NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEE HOPE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Lee Hope, pursuant to Rule 39.1, Rules of the Supreme Court, and 18 U.S.C. § 3006 A(d)(7), requests leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed *in forma pauperis*. The undersigned was appointed to represent the Petitioner by the District Court for purpose of appeal pursuant to 18 U.S.C. § 3006 A(d)(6).

Dated this 27th day of November, 2019.

Respectfully Submitted,

THE WHARTON LAW FIRM

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEE HOPE,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.) Whether the Circuit Court of Appeals erred in holding that defendant's motion for judgment of acquittal was properly denied by the District Court when the government failed to prove, and the court did not instruct the jury that the Government must have found that there was not sufficient evidence showing that Petitioner Lee Hope knew of his prohibited status as an unlawful user of a controlled substance under 18 U.S.C. § 922(g)(3), as that term is defined under federal law as this Court has ruled in *Rehaif v. United States*, 568 U.S. ____ (2019); and

2.) Whether, in light of this Court's decision in *Rehaif v. United States*, 18 U.S.C. § 922(g)(3) is unconstitutionally vague, as a person's knowledge of their prohibited status under said section is entirely subjective.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Lee Hope, Petitioner

United States of America, Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Lee Hope, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to this Petition and can be found at *United States v. Lee Hope*, No. 2:17-cr-20296-1 (6th Cir. Filed September 12, 2019).

JURISDICTION

On September 12, 2019, the Court of Appeals for the Sixth Circuit entered its ruling affirming the district court as it relates to the conviction of Petitioner Lee Hope. *United States v. Hope*, 2:17-cr-20296-1 (6th Cir. 2019). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

1.) Federal Rule of Evidence 401:

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

2.) Federal Rule of Evidence 403:

[E]vidence may be exclude[d] if its probative value is substantially outweighed by a danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, wasting time, or needlessly presenting cumulative evidence.

3.) Federal Rule of Evidence 404(b):

Other Crimes, Wrongs or Acts. Evidence of a crime, wrong, or other act is not admissible to prove the character of a person in order to show action in conformity therewith...It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial…

4.) Federal Rule of Criminal Procedure 29(a):

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

5.) Title 18 of the United States Code, section 922 (g)(3):

It shall be unlawful for any person — who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

6.) Title 21 U.S.C. 802, section 6:

The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title [21 USCS § 812].

7.) Title 18 of the United States Code, section 924(a)(2):

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 [18 USCS § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

On or about May 27, 2017, Officers Austin Laine, Cortnee Chrestman, and Christopher Murphy were at the Breath of Life Christian Church, located on 3795 Raleigh Frayser Road in Memphis, Tennessee to monitor a funeral at the request of the church pastor. Trial Transcript, RE 102, Page ID #1326. Officer Laine was in his squad car and noticed a silver Toyota Camry enter the church parking lot and parked. Trial Transcript, RE 102, Page ID #1328. Officer Laine observed four occupants in the silver Toyota Camry and all of them got out of the car and, with the exception of the driver, three of them returned to the vehicle. Trial Transcript, RE 102, Page ID #1333. Officer Laine's partners (Chrestman and Murphy) ran the license plate on the silver Toyota Camry and discovered the license plate was registered for a different vehicle. *Id.* The three officers observed the vehicle for approximately thirty (30) minutes without incident and their lieutenant told them to make contact with the individuals inside the vehicle. *Id.* at Page ID #1334.

Officer Laine approached the right passenger side of the vehicle, and testified he smelled burned marijuana and saw a marijuana blunt laying between the two passengers of the backseat. Trial Transcript, RE 102, Page ID #1335. Officer Laine further testified that he identified Defendant Jamal Bowens on the back, left side and Defendant Lee Hope on the back, right side of the silver Toyota Camry. *Id.* at Page ID #1336. Officer Laine was told by his partner that he saw a

gun and Officer Laine saw a gun at the feet of Defendant Jamal Bowens, and identified it as a .357 revolver. *Id.* at Page ID #1338. After Officer Murphy and Officer Laine detained Defendant Bowens, Officer Chrestman detained Defendant Lee Hope and discovered another gun, which was identified as a Smith and Wesson. *Id.* at Page ID #1340. The officers arrested the defendants and charged them with unlawful possession of a weapon; however, Defendant Lee Hope was not charged with possessing the marijuana.

During the preliminary hearing at Shelby County General Sessions Court, on or about June 23, 2017, less than thirty (30) days after the May 27, 2017 incident, Officer Laine testified under oath that the marijuana discovered in the vehicle was not burnt. *Id.* at Page ID #1348-51. In addition, Officer Laine testified under oath during trial that he did not see Defendant Lee Hope smoke any marijuana on May 27, 2017. *Id.* at Page ID #1353. Officer Laine further testified that, while approaching the vehicle, in which Mr. Hope was a passenger, he did not see Defendant Lee Hope (or any person) make any furtive movements. *Id.* at Page ID #1356. Officer Chrestman, the officer who detained Defendant Lee Hope, did not see him make any furtive moments nor did she know who was the owner of the blunt found in the backseat of the silver Toyota Camry. Trial Transcript, RE 102, Page ID #1384-85. Officer Chrestman did not perform any other investigatory tasks as it relates to Defendant Lee Hope. *Id.* at Page ID #1387.

Detective Jarrett Parks of the Shelby County Sherriff's Office who, reviewed information from Defendant Lee Hope's social media accounts. Trial Transcript, RE 101-1, Page ID # 838-39. According to Detective Parks, the investigation of the Facebook social media account of Defendant Lee Hope revealed videos and posts of Defendant Hope brandishing firearms and smoking. *Id.* at Page ID # 840-41. Specifically, Detective Parks was asked what Defendant Lee Hope was smoking and he did not know. *Id.* at Page ID # 848. Detective Parks also testified that there was no follow-up investigation or attempts made to determine what Defendant Lee Hope was smoking or when the videos were made. *Id.* at Page ID # 849.

