

13-1640

To Be Argued By:
ANASTASIA E. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-1640

—————
UNITED STATES OF AMERICA,
Appellee,

-vs-

RICHARD POUPART,
Defendant-Appellant.

—————
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
*United States Attorney
District of Connecticut*

ANASTASIA E. KING
NEERAJ N. PATEL
Assistant United States Attorneys
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

Table of Contents

Table of Authorities	iv
Statement of Jurisdiction.....	xi
Statement of Issues Presented for Review	xii
Preliminary Statement.....	1
Statement of the Case	3
A. The defendant’s history and offense conduct.....	3
B. Procedural history.....	6
Summary of Argument	9
Argument.....	11
I. The district court was not required to conduct a <i>Faretta</i> hearing before permitting Poupart to file his <i>pro se</i> motion to withdraw his guilty plea, and any error in this regard was harmless in any event.....	11
A. Relevant facts.....	11
1. Pre-guilty plea proceedings.....	11
2. Poupart’s change of plea.....	12
3. Post-plea proceedings	15

B. Governing law and standard of review	20
C. Discussion	27
1. There was no Sixth Amendment violation because the district court was not required to conduct a <i>Faretta</i> hearing.....	27
2. Any error in failing to conduct a <i>Faretta</i> inquiry was harmless error	32
II. The sentence imposed by the district court was procedurally and substantively reasonable	34
A. Relevant facts	34
B. Governing law and standard of review	44
C. Discussion	51
1. The sentence imposed by the district court was procedurally reasonable.....	51

2. The sentence imposed by the district court was substantively reasonable	54
Conclusion	66
Certification per Fed. R. App. P. 32(a)(7)(C)	
Addendum	

Table of Authorities

Pursuant to “Blue Book” rule 10.7, the Government’s citation of cases does not include “certiorari denied” dispositions that are more than two years old.

Cases

<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993).....	26
<i>Coleman v. Alabama</i> , 399 U.S. 1 (1970).....	26
<i>Dallio v. Spitzer</i> , 343 F.3d 553 (2d Cir. 2003).....	22
<i>Dallio v. Spitzer</i> , 170 F. Supp. 2d 327 (E.D.N.Y. 2001).....	25
<i>Faretta v. California</i> , 422 U.S. 806 (1975).....	<i>passim</i>
<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	<i>passim</i>
<i>Islam v. Miller</i> , 166 F.3d 1200 (2d Cir. 1998).....	24, 29
<i>Lainfiesta v. Artuz</i> , 253 F.3d 151 (2d Cir. 2001).....	25, 26, 32

<i>McKee v. Harris</i> , 649 F.2d 927 (2d Cir. 1981)	20, 21, 28, 29
<i>Peck v. United States</i> , 106 F.3d 450 (2d Cir. 1997)	26
<i>Penson v. Ohio</i> , 488 U.S. 75 (1988).....	25
<i>Peters v. Chandler</i> , 292 Fed. Appx. 453 (6th Cir. 2008)	29
<i>Satterwhite v. Texas</i> , 486 U.S. 249 (1988).....	25, 26
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	18
<i>United States ex rel. Robinson v. Fay</i> , 348 F.2d 705 (2d Cir. 1965).....	21
<i>United States v. Aglony</i> , 421 Fed. Appx. 756 (9th Cir. 2011)	64
<i>United States v. Aumais</i> , 656 F.3d 147 (2d Cir. 2011)	50
<i>United States v. Barnett</i> , 574 F.3d 600 (8th Cir. 2009).....	65
<i>United States v. Beenen</i> , 305 Fed. Appx. 307 (8th Cir. 2008).....	65

<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	37, 44, 51
<i>United States v. Broxmeyer</i> , 699 F.3d 265 (2d Cir. 2012), <i>cert. denied</i> , 133 S. Ct. 2786 (2013).....	<i>passim</i>
<i>United States v. Brumer</i> , 528 F.3d 157 (2d Cir. 2008) (per curiam).....	20
<i>United States v. Carmenate</i> , 544 F.3d 105 (2d Cir. 2008).....	24
<i>United States v. Cavera</i> , 550 F.3d 180 (2d Cir. 2008) (en banc)	45, 47, 48, 53
<i>United States v. Chow</i> , 441 Fed. Appx. 44 (2d Cir. 2011).....	56
<i>United States v. Cromer</i> , 389 F.3d 662 (6th Cir. 2004).....	23, 29
<i>United States v. Cronic</i> , 466 U.S. 648 (1984).....	20, 25, 29, 32
<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005).....	45

<i>United States v. Crowley</i> , 318 F.3d 401 (2d Cir. 2003)	61
<i>United States v. Culbertson</i> , 670 F.3d 183 (2d Cir. 2012)	21, 30, 31, 33
<i>United States v. Dattilio</i> , 42 Fed. Appx. 187 (6th Cir. 2011) <i>cert. denied</i> , 132 S. Ct. 785 (2011).....	64
<i>United States v. Dominguez Benitez</i> , 542 U.S. 74 (2004).....	46
<i>United States v. Dorvee</i> , 604 F.3d 84 (2d Cir. 2010)	55
<i>United States v. Dorvee</i> , 616 F.3d 174 (2d Cir. 2010)	<i>passim</i>
<i>United States v. Dukagjini</i> , 326 F.3d 45 (2d Cir. 2003)	26
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006)	45, 48, 60
<i>United States v. Fleming</i> , 397 F.3d 95 (2d Cir. 2005)	49
<i>United States v. Goffi</i> , 446 F.3d 319 (2d Cir. 2006)	45

<i>United States v. Gouse</i> , 468 Fed. Appx. 75 (2d Cir. 2012).....	50
<i>United States v. Jones</i> , 531 F.3d 163 (2d Cir. 2008)	49
<i>United States v. Leggett</i> , 81 F.3d 220 (D.C. Cir. 1996).....	23, 29
<i>United States v. Maldonado-Rivera</i> , 922 F.2d 934 (2d Cir. 1990)	22, 34
<i>United States v. Martinucci</i> , 561 F.3d 533 (2d Cir. 2009) (per curiam).....	60, 61
<i>United States v. Mauck</i> , 469 Fed. Appx. 424 (6th Cir. 2012)	64
<i>United States v. Miller</i> , 728 F.3d 768 (8th Cir. 2013).....	24
<i>United Stated v. Montgomery</i> , 389 Fed. Appx. 321 (4th Cir. 2010)	29
<i>United States v. Nersesian</i> , 824 F.2d 1294 (2d Cir. 1987)	20, 29, 32
<i>United States v. Oehne</i> , 698 F.3d 119 (2d Cir. 2012) (per curiam).....	60, 61, 63

<i>United States v. Pascarella</i> , 84 F.3d 61 (2d Cir. 1996)	22, 34
<i>United States v. Ramey</i> , 312 Fed. Appx. 647 (5th Cir. 2009)	65
<i>United States v. Reingold</i> , 731 F.3d 204 (2d Cir. 2013)	39, 50, 57
<i>United States v. Rigas</i> , 583 F.3d 108 (2d Cir. 2009)	47, 49
<i>United States v. Rita</i> , 551 U.S. 338 (2007)	48, 53
<i>United States v. Salim</i> , 690 F.3d 115 (2d Cir. 2012), <i>cert. denied</i> , 133 S. Ct. 901 (2013)	55
<i>United States v. Thomas</i> , 628 F.3d 64 (2d Cir. 2010)	45
<i>United States v. Tompkins</i> , 623 F.2d 824, 828 (2d Cir. 1980)	23
<i>United States v. Torres</i> , 129 F.3d 710 (2d Cir. 1997)	17
<i>United States v. Tutty.</i> , 612 F.3d 128 (2d Cir. 2008)	<i>passim</i>

<i>United States v. Verkhoglyad</i> , 516 F.3d 122 (2d Cir. 2008)	46
<i>United States v. Villafuerte</i> , 502 F.3d 204 (2d Cir. 2007)	46
<i>United States v. Wagner-Dano</i> , 679 F.3d 83 (2d Cir. 2012)	46
<i>Williams v. Bartlett</i> , 44 F.3d 95 (2d Cir. 1994)	23, 30

Statutes

18 U.S.C. § 2252	1, 7
18 U.S.C. § 3231	xii
18 U.S.C. § 3553	<i>passim</i>
18 U.S.C. § 3742	xii
28 U.S.C. § 1291	xii

Rules

Fed. R. App. P. 4	xii
Fed. R. Crim. P. 11	12

Guidelines

U.S.S.G. § 2G2.2.....*passim*

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet B. Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on February 22, 2013. A18-19. On February 19, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A18, A243. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

- I. Whether the district court properly permitted the defendant to file a *pro se* motion to withdraw his guilty plea, without conducting a *Faretta* hearing first, where the defendant was never without counsel, never unequivocally asked to represent himself, and his court-appointed attorney and stand-by counsel were ethically prevented from filing frivolous motions on his behalf?

- II. Whether the 240-month sentence for possessing child pornography was procedurally and substantively reasonable where the defendant, who had a history of sexually assaulting minors, possessed images and videos of child pornography that included pornographic images that he produced of a minor victim, where the defendant expressed no remorse and blamed the victims, and where the district court correctly calculated the guidelines, acknowledged their advisory nature, and expressly considered the § 3553(a) factors in tailoring an appropriate sentence?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-1640

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICHARD POUPART,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Richard Poupart, pleaded guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The district court sentenced him principally to 240 months in prison, which was within the applicable guidelines range. On appeal, Poupart claims (1) the judgment should be vacated because his Sixth Amendment rights were violated when the district court allowed him to file a *pro*

se motion to withdraw guilty plea without first conducting a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975); and (2) the case should be remanded for resentencing because the 240-month sentence was procedurally and substantively unreasonable.

As explained more fully below, Poupart's claims are meritless. The district court was not required to conduct a *Faretta* colloquy because Poupart was represented by appointed counsel at all times, counsel was ethically prevented from filing the motion to withdraw the guilty plea, and Poupart never unequivocally asked to represent himself. Further, Poupart's sentence was procedurally and substantively reasonable. The district court correctly calculated the guidelines, recognized its discretion and the advisory nature of the guidelines, made fully supported factual findings, remained mindful of the concerns stated in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), carefully applied the guidelines, considered the § 3553(a) factors, and stated the reasons for imposing the within-guidelines sentence.

