No. 13-2764

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Charles W. Pollock, Jr.,
Defendant-Appellant.

Appeal from the United States District Court
For the Central District of Illinois,
Case No. 11-CR-10082
The Honorable Judge James E. Shadid

REPLY BRIEF OF DEFENDANT-APPELLANT CHARLES POLLOCK

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Scarecrows look like people because they have arms, legs, and heads. But scarecrows are just ornamentations stuffed with straw, void of the essential meat that makes us tick. The government props its arguments up like a scarecrow, ignoring the heart of the issues in this case: that Pollock's due process right to a unanimous jury verdict was violated by an inadequate jury instruction; that the government harmed Pollock at trial by mischaracterizing key evidence; and that the district court gave Pollock an unreasonable sentence riddled with errors.

I. The government concedes that the district court failed to instruct the jury that possession of a specific firearm is an element of § 922(g)(1).

The government does not challenge the proposition that possession of a specific firearm is an element of § 922(g)(1) and that due process requires the jury be unanimous as to that element. *See Richardson v. United States*, 526 U.S. 813, 817–20 (1999); *see also United States v. Griffin*, 684 F.3d 691, 694 (7th Cir. 2012) (noting that "jurors were properly instructed that they would need to agree unanimously on Griffin's possession of one or more specific firearms or sets of ammunition to find him guilty"). This concession operates as a waiver, *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (inferring acquiescence from appellee's failure to mention an argument

and holding such acquiescence to be a waiver), and so this Court need go no further to reverse Pollock's conviction.[1]

Having conceded the substantive argument, the government instead maintains that at trial the district court *and* the government properly instructed the jury on this element. (Gov't Br. 33–34.) As a preliminary matter, just as "[t]he lawyers' statements and arguments are not evidence," (R.66 at 4), they are also not the governing law, *see, e.g.*, *Jimenez v. City of Chicago*, 732 F.3d 710, 721 (7th Cir. 2013) ("It is the role of the judge . . . to instruct the jury on the applicable principles of law."); *see also* (R.66 at 1) (district court instructing the jury that it "must take the law as the [judge] gives it"). Accordingly, the jury was not allowed to consider the lawyers' statements on § 922(g)(1).

Even if a lawyer's statements held some currency in instructing the jury as to the applicable law, the government's closing arguments here did not properly instruct the jury on this specific element. The government merely told the jury that it "need only prove that the defendant possessed a *single* firearm" out of the nine listed in the indictment. (Trial Tr. 480) (emphasis added). The government did not instruct the jury that it had to be unanimous as to *which* single firearm the defendant possessed; its concern was only with ensuring the jury did not think it had to prove Pollock possessed all nine

[1] If this Court does not impute a waiver to the government, Pollock's opening brief exhaustively showed why, under *Richardson*, possession of a specific firearm is an element of the offense, so this Court could also address—and reverse—on the substance of the argument. (Br. 15–25.)

firearms: "We really don't have to prove that he possessed every one of those." (Trial Tr. 480.)

The government also argues that the district court properly instructed the jury on this element.[2] (Gov't Br. 33.) But the instructions did *not* require the jury to unanimously agree that Pollock possessed a specific firearm. The district court simply told the jury that the government needed to prove each of the three elements of § 922(g)(1) beyond a reasonable doubt. (Trial Tr. 466.) It never explained that the first element—knowing possession of a firearm—requires possession of a *specific* firearm. (Trial Tr. 466.) In the absence of this explanation, the instructions simply did not serve the purpose the government now assigns to them.

Finally, this error was not harmless. Due process requires juror unanimity as to each element of the crime, *Richardson*, 526 U.S. at 817, and the district court's deficient instructions allowed the jury to convict without unanimously agreeing on the specific firearm possessed. In these circumstances, the government is tasked with showing "'*beyond a reasonable doubt* that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999) (emphasis added) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The government has not made this showing. As the government concedes, its evidence below was

[2] The government cites to pages 467 and 472 of the trial transcript, but neither supports the government's claim that the instructions required the jury unanimously agree on the specific firearm possessed. *See* (Gov't Br. 33).

