IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 13-2764

UNITED STATES OF AMERICA,	)	Appeal from the
	)	United States District Court
Plaintiff-Appellee,	)	Central District of Illinois
	)	At Springfield
v.	)	
	)	No. 11-CR-10082
CHARLES W. POLLOCK, JR.,	)	
	)	Honorable James E. Shadid
Defendant-Appellant.	)	United States District Judge

BRIEF OF PLAINTIFF-APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Page

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The jurisdictional summary in the defendant's brief is complete and correct.

ISSUES PRESENTED FOR REVIEW

I. Whether the district court plainly erred when it used this court's Pattern Criminal Jury Instruction 4.01 to describe the elements of a felon-in-possession offense and did not, on its own, amend that instruction to require the jury to identify the particular gun or guns it found the defendant possessed.

II. Whether the district court plainly erred by failing to step in and declare a mistrial because the prosecutors said five times that the defendant displayed a ".45 caliber semiautomatic pistol" to a witness when the witness testified only that the defendant displayed a "semiautomatic pistol."

III. Whether the district court committed any significant procedural or substantive error at sentencing by: misapplying the cross-reference in USSG § 2K2.1(c)(1); relying on inaccurate information; failing to adequately address the § 3553(a) sentencing factors; failing to adequately explain its reason for imposing a 10-year consecutive sentence for witness tampering; and announcing an "alternative sentence" it would have imposed if it had not applied the cross-reference.

IV. Whether this court has jurisdiction to review a lower "alternative sentence," which the district court discussed but did not impose.

STATEMENT OF THE CASE[1]

A jury convicted Charles Pollock, Jr., of three offenses: unlawful possession of a firearm; unlawful possession of ammunition; and attempted witness tampering. (Tr.534; R.70) At sentencing, the district court found that Pollock possessed a firearm in connection with the commission of a kidnaping and rape. (Sent.Tr.97-99) So, the court followed the cross-reference in Guideline Section 2K2.1(c)(1)(A) and calculated Pollock's advisory sentencing range using the guideline for criminal sexual abuse (USSG § 2A3.1). That calculation resulted in an imprisonment range of 360 to 480 months. (Sent.Tr.100, 127) The court imposed a below-range, total sentence of 20 years. (Sent.Tr.128; R.85)

On appeal, Pollock first asks this court to reverse his conviction and remand for a new trial. (Def.Br.25, 53) But his arguments for reversal of conviction address only his conviction on Count One. (Def.Br.13, 15-32) Two additional arguments challenge his sentence on all three counts. (Def.Br.32-46) Pollock's final argument asks this court to reverse an "alternative sentence" the district court discussed but did not impose. (Def.Br.46-52)

[1] Our record citations use the following abbreviations: "d/e" means "docket entry"; "Def.Br." and "Def.App." refer to the defendant's brief and appendices; "Hrg.Tr." refers to the transcript of the suppression hearing (R.72); "Hrg.Ex." refers to an exhibit introduced at that hearing; "Tr." refers to the transcript of the jury trial (R.75-77); "Gov.Ex." refers to a trial exhibit; "PSR" means "presentence report"; "R." followed by a number refers to the document bearing that number on the district court's docket sheet; and "Sent.Tr." refers to the transcript of the sentencing hearing (R.105).

The following chronological narrative draws facts from various record sources. Farther below, the brief summarizes the trial evidence. To avoid additional redundancy, some facts relevant to particular arguments appear only in those arguments.

I. BACKGROUND

A. Pollock Is Convicted of Felony Stalking.

For over 20 years until February 2009, Pollock had a personal relationship with Robin Linder. (PSR¶¶60, 71; Sent.Tr.73-74) Soon after that relationship ended, Pollock violated an order of protection, followed Linder, and threatened her with physical harm. He was charged and convicted of aggravated stalking. (PSR¶¶9, 44; Tr.28; Sent.Tr.74) That felony conviction prohibited him from possessing any firearms. (PSR¶9)

B. Pollock Retrieves His Guns from His Mother's House.

From April 2010 until mid-July 2011, Pollock had a personal relationship with Kim Bowyer. (Tr.22, 49-50, 73; Sent.Tr.12, 37; PSR¶10) In the month before that relationship ended, Pollock had a falling out with his mother. (Tr.51, 77-78) A week or so later, he drove Bowyer to his mother's house in Kewanee, Illinois, to retrieve his guns. (Tr.52-53) When his mother opened the door, he shunned her embrace and said, "I'm going [to] pick up all my guns." (Tr.53, 99) He retrieved

several gun cases and shoeboxes. (Tr.54-59, 78-80, 99, 360-61, 383; Gov.Exs.1A, 2A, 8A, 9A, 10, 11) Bowyer carried the long-gun cases, and Pollock carried the shoeboxes and a handgun case to the trunk of his car. (Tr.54-58) Bowyer did not see any guns but felt weight in the gun cases she carried. (Sent.Tr.46; Tr.54-55, 57, 59, 78)

Near the same time (on June 21, 2011), Bowyer went to Galesburg with Pollock to purchase a junked Nissan Altima. (Tr.63-64, 253-57) Pollock hauled the car back to his place in rural Knox County where he operated an auto scrap yard on three acres of property. (Tr.60-61, 72, 81, 186, 327-30; Gov.Exs.21D-2 to 21D-7; Hrg.Tr.111, 119-20) He parked the Nissan on his neighbor's farm about ten yards from his own property. (Tr.66; Hrg.Tr.103, 109, 113-14, 124-26)

C. Pollock Assaults Kim Bowyer and Implicitly Threatens to Silence Her.

By July 2011, Bowyer's relationship with Pollock had become stormy and, according to Bowyer, Pollock had become abusive toward her. (Tr.93-94; Sent.Tr.14, 16, 18, 37) On July 9, 2011, Bowyer left her truck at Pollock's house and went to a tavern with him. Bowyer became upset at Pollock's conduct there and left alone. A police officer drove her home. Pollock went home and allegedly damaged Bowyer's truck. (Tr.81-88, 102-03; Hrg.Tr.38; Hrg.Ex.SWA-4; Sent.Tr.19-22, 39-41)

A week later (on July 16), Pollock arrived at Bowyer's house, grabbed her by the neck and shoulders, threw her into his car, drove her to his house, and dragged her by the hair into his house. (Sent.Tr.24-26, 44, 47; Hrg.Ex.SWA-2,pp.4, 6) Bowyer's daughter called the police and reported the abduction. (Hrg.Tr.25; Hrg.Ex.SWA-2,p.4) When the police arrived and knocked on Pollock's door, no one answered. (Hrg.Tr.30-32; Hrg.Ex.SWA-2,pp.4-5) Pollock restrained Bowyer on his lap and threatened to break her neck if she said anything. (Sent.Tr.27-28) He took her upstairs and pushed her on the bed until the police left. (Sent.Tr.28) Then he ordered her to get on her knees and perform oral sex on him, which she did. (Sent.Tr.30-31) He threatened to tie her up, to repeatedly rape her younger daughter, and to have his friends kidnap her older daughter to use as a prostitute. (Sent.Tr.31) He coerced Bowyer to have sexual intercourse with him by threatening to have his friends "take care" of her mother. (Sent.Tr.32, 35, 47)

After he climaxed, Pollock talked about the evidence Bowyer had against him. He said she had his DNA, his fingerprints were on her truck, and her daughter witnessed the abduction. (Sent.Tr.33) He said he wanted to end their lives together and suggested they go to his garage, put their heads together, and blast their brains out with a .45 he kept there. (Sent.Tr.32-33, 49, 51-52, 55; Hrg.Tr.26-27, 37; Def.App.B.55)

After Pollock sobered up and drove Bowyer home, she reported the incident to the police. (Sent.Tr.54; Hrg.Tr.25, 35; Hrg.Ex.SWA-3) A criminal complaint filed in Knox County on July 20, 2011, charged Pollock with, among other things, battery, aggravated kidnaping, and aggravated sexual assault. (Hrg.Tr.41-42; Hrg.Ex.SWA-6) (Pollock denied such conduct, and a jury later acquitted him on all counts in state court.) (Sent.Tr.67-71; PSR¶¶14, 55)

D. Pollock Displays a Semiautomatic Pistol to Todd Clayes.

Also on July 20, Pollock's friend Todd Clayes stopped at Pollock's place. (Tr.185-87) The two men were drinking beer in the garage when Pollock asked if Clayes wanted to smoke some marijuana. Clayes drove them into the field to the junked Nissan sedan Pollock had bought a month earlier. (Tr.187, 190-91, 253-57; Gov.Exs.25B-2, 25B-3, 25B-4) Pollock removed from the car's trunk a small Tupperware container of marijuana, some of which Clayes smoked. (Tr.187-88) Pollock then removed a semiautomatic pistol from among other boxes in the trunk, showed it to Clayes, and returned it to the trunk. (Tr.187-88)