Accordingly, this Court should affirm the judgment below.

Statement of the Case

A. The defendant's history and offense conduct

Richard Poupart, now 54 years old, has sexually exploited minor females since the summer of 1989. PSR ¶47.¹ At that time, he lived in Vermont and forced a 13-year-old girl to perform fellatio on him multiple times. PSR ¶47. As a result of that conduct, he was convicted in 1991 of Sexual Assault, sentenced to four to ten years' imprisonment, and required to register as a sex offender. PSR ¶¶12, 47, 49. Following his release in January 1998, he moved to Newport, Maine, where he lived with his mother until 2006. PSR ¶¶47, 57. He failed to register as a sex offender for which he was convicted and fined in 2004. PSR ¶49.

In 2003 and 2004, two minor females spent part of their summer vacation in Maine visiting Poupart's mother. PSR ¶¶14-15. Each minor was 12 years old during the summer of 2003. PSR ¶12. As Poupart was then living with his mother, he was present for those summer visits. PSR ¶¶14-15, 57.

¹ The Pre-Sentence Report, filed by the defendant under seal, is cited as "PSR ¶__." The Appendix, filed by the defendant, is cited as "A__." The Government's Appendix is cited as "GA__."

While the minor girls were in Maine, Poupart watched pornography in their presence. PSR ¶14. Poupart also told one of them, Minor Victim 1 (“MV1”), that he had many computer drives of pornography. PSR ¶14.

In addition, during one of the girls’ summer visits to Maine, Poupart took each girl on a camping trip to an island for one night. PSR ¶¶14-15. Ostensibly, he took them separately because the tent only held two people. PSR ¶15. During the night on the island with Minor Victim 2 (“MV2”), Poupart attempted to play strip poker with her and asked “if she had hair down there,” (*i.e.*, in her pubic area). PSR ¶15. In the tent that night, Poupart pulled off MV2’s pants while she was trying to sleep, molested her, and then photographed her exposed vagina. PSR ¶¶15, 18, 20, 22. MV2 tried to make him stop, but gave up once she realized that her efforts were futile. PSR ¶15.

Shortly afterward, Poupart took MV1 camping overnight on an island. PSR ¶¶14-15. During the night, he climbed on top of her and said he wanted to have sex with her. PSR ¶14. After she expressed shock and disgust, he said he was only kidding. PSR ¶14. While MV1 was visiting Maine, Poupart also physically abused her. She described how Poupart punched her, threw her to the ground, and kicked her while she was on the ground. PSR ¶14.

In 2006, Poupart moved to Connecticut and began living with another relative. PSR ¶¶57, 60. Poupart again failed to notify the sex offender registry of his address change. GA58.

After Poupart moved to Connecticut, he visited the Connecticut home of MV1 and MV2 on multiple occasions. PSR ¶12. He sexually assaulted each victim in their own home—one on September 1, 2006 and the other on July 15, 2007. PSR ¶50. On August 5, 2009, he was convicted in Connecticut Superior Court of two counts of Sexual Assault in the Fourth Degree and sentenced to serve one year imprisonment on each count, to run concurrent. PSR ¶50.

In the course of investigating those sexual assaults, law enforcement executed a search warrant at Poupart's residence—the house he shared with a relative. PSR ¶¶16, 60. During the search, law enforcement observed hard core pornography scrolling on the twin computer screens on Poupart's desk. GA29. They also observed photos of MV1 and MV2 taped to the wall close to Poupart's twin screens. GA16. Law enforcement seized three computers and other storage media. PSR ¶16. When Poupart was interviewed the next day by law enforcement, he reported that he had built two of the computers himself. PSR ¶16.

A forensic examination of Poupart's computers revealed over 100 images and videos of child pornography. PSR ¶¶17, 21, A83. The images

and videos depicted young children, including children as young as 3 to 5 years old, engaged in penetrative sex with adults. PSR ¶21, GA191-95, A83. One 15-minute video depicted a girl, approximately 10 to 11 years old, bound and restrained at the wrists, ankles and neck with ropes, being vaginally and anally raped by an adult male. GA194-95, A83.

The child pornography stored on Poupart's computer equipment also included two pornographic images of MV2 that Poupart produced himself while sexually assaulting her during the overnight camping trip in Maine. PSR ¶¶15, 18, 20, 22, A83. These two images were created in Maine, and found on his computer in 2007 in Connecticut. PSR ¶¶15, 16, 18, 22.

Law enforcement also found forensic evidence indicating that the program "Eraser" had recently been run on his computers to delete the contents. PSR ¶19. The program was run the same day that MV1 and MV2 disclosed the abuse to law enforcement. PSR ¶19.

B. Procedural history²

On July 22, 2010, Poupart was charged by criminal complaint with transportation of child pornography. A4. Poupart was arrested and taken into federal custody on August 6, 2010. A4.

² Additional facts related to the issues on appeal are set forth in the respective sections below.

On June 30, 2011, a federal grand jury sitting in New Haven returned an indictment charging Poupart in Count One with transportation of child pornography, in violation of 18 U.S.C. § 2252(a)(1), and in Count Two with possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). A8, A22-24.

On May 25, 2012, five days before Poupart's trial was scheduled to begin, Poupart pleaded guilty, pursuant to a written plea agreement, to possession of child pornography, as charged in Count Two. A14, A73-87.

On August 7, 2012, defense counsel filed a motion to be relieved as counsel and for the appointment of new counsel for Poupart. A103-04. At a hearing on this motion, the district court (Janet B. Arterton, J.) learned that Poupart wanted his lawyer to file, *inter alia*, a motion to withdraw his guilty plea, but that his lawyer was unwilling to do so. A115-17.

The district court did not rule on the motion for substitute counsel or relieve Poupart's attorney. A117-20. Rather, the court granted Poupart leave to file, *pro se*, a motion to withdraw his guilty plea. A117-18. Further, the court appointed an Assistant Federal Defender as stand-by counsel to assist Poupart with his motion, to the extent the rules of professional conduct so permitted. A117-18.

Poupart filed his motion on September 5, 2012. A126-31. The government responded, and on October 18, 2012, the district court issued a decision denying Poupart's motion to withdraw the guilty plea. A16, A132-49.

On November 6, 2012, the district court conducted a second hearing on the motion for substitute counsel and denied the motion. A150-68. One week later, however, the district court *sua sponte* reconsidered its decision and appointed substitute counsel from the CJA panel to represent Poupart. A17, A169.

On February 5, 2013, the district court sentenced Poupart to serve a 240-month term of imprisonment, a lifetime period of supervised release, and a \$100 special assessment.³ A18-19, A227-33, A239-42.

Judgment entered on February 22, 2013, A18-19, and on February 19, 2013, Poupart filed a timely notice of appeal, A18, A243.

Poupart is currently serving his term of incarceration.

³ The docket sheet incorrectly states that sentencing was on February 7; as shown in the transcript, sentencing was February 5.

Summary of Argument

I. The district court was not required to conduct a *Faretta* inquiry before allowing Poupart to file a *pro se* motion to withdraw his guilty plea. Poupart never asked to proceed *pro se*, and he was never without appointed counsel in this matter. Moreover, stand-by counsel assisted him in connection with the motion to withdraw his guilty plea, and the court acknowledged that both appointed and stand-by counsel were ethically prevented from filing the motion.

The Sixth Amendment does not require defense counsel to act unethically or file frivolous motions. Nor does it give defendants an unbridled right to reject one counsel and demand another. A court can require a defendant to select from a limited set of options as long as the choices are not constitutionally offensive. Where substitute counsel would face the same ethical concerns as appointed counsel, it was not constitutionally offensive to allow Poupart limited leave to file the motion to withdraw his guilty plea *pro se*. Because Poupart had a limited *pro se* role, this situation presents a form of hybrid representation. Where, as here, the defendant made no clear and unequivocal demand to proceed *pro se*, the district court was not required to conduct a *Faretta* inquiry.

In any event, there is no basis for concluding that a *Faretta* inquiry would have had any impact on the outcome of the proceedings below.

Poupart was never denied the representation of counsel, and even if the court had conducted a *Faretta* inquiry, the record suggests that the outcome would have been the same: the court would have been unlikely to grant a motion to proceed *pro se*, and Poupart's lawyer would be ethically prevented from filing a meritless motion. Finally, even though the court did not conduct a formal *Faretta* inquiry, the record reflects that Poupart's decision to proceed *pro se* on his motion to withdraw his guilty plea was a reasonable decision, made knowingly and voluntarily.

II. The 240-month within-guidelines sentence was procedurally and substantively reasonable. The district court correctly calculated the guidelines range, recognized its discretion and the advisory nature of the guidelines, made factual findings that were fully supported by the record, considered the § 3553(a) factors, and stated the reasons for the sentence imposed. The district court was well within its discretion to impose the statutory maximum on a defendant with a history of sexual abuse against minors, who possessed child pornography depicting sadistic and masochistic abuse of minors as well as child pornography images he had produced while sexually assaulting a minor victim, and who expressed a complete lack of remorse and, further, blamed the victims for his legal woes.

Argument

I. The district court was not required to conduct a *Faretta* hearing before permitting Poupart to file his *pro se* motion to withdraw his guilty plea, and any error in this regard was harmless in any event.

A. Relevant facts

1. Pre-guilty plea proceedings

Poupart was represented by multiple attorneys over the course of this criminal prosecution. After Poupart's arrest on the federal charges in this case, the court appointed an Assistant Federal Defender to represent him. A4-5. Less than two months later, though, counsel moved to withdraw from representing Poupart, citing a breakdown in the working relationship between counsel and client. A6; *see* A132. The court granted Poupart's request for substitute counsel and appointed Attorney Jodi Zils Gagné from the CJA panel to represent him. A6, A132-33. Moreover, on December 23, 2011, due to the technical complexity of computer evidence in this case, the district court granted Poupart's request for additional counsel and appointed Attorney James Filan as co-counsel. A11, A132-33.

After multiple continuances, jury selection was scheduled for May 30, 2012. A8-13.