"largely circumstantial." (Gov't Br. 34.) It was also non-specific. The only evidence it offered that Pollock possessed a specific firearm was Clayes's testimony that Pollock briefly showed him a firearm late one night after the two had been drinking. (App. B.17.) The persuasiveness of this evidence, however, was severely limited, both because of the conditions under which Clayes viewed the firearm and because he was unable to identify the firearm at trial. (App. B.22.) The government, aware of these shortcomings, repeatedly mischaracterized Clayes's testimony in an effort to link Pollock to a specific firearm. *See infra* Part-II. Given that the government had no convincing evidence that Pollock possessed a specific firearm, it is likely that the district court's deficient instructions contributed to the jury's verdict. The government has failed to meet its burden.

Rather than meaningfully address the merits of the issue, the government falls back on stock waiver and forfeiture arguments to discourage this Court's review. But the record shows that the district court understood that Pollock objected to Instruction 8A: the district court explicitly stated that it was giving Instruction 8A over Pollock's objection. (App. A.8.)[3] The objection served its purpose: both the district court and the government were on notice

[3] In a convoluted reading of the record, the government claims that the district court's "given over objection" notation refers to Pollock's "objection" to the court's ruling on his motion for acquittal. (Gov't Br. 29–30.) But parties do not object to courts' rulings on motions for acquittal; doing so would be a post-ruling exception, which the Federal Rules explicitly reject. Fed. R. Crim. P. 51(a). The simple fact is that the district court understood, and memorialized, Pollock's objection to Instruction 8A.

and had ample opportunity to address and cure Pollock's concerns with the instruction, which is all that is required to preserve it for appellate review. *See* Fed. R. Crim. P. 30(d).

First, there is no waiver here. A waiver is an intentional relinquishment or abandonment of a right. *United States v. Natale*, 719 F.3d 719, 729 (7th Cir. 2013). Because of the harshness of their application, which precludes appellate review, waivers are construed "liberally in favor of the defendant." *Id*. Thus, anything less than a clear, affirmative act is insufficient to impute a waiver to a party. *See United States v. Courtright*, 632 F.3d 363, 371 (7th Cir. 2011). In support of this purported waiver, the government relies on the following colloquy, which occurred after the district court had already considered the original version of Instruction 8A, found an error, and asked the government to correct it, (Trial Tr. 415–16)[4]:

[DEFENSE COUNSEL]: . . . but did the Court also receive a new 8A?

****

[GOVERNMENT]: I have extras here, Judge.

THE COURT: Okay. Got it. Thank you. Okay. Let's go to 4.01.[5]

[DEFENSE COUNSEL]: Judge, no objection.

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[4] The Government's Proposed Instruction 8 listed the third element of § 922(g)(1) as whether "[t]he ammunition traveled in interstate commerce," (R.57 at 11), instead of whether the firearm traveled in interstate commerce. The government agreed the instruction was "wrong," (Trial Tr. 416), and the district court suggested the government have an amended instruction ready the following day, (Trial Tr. 418).

[5] Here, the judge uses 4.01 as shorthand for Instruction 8A.

(Trial Tr. 429–30). Defense counsel's statement, when viewed in this context, does not disavow its objection to this instruction, but rather indicates that Pollock did not object to the government's amendment to the original instruction. *See* (R.66 at 18.)[6] There was no "knowing and intentional decision to forgo a challenge before the district court." *Natale*, 719 F.3d at 729 (internal quotation marks omitted).