E. The Police Find Ammunition in Pollock's Bedroom.

Clayes spent the night at Pollock's and went back to work the next day. (Tr.192) That day (July 21), law enforcement officers obtained and executed a warrant to search Pollock's premises for items belonging to Bowyer, a .45 caliber

gun, and any firearms and ammunition. (Tr.315, 317-18; Gov.Ex.20; Hrg.Ex.SWA-1) Between folded T-shirts on a shelf in Pollock's bedroom, they found five pistol bullets and 11 high-powered rifle bullets. In a dresser drawer with socks, they found two high-capacity rifle magazines suitable for the rifle ammunition. (Tr.295-97, 305-07, 319, 321-22, 330-31, 370, 389; Gov.Exs.12, 12A, 12B, 12C, 20A-2, 20A-5, 21C-1, 21C-2, 40) They arrested Pollock that day. (PSR¶14)

F. Clayes Retrieves Pollock's Guns for Him.

The following morning (July 22), Clayes learned that Pollock had been arrested. (Tr.193) Pollock called Clayes from his mobile phone, said he was in jail, and told Clayes to "go get that stereo out of that car." (Tr.193) Clayes knew "stereo" meant "guns." (Tr.193, 200) After work, Clayes went to Pollock's place to get the guns, but the car was locked. He got scared and left. (Tr.193-94)

The next day (July 23), Pollock called Clayes again. (Tr.194) The jail recorded the call. (Tr.32-33, 195, 324-25) Pollock urged Clayes to "take care of that" immediately by breaking into the car or using a hammer to "knock a lock out of the trunk." (Tr.194, 324; Gov.Exs.24, 24T-1,pp.1-3)

Clayes drove to Pollock's place, knocked out the Nissan's trunk lock with a hammer, and removed "the guns" and marijuana. (Tr.198, 201; Gov.Ex.25B-5) The items he removed included: two long-gun cases (Tr.125, 208-09, 365;

Gov.Exs.1A, 2A, 19-1, 19-3); three small handgun cases (Tr.128-29, 211-12, 230; Gov.Exs.5A, 6A, 7A, 19-12); a large handgun case (Tr.126, 212; Gov.Exs.8A, 19-5); a Dr. Scholl's shoebox (Tr.130, 210-11; Gov.Exs.10, 19-14); a Faded Glory shoebox (Tr.127, 213; Gov.Exs.11, 19-9); and a Tupperware container. (Tr.203) He did not know what was in the shoeboxes (Tr.198) and did not then look in the gun cases (Tr.229, 365-66, 386), but the gun cases and boxes were heavy. (Tr.235) He assumed the gun cases contained guns (Tr.198, 203), including the semiautomatic pistol Pollock had shown him. (Tr.232)

That evening, Pollock called Clayes again from jail. Clayes confirmed he had gotten the "stereo." (Gov.Exs.24, 24T-2,p.1) Pollock said he would have his mother call Clayes so Clayes could "take it down to her house." (Gov.Exs.24, 24T-2,p.1) After receiving a call from Pollock's mother, Clayes took the guns to her house. (Tr.198-200)

On July 25, Knox County Sheriff's Detective Carl Kraemer listened to Pollock's jailhouse calls to Clayes and obtained a warrant to search all vehicles on Pollock's property for various items including firearms. (Tr.325-26; Gov.Ex.21) When he and other officers executed the warrant, they found the Nissan with a busted trunk lock and an empty trunk. (Tr.326, 329-30) They found no guns. (Tr.330)

G. Clayes Delivers Pollock's Gun to the Police.

On July 27, Det. Kraemer confronted Clayes. (Tr.331-32, 385) Clayes initially said he went to Pollock's place to get a stereo, but eventually he admitted he got the guns. (Tr.203, 227-28, 365, 383-84)

Two days later (July 29), Pollock learned a detective had called his mother. In a call to his mother, Pollock suggested she deny to the detective that Pollock "was at her house and took some stuff [when] Kim was with [him]." (Gov.Exs.24, 24T-13,p.1) He then called his sister and told her to not let their mother "talk to that detective." (Gov.Exs.24, 24T-14.pp.1, 3) He gave his sister Clayes's phone number and told her to tell Clayes to "pick that up for me." (Gov.Exs.R.24, R24T-15,p.2) Pollock's sister phoned Clayes and said Pollock wanted him to take "that stuff" back. Clayes called Det. Kraemer and offered to retrieve the guns from Pollock's mother's house. (Tr.204-05) Kraemer accepted that offer. (Tr.205)

At Pollock's mother's house, Clayes took the gun cases and shoeboxes he had left there previously and one other gun box. (Tr.205, 208-15, 229-30; Gov.Ex.19-7) They were as heavy as when he took them from the Nissan's trunk. (Tr.235) Clayes took the items home, called Det. Kraemer, looked inside the gun cases for the first time, read some of the serial numbers to him, and delivered the gun cases and shoeboxes to the Kewanee Police Department. (Tr.118-19, 205-07, 229,

232, 235, 361-62) He delivered nine guns in total, including a shotgun, two rifles, and six handguns, consisting of two revolvers and four semiautomatic pistols. (Tr.121-31, 208-14, 402-04; Gov.Exs.19-16, 41; R.64,pp.1-2)

The shotgun and rifles were in the same two long-gun cases that Kim Bowyer carried to Pollock's car and that Clayes retrieved from the Nissan's trunk and from Pollock's mother's house. (Tr.56-57, 125, 208-09; Gov.Exs.1A, 2A, 19-1, 19-3) Three of the handguns were in the same small gun cases Clayes took from the Nissan's trunk and from Pollock's mother's house. (Tr.128-29, 211-12, 230; Gov.Exs.5A, 6A, 7A) Two of those handgun cases contained .32 caliber semiautomatic pistols. (Tr.128-29, 403; Gov.Exs.5, 6, 7, 19-12, 19-13; R.69,pp.1-2) The Dr. Scholl's shoebox contained more than 200 rounds of various calibers of ammunition. (Tr.130; Gov.Exs.10, 19-14, 19-15; R.69,p.2) The Faded Glory shoebox contained a black Colt Super .38 caliber semiautomatic pistol. (Tr.127-28, 402; Gov.Exs.4, 4A, 11, 19-10) The large handgun box contained an Essex Arms .45 semiautomatic pistol with a Colt slide.[2] (Tr.126, 287, 289, 292, 300-01, 404; Gov.Exs.8, 8A, 19-6) Clayes did not know which of the semiautomatic pistols Pollock had shown him on July 20. (Tr.232)

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2 At trial, Clayes testified on direct examination he had taken the case that contained the .45 semiautomatic pistol from the Nissan's trunk. (Tr.212) He said on cross-examination he was not sure he had taken that case from the trunk. (Tr.230)

The gun box that Clayes first saw at Pollock's mother's house contained a Colt .45 revolver. (Tr.126-27, 212-13, 404; Gov.Exs.9, 9A-1, 19-7) He gave that box to the police inside a larger box he had removed from the Nissan's trunk. (Tr.58, 127, 212-13, 230; Gov.Ex.9A)

Two days after the police received the guns, Pollock phoned his brother and said, "They already got all the guns 'cause Ma told 'em where they was at." (Gov.Exs.24, 24T-22,p.2) Pollock added: "I was at a buddy of mine's house and I had him pick 'em up from Ma's and Ma told him where they were at. They already got 'em all." (Gov.Exs.24, 24T-22,p.2)

II. DISTRICT COURT PROCEEDINGS

The government initially filed a criminal complaint charging Pollock with unlawful transportation of firearms and possession of a firearm during the commission of a violent crime, namely, kidnaping and rape. (R.1) A month later, a federal grand jury charged Pollock with unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). (R.14) Two months after that, the grand jury filed its first superseding indictment, which re-charged Pollock with unlawful possession of a firearm and added a count of unlawful possession of ammunition in violation of the same code section, § 922(g). (R.22) Those charges were initially scheduled for trial on February 27, 2012. (d/e 2/2/12)

A. Pollock Attempts to Tamper with a Witness.

On February 7, 2012, Pollock wrote Todd Clayes a letter recommending he avoid being served with a trial subpoena. (Tr.221; Gov.Exs.33, 33A) Pollock's letter reported the trial date and the fact that the sheriff would soon be trying to serve Clayes. The letter said that, if Clayes could avoid being served, he would not have to testify and Pollock would be released from custody because Clayes was "the only witness who [could] put [Pollock] away." (Tr.221; Gov.Ex.33) The letter suggested ways Clayes could "disappear or become invisible" until the day after the trial date: "[M]aybe go fishing in Alaska or Florida or anywhere you want. Hide. Leave state or whatever." (Tr.222; Gov.Ex.33) The letter also advised that Clayes could only be fined a thousand dollars if he received a subpoena but did not show up in court, whereas Pollock would "go to prison for up to ten years" if Clayes testified. (Tr.222; Gov.Ex.33)

Ten days later, Pollock wrote Clayes another letter, calling Det. Kraemer a "liar" and telling Clayes to "quit running to" Kraemer. (Tr.223; Gov.Ex.34) In the letter Pollock said Kraemer was "bullying" Clayes and that Clayes needed to "come over here and talk to me." (Tr.223; Gov.Ex.34) Pollock wrote: "Todd, I want you to testify. Kraemer isn't your friend. I'm your friend. Now get . . . over here and see me." (Tr.223-24; Gov.Ex.34)

The grand jury filed a second superseding indictment, which added as its third count a charge of attempted witness tampering in violation of 18 U.S.C. § 1512(b)(2)(C). (R.33) Count One listed and described nine firearms, including a shotgun, two rifles, and six handguns. Count Two listed only the high-powered rifle rounds found in Pollock's bedroom. (R.33)

B. The Trial.

1. The government's case.

Excluding the details about Pollock's prior conviction and his alleged offenses against Kim Bowyer, the Background section above and the subsection under District Court Proceedings entitled "Pollock Attempts to Tamper with a Witness" summarize the government's evidence at trial.