2. Poupart's change of plea

As the parties prepared for trial, they also engaged in lengthy plea negotiations. A133. On March 28, 2012, the government proposed a plea agreement to Poupart. A133. Poupart conferred with his counsel, considered the offer for several days, and ultimately rejected it. A133.

Five days before jury selection, however, the government renewed the same offer to Poupart. A133. After consulting with his attorneys for approximately one hour and calling his wife, Poupart decided to accept the agreement. A133. According to the terms of the agreement, Poupart would plead guilty to Count Two of the indictment, charging him with possession of child pornography. A73-87, A133. The plea would satisfy Poupart's criminal liability for the production, possession and transportation of child pornography in the District of Connecticut and the District of Maine. A81. The district court held a change of plea hearing that afternoon. A25-72. At the hearing, the defendant was represented by both Attorneys Filan and Gagné. A25.

During the hearing, the district court conducted an extensive Rule 11 canvass of Poupart. The court informed Poupart of the various rights he was waiving by pleading guilty. A28, A34-39. Poupart confirmed that he did not have "any difficulty for any reason in communicating with [his] attorneys[.]" and that he "had enough opportunity and information to discuss the case

with [his] attorneys[.]” A29, A32-33. He further acknowledged that he was “satisfied to have them represent [him.]” A32-33. When asked if there was “any way in which you are not fully satisfied with their advice and representation[.]” Poupart responded “No.” A33.

When the district court inquired, Poupart indicated that he had read the written plea agreement, understood it, and discussed it with his attorneys. A39. Counsel for the government went through the terms of the agreement, page by page. A40-54. When the prosecutor finished describing the agreement, Poupart confirmed that the written agreement, as outlined by the prosecutor, “fully and accurately reflect[ed] [his] understanding of the agreement that [he] entered into with the government[.]” A54-55. Then the court asked:

COURT: Has anybody threatened you or intimidated you in any way that has caused you to decide to plead guilty?

DEFENDANT: No.

A55.

After confirming that Poupart had no “questions for the [c]ourt or [his] lawyers[.]” Poupart described, in his own words, his offense conduct: “I know that I had images of child pornography on my computer, I know that I put these images on my computer, I know these images were of a minor engaged in sexual acts, and I know the

images were made with materials that were transported in interstate commerce.” A63. Government counsel summarized its evidence against Poupart, A63-66, and Poupart affirmed that he had no disagreement with the evidence as summarized, A66.

Next, Poupart and his two attorneys signed and submitted a written petition to enter a guilty plea. A66. In this petition, Poupart affirmed repeatedly that he was pleading guilty voluntarily and of his own free will, and further that he believed his attorney had done all that an attorney should do to assist him with his case. GA69, GA72-74, GA76.

After this extensive canvass, Poupart entered his guilty plea to Count Two of the indictment. A67. The district court then made the following findings:

On the basis of the petition, which the defendant and his counsel have signed, based on Mr. Poupart’s answers to the Court’s questions while he’s under oath, in the presence of his attorneys and on the record; on the basis of the remarks of the assistant U.S. attorney, I find that Mr. Poupart is competent to plead. . . .

I find there is a factual basis for Mr. Poupart’s guilty plea. I find that he has knowingly and intelligently waived his right to a jury trial, that he has entered

his plea knowingly and voluntarily and of his own free [will], and accordingly, a finding of guilty on the charge in Count Two shall enter forthwith.

A67-68. Sentencing was set for August 21, 2012. A70-71.

3. Post-plea proceedings

In response to two motions to continue, the district court re-scheduled sentencing for October 30, 2012. A14-15, A88-101, A105, A133. On August 5, 2012, Attorney Filan filed a motion to withdraw in light of the district court's observation that two attorneys were no longer necessary as the matter was not proceeding to trial. A15, A133. The court granted that request the next day. A15. On August 7, 2012, Attorney Gagné also filed a motion to withdraw as counsel and for appointment of substitute counsel, citing a breakdown in the attorney-client relationship. A15, A103-104, A133.

The district court held a hearing on the motion for substitute counsel on August 21, 2012. A106-25. Prior to the hearing, however, the court asked Attorney Paul Thomas, an Assistant Federal Defender, to meet with Poupart to determine whether he could take over the case at that time. A108. Attorney Thomas did so, and attended the hearing on August 21.

During the hearing, it became clear that the reason Attorney Gagné had moved to withdraw as counsel was that Poupart wanted her to file a motion to withdraw his guilty plea, as well as pre-trial motions related to chain of custody and other evidence, and when she refused to follow his direction to file those motions, he asked for new counsel. A108, A115-17. Attorney Thomas stated he met with Poupart but had the same problem as Attorney Gagné in that he would not be able to file the requested motions “under the Rules of Professional Conduct where an attorney cannot assert or advance an issue unless there is a basis for doing so that is not frivolous[.]” A109.

After finding that “two attorneys have opined that the motions [Poupart] sought to file in their opinion . . . were not proper for some reason” and that appointing another attorney such as Attorney Thomas to represent Poupart is “only going to lead to the same problem[.]” the district court indicated it would permit Poupart to file a motion to withdraw his plea on his own. A110, A112, A117-18, A152. The court appointed Attorney Thomas to act as stand-by counsel to provide Poupart with relevant cases and a synopsis of the legal standard applicable to a motion to withdraw a guilty plea. A117-18, A152.

Significantly, the district court did not grant Attorney Gagné’s motion to withdraw as counsel. A119-20. The court noted that Poupart would not be representing himself for the remainder of

the case because the court had “not granted a motion, having none before me, that he represent himself, and he says he doesn’t know the first thing about motions, and so I’m not sure I’d let him represent himself.” A120. Accordingly, Attorney Gagné remained as Poupart’s counsel of record.

Poupart filed a *pro se* motion to withdraw his plea on September 5, 2012, arguing that Attorney Filan intimidated him into accepting the plea agreement and that Attorney Gagné was ineffective by failing to file certain pre-trial motions related to discovery and evidentiary issues. A126-31. The government’s response was filed on September 10, 2012. A16.

On October 18, 2012, the district court issued an 18-page decision denying Poupart’s motion. A132-49. First, the court rejected Poupart’s claim that he had been intimidated into pleading guilty. The court found that in the plea agreement, the plea colloquy, and the plea petition, Poupart represented that he was not threatened, forced, or intimidated into pleading guilty. A135-36. The court noted that Poupart offered no evidence of threats or coercion to contradict those prior sworn statements, and that “[a] defendant’s bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw [a] guilty plea.” A136 (quoting *United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997)).

Furthermore, the court rejected Poupart’s argument that he had not sufficient time to consider the proposed plea agreement. The court noted that the agreement Poupart entered was identical to the one that he had considered and rejected—after discussing the proposal with his lawyers—two months earlier, and thus that he was familiar with its terms. A136-37. In addition, the court noted that during the plea colloquy, Poupart had represented that he had had sufficient time to discuss the agreement with his attorneys. A137.

With respect to the claims of ineffective assistance of counsel, the district court noted that Poupart was barred from raising claims relating to counsel’s conduct that occurred prior to his guilty plea. A139-40. Nonetheless, the court conducted a detailed analysis of each claim of ineffective assistance of counsel and determined that the claims failed the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A140-48. The court also found that the defendant confirmed that he was satisfied with his representation during the plea colloquy. A147.

On November 6, 2012, the district court held a second hearing on Attorney Gagné’s outstanding motion for substitute counsel. A150-68. At this hearing, Attorney Gagné indicated that she could continue to represent Poupart. A152-53. Poupart, however, stated that he was “not comfortable” with either Attorney Gagné or Attorney

Thomas. A153. The court noted that Poupart had worked with four attorneys and had expressed his dissatisfaction with all of them. A154. Following a further colloquy during which the court attempted to understand the reasons for Poupart's dissatisfaction with Attorneys Gagné and Thomas, the court asked if Poupart was requesting to proceed *pro se* and represent himself, to which Poupart responded, "no." A157.

After from hearing from Poupart, the government, Attorney Gagné, and Attorney Thomas, the district court denied the motion for substitute counsel and Attorney Gagné remained as Poupart's counsel. A162-64.

On November 14, 2012, however, the court reconsidered this decision *sua sponte*. On that day, the court issued an order stating that "in the interests of justice" it was granting the motion for substitute counsel, and appointing Attorney C. Thomas Furniss as CJA counsel for Poupart. A17, A169. Attorney Furniss represented Poupart at the sentencing hearing, which was continued to February 5, 2013 to allow new counsel time to familiarize himself with the case and prepare for sentencing. A17. Poupart was sentenced principally to 240 months' imprisonment. A239. Attorney Furniss filed a notice of appeal at Poupart's direction. A18.

On May 8, 2013, Attorney Furniss filed a motion with this Court to withdraw as counsel, referring to a letter from Poupart expressing com-

plete dissatisfaction with his representation. This Court granted the motion on May 10, 2013 and appointed Attorney Lawrence Gerzog—who is the fifth attorney to represent Poupart in this matter (not including Attorney Thomas who was stand-by counsel)—as substitute counsel.

B. Governing law and standard of review

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. However, “the Sixth Amendment does not require that counsel do what is impossible or unethical.” *United States v. Cronin*, 466 U.S. 648, 656 n.19 (1984). As this Court has noted, “[c]ounsel certainly is not required to engage in the filing of futile or frivolous motions.” *United States v. Nersesian*, 824 F.2d 1294, 1322 (2d Cir. 1987).