Special Agent Heath Stewart, with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, also investigated the incident surrounding Defendant Lee Hope and could not determine through the Facebook social media account what Defendant Lee Hope was smoking. *Id.* at Page ID #879. Agent Stewart also testified that when a claim is made, verification and corroboration is needed to substantiate it before a person can be arrested or charged. Trial Transcript, RE 101-1, Page ID #882.

The parties involved herein also stipulated to the following as it pertains to Defendant Lee Hope: 1.) the Smith and Wesson .40 caliber pistol charged in Count Two of the indictment was manufactured outside of the State of Tennessee, thereby

affecting interstate commerce, as required by 18 U.S.C. § 922(g)(3); and 2.) Memphis, Tennessee is located within the Western District of Tennessee. Trial Transcript, RE 101-1, Page ID # 889.

At the conclusion of the Government's proof, Defendant Lee Hope moved the Court for Judgment of Acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure, which the same was denied during the trial on January 23, 2018. *Id.* at Page ID # 900. The trial began on January 22, 2018 and concluded on January 24, 2018, at which time the jury found Defendant Lee Hope guilty of Count 2 of the Indictment. Sentencing took place on June 13, 2018, from which final judgment was entered in the district court.

Defendant filed a timely notice of appeal on June 18, 2018 for the United States Court of Appeals for the Sixth Circuit to review and hear this matter. Notice of App., RE 93, Page ID # 408. This matter was argued on Thursday, June 27, 2019. Case No. 18-5637, Sixth Circuit Opinion, RE 49-2, Page ID # 1-15. Six days prior to the argument before the Sixth Circuit panel, this Court decided the case of *Rehaif vs. United States*, 588 U.S. ___ (2019), where similar issues were raised and the same was brought to the attention of the Circuit Court. Letter to Clerk of Sixth Circuit, RE 48, Page ID # 1-3. On September 12, 2019, notwithstanding the arguments advanced by Defendant Lee Hope and the pain ruling of *Rehaif*, the

Sixth Circuit affirmed the District Court's decision as it relates to Defendant Lee Hope. Case No. 18-5637, Sixth Circuit Opinion, RE 49-2, Page ID # 1-15.

Accordingly, Petitioner submits that the Sixth Circuit Court of Appeals committed plain error when the district court failed to instruct the jury that they had to find Petitioner Lee Hope guilty of knowingly being an unlawful user of a controlled substance under 18 U.S.C. § 922(g), and further erred by affirming that the Government proved that Petitioner Lee Hope knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm as per this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

REASONS FOR GRANTING THE PETITION

The Defendant's Constitutional right to a fair trial and other procedural protections were violated due to the errors committed by the District Court in the denial of Defendant's Motions for Judgment of Acquittal and New Trial. This petition addresses United States Supreme Court precedent on the issue of whether the Sixth Circuit Court of Appeals correctly interpreted this Court's decision in *Rehaif, supra*, that evidence was not produced and the jury was not instructed that Petitioner **knew** he possessed a firearm and he **knew** he belonged to the relevant category of persons barred from possessing a firearm, or a prohibited person. (**emphasis added**).

ARGUMENT

I. The Sixth Circuit Court of Appeals committed error when they held defendant's motion for judgment of acquittal was properly denied when the government failed to prove, and the court did not instruct the jury that the Government had to prove that Petitioner Lee Hope was an unlawful user under 18 U.S.C. § 922(g)(3), and that Petitioner Lee Hope "knew" he was an lawful user as that term is defined by federal law from possessing a firearm.

For a claim based on insufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Title 18 U. S. C. §922(g), provides that "[i]t shall be unlawful" for certain individuals to possess firearms. The provision lists nine categories of individuals subject to the prohibition, including felons and aliens who are "illegally or unlawfully in the United States." *Rehaif v. United States*, 139 S.Ct. 2191, 2194 (2019). The applicable category that concerns the instant matter is 18 U.S.C. § 922(g)(3), which provides the following: "It shall be unlawful for any person— (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))..." 18 U.S.C.S. § 922.

The seminal case on this issue is *Rehaif v. United States*, 139 S.Ct. 2191 (2019). In *Rehaif*, Hamid Rehaif entered the United States on a student visa to

attend university, but was eventually dismissed from university and lost his immigration status. *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019). Hamid Rehaif did not act accordingly and, subsequently, went to a firing range where he shot firearms. *Id.* "The Government learned about his target practice and prosecuted him for possessing firearms as an alien unlawfully in the United States, in violation of §922(g) and §924(a)(2)." *Id.* Hamid Rehaif argued in the lower courts that the error was committed when the court failed to instruct the jury that it needed to find that Hamid Rehaif *knew* he was in the country unlawfully. (*emphasis added*). *Id.* The District Court in Rehaif's case disagreed and the Court of Appeals for the Eleventh Circuit affirmed, holding "the criminal law generally does not require a defendant to know his own status, and further observed that no court of appeals had required the Government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions." *Id.* at 2195.

This Court granted certiorari to determine whether the Government must prove that a defendant knows of his status as a person barred from possessing a firearm in prosecutions under section 922(g). *Id.* The issue, as this Court determined, hinged on knowledge. Specifically, this Court held that "[i]t is therefore the defendant's status, and not his conduct alone, that makes the

difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful." *Id.* at 2197.

The *Rehaif* decision applies to the instant matter. In the case involving Petitioner Lee Hope, Petitioner was charged under 18 U.S.C. § 922(g)(3) and was found guilty. Petitioner argued that *Rehaif* requires the Government to prove that the defendant both knew that he possessed a firearm and that he knew that he belonged to the category of persons prohibited from possessing a firearm. At no point did the Court instruct the jury of that legal requirement. While the Government argues that Petitioner allegedly knew he was an unlawful user of marijuana by the fact of his Facebook page photos and purported admissions, the jury was never required to find as much and the Government did not prove this knowledge beyond a reasonable doubt. This does not comply with this Court's decision in *Rehaif* and is clearly plain error.