Bowyer testified about Pollock's retrieval of gun cases from his mother's house. (Tr.51-59, 77-78) She identified the two long-gun cases Clayes delivered to the police as two of three cases she carried to Pollock's car. (Tr.56-57, 62) Bowyer said Pollock himself carried three shoeboxes and a handgun case, including: the Dr. Scholl's shoebox (Tr.58, 130; Gov.Exs.10, 19-14); the Faded Glory shoebox (which, when delivered by Clayes, contained the Colt Super .38 caliber semiautomatic pistol) (Tr.57, 127; Gov.Exs.11, 19-10, 19-11, 19-12); a large handgun case (which contained the Essex Arms .45 caliber semiautomatic pistol)

(Tr.58, 79-80, 126; Gov.Exs.8A, 19-5, 19-6); and a large shoebox (which contained the gun box that contained the .45 caliber revolver). (Tr.58, 127; Gov.Exs.9A, 9A-1, 19-7, 19-8)

Todd Clayes testified about Pollock's display of a "semiautomatic pistol" from the Nissan's trunk. He did not describe the caliber of that gun or identify it from among the pistols admitted into evidence at trial. (Tr.187-88, 231-34) Clayes testified about his retrieval of gun cases and shoeboxes from the Nissan's trunk, his delivery to Pollock's mother's house, his retrieval of the items from there, and his delivery to the police. (Tr.193-215, 229-31, 234) Clayes also testified about the calls he received from Pollock asking him to remove a "stereo" (Tr.195-97, 200) and about Pollock's letters, including the one encouraging him to "disappear" before trial. (Tr.221-24)

The government played excerpts of the recorded calls Pollock made: (a) to his mother and sister to arrange for Clayes to take "that stuff" to his mother's house and retrieve it after the detective called his mother; and (b) to his brother, saying, "They already got all the guns." (Tr.347-51)

The Kewanee police investigator who received the guns, gun cases, and shoe boxes from Clayes identified those items and described the guns they held. (Tr.117-30) Detective Kraemer testified about the seizure of ammunition from

Pollock's bedroom (Tr.317-22) and his search of the Nissan with the busted trunk lock. (Tr.329-30)

The government also elicited testimony that the nine guns and 11 high-powered rifle rounds traveled in interstate or foreign commerce (Tr.401-06) and bore no latent prints suitable for identification. (Tr.135, 143)

2. The Defense Case.

Pollock himself did not testify. (Tr.426-28) But the district court allowed him to interrupt the government's case to call Det. Kraemer as his own witness to testify about prior inconsistent statements by Bowyer, primarily concerning her ability to send text messages and her prior statement that she also carried from Pollock's mother's house to his car a long-gun case made of cloth. (Tr.168-78)

3. The Verdict and Pollock's Post-Trial Motions.

The jury found Pollock guilty on all three counts. (d/e 2/7/13; R.70) Pollock did not request a special verdict, and the jury did not identify which gun or guns it found he possessed.

After the trial, Pollock filed a motion for a new trial and an amended motion for a new trial. Neither motion mentioned either of the alleged trial errors Pollock now argues. (R.73, R.74) The court denied both motions. (d/e 8/5 /13)

C. Sentencing.

1. The Presentence Report.

Under standard grouping rules, the presentence report grouped Pollock's three offenses and used the highest offense level for the three counts as the offense level for the group. (PSR¶¶30-31) (citing USSG §§ 3D1.1(a), 3D1.2(c)) The firearms offense in Count One produced the highest offense level. (PSR¶31)

Guideline Section 2K2.1 determines the offense level for violations of 18 U.S.C. § 922(g). (PSR¶32) The PSR found that Section 2K2.1's cross-reference to Section 2X1.1 applied here because Pollock committed the firearms offense "in connection with another offense." (PSR¶32) (citing USSG § 2K2.1(c)(1)(A)) Under Section 2X1.1, the guideline for the other offense, which was aggravated sexual abuse, determined Pollock's offense level. The base level for that offense (under USSG § 2A3.1(a)(2)) was Level 30. (PSR¶32)

The PSR increased that base by a total of ten levels to Level 40. (PSR¶37) The increase included three upward adjustments: a four-level increase (under USSG § 2A3.1(b)(1)) because the offense involved conduct described in 18 U.S.C. § 2241(a) or (b); a four-level increase (under USSG § 2A3.1(b)(5)) because Pollock abducted the victim; and a two-level increase (under USSG § 3C1.1) for

obstruction of justice due to Pollock's attempt to influence Todd Clayes. (PSR¶¶32, 36)

Prior convictions in 2009 for telephone harassment, violation of an order of protection, and aggravated stalking gave Pollock six criminal history points. (PSR¶¶42-44) He received another two points for committing the offense in this case while on probation. (PSR¶46) Those eight points placed Pollock in criminal history category IV. (PSR¶47) At Level 40 in Category IV, the imprisonment range is 360 months to life, but life imprisonment exceeded the maximum statutory penalty of 10 years on each of Counts One and Two and 20 years on Count Three, for a maximum imprisonment of 480 months with consecutive sentences. (PSR¶76) So, the PSR said the advisory imprisonment range was 360 to 480 months. (PSR¶76)

2. Pollock's Objections to the PSR.

Pollock objected to use of the cross-reference under § 2K2.1(c)(1)(A). (R.80,p.3; PSR Addendum, pp.1-2) In his Sentencing Memorandum, he argued, "Cross referencing is only available to conduct which is relevant under 18 U.S.C. § 1B1.3." (R.80, p.3) (citing *United States v. Kulick*, 629 F.3d 165, 169 (3d Cir. 2010)). He argued that the alleged criminal sexual abuse of Bowyer was "not relevant conduct" because: (a) the government could not prove by a preponderance that

he committed the underlying acts; and (b) the alleged conduct was not "temporally proximate" to his offense of conviction. (R.80,pp.3-5) He argued that, as a result, the alleged conduct could not satisfy two of the three conditions set forth in Section 1B1.3(a)(1)(A), which must be met "[f]or an act to be relevant under § 1B1.3(a)(2)." (R.80,p.3)

Overlooking the fact that he was a "prohibited person" within the meaning of § 2K2.1(a)(6), Pollock argued that his base offense level: should start at Level 12 (under Section 2K2.1(a)(7)); should increase by four levels (under Section 2K2.1(b)(1)(B)) due to the number of firearms he possessed; and should decrease by six levels (under Section 2K2.1(b)(2)) because, Pollock claimed, he possessed the ammunition and firearms solely for "lawful sporting purposes or collection." (PSR Addendum,pp.1-2; R.80,pp.7-8) He also objected to the obstruction-of-justice enhancement and to two criminal history points, but he has abandoned those last two objections on appeal. (PSR Addendum,pp.1-2; Def.Br.12)

3. Evidence Presented at the Sentencing Hearing.

(a) Kim Bowyer's testimony.

Kim Bowyer testified for the government at the sentencing hearing and provided most of the facts summarized above under "Background; Pollock Assaults Kim Bowyer and Implicitly Threatens to Silence Her." Bowyer

described how Pollock took her forcefully from her house to his and how he restrained and silenced her when the police arrived. (Sent.Tr.25-28, 44) She described Pollock's threats and how he kicked the side of her head and ordered her to kneel and bark like a dog, squeal like a pig, and fellate him. (Sent.Tr.27, 30-33, 50)

Bowyer said, after Pollock raped her, he listed the incriminating evidence she had against him, including his DNA, his fingerprints on her truck, and her daughter's witnessing his abduction of her. (Sent.Tr.32-33, 35, 47) Bowyer said Pollock "started getting into ending their lives together" and said they could "blast [their] brains out" using "a 45 hidden out in the garage somewhere." (Sent.Tr.33) Bowyer saw no guns that night but felt Pollock threatened her with "a .45" to keep her from going to the authorities. (Sent.Tr.46-47, 49, 50-55)

(b) Pollock's own testimony.

Pollock himself testified he never hit or choked Bowyer and never grabbed her by the neck or hair, never dragged her from his car, and never threatened to kill her. (Sent.Tr.61, 68) He said he went to Bowyer's house the night of the alleged sexual assault to take her dog for her while she was away. (Sent.Tr.67) According to Pollock, Bowyer got into his car on her own and refused to get out. (Sent.Tr.67, 72) He said, when the police arrived at his house, he did not restrain

or silence Bowyer but instead told her to "deal with them" while he went upstairs to shower. (Sent.Tr.69-71) He said he did not threaten Bowyer, her children, or her mother, and he did not have sex with her. (Sent.Tr.71-72)

(c) Testimony disputing Pollock's "gun collection" claim.

The district court also heard testimony from an ATF agent who disputed Pollock's claim that he possessed ammunition and firearms solely as a collection. (Sent.Tr.76-85) That claim, if proven, would have lowered by six levels Pollock's offense level calculated under Section 2K2.1(a)(6). *See* USSG § 2K2.1(b)(2). It had no effect on his offense level calculated under Section 2A3.1.