Additionally, the Sixth Amendment does not provide a defendant with an unfettered right to obtain new counsel. *See, e.g., United States v. Brumer*, 528 F.3d 157, 160-61 (2d Cir. 2008) (per curiam); *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981) (defendant does not have “the unbridled right to reject assigned counsel and demand another” (internal quotations omitted)). “Nor can every disagreement with counsel’s version of statements to a defendant require a halt in the

proceedings and the briefing of substitute counsel.” *United States ex rel. Robinson v. Fay*, 348 F.2d 705, 707-08 (2d Cir. 1965). “This Court has long recognized that certain restraints must be put on the reassignment of counsel lest the right be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.” *McKee*, 649 F.2d at 931 (internal quotations omitted). The ultimate question is whether a defendant has “demonstrated good cause for the substitution of assigned counsel.” *Id.*

Accordingly, a court can require a defendant “to select from a limited set of options a course of conduct regarding his representation.” *Id.* Indeed, a court may ask a defendant, “in the interest of orderly procedures, to choose between waiver [of counsel] and another course of action as long as the choice presented to him is not constitutionally offensive.” *Id.* (internal quotations omitted); see *United States v. Culbertson*, 670 F.3d 183, 193 (2d Cir. 2012) (when a court “has already replaced counsel more than once . . . it is reasonable for the court to require an intractable defendant either to proceed with the current appointed lawyer, or to proceed *pro se*”). “That [a defendant] did not particularly like the choice presented to him and that he did not want to proceed *pro se* are not sufficient reasons to render the choice constitutionally offensive.” *McKee*, 649 F.2d at 931 (internal quotations omitted).

If a defendant elects to waive his right to counsel and proceed *pro se*, the court should ensure that the defendant made his decision “knowingly and intelligently.” See *Faretta v. California*, 422 U.S. 806, 835 (1975) (internal quotations omitted). A defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Id.* (internal quotations omitted).

Nevertheless, this Court has made clear that such explicit warnings are not necessarily and always required to establish a valid waiver of the right to counsel because the validity of a waiver turns on the totality of the circumstances. See, e.g., *United States v. Maldonado-Rivera*, 922 F.2d 934, 977-78 (2d Cir. 1990) (finding no error in failure of court to engage in express *Faretta* inquiry where defendant was practicing attorney and record reflected that his waiver of counsel was knowing and voluntary); *United States v. Pascarella*, 84 F.3d 61, 68 (2d Cir. 1996) (affirming waiver of right to counsel without formal *Faretta* inquiry where record reflected that the defendant’s decision to proceed *pro se* was made with a full understanding of the consequences); see also *Dallio v. Spitzer*, 343 F.3d 553, 560-65 (2d Cir. 2003) (in habeas context, concluding that no clearly established federal law mandated explicit warnings). Indeed, this

Court has explained that “[i]f the defendant has willfully waived his right to counsel, or purposefully manipulated the proceedings to create a confusing record for appeal, the failure explicitly to inform the accused of the consequences of proceeding without an attorney does not require reversal of his conviction.” *United States v. Tompkins*, 623 F.2d 824, 828 (2d Cir. 1980).

Moreover, a *Faretta* hearing is not necessary unless a defendant “clearly and unequivocally” asserts his right to proceed *pro se*. See *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994) (“The right to self-representation does not attach until it is asserted ‘clearly and unequivocally.’” (quoting *Faretta*, 422 U.S. at 835)).

Thus, courts have held that in cases involving hybrid representation, where counsel is not relieved and the defendant participates in his defense along with counsel, a *Faretta* hearing is not required. See, e.g., *United States v. Cromer*, 389 F.3d 662, 682-83 (6th Cir. 2004) (holding that *Faretta* hearing was not required before permitting hybrid representation and letting defendant cross-examine witness because defendant never “clearly and unequivocally” asked to proceed *pro se*); *United States v. Leggett*, 81 F.3d 220, 223-24 (D.C. Cir. 1996) (holding that *Faretta* warnings were not required in “hybrid form of representation” where defendant asked questions of some witnesses, delivered closing statements, and obtained trial court’s permission to

have defense counsel ask questions suggested by defendant, against counsel's advice, because defendant "was advised of his options [by the court] and neither waived his right to counsel nor invoked his right of self-representation").

Similarly, this Court, in an unpublished opinion, has also held that *Faretta* hearings are unnecessary in cases of hybrid representation, where a defendant does not "clearly and unequivocally" waive his right to counsel but, rather, participates in his defense along with his counsel. See *Islam v. Miller*, 166 F.3d 1200, at *3 (2d Cir. 1998) (unpublished table decision) (in habeas context, holding that "[defendant's] request [to deliver closing summations] thus falls within the ambit of cases governing so-called 'hybrid' representation—which do not require the trial court judge to conduct a *Faretta* inquiry").

The adequacy of a waiver of a constitutional right is ultimately a legal question that is reviewed *de novo*. See *United States v. Carmenate*, 544 F.3d 105, 107 (2d Cir. 2008); see also *United States v. Miller*, 728 F.3d 768, 773 (8th Cir. 2013) ("We review *de novo* a district court's decision to allow a defendant to proceed *pro se*.").

In cases where *Faretta* warnings are necessary, however, a court's failure to conduct the inquiry should be subject to review for harmless error. Although there does not appear to be a reported case where this Court has held that a

failure to conduct a *Faretta* inquiry is subject to harmless error analysis,⁴ this Court has observed that Sixth Amendment violations only require *per se* reversal, as opposed to triggering harmless-error review, if they “amount to an ‘[a]ctual or constructive denial of the assistance of counsel altogether,’ or when counsel was ‘prevented from assisting the accused during a critical stage of the proceeding.’” *Lainfiesta v. Artuz*, 253 F.3d 151, 157 (2d Cir. 2001) (quoting *Penson v. Ohio*, 488 U.S. 75, 88 (1988) and *United States v. Cronin*, 466 U.S. 648, 659 & n.25 (1984)); see *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) (stating that violations of Sixth Amendment right to counsel are *per se* reversible only where the deprivation “affected—and contaminated—

⁴ In *Dallio v. Spitzer*, the district court observed that the issue of whether a failure to supply *Faretta* warnings is structural error requiring *per se* reversal or whether it is subject to harmless error analysis was a question of first impression. 170 F. Supp. 2d 327, 337 (E.D.N.Y. 2001), *aff’d* 343 F.3d 553 (2d Cir. 2003). In *Dallio*, the defendant requested to proceed *pro se*, unlike Poupart here, and the state court granted the request without conducting a *Faretta* hearing. See 170 F. Supp. 2d at 333-34. The district court concluded that harmless error should apply. See *id.* This Court affirmed without deciding whether harmless-error review was appropriate in this context. *Dallio*, 343 F.3d at 555.

the entire criminal proceeding” (emphasis added)).

Otherwise, Sixth Amendment violations that do not constitute complete deprivations of the right to counsel are routinely subject to harmless error analysis. *See, e.g., Satterwhite*, 486 U.S. at 257-58 (holding that violation of defendant’s right to counsel before submitting to psychiatric evaluations is subject to review for harmless error); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (holding that deprivation of counsel at a preliminary hearing is a Sixth Amendment violation and remanding to the state court to consider whether the error was harmless); *Lainfiesta*, 253 F.3d at 157-58 (recognizing that the deprivation of a second attorney of choice is a constitutional violation subject to harmless error analysis).

Because *Faretta* warnings are not required by the Constitution, the applicable harmless error standard is whether the error “had substantial and injurious effect or influence” on the outcome. *Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997) (“standard applied on direct review of non-constitutional error [is] whether the error ‘had substantial and injurious effect or influence’” (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993))); *see United States v. Dukagjini*, 326 F.3d 45, 62 (2d Cir. 2003) (holding that non-constitutional errors are harmless

only if they did not have a “substantial and injurious effect or influence” on the jury’s verdict).

C. Discussion

1. **There was no Sixth Amendment violation because the district court was not required to conduct a *Faretta* hearing.**

Poupart claims that his Sixth Amendment rights were violated because the district court did not conduct a *Faretta* hearing before allowing him to file a *pro se* motion to withdraw his guilty plea. *See* Def.’s Br. at 9-12. Significantly, Poupart does not claim that he was denied counsel when he filed his motion, or even that his decision to proceed *pro se* on one motion was not made voluntarily. Rather, he only claims the district court should have first provided him with warnings pursuant to *Faretta*. Poupart’s argument is without merit.

A *Faretta* hearing was unnecessary because Poupart was never without counsel and never unequivocally asked to represent himself. From the day he was arrested, he had the benefit of court-appointed counsel. Indeed, the district court took the unusual step of appointing two lawyers to represent him as he prepared for trial. Those two attorneys also represented him during the plea negotiations and at the change of plea hearing. In addition, Poupart was repre-

sented by counsel at sentencing, and on this appeal.

The *only time* Poupart acted *pro se* was on his motion to withdraw his guilty plea. The district court permitted Poupart to file that motion *pro se* after hearing from his counsel and stand-by counsel that they could not ethically file his motions because they believed the motions lacked merit. A110-18, A152. In this context, the district court noted the futility in appointing yet another lawyer to represent because it would “only . . . lead to the same problem,” A110, namely that another lawyer would similarly be barred from filing such a motion.

Faced with the prospect of providing Poupart with yet another attorney who would be ethically barred from filing his requested motion (and in the absence of any request by Poupart to dispense with counsel altogether) the district court reasonably permitted Poupart to file this motion—but only this motion—*pro se*, with the assistance of stand-by counsel. *McKee*, 649 F.2d at 931 (holding that a court can require a defendant “to select from a limited set of options a course of conduct regarding his representation . . . as long as the choice presented to him is not constitutionally offensive”). In this case, there was nothing constitutionally offensive about Poupart having to file his motion *pro se* because the Sixth Amendment does not require counsel to act unethically or file futile or frivolous mo-

tions on a defendant's behalf. *See, e.g., Cronin*, 466 U.S. at 656 n.19 (“[T]he Sixth Amendment does not require that counsel do what is impossible or unethical.”); *Nersesian*, 824 F.2d at 1322 (“Counsel certainly is not required to engage in the filing of futile or frivolous motions.”). Nor does the Sixth Amendment give the defendant “the unbridled right to reject assigned counsel and demand another.” *McKee*, 649 F.2d at 931.

Moreover, the district court did not relieve Attorney Gagné as counsel for Poupart. Attorney Gagné remained counsel for all other purposes. Accordingly, this situation was a form of hybrid representation that did not require a *Faretta* hearing. *See, e.g., Cromer*, 389 F.3d at 683 (holding that *Faretta* inquiry was not required before permitting hybrid representation); *Leggett*, 81 F.3d at 223-24 (same); *Islam*, 166 F.3d at *2 (same). *See also United States v. Montgomery*, 389 Fed. Appx. 321, 322 (4th Cir. 2010) (finding no violation when court heard the defendant's *pro se* motion to withdraw his guilty plea without advising him of his rights under *Faretta*, because counsel was present and available throughout the hearing even though he would not support the defendant's motion to withdraw the plea); *Peters v. Chandler*, 292 Fed. Appx. 453 (6th Cir. 2008) (in habeas context, finding no violation when trial court allowed defendant to present motion to withdraw guilty plea *pro se* because the defendant “made no clear and une-

quivocal demand to proceed *pro se*” and this was accordingly a “type of hybrid representation” that did not require a *Faretta* warning). As in these cases, because Poupart’s court-appointed lawyer remained counsel of record, this was a type of hybrid representation in which no *Faretta* hearing was necessary.

