt of child pornography, was originally sentenced primarily to 30 years in prison and a lifetime of supervised release. We ruled that that sentence was shockingly high given Sawyer's harrowing upbringing and comparatively low danger to the community, and remanded to the district court for resentencing. The district court disagreed with our analysis but found that Sawyer's exemplary record as an inmate justified a reduction to 25 years. Sawyer returned the matter to our docket, challenging his new sentence on both reasonableness and law-of- the-case grounds. By order of July 30, 2018, we affirmed Sawyer's new sentence. We now explain that we did so because the district court effectively complied with our instruction to significantly reduce Sawyer's sentence and because that sentence is now within the realm of reasonableness.

BACKGROUND

In 2014, defendant Jesse Sawyer pled guilty to two counts of sexual exploitation of children in violation of 18 U.S.C. § 2251(a) and one count of receipt of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2256(8)(A). The sexual exploitation charges arose out of approximately 30 cellphone photos taken by Sawyer of two girls, aged 4 and 6. The girls had close relationships with Sawyer. The photos depicted the children's genitals. Sawyer

kept the photos and there was no evidence that he took any steps to distribute them to third parties. The count of receipt of child pornography concerned images that Sawyer downloaded from the Internet.

Each sexual exploitation charge carried a fifteen-year mandatory minimum sentence and a maximum of 30 years. *See* 18 U.S.C. § 2251(e). The receipt of child pornography count carried a mandatory minimum sentence of five years and a maximum of 20 years. *See* 18 U.S.C. § 2252A(b)(1). The guideline range for the three sentences was the combined maximum of 80 years. *See* United States Sentencing Guidelines Manual ("USSG") § 5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."). In the absence of these statutory limitations, the guidelines would have called for a life sentence. *See* USSG §§ 2G2.1, 2G2.2, 4B1.5.

The presentence report and the defendant's sentencing memorandum described Sawyer's personal history of abuse as a child. By age seven, he was repeatedly subjected to sexual abuse, including rape, with the approval and even encouragement of his parents and other family members. By age 10, he was introduced to drugs and alcohol. He and his siblings were never shielded from their adult relatives' sexual promiscuity and frequent drug use; they were, in fact,

encouraged to participate. As well, Sawyer's father beat him, at one point with such ferocity that Sawyer lost control of his bowels.

At the original sentencing, the judge described the defendant's childhood as "a childhood that never was," "horrid [and] nightmarish," and marked by "incredible sadness." Transcript of Sentencing, July 7, 2015, at 30–31. The judge noted that a psychologist retained by the defense described Sawyer as a moderate to high risk to reoffend. She found that he presented a significant danger to the community because he had "an inadequate and distorted perception of rape and child molestation." *Id*. at 32. She expressed great concern for the violation of trust and victimization of the two girls. She stated, "I can't excuse what you did. I take into consideration your life but I can't excuse that darkness in your heart and soul that made you prey upon two innocent children." *Id*. at 35.

The original sentence was primarily 30 years imprisonment--15 years on each sexual exploitation of children count, to run consecutively, and five years on the receipt of child pornography count, to run concurrently--and supervised release for the rest of his life thereafter. He appealed that sentence to us in 2016, contending that it was both procedurally and substantively unreasonable. We rejected the claims of procedural unreasonableness. *United States v. Sawyer*, 672 F. App'x 63, 64–65 (2d Cir. 2016) (summary order). We concluded, however, that the 30-year sentence was substantively unreasonable. *Id*. at 65–67. It was

insufficiently justified by concerns of public protection because Sawyer had no history of sexual assault with these victims or other children, and there was no specific evidence of such future risk. While Sawyer violated both children by exposing them to the camera and touching them in the process, there was no evidence--and the government does not suggest--that he engaged in penetrative sexual assault in any form. A 30–year sentence would have been appropriate for "extreme and heinous criminal behavior," and the conduct in this case did not rise to such a level. *Id*. at 66.

In remanding the case for resentencing, we also identified a specific shortcoming in the district court's consideration of the sentencing factors set out at 18 U.S.C. § 3553(a). We noted that "the district court clearly failed to give appropriate weight to a factor listed in Section 3553(a) that should have mitigated the sentence substantially: the history and characteristics of the defendant." *Sawyer*, 672 F. App'x at 67 (internal quotation marks omitted). "Particularly given Sawyer's scant criminal history (he was scored within the Criminal History Category of I), the deplorable conditions of his childhood should have militated in favor of a sentence less severe than the one imposed." *Id*. We concluded that the defendant's own extraordinary history of childhood abuse and the expert testimony that the unresolved and untreated trauma therefrom contributed to the commission of the offense would justify "not just a

departure from the Guidelines, but a significant one indeed." *Id*. We vacated the sentence and remanded to the district court using the procedure described in United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994).

At the July 7, 2017 resentencing hearing, the district judge expressed in detail her disagreement with our decision: "surely . . . anyone reviewing the sentence would conclude, as I did, that it was substantively reasonable." App'x at 235. She had not thought she "was doing anything that could be considered shockingly high." *Id*. at 237. In particular, she noted that nothing in our decision convinced her to revisit her conclusions regarding the relevance of Sawyer's childhood or his likely danger to the community. In sum, she remained of the view that "that sentence was an appropriate one and is sufficient but not greater than necessary to meet the goals of sentencing." *Id*. at 264. All that said, the judge nevertheless reduced Sawyer's sentence by five years to account for his "extraordinary post-sentencing rehabilitative efforts." *Id*.

Sawyer returned this case to our docket by a letter of July 14, 2017.

DISCUSSION

Sawyer's primary challenge to his new sentence is that it fails to comply with our previous mandate. We disagree.

The mandate rule, a component of the law of the case doctrine, requires district courts to comply with our holdings regarding that case. *See Burrell v.*

United States, 467 F.3d 160, 165 (2d Cir. 2006). Issues implicitly or explicitly decided on appeal are not open for contrary ruling on remand. *Id*. The district court retains authority over issues not addressed on appeal, but where an appellate court has resolved an issue, the district court is not empowered to ignore or reject the appellate court's disposition of the issue. *Id*.