Nor did Pollock forfeit his objection. First, it is difficult to conceive of a situation where an acknowledged objection somehow transforms into a forfeiture—and the government does not explain how this might have happened here. (Gov't Br. 33.) Even if the government had an explanation, its forfeiture argument is unsupported by the law and the facts. Forfeiture is an accidental or negligent omission: a "failure to timely assert a right." *United States v. Jaimes-Jaimes*, 406 F.3d 845, 847 (7th Cir. 2005). Here, the district court understood Pollock harbored objections to 8A and noted them for the record, which is all that is required to preserve the issue for this Court's review. *See United States v. White*, 698 F.3d 1005, 1018 (7th Cir. 2012) ("We have said that, so long as defense counsel 'alert[s] the court and the opposing party to the specific grounds for the objection in a timely fashion,' then '[t]here is no utility in requiring defense counsel to object again after the

[6] Indeed, there is a small check mark next to the third element, (R.66 at 18), indicating that what the defense counsel and the district court approved of was the government's amendment—not the entire instruction.

court has made its final ruling.'") (quoting *United States v. James*, 464 F.3d 699, 707 n.1 (7th Cir. 2006)).

After the government submitted its revised version of Instruction 8A, to which Pollock said he had no objection, (Trial Tr. 429–30), both the district court and Pollock referred to what each clearly understood to be Pollock's objection to the substance of Instruction 8A, (App. A.8, A.10). After denying Pollock's motion for acquittal, the district court stated that, with its denial in mind, it would "go back and 8A would be given over objection." (App. A.8.) The district court meant that, because it had denied Pollock's motion for acquittal, the case would go to the jury and the jury would be instructed on 8A—despite Pollock's objection. When the government expressed its desire that the district court instruct the jury that it needed only to find that Pollock possessed a *single* firearm (which, as noted above, is not the same as a request that the jury be instructed it needed to find a *specific* firearm), Pollock repeated his objection, stating, "Judge, I would continue to have the same objection that I expressed earlier." (App. A.10.) The district court understood that Pollock objected to Instruction 8A.[7]

Even if Pollock forfeited his objection, his claim would still survive because this Court has held that a failure to instruct on an element of the offense is, absent exceptional circumstances, plain error. *United States v. Kerley*, 838 F.2d 932, 939 (7th Cir. 1988) (finding such extraordinary

[7] Indeed, as mentioned above, the working version of Instruction 8A has a handwritten note on it that says "g over obj given ruling." (R.65 at 27.)

circumstances where the element omitted from the instruction was "not contestable and was barely if at all contested"); *United States v. Golomb*, 811 F.2d 787, 793 (2d Cir. 1987) (holding that "in general, failure to instruct the jury on an essential element of the offense constitutes plain error"). Unlike *Kerley*, the firearm-unanimity issue in Pollock's case is contestable (Pollock may have possessed none, one, or some of the nine firearms listed in the indictment) and was contested (Pollock argued that the government had not proven that he possessed a specific firearm). (Trial Tr. 498–99.) Because no exceptional circumstances exist here, the district court's failure to instruct the jury on an element of the offense constituted plain error. This Court should reverse.

II. The government committed prosecutorial misconduct at trial and at sentencing.

The government concedes that it "repeated[ly]" mischaracterized Todd Clayes's testimony at trial. (Gov't Br. 36) ("mistaken description," "misstatements"); (Gov't Br. 38) ("mischaracterization," "mistake"); (Gov't Br. 39) ("misstatements"); (Gov't Br. 40) ("misstatements"); (Gov't Br. 41) ("the error"); (Gov't Br. 43) ("prosecutors' mischaracterization of Clayes's testimony . . ."). Yet the government suggests that this Court should ignore these missteps because "it appears to have been an inadvertent mistake." (Gov't Br. 38.) But whether the misstatements were intentional or unintentional is irrelevant. *See Smith v. Phillips*, 455 U.S. 209, 219 (1982)