In addition, Poupart never made an unequivocal request to represent himself. Indeed, he stated to the contrary that he wanted another lawyer. A103, A117-18; *see* A152-54, A156-57. On this record, then, there was no reason for the court to conduct a formal *Faretta* inquiry. *Williams*, 44 F.3d at 100 (“The right to self-representation does not attach until it is asserted ‘clearly and unequivocally.’” (quoting *Faretta*, 422 U.S. at 835)).

Poupart cites this Court’s recent decision in *United States v. Culbertson* for the proposition that the district court should have conducted a *Faretta* hearing before permitting him to proceed *pro se* on his motion to withdraw his plea. *See* Def.’s Br. at 11-12. *Culbertson*, however, is inapposite. In that case, during pre-trial proceedings, the defendant sought his fifth court-appointed counsel because his current (fourth) counsel refused to file a frivolous motion. 670 F.3d at 187. The district court rejected the request, and instead of permitting the defendant to file the motion *pro se*, the district court stated that the defendant would have to try the entire the case

himself and that his court-appointed lawyer would act as stand-by counsel. *See id.* In sum, the defendant proceeded through the remaining parts of his case *pro se*, with his previously-appointed lawyer serving as stand-by counsel. *Id.* at 193.

Unlike Culbertson, Poupart was not forced to represent himself for all aspects of his case. While the *Culbertson* court refused to appoint a new lawyer, the court here never relieved Poupart's lawyer, but rather chose to allow a form of hybrid representation in which Poupart could file one motion *pro se* while retaining his lawyer for all other purposes. Significantly, Poupart's court-appointed attorney remained counsel of record and continued in that role until new counsel was appointed to represent Poupart at sentencing.

Accordingly, this Court should reject Poupart's argument and find that allowing Poupart to file this single motion—which his counsel and stand-by counsel were ethically prevented from filing—while he continued to be represented by counsel for all other purposes, was a form of hybrid representation that does not amount to a *pro se* election requiring a *Faretta* hearing.

2. Any error in failing to conduct a *Faretta* inquiry was harmless error.

Even if this Court determines that the district court should have conducted a *Faretta* hearing before allowing him to file one motion *pro se*, any such error was harmless.

First, Poupart was not denied “the assistance of counsel *altogether*,” nor was counsel “*prevented* from assisting [Poupart] during a critical stage of the proceeding.” *Lainfiesta*, 253 F.3d at 157 (emphasis added) (internal quotations omitted). To the contrary, he had counsel at every stage of the case, except for the motion to withdraw his plea, and he had stand-by counsel available to assist him on that motion. The only reason counsel did not represent him on the motion to withdraw his plea was because counsel deemed the motion frivolous. The Sixth Amendment does not require counsel to file frivolous motions on a defendant’s behalf. *See, e.g., Cronin*, 466 U.S. at 656, n.19; *Nersesian*, 824 F.2d at 1322.

Second, even if *Faretta* warnings were provided, Poupart would be in the exact same position as he is in now. The district court stated that it was unlikely to grant a motion for self-representation given Poupart’s statements to the court. A113-14. Moreover, his attorney would still be ethically barred from filing a frivolous motion. Given the court’s observation that ap-

pointing another lawyer would only lead to the same problem, Poupart would not have been able to file any motion, except on his own. Because the result would have been the same even after a *Faretta* hearing, any error here was harmless.

Finally, the record reflects that Poupart made a knowing and voluntary choice to proceed *pro se* on his motion to withdraw his guilty plea, and thus any failure to canvass Poupart further on this topic was harmless. The court explained the dilemma facing Poupart in detail: his lawyer was ethically prevented from taking the action that he wanted to take. A110-12. Further, the court explained that the likelihood of success on the motion he wanted to file was very low given the extensive plea colloquy and the record in this case. A117-19. In addition, the court noted that Poupart had expressed an unwillingness to go forward without a lawyer for his case. A117-18, A120. In this context, the court offered Poupart a reasonable alternative: keep his current lawyer and file one motion *pro se*. See *Culbertson*, 670 F.3d at 193 (when a court “has already replaced counsel more than once . . . it is reasonable for the court to require an intractable defendant either to proceed with the current appointed lawyer, or to proceed *pro se*”).

Given this record, and Poupart’s extensive colloquy with the court on this topic, his decision to accept this reasonable option was knowing

and voluntary. Indeed, although the court did not address every topic usually covered in a *Faretta* colloquy, there is no doubt from the record that Poupart's decision was knowing and voluntary. *See, e.g., Maldonado-Rivera*, 922 F.2d at 977-78 (finding no error in failure of court to engage in express *Faretta* inquiry where record reflected that his waiver of counsel was knowing and voluntary); *Pascarella*, 84 F.3d at 68 (affirming waiver of right to counsel without formal *Faretta* inquiry where record reflected that the defendant's decision to proceed *pro se* was made with a full understanding of the consequences).

On this point, it is worth noting that even on appeal, Poupart does not claim that his decision to proceed *pro se* on his motion was not made knowingly and voluntarily. He merely claims that the court failed to conduct a proper *Faretta* colloquy. Accordingly, in the absence of some reason to believe that this alleged error had any impact on the outcome here, the district court's decision should be affirmed.

II. The sentence imposed by the district court was procedurally and substantively reasonable.

A. Relevant facts

Poupart was sentenced on February 5, 2013. A170. Prior to sentencing, the parties reviewed the PSR and filed their sentencing memoranda. GA123, GA144.

In the PSR, the sentencing guidelines were calculated as follows:

Base offense level for possession of child pornography, U.S.S.G. § 2G2.2(a)(1)	18
The material involved prepubescent minors or minors under the age of 12, § 2G2.2(b)(2)	+2
The material included sadistic or masochistic conduct or other depictions of violence, § 2G2.2(b)(4)	+4
The defendant's conduct was part of a pattern of activity involving the sexual abuse or exploitation of a minor, § 2G2.2(b)(5)	+5
The offense involved the use of a computer for the possession, transmission, receipt, distribution, or for accessing with intent to view the material, § 2G2.2(b)(5)	+2
The offense involved 600 or more images, § 2G2.2(b)(7)(D)	+5
Adjusted Offense Level	<hr/> 36

Poupart was determined to be in criminal history category IV.⁵ PSR ¶51, A225. The guidelines range for level 36, with a criminal history category IV, is 262-327 months of imprisonment. PSR ¶86. Because the offense of conviction had a 20 year statutory maximum penalty, however, the guidelines range became 240 months' imprisonment. PSR ¶86.

Although Poupart pleaded guilty, the PSR contained no reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 because Poupart had not acknowledged his guilt to the Probation Office and had attempted to withdraw his guilty plea. PSR ¶26-27.

At sentencing, the district court conducted a specific colloquy on this issue, taking care to clarify the difference between attempting to withdraw one's guilty plea and actually denying one's guilt. A178-81. After hearing Poupart say, "I am stating, and I have been stating right along, that I'm not guilty[.]" the court concluded, a reduction for acceptance "would not be appropriate." A181, A202.

Poupart's sentencing memorandum challenged the applicability of each guidelines enhancement; certain challenges concerned facts about the child pornography depictions Poupart

⁵ Poupart agreed that this criminal history category was correct. GA127.

possessed. GA135-39. The government's sentencing memorandum addressed each enhancement, as well. GA157-68. As an addendum to its memorandum, the government submitted a declaration from Postal Inspector Bernard Feeney which described, in detail, certain of the images and videos Poupart possessed and provided a factual basis for the court to make findings related to the proposed enhancements. GA190-96. Additionally, the government filed a computer forensic report from Detective Richard Frawley detailing, *inter alia*, the number of images and videos of child pornography found on Poupart's computer media. GA176-89. Inspector Feeney also brought the images and videos to sentencing, in the event the defense sought to press the factual challenges. A176. Further, the court noted that the Probation Officer who authored the PSR had reported viewing each of the described images and videos and confirmed the descriptions in the declaration were accurate. A177-78.

During the sentencing hearing, the district court acknowledged the advisory nature of the guidelines post-*Booker*. A183. The district court calculated the base offense level of 18, which was undisputed. A183. Then, the district court addressed each enhancement in turn.

Ultimately, the district court determined that the defense no longer contested the application of a 2-level enhancement under U.S.S.G. § 2G2.2(b)(2) (material involves a prepubescent

minor), A185, a 4-level enhancement under § 2G2.2(b)(4) (material contains sadistic or masochistic conduct or other depictions of violence), A186, and a 5-level enhancement under § 2G2.2(b)(7)(D) (offense involves more than 600 images), A201. Even though Poupart did not contest the applicability of these enhancements, the district court made its own determination whether they applied and stated the basis for its conclusions.⁶

⁶ Regarding the enhancement for material involving prepubescent or under 12-year old minors (§ 2G2.2(b)(2)), the court stated that “[i]t would seem from the description of Mr. Feeney and [the probation officer who wrote the PSR] that that has been amply demonstrated by at least eight of the files matched to the image and videos where the children appear to be under 12, at least two of whom were confirmed to be under the age of 12.” A185-86. Regarding the enhancement for sadistic or masochistic conduct (§ 2G2.2(b)(4)), the court stated that “it would not seem as if that would be a well-founded dispute, particularly given the video of the girl estimated to be 10- to 12-years old, masked, bound and raped.” A186. Regarding the enhancement for more than 600 images (§ 2G2.2(b)(7)(D)), the court referenced the declaration of Inspector Feeney and the computer forensic report of Detective Frawley, noting that they, “reflect[ed] at a minimum on one hard drive 110 images and 42 videos, which the guidelines give a rough translation to of 75 images per video,

As for the other two enhancements, the district court heard argument from both parties as to their potential applicability: a 5-level enhancement under U.S.S.G. § 2G2.2(b)(5) (pattern of abuse of minors) and a 2-level enhancement under § 2G2.2(b)(6) (use of a computer). A186-201. The parties ultimately agreed that the 5-level enhancement was applicable in light of Poupart’s history of sexual offenses against minors and the lack of any temporal limitation in the plain language of this guideline provision. A187, A189. The district court reviewed—by name—seven relevant cases on this issue, discussed the lack of temporal limitation, noted the age and type of prior acts that other courts had found formed a pattern (*e.g.*, sexual abuse up to 35 years in the past), considered the relevant prior acts of Poupart, and concluded the enhancement applied in Poupart’s case.⁷ A187-90.