Additionally, the category under 18 U.S.C. § 922(g) gives nine categories, of which, subsection (3) is a category that is subjective, meaning that the other categories are bestowed upon the accused by a third-party entity; whereas, subsection (3) is a category that can be interpreted in different ways. For example, under the statute (18 U.S.C. § 922(g)(3)), "the government must prove...that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm." *United States v.*

Burchard, 580 F.3d 341, 350 (6th Cir. 2009). Rhetorically, what does regularity or consistently and frequently mean? It is a subjective interpretation and therefore a defendant's knowledge, as this Court noted is paramount to determine whether or not a defendant knew he was prohibited from possessing a firearm because he was an unlawful user of a controlled substance, and he knew of his status as a prohibited person. Petitioner submits a jury instruction on this matter would have made a significant difference. Additionally, based on *Rehaif*, Petitioner submits that 922(g)(3) is unconstitutionally vague.

The Sixth Circuit contends that Petitioner's reading of this Court's *Rehaif* decision "goes too far because it runs headlong into the venerable maxim that ignorance of the law is no excuse." Sixth Circuit Opinion, RE 49-2, Page ID # 1-15. This Court addresses this maxim as well, where this Court held

> the defendant's status as an [unlawful user of a controlled substance] (original omitted) refers to a legal matter, but this legal matter is what the commentators refer to as a "collateral" question of law. A defendant who does not know that he is an "unlawful user of a controlled substance" does not have the guilty state of mind that the statute's language and purposes require.
>
> *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019).

Therefore, as this Court has opined, where a defendant "has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct, it thereby negat[es] an element of the offense." *Id.* at 2198. *See also* Model Penal Code §2.04, at 27 (a

mistake of law is a defense if the mistake negates the "knowledge...required to establish a material element of the offense"). *Id.*

In the present case, Petitioner would submit the District Court did not instruct the jury that the Government had to prove Petitioner knew of his prohibited status as an unlawful user of a controlled substance. Furthermore, this Court's decision in *Rehaif* requires the Government to prove the Petitioner knew he possessed a firearm and Petitioner knew he belonged to the category of person prohibited from possessing a firearm.

A. VAGUENESS

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." [This Court] has establish[ed] that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standard-less that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also, Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015).

The Sixth Circuit has adopted an applied this Court's past rulings in its jurisprudence, as cited *supra*, and further expands on it in *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608-09 (6th Cir. 2005), (*holding*: A statute is unconstitutionally vague if it denies fair notice of the standard of conduct for which the citizen is to be held accountable, or if it is an unrestricted delegation of power which leaves the definition of its terms to law enforcement officers); and in *Leonardson v. E. Lansing*, 896 F.2d 190, 196 (6th Cir. 1990), (*holding*: Vagueness may take two forms, both of which result in a denial of due process. A vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable. At the same time an ordinance is void for vagueness if it is an unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement).

Petitioner advances there is vagueness in 18 U.S.C. 922(g)(3). Here, the statute makes it unlawful for an individual to be an unlawful user of a controlled substance in possession of a firearm. The statute, however, provides that to be an unlawful user of a controlled substance, the person must use a controlled substance with regularity or consistently. The confusion, or vagueness of this language stems from the meaning of regularity or consistently. Again, the statute is silent on what does regularity or consistently and frequently mean and is therefore left entirely to

the subjective judgment of both the defendant, government, and a jury. It is a subjective interpretation, and the lower courts erred in finding that the Petitioner was a regular or consistent user and knew of his prohibited status, which the Government did not prove. In addition, the lower courts did not define what the terms regularity, consistently, or frequently mean in the context of section 922(g)(3) of title 18 of the United States Code. The lower court did not instruct the jury properly of this legal requirement and the government did not prove it in the lower court, and thus, the Sixth Circuit erred and committed plain error by affirming the District Court's judgment against Petitioner.

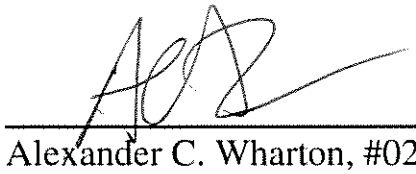
CONCLUSION

For the foregoing reasons, Petitioner, Lee Hope, respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit in his case.

Dated: This 27th day of November, 2019.

RESPECTFULLY SUBMITTED,

THE WHARTON LAW FIRM



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IN THE
SUPREME COURT OF THE UNITED STATES

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Alexander C. Wharton, do swear or declare that on this date, November 27, 2019, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

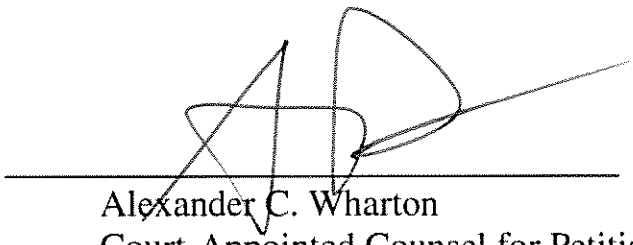
Mr. Marques Young
Assistant United States Attorney
8th Floor, Federal Building
167 North Main Street
Memphis, Tennessee, 38103

Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., NW
Washington, D. C. 20530-0001

With a courtesy copy also e-mailed this same date to the Solicitor General, at: SUPREMECTBRIEFS@USDOJ.GOV.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of November, 2019.



