03-1592

To be Argued By:
KARI A.DOOLEY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1592

UNITED STATES OF AMERICA,

Appellee,

-vs-

ANTONIO LASAGA

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The defendant filed a timely notice of appeal, and this Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742 over the defendant's challenge to his sentence.

STATEMENT OF ISSUE PRESENTED

I. In light of this Court's vacating a ground for upward departure, did the district court err at resentencing when it imposed the same sentence by relying on alternative upward departure grounds that it had previously found to apply but that it had not previously found necessary to rely upon to impose an appropriate sentence of 15 years' imprisonment?

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-vs-

ANTONIO C. LASAGA,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal requires an examination of what options a district court has when it resentences a criminal defendant following an appellate remand. The district court initially sentenced the defendant-appellant Antonio C. Lasaga to a term of 15 years' imprisonment. This sentence was based in part on a two-level upward departure for extraordinary volume of child pornographic images, see U.S.S.G. § 5K2.0, and a one-level upward departure for extraordinary harm that the defendant caused by sexually abusing a young boy. See U.S.S.G. § 5K2.3. On initial appeal, this Court affirmed the first departure for extraordinary volume

of images, but it vacated the second ground for departure, concluding that the district court failed to apply the correct legal standard of "comparative harm" to support an upward departure for extraordinary psychological harm. Without specifically restricting what issues the district court could consider on remand, the Court ordered resentencing "consistent with" its opinion.

On resentencing, based upon discussions with the victim's therapist, the government withdrew its request for a departure on the ground of extraordinary harm to the child victim. A13 Instead, the government recommended that the district court depart upward on the ground of under-representation of criminal history, see U.S.S.G. § 4A1.3, and that it also depart upward one more additional level for extraordinary volume of child pornographic images. Both of these alternative grounds had been specifically asserted by the government at the first sentencing. And both of these grounds had been found applicable by the district court at the first sentencing, but the district court had not relied upon them, because it had been unnecessary to do so in order for it to impose what it believed to be the appropriate sentence of 15 years' imprisonment. Now at the second sentencing, and in light of this Court's decision invalidating the upward departure for extraordinary psychological harm, the district court elected to depart upward on both alternative grounds proposed by the government in order to once again impose a sentence of 15 years' imprisonment.

The principal issue posed in this appeal is whether a district court, on resentencing and in the absence of a directive from this Court to impose sentence within a particular guideline range, may depart for alternative

reasons that were previously raised and found to be applicable at a prior sentencing. This Court should reject the defendant's argument that the "mandate rule" restricts the discretion of a district court to impose a just sentence on the basis of departure grounds that were properly preserved and found to be applicable at the first sentencing. The Court should further reject the defendant's complaint that the district court erred when, in reliance on the defendant's prior admissions at his guilty plea hearing that he stored images of "real" children, it declined to permit him to relitigate the issue whether the pornographic images he stored were of "virtual" children and subject to the protection of the First Amendment. Accordingly, the Court should affirm.

STATEMENT OF THE CASE

This case originated with the defendant's arrest on November 19, 1998, on charges of possession of child pornography. On June 17, 1999, a federal grand jury in the District of Connecticut returned an indictment charging the defendant with four counts of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2), and three counts of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

On February 18, 2000, the defendant elected to plead guilty to Counts Two and Six of the Indictment. Count Two charged that on or about November 1, 1998, the defendant knowingly received "numerous graphic image files" of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). Count Six charged that on or about November 6, 1998, the defendant knowingly possessed

"two videotapes containing images of child pornography," in violation of 18 U.S.C. § 2252A(a)(5)(B).

On May 18, 2000, the district court conducted an initial sentencing hearing. However, the court did not impose sentence because the defendant moved to withdraw his guilty plea to Count Six and to dismiss Count Six, arguing that the reach of the statute alleged in that count exceeded Congress' power under the Commerce Clause. The defendant ultimately withdrew that challenge on January 8, 2002.

On February 12 and 13, 2002, Judge Thompson conducted additional sentencing hearings and ultimately sentenced the defendant to 180 months' imprisonment on Count Two and to 60 months' imprisonment on Court Six, to be served concurrently.

