

United States Court of Appeals
for the Fifth Circuit

No. 25-20055

United States Court of Appeals
Fifth Circuit

FILED

September 9, 2026

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SCOTT THOMAS PROVOST,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CR-120-1

Before STEWART, HIGGINSON, and HO, *Circuit Judges*.

PER CURIAM:*

Defendant Scott Provost pleaded guilty to receiving child pornography and possessing child pornography. Provost was indicted after law enforcement discovered that he had downloaded thousands of images of child pornography to his personal computer using the software Freenet. At Provost's initial sentencing, the district court applied a five-level enhancement for distributing child pornography in exchange for valuable

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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consideration. Provost objected, arguing that the five-level enhancement did not apply and that the district court should instead apply a two-level sentence reduction under U.S.S.G. § 2G2.2(b)(1). The district court overruled Provost's objections and sentenced Provost to 262 months' imprisonment. Provost appealed, and the government moved to remand the case to the district court for resentencing, agreeing with Provost that the district court erred in applying the five-level sentencing enhancement. We granted the government's motion and remanded the case for resentencing.

At resentencing, the district court applied a two-level enhancement under § 2G2.2(b)(3)(F) for knowingly distributing child pornography. Provost objected to the enhancement, arguing that he did not knowingly distribute child pornography. And he again argued that the district court should apply a two-level sentence reduction under § 2G2.2(b)(1) because his conduct was limited to receiving child pornography. The district court overruled his objections, applied the two-level enhancement under § 2G2.2(b)(3)(F), and sentenced Provost to 188 months' imprisonment. Provost now appeals again, challenging the district court's application of the two-level sentencing enhancement under § 2G2.2(b)(3)(F) and arguing that the district court failed to properly pronounce the terms of his supervised release at sentencing. For the following reasons, we vacate Provost's sentence and remand to the district court for resentencing.

As an initial matter, the government concedes that the district court erred in applying a two-level enhancement under § 2G2.2(b)(3)(F) for knowingly distributing child pornography because, under *United States v. Lawrence*, 920 F.3d 331 (5th Cir. 2019), there was insufficient evidence that Provost knew using the Freenet software also caused child pornography to be distributed to other users' computers. We agree. But we express no view as to whether using Freenet to download child pornography could warrant a

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distribution enhancement under different facts. Accordingly, we vacate Provost's sentence and remand to the district court for resentencing.

To the extent Provost attempts to challenge the district court's failure to apply a two-level sentence reduction under § 2G2.2(b)(1), his arguments are forfeited. "[A]n issue that could have been but was *not* raised on [initial] appeal is forfeited," and thus we may not "consider[] such an issue during a second appeal." *Lindquist v. City of Pasadena*, 669 F.3d 225, 239 (5th Cir. 2012) (emphasis in original). Nor does a second appeal "provide [a defendant] an opportunity to make an argument that he should have made in the first appeal." *United States v. Caravayo*, 696 F. App'x 671, 673 (5th Cir. 2017). "Appeals taken from a defendant's resentencing on remand must be limited to new issues that materialized at resentencing and cannot raise an argument that should have been presented in the first appeal." *Id.*

In his initial sentencing, Provost argued that the court should apply the two-level reduction under § 2G2.2(b)(1). The district court disagreed. But on appeal, Provost challenged only the district court's application of the five-level sentencing enhancement. He never raised the district court's failure to apply the two-level reduction under § 2G2.2(b)(1). Nor has Provost demonstrated "why he was unable to appeal [this] issue in the initial appeal." *United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008). Rather, he "had every incentive and opportunity to appeal the sentence on [that] ground[] as well," yet he did not pursue the challenge. *Id.* Accordingly, Provost has forfeited any argument that the district court should have applied a two-level reduction under § 2G2.2(b)(1).

Finally, Provost argues that the district court failed to properly pronounce the terms of his supervised release aloud at resentencing. But because we are vacating Provost's sentence, we need not address this argument.

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For these reasons, the judgment of the district court is vacated, and this case is remanded to the district court for resentencing in accordance with this opinion.