Alexander C. Wharton
Court-Appointed Counsel for Petitioner

APPENDIX

1.) Opinion of the Court of Appeals for the Sixth Circuit in *United States v. Hope*, No. 2:17-cr-20296-2 (6th Cir. Filed September 12, 2019).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
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Filed: September 12, 2019

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Re: Case Nos. 18-5636/18-5637, *USA v. Jamal Bowens*
Originating Case No. : 2:17-cr-20296-1

Dear Counsel,

The court today announced its decision in the above-styled cases.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Thomas M. Gould

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0239p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMAL BOWENS (18-5636); LEE HOPE (18-5637),
Defendants-Appellants.

Nos. 18-5636/5637

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:17-cr-20296—Sheryl H. Lipman, District Judge.

Argued: June 27, 2019

Decided and Filed: September 12, 2019

Before: ROGERS, GRIFFIN, and NALBANDIAN.

COUNSEL

ARGUED: Tyrone J. Paylor, FEDERAL PUBLIC DEFENDER, Memphis, Tennessee, for Appellant in 18-5636. Alexander C. Wharton, THE WHARTON LAW FIRM, Memphis, Tennessee, for Appellant in 18-5637. Marques T. Young, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee. **ON BRIEF:** Tyrone J. Paylor, FEDERAL PUBLIC DEFENDER, Memphis, Tennessee, for Appellant in 18-5636. Alexander C. Wharton, THE WHARTON LAW FIRM, Memphis, Tennessee, for Appellant in 18-5637. Marques T. Young, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee.

OPINION

ROGERS, Circuit Judge. A jury convicted Jamal Bowens and Lee Hope of possessing firearms while being unlawful users of marijuana, a controlled substance, after they were arrested with guns and marijuana in May 2017. *See* 18 U.S.C. § 922(g)(3). There was sufficient evidence of the defendants' regular and repeated use of marijuana to sustain the conviction, notwithstanding defendants' arguments regarding the credibility of some of the evidence from their Facebook accounts. There was also ample evidence showing that the defendants knew they used marijuana, such that it was not plain error that the jury was never asked if the defendants were "knowingly" unlawful users of a controlled substance, notwithstanding the Supreme Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). There was not, however, enough of a connection between Bowens' possession of a firearm in January 2017 to justify the district court's determination that the earlier possession was "relevant conduct" that could count against him at sentencing. In all, the defendants' convictions stand but Bowens' case will be remanded for resentencing.

I.

On May 27, 2017, Memphis police officers found Bowens and Hope in the backseat of a vehicle with a marijuana blunt between them, as well as two firearms—one at Bowens' feet and the other on Hope's person. The Government charged both men with violating 18 U.S.C. § 922(g)(3), which prohibits unlawful users of controlled substances from possessing firearms. Under our caselaw, the Government needed to prove that the defendants were regular and repeated users of marijuana to get a conviction. *See United States v. Burchard*, 580 F.3d 341, 350 (6th Cir. 2009).

To do this, the Government presented the jury with evidence from Facebook. A video uploaded to Bowens' Facebook account the day of the arrest showed the defendants in the parking lot of a McDonald's brandishing the firearms they were later arrested with and smoking what appeared to be a marijuana blunt. There were various comments and posts on both

defendants' accounts in which they appeared to describe using marijuana; statements such as "Getting high and drunk da whole day," or "Too high last night. Just woke up." There were also some pictures on their Facebook accounts that appeared to show the men smoking marijuana, some with captions like "Smoking dope wit da demons" or "Smoking gas to my face." These photos and comments were uploaded or posted over the course of seven months leading up to the date of the defendants' arrests. The jury was convinced, and convicted both men. The district court sustained the convictions, denying motions for judgment of acquittal and for a new trial.

At Bowens' sentencing, the Government sought a two-level enhancement under U.S.S.G. § 2K2.1(b)(1)(A) for an offense involving three to seven firearms. Only two firearms were recovered from the arrest, but the Government got to three by counting a firearm Bowens allegedly possessed in January 2017. This firearm had been recovered in Bowens' room at his mother's house as part of an unrelated investigation into a shooting that had occurred that month. Bowens was never charged with unlawful possession of this firearm. Over Bowens' objection, the district court found that this firearm possession constituted "relevant conduct" and applied the two-level enhancement to Bowens' sentence. Bowens asked that his sentence run concurrently with his anticipated state sentence for the January shooting, but the district court rejected this request. The court did, however, orally agree to credit Bowens' time served in federal custody since his indictment, but the judgment sheet did not include language to that effect.

II.

The defendants challenge their convictions on three grounds. They first assert that there was insufficient evidence to establish their regular and repeated use of marijuana. Next they argue that even if there was sufficient evidence to sustain their convictions under Federal Rule of Criminal Procedure 29, the district court erred in denying their motions for a new trial under Rule 33 because the court applied the wrong legal standard in reviewing their Rule 33 motions. Finally, based on a recent Supreme Court decision, defendants contend that the district court plainly erred by failing to give an instruction about the defendants' knowledge. These challenges lack merit.

The evidence was sufficient to support the jury's verdict that the defendants were unlawful users of a controlled substance while in possession of a firearm, in violation of 18 U.S.C. § 922(g)(3). Under that statute, "the government must prove . . . that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm." *United States v. Burchard*, 580 F.3d 341, 350 (6th Cir. 2009). The Government used evidence obtained from the defendants' Facebook accounts to prove that the defendants used marijuana regularly and over an extended period of time encompassing their firearm possession. These accounts showed several pictures (and one video) of the defendants smoking marijuana, as well as comments about smoking marijuana, all posted over the course of seven months leading up to the defendants' arrest.

The defendants challenge the sufficiency of this evidence only on the grounds that the Facebook evidence does not depict marijuana use and that the Government failed to "corroborate" this evidence. They do not argue that even if the Facebook posts depict marijuana use, that use is too infrequent to constitute "regularity" or use "over an extended period of time." The defendants' arguments fail because they are at bottom jury arguments—that the evidence is circumstantial and open to multiple interpretations.