Our previous review of Sawyer's sentence ruled that a 30-year term of imprisonment was "shockingly high," *see United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), in light of Sawyer's circumstances, and thus substantively unreasonable. The law of this case is thus that a 30-year term of imprisonment is substantively unreasonable, and the mandate required a substantial reduction. The sentencing judge reduced Sawyer's prescribed term of imprisonment by five years--one-sixth--which is undoubtedly substantial.

At the resentencing hearing, the district court expressly rejected our reasoning, which was odd and regrettable. But our mandate did not bar her from doing so. The scope of our mandate must be understood in terms of the scope of our authority to review a district court's decisions. In reviewing sentences for substantive reasonableness, we are "particularly deferential." *United States v. Thavaraja*, 740 F.3d 253, 259 (2d Cir. 2014) (internal quotation marks omitted). We only "patrol the boundaries of reasonableness," *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008), taking care not to "substitut[e] our own

judgment for that of district courts" by undertaking our own rebalancing of sentencing factors, *Broxmeyer*, 699 F.3d at 289. Our mandate did not require the district judge to weigh the sentencing factors in the way we would have done, so long as she brought the sentence within the (elastic) bounds of reasonableness.

It is not unheard of for a district judge to disagree with an appellate ruling. But it is not necessary that a district judge should endorse our decisions. The mandate rule only "compels compliance." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (internal quotation marks omitted). The district judge in this matter may have complied under protest, but she complied nevertheless. It was doubted, but it was done.

On this second appeal, Sawyer continues to protest the reasonableness of his sentence, but we cannot bring ourselves to call it shocking under governing law. He faced a mandatory minimum of fifteen years. Regrettably, twenty-five years is no great departure from sentences routinely imposed in federal courts for comparable offenses. *See, e.g., United States v. Smith*, 697 F. App'x 31, 31–32 (2d Cir. 2017) (summary order); *United States v. Rafferty*, 529 F. App'x 10, 12–14 (2d Cir. 2013) (summary order); *United States v. Ketcham*, 507 F. App'x 42, 43–45 (2d Cir. 2013) (summary order); *United States v. Levy*, 385 F. App'x 20, 21, 24–25 (2d Cir. 2010) (summary order). "In 2010--the most recent year for which data is available--the average sentence for production of child pornography was 267.1

months, or approximately 22 years." *United States v. Brown*, 843 F.3d 74, 92 (2d Cir. 2016) (Pooler, J., dissenting). The sentence is barbaric without being all that unusual.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

2 Sawyer does not challenge his permanent supervised release, so we do not opine on it.

CRAWFORD, Chief District Judge, dissenting:

I agree in every respect with the majority's description of the facts in the case and the reasoning that led the panel to declare the original 30-year sentence to be substantively unreasonable. The majority accurately identifies the deficiencies in the original sentence which led to reversal. These were insufficient justification for such a long sentence by concerns of public protection and the sentencing court's failure to give appropriate weight to the defendant's history and characteristics. These are among the factors commonly considered by sentencing courts in reaching sentencing decisions under 18 U.S.C. § 3553. The panel ruled that the district court failed to give sufficient weight to these factors. The case was remanded for resentencing in a manner consistent with our decision.

On resentencing, the district court declined to give any additional weight to either of the factors we identified. The majority accurately describes the district court's rejection of the appeals court ruling. I intend no criticism of the trial judge. She was candid about the reasons for her decision and recommended that the case be referred to another judge if we were to conclude that she erred in rejecting our first ruling. That was an appropriate course of action, and we can ask no more of a judge who cannot in good conscience follow an appellate ruling.

What we cannot do—and where I part company with the majority—is to fail to enforce our original ruling. Had the district court resentenced the defendant to the same 30-year sentence, I have no doubt that the other panel members would have joined me in reversing and referring the case to another district judge for a second resentencing. It is not necessary to agree with an appellate ruling, but under any system of the rule of law it is necessary to follow it.

On resentencing in this case, the district court merely changed the subject. After rejecting our decision, the court found another, previously unavailable reason to impose a reduced sentence. In the district court's view, the defendant's two years of model conduct within the prison system after his original sentencing justified a five-year reduction of sentence. This new factor led the court to impose a 25-year sentence in place of the original 30 years.

The majority is prepared to accept the new sentence as reasonable in length and, in effect, call it a day. I am not. The new sentence still fails to take into proper consideration the two § 3553(a) factors we singled out as the basis for reversal. That the defendant has since demonstrated other reasons for a reduced sentence is an entirely separate development that fails to justify the district court's refusal to follow the original mandate. At this time, we still do not know how a district court which followed the mandate—by giving significant downward weight to the two § 3553(a) factors we identified—would sentence this defendant. What all three members of this panel unanimously identified as significant substantive errors in the original sentencing decision remain uncorrected. These errors continue to form the primary basis for the new sentence.

The issue that separates us is not trivial or confined to the facts of this case. It goes directly to our authority to supervise the sentencing process. In the years between adoption of the federal sentencing guidelines in 1987 and the decision of the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), review for substantive unreasonability was available principally for considering the scope and extent of a departure from the guidelines. *Id*. at 261. With the arrival of the current regime of advisory guidelines, the Supreme Court expanded the reach of substantive unreasonability review to cover all sentences. *Id*. at 260.

As *Booker* and subsequent cases make clear, substantive unreasonability is the vehicle through which we review the district court's performance in addressing and weighing the sentencing factors identified in 18 U.S.C. § 3553(a). The district court must identify the relevant factors and weigh and balance them appropriately. The judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S 38, 50 (2007). In reviewing this decision, the appeals court applies an abuse of discretion standard.

The process of review is carefully described in *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008). It has two parts. We look first at the *reasons* given by the district court to explain its decision. Giving reasons is mandatory. "Most obviously, the requirement helps to ensure that district courts actually consider the statutory factors and reach reasoned decisions." *Id*. at 193. Requiring a statement of the courts' reasoning encourages public confidence in federal courts and the fair administration of justice. *Id*.; *Rita v. United States*, 551 U.S. 338, 356 (2007) ("Confidence in a judge's use of reason underlies the public's trust in the judicial institution."). Moreover, in the absence of reasons, appellate review of the basis of the decision is severely hampered. "We cannot uphold a discretionary decision unless we have confidence that the district court exercised its discretion and did so on the basis of reasons that survive our limited review. Without a sufficient

explanation of how the court below reached the result it did, appellate review of the reasonableness of that judgment may well be impossible." *Cavera*, 550 F.3d at 193.