("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

While acknowledging that the "misconduct" happened, the government now claims it was not "serious." (Gov't Br. 38–41.) First, the government asserts that the extent of the "mischaracterization," (Gov't Br. 38), was merely about the caliber of the weapon, (Gov't Br. 36), but this ignores the fact that the misconduct also arose because the government equated Clayes's testimony with a specific firearm, Government Exhibit 8, (Br. 27–28, 31). Second, the government's post-hoc justification of the prosecutors' "mistake" relies primarily on the fact that they "genuinely believed Clayes would describe and did describe" Exhibit 8. (Gov't Br. 39.) But even if that accounts for the government's statements during opening statements, it cannot account for the statement in closing, the one made during the directed-verdict colloquy, and, especially the two statements made in rebuttal in direct response to defense counsel's argument that the government's proof was not what it claimed it to be.[8] The prosecutor's statements during rebuttal—all revolving around a specific .45 caliber semiautomatic, (App. B.30–31)—remained unanswered by the defense, who had no further opportunity to

[8] The government's reliance on *United States v. Johnson* is misplaced. In *Johnson*, the government made *one* false statement during opening statements. 655 F.3d 594, 602 (7th Cir. 2011). Here the government made *five* false statements to the jury, including two during rebuttal to which defense counsel could not respond. (App. B.6, B.18, B.28, B.30–31.) The government in this case claimed until the very end that it delivered on its promise in opening statements that Clayes would testify to having seen a .45 semiautomatic pistol. Thus, the factual dissimilarities render *Johnson* inapposite.

address the jury. The government cannot thus credibly argue that the defense was able to mitigate the error. Furthermore, contrary to the government's suggestion, (Gov't Br. 42), if a district court's boilerplate instructions about what does and does not constitute evidence cured the prejudice inflicted by repeated mischaracterizations of that evidence, no prosecutorial misconduct claims would ever survive.

In what should be deemed yet another waiver, *Cincinnati*, 260 F.3d at 747, the government wholly fails to address the prosecutorial misconduct at sentencing, choosing instead to couch its argument as one of district court fact-finding. (Gov't Br. 52–53) (sole reference to the DNA issue discussed in terms of "erroneous facts" and not the prosecutor's characterization of it). Two separate issues are at play in sentencing: (1) the government's continuing assumption that the .45 semiautomatic was the crucial weapon for both Clayes and Bowyer; and (2) the government's mischaracterization of Kim Bowyer's sentencing testimony. As to the latter, although Bowyer actually said, "He says, you got DNA. I'm sure that they will fingerprint the truck," (App. B.39), the government parlayed this into an intent on Pollock's part to prevent her from going to the authorities following the alleged sexual abuse, (App. A.16, A.20, A.28–29). Even Bowyer was in the dark about the government's intended use of this evidence when first asked. (App. B.40.) It was only later, after the government asked her a pointed, leading question about the topic that she first assented to its characterization. *Compare* (App.

B.40) ("Q. Why do you think he told you—what was your understanding of why he told you about the 45? A. I don't understand. Q. Why did he say that to you? A. I don't know.") *with* (App. B.40) ("Q. Did he express a concern about you reporting the kidnapping and the rape to the authorities? A. Yes."). In spite of this, the government argued to the district court that Pollock intended to threaten Bowyer to prevent her from going to the authorities. (App. A.20) ("He made the comment, well, you have my DNA; you could really get me in a lot of trouble. So he is trying to convince her not to go to the authorities."). *See also* (App. A.16, A.28–29.) What is more, now on appeal the government continues this pattern by misquoting Bowyer's sentencing testimony, (Gov't Br. 53); adding one word and omitting another, the government attributes the following to Bowyer: "[Y]ou got *my* DNA. I'm sure they will fingerprint the truck," (Gov't Br. 53). The actual quote is "[h]e says, you got DNA. I'm sure *that* they will fingerprint the truck."[9] (App. B.39.)