It is true that much of this evidence is circumstantial, and the illegality of the defendants' conduct must be inferred. There is no physical proof that the defendants were smoking marijuana or discussing marijuana use in these Facebook posts; in theory they could have been smoking cigars and talking about "getting high" on alcohol. But circumstantial evidence alone can support conviction, *United States v. Algee*, 599 F.3d 506, 512 (6th Cir. 2010), and on sufficiency review we draw all reasonable inferences in favor of the jury's verdict, *United States v. Vichitvongsa*, 819 F.3d 260, 270 (6th Cir. 2016).

There is ample circumstantial evidence to support the jury's apparent inference that the defendants were smoking marijuana. The men were arrested with a marijuana blunt. There are pictures of defendants smoking what appears to be marijuana, with captions that refer to marijuana use. For example, a picture on Bowens' page has the caption "Smoking dope wit da demons," and a picture on Hope's page has the caption "Smoking gas to my face." Several other posts on the defendants' pages refer to marijuana use, such as "Getting high and drunk da whole

day," "I'm so MF high crazy," and "I just been too high lately." Hope referred specifically to "weed" when asking "Where da weedman at?" The jury did not need an eyewitness testifying that Bowens and Hope smoked marijuana, nor an expert to explain why the smoke in these pictures had to be marijuana smoke, or why statements about "kush" and "gas" had to refer to marijuana. This was enough circumstantial evidence for the jury to infer that the defendants were smoking marijuana in the Facebook pictures, and referring to marijuana use in these Facebook posts.

There was also enough to infer that defendants were using marijuana during the relevant timeframe. Again, there is no direct physical evidence that the pictures were taken in the seven-month timeframe leading up to the defendants' arrest. Facebook strips metadata from pictures, so aside from when a Facebook picture was uploaded, it is hard to say when it was taken. But when a picture was uploaded is at least a reference point. A juror could infer that a picture posted in, say, late October 2016, was in fact taken in late October 2016. In addition, there is circumstantial evidence that supports the jury's verdict that these pictures were taken on or about the dates they were uploaded to Facebook. The jury could compare the defendants in the courtroom with the men in the pictures to determine if they differed in age, or in entirety for that matter, from the men in the pictures. The captions to the pictures suggest recency—for example, the defendants used the present participle, e.g., "*Smoking* dope wit da demons," "*Smoking* gas to my face," and not "*smoked*." Also, these pictures were posted around the times that the defendants were posting other comments about smoking marijuana.

Those comments of course could have been posted by other people. Anyone could have used the defendants' Facebook accounts, just as the pictures could have depicted the men smoking tobacco cigars, and "getting high" could have been a reference to skydiving. But just as there was circumstantial evidence from which the jury could infer that the pictures depicted marijuana use and "getting high" referred to marijuana, there was circumstantial evidence from which the jury could infer that the defendants were the ones posting this content. The account linked to Bowens was under the name he first gave the arresting officers. Hope's account was under his own name. Both accounts contained images of the two men. This was enough for the

jury to infer that the accounts belonged to the defendants, and that the defendants were the authors of the posts about using marijuana.

In arguing the contrary, the defendants make misplaced admission-related arguments. Bowens notes that no one testified for certain that either defendant authored these comments or posts and he discusses the "challenges presented by Facebook evidence," but he cites only cases regarding authentication, and therefore admission, of evidence. *See* Bowens' Appellant's Br. at 34–35 (citing, inter alia, *Commonwealth v. Mangel*, 181 A.3d 1154, 1162 (Pa. Super. Ct 2018); *United States v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014); *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000)). On appeal, neither defendant challenges the admission of this evidence, only its sufficiency. This is the fundamental problem with the defendants' evidentiary arguments: they are at bottom jury arguments—contentions that the Government's case is weak and that the Facebook evidence is not to be believed. But the evidence was properly admitted and the jury chose to believe the Government's interpretation of it.

There is no general rule against the Government's relying on this Facebook evidence. Defendants argue that the Facebook evidence violated the "corroboration rule," a "dusty doctrine of criminal law" that generally speaking prohibits convictions based solely on uncorroborated confessions. *See United States v. Brown*, 617 F.3d 857, 860 (6th Cir. 2010). But as the district court explained, there is a "fatal defect" in the defendants' argument: they did not make a "confession." "[C]ourts have distinguished between a defendant who admits facts sufficient to establish an element of a crime after the crime has been committed [i.e., a confession,] and a defendant who admits similar facts before, or during the commission of, a crime." *United States v. Pennell*, 737 F.2d 521, 537 (6th Cir. 1984). Only the former requires corroboration. *Id.* The modern version of the rule is designed to protect against false confessions, especially those obtained by prosecutorial pressure. *See id.* (discussing *Opper v. United States*, 348 U.S. 84, 90 (1954)). The rule is not meant to hide from sight a defendant's inadvertent admissions of criminal activity. As the Facebook evidence here consists of statements (and photographs and a video) produced before or during the commission of the charged offense, the corroboration rule presents no hurdle to the jury's use of this evidence in finding guilt.

Finally, the district court applied the proper distinct legal standards in denying the defendants' motions for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and for a new trial under Rule 33. First, with respect to a motion under Rule 29, a court considers "whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Mallory*, 902 F.3d 584, 596 (6th Cir. 2018) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In a written order, the district court set forth this standard and determined that a rational trier of fact could have convicted the defendants of violating 18 U.S.C. § 922(g)(3) beyond a reasonable doubt. As explained above, this was correct.