On February 22, 2002, the defendant filed a timely notice of appeal. On May 2, 2003, this Court affirmed the defendant's conviction but vacated and remanded his sentence on the ground that the district court had not made sufficient findings to support a one-level upward departure under U.S.S.G. § 5K2.3. See United States v. Lasaga, 328 F.3d 61 (2d Cir. 2003) ("Lasaga I").

Following the remand, the district court held sentencing hearings on August 28 and September 5, 2003. At resentencing, the district court departed upward on two separate bases. First, it departed from criminal history category I to criminal history category II, on the basis that criminal history category I significantly under-represented both the seriousness of the defendant's criminal history and the likelihood that he will commit further crimes.

Second, the district court enhanced the offense level calculation by one level pursuant to U.S.S.G. § 5K2.0, on the grounds that the Guidelines did not adequately take into consideration the enormous volume of child pornography collected by the defendant. This adjustment of one offense level was in addition to the two level upward departure found applicable (and applied) at the first sentencing. A217-218.

These departures resulted in a criminal history category II, an offense level of 34, and a commensurate sentencing range of 168 months to 210 months. The court then sentenced the defendant to 180 months' imprisonment on Count Two and 60 months' imprisonment on Count Six, to be served concurrently to the sentence on Count Two with credit for time served. A219-220.

On September 5, 2003, the district court entered judgment. A-227. On September 12, 2003, the defendant filed a timely notice of appeal. A228. The defendant is presently serving his sentence.

STATEMENT OF FACTS

A. The Offense and Related Conduct

At the time of the charged offenses, the defendant was a senior professor at Yale University in the Department of Geology and Geophysics. He lived on campus where he served as "Master" of Saybrook College, one of Yale's

twelve residential "colleges" for undergraduate students. Presentence Investigation Report (PSR) ¶ 12.[1]

On approximately October 23, 1998, a graduate student at the defendant's geology department advised one of the department's computer specialists that he believed the defendant was using the department's computers and its Internet server to download child pornography. In an attempt to verify the student's claim, the computer specialist wrote a program that, in essence, instructed the computer to send the specialist an electronic mail message if and when any user accessed the specific directories identified by the student as the repository to which child pornography was being downloaded. Shortly thereafter, the specialist received an e-mail, and then he accessed the system to learn that an individual who was logged on in the defendant's name was downloading graphic images of minors engaged in various sexual acts. The defendant was in his office with the door closed. The defendant later returned to his campus home at Saybrook College, where he remotely accessed the department's computers and transferred the downloaded files to his home computer. PSR ¶¶ 16-18.

One week later, on October 30, 1998, and into the early morning hours of October 31, 1998, the specialist again monitored the defendant through the computer system as he logged into the department's server, downloaded

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[1] The PSR is included in the record of this matter and was made a part of the Government's sealed appendix in Lasaga I (Dkt. No. 02-1144). Insofar as the facts cited and relied upon are not in dispute, the Government did not create another sealed appendix for purposes of this appeal.

numerous child pornography files, logged off again and left the building. The defendant re-logged on to the system from his home computer at Saybrook College, transferred the pornographic files to his home computer, deleted the downloaded files from the office server, and then logged off again. PSR ¶¶ 19-20.

The defendant's conduct was referred through Yale authorities to the Federal Bureau of Investigation. In the early morning hours of November 6, 1998, federal law enforcement agents executed a court-authorized search warrant at the defendant's home at Saybrook College. The agents seized more than 200 "Zip" disks, a computer hard drive, and numerous other diskettes, cumulatively containing tens of thousands of graphic image files, the majority of files containing minors posed in the nude or engaged in various sexual acts. Among other examples, the images included a four-year-old boy being anally penetrated by an adult; an adult male ejaculating on the face of a five- or six-year-old girl; and a prepubescent girl being subjected to "oral sex" by a dog. The defendant had accessed newsgroups including "alt.sex.pedophilia.boys," "alt.binaries.pictures.boys," "alt.sex.incest," and "alt.sex.pedophilia.boys." PSR ¶¶ 21, 24.

The agents also seized numerous videotapes from the defendant's campus home, including the two videotapes that served as a basis for the child pornography possession charge of Count Six of the Indictment. Both these tapes showed sexually explicit conduct involving a young boy from New Haven, for whom the defendant had served as a volunteer "mentor" over the past several years. The first videotape showed the boy with his pants around his ankles

when he was approximately 9 years old, focusing on the boy's buttocks, anus and genitalia. The scene was filmed in a science classroom at Yale and featured the defendant's hand spreading the boys buttocks and instructing him by name to open further. PSR ¶ 25.