Likewise, the 2-level enhancement under § 2G2.2(b)(6) for use of a computer was also carefully considered by the court. A190-201. On this

leading to a total of 3,260 from that hard drive.” A201.

⁷ Subsequent to Poupart’s sentencing (and consistent with the district court’s analysis), this Court held in *United States v. Reingold*, 731 F.3d 204, 223-24 (2d Cir. 2013) that no temporal proximity among acts of sexual abuse or exploitation is required to satisfy the pattern requirement of U.S.S.G. § 2G2.2(b)(5).

issue, the district court repeatedly interrupted during argument, pressed for further elaboration, and reviewed relevant cases during a brief recess. A223-25.

Ultimately, the district court concluded that it would not apply the computer enhancement:

Here it seems to the Court that all of what aggravates the defendant's conviction of possession of child pornography has been picked up in the other enhancements that apply, in the Court's view, squarely to this case and which do not—will not result in a substantively unreasonable sentence because even without application of the computer guideline, the sentencing range is 210 to 262 months, reduced back to 240 months because of that statutory maximum.

So, while I think this is a very close question, an interesting question, I don't think it's one that makes a particular difference in the outcome of this case.

Assuming, therefore, that the guideline enhancement for computer has not been shown to apply, the offense level will be a 34.

A224-25.

The district court found the defendant's criminal history category was IV and noted that this

was undisputed. A225. Accordingly, the court calculated the guidelines range to be 210-240 months, in light of the 20-year statutory maximum. A224-25.

The court heard from counsel and Poupart's mother. A202-05, A211-21. In addition, the court heard from Poupart's victims, and the victims' mother. A206-11. The victims described the long-lasting and devastating effects Poupart's conduct had had on their lives. A207-11.

Finally, the court heard from Poupart. A221-23. Poupart began by denying that he hurt MV1 and MV2:

[A]ll my life I've been accused of things, a lot of things, and yes, I admit, I've not been a nice guy at times, but [MV1 and MV2], I never hurt them. I never dreamed of hurting them; I never would. I really don't understand where they come with this or where they're coming from with this.

A221. Poupart then stated he was abused as a child and accused the girls' mother of sexually abusing him when he was 16 years old.⁸ A222. He went on to repeat that he had been through a

⁸ The girls' mother is approximately 4 years *younger* than Poupart, meaning she would have been only 12 years old at the time he alleges she abused him. A206, PSR ¶¶53, 59.

lot in his life, “but I didn’t hurt these kids.” A222. He further stated that “for years the only thing, the only attention these girls got was being yelled at . . . [a]nd that was the reason why me and my mom allowed them to come to Maine for summer vacations.” A222. Poupart concluded by stating “all I know is I’ve been stating since day one that I didn’t do this.” A222.

After hearing from all interested parties, the district court then explicitly discussed the § 3553(a) factors applicable to this case, including the nature and circumstances of the offense, “which are set out in their stark and harsh reality in the enhancements as we’ve discussed [during the sentencing hearing].” A225. The district court went on to state that “the seriousness of the offense, and the context in which it occurred, can hardly be overstated.” A225. The court expanded on this, saying, “the context is further the third offense related to sexual exploitation of female minors, reflecting, of course, that possession has a different form . . . than the actual sexual assaults reflected in the convictions in Connecticut and Vermont, but nonetheless devastating for the victims.” A225.

Next, the district court discussed Poupart’s history and characteristics including the hardships and beatings he suffered as a child, health conditions including the lack of soundness in his ankles and a chronic, serious bone condition, his abilities—including prowess with computers and

the ability to be a pleasant individual when he chooses to do so, and his lack of counseling in the past. A226.

The district court continued by stating that “the real core goal of sentencing today is to provide adequate deterrence and to protect the public.” A226. It further explained why: “[t]hat goal is so central because any single act of sexual abuse or exploitation of a young person is so costly in terms of their emotional well-being. It doesn’t have to be chronic, it doesn’t have to be the ultimate of penetration, it is devastating in and of itself, as we know repeatedly from the victims, that it corrodes and corrupts the very spirit of the person.” A226.

The district court also explained the weight it gave to “the fact that not only is there no remorse from Mr. Poupart, there is denial and there is accusation of the victims, that the victims themselves are responsible for his legal woes.” A226-27. The district court further observed, “[Poupart] [s]aying at this stage of the game, ‘I don’t know where they’re coming from,’ ‘I don’t understand,’ is either a final slap in the face or an indication of a disconnect with reality that is quite astonishing.”⁹ A227.

⁹ The district court further added, “[t]he victims’ statements have been repeatedly credited as truthful. Their statements today here are credited by this Court in the same way. And, to the extent that [Pou-

The district court then imposed sentence, stating,

Having really considered this entire sentencing and all of its parts very seriously, and having heard from both sides today, the sentence that the Court imposes on Count Two is that you be remanded to the custody of the Attorney General for a term of 240 months.

Thereafter, you shall be on supervised release for life.

A227. At no point during the proceeding did Poupart object to the court's alleged failure to consider § 3553(a) factors.

Finally, in the written judgment, the district court reiterated, the sentence “reflect[s] defendant's total lack of remorse, baseless accusations against his victims and repeated declaration of innocence, all of which bode poorly for likelihood of re-offending.” A239.

B. Governing law and standard of review

The United States Sentencing Guidelines are “effectively advisory.” *United States v. Booker*, 543 U.S. 220, 245 (2005). At sentencing, a dis-

part's] protestation of innocence and being victimized himself indicates the need for the lengthy sentence, it is underscored by his statements.” A227.

district court must begin by calculating the applicable guidelines range. *See United States v. Thomas*, 628 F.3d 64, 67 (2d Cir. 2010) (citing *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)). “The Guidelines provide the ‘starting point and the initial benchmark’ for sentencing, and district courts must ‘remain cognizant of them throughout the sentencing process.’” *Cavera*, 550 F.3d at 189 (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50.

This Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors.” *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). A judge need not address every “specific argument[] bearing on the implementation of those factors” in order to execute the required consideration. *Id.* at 29. There is no “rigorous requirement of specific articulation by the sentencing judge.” *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). Thus, while a judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), “robotic incantations” are not required. *See, e.g. United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006); *see also*

United States v. Wagner-Dano, 679 F.3d 83, 89 (2d Cir. 2012) (“In this Circuit, ‘we presume that a sentencing judge has faithfully discharged her duty to consider the statutory factors.’”) (quoting *United States v. Verkhoglyad*, 516 F.3d 122, 129 (2d Cir. 2008)).

This Court’s review has two components: procedural review and substantive review. *See Gall*, 552 U.S. at 51. The Court “must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guideline range.” *Id.*

Moreover, when “a defendant does not object to a district court’s alleged failure to properly consider all of § 3553(a) factors,” this Court reviews only for plain error. *Wagner-Dano*, 679 F.3d at 89. “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Id.* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

This Court has cautioned that reversal under the plain error standard of review should “be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.” *United States v. Villafuerte*, 502 F.3d

204, 209 (2d Cir. 2007) (internal quotation marks omitted).

Once the Court determines that the sentence is procedurally sound, the Court then reviews the substantive reasonableness of the sentence, “reversing only when the trial court’s sentence ‘cannot be located within the range of permissible decisions.’” *Dorvee*, 616 F.3d at 179 (quoting *Cavera*, 550 F.3d at 189).

Review of sentences for substantive reasonableness is a “particularly deferential form of abuse-of-discretion review.” *Cavera*, 550 F.3d at 188 n.5. Accordingly, this Court has analogized reasonableness review to the manifest-injustice and shocks-the-conscience standards. *United States v. Rigas*, 583 F.3d 108, 122-23 (2d Cir. 2009).

Substantive reasonableness review is undertaken modestly—it is not an opportunity for the appellate court to substitute its own judgment for that of the district court. *Id.* at 123; *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013). In conducting its review, this Court “bear[s] in mind the institutional advantages of the district courts” and “give[s] due deference to the sentencing judge’s exercise of discretion.” *Cavera*, 550 F.3d at 190. The district court “is in a superior position to find facts and judge their import under § 3553(a) in the individual case,” *Gall*, 552 U.S. at 51, and “has access to, and greater famil-

ilarity with, the individual case and the individual defendant,” *United States v. Rita*, 551 U.S. 338, 357 (2007). Thus, once this Court “is sure that the sentence results from the reasoned exercise of discretion” then it “must defer heavily to the expertise of district judges.” *Cavera*, 550 F.3d at 193.

In determining substantive reasonableness, this Court considers the totality of the circumstances. *See Gall*, 552 U.S. at 51. This Court “do[es] not consider what weight we would ourselves have given a particular factor. Rather, we consider whether the factor, as explained by the district court, can bear the weight assigned to it under the totality of circumstances in the case.” *Cavera*, 550 F.3d at 191 (citation omitted). The weight that should be given to any particular argument regarding the § 3553(a) factors is ordinarily “a matter firmly committed to the discretion of the sentencing judge” and the requirement that a district court consider the § 3553(a) factors does not mean that the court must find any given factor to be determinative. *Fernandez*, 443 F.3d at 32. Rather, a sentence will be found substantively reasonable as long as it can “be located within the range of permissible decisions,” *Cavera*, 550 F.3d at 191, even if the appellate court itself “might have reasonably concluded that a different sentence was appropriate” *Gall*, 522 U.S. at 51.