In its order, the district court also denied the defendants' Rule 33 motions for a new trial; the court stated and applied the correct legal standard here as well. The court explained that it "may vacate any judgment and grant a new trial if the interest of justice so requires," quoting Fed. R. Crim P. 33. The court further elaborated that such motions are "disfavored, discretionary, and granted only in the extraordinary circumstance where the evidence preponderates heavily against the verdict." *Id.* (quoting *United States v. Mitchell*, 9 F. App'x 485, 489 n.2 (6th Cir. 2001)). This is the correct standard for reviewing a motion for a new trial—it is not a question of whether the evidence was sufficient but whether the evidence weighed "heavily" against the verdict. A trial court should only grant the motion when the verdict is against the "manifest weight" of the evidence. *Mallory*, 902 F.3d at 596 (quoting *United States v. Hughes*, 505 F.3d 578, 592 (6th Cir. 2007)).

The district court correctly applied that standard. The court wrote that it denied the Rule 33 motions "for the same reasons" it denied the Rule 29 motions. This was enough under abuse-of-discretion review because the defendants made the same arguments in support of their Rule 33 motions as they did in support of their Rule 29 motions. These are the same arguments addressed above: that the Facebook evidence did not necessarily show what the Government says it showed. The district court's statement that it was denying the Rule 33 motions "for the same reasons" is reasonably understood as the court's denying the motions because it found that the defendants' evidentiary arguments were weak and therefore the manifest weight of the evidence does not cut against the jury's verdict. The defendants would have us read "for the

same reasons" as "because the evidence here was sufficient," but, although a plausible reading, that is not the most natural reading of the court's statement, given that it had immediately before set forth the appropriate standard of review for a motion under Rule 33 (a standard that does not concern sufficiency).

Bowens relies on *Mallory*, but that case is distinguishable. In *Mallory*, this court remanded because it was unclear what standard the trial court applied. 902 F.3d at 596–97. In that case, the trial court repeatedly intermingled the Rule 33 and Rule 29 standards in such a manner as to make it unclear whether the court understood the distinction or applied it. *See id.* That is not the case here. The court clearly separated its analysis of the two motions, set forth the correct standard for a Rule 33 motion, and gave a sufficient reason for denying the motions. There was enough evidence to convict the defendants, and the district court properly reviewed their motions for acquittal and a new trial.

III.

Further, the district court did not plainly err in failing to instruct the jury that the defendants must have known they were unlawful users of a controlled substance in order to be guilty of violating 18 U.S.C. § 922(g)(3). Defendants did not object to the jury instructions on this ground, and they concede that we should review for plain error. In light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the lack of an instruction on the defendants' knowledge of this element may have been an error. The defendant in *Rehaif* was prosecuted under 18 U.S.C. § 922(g)(5) for possessing a firearm while being an alien unlawfully present in the United States. 139 S. Ct. at 2194. The Court held that in prosecutions under 18 U.S.C. § 922(g), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. Defendants here would extend the holding in *Rehaif* to prosecutions under 18 U.S.C. § 922(g)(3), such that the Government would have to prove that they both knew they possessed firearms and knew that they were unlawful users of a controlled substance.

Even assuming that *Rehaif* would apply to prosecutions under § 922(g)(3), any error from not instructing the jury on this knowledge requirement was not plain because the defendants

cannot show that but for the error, the outcome of the proceeding would have been different. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). The jury would surely have found that defendants knew they were unlawful users of controlled substances. The jury heard that the defendants were arrested with marijuana, posted pictures of themselves using marijuana, commented about using marijuana, and posted a video of them smoking marijuana. As discussed above, the defendants dispute this evidence, but not on the ground that they were unaware the substance was marijuana, or unaware they were "unlawfully" using it. They argued that the pictures showed the defendants smoking other substances and that the posts had other meanings, or were written by other people. Not in the court below, in their briefing on appeal, or in their letters to the court post-*Rehaif* have the defendants argued that even if they smoked marijuana they did not do so "knowingly."

Rather, defendants appear to argue that even if they knowingly used marijuana, *Rehaif* requires something more: that the Government prove each defendant "knew he was *prohibited from possession* [of a firearm] because he was an unlawful user of a controlled substance," that in other words he "knew of his status *as a prohibited person*." Under such a reading a jury instruction might have made a difference. Although it borders on fantastical to suggest that defendants were unaware they were smoking marijuana, or that marijuana was a controlled substance, it is at least plausible that they were unaware that they were prohibited from possessing firearms under a subsection of 18 U.S.C. § 922(g) due to their regular and repeated drug use. Such knowledge, however, is not, and cannot be, what *Rehaif* requires.

The defendants' reading of *Rehaif* goes too far because it runs headlong into the venerable maxim that ignorance of the law is no excuse. *See Cheek v. United States*, 498 U.S. 192, 199 (1991). *Rehaif* did not graft onto § 922(g) an ignorance-of-the-law defense by which every defendant could escape conviction if he was unaware of this provision of the United States Code. Defendants' interpretation does not follow from the text of *Rehaif*. At the end of its opinion, the Court wrote that "the Government must prove . . . that [a defendant] knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200. That is, in a prosecution under § 922(g)(3), the Government arguably must prove that defendants knew they were unlawful users of a controlled substance, but not, as defendants

appear to argue, that they knew unlawful users of controlled substances were prohibited from possessing firearms under federal law.

To be sure, the knowledge the Government would have to prove encompasses questions of law—the defendant must know that his use is "unlawful" and that the substance was "controlled," all of which require some knowledge of federal drug law. Proving knowledge of such collateral legal matters however does not conflict with the general rule against using ignorance of the law as a defense. *See Rehaif*, 139 S. Ct. at 2198. As the Court explained in *Rehaif*, the maxim that ignorance of the law is no excuse "does not normally apply where a defendant 'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct,' thereby negating an element of the offense." *Id.* (quoting 1 W. LaFave & A. Scott, Substantive Criminal Law § 5.1(a), p. 575 (1986)).