The second film showed the boy when he was approximately 12 years old, engaging in masturbation while he watched television. The defendant's voice on the video told the boy to walk toward the defendant, and the video panned downward to show the defendant's erect penis coming into view and touching and rubbing against the child's penis. PSR ¶ 25.

The child victim was later interviewed and described with great difficulty the extent of abuse he suffered from the defendant, beginning at a young age and continuing through his 12th birthday. The boy estimated that 10 or 20 times the defendant took him to a science classroom at Yale, to his residence at Saybrook College, and once on a trip to New Hampshire, where he took sex-laden videos and digital photographs of the boy. Not content simply to film or photograph the boy, the defendant also forced the child to perform oral sex on him and sodomized the child on numerous occasions. The forensic examination of the items seized from the defendant's home also revealed numerous digital images, to include those of the defendant sodomizing the child. PSR ¶26.

The defendant told investigators at the time of the search warrant that he regularly downloaded child pornography from the Internet, including just hours before the warrant was executed. He had no academic purpose in doing so and he knew it was illegal, but he believed that it

should not be. Despite what investigators would later learn from the seized videotapes, he denied any sexual contact with the child victim. PSR ¶ 22, A256-262.

The defendant also had a history of uncharged sexual misconduct with young boys, that spanned a 20 year period. At the initial sentencing, the government presented additional arrest reports and memoranda of interview detailing the defendants numerous instances of sexual misconduct with no less than 4 and possibly 5 young boys, other than the victim depicted in the videotapes, in incidents occurring at a swimming pool in 1981 and at a YMCA facility in 1986-87 and 1991. A263-297, A198-215.

B. The First Sentencing

At the defendant's first sentencing in 2002, the parties agreed and the district court found that the applicable adjusted offense level was 31 and the applicable criminal history category was Level I, with a resulting range of 108 -135 months of incarceration. From this range, the government sought upward departures on a variety of bases: (1) extraordinary harm to the minor victim, see U.S.S.G. § 5K2.3; (2) the enormous volume of child pornography, see U.S.S.G. § 5K2.0; and (3) the under-representation of the defendant's past criminal conduct and the likelihood of recidivism, see U.S.S.G. § 4A3.1. The government requested that the maximum sentence allowed under law – 20 years -- be imposed. Although the district court characterized the government's request as "not unreasonable," it determined that a sentence of 15 years would adequately address and achieve the myriad of

sentencing goals as described in 18 U.S.C. § 3553. With this as the court's objective, the district court then addressed the government's various motions for upward departure. Government Appendix ("G.App") 4-7.

First, the district court determined that a two-level upward departure was appropriate due to the defendant's possession of 150,000 images of child pornography. In fact, at that time, Judge Thompson concluded that a departure of more than two offense levels was warranted, but he chose to depart upward only two offense levels, stating:

> The conservative estimate is that you amassed a collection with approximately 150,000 pornographic images of children. ...
>
> For each of the images that is created, there is at least one victim; namely, the child in the image, and some images include more than one child. Although you collected the images and did not create them, by collecting them, you lend support and encouragement to the people who engage in the practice of creating child pornography. That is the theory behind our criminal laws in this area.
>
> Here in the courtroom there is a danger that one may be tempted to look at these children as nameless and faceless victims, but each one of them is important and in this case tens of thousands of them are involved. ...

> While **I believe that a departure of more than two offense levels is warranted**, if one looks only at the offense behavior, I am going to depart upward only two offense levels on this basis. **I will depart upward only two offense levels on this basis because I'm also going to depart upward on another basis** and because I believe that to some degree your conduct was somewhat obsessional in nature and it appears that you could not possibly have viewed all the images.

G.App 6-9. (emphasis added).

Next, the court determined that the record supported a finding of extraordinary harm to the victim child. He therefore upwardly departed one more offense level. G.App. 13.