4. The District Court's Findings.

The district court heard arguments on whether the cross-reference (under § 2K2.1(c)(1)) applied and whether Pollock possessed his firearms as a lawful collection. (Sent.Tr.85-95) During its argument, the government said, if the court did not apply the cross-reference, it should apply § 2K2.1(a)(4) and start the guideline calculation at base offense level 20 because Pollock committed the firearms offense after a conviction for a violent felony – aggravated stalking. (Sent.Tr.94) (citing *United States v. Meherg*, 714 F.3d 457 (7th Cir. 2013)).

The district court found that the cross-reference applied. (Sent.Tr.97) The court said it was aware that a jury acquitted Pollock of the sexual abuse charge in

state court using a reasonable-doubt standard and consequently, the court said, it was cautious in determining that a preponderance of evidence proved a connection between Pollock's firearms possession and "the commission or attempted commission of another offense." (Sent.Tr.98) The court focused "solely on the issue of the .45 caliber weapon" and found, "based on Ms. Bow[y]er's testimony," that Pollock's mention of "murder suicide" while restraining Ms. Bowyer's movement was, by "reasonable inference," a way of "letting her know what he could do if she went to authorities." (Sent.Tr.98-99) The court questioned whether Pollock would have actually "taken her . . . life" but added that "there can be no question with the belief of Miss Bowyer at that time that Mr. Pollock could and would do it; that he was capable of doing it." (Sent.Tr.98)

The court also dismissed as "not even a close call" Pollock's claim that he possessed firearms as a lawful collection or for sporting purposes. (Sent.Tr.99) It also found, based on the jury verdict in this case, that the obstruction enhancement applied. (Sent.Tr.99)

Based on those findings, the court concluded that Pollock's offense level was 40, his criminal history category was IV, and his imprisonment range was 360 to 480 months due to the maximum statutory penalties of 120 months'

imprisonment on each of Counts One and Two and 240 months' imprisonment on Count Three. (Sent.Tr.100)

5. The Court's Consideration of Sentencing Information.

After the parties' arguments in aggravation and mitigation and Pollock's allocution, the district court listed the information it considered in determining a sentence it regarded as "sufficient but not greater than necessary." (Sent.Tr.124-25) That information included the "factors as set forth in 3553," which the court recited. (Sent.Tr.125) The court also cited Guidelines Policy Statement 5K2.9 as providing reason for imposing a consecutive sentence on Count Three. The court explained that Pollock committed the offense in Count Three while "under federal indictment for Counts I and II" and "the two point enhancement" for obstruction of justice did not "adequately account[] for the nature and circumstance of the offense." (Sent.Tr.125-26)

6. The Court's Announcement of Pollock's Sentence.

The district court then rejected Pollock's claim that he was "being singled out for everything because of Kim Boyer." (Sent.Tr.128) The court said, "The fact that you are being sentenced for the guns, the ammunition, and for tampering with the witness has little to do with Kim Bowyer and everything to do with you." (Sent.Tr.128) The court added, "The finding that I made cross-referencing the

case has to do with Kim Bowyer in the sense that she was under your control when that threat or request to commit suicide together was made, if you want to put it that way." (Sent.Tr.128)

The court announced maximum sentences of 120 months' imprisonment on each of Counts One and Two, to run concurrently, and a consecutive sentence of 120 months' imprisonment on Count Three for a "total sentence of 240 months." (Sent.Tr.128) The court also imposed a term of three years of concurrent supervised release on each count and a special assessment of $300. (Sent.Tr.128-29; d/e 8/5/13)

The judgment the court entered on August 6, 2013, does not mention any "alternative sentence." (R.85) On August 12, 2013, Pollock filed a timely notice of appeal. (R.88)

SUMMARY OF THE ARGUMENT

I. The district court used this court's Pattern Criminal Jury Instruction 4.01 to instruct the jury on the elements of the firearms offense charged in Count One. That instruction tells the jury that, to find the defendant guilty, it must find he knowingly possessed "a firearm." Pollock made only a meaningless objection to that instruction, without elaboration. He now argues the court should have required the jury to find that Pollock possessed a *particular* firearm. If Pollock did not waive that argument, he forfeited it, and the court's use of a pattern jury instruction was not plain error.

II. The prosecutors said several times that Pollock showed Todd Clayes a ".45 caliber semiautomatic pistol." Clayes testified only that Pollock showed him a "semiautomatic pistol." Four such pistols, including a .45 caliber one, were in evidence. Pollock could have shown Clayes any one of them. Pollock never objected to the misstatements. He pointed them out in closing argument, and the court told the jury that the lawyers' statements were not evidence. The prosecutors' minor mistake did not affect the jury verdict.

III. Pollock's below-range, 20-year sentence is procedurally sound and substantively reasonable. The government recommended application of the Guideline Section 2K2.1(c)(1) cross-reference based on Pollock's possession of a

firearm in connection with his kidnaping and sexual assault of Kim Bowyer. At sentencing, Bowyer testified about the incident. Pollock testified and denied any misconduct. The district court found in the government's favor, implicitly finding that Bowyer was more credible than Pollock and that Pollock sexually assaulted Bowyer. The court applied the cross-reference because, while Pollock continued to restrain Bowyer, he referred to a ".45" that was available to kill her and himself. Pollock's possession of that gun facilitated his continuing offense against Bowyer and supported application of the § 2K2.1(c)(1) cross-reference.

Otherwise, the district court properly considered the relevant § 3553(a) factors (although not in checklist fashion), and it adequately explained its sentence which is 10 years below the bottom of the advisory guideline range. It consequently enjoys a presumption of reasonableness that Pollock fails to rebut.

IV. At sentencing, the district court discussed, but did not impose, a slightly lower sentence, which the court said it would have imposed if the cross-reference had not applied. This court lacks jurisdiction to review that "alternative sentence," which was neither imposed nor a final judgment.

ARGUMENT

I. The District Court Properly Instructed the Jury Using This Court's Pattern Jury Instruction on The Elements of a Felon-In-Possession Offense.

Pollock contends the district court erred by failing to instruct the jury that, as an element of the felon-in-possession offense charged in Count One, it must agree unanimously on the specific firearm or firearms Pollock possessed. (Def.Br.15-25) Not only did Pollock fail to raise this issue in district court, but his attorney initially said he had no objection to this court's Pattern Jury Instruction 4.01. (Tr.429-30) And the attorney later agreed that the issue could be addressed in closing argument, which it was. (Tr.455, 480, 511) Nevertheless, after the court denied Pollock's motion for judgment of acquittal, the court said it could give the elements instruction over the defendant's objection, and Pollock's attorney accepted that offer. (Tr.437) So, the threshold issue here is whether Pollock waived or merely forfeited any objection to the jury instruction on the elements of a felon-in-possession offense.

A. Standard of Review.

If Pollock waived the issue, then "there can be no 'error' to correct . . . , so all appellate review of the issue is extinguished." *United States v. Cooper*, 243 F.3d 411, 415 (7th Cir 2001). If, on the other hand, Pollock merely forfeited the issue,

then this court has "a limited power" under Federal Rule of Criminal Procedure 52(b) to correct an error that is "plain," "affects substantial rights," and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States v. Olano,* 507 U.S. 725, 731 (1993)); *see also United States v. Murry,* 395 F.3d 712, 717 (7th Cir. 2005) (collecting waiver cases and holding that defense counsel's statement that he had no objection to jury instructions waived any objection and precluded appellate review).

The following review of the record establishes that Pollock waived the issue and, even if he merely forfeited it, the district court committed no error, much less a plain one.

B. The Factual Background and Analysis.

As the elements instruction for the felon-in-possession offense charged in Count One, the government proposed Government Instruction 8A. (R.57-1,p.11; Def.App. A-4) It tracked the language of this court's Pattern Jury Instruction 4.01:

> Count 1 of the indictment charges the defendant with Felon in Possession of Firearms. In order for you to find the defendant guilty of this charge, the government must prove each of the three following elements beyond a reasonable doubt:
>
> 1. The defendant knowingly possessed a firearm; and
> 2. At the time of the charged act, the defendant was a convicted felon; and

3. The firearm had traveled in interstate commerce.

(R.65,p.27)

At the instructions conference, the court and the parties reviewed each proposed instruction and compared them to this court's pattern jury instructions. (Tr.425-45) During the brief discussion of Government Instruction 8A, the court referenced the number of the relevant pattern jury instruction, and defense counsel said he had no objection:

[PROSECUTOR]:	Did we do 8A?
* * * *	
THE COURT:	No, we didn't.
* * * *	
[PROSECUTOR]:	I gave you both the numbered and a clean [copy], Judge.
* * * *	
THE COURT:	Okay. Got it. Thank you. Okay. Let's go to 4.01.
[DEFENSE ATT'Y]:	Judge, no objection.
THE COURT:	All right. That will be given.

(Tr.429-30)

Later during the conference, the court asked if Pollock would move for a judgment of acquittal and said the motion would "address these instructions." (Tr.432) The court told Pollock's attorney, "If I deny the motion . . . , these instructions as to each count can be given over your ob[jection] based upon your request for a directed verdict." (Tr.432) The court added, "[W]hat I am saying is

. . . if I don't toss the case then I'm going to give the instruction [then under consideration] over your objection for the record. Okay? So go ahead." (Tr.433)

Pollock's attorney then argued for acquittal on each count. (Tr.433-35) He challenged the sufficiency of evidence on Count One (and the other counts) but said nothing about the validity of the elements instruction. (Tr.433-35) The court denied the motion but offered to give Government Instruction 8A over objection:

[THE COURT]:	So with that [denial] in mind, I would go back and 8A would be given over objection given my ruling, if you prefer, Mr. [Defense Counsel].
[DEFENSE ATT'Y]:	That's fine, Judge.