We then consider whether the § 3553(a) factors, on the whole, justify the sentence. After *Booker*, it is a constitutional necessity that the sentencing court make its own determination, informed but not constrained by the sentencing guidelines, about the appropriate length of the sentence. Under an abuse of discretion standard, we defer to the district court and affirm all sentences except those falling outside of the "broad range" warranted by the totality of the circumstances. *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008). We may not substitute our preferred sentence for the district court's. "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51. Deference to the district court makes reversal on grounds of substantive unreasonability relatively rare, but it does not eliminate meaningful review of the reasons for a sentence.

Applying these general statements to the facts in this case reveals that the sentencing process went awry following the first appeal. At the first sentencing, the district court identified three § 3553(a) factors which guided the sentencing decision: the defendant's history of extreme childhood abuse, the future danger he

posed to children, and the serious harm which results from downloading images of child pornography. In the district court's view, these factors supported a sentence of 30 years. In particular, the district court gave minimal weight to the defendant's lengthy history of childhood abuse. The district court concluded, "I can't excuse what you did. I take into consideration your life but I can't excuse that darkness in your heart and soul that made you prey upon two innocent children." Joint Appendix ("J.A.") 167. The court imposed a 30-year sentence, which represented a variance down from the 80-year guideline range.[1]

We disagreed with the weight the district court assigned to the defendant's personal history and his future dangerousness. We followed *Cavera* in "consider[ing] whether the [§ 3553(a) factors], as explained by the district court, can bear the weight assigned [them] under the totality of circumstances in the case." *United States v. Sawyer*, 672 F. App'x 63, 65 (2d Cir. 2016) (quoting *Cavera*, 550 F.3d at 191). Applying an abuse-of-discretion standard, we determined that the § 3553(a) factors the district court addressed did not "appear remotely sufficient to support imposing such a sentence on a person who shared no images with others, possessed fewer images than defendants in typical cases, and did not have sex with the victims or any other underage persons." *Id*. at 65–66.

Our original ruling set no parameters on the length of the second sentence. It did not propose an alternative sentence. It did not presume to instruct

the district court as to the relative significance of the § 3553(a) factors. It required only that the district court reconsider its overreliance on future danger to the community and the insufficient weight given to the defendant's history and personal characteristics. In the panel's view, these factors should have resulted in significant down weight in the sentencing decision. In remanding the case for resentencing, we identified these issues explicitly: "In light of the district court's overreliance on Sawyer's danger to the community, and its failure to afford sufficient weight to Sawyer's history and personal characteristics, settled law dictates that the sentence be vacated on grounds of substantive unreasonableness." *Sawyer*, 672 F. App'x at 67.

On resentencing, the district court declined to follow this clear mandate. The district court addressed both factors and found no reason to change its mind. In addressing the defendant's history as a victim of abuse, the court stated, "On the mandate, the issue, failure to afford sufficient weight to the way you were raised in determining your sentence, looking at the fact that I departed by 50 years from the [80 year] guideline range, I still can't say in good conscience that my sentence at that time was substantively unreasonable." J.A. 258.

Turning to the question of danger to the community, the district court stated, "I felt that there was a lot of evidence in the record, and I still feel that way, to convince me that you continue to be a danger to the community." J.A. 258. The

court noted that there were two victims and that the defendant had fled to Florida following discovery of the crime. The court also referred to his arrest at ages 19 and 23 for misdemeanor charges of endangering the welfare of a child.[2] The court pointed to the report of the defense psychologist, who described the defendant's risk of re-offense as moderate to high and further described him as being aroused by young children and failing to respect the boundaries which protect children from sexual abuse. In sum, the judge announced that she had not changed her views since the original sentencing:

> Although the Court of Appeals disagreed, I did feel that I fully considered a multitude of factors in imposing the prior sentence of 30 years. I still believe that sentence was an appropriate one and is sufficient but not greater than necessary to meet the goals of sentencing.

J.A. 264.

This case poses a fundamental question of court governance. Following an appellate court's determination that a sentence is substantively unreasonable because it fails to give weight to specific § 3553(a) factors, is the district court free on remand to take a second look and decline to change its original position? The only answer consistent with the mandate rule is that the decision of the panel must be followed. *Briggs v. Pennsylvania R. Co*., 334 U.S. 304, 306 (1948) ("In its earliest days this Court consistently held that an inferior court has no power or

authority to deviate from the mandate issued by an appellate court. The rule of these cases has been uniformly followed in later days . . . ." (citations omitted)); *In re Ivan F. Boesky Sec. Lit.,* 957 F.2d 65, 69 (2d Cir. 1992). How much to change the sentence based on the factors identified in the mandate lies within the sentencing discretion accorded to the district courts. But that discretion does not extend to the outright rejection of the mandate which occurred in this case.

The remaining question is whether finding some other basis for a reduced sentence prevents a second reversal. Such a rule would tend to reduce the role of the appellate court to passing on the length of the sentence only. That limitation is inconsistent with *Booker*, *Gall*, and *Cavera*, which identify the role of the appeals court in reviewing the reasons for the sentence, especially those derived from § 3553(a), and determining whether these reasons, considered as a whole, support the sentence. *Cf. Gall*, 552 U.S. at 47 (rejecting a "rigid mathematical formula" for reasonableness that compared the length of the sentence to the Guidelines because the relative weight of factors cannot be quantified as a percentage of the term). In this regard, the majority's determination that a one- sixth reduction of the original sentence is sufficient to render the sentence reasonable is unpersuasive. The consideration of qualitative reasons for the sentence – not the specific term of years – lies at the heart of the process of review of sentencing decisions for substantive unreasonability.

This panel's prior mandate was that the two primary factors that the district court relied upon in fashioning the original sentence did not receive the proper weight. That error placed the sentence beyond the broad scope of discretion accorded to district courts. On remand, the district court declined to follow this decision by according some weight to these factors. The district court's actions mean that these factors still have not received consideration in a manner consistent with the mandate. The district court enjoys wide discretion in deciding how much weight to assign to the two factors. It would thus be difficult to quarrel with a decision following remand that the factors changed the sentence only a little. But the fact that our ruling did not alter the manner in which the district court viewed these factors at all is a glaring indication that its consideration of them remains unchanged and out of balance.