Finally, the court agreed with the government that an upward departure to a higher criminal history category was supported by the defendant's demonstrated history of abusing young children. The court fully credited the reports and records introduced by the government and concluded that the defendant had engaged in a pattern of sexual misconduct with children spanning a 20-year period. Specifically, the court stated:

> I conclude that the government has produced reliable information that the defendant engaged in prior uncharged sexual contact with minors on at least three occasions. The details of these incidents

> are documented in the government's exhibits submitted on May 18, 2000.
>
> There is no doubt that as to the identity of the defendant and that he was involved in these incidents. There is a similar pattern for each of these incidents. In addition, the defendant's explanation as to why he did nothing wrong is similar in each of these instances.
>
> Looking at all of the evidence together, there is a clear pattern of activity on the part of the defendant.

G.App. 13-14. However, in view of the court's determination that a sentence of 15 years' imprisonment was the appropriate sentence to be imposed, and because the court could arrive at a guideline range that encompassed that sentence without the need for an additional "horizontal" criminal history departure, it declined to upwardly depart. The court stated:

> At this point we are now dealing with very wide ranges under the Sentencing Guidelines and those ranges overlap.
>
> If I were to depart on this basis and place the defendant in criminal history category II, I would conclude it was most appropriate to impose a sentence at or towards the mid point to the bottom of the range when I look at the defendant in the context of other people in criminal history category II.

> Since the ranges overlap, the same sentence can be imposed by sentencing the defendant near or at the top of the range applicable to criminal history category I. Therefore, I do not believe a departure on this basis is necessary in order to impose an appropriate sentence in this case.

G.App. 14-15. With an upward departure of three levels in total, the defendant's offense level of 34 and his criminal history category I resulted in an applicable guideline range of 151-188 months. The district court sentenced the defendant to 180 months. G.App. 18.

C. The First Appeal

The defendant appealed both upward departures. He claimed on appeal that the departures were factually and legally unsupported. With respect to the volume of child pornography, he further challenged whether the images in question were of "real" or "virtual" children. This Court upheld the district court's upward departure under U.S.S.G. § 5K2.0 for the enormous volume of images. 328 F.3d at 67. It further found not only that the defendant waived his argument that the images were "virtual," but also concluded that the defendant's own admissions supported a factual basis for a finding that the images were real. Id. at 68. However, the Court determined that the district court failed to consider the "comparative harm" to the victim in its upward departure under U.S.S.G. §5K2.3. Id. at 66 ("the district court erred in departing under § 5K2.3 without making the additional finding that the victim suffered much more serious harm than would

normally be the case"). Therefore, the Court vacated the sentence and remanded for resentencing.

On May 16, 2003, the government moved for clarification of the scope of the mandate, specifically seeking clarification that, on remand, the district court was free to revisit the upward departures that it found appropriately applied but not necessary to impose at the first sentencing. The Court denied without comment the government's motion.[2]

D. The Resentencing

At resentencing, in light of additional information received from the child victim's psychotherapist, the government withdrew its request for an upward departure on the basis of extreme psychological harm. A13.

Instead, the government recommended that the district court upwardly depart in two ways that were previously raised at the first sentencing but determined at that time by the district court not to be necessary to impose. First, the government recommended that the court augment its prior two-level upward departure for extraordinary-volume-of-images to a three-level upward departure, see U.S.S.G. § 5K2.3. Judge Thompson agreed that a three-level departure was appropriate in order to impose an appropriate sentence of 15 years, and he explained that he

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[2] A court of appeals' denial of a request for clarification of its opinion does not have inferential or precedential weight. See Exxon Chemical Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1479 (Fed. Cir. 1998).

had previously departed by only two levels for extraordinary-volume-of-images, because a further departure had not been necessary to achieve what he believed to be an appropriate sentence:

> I concluded that the government had established that a departure of more than two offense levels was warranted pursuant to Guideline Section 5K2.0 because of the enormous quantity of child pornography collected by the defendant.
>
> ... I did not make a specific determination as to how many offense levels in excess of two offense levels would have been a warranted departure because I realized at the time that such a question was moot in view of the fact that I intended to limit the extent of the combined departures in the case, and I also planned to depart pursuant to Guideline Section 5K2.3.
>
> I believe it is self-evident that I had concluded that an upward departure of at least three offense levels was warranted. ...

A57-A58. The court later explained: "I hope it is obvious then that I believed then and now that a departure of three offense levels is warranted since in order to be more than two you have to be at least three offense levels." A218 (emphasis added).