(Tr.437)

The court proposed and adopted the same arrangement for Government Instructions 21 and 24, the elements instruction relating to Counts Two and Three. That is, the court gave the instructions over Pollock's objection, but his objection was to the court's denial of his motion for acquittal, not to any issue with the instructions:

THE COURT:	Number 21 as to Count II. Issues Instruction.
[DEFENSE COUNSEL]:	Judge, . . . I don't have any objection to the instruction.
THE COURT:	Given my ruling of --
[DEFENSE COUNSEL]:	In light of your ruling, yes.
THE COURT:	Got it.

(Tr.438)

THE COURT:	[Government Instruction] 24 is Count III, issues instruction of 18 USC 1512(b)(2)(C).
[DEFENSE COUNSEL]:	No objection as to the form.
THE COURT:	Got it.

(Tr.440)

The court marked each of the three elements instructions as "g[iven] over obj[ection] per ruling." (R.65,pp.27, 28, 32)

Shortly before closing arguments, the prosecutors proposed amending Instruction 8A to clarify that the jury needed to find "unanimously that the defendant possessed at least one of the nine firearms alleged." (Tr.453-54) Mr. Pollock's attorney said he "would have the same objection that [he] expressed earlier." (Tr.454) But the record reveals no earlier expressed objection other than the attorney's acceptance of the court's proposal that it give the instruction over objection in light of its denial of Pollock's motion for judgment of acquittal.

The court said the proposed change was unnecessary because the relevant instruction said the jury needed to find that the "defendant knowingly possessed a firearm" and clearly did not require finding "he possessed all of them." (Tr.455) The court said the issue "could be addressed in closing by correctly stating that

[the jurors] don't have to find [the defendant] possessing all of [the nine firearms]." (Tr.455)

The prosecutors asked Mr. Pollock's attorney if he agreed with that solution. He said, "Yeah, that's all right. That's what I said to you." (Tr.455) The court concluded the issue by saying, "[The prosecutor will] argue from the instruction that [the jurors] just need to find that [the defendant] possessed at least one firearm to establish that element, that's a correct statement of the law." (Tr.455)

Based on these facts, Pollock waived any "specific firearm" objection to the elements instruction for Count One. *See United States v. Perez,* 612 F.3d 879, 883-84 (7th Cir. 2010) (reiterating that attorney may waive, on defendant's behalf, objection to instructions). The only objection Pollock even arguably made was an objection -- based on his belief that the district court should have granted his motion for judgment of acquittal-- that the court should not have instructed the jury that it could find Pollock guilty. Such a meaningless objection, in light of his subsequent "Yeah, that's alright," cannot save from waiver the objection Pollock now argues. *See United States v. Natale,* 719 F.3d 719, 729-30 (7th Cir. 2013), *petition for cert filed* (Dec. 20, 2013)(No. 13-744) (collecting cases in which this court strictly applied waiver rule to affirmative expressions of approval of jury instructions).

Even if Pollock merely forfeited the issue, the alleged error was far from "plain." Under Rule 52(b), this court cannot correct an error "unless the error is clear under current law." *Olano,* 507 U.S. at 734. The instruction at issue here reflects current law. It is a recitation of this court's Pattern Jury Instruction 4.01, the use of which this court has previously upheld. *See, e.g., United States v. Ray,* 238 F.3d 828, 834-35 (7th Cir. 2001) (finding no plain error in the instruction's use of "should" acquit, rather than "must" acquit); *see also United States v. King,* 897 F.2d 911, 913 n.1 (7th Cir. 1990) (listing the same three elements as in PJI 4.01).

Furthermore, Pollock's claim of error cannot survive in the face of the instructions as a whole and the government's closing arguments. Pollock's complaint is that the given instruction did not require the jury to find unanimously that Pollock possessed a specific gun. Yet, the jury instructions, read as a whole, required just such a finding. The court instructed the jury that its verdict must be unanimous; that the government must prove each element beyond a reasonable doubt; and that one of the elements required proof that Pollock knowingly possessed "a firearm." (Tr.467, 472)

That combination of instructions told the jury it needed to be unanimous about the firearm Pollock possessed. The prosecutors echoed that message. The first prosecutor said in closing argument:

> [T]he government need only prove that the defendant possessed a single firearm and that you find unanimously that he did so in order to prove Count I. We really don't have to prove that he possessed every one of those. Only *you must find unanimously that he possessed a single one of those firearms*. I believe we have proven that he possessed all of them. But you must find unanimously that he possessed at least one of them.

(Tr.480) (emphasis added).

If that argument left doubt about the requirement for unanimity on a specific firearm, the government's rebuttal argument erased the doubt. There, the prosecutor told the jury: "You have to decide beyond a reasonable doubt and all agree at some point [Pollock] possessed at least one of these [firearms]. And *you have to agree on which one* or all nine of these firearms that he possessed them." (Tr.511) (emphasis added).

Finally, even if use of the pattern jury instruction without alteration can be construed an error, the error was harmless. Although the evidence of Pollock's possession of specific firearms (including a shotgun, two rifles, and several handguns) was largely circumstantial, that evidence was substantial. It began with Pollock's announcement to his mother that he was at her house to collect his "guns." It concluded with his recorded call to his brother saying "they" got his "guns" and his letter to Clayes saying he would go to prison if Clayes testified.

In between was a series of transfers of gun cases and shoeboxes that bore the weight of guns, that remained in Pollock's actual or constructive possession, and that, when opened, revealed the very items Pollock said he was retrieving from his mother's house – that is, guns, including (among others) a shotgun and two Remington rifles from long-gun cases both Kim Bowyer and Todd Clayes identified and a Colt Super .38 caliber semiautomatic pistol from the Faded Glory shoebox they also both identified.

II. The District Court Did Not Plainly Err by Failing, on Its Own Motion, to Declare a Mistrial When the Prosecutors Mistakenly Described the "Semiautomatic Pistol" Pollock Showed Todd Clayes as a ".45 Caliber Semiautomatic Pistol."

Pollock does not contest that Todd Clayes testified that Pollock showed him a semiautomatic pistol. Pollock argues only that Clayes never described the caliber of that pistol, yet the prosecutors repeatedly referred to it as a ".45 caliber semiautomatic pistol." The government agrees. But Pollock did not object to the mistaken description during trial, probably because the difference in prejudice between ".45 caliber semiautomatic pistol" and "semiautomatic pistol" is insubstantial. Pollock's defense was that he possessed no firearms, including the pistol Clayes saw. (Tr.496-502) So, the caliber of that pistol was far less significant to both Pollock and the government than the testimony that Clayes saw a pistol.

Nevertheless, Pollock now contends, in effect, that the district court plainly erred by failing to declare a mistrial because of the prosecutors' inclusion of the caliber in their description of the semiautomatic pistol Clayes saw. (Def.Br.25-31) In the context of the trial as a whole, the prosecutors' misstatements – although repeated – were not so prejudicial as to affect the jury verdict.

A. Standard of Review.

Ordinarily, this court reviews a district court's denial of a motion for mistrial for an abuse of discretion, "because the district court is in a superior position to

judge 'the seriousness of the incident in question, particularly as it relates to what transpired in the course of the trial.'" *United States v. Johnson,* 655 F.3d 594, 602 (7th Cir. 2011) (quoting *United States v. Lauderdale,* 571 F.3d 657, 660 (7th Cir. 2009)). But where, as here, the defendant did not request a mistrial or otherwise object to the prosecutors' statements, this court reviews the issue only for plain error. *United States v. Alexander*, 2014 WL 407329 *3 (7th Cir. Feb. 4, 2013); *United States v. Anderson,* 450 F.3d 294, 300 (7th Cir. 2006); *United States v. Miller,* 199 F.3d 416, 423 (7th Cir. 1999).

Plain-error review requires Pollock "to establish 'not only that the [prosecutors'] remarks denied him a fair trial, but also that the outcome of the proceedings would have been different absent the remarks.'" *United States v. Bowman*, 353 F.3d 546, 550 (7th Cir. 2003) (quoting *United States v. Sandoval,* 347 F.3d 627, 632 (7th Cir. 2003), which quotes *United States v. Anderson,* 303 F.3d 847, 854 (7th Cir. 2002)); *see also United States v. Granados,* 142 F.3d 1016, 1021 (7th Cir. 1998) (stating that this court employs its discretion to correct plain error only "in those circumstances in which a miscarriage of justice would otherwise result").

B. Analysis.

Pollock cannot establish that the prosecutors' mischaracterization of the semiautomatic pistol affected the verdict. He cannot even establish that the mischaracterization denied him a fair trial.