When reviewing for substantive reasonableness, this Court’s inquiry “reduces to a single question: ‘whether the District Judge abused his discretion in determining that the § 3553(a) factors supported’ the sentence imposed.” *United States v. Jones*, 531 F.3d 163, 170 (2d Cir. 2008) (quoting *Gall*, 552 U.S. at 56). In undertaking this review, the Court “should exhibit restraint, not micromanagement.” *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

Given this highly deferential review, the sentence imposed by a district court will be found substantively unreasonable only in the “few cases” that would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *Rigas*, 583 F.3d at 123. As this Court stated in *Fleming*, “[a]lthough the brevity or length of a sentence can exceed the bounds of reasonableness, we anticipate encountering such circumstances infrequently.” 397 F.3d at 100 (quotation marks omitted). A defendant challenging the substantive reasonableness of his sentence, therefore, “bears a heavy burden.” *Broxmeyer*, 699 F.3d at 288.

U.S.S.G. § 2G2.2 governs child pornography offenses. In *Dorvee*, this Court permitted district judges to deviate from U.S.S.G. § 2G2.2 strictly for policy reasons, stating that § 2G2.2 “can lead to unreasonable sentences that are inconsistent with what § 3553(a) requires,” unless it is “ap-

plied with great care.” *See Dorvee*, 616 F.3d at 184. This implies, however, that when the guideline is carefully applied, it can lead to a reasonable sentence. In fact, since *Dorvee*, this Court has upheld within-guidelines sentences based on the application of the enhancements in § 2G2.2. *See, e.g., United States v. Aumais*, 656 F.3d 147, 157 (2d Cir. 2011) (upholding guidelines sentence based on application of § 2G2.2 enhancements, including two levels for material involving pre-pubescent minors, four levels for sadistic images, two levels for use of a computer, and five levels based upon the number of images); *United States v. Gouse*, 468 Fed. Appx. 75, 77 (2d Cir. 2012) (unpublished summary order) (affirming Guidelines sentence stating, “Of course, while the district court *may* depart from the Guidelines based on a policy disagreement, the district court may also determine that the Guidelines range is appropriate in a particular case.”); *see also Reingold*, 731 F.3d at 222-28 & n.19 (holding that enhancements for pattern of activity involving the sexual abuse of a minor, use of a computer, and distribution were applicable, and observing that neither *Tutty* nor *Dorvee* consider the reason so many of the same enhancements apply in the child pornography cases is that the “[G]overnment, confronting an epidemic of such crimes with limited resources, has focused its prosecutorial efforts on those cases presenting these aggravating factors”).

C. Discussion

1. The sentence imposed by the district court was procedurally reasonable.

The record demonstrates the sentence was procedurally reasonable. First, the district court explicitly stated that the federal sentencing guidelines, “post-*Booker* are advisory but must be taken into account.” A183. Thus, no assumption is necessary to conclude that the district judge understood her discretion under *Booker*. Poupart offers no citation to the record to suggest that the judge failed to understand her discretion, and indeed, the record provides no basis for such a conclusion.

Second, the district court stated the statutory imprisonment range—120 to 240 months—and noted that both parties explicitly agreed with this statutory range. A183.

Third, the district court proceeded to correctly calculate the guidelines range, noting first that the base offense level was 18, under U.S.S.G. § 2G2.2(a)(1) and that the parties had no objection to this. A183. Thereafter, the court spent a significant portion of the sentencing hearing going through each potential enhancement “in light of *Dorvee*” and hearing argument “as to which of the enhancements should not apply and why.” A183. The court thus considered each defense objection and whether the defense was

continuing to pursue those objections given the declaration and forensic report filed by the government.

After considering each guidelines provision, the district court accurately calculated, as required by *Gall*, Poupart's final offense level (34), his criminal history category (IV), and the applicable guidelines range, which was reduced to 210-240 months in light of the statutory maximum. Poupart does not argue that the district court erred in this regard.

Fourth, the district court thoroughly considered the relevant § 3553(a) factors. There is no evidence in the record that calls into question whether the court properly considered the § 3553(a) factors. On the contrary, the court explicitly analyzed the relevant § 3553(a) factors, going well beyond what would otherwise suffice to demonstrate appropriate consideration of the factors. The court discussed "the nature and circumstances of the offense," A225, "the seriousness of the offense," A225, "the history and characteristics" of the defendant, A225-26, the need to "provide adequate deterrence," A226, and the need "to protect the public," A226-27, as "factors that the Court considers in the sentence to be imposed." A225-27. Therefore, the record reflects the court's explicit review of the § 3553(a) factors and easily satisfies the consideration required for procedural reasonableness.

Fifth, there is no contention that the district court selected a sentence based on clearly erroneous facts. The district court relied on the facts in the PSR, as well as those in the signed declaration of Inspector Feeney and computer forensic report of Detective Frawley, only after establishing that neither the government nor Poupart had any objections to those facts. A182.

Sixth, the district court explained the reasoning behind the sentence that it imposed, handily meeting the requirements of procedural reasonableness. As the Supreme Court has made clear, there is no rigid requirement as to how much the district court must say in explicating its reasons; rather “[t]he law leaves much . . . to the judge’s own professional judgment.” *Rita*, 551 U.S. at 356.

Further, the district court made clear that it gave particular weight to the goals of adequate deterrence and protecting the public, and considered Poupart’s lack of remorse to be of “enormous significance” in formulating the sentence necessary to achieve those aims. A226.

Where, as here, the arguments addressed by the district court are not conceptually complicated and the sentence is within the guidelines, a brief statement of the district court’s reasons would generally be sufficient. *See Cavera*, 550 F.3d at 193. Nonetheless, the district court in this case in fact provided a thorough and lengthy explanation of the reasons behind its chosen sen-

tence. These explicit and lengthy comments clearly demonstrate the district court's consideration of the § 3553(a) factors and satisfy the requirement of stating the reasons for the sentence it imposed.

On the record before this Court, it is plain that the sentence imposed by the district court is procedurally sound. In accordance with *Gall*, the “district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence” 552 U.S. at 51. Thus, Poupart's claim of procedural unreasonableness fails.

2. The sentence imposed by the district court was substantively reasonable.

In arguing that the sentence imposed by the district court was unreasonable, Poupart relies heavily on *Dorvee*, 616 F.3d 174, and *United States v. Tutty*, 612 F.3d 128 (2d Cir. 2008).¹⁰

¹⁰ In *Tutty*, this Court found that the district court committed procedural error in determining that it could not consider a challenge to § 2G2.2 of the guidelines based on policy considerations. 612 F.3d 128. As a result, this Court did not reach the question of substantive reasonableness. *Id* at 132.

Specifically, Poupart claims that the district court in this case “failed to address the important considerations outlined by this Court in *Dorvee* and *Tutty*.” Def.’s Br. at 18.

In *Dorvee*, this Court stated that, given the distinct history of the child pornography guidelines, those guidelines must be “applied with great care” by district courts. *Dorvee*, 616 F.3d at 184. In *Tutty*, while remanding the case to the district court for resentencing based on a procedural error, this Court discussed *Dorvee* and again stated that the guidelines in child pornography cases must be “carefully applied.” *Tutty*, 612 F.3d at 133 (quoting *United States v. Dorvee*, 604 F.3d 84, 98 (2d Cir. 2010)).

Subsequently, this Court has made clear that, while the guidelines applicable to child pornography cases must be applied with care, this Court has “never held that a district court is required to reject an applicable Guideline.” *United States v. Salim*, 690 F.3d 115, 126 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 901 (2013); *see Broxmeyer*, 699 F.3d at 291 (“[W]e nowhere suggested [in *Dorvee*] that it would be an abuse of discretion for the district court to accord some weight to the referenced Guidelines in imposing a sentence above the statutory minimum.”).

Contary to Poupart’s suggestion that “the court merely imposed the maximum guideline sentence” in this case, Def.’s Br. at 18, the district court employed precisely the careful analy-

sis that *Dorvee* and *Tutty* require and that this Court has affirmed since those decisions. See, e.g., *United States v. Chow*, 441 Fed. Appx. 44, 46 (2d Cir. 2011) (summary order) (holding that the defendant’s sentence for attempted receipt of child pornography and possession of child pornography was substantively reasonable where the record shows that the district court discussed “*Dorvee’s* admonition against mechanically sentencing child pornography defendants,” the applicability of particular enhancements, the appropriate sentence in light of § 3553(a) factors, and the purposes of sentencing).

First, in Poupart’s case, the district court carefully considered the application of each guidelines enhancement, giving the defense ample opportunity to be heard on each issue. Although Poupart argues that the district court “failed to address the important considerations outlined by this Court in *Dorvee* and *Tutty*,” Def.’s Br. at 18, the district court addressed such concerns in its deliberations on the enhancements.

For instance, Poupart cites the concern raised in *Tutty* that many of the guidelines enhancements apply to more than ninety percent of child pornography cases, and specifically references the enhancement for use of a computer as particularly problematic. Def.’s Br. at 18 (citing *Tutty*, 612 F.3d at 132). Since *Dorvee* and *Tutty*, this Court has noted that neither case had occasion

to consider that one reason behind the frequent application of these enhancements might be that the government, confronted with an epidemic of child pornography crimes and limited resources, has focused its prosecutorial efforts on those cases presenting these aggravating factors. *Reingold*, 731 F.3d at 226 n.19. Moreover, an examination of the record reveals that the district court engaged both parties in an in-depth discussion about the applicability of the computer enhancement, addressing precisely the concerns raised in *Tutty* and *Dorvee*. A190-A201. Further, addressing *Tutty's* concern that the computer enhancement has the flavor of impermissible double counting, the district court contemplated whether “there’s an element of, if you will, enhanced criminal activity or criminal thinking just because somebody is using a computer,” A191, and “in what circumstances use of a computer makes the crime of possession worse,” A198.

The district court also considered the defense argument, based on *Dorvee*, about the unique history of the enhancements, and the two-level computer enhancement, which “the Sentencing Commission did not want, but Congress did.” A191. Finally, the district court explicitly cited *Dorvee* twice in its discussion of the computer enhancement, at one point asking the government, “why is that more substantial than . . . what *Dorvee* recognizes is the most . . . frequent

occurrence of child pornography on someone's computer," A193, and at another point asking the government "how do you square your position with *Dorvee*?" A195.