In addition, as it had at the first sentencing hearing and on the basis of the same evidence introduced at the first sentencing, the government requested that the district court depart upward for under-representation of criminal history, see U.S.S.G. § 4A1.3. Judge Thompson agreed that a one-level criminal history category increase was appropriate in view of the defendant's extensive and reliably documented history of abusing young boys. After a lengthy recitation of the supporting evidence, see A198-A215, Judge Thompson concluded from this history that the defendant's criminal history category under-represented the "likelihood that the defendant will commit further crimes of this nature." A215.

The court made clear that these finding were consistent with its findings at the first sentencing hearing:

> Thus, whereas I opted not to make findings with respect to the likelihood that the defendant will commit further crimes on the day of the original sentencing; namely, because I didn't want to go through all of that detailed information, particularly with the defendant's wife sitting here and having already been so humiliated, I am expressly making that finding in addition to the finding with respect to the defendant's criminal history that I made on the day of sentencing.

A215-216.[1]

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[1] The court noted as well that additional facts, which came to the court's attention since the 2002 sentencing, if he

(continued...)

Ultimately, at resentencing, the district court departed upwards three offense levels pursuant to U.S.S.G. § 5K2.0 for the enormous volume of child pornography amassed by the defendant, and it departed upwards from criminal history category I to criminal history category II pursuant to U.S.S.G. § 4A3.1. Thus, the court concluded, the applicable offense level was 34, with a criminal history category of II, which resulted in a sentencing range of 168 months to 210 months. A219. The defendant was sentenced to 180 months' incarceration. A219-220.

During the resentencing proceedings, the district court made clear that its alternative departures were not inconsistent with its actions at the first sentencing and effectuated its intention to impose a total sentence of 180 month imprisonment. Judge Thompson explained that at the first sentencing "I exercised my discretion to depart to a lesser extent than the government had established was justifiable because I had concluded the extent of the combined departures in the case should be limited so that the total effective sentence did not exceed 180 months." A57.

The defendant now appeals the sentence imposed after remand. He contends that the district court exceeded the scope of this Court's mandate in the first appeal. He is currently serving his sentence.

SUMMARY OF ARGUMENT

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[1] (...continued)
were to revisit the issue would now indicate that there is a substantial likelihood of recidivism. A216 to 217.

The district court did not exceed the scope of this Court's mandate when it imposed the same sentence of 15 years' imprisonment at resentencing. The district court permissibly departed upward on two grounds that were not previously decided by this Court in the first appeal but that had been previously identified by the district court at the first sentencing as valid yet unnecessary grounds for upward departure. The resentencing was appropriately "limited" in nature to address only matters that became newly relevant because of this Court's vacating of the initial sentence imposed. In any event, whether the resentencing is deemed "limited" or "*de novo*" in nature, the district court acted well within the scope of the mandate rule and its discretion to impose a just sentence when it elected to impose the same sentence on remand.

Finally, in view of the defendant's prior admissions that he had stored images of "real" and not "virtual" children and this Court's express rejection of the defendant's challenge on this issue in the first appeal, the district court properly declined to permit the defendant to relitigate this issue again at resentencing. Accordingly, the Court should affirm the sentence of the district court.

ARGUMENT

I. THE DISTRICT COURT PERMISSIBLY RESENTENCED THE DEFENDANT TO THE SAME TERM OF IMPRISONMENT ON THE BASIS OF ALTERNATIVE GROUNDS FOR UPWARD DEPARTURE

A. GOVERNING LAW AND STANDARD OF REVIEW

The "mandate rule" is an aspect of the law-of-the-case doctrine that "requires a trial court to follow an appellate court's previous ruling on an issue in the same case." United States v. Quintieri, 306 F.3d 1217, 1225 (2d Cir. 2002). "The mandate rule 'bars the district court from reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals' but does not forbid the district court from 'reconsidering, on remand, issues that were not expressly or implicitly decided by this Court." United States v. Cox, 299 F.3d 143, 148 (2d Cir. 2002) (quoting United States v. Stanley, 54 F.3d 103, 107 (2d Cir. 1995)).

A corollary to the mandate rule is this Court's statement of principles governing whether a resentencing after appellate remand should be "*de novo*" or "limited" in nature. On the one hand, it has stated that "[a] 'resentencing usually should be *de novo* when a Court of Appeals reverses one or more convictions and remands for resentencing,'" or if the Court of Appeals' decision "otherwise 'effectively undoes the entire knot of calculation' underlying the original sentencing." United States v. Barresi, – F.3d –, 2004 WL 432215 at *4 (2d Cir.

