No. _____

In the

Supreme Court of the United States

JAMES EDWARD SANDFORD, III
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Should the Court grant certiorari to resolve the Circuit split regarding the plain error rule between the Second and Fourth Circuits as it applies to 18 U.S.C. 922 (g) (Felon in possession of a weapon) where Petitioner was convicted without an allegation of the essential element of knowledge of felon status in the indictment and without any proof of knowledge of his felon status established at trial?

2. Should the Court grant certiorari where Petitioner received wrong and incomplete advice about the use of drug enhancements at sentencing where his attorney admitted at a hearing that he was not aware that such enhancements could be used if Petitioner was not convicted of the drug charges but they were in fact used to dramatically increase his sentence where Petitioner was convicted of Tampering with a witness?

Parties and Related Cases

The names of all parties appear on the caption of the case on the cover page and there are no other additional parties. The related cases are *United States v. James Edward Sandford*, Western District of New York, Docket No. 15: 6101 judgment date on the jury trial conviction and sentence January 4, 2018 and judgment date on the Rule 33 motion December 7, 2018. *United States v. James Edward Sandford*, United States Court of Appeals, Second Circuit, Docket No. 18-0288, and *United States v. James Edward Sandford*, Docket No. 18-3703, consolodated appeals with joint arguments and Summary Order and Mandate filed on May 29, 2020.

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Petitioner James Edward Sandford, III respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated May 29, 2020.

Opinions and Proceedings Below

The decision of the Court of Appeals docket no.18-0288-cr and 18-3703-cr, is set forth in a Summary Order reported decision, *United States v. Sandford,* 814 Fed. Appx 649, as set forth in the Appendix materials. The district court case was *United States v. Sandford et al*, Western District of New York docket no. 15:6101 (DGL), as set forth in the Appendix materials.

Jurisdiction

The decision of the Court of Appeals was entered on May 29, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in the district court was 18 U.S.C. § 3231 (jurisdiction over offenses against the United States). The basis for the jurisdiction of the court of appeals was 28 U.S.C. §1291 (appeals from final judgments of district courts), Rule 4(b), Fed. R. App. Proc. (appeals from criminal convictions), 18 U.S.C. § 3557 and 18 U.S.C. § 3742 (appeals from sentences). The time to file this Writ of Certiorari was extended by this Court by Order dated March 19, 2020 extending deadlines.

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 922(g)

(g) It shall be unlawful for any person-

(1)who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Statement of the Case

Petitioner/Appellant was convicted on January 4, 2017 of one count of Possession of a Weapon under 18 U.S.C. § 922 (g), one count of Possession of a Weapon under 18 U.S.C. § 922 (j) and Tampering with a Witness. He had also been indicted for 10 counts of Distributing a Controlled Substance analogue (synthetic or "fake") marijuana and one count of 924 (c) drug trafficking with a weapon for which the jury did not reach a verdict and the Court declared a mistrial. He was represented at trial by Matthew Nafus, Esq.

After the presentence report was filed, Mr. Nafus was relieved as counsel for Defendant/Appellant based upon a complaint letter Defendant/Appellant had written to the Court and later presented in open court at an appearance. Thereafter, Defendant/Appellant filed a pro-se Motion pursuant to Rule 33 to vacate the judgment on the grounds of ineffective assistance of counsel on the grounds that Mr. Nafus had

improperly advised him as to his potential sentence he could receive. (See Court of Appeals Appendix hereafter "CA-33").

The sentence recommended in the PSR was 480 months and Defendant/Appellant alleged that he was improperly advised that he would receive a much lower sentence after trial assuming that he was not convicted of the drug charges. The matter was eventually set down for a hearing which was scheduled for May 30, 2018.

At the hearing there was undisputed testimony taken from both Petitioner and from Mr. Nafus and an Exhibit received that Mr. Nafus before trial had calculated an estimated sentence on the Weapons charges alone of 46 to 57 months and also that he had testified that he did not believe that the Tampering charge would add much to his sentence if Petitioner was convicted. (A-508).

It was also undisputed that Petitioner was confident that he could "beat" the drug charges and that if he did, that would result in a lower sentence than the offers he had been receiving from the Government which were in the range of 8 to 10 years, and just before trial to 78 to 87 months.

When the trial concluded, Petitioner and his attorney were relieved and elated because, as expected, he had been convicted of the Weapons charges but had achieved a hung jury on the drug counts. There was little concern about the conviction on the Tampering charge. After the PSR was

ordered, Mr. Nafus heard from the Government about an offer of 8 to 10 years which would satisfy the still pending drug counts.

This offer was relayed to petitioner who turned it down thinking that he would take his chances on the new trial and expecting that he would probably receive a sentence of no more than 57 months on the charges of conviction. When the PSR was completed, the recommendation was 480 months, based upon Petitioner's record which resulted in a Criminal History Category of VI and implementation of the cross reference (USSG 2k1.1 (c) (1)), which enhanced his sentence due to a large estimation of the amount of synthetic drugs he had been estimated to have been dealing.

The offense level on the weapons charges were enhanced from 16 