Similarly, the district court carefully considered the five-point enhancement for pattern of conduct involving the sexual abuse or exploitation of a minor. A187-89. Even though the defense conceded that this enhancement applied in the defendant's case, A187, given the plain language of the provision, the court still analyzed it from two angles. As Poupart's earliest sexual abuse of a minor occurred in 1989, the court reviewed the provision's lack of temporal limitation. In addition, the court looked at the lack of similarity in type of exploitation, because Poupart was not only a hands-on offender, but also a possessor of child pornography. The court reviewed the cases available and the facts underlying Poupart's situation. Only after this analysis, did the court apply this enhancement.

Likewise, after the district court determined that the defense no longer objected to the application of the remaining three enhancements, the district court did not blindly apply the enhancements. Rather, the court reviewed the contents of the law enforcement agent's declaration and forensic report and made findings based on these facts.

Ultimately, after this extended consideration, the district court declined to apply the computer

enhancement finding that “all of what aggravates this defendant’s conviction of possession has been picked up in other elements that apply in the court’s view, squarely[.]” A224. Thus, the district court decided to impose its sentence “assuming . . . that the guideline enhancement for computer has not been shown to apply.” A225. In contrast to the defendant’s claim, then, the district court’s analysis of the applicability of guidelines enhancements reflects exactly the type of careful consideration and application called for by this Court in *Tutty* and *Dorvee*.

Second, contrary to Poupart’s claim that the district court engaged in only a “brief discussion of § 3553,” Def.’s Br. at 18, the district court gave careful consideration to the relevant § 3553(a) factors. The district court began by considering the “stark and harsh reality” of “[t]he nature and circumstances of the offense.” A225. In discussing the circumstances of the offense, the district court emphasized that Poupart’s crime was “the third offense related to sexual exploitation of female minors” and that such crimes are “devastating for the victims.” A225.

Next, the district court considered “the seriousness of the offense,” which it said “can hardly be overstated.” A225. The district court also considered the “history and characteristics” of Poupart, noting, for instance, that “he suffered great hardship as a child, that “he has a continuing and chronic serious bone condition,” that “he has

abilities demonstrated by his prowess with computers.” A225-26. Of course, this Court has made clear that merely because some of Poupart’s history and characteristics might provide “a lawful basis for leniency” does not mean that these factors “be given determinative or dispositive weight in a particular case” as these factors “must be weighed and balanced by the sentencing judge” with the other relevant considerations. *Fernandez*, 443 F.3d at 32.

Indeed, the district court stressed the importance of providing adequate deterrence and protecting the public in this case because “any single act of sexual abuse or exploitation of a young person is so costly in terms of their emotions well-being.” A226. The district court stated that sexual abuse or exploitation “is devastating in and of itself, as we know repeatedly from the victims, that it corrodes and corrupts the very spirit of the person.” A226.

This Court has repeatedly affirmed that these § 3553(a) factors of seriousness of the offense, the need for deterrence, and the need to protect the public—relied on heavily by the district court in this case—are appropriate bases for sentencing in child exploitation cases. *See, e.g., United States v. Oehne*, 698 F.3d 119, 125-26 (2d Cir. 2012) (per curiam) (affirming sentence where the district court emphasized the need to protect the public from Oehne’s crimes and the seriousness of the offense); *United States v. Martinucci*, 561

F.3d 533, 535 (2d Cir. 2009) (per curiam) (affirming sentence where “the court cited the great harm the defendant had done to the victim, as well as to other child victims of his abuse, the need for severe punishment, the importance of deterring others from committing similar offenses, and the need to protect other potential victims from the defendant”).

As it considered the need for deterrence and the goal of protecting the public, the district court found it enormously significant that “there [is] no remorse from Poupart.” A227. This Court has clearly established that lack of remorse is a factor that district courts can consider when imposing a sentence. *See, e.g., Oehne*, 698 F.3d at 125; *United States v. Crowley*, 318 F.3d 401, 421 (2d Cir. 2003) (“A sentencing court is in the best position to judge the appropriateness of a sentenc[e] in light of the defendant’s . . . remorse or lack of it . . .”). More specifically, this Court has stated that a defendant’s lack of remorse can “expand[] the range of substantively reasonable sentences to allow the district court to afford adequate specific deterrence and protection of the public.” *Broxmeyer*, 699 F.3d at 276.

Moreover, this Court has affirmed a district court’s emphasis on the defendant’s lack of remorse in cases that are particularly relevant here. In *United States v. Martinucci*, this Court upheld the district court’s sentence where “the district court cited the defendant’s complete lack

of remorse, as evidenced by his denial at the sentencing proceeding of the very conduct he had admitted at his guilty plea.” 561 F.3d at 535. Similarly, in the present case, Poupart stated at the sentencing proceeding, “I am stating, and I have been stating right along, that I’m not guilty.” A181.

Subsequently, in *Broxmeyer*, this Court affirmed the defendant’s sentence where the defendant at sentencing “professed sorrow, not for the harm caused by his conduct, but for” his own “criminal prosecution” and “suggested that he was not a victimizer but a victim of accusers.” 699 F.3d at 277. Similarly, in this case, the district court highlighted that in Poupart’s statements, “there is denial and there is accusation of the victims, that the victims themselves are responsible for his legal woes.” A227. Therefore, the district court’s consideration of Poupart’s lack of remorse in its evaluation of the relevant § 3553(a) factors is squarely in line with this Court’s precedent.

In addition, beyond the district court’s careful analysis of the guidelines and other relevant sentencing factors, this case is readily distinguishable on the facts from both *Dorvee* and *Tutty*. In *Dorvee*, this Court was “troubled by the district court’s apparent assumption that Dorvee was likely to actually sexually assault a child, a view unsupported by the record evidence yet one that plainly motivated the court’s perceived need

to protect the public from further crimes of the defendant.” *Dorvee*, 616 F.3d at 183. In that case, a report from a therapist concluded that *Dorvee* would not initiate sexual contact with a child and was not a predator. *Id.* at 177. Likewise, in *Tutty*, this Court stressed that the defendant was a first-time offender with “no hint that he ever had any sexual contact with a child or intended or sought to do so.” 612 F.3d at 132-33.

However, quite unlike *Dorvee* and *Tutty*, Poupart has a documented history of contact sexual assault offenses, including forcing a 13-year old victim to perform oral sex on him on multiple occasions, sexually assaulting two 14-year old victims, and creating some of the very child pornography he possessed in this case by photographing the vagina of MV2 while he was sexually assaulting her. PSR ¶¶11-12.

This Court has repeatedly found that a record of actual sexual contact with a minor distinguishes cases from *Dorvee* and *Tutty* for sentencing purposes. *See, e.g., Oehne*, 698 F.3d at 125 (“Unlike the defendant in *Dorvee*, *Oehne* actually sexually assaulted a child.”); *Broxmeyer*, 699 F.3d at 291 (distinguishing *Dorvee*, where a maximum sentence was imposed “based on speculation the defendant was a pedophile likely to engage minors in sexual contact,” from the present case, “with ample record evidence of *Broxmeyer* actively engaging minors in sexual

conduct, for the purpose of both photographing it and participating in it”).

Finally, an examination of sentences upheld in similar cases defeats Poupart’s claim that there is an unwarranted sentencing disparity between Poupart and similarly situated defendants. First, this Court should note, as it did in *Broxmeyer*, that the defendant “failed to provide sufficient information” to establish that “these persons were similarly situated to himself” and “that any disparity in sentencing would be unwarranted.” *Broxmeyer*, 699 F.3d at 296-97. In the present case, Poupart fails to cite any cases to support his claim that there is an unwarranted sentencing disparity, other than *Dorvee* and *Tutty*, the facts of which are dissimilar, as discussed above.

Moreover, a review of the relevant case law reveals that sentences similar to that imposed on Poupart have repeatedly been upheld in possession of child pornography cases. *See, e.g., United States v. Mauck*, 469 Fed. Appx. 424 (6th Cir. 2012) (235-month sentence for possession of child pornography); *United States v. Dattilio*, 442 Fed. Appx. 187 (6th Cir.) *cert. denied*, 132 S. Ct. 785 (2011) (20-year sentence for possession of child pornography found to be reasonable); *United States v. Aglony*, 421 Fed. Appx. 756 (9th Cir. 2011) (240-month sentence for possession of child pornography and receipt of child pornography found to be reasonable); *United States v.*

Barnett, 574 F.3d 600 (8th Cir. 2009) (same); *United States v. Beenen*, 305 Fed. Appx. 307 (8th Cir. 2008) (same) *United States v. Ramey*, 312 Fed. Appx. 647 (5th Cir. 2009) (240-month sentence for possession of child pornography found to be reasonable where it was an upward departure from guidelines).

Where, as here, the district court engaged in a careful analysis of the necessary and relevant sentencing factors, the mere existence of some disparity alone would not make the sentence substantively unreasonable. The district court was in the best position to determine the appropriate sentence in Poupart's case. After its careful, in-depth consideration, the district court imposed a sentence that balanced the relevant § 3553(a) factors in this case. In light of this record, Poupart has failed to show any error, much less plain error and the sentence should be affirmed.

Conclusion

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

Dated: December 13, 2013

Respectfully submitted,

DEIRDRE M. DALY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



ANASTASIA E. KING
ASSISTANT U.S. ATTORNEY



NEERAJ N. PATEL
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

Alexandra Messiter
Law Student Intern (on the brief)

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,977 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

Anastasia E. King

ANASTASIA E. KING
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 3553. Imposition of a sentence

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

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

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

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

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

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

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

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

section 994(p) of title 28);

(5) any pertinent policy statement--

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

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [FN1]

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

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

U.S.S.G. § 2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) 18, if the defendant is convicted of 18 U.S.C. §1466A(b), §2252(a)(4), §2252A(a)(5), or §2252A(a)(7).

(2) 22, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

(3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.

(C) Distribution to a minor, increase by 5 levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.

(7) If the offense involved--

(A) at least 10 images, but fewer than 150, increase by 2 levels;

(B) at least 150 images, but fewer than 300, increase by 3 levels;

(C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian

Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.