Mar. 8, 2004) (quoting Quintieri, 306 F.3d at 1228). By contrast, "'absent explicit language in the mandate to the contrary, resentencing should be limited when the Court of Appeals upholds the underlying convictions but determines that a sentence has been erroneously imposed and remands to correct that error.'" Id. (quoting Quintieri, 306 F.3d at 1228).

Whether a district court has exceeded the scope of this Court's mandate is an issue of law that is subject to *de novo* review. See United States v. Bryce, 287 F.3d 249, 253 (2d Cir.), cert. denied, 537 U.S. 884 (2002); Carroll v. Blinken, 42 F.3d 122, 126 (2d Cir. 1994).

B. Discussion

The defendant's claim that the district court exceeded the scope of its mandate requires the Court to address three aspects of its "mandate rule" principles: (1) whether the district court's consideration of additional departure grounds violated the express terms of this Court's mandate for resentencing "consistent with" its opinion; (2) whether the district court' consideration of additional departure grounds impermissibly addressed grounds that were previously resolved by this Court; and (3) whether the district court's consideration of additional departure grounds exceeded the permissible scope of a "limited" resentencing hearing. Because, for the reasons outlined below, the answer to each of these questions is "no," the Court should affirm.

To begin with, this Court's mandate from the first appeal did nothing to restrict the district court from

considering whether alternative grounds supported an upward departure in place of the basis invalidated by this Court in the first appeal. The decretal paragraph of the Court's opinion simply remanded for "re-sentencing consistent with this opinion."

This is not a case where the Court has remanded with specific instructions to consider only one issue or to impose a particular type of sentence. Compare United States v. Carpenter, 320 F.3d 334, 339, 341 (2d Cir. 2003) (where decretal paragraph of mandate "was narrow" and identified specific sentencing offense level and guidelines range for resentencing, district court at resentencing could not depart downward on additional previously-available grounds that were not raised by defendant at first sentencing). Accordingly, the district court's consideration of additional grounds for upward departure did not violate the express terms of this Court's mandate.

Nor can there can be a serious claim that this Court's prior decision in Lasaga I either ruled on or ruled out the two reasons relied on by the district court at resentencing to upwardly depart. The Court's prior decision did not touch at all upon a criminal history departure and although it affirmed the propriety of an upward departure for quantity of pornographic images, it did not evaluate the propriety of the extent of departure on this ground. See 328 F.3d at 67-68. Accordingly, a core concern of the mandate rule is not implicated in this case: the district court did not reconsider an issue on resentencing that was decided by this Court's prior ruling.

Since the district court's rulings on resentencing neither conflicted with the express terms of the mandate nor conflicted with this Court's resolution of any issue in Lasaga I, the only remaining question is whether the district court exceeded the scope of issues that may be generally raised on resentencing. As set forth below, regardless whether the district court's resentencing is viewed as a "limited" or "*de novo*" proceeding, it did not run afoul of this Court's guidance concerning the scope of issues generally subject to consideration on remand.

The district court's resentencing is properly characterized as a "limited" resentencing. This Court's decision in Quintieri makes clear that such a "limited" resentencing may encompass previously dormant issues that are made newly relevant by an appellate court's ruling. The Quinteri decision cites and expressly approves of the D.C. Circuit's interpretation of a "limited" resentencing to include "'such new arguments or new facts as are made newly relevant by the court of appeals' decision--whether by the reasoning or by the result.'" Quintieri, 306 F.3d at 1228 n.6 (quoting United States v. Whren, 111 F.3d 956, 960 (D.C. Cir. 1997)). In Whren, the D.C. Circuit further noted that "[u]nder our approach a [party] may argue at resentencing that the court of appeals' decision has breathed life into a previously dormant issue, but he may not revive in the second round an issue he allowed to die in the first." 111 F.3d at 960.