At the risk of repetition, I return to the directive in *Cavera* to examine the reasons given by the district court for a sentence. The critical issue is not whether the term of years is too long or too short. It is whether the reasons given by the sentencing judge can reasonably support the sentence. Here, we have already considered the principal reasons offered at both sentencings and found them to be insufficient to support the original sentence. That sentence has been re- imposed—reduced only by an unrelated factor not previously available. By failing to enforce its original mandate, the majority denies the defendant a sentence that fairly

addresses the reasons which we previously identified as critical to a just sentence.

For these reasons, I respectfully dissent.

1 The guideline range in this case would have been a life sentence except that the maximum statutory penalty was 80 years. The defendant's total offense level was 43. Although he had zero criminal history points, the sentencing table provides for a life sentence for all offense level 43 cases.

2 As the district court stated, no details were available concerning these misdemeanor charges which did not result in convictions. In both cases, the defendant was also charged with disorderly conduct. He contends that the endangerment charges concerned underage drinking by one or more of his teenage companions. This is a plausible explanation in light of the related disorderly conduct charges, but not one that can be verified. What is clear is that there is no indication that these misdemeanors were sexual in nature or involved small children.

APPENDIX B

United States v. Sawyer, 892 F.3d 558 (2d Cir. 2018)

Argued April 12, 2018

Decided June 19, 2018

Before: JACOBS, POOLER, Circuit Judges, CRAWFORD, District Judge.*

Appeal from a judgment of the United States District Court for the Northern District of New York (D'Agostino, J.) imposing a sentence of 300 months of imprisonment for the offenses of producing child pornography and receiving child pornography. This court previously vacated as substantively unreasonable a sentence of 360 months of imprisonment for the same offenses, identifying specific deficiencies in the district court's analysis. The district court did not sufficiently address those deficiencies on remand and suggested that it would have difficulty putting aside its previously-expressed views.

VACATED AND REMANDED FOR RESENTENCING BEFORE A DIFFERENT JUDGE.

Judge Jacobs dissents in a separate opinion.

BRUCE R. BRYAN, Syracuse, New York, *for Defendant-Appellant*.

STEVEN D. CLYMER, Assistant United States Attorney (Lisa M. Fletcher and Michael D. Gadarian, Assistant United States Attorneys, on the brief), *of counsel,*

for Grant C. Jaquith, United States Attorney for the Northern District of New York, Syracuse, New York, *for Appellee*.

GEOFFREY W. CRAWFORD, District Judge:

This case returns on a second appeal following resentencing. Because we conclude that the district court did not follow this panel's prior mandate, we vacate the sentence for the second time and order resentencing before a different judge.

Background

In 2014, defendant Jesse Sawyer pled guilty to two counts of sexual exploitation of children in violation of 18 U.S.C. § 2251(a) and one count of receipt of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2256(8)(A). The sexual exploitation charges arose out of approximately 30 cellphone photos taken by Sawyer of two young girls, aged 4 and 6 at the time of the offenses. The girls had close relationships with Sawyer. The photos depicted the children's genitals. Sawyer kept the photos and there was no evidence that he took any steps to distribute them to third parties. The count of receipt of child pornography concerned images which Sawyer downloaded from the Internet.

Each of the sexual exploitation charges carried a fifteen year mandatory minimum sentence and a maximum of 30 years. *See* 18 U.S.C. § 2251(e). The receipt of child pornography count carried a mandatory minimum sentence of five years and a maximum of 20 years. See 18 U.S.C. § 2252A(b)(1). The guideline

range for the three sentences was the combined maximum of 80 years. *See* United States Sentencing Guidelines Manual ("USSG") § 5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.") In the absence of these statutory limitations, the guidelines would have called for a life sentence. See USSG § 2G2.1.

The Original Sentencing

The presentence report and the defendant's sentencing memorandum described Sawyer's personal history as a victim himself of childhood sexual abuse. He was subjected to severe abuse, including rape, as a small boy at the hands of men and women. At the first sentencing, the judge described the defendant's childhood as "horrid [and] nightmarish" and marked by "a childhood that never was" and "incredible sadness." Transcript of Sentencing, July 7, 2015, at 30–31. By the age of 7, he had been victimized sexually. He witnessed prostitution and drug use in his home. Before the age of 10, he was introduced to drugs and alcohol. The judge noted that a psychologist retained by the defense described Sawyer as a moderate to high risk to reoffend. She found that he presented a significant danger to the community because he had "an inadequate and distorted perception of rape and child molestation." *Id*. at 32. She expressed great concern for the violation of trust and victimization of the two girls. She stated, "I can't excuse what you did. I

take into consideration your life but I can't excuse that darkness in your heart and soul that made you prey upon two innocent children." *Id*. at 35. The original sentence was 15 years, consecutive, on each of the child exploitation counts and five years, concurrent, on the receipt of child pornography count, for a total effective sentence of 30 years of imprisonment.

The First Appeal

On appeal, Sawyer contended that his sentence was both procedurally and substantively unreasonable. We rejected the claims of procedural unreasonableness. *United States v. Sawyer*, 672 F. App'x 63, 64–65 (2d Cir. 2016) (summary order). We concluded, however, that the 30-year sentence was substantively unreasonable. *Id*. at 65–66. It was not justified by concerns of public protection because Sawyer had no history of sexual assault with these victims or other children, and there was no specific evidence of a risk of such behavior in the future. While Sawyer violated both children by exposing them to the camera and touching them in the process, there was no evidence—and the government does not suggest—that he engaged in penetrative sexual assault in any form. A 30-year sentence would have been appropriate for "extreme and heinous criminal behavior" and the conduct in this case did not rise to such a level. *Id*. at 66.

In remanding the case for resentencing, we also identified a specific shortcoming in the district court's consideration of the sentencing factors set out at

18 U.S.C. § 3553(a). We noted that "the district court clearly failed to give appropriate weight to a factor listed in Section 3553(a) that should have mitigated the sentence substantially: the history and characteristics of the defendant . . . . Particularly given Sawyer's scant criminal history (he was scored within the Criminal History Category of I), the deplorable conditions of his childhood should have militated in favor of a sentence less severe than the one imposed." *Sawyer*, 672 F. App'x at 67. We concluded that the defendant's own extraordinary history of childhood abuse and the expert testimony that it contributed to the commission of the offense justified "not just a departure from the Guidelines, but a significant one indeed." *Id*. We vacated the sentence and remanded for "imposition of a new sentence that comports with this opinion." *Id*.