In deciding whether prosecutors' remarks met the less rigorous standard – denial of a fair trial, this court considers five factors, in the context of the entire record: (1) the nature and seriousness of the misconduct; (2) the extent to which the defense invited the comments; (3) the defendant's opportunity to counter the prejudice; (4) the extent to which a jury instruction cured the prejudice; and (5) the weight of the evidence supporting the conviction. *Anderson*, 450 F.3d at 300. Here, Pollock did not invite the prosecutors to mischaracterize the pistol he showed Clayes. But, otherwise, the factors weigh in favor of finding that Pollock did not suffer an unfair trial, much less a miscarriage of justice.

1. The Prosecutors' Mistake Was Not Serious.

First, the record contains no hint that prosecutors' addition of a caliber to the semiautomatic pistol Pollock displayed was serious misconduct. Rather, it appears to have been an inadvertent mistake, and a relatively minor one at that. The record does not explain why the prosecutors made the mistake; they offered no explanation because the issue never arose below. But the record suggests the

prosecutors genuinely believed Clayes would describe and did describe the gun Pollock showed him as a ".45 caliber" semiautomatic pistol. One of the prosecutors anticipated that testimony in opening statement, saying, "[Pollock] took . . . Clayes out to one specific car . . . . and he takes out one particular gun, a Colt .45 military semiautomatic pistol, and he shows it to Mr. Clayes." (Tr.18) Later in the trial, soon after Clayes testified that Pollock showed him a "semiautomatic pistol," the prosecutor asked, "So after . . . [Pollock] pulled out the .45 pistol, . . . what happens next?" (Tr.192)[3]

The prosecutors made similar misstatements in closing and rebuttal arguments:

- "They open the [Nissan's] trunk and what is there? The defendant pulls out and Todd Clayes claims to have seen at that time a .45 caliber automatic [*sic*] pistol. Ladies and gentlemen, Government's Exhibit Number 8, a .45 caliber automatic [*sic*] pistol, wouldn't you expect to find a .45 caliber automatic pistol in this evidence. Here is one; Government's Exhibit Number 8." (Tr.482)

- "[Defense] counsel made much of the fact that I said a .45 automatic. Remember what happened in that little give and take with Todd Clayes? I said .45 automatic and Todd Clayes . . . said 'semiautomatic' because that's the proper name for this gun, a .45 caliber semiautomatic.

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3 In response to Pollock's motion for judgment of acquittal, the prosecutor repeated that Clayes "not only saw the .45 caliber semiautomatic pistol that the defendant showed him" but Clayes also took all the guns and boxes from the Nissan's trunk. (Tr.435-36) The record contains no suggestion that, in summarily denying Pollock's motion, the district court misconstrued Clayes's testimony or that the court relied on – or was misled by – the prosecutor's misstatement. (Tr.437)

> . . . [Defense counsel,] when he made his closing arguments[,] . . . called it an automatic. That's not what it is. And this is not what Todd Clayes says he saw. He said he saw this .45 caliber semiautomatic, and he is correct that's the right name for this. He saw this where? He saw this in the trunk of the Nissan." (Tr.506-07)

In each instance, the prosecutor accurately related highly incriminating details of Clayes's testimony – that is, Pollock removed a semiautomatic pistol from the Nissan's trunk (which was the same trunk from which Clayes later removed several gun cases and shoeboxes). The caliber of the pistol was a minor feature of each statement. It likely had little impact on the jury. Even if it did, this court should not assume the impact prejudiced Pollock. The discrepancy between the prosecutors' misstatements and Clayes's testimony could just as easily have harmed the government's case by making the jury skeptical of the prosecutors' recollection of testimony. *See Johnson*, 655 F.3d at 602 (remarking that discrepancy between prosecutor's opening statement and evidence could "easily harm the government's case").

The fact that a prosecutor's closing argument linked Clayes's testimony to a particular trial exhibit also added little prejudice to the misstatement. The prosecutor could have made the same point without mentioning the pistol's caliber by saying, "Wouldn't you expect to find a semiautomatic pistol in this evidence. Here are four; Government's Exhibit Numbers 4, 6, 7, and 8."

2. Pollock's Attorney Responded to the Prosecutors' Misstatements.

Pollock's claim that he had no opportunity to "mitigate the error" is incorrect. (Def.Br.31) Not only did he have an opportunity to mitigate the error, but he seized that opportunity assertively in closing argument to dispute the prosecutors' characterization of the pistol Clayes saw:

> Now I do disagree with what [the prosecutor] said. . . . I believe it was [the prosecutor] who said to Mr. Clayes that he showed you a .45 automatic and Mr. Clayes testified he showed me a semiautomatic.
>
> There is no .45. . . . [Y]ou can go off your recollection and your notes. Mr. Clayes never identified a gun other than to say, well he showed me a semiautomatic. He didn't say that it was black or silver or purple or pink. He didn't say how long or anything like that.

(Tr.498-99)

In short, the prosecutors' description of the semiautomatic pistol's caliber was hotly contested. Pollock presented the issue for the jurors to decide based on their "recollection" and "notes." If the jurors had good recollections or good notes, Pollock won that contest.

3. The Court's Instructions Should Have Cured Any Prejudice.

Pollock now argues, "[T]he misstatements were not neutralized by any curative instruction because the court did not provide one." (Def.Br.31) That claim is mistaken.

Statements of the prosecuting attorneys were at issue, and the court specifically instructed the jury about such statements, saying:

> [The] lawyers[‘] statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers[‘] questions . . . are not evidence.

(Tr.461-62)

In addition to telling the jury what was *not* evidence, the court told the jury what *was* evidence. It did not include what the prosecutors said:

> The evidence includes only what the witness[es] said when they were testifying under oath, the exhibits that I allowed into evidence, and the stipulations that the lawyers agreed to. . . . Nothing else is evidence.

(Tr.461)

Pollock’s attorney was even more direct in his closing argument. Immediately before disputing the prosecutors’ description of the semiautomatic pistol’s caliber, the attorney repeated the court’s instruction and asked the jury to rely, not on what the prosecutors said, but on its memory of Clayes’s testimony: “The Court has already instructed you and I will remind you, whatever you remember is what you’re to go off of.” (Tr.498) The attorney then argued, “Mr. Clayes testified he[, Pollock,] showed me a semiautomatic.” (Tr.498)

Assuming the jury followed the court’s instructions, the prosecutors’

misstatements did not deny Pollock a fair trial or affect the verdict.

4. The Evidence of Pollock's Guilt Was Substantial.

Finally, as presented in our Statement of the Case and summarized in our previous argument, the evidence of Pollock's unlawful possession of firearms was substantial. Pollock argues otherwise. He claims the government's evidence was weak and that the prosecutors' mischaracterization of Clayes's testimony allowed the jury to "more easily conclude that Pollock actually possessed the firearms that Clayes collected from Pollock's mother's house." (Def.Br.31) The fact that Pollock removed a semiautomatic pistol from among other boxes in the Nissan's trunk may have given the jury one of several reasons to believe that Pollock put his guns in that trunk and that Clayes later delivered those guns to the police. But the caliber of the semiautomatic pistol Pollock showed Clayes added little to the strength of the government's otherwise substantial proof of guilt on Count One, and Pollock does not challenge his convictions on Counts Two and Three.

III. Pollock's Sentence Is Procedurally Sound and Substantively Reasonable.

Pollock challenges his sentences on several procedural and substantive grounds. (Def.Br.28-30; 32-46) We oppose each challenge.

A. Standards of Review and Legal Framework.

This court conducts a *de novo* review for any procedural errors; it reviews a sentence for substantive reasonableness under an abuse-of-discretion standard. *United States v. Annoreno,* 713 F.3d 352, 356-57 (7th Cir.), *cert. denied,* 134 S.Ct. 335 (2013).

For procedural challenges, this court looks to see whether the sentencing judge properly calculated the guideline range, recognized that the guideline range was not mandatory, considered the sentencing factors in 18 U.S.C. § 3553(a), selected a sentence based on facts that were not clearly erroneous, and explained the sentence adequately. *Gall v. United States*, 552 U.S. 38, 53 (2007); *United States v. Jackson*, 547 F.3d 786, 792 (7th Cir. 2008).

If the sentence is procedurally sound, this court reviews its substantive reasonableness and presumes any sentence within a properly calculated advisory guideline range is reasonable. *Rita v. United States,* 551 U.S. 338, 350-55 (2007); *United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir. 2005) (adopting a rebuttable presumption of reasonableness for within-guidelines sentence). That

presumption applies with even greater force to below-range sentences, for "[i]t is hard to conceive of below-range sentences that would be unreasonably high." *United States v. George,* 403 F.3d 470, 473 (2005).

B. Analysis.

1.The District Court Properly Calculated the Advisory Guideline Range.

Pollock contends the district court miscalculated his guideline range, which was based on the court's conclusion that Pollock possessed a firearm in connection with his sexual assault of Kim Bowyer. Pollock challenges on several grounds the district court's conclusion regarding the sexual assault and argues that, even if that conclusion is valid, the court misapplied the relevant guidelines. (Def.Br.36-46) We disagree with each of his claims.

The guideline at issue is Section 2K2.1(c)(1)(A). It provides:

> If the defendant used or possessed any firearm . . . in connection with the commission or attempted commission of another offense . . . , apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above [under § 2K2.1(a)].

Section 2X1.1 directs the sentencing court to apply the guideline for the other offense. The guideline for an offense that is closest to rape or sexual assault is the guideline for criminal sexual abuse, Section 2A3.1, which is the guideline the district court applied.