In United States v. Lee, 358 F.3d 315, 324 (5th Cir. 2003), the Fifth Circuit recently affirmed a district court's imposition of an upward departure on resentencing following the appellate court's vacating of a different

sentencing adjustment. Specifically, the Fifth Circuit concluded that a district court could impose on remand an upward departure for under-representation of criminal history under § 4A1.3, following invalidation in a defendant's prior appeal of a 6-level upward adjustment arising under § 2K2.1(a)(4)(A) for the defendant's conviction of a "crime of violence." Although the conviction at issue no longer technically qualified as a "crime of violence," the Fifth Circuit concluded that the district court at resentencing could properly consider whether it served as the basis for an upward departure (which would not have been necessary had the conviction been a "crime of violence"). In reliance on the D.C. Circuit's guidance in Whren, the Fifth Circuit concluded that "the sentencing issue [of an upward departure] became newly relevant as a consequence of the correction of the sentence ordered by this court in the initial appeal." Id. at 326.

Here, the district court breathed life into previously dormant yet properly preserved departure issues that – as in Lee and Whren – had simply not been necessary to resolve at the first sentencing. The district court could not have been clearer – either at the first sentencing or the second – that it initially declined to rule on either the criminal history departure or a higher departure for volume of pornography because it was unnecessary to do so in order for the court to impose the 15-year sentence it believed appropriate. Only when this Court invalidated the district court's extreme-psychological-harm departure was it necessary and appropriate for the district court to consider the applicability and extent of these alternative reasons for departure.

Significantly, the district court at resentencing did not ask for nor did it consider new facts. Neither did the court consider new arguments.[1] Rather, the court revisited old arguments premised on previously established facts in order to reach the conclusion, undisturbed by this Court's prior ruling, that a sentence of 15 years' imprisonment was appropriate.[2]

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[1] For this reason, the defendant's reliance on United States v. Norris, 277 F. Supp.2d 189 (E.D.N.Y. 2003), is misplaced. There, unlike this case, the district court was asked, but declined at resentencing, to take account of a defendant's intervening murder conviction. As noted, the district court here did not premise its departure on the basis of any new facts or events.

[2] Following the first sentencing, but prior to the resentencing, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, (the "PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (effective April 30, 2003). The Act amended 18 U.S.C. § 3553 to require a written statement of reasons in a judgment and conviction order for any departure that a court may grant, and it includes a provision limiting those issues that can be considered at a resentencing after remand to those issues previously articulated and included in such a written judgment. See 18 U.S.C. § 3742(g)(2)(A). Because the written-statement-of-reasons requirement was not in effect at the time that the district court initially imposed sentence in this case, the PROTECT Act did not impose limitations on the district court's authority to upwardly depart on alternative grounds in this case. Cf. United States v. Kostakis, – F.3d –, Dkt. No. 02-1647, slip op. at 13 (2d Cir. Apr. 5, 2004).

Indeed, this Court has made clear that "a district court may, in some circumstances, 'revise upward one component of a sentence after another component was held to have been invalidly imposed.'" United States v. Chaklader, 232 F.3d 343, 346 (2d. Cir. 2000) (quoting United States v. Versaglio, 85 F.3d 943, 948-49 (2d Cir. 1996)).

Similarly, this Court's very recent decision in Barresi reaffirms that a district court may permissibly elect at resentencing to attach more weight to a single, valid ground for upward departure than it did at an initial sentencing when other grounds initially relied upon have been removed. See Barresi, 2004 WL 432215 at *4 (affirming imposition of same sentence on remand despite fact that Court of Appeals had invalidated two of four grounds for district court's upward departure). Thus, the district court's increase in the extent of the volume departure was one of the options open to the district court.[1] This is especially so where, as here, the district court expressly noted at the first sentencing that a departure of more than two levels would have been appropriate (but was not then necessary).

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[1] As for the defendant's complaint that in the first appeal the government "did not file a cross-appeal on any of the sentencing issues," see Def. Br. at 3, it is well-established that neither a district court's determination not to grant a departure or the extent of any departure it chooses to grant is subject to appellate review. See United States v. Miller, 263 F.3d 1, 4 (2d Cir. 2001) (collecting cases); United States v. Lawal, 17 F.3d 560, 562 (2d Cir. 1994).

Further, in United States v. Uccio, 940 F.3d 753 (2d Cir. 1991), this Court affirmed a district court's imposition of an upward departure on remand that had been initially denied by the district court at the first sentencing. The district court in Uccio had initially ruled that it would not upwardly depart under U.S.S.G. § 5K2.4, reasoning that this departure could extend only to a criminal defendant's kidnapping of a victim of the offense, not a co-participant in the offense. Id. at 756. The district court, however, upwardly departed on a combination of other grounds (including violence to others during the commission of the offense). Id. This Court remanded for resentencing because the district court failed to make the type of factual findings that intervening case law required to sustain an upward departure. Id. On remand, the district court revisited its ruling concerning § 5K2.4, concluding that it had incorrectly limited the application of § 5K2.4 to victims of the offense and that § 5K2.4 now warranted an upward departure. Id. at 757.