The Second Sentence

The district court held a de novo sentencing hearing on July 7, 2017, and reduced the total sentence from 30 to 25 years.1 The judge's sentencing remarks identify Sawyer's good conduct in prison following the first sentencing as the basis for the five year reduction. The judge did not alter her sentence to reflect the direction in this panel's mandate. She stated: On the mandate, the issue, failure to afford sufficient weight to the way you were raised in determining your sentence, looking at the fact that I departed by 50 years from the [80 year] guideline range, I still can't say in good conscience that my sentence at that time was substantively

unreasonable. I would be surrendering the conviction of what I did. Transcript of Sentencing, July 7, 2017 ("Resentencing Tr.") at 34. The judge explained that she remained persuaded, in light of Sawyer's childhood abuse and the findings of the defense psychologist, that "because of the way you were raised, you do continue to be a clear and present threat to society and specifically to children." *Id*. at 37. She reviewed at length the basis for her original sentence. She stated, "[a]lthough the Court of Appeals disagreed, I did feel that I fully considered a multitude of factors in imposing the prior sentence of 30 years. I still believe that sentence was an appropriate one and is sufficient but not greater than necessary to meet the goals of sentencing." *Id*. at 40. In closing, the judge indicated that if a further remand became necessary, for reasons of judicial economy, the case would be best sent to a different judge.

Scope of Review

"In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." *Rita v. United States*, 551 U.S. 338, 354 (2007). As a reviewing court, we accord great latitude to the experience and judgment of the sentencing court, but we retain authority to vacate sentences which are unreasonable in length or in some other way fail to meet the requirements of 18 U.S.C. § 3553.

The mandate rule, a component of the law of the case doctrine, requires district courts to comply with circuit court mandates in proceedings on remand. *See Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006). Issues implicitly or explicitly decided on appeal are not open for contrary ruling on remand. The district court retains authority over issues not addressed on appeal, but where an appellate court has resolved an issue, the district court is not empowered to ignore or reject the appellate court's disposition of the issue.

Discussion

When we first heard this case on appeal, we ruled that a 30-year sentence was substantively unreasonable in light of the circumstances of the case. *See Sawyer*, 672 F. App'x at 67. The substance of our prior ruling is not at issue in this appeal, and we need not recapitulate our earlier summary order in full detail here. It suffices to restate in brief the two related shortcomings we identified in the first sentence: (1) the district court's failure to give sufficient downward weight to the effect of the severe sexual abuse Sawyer endured at home throughout his childhood, and (2) the district court's overreliance on the factor of Sawyer's danger to the community.

An extraordinary history of familial sexual abuse during childhood has long been recognized as a potential basis for downward departure. *See United States v. Brady*, 417 F.3d 326, 333 (2d Cir. 2005) ("[I]n extraordinary circumstances a

downward departure may be warranted on the ground that 'extreme childhood abuse caused mental and emotional conditions that contributed to the defendant's commission of the offense.'") (quoting *United States v. Rivera*, 192 F.3d 81, 85 (2d Cir. 1999)). Neither the district court nor this court had any difficulty recognizing the horrific and extraordinary nature of the childhood abuse Sawyer suffered. *See Sawyer*, 672 F. App'x at 67.

In imposing a 30-year sentence, the district court also misapprehended the danger posed to the community by Sawyer. Sawyer produced a comparatively small number of images, and there was no evidence at sentencing that he had disseminated child pornography to others or had sexual contact with any children beyond the touching of the inner thigh. The danger posed to the community by such an individual is assuredly less than that posed by someone who has actually sexually assaulted children. The 30-year sentence in this case flattened the real and meaningful distinction between Sawyer and other child abusers who have shown themselves to be greater threats. *Id*. at 66; *see United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010); *compare, e.g., United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc) (vacating a 210-month sentence and ordering the imposition of a 30-year sentence on a defendant who "raped, sodomized, and sexually tortured fifty or more little girls, some as young as four years of age, on many occasions over a four- or five-year period" and "scripted, cast, starred in, produced, and

distributed worldwide some of the most graphic and disturbing child pornography that has ever turned up on the internet.").

Moreover, when the district court discussed the examining psychologist's mention of Sawyer's moderate to high risk to reoffend, Resentencing Tr. at 259, it failed to take note of that same psychologist's view that Sawyer's "risk would be reduced if he is able to complete a sex offender treatment program." App'x at 106. The psychologist noted that Sawyer had substantial untreated trauma and, given that he "never witnessed a healthy parenting experience," had his "psychological development arrested at an early age." *Id*. He "is motivated to stay drug and alcohol free" and is "remorseful, guilt ridden and self-loathing." *Id*. This all suggests that Sawyer's risk of reoffending depends largely on his access to treatment.

We vacated the sentence and remanded "for imposition of a new sentence that comports with this opinion." *Sawyer*, 672 F. App'x at 67. We directed the district court to impose a new sentence that included a significant downward departure reflecting Sawyer's childhood history. We also called for a reassessment of Sawyer's risk to the community.

The precise magnitude of the downward departures to be assessed on the basis of Sawyer's extraordinary history and risk to the community were left to be determined by the district court. But our mandate required some downward

departure on the basis of Sawyer's history, and some downward departure based on a reassessment of the danger posed by Sawyer. These were issues we explicitly addressed on appeal, and the mandate rule compelled the district court to execute our directions.

On resentencing, the district court identified Sawyer's good conduct in prison since the original sentencing as a basis for a five-year reduction of the sentence, and imposed a sentence of 25 years of imprisonment. The district court ordered no downward departure on either of the grounds specifically identified in our summary order as grounds for significant downward departures. It thereby failed to comply with the mandate rule. Its sentence, imposed in violation of the mandate rule, cannot stand.

The reduction of the sentence from 30 years to 25 years for a reason not available at the time of the original sentencing did not satisfy our prior mandate. While the total sentence was shortened, the errors identified in our original summary order remained uncorrected. It may well be that Sawyer's good conduct in prison warrants an additional downward departure. Sawyer's good conduct might also support a conclusion that the risk to the community caused by his untreated trauma and the lack of moral guidance from his childhood can be significantly mitigated via rehabilitation. It was entirely appropriate for the district

court to consider Sawyer's good conduct, and it could properly have done so in addition to, not instead of, addressing the errors we identified.