These mischaracterizations at sentencing together with the mischaracterizations at trial infected the entire proceeding. First, the government shored up its circumstantial case by linking Clayes's testimony

[9] The significance of these slight alterations is not mere semantics. The addition of "my" suggests Pollock told Bowyer she had his DNA material from the alleged rape, which the original transcript does not suggest. On appeal the government also takes other statements out of context in order to bolster its interpretation of Bowyer's DNA statement; specifically, the government equates Pollock's statement at sentencing that Bowyer never submitted to a rape kit as an admission that Bowyer had DNA evidence against him from the alleged rape. Yet Pollock's reference to the rape kit occurred much later at sentencing and demonstrates nothing more than his continued belief in his innocence, not an admission that Bowyer had evidence against him. (Sentencing Tr. 119.)

to one specific firearm, Government Exhibit 8. The government's concession on appeal that the jury needed to unanimously find Pollock guilty of possessing a specific firearm in order to convict only compounds the seriousness of these misstatements that tried to direct the jurors to a specific firearm. (Gov't Br. 33.) Second, these mischaracterizations at trial were heard not just by the jury, but also by the district court, which then co-opted the government's repeated insistence that its star witness identified a specific exhibit by a specific caliber (.45) that incidentally matched the one that Kim Bowyer reported after the alleged sexual abuse. (App. A.28.)[10] All of this resulted in a cross reference and a 20-year sentence for Pollock. Thus, the mischaracterizations at trial and sentencing impacted the outcome of the proceedings.

III. Pollock's sentence is procedurally and substantively flawed.

Because the district court's flawed factual findings and erroneous legal conclusions do not support a cross reference, and because the district court handed down an unjustified, substantively unreasonable sentence, Pollock's sentence should be vacated.

A. The district court's factual findings did not comply with this Court's requirements.

Pollock argued in his opening brief not that the lower court made clearly erroneous factual findings, but rather that the court erred by failing to make

[10] Though the government was precluded from introducing the details of the alleged assault at trial, the incident was fully aired at a pretrial suppression hearing. (Trial Tr. 6–11; R.42; R.48.) Thus the district court, unlike the jury, was fully aware of the details of the incident, including the .45, prior to sentencing.

any findings *at all*. (Br. 37–38.) Yet the government glosses over this absence of fact-finding and simply recharacterizes it as a run-of-the-mill—though implicit—judicial fact-finding, governed by clear-error review.[11] (Gov't Br. 46.) In doing so, the government concedes that the trial court made no *explicit* findings. Accordingly, the government can only prevail if this were the rare case where an implicit finding is sufficient; it is not. *United States v. Buchannan*, 115 F.3d 445, 452 (7th Cir. 1997) (holding that only in rare cases is the record's factual basis sufficient to uphold implicit fact-finding). Though this Court has sustained sentences based on implicit relevant-conduct findings, it has done so only when these findings were supported by "sufficient, objective evidence in the record," such as undisputed PSR statements corroborated by testimony. *United States v. Locke*, 643 F.3d 235, 244–45 (7th Cir. 2011) (collecting cases).

This case lacks such requisite objective evidence, and is more complicated than a routine relevant-conduct inquiry. First, the sharply divergent testimony and Pollock's acquittal of sexual abuse demand that the district court make explicit why it found by a preponderance that the elements of

[11] The government engages in similar diversionary tactics when it summarily announces that the district court correctly credited Bowyer's inconsistent testimony over Pollock's. (Gov't Br. 46–48.) It can hardly be disputed that the district court credited Bowyer, but the question is not *if* the district court credited Bowyer, but if it explained *why* it did so, accounting for the problems with her testimony (internal inconsistency and conflict with Pollock's testimony). The court below did neither, and so remand is required. It is also important to note that, despite the government's contention to the contrary, Bowyer's statements were indeed internally inconsistent. *See United States v. Krilich*, 159 F.3d 1020, 1025–26 (7th Cir. 1998) (statements are inconsistent if "the truth of one [must imply] the falsity of the other").