This Court affirmed, noting that its prior remand had not expressly ruled on the applicability of an upward departure under § 5K2.4 and that the factual predicate for this departure had been raised at the first sentencing hearing. Id. It concluded that "our vacation of Uccio's sentence left the district court free to change its prior ruling on that matter, for until there is a final judgment in a case, an interlocutory ruling generally remains subject to reconsideration or modification." Id. at 757-58.

The instant case follows *a fortiori* from Uccio. In Uccio, an upward departure on remand was affirmed despite the fact that the basis for departure had been

explicitly rejected by the sentencing court at the initial sentencing. The instant case is not nearly as taxing an application of the law-of-the-case doctrine. Judge Thompson imposed an upward departure not on grounds that were expressly rejected at the first sentencing but that were expressly reserved and deemed unnecessary at the time to resolve.

Even assuming the district court to have conducted more than a "limited" resentencing, its determination withstands scrutiny under "*de novo*" sentencing principles. As noted above, a *de novo* sentencing may be warranted where an appeals court decision "'effectively undoes the entire knot of calculation' underlying the original sentencing." Barresi, 2004 WL 432215 at *4 (quoting Quintieri, 306 F.3d at 1228). Such could clearly be argued to apply in this case. At the first sentencing, Judge Thompson expressly linked his determination not to further upwardly depart to the fact that he was imposing a now-invalidated one-level upward departure for extraordinary psychological harm.

In any event, with respect to the district court's increase from two levels to three levels for the volume of child pornography, any possible error was harmless. Judge Thompson has removed any doubt that, in his view, the appropriate sentence for this case is 15 years' imprisonment. Even assuming the additional volume-of-pornographic-images increase to be invalid, the upward departure for criminal history would still result in a sentencing range of 151-188 months, and Judge Thompson could still have lawfully imposed a 15-year sentence.

Finally, the Court should reject the defendant's argument that the district court erred by declining to permit him an opportunity to prove that the tens of thousands of images he collected were of "virtual" not "real" children and thus subject to First Amendment protection under Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
As the district court correctly concluded, this narrow issue was in fact expressly decided and foreclosed by this Court's opinion in Lasaga I. JA 165-170, 177-78.

The opinion in Lasaga I considered and rejected the defendant's argument that the images he collected were of "virtual" children, in light of the defendant's contrary admissions during the course of his guilty plea hearing:

> [T]he plea agreement--which defendant signed--explicitly stated that the government was proceeding under 18 U.S.C. § 2256(8)(A), which criminalizes the possession of visual depictions produced in a manner that "involves the use of a minor engaging in sexually explicit conduct ...." This understanding was reinforced by the district court during its plea colloquy with defendant. Furthermore, defendant admitted in the course of his guilty plea that the images in question "were pornographic photographs of children."

328 F.3d at 68. The mandate rule "bars the district court from reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals." Cox, 299 F.3d at 148; see also United States v. Minicone, 994 F.2d 86, 88-89 (2d Cir. 1993) (reversing district court

reconsideration of denial of "minor participant" reduction that had been addressed and affirmed on first appeal).

Even assuming that the mandate rule did not operate to foreclose further litigation of the "virtual" children issue, the district court did not otherwise abuse its discretion when it declined to conduct a further evidentiary hearing on this issue. It could appropriately rely – as did this Court in Lasaga I -- on the defendant's damning admissions during the course of his guilty plea hearing. Cf. Johnson v. Fogg, 653 F.2d 750, 752-53 (2d Cir. 1981) (district court did not abuse discretion in declining to hold evidentiary hearing concerning defendant's claim of misinformed guilty plea where allegations of misinformation were contradicted by defendant's solemn admissions made during course of guilty plea) (*per curiam*); see also United States v. Torres, 129 F.3d 710, 715 (2d Cir. 1997) ("A defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea.").

CONCLUSION

For the foregoing reasons, the judgment and sentence of the district court should be affirmed.

Dated: April 7, 2004

Respectfully submitted,

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