In reviewing the second sentencing, we do not question the good faith of the district judge in responding to a serious offense in a manner which she believed would best protect the victims and the community. Crimes involving the sexual abuse of children, especially very young children as in this case, are appropriately the subject of indignation and revulsion. But every federal sentence is potentially subject to review for reasonableness, including sentences for crimes which are deeply offensive. Where an appellate court determines that certain deficiencies render a sentence substantively unreasonable, a district court must correct those deficiencies on remand, even if the district court judge disagrees with the appellate court's determination.

"Three considerations . . . are useful in deciding whether to reassign a case on remand: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *United States v. DeMott*, 513 F.3d 55, 59 (2d Cir. 2008) (quotation marks omitted). We have previously determined that "[h]aving

reimposed an identical sentence after the first remand, the district judge may reasonably be expected to have substantial difficulty ignoring his previous views during a third sentencing proceeding." *Id*. The same reasoning favors reassignment in this case, where the district judge has noted on the record her continuing disagreement with this court and has informed us that "it would probably be better for judicial economy if another judge sentence for a third time." Resentencing Tr. at 53.

The sentence imposed on July 7, 2017 is **VACATED**, and this matter is **REMANDED** for resentencing. The clerk of the United States District Court for the Northern District of New York is respectfully directed to assign the matter to a different judge for resentencing.

* Judge Geoffrey W. Crawford, United States District Court for the District of Vermont, sitting by designation.

1 The second sentence was 180 months each on Counts One and Two, consecutive for 120 months and concurrent for 60 for a total of 300 months or 25 years. Count Three remained a concurrent sentence of 60 months.

DENNIS JACOBS, Circuit Judge, dissenting:

I respectfully dissent.

The law of the case is that a 30-year sentence is substantively unreasonable. Although Sawyer argues now, after remand, that 25 years is also substantively unreasonable, the single issue on this appeal is the district court's compliance (or not) with the mandate of our summary order.

In terms, the mandate directed the court to re-sentence after reconsideration of Sawyer's horrible upbringing and his potential danger to the community. At resentencing, the district judge concluded in effect that Sawyer's horrible upbringing had so warped his psyche that he fails to grasp the difference between sex between adults and sex with a child—from which the district judge drew the available inference that Sawyer is likely to remain a threat to the community for a long long time. The district judge thus registered disagreement with our summary order, but nevertheless reduced the sentence by 60 months to reflect his rehabilitation in prison, a reduction that is undoubtedly substantial.

I would affirm for the following reasons:

1. It is not unheard of for a district judge to disagree with an appellate ruling. But it is not necessary that a district judge should agree with an appellate ruling, or endorse it. The mandate rule "compels compliance on remand with the dictates of the superior court," not endorsement. *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d

Cir. 2001). We ordered a substantial sentence reduction; it was reduced; it was reduced substantially; and the majority opinion is unwilling to find it substantively unreasonable.

2. The district judge's decision to reduce the sentence on a stated ground other than the ones specified in our mandate was arrived at after weighing the two variables we identified—upbringing and dangerousness—and after finding that the one intensifies the other. I take this to be compliance; it is conscientious and thorough, albeit (in my view) wrong. An appellate mandate to resentence forecloses reconsideration of the merits of the conviction but does not foreclose a de novo balancing of the discretionary factors. *See United States v. Cavera*, 550 F.3d 180, 188, 196 (2d Cir. 2008) (en banc); *Gall v. United States*, 552 U.S. 38, 50 (2007); see also Resentencing Tr. at 11–12.

Moreover, this sentence reduction for rehabilitation does reflect (implicitly) a reduced assessment of danger to the community. Since danger to the community drove the 30-year sentence, it makes sense to reduce it for rehabilitation only if rehabilitation has in some measure mitigated that danger. It surely would have made little sense to reduce it solely because (as the district judge observed) Sawyer performed admirably in his prison coursework. Being prison valedictorian does not logically bear on one's propensity to produce child pornography.

So I think it clear that the new sentence would have been deemed compliant with our mandate if the district judge had spoken other words to justify the reduction. I decline to remand (to this judge or another one) in order to script other reasons for doing what was in fact ordered. This remand is provoked by the judge's candor and transparency rather than by her ruling itself. It all comes down to who is charged with making the ultimate sentencing decision. And since no one knows what this defendant will be like in a decade or two, it comes down to who is assigned the power to err.

3. In decrying the 25-year sentence, the majority opinion observes (fairly) that this case is not the most heinous or egregious on record. At the same time, however, this is not a case such as *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), or *United States v. Brown*, 843 F.3d 74 (2d Cir. 2016), in which decades of imprisonment were imposed solely for looking at images created by others, and in which any harm to a child was inflicted at one or more removes. This defendant was hands-on.1 He produced the pornography, and he used a 4-year-old and a 6-year-old to do it. For these acts, a 25-year sentence is not a shocking departure from sentences routinely imposed in federal courts for comparable offenses2—especially considering that the mandatory minimum is fifteen. The sentence is barbaric without being all that unusual.

That said, I ultimately agree with the majority opinion that sentencing in this case would benefit from further review and consideration. For one thing, no account has been taken that danger to the community is mitigated by lifetime supervised release, and by the restraints imposed by sex-offender registration. Although I cannot regret this remand to push for a further reduction, the only question on this appeal is whether our mandate was executed. It was doubted, but it was done.

* * *

The district judge expressly acknowledged that any further remand should best go to another judge. And a reassignment lies within our discretion. But it bears observing that the district judge approached the remand with seriousness and with respect for this Court's directives. She wrestled with the problem, and did all that she could do in good conscience. The majority opinion does not provide that this case will return to this panel after the second remand—which is just as well.

1 The majority opinion treats the offense with bland understatement. Thus, Sawyer is said to have had no sexual contact with any children "beyond the touching of the inner thigh." Op. at 10. And Sawyer's abuse is characterized as "touching [the children] in the process" of taking photographs, Op. at 5, as if it were unavoidable.