Pollock first challenges the district court's application of the sexual-abuse guideline because the court allegedly failed to make a finding of sexual abuse and failed to explain its finding or its credibility determination. But, as Pollock acknowledges, the district court's determination that Pollock sexually assaulted Bowyer is a factual finding, which this court reviews for clear error. (Def.Br.36) (citing *United States v. Quintero*, 618 F.3d 746, 755 (7th Cir. 2010)). "[A] district court's finding is clearly erroneous only if [this court] cannot avoid a definite and firm conviction that a mistake has been made." *United States v. McCauley*, 659 F.3d 645, 652 (7th Cir. 2011) (internal quotation marks omitted). The district court made no mistake here. The record (which includes testimony and exhibits admitted at the suppression hearing) amply supports a finding that Pollock sexually assaulted Bowyer.

Although the court did not say explicitly that Bowyer was more credible than Pollock and that Pollock raped Bowyer, those findings were the clear implication of the court's remarks. The court had heard about the sexual assault at the suppression hearing and read about it in one of the search warrant affidavits admitted at that hearing, as well as in the police reports about the incident. (Hrg.Tr.26-27, 37; Hrg.Ex.SWA-2,pp.4, 6; Def.App.B.53-55, 57) The court had also heard and observed Bowyer at trial and could reasonably infer that the jury

found her credible despite defense counsel's challenging her (as he did again at the sentencing hearing) about prior inconsistent statements, primarily about a prior incident. (Sent.Tr.38-44) And, the presentence report had forewarned the court about Pollock's narcissistic personality disorder, which causes him to blame others for his problems, as he did in his calls from the jail (variously blaming Bowyer, Clayes, his mother, and Detective Kraemer) and in his testimony (blaming Bowyer). (PSR¶63) The court referred to that mental health assessment during its explanation of its sentence, but the assessment also likely, and reasonably, influenced the court's credibility determination. (Sent.Tr.129)

After hearing testimony from Bowyer for the second time and Pollock for the first time, the court announced at the sentencing hearing, "On the . . . issue of cross-referencing, . . . I'm going to find for the government and the probation's position." (Sent.Tr.97) The court said the jury's acquittal of Pollock on the sexual assault charge in state court counseled the court to be "cautious in making some determination," but it distinguished the preponderance-of-the-evidence standard from the beyond-a-reasonable-doubt standard the jury applied in state court. The court concluded, "So I believe by a preponderance of the evidence on that [cross-reference] issue, the government has prevailed." (Sent.Tr.98-99) The court's determination clearly implies a finding that Pollock sexually assaulted Bowyer.

That finding is supported by the court's credibility determination, which is equally clear, albeit implicit. Two statements in particular support the conclusion that the court found Bowyer to be more credible than Pollock. First, during its explanation of its ruling, the court said it interpreted the mention of suicide, "based on Ms. Bowyer's testimony," to be a proposed murder-suicide. Only Bowyer mentioned the proposed "suicide." (Sent.Tr.33-34, 49) Pollock denied even having consensual sex with Bowyer. (Sent.Tr.72) So, the court obviously credited her account of the incident over his. Second, the court said, "[T]here can be no question with the belief of Miss Bowyer . . . that Mr. Pollock could and would . . . and was capable of doing it" – that is, carrying out a murder-suicide. (Sent.Tr.98) The court's statement that "there can be no question" about Bowyer's belief establishes which witness the court credited: Bowyer.[4]

The court's crediting Bowyer's testimony virtually eliminates any possibility

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4 Pollock also argues the district court committed reversible procedural error by failing to explain why it credited one of Bowyer's supposedly inconsistent statements over another. (Def.Br.39-41) But the two statements Pollock references are not inconsistent. Rather, the second one expands on the first. Moreover, both statements are consistent with Bowyer's testimony. In her first statement to the police after the incident, Bowyer described the kidnaping and sexual assault and said Pollock threatened to kill her if she moved while he took a shower and he later said he wanted to kill himself. (Def.App.B.54) The next day, Bowyer added that, in addition to "talking about suicide," Pollock asked her what she thought about putting their heads together and pulling the trigger on "his 45 gun . . . to end their lives." (Def.App.B.55) Both reports discuss Pollock's suicide talk. Only the second report discloses the proposed suicide-murder, which is an additional detail, not an inconsistency.

of a clear error in the court's finding that Pollock sexually assaulted Bowyer. *See United States v. Cox,* 536 F.3d 723, 729 (7th Cir. 2008) (stating, "Determinations of witness credibility are entitled to great deference and can virtually never be clear error." (internal quotation marks omitted)).

Pollock argues, however, that even if he sexually assaulted Bowyer, he did not commit the offense in connection with his possession of a firearm, so the district court erred in applying the Section 2K2.1(c)(1) cross-reference. (Def.Br.41-46) His argument mistakenly assumes that Pollock's sexual assault of Bowyer ended with his climax. Perhaps from Pollock's perspective, that was the end of the incident. But it certainly was not the end for Bowyer. Nor did the district court regard the offense as concluded at that point. As the court said, "The restraint of [Bowyer's] movement continued throughout this time." (Sent.Tr.98)

Based on the guideline commentary, Pollock possessed a firearm "in connection" with the sexual assault if the firearm "facilitated, or had the potential of facilitating," the sexual assault. (USSG § 2K2.1, comment. (n.14)) The district court properly concluded that the firearm had that effect. Pollock possessed the ".45 caliber weapon" in his garage to facilitate, or potentially facilitate, his sexual assault of Bowyer so long as his restraint of her, and the potential for additional assaults, continued. In fact, after forcing her to perform

fellatio and then raping her, Pollock threatened to kill Bowyer if she moved from the bathroom while he took a shower. (Def.App.B.53-54) His threat to end her life (and his) with his "45" was part of Pollock's continuing control of Bowyer. As the district court concluded, "The restraint of her movement continued throughout this time and at the very least an inference could be drawn that letting her know what he would do if she went to authorities." (Sent.Tr.98-99)

In an unpublished *per curiam* order, the Eleventh Circuit addressed an analogous situation. *United States v. Arneth*, 294 Fed. App'x 448, 453-54 (11th Cir. 2008) (unpublished). There, a convicted felon falsified his fingerprints in order to be hired as a police officer, a job that required him to carry a firearm. The district court applied a Section 2K2.1 guideline enhancement because the defendant possessed firearms as a police officer "in connection with" his fraudulent acts in the application process. *Id.* at 454. On appeal, the defendant argued, as does Pollock, his possession of a firearm did not "facilitate" another offense because he had completed the other offense (namely, the fraud) before he possessed the firearm and his possession of firearms did not facilitate his covering up his prior convictions. *Id.* The Eleventh Circuit rejected that argument, ruling that the defendant's use of a gun perpetuated his fraud scheme and consequently the district court did not clearly err in applying the "in connection with"

enhancement. *Id.*

That same reasoning should apply here. Pollock mentioned his possession of "45" to facilitate his continued restraint of Bowyer, which involved two sexual assaults and at least two threats to kill her, one explicit and the other implicit.

2. The District Court Adequately Considered the Section 3553(a) Factors.

In a four-sentence argument, Pollock contends the district gave only cursory attention to the Section 3553(a) sentencing factors. (Def.Br.32-33) His argument suffers several infirmities. First, Pollock has not identified any specific § 3553(a) factor that he believes the court should have discussed and which might have made a difference in his sentence. So, the alleged error is, at best, technical and not a "significant procedural error."

Second, Pollock's argument implies that the court should have discussed all the § 3553(a) factors. But the law is otherwise. "[T]he district court is not required to recite and address each of the § 3553(a) sentencing factors." *United States v. Lyons*, 733 F.3d 777, 785 (7th Cir. 2013).

Third, a defendant bears some responsibility for pointing out the factors the defendant believes the sentencing judge should consider. *See, e.g., United States v. Reyes-Medina,* 683 F.3d 837, 840 (7th Cir. 2012) (stating, the district court "must allow a defendant to point out any of the § 3553 factors that might justify a

sentence outside of the guidelines range"). Here, neither Pollock nor his attorney mentioned any § 3553(a) factor at sentencing. Pollock's attorney sought a two-year sentence (which he described as "an incredible departure") based on the fact that Pollock was a church-going person with a limited history of violence. (Sent.Tr.111-13) Pollock began his allocution by telling the judge, "I don't feel any statement I make is going to carry any weight in your courtroom." (Sent.Tr.112) He likely fulfilled his own prophesy by then presenting a lengthy proclamation of his innocence and a denunciation of Kim Bowyer. (Sent.Tr.113-24)

Fourth, as explained below, the court's explanation of its sentence should satisfy this court that the district court gave adequate consideration to the relevant § 3553(a) factors.

3. Pollock's Sentence Was Not Based on Any Clearly Erroneous Facts.

Pollock does not claim the district court relied on inaccurate information at sentencing. Nor does the record support such a claim. So, any suggestion of a procedural error due to reliance on erroneous facts falls flat. Pollock argues only that the government "improperly mischaracterized witness testimony at . . . sentencing." (Def.Br.25) But Pollock misunderstands the evidence and is consequently wrong about both alleged mischaracterizations.