abuse were satisfied here (if it did so find). Here, the district court failed to even reference those elements, despite the fact that identifying the elements and explaining how they are satisfied are both prerequisites to applying the cross reference. *See United States v. Tapia*, 610 F.3d 505, 512–513 (7th Cir. 2010). In addition, although implicit findings may be appropriate for relevant-conduct inquiries, as the above-cited cases recognize, they are particularly inappropriate for the factual findings underlying a cross reference. In a relevant-conduct inquiry, where the only question is the legal connection between two instances of conduct that everyone agrees occurred, reviewing courts can readily ascertain whether the admitted facts link the two events. Factual findings underlying cross references, however, concern situations in which the alleged action may itself be disputed. Here, the question is not how certain facts relate to others, but whether the alleged activity happened at all—a question that is much more difficult for this Court to determine without adequate lower court fact-finding. *See, e.g.*, *Furry v. United States*, 712 F.3d 988, 993 (7th Cir. 2013) (appellate courts defer to trial judges who are better situated to make factual findings). Thus, this Court should be even more circumspect about implicit findings here than it is in relevant-conduct cases. Yet under the government's approach, the district court could rely on implicit findings and would never have to make the requisite underlying finding that the disputed act even occurred. Not only does such an approach directly violate the criminal procedure rules, *see* Fed.

R. Crim. P. 32(i)(3)(B) (requiring sentencing courts to rule on any controverted matter), it also frustrates this Court's review and indeed undercuts the rationale for deference to trial courts on factual matters.

B. The district court should not have applied the cross reference.

Even if the district court had engaged in the requisite fact-finding, resentencing is nonetheless required because the district court erroneously imposed the cross reference as a matter of law. As a threshold matter, once again, the government's complete failure to address Pollock's relevant-conduct argument (Br. 45), means that Pollock's sentence must be vacated. *Wani Site v. Holder*, 656 F.3d 590, 593 (7th Cir. 2011) (appellee's failure to respond to an appellant's dispositive, meritorious arguments results in a forfeiture and victory on the merits for the appellant). The relevant-conduct inquiry is an essential first step for determining whether the cross reference even applies, because only relevant conduct may be used at sentencing. *See United States v. Taylor*, 272 F.3d 980, 982 (7th Cir. 2001) (holding that the relevant conduct guideline "controls whether a cross-reference is appropriate"). Thus, the government's wholesale failure to address this requirement results in a forfeiture meriting reversal, and "simplifies the task before [this Court]." *Wani Site*, 656 F.3d at 592.

The government, in light of its decision to ignore relevant conduct, attempts to defend the cross reference solely based on sentencing guideline § 2K2.1(c). But its argument that "Pollock mentioned his possession of [a

firearm] to facilitate his continued restraint of Bowyer" and that Pollock had previously assaulted Bowyer during this restraint, (Gov't Br. 51), contravenes both the district court's actual findings as well as common sense. Though the district court noted that the restraint continued, it treated the firearm as an afterthought to prevent Bowyer from going to the police,[12] not as an instrumentality of the actual restraint. (App. A.28–29) ("a reasonable inference could be that [he was] letting her know what he could do if she went to authorities").

Setting aside the fact that the district court's finding does not support the cross reference, it strains credulity to conclude that Pollock's mention of the firearm had any potential to facilitate the already completed *sexual abuse*, the relevant question under § 2K2.1(c). The government's reliance on an unpublished Eleventh Circuit decision gets it nowhere. (Gov't Br. 50) (citing *United States v. Arneth*, 294 F. App'x 448, 453–54 (11th Cir. 2008), for the proposition that using a firearm in an attempt to cover up a completed offense may serve as a basis for imposing a cross reference). In *Arneth*, the court held that the defendant's use of a firearm perpetuated his ongoing fraudulent scheme of pretending that he was a police officer (the