2 Sentences of 25 years or more are regularly upheld for defendants involved in the

production (as opposed to mere possession) of child pornography. *See, e.g., United States v. Smith*, 697 F. App'x 31 (2d Cir. 2017) (summary order) (affirming sentence as substantively reasonable and distinguishing activities involved in a production offense from *Dorvee*); *United States v. Rafferty*, 529 F. App'x 10, 13 (2d Cir. 2013) (summary order) (upholding 60-year sentence for production of child pornography); *United States v. Ketcham*, 507 F. App'x 42 (2d Cir. 2013) (same); *United States v. Levy*, 385 F. App'x 20, (2d Cir. 2010) (summary order) (upholding 30-year sentence for production of three images of one child).

APPENDIX C

United States v. Sawyer, 672 F. Appx. 63 (2d Cir. 2016)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 2nd day of December, two thousand sixteen.

Present: DENNIS JACOBS, ROSEMARY S. POOLER, *Circuit Judges*

GEOFFREY W. CRAWFORD,1 *District Judge*.

UNITED STATES OF AMERICA,

Appellee,

-v.- 15-2276-c

JESSE SAWYER, *Defendant-Appellant*.

Appearing for Appellant: Bruce R. Bryan, Syracuse, NY.

Appearing for Appellee: Michael D. Gadarian, Assistant United States Attorney (Lisa M. Fletcher, Assistant United States Attorney, on the brief), for Richard S. Hartunian, Jr., United States Attorney for the Northern District of New York, Syracuse, NY.

Appeal from the United States District Court for the Northern District of New York (D'Agostino, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **VACATED** and **REMANDED**.

Defendant-appellant Jesse Sawyer appeals from the judgment of the United States District Court for the Northern District of New York (D'Agostino, J.), sentencing him to thirty years of imprisonment and a life term of supervised release. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

We review sentencing decisions for "reasonableness." *United States v. Cossey,* 632 F.3d 82, 86 (2d Cir. 2011). "Reasonableness review has both a procedural and a substantive component," *United States v. Irving*, 554 F.3d 64, 71 (2d Cir. 2009), and it is "akin to a 'deferential abuse-of-discretion standard,'" *Cossey*, 632 F.3d at 86 (quoting *Gall v. United States*, 552 U.S. 38, 52 (2007)).

However, if defendant failed to raise an issue to the district court, then we review for plain error. See *United States v. Marcus*, 560 U.S. 258, 262 (2010).

I. Procedural Reasonableness

In reviewing for procedural reasonableness, we consider whether the district court "committed [a] significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [28 U.S.C.] §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.

Sawyer first argues that the district court erred by refusing to allow a psychologist to testify at his sentencing hearing. In particular, Sawyer sought testimony regarding whether the abuse he suffered as a child was causally linked to the instant offense; whether he would have committed the instant offense had he received counseling for his own childhood abuse; and whether he would likely re-offend if he received sex offender treatment while in prison. Since he raised this argument to the district court, we review the court's denial for abuse of discretion.

District courts enjoy wide latitude in determining the procedures necessary to resolve factual disputes at sentencing. See *United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996) ("Decisions as to what types of procedures are needed lie within the discretion of the sentencing court . . . ."). Here, the district court

denied Sawyer's request for testimony because the psychologist had already submitted a written report to the court. The district court "read [the report] numerous times" and described it as "very thorough and very comprehensive." App'x at 153. The district court agreed with Sawyer that the report reflected a causal connection between Sawyer's abusive upbringing and his crime, and thus the court needed no further testimony on that issue. The court refused to hear testimony on whether Sawyer would have committed the instant offenses if he had received counseling as a child, reasonably concluding that such testimony would be highly speculative. Sawyer contends that the court failed to consider his request that the psychologist testify as to whether his likelihood of recidivism would change if Case 15-2276, Document 61, 12/02/2016, 1918666, Page2 of 5 3 Sawyer received sex offender treatment in prison. However, the written report discussed Sawyer's risk of re-offense, and the district court reasonably concluded that additional testimony would be "cumulative." App'x at 134. In short, we find no abuse of discretion in the district court's decision to forgo the in-person testimony.

Second, Sawyer cites as procedural error the district court's failure to consider his contention that the relevant Guideline for sex offenders was not based on empirical evidence. Sawyer complains that, despite his criticisms of the Guidelines, the court allowed itself to be "influenced by" the Guidelines. Appellant's Br. at 35. We find no error in the district court's failure to address

Sawyer's contention that the Guidelines should be given little weight because of their inadequate empirical support. "A reviewing court entertains 'a strong presumption that the sentencing judge has considered all arguments properly presented to her, unless the record clearly suggests otherwise.'" *Cossey*, 632 F.3d at 87 (quoting *United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006)). Nothing in the record suggests the district court failed to consider Sawyer's argument, and so we presume that the district court did consider it.

Further, despite Sawyer's suggestion that the district court should have avoided any consideration of the Guidelines, "a sentencing court is statutorily obligated to give fair consideration to the Guidelines before imposing sentence." *United States v. Jones*, 531 F.3d 163, 170 (2d Cir. 2008).

II. Substantive Reasonableness

"At the substantive stage of reasonableness review, an appellate court may consider whether a factor relied on by a sentencing court can bear the weight assigned to it." *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (citing *Gall*, 552 U.S. at 50). "[W]e do not consider what weight we would ourselves have given a particular factor. Rather, we consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case." *Id*. (internal citation omitted); *see also United States v. Dorvee*, 616 F.3d 174, 183 (noting that "substantive reasonableness review is not

an opportunity for 'tinkering' with sentences we disagree with, and that we place 'great trust' in sentencing courts").

In *Dorvee*, we held that a 240-month sentence for distribution of child pornography was substantively unreasonable, based, in part, on our conclusion that the sentencing judge had "place[d] unreasonable weight on [a] sentencing factor." 616 F.3d at 183. We explained that the sentencing court had focused too heavily on the "need 'to protect the public from further crimes of the defendant'" despite a lack of "record evidence" that the defendant "was likely to actually sexually assault a child." Id. The *Dorvee* panel concluded that a twenty-year sentence for distributing child pornography could not be justified on grounds of public protection, as the Guidelines recommend more lenient sentences for defendants who commit offenses far more harmful to the public. In particular, we stated that "[a]n adult who intentionally seeks out and contacts a twelve year-old on the internet, convinces the child to meet and to cross state lines for the meeting, and then engages in repeated sex with the child, would qualify for . . . a Guidelines range of 151 to 188 months in prison." *Id*. at 187. Consequently, despite the sentencing court's goal of "protect[ing] the public," that factor could not "bear the weight assigned to it." Id. at 183 (quoting *Cavera*, 550 F.3d at 191).

In this case, Sawyer pled guilty to two charges of production of child pornography, see 18 U.S.C. §2251(a), which consisted of taking between fifteen

and twenty lewd photographs for his own viewing, and one charge of receipt of child pornography, *see* 18 U.S.C. §2252A(a)(2)(A) and §2256(8)(A), which consisted of Sawyer's viewing of 87 images from the internet on his cellphone. For these charges, the district court imposed a thirty-year sentence.

As in *Dorvee*, a major factor driving Sawyer's sentence appears to have been the court's view that he "present[ed] a significant danger to the community." App'x at 165. Similar also to *Dorvee*, however, the district court here did not find that Sawyer engaged in sex with the victims or any other underage persons, or that there was specific evidence that he was likely to do so in the future. The sentence imposed in this case thus cannot be justified by public protection, given that a defendant who repeatedly has sex with a child would face a far more lenient sentence. *Dorvee*, 616 F.3d at 187. A 30-year term of imprisonment is appropriate for extreme and heinous criminal behavior. *Cf. United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc) (determining that thirty-year sentence should be imposed on one-count indictment where defendant "raped, sodomized, and sexually tortured fifty or more little girls, some as young as four years of age, on many occasions over a four- or five-year period," and "scripted, cast, starred in, produced, and distributed worldwide some of the most graphic and disturbing child pornography that has ever turned up on the internet"). While the district court mentioned certain factors in Section 3553(a), none of them appear remotely

sufficient to support imposing such a sentence on a person who shared no images with others, possessed fewer images than defendants in typical cases, and did not have sex with the victims or any other underage persons.

What is more, the district court clearly failed to give appropriate weight to a factor listed in Section 3553(a) that should have mitigated the sentence substantially: "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The careful findings of the district court facilitate our review even though we ultimately conclude that the sentence itself was excessive. The district court recognized, quite clearly, the exceptional horrors of Sawyer's childhood, which were largely verified by government records. The court acknowledged that "[t]he abuse that was imposed upon [Sawyer] as a child goes beyond anything else that I have seen so far in my capacity as a federal judge." App'x at 163. Sawyer's childhood included exposure to drugs and alcohol before the age of 10, significant and repeated sexual abuse (including being sodomized) by close relatives and other persons in control of him, and being beaten by his father until he lost control of his bowels. The district court told Sawyer that, "to say that you had a horrid, nightmarish childhood would be an understatement," and "you were treated as less than plant life by those who were supposed to take care of you." App'x at 162. A psychologist reported, moreover, that Sawyer's unfortunate childhood gave him great difficulty in "experienc[ing] healthy and normalized relationships," App'x at

106, which the district court properly understood to mean that "Sawyer's childhood was a . . . producing cause of his activities as an adult as they relate to the victims." App'x at 153.

Particularly given Sawyer's scant criminal history (he was scored within the Criminal History Category of I), the deplorable conditions of his childhood should have militated in favor of a sentence less severe than the one imposed. We have held that "a downward departure may be warranted on the ground that 'extreme childhood abuse caused mental and emotional conditions that contributed to the defendant's commission of the offense.'" *United States v. Brady*, 417 F.3d 326, 333 (2d Cir. 2005) (quoting *United States v. Rivera*, 192 F.3d 81, 85 (2d Cir. 1999). We have also said, in reference to some cases, that child abuse may be so severe that it "obviously and unquestionably justifie[s] a departure, whatever the standard." *Id*. at 334. Sawyer's background, considered alongside expert testimony that it contributed to the commission of the offense, meets that standard; it justifies not just a departure from the Guidelines, but a significant one indeed.

In light of the district court's overreliance on Sawyer's danger to the community, and its failure to afford sufficient weight to Sawyer's history and personal characteristics, settled law dictates that the sentence be vacated on grounds of substantive unreasonableness. Accordingly, we **VACATE** defendant's sentence and **REMAND** this matter to the district court for imposition of a new

sentence that comports with this opinion. From whatever final decision the district court makes, the jurisdiction of this Court to consider a subsequent appeal may be invoked by any party by notification to the clerk of this Court within ten days of the district court's decision, in which event the renewed appeal will be assigned to this panel. See United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

1 Judge Geoffrey W. Crawford, United States District Court for the District of Vermont, sitting by designation.

2 The sentence of 30 years reflected 15-year sentences on each of the production counts, which ran consecutively, and a 5-year sentence on the receipt charge, which ran concurrently. 3 The Presentence Report ("PSR") alleged, somewhat ambiguously, that Sawyer touched the victims' "vaginal area[s]" in the photographs presented to the court, PSR at 5, but Sawyer vehemently insisted that he had not ever touched the victims' vaginas. Although the district court did state that it adopted the findings of the PSR, the court may not have seen any need to resolve the parties' dispute. A district court need not settle an objection to the PSR if "such a finding is unnecessary because the matter controverted will not be taken into account in sentencing." United States v. Rosado-Ubiera, 947 F.2d 644, 646

(2d Cir. 1991) (internal quotation marks omitted). The district court did not consider Sawyer's alleged touching of the victim's genitals at the sentencing, and the relevant guideline enhancement for "sexual contact" applies even if a defendant merely performs "the intentional touching . . . of the . . . inner thigh . . . to . . . arouse . . . the sexual desire of any person." 18 U.S.C. § 2246(3) (defining "sexual contact"); U.S.S.G. § 2G2.1(b)(2)(A) (applying two-level enhancement for "the commission of . . . sexual contact," defined based on the standard in 18 U.S.C. § 2246). Consequently, the district court may not have reviewed the images to resolve the question.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of January, two thousand nineteen.

United States of America,

Appellee,

v. ORDER Docket No: 15-2276

Jesse Sawyer,

Defendant - Appellant.

Appellant, Jesse Sawyer, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX E

Constitutions:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval force, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes:

18 U.S.C. §3553(a)

(a) Factors to be considered in imposing a sentence.--

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> **(B)** to afford adequate deterrence to criminal conduct;
>
> **(C)** to protect the public from further crimes of the defendant; and
>
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1), United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) 0f title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.