Immediately after testifying that Pollock climaxed inside her, Bowyer testified that he talked about the evidence she had against him, saying: "[Y]ou got my DNA. I'm sure they will fingerprint the truck." (Sent.Tr.32-33) Pollock now argues, "[Bowyer] testified that Pollock said the authorities would find his fingerprints and DNA on her truck." (Def.Br.26) That's doubtful. Pollock himself later proclaimed the rape couldn't be proven because, "There is no rape test kit done." (Sent.Tr.119) His comment about DNA was surely a post-coital reference to Bowyer's having his semen.

Pollock similarly misconstrues the prosecutor's statements at sentencing about "the .45" Pollock said was available to commit suicide. (Def.Br.28-29) The prosecutor used the same description Bowyer had used– a ".45." (Sent.Tr.32-33, 49, 51-52, 55, 89-91) The prosecutor never said the gun was one of the two .45's in evidence at trial, and even if he had, the prejudice to Pollock is not obvious. Such a comment could not have "denied the defendant his right to a fair . . . sentencing," as Pollock now claims. (Def.Br.25)

4. The District Court Adequately Explained the Sentence.

Pollock asserts that the district court provided this court "with no information as to why Pollock received a 20-year sentence." (Def.Br.33) But, if "little explanation is necessary when a court decides to impose a sentence within the

Guidelines range," *United States v. Tyra,* 454 F.3d 686, 688 (7th Cir. 2006), then even less explanation should be necessary from the defendant's perspective when, as here, the court decides to impose a below-range sentence.

Moreover, the court did not fail to consider any principal non-frivolous arguments Pollock made, because Pollock did not make any. His attorney presented only brief, stock arguments about Pollock's being a church-goer and having no substantial prior record of serious violence. (Sent.Tr.110-12) Pollock himself spoke at length, but his proclamation of innocence required no response from the court. As this court has repeatedly said, "[A] sentencing court is certainly free to reject [stock arguments] without discussion." *United States v. Grigsby,* 692 F.3d 778, 791 (7th Cir. 2012). Nor must a sentencing court comment on arguments such as Pollock's that are so weak they merit no discussion. *See, e.g., United States v. Cunningham,* 429 F.3d 673, 678 (7th Cir. 2005).

Although the district court appropriately did not "step through each § 3553(a) factor in checklist fashion," it gave meaningful consideration to the relevant factors in light of the individual circumstances of this case. *Grigsby,* 692 F.3d at 791. Perhaps most significantly, the district court applied the Section 2K2.1(c)(1) cross-reference and implicitly credited Kim Bowyer's testimony. (Sent.Tr.98-99) Although the court did not say as much, it must necessarily have concluded that

Pollock was a perjurer, kidnaper, and rapist. In light of those characteristics, Pollock is fortunate the court did not impose an even harsher sentence.

Contrary to Pollock's claim, the district court provided this court an adequate explanation to review its decision to impose consecutive sentences on the witness-tampering count. The court specifically referenced Guideline Policy Statement § 5K2.9, which authorizes an upward variance "[i]f the defendant committed the offense in order to . . . conceal the commission of another offense." As the court noted, the two-level enhancement for obstruction of justice did not adequately account for the seriousness of Pollock's attempted witness tampering. (Sent.Tr.125-26) Pollock was under indictment for the firearms and ammunition offenses at the time – indeed, his tampering attempt was virtually on the eve of trial – when he tried to persuade Todd Clayes, an important government witness, to avoid process and thereby avoid testifying so Pollock could evade justice. As the court explained (and this court can review), that conduct deserved greater punishment than the small offense-level bump the guidelines provided.

The factor that seemed most important to the court in determining an appropriate sentence was the characteristics of Pollock. The court surely recognized, based on Pollock's allocution and conduct throughout the proceedings, that Pollock was a remorseless offender. The court commented on

that characteristic specifically, saying: "Mr. Pollock, you . . . believe that you are being singled out for everything because of Kim Bowyer. The fact that you are being sentenced for the guns, the ammunition, and for the tampering with the witness has little to do with Kim Bowyer and everything to do with you." (Sent.Tr.128)

Moments later, the court was even sharper in its evaluation of Pollock when it referenced the mental health assessment of Pollock, which found he had a narcissistic personality disorder that was untreatable because Pollock did "not see himself as having any significant personality problems of his own making." (PSR¶63; Sent.Tr.129) The court summarized its own assessment of Pollock when it said: "[A]nything more that needs to be said about you is set forth in paragraph 63, Dr. [U]lms' characterizing of you that [the prosecutor] referred to. It is conduct that is abundantly clear by spending any amount of time with you as we have." (Sent.Tr.129) That comment alone affords this court adequate basis to review the district court's reason for imposing a 20-year sentence, for the court obviously regarded Pollock as someone who needed to be dealt with harshly for his violent conduct because he did not acknowledge that he had done anything wrong and was consequently incapable of being deterred.

5. Pollock's Below-Range Sentence Is Reasonable.

Pollock does not argue that his concurrent 10-year sentences for his firearms and ammunition offenses are substantively unreasonable. Nor does he contest that a consecutive sentence for witness tampering was substantively unreasonable. His narrow claim is that a 10-year sentence for witness tampering is too high and consequently unreasonable. (Def.Br.33-35) His argument faces a steep uphill challenge with two seemingly insurmountable obstacles.

First, Pollock's total imprisonment sentence of 20 years was substantially below the low end of his 30-to-40-year advisory guideline range. As this court said in *George,* "[i]t is hard to conceive of below-range sentences that would be unreasonably high." 403 F.3d at 473. It is harder still to conceive that a sentencing court abused its discretion by failing to grant an even greater variance after varying downward 10 years -- 33 percent – from the low end.

Second, Pollock's argument crashes against the guideline for "Sentencing on Multiple Counts of Conviction." That guideline provides: "If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment." USSG § 5G1.2(d). Here, the count

carrying the highest punishment is the witness-tampering count – 20 years. Had the district court strictly followed Section 5G1.2(d), it would have imposed a 20-year sentence on Count Three, which renders Pollock's claim of error harmless. Instead, the court exercised its discretion to: vary downward; impose half of the highest statutory maximum; and run that sentence consecutively to concurrent maximum sentences for the other two offenses. That decision cannot be unreasonable. *See, e.g., Reyes-Medina,* 683 F.3d at 843 (affirming sentences the sentencing court imposed consecutively, and consistently with § 5G1.2, to reach the bottom of the guideline range).

IV. This Court Lacks Jurisdiction to Review the Lower "Alternative Sentence" the District Court Discussed.

After calculating Pollock's guideline range using the § 2K2.1(c)(1) cross-reference, the district court said, "[I]f the Seventh Circuit were to disagree with me [about the applicability of the cross-reference], it would be my position that under 2K2.1(a)(4)(A), the base offense level would be 20 because of the case of *United States v. Meherg* [714 F.3d 457 (7th Cir. 2013)]which was decided April 8, 2013, that one of Mr. Pollock's criminal convictions was for aggravated stalking and that constitutes a crime of violence." (Tr.101) The court said that, with six levels of upward adjustments, the total offense level would be Level 26 and the imprisonment range at Category IV would be 92 to 115 months on each count. (Tr.101)

The court later described the sentence it would have imposed if it had not applied the cross-reference:

> [A]lternatively, if I had just found against the cross-reference and for the gun and on the gun issue and then establish the guidelines accordingly, the guideline range would have been 92 to 115 months. I would have imposed 115 months on Count I and II concurrent, and because I think a consecutive sentence is necessary, . . . I would have imposed a 115 months[' sentence] . . . on Count III, consecutive to Counts I and II. But I'm not sentencing in that regard. I'm sentencing you for – alternatively under the

> findings that I made that cross-reference the specific Act of the .45 caliber and request to commit suicide in the commission of or continuing commission of the offense.

(Sent.Tr.127)

Pollock challenges this "alternative sentence" as procedurally flawed.[5] (Def.35-36, 46-52) But this court has jurisdiction to review only "final judgments of the district courts" and sentences that were actually imposed. 28 U.S.C. § 1291; 18 U.S.C. § 3742. The "alternative sentence" is neither.

This court need not address Pollock's arguments. If this court concludes the district court erred in applying the § 2K2.1(c)(1) cross-reference, the case should be remanded for re-sentencing, and the probation office should prepare a revised presentence report. If that report recommends applying § 2K2.1(a)(4) (for a prior violent felony conviction) and not applying 2K2.1(b)(2) (for a firearms collection), Pollock will have an opportunity to present in district court the arguments he presents here. On the other hand, if this court affirms the district court's application of the cross-reference but vacates the sentence on some other ground, the district court's alternative calculations will play no role at re-sentencing.

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5 For his claim of reversible procedural error, Pollock relies on *United States v. Desantiago-Esquival*, 526 F.3d 398, 401 (8th Cir. 2008), in which the Eighth Circuit vacated alternative sentences. But there, the district court actually imposed – and presumably entered judgment on – two sentences, the lower of which would become effective only if the defendant, an illegal alien, stipulated to voluntary removal.

CONCLUSION

For the reasons presented above, this court should affirm the district court's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains 12,593 words and 1,172 lines of text as shown by Microsoft Word 2010 used in preparing this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2014, I caused the Brief of Plaintiff-Appellee to be electronically filed with the Clerk of the Court using the ECF system which will send notification of the filing to Sarah O'Rourke Schrup, the attorney for the defendant-appellant.

/s/ Joseph H. Hartzler
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