[12] And it was a problematic finding at that. Bowyer's first answer as to why Pollock told her about the .45, was "I don't know." (App. B.40.) Only after leading questions from the government on redirect, (Sentencing Tr. 47) (government suggesting that Pollock threatened her with a firearm to keep her from going to the authorities), did she accede to its proposed rationale, (Sentencing Tr. 47). *See also supra* Part-II.

cross-referenced[13] offense) because no one would believe he was an officer unless he used a firearm. *Id.* at 454. Given these facts—including most importantly that the scheme was ongoing—*Arneth* does not support a blanket rule that a cross reference is appropriate when a firearm is used to cover up a completed offense. Such conduct simply does not and cannot facilitate the completed conduct here; at most it falls into the arena of obstructive conduct. Unlike fraud in *Arneth*, the alleged sexual abuse in this case was not an ongoing crime. *See* 720 ILCS 5/11-1.20(a)(1) (delineating discrete elements of sexual abuse). Though the government also argues that a hypothetical future sexual assault could support the cross reference, (Gov't Br. 49), any such suggestion directly contradicts this Court's requirement that all the elements of the other offense be satisfied before a district court may apply a cross reference. *Tapia*, 610 F.3d at 513. Of course, the elements of a not-yet-committed offense are by definition *not* satisfied. Accordingly, the cross reference's requirements were not met and Pollock's sentence was improper.

C. The district court imposed an unjustified, substantively unreasonable 20-year sentence.

Pollock received a 20-year sentence for simple felon in possession and *attempted*, non-violent witness tampering. He received a consecutive, 10-year sentence for the latter, even though these crimes typically carry, on average,

[13] *Arneth* dealt with an enhancement under guideline § 2K2.1(b)(6)(B), not a cross reference under 2K2.1(c)(1), but the relevant test (whether the firearm was "used or possessed . . . in connection with" another offense) is identical under both subsections. U.S. Sentencing Guidelines Manual § 2K2.1 cmt.14. Accordingly, cross reference is a useful shorthand here.

two-to-three year sentences, even in extreme and violent cases. (Br. 34–35.) The sentence imposed is even more egregious in light of the district court's failure to satisfy its duty to meaningfully address any of the § 3553(a) factors. 18 U.S.C. § 3553(a) (the district court "*shall* consider" the § 3553(a) factors regardless of whether the sentence is within guidelines or whether the defendant raises any specific points[14]) (emphasis added); *United States v. Washington*, 739 F.3d 1080, 1082 (7th Cir. 2014) ("The district court may not presume that a within guidelines sentence is reasonable and *must* provide an 'independent justification' in accordance with the § 3553(a) factors for the terms of imprisonment imposed.") (emphasis added) (citations omitted); *cf. United States v. Castaldi*, --F.3d--, Nos. 10-3406 & 12-1361, 2014 WL 702207 at *6 (7th Cir. Feb. 24, 2014) (affirming defendant's sentence because the district court, despite not specifically addressing one mitigating factor, "walked carefully through all the applicable sentencing factors under § 3553(a)"). Factor Six, for example, which requires the district court to consider the need to avoid sentencing disparities among defendants, was particularly relevant but remained untouched by the district court's analysis. (Sentencing Tr. 124–25.) The government tries to circumvent this straightforward legal standard by repeatedly stating Pollock received a

[14] The government mischaracterizes *United States v. Reyes-Medina* when it claims that the defendant bears the burden of raising the § 3553(a) factors. 683 F.3d 837, 840 (7th Cir. 2012). This Court actually said that the district court must *allow* a defendant to raise any of the § 3553(a) factors, *id.*; it did not relieve the district court of its statutorily mandated obligation to independently consider the § 3553(a) factors.

below-guidelines sentence. (Gov't Br. 3, 25, 26, 45, 57, 58.) But not only is that argument legally unsound for the reasons mentioned above, *see supra* Part-III, it ignores the district court's many procedural errors, including its failure under § 3584(b) to consider and discuss the § 3553(a) factors before imposing a consecutive sentence in addition to those set forth in Part-III *supra*. And contrary to the government's assertion, the district court's cursory attention to obsolete Policy Statement § 5K2.9 fails to justify its sentence and to provide meaningful explanation to aid this Court's review. In short, Pollock's extraordinarily long 20-year sentence is substantively unreasonable when considered alongside similar defendants sentenced for similar crimes, and the district court's deficient explanation of that sentence exacerbates this error.[15]

D. This Court has jurisdiction over the district court's crime-of-violence and collection findings.

This Court may review the lower court's erroneous findings as to whether Pollock's firearms were a collection and whether *Meherg* defines Pollock's previous conviction as a crime of violence because these findings were a required part of the actual sentence imposed. Nevertheless, because the government is correct that the district court did not impose the alternate sentence, this Court cannot affirm on that basis.

[15] To ensure a fair sentence free from bias, this Court should apply Rule 36 on remand. *See United States v. Morris*, 204 F.3d 776, 779 (7th Cir. 2000) (applying Rule 36 to resentencing remand because of the district court's remarks at the first sentencing hearing).

1. The factual findings were required under § 2K2.1.

The government argues that because the alternate sentence is not a final judgment, this Court cannot review the factual findings that underlay it. Yet these findings were instrumental to the district court's cross reference determination and, as such, are appealable as part of the sentence that was imposed (over which this Court has jurisdiction). Under the explicit terms of § 2K2.1, a cross reference for another offense is only applied if the offense level for that offense is higher "than [the offense level] *determined* above" (under the firearm guideline). U.S. Sentencing Guidelines Manual § 2K2.1(c)(1)(A) (emphasis added). Thus the district court must first determine both offense levels, compare them, and only then apply the higher level. *See also United States v. Rushton*, 738 F.3d 854, 858 (7th Cir. 2013) (when the guidelines require applying a higher offense level, both levels must be calculated).

Here, the district court could not accurately calculate the offense level under § 2K2.1 without the findings required to make that calculation, which necessarily included those that comprised the alternate sentence. This Court thus retains jurisdiction to review those calculations. In addition to the express dictates of the guideline, policy considerations counsel in favor of reaching these issues. As the government notes, if this Court does not decide these issues now, it may well have to do so in the context of a later appeal, an inefficient approach that wastes judicial resources.

2. The alternate sentence may not now be imposed.

Though this Court does have jurisdiction over the erroneous § 2K2.1 findings, it may not impose a sentence that the district court did not. *United States v. Feekes*, 879 F.2d 1562, 1568 (7th Cir. 1989). In *Feekes*, the district court, believing the sentencing guidelines to be unconstitutional, imposed a sentence that did not conform to the guidelines. *Id.* Nevertheless, it also announced the sentence that it would have imposed under the guidelines. *Id.* After the guidelines were upheld, this Court rejected the government's motion to substitute the guidelines sentence, holding that although the sentence conformed to the guidelines, resentencing was necessary because the district court announced only a sentence that it *would* have imposed. *Id.*

Feekes controls here. The government correctly observes that the district court announced only what it would have done had the cross reference not applied, (App. A.34), and the written judgment does not mention the alternate sentence, (App. A.39). Because the district court did not impose the alternate sentence, resentencing from scratch is the appropriate remedy for the numerous sentencing errors. *See Rushton*, 738 F.3d at 860.

CONCLUSION

In light of the foregoing, Appellant respectfully asks this Court to reverse his conviction, and alternatively to remand for resentencing.

Respectfully Submitted,
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No. 13-2764

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES W. POLLOCK JR.,
Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellant, Charles Pollock, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Century Schoolbook font with the footnotes in Century Schoolbook 11-point font.

The length of this brief is 5584 words.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Charles Pollock, hereby certify that I electronically filed the foregoing with the clerk of the Seventh Circuit Court of Appeals on February 27, 2014, which will send notification to counsel of record.

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