If defendants rely on ignorance of their unlawful drug use, they run up against plain error review; nothing suggests the outcome would be different if the jury had to find that defendants knew that marijuana was illegal. If defendants rely on ignorance of the law, they must confront the more basic tenet that ignorance of the law is no excuse. In either event, *Rehaif* does not compel reversal. The defendants have presented no compelling reason to disturb their convictions.

IV.

Bowens alone challenges his sentence and two of his three arguments have merit. He challenges the court's application of a number-of-firearms enhancement under U.S.S.G. § 2K2.1(b), arguing that a third firearm should not count against him because he did not possess it and even if he did it was not relevant conduct. Although the district court's determination that Bowens possessed this third firearm was not clearly erroneous, Bowens is correct that the third firearm should not have been counted because it was not conduct relevant to the offense of conviction.

In January 2017 (four months before Bowens was arrested on the instant charges), Officer Beckham of the Memphis police department obtained a search warrant for Bowens'

mother's house. He was investigating a homicide that occurred earlier in January. Bowens was a suspect in that homicide and Bowens had provided his mother's address as his residence. Beckham and others executed the warrant on January 25, 2017. After entering the house, the officers asked Bowens' mother where Bowens slept, and she indicated a downstairs bedroom. Police officers found a Sig Sauer handgun underneath a pillow in that room.

Under U.S.S.G. § 2K2.1(b), a court will increase a defendant's offense level if he possessed three to seven firearms during the commission of an offense. The Government argued that Bowens possessed three firearms—the two firearms found when the defendants were arrested in May 2017, and the Sig Sauer recovered in January 2017. The court agreed. The firearms enhancement should not have been applied however because Bowens' possession of the Sig Sauer was not relevant to the charged offense under the Guidelines' relevant-conduct provision.

Bowens' possession of the Sig Sauer should not have counted as relevant conduct because the circumstances surrounding that possession were unrelated to the offense of conviction. To determine relevant conduct, the court looks to whether the activity was "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2); *see United States v. Santoro*, 159 F.3d 318, 321 (7th Cir. 1998). Leaving a Sig Sauer under a pillow at his mother's house in January 2017 was not part of the same scheme or plan as possession of the two charged firearms four months later. It was also not part of the same course of conduct because it was not sufficiently connected or related as to be part of a single episode, spree, or ongoing series of offenses. *See United States v. Amerson*, 886 F.3d 568, 574 (6th Cir. 2018) (quoting U.S.S.G. § 1B1.3 cmt. n.5(B)(ii)).

In reaching that conclusion, we focus, as the Guidelines require, on three factors: regularity, similarity, and timing. U.S.S.G. § 1B1.3 cmt. n.5(B)(ii). Viewing these factors independently and together, they do not support a finding that the possession of the Sig Sauer in January and the other firearms in May were part of the same course of conduct.

Regularity. There is no regularity here because there are only two instances of unlawful gun possession. Two instances of unlawful conduct is not "regular" conduct. As this court has

noted, "regularity is 'completely absent' where the government shows only one other offense." *Amerson*, 886 F.3d at 574 (quoting *United States v. Hill*, 79 F.3d 1477, 1484 (6th Cir. 1996)). The Government responds that there is more than one other instance here. At sentencing, the Government introduced seven photographs from Bowens' Facebook account showing him possessing firearms—"four instances in December 2016, two instances in January 2017, and one instance in May of 2017." But as Bowens' counsel noted at sentencing, and as the Government concedes on appeal, the Government is not seeking an enhancement based on those photos. *See* Oral Arg. at 27:23.

Similarity. These two instances were similar only in the broadest terms: they were both illegal gun possessions.[1] In this context, that is too broad. "When we have upheld relevant-conduct determinations involving illegal gun possessions, we have emphasized characteristics about the possessions that show similarity *beyond* the act of unlawfully possessing a gun." *Amerson*, 886 F.3d at 578 (emphasis added) (citing *United States v. Phillips*, 516 F.3d 479, 485 (6th Cir. 2008)). In other words, we look beyond "the general nature of the offense." *Id.*

For example, in *Phillips* the defendant was convicted of being a felon in possession of a firearm for an incident in 2004, and then his sentence was enhanced for unlawful possessions in 2002 and 2006. We affirmed. In discussing similarity, we noted that these other instances of possession were for the same offense, i.e., in all three the defendant was a felon in possession of a firearm. "More importantly," we added, the defendant's "repeated possession of firearms appear[ed] linked by a common purpose: self-defense." 516 F.3d at 485. We went on to explain that these instances of unlawful possession were similar because they had the same motivation and surrounding circumstances. In other words, there was more in common than just the nature of the offense.

That was not the case in *Hill* or *Amerson*, where the nature of the offense was the only similarity. In those cases, we held that the conduct was not relevant. *Hill* involved two instances

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[1]We assume without deciding that the January possession was illegal. The Government presented evidence at trial that Bowens was a prohibited person in January because the Facebook evidence includes statements about smoking marijuana around that time period. But the jury was not asked, and did not need to find, whether Bowens was a regular and repeated user of marijuana in January 2017. All that was necessary for conviction was evidence that Bowens was a regular and repeated user in May 2017.

of possession with intent to distribute, but the earlier one was not relevant conduct because the only similarity was the type of drug sold. *See* 79 F.3d at 1484. Selling crack one year was not "relevant" to selling crack the next year just because both episodes involved selling crack; there had to be some other connection.

Amerson is even more on point. In that case, the defendant was charged with being a felon in possession of a firearm, and the government sought to enhance his sentence for an unlawful possession a few months earlier. 886 F.3d at 571–73. As in this case, these two instances were, in a sense, "similar." In both instances the defendant had unlawfully possessed a gun. But that was not similar enough. The court found that the earlier unlawful possession was not relevant conduct because the circumstances surrounding the earlier firearm possession were totally unrelated to the circumstances surrounding the offense of conviction. *Id.* at 575.

This case is more like *Hill* and *Amerson* than *Phillips*. There was nothing similar about Bowens' separate acts of possession *other* than the general nature of the offense. The two charged firearms were found with Bowens in a car while he was also in possession of marijuana. As a result of this arrest, police officers mined Bowens' Facebook to find images of him with these firearms and marijuana. The Sig Sauer was found months earlier in Bowens' home. It was not discovered as part of the police investigation into Bowens' Facebook posts, and the Government has not argued that the Sig Sauer is featured in those Facebook posts. Nor has the Government argued that marijuana was found in the same room (or house) as the Sig Sauer, or that Bowens ever had the Sig Sauer while riding in a car, or while smoking marijuana. Unlike *Phillips*, where the different instances of possession were at least related by a common purpose, nothing ties these possessions together. When we reversed the finding of relevant conduct in *Amerson*, we said: "[The government] failed to show that [the defendant's] [two] possessions were connected in any significant way. There were no common victims, common accomplices, common purpose, or similar modus operandi. And the possessions took place at different locations." 886 F.3d at 577 (citation omitted). We could say virtually the same thing here.

Timing. Finally, with respect to timing, while four months is not a very long span of time, it is not short enough to make up for the lack of regularity or similarity here. The three factors—similarity, regularity, and timing—are weighed on a sliding scale. *See Hill*, 79 F.3d at

1482. For example, if there are only two instances of conduct, and thus no regularity, there must be strong similarity and close temporal proximity to make up for it. *See id.*; *Amerson*, 886 F.3d at 574–75. In *Amerson*, the two instances of unlawful possession were three-and-a-half-months apart. The court noted that the defendant's "willingness to engage in the same type of criminal activity in a three-and-a-half-month period cuts in favor of a course-of-conduct finding." 886 F.3d at 574. But "a several-month gap between illegal possessions [was] not strong enough timing evidence to overcome a complete lack of regularity and prove that the possessions were part of the same course of conduct." *Id.* at 575. That is the case here. If there was stronger evidence of regularity or similarity, the four-month gap would not be a roadblock for finding relevant conduct, but without regularity or similarity this temporal proximity is not enough. Because of the lack of regularity and similarity, and weak temporal proximity, these two occurrences are not "relevant conduct" under the Guidelines. Therefore, the district court should not have applied the number-of-firearms enhancement under U.S.S.G. § 2K2.1(b).

Our review of the district court's relevant-conduct determination is not limited to review for plain error. According to the Government, plain error review applies because Bowens failed to raise the issue of relevant conduct at the sentencing hearing.[2] It is true that Bowens did not press his relevant-conduct argument at sentencing. But he did raise the issue squarely in a position paper objecting to portions of the presentence report, and the Government discussed it at least briefly at sentencing. This is enough to preserve the claim. In *United States v. Prater*, 766 F.3d 501 (6th Cir. 2014), this court considered a challenge preserved when it was raised in a paper but not squarely addressed at sentencing. 766 F.3d at 506–07. In fact, we have deemed a challenge preserved when it was addressed in an objection to the presentence report but left unsaid at sentencing—the same situation as the case here. *See United States v. Wilson*, 172 F.3d 50 (Table), 1998 WL 939987, at *3 (6th Cir. 1998). Finally, while Bowens' counsel did not respond to the district court's *Bostic* question when the court asked whether there were any further objections to discuss, *see United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004), "neither

[2]Bowens did not waive this claim by intentionally conceding that possession of the Sig Sauer was relevant conduct, as the Government argues. In addressing a separate sentencing argument, Bowens' counsel argued that *if* Bowens' possession of the Sig Sauer is relevant conduct, the anticipated sentence for a state charge that led to the discovery of the Sig Sauer should run concurrently with his federal sentence. This was an alternative argument, not a concession.

the defense nor the government, in response to the *Bostic* question, has any obligation to raise objections already made." *United States v. Vonner*, 516 F.3d 382, 390 (6th Cir. 2008) (en banc).

Contrary to Bowens' second sentencing contention, however, there was no error in the district court's decision not to run Bowens' federal sentence concurrently with his anticipated state sentence for the January shooting. The district court did not abuse its discretion in refusing to run the sentences concurrently because the anticipated state sentence does not arise out of conduct related to the instant offense of conviction. Under the Guidelines, "the sentence for the instant offense shall be imposed to run concurrently" to an anticipated state term of imprisonment when the state term is for "another offense that is relevant conduct." U.S.S.G. § 5G1.3(c). The anticipated state sentence here is for an attempted first-degree murder charge arising out of a shooting in January 2017. As the above discussion of relevant-conduct principles shows, this January shooting/attempted murder is plainly not part of the same "course of conduct" or "common scheme or plan" as possession of firearms while using marijuana four months later. The two events are only "related" in the sense that investigation of the one (the shooting) led to evidence that was used in sentencing for the other (unlawful possession).

Finally, remand is also required because the judgment should be amended to reflect the oral sentence. Generally when there is a discrepancy the oral sentence controls. *United States v. Cofield*, 233 F.3d 406–07 (6th Cir. 2000). The Government concedes this point and agrees to a limited remand for the district court to correct its judgment.

V.

The judgment of conviction is affirmed. Bowens' sentence is vacated, and his case is remanded for sentencing in accordance with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18-5636/5637

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMAL BOWENS (18-5636); LEE HOPE (18-5637),

Defendants - Appellants.

FILED
Sep 12, 2019
DEBORAH S. HUNT, Clerk

Before: ROGERS, GRIFFIN, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that both defendants' convictions and Lee Hope's sentence are AFFIRMED. IT IS FURTHER ORDERED that Jamal Bowens's sentence is VACATED and REMANDED for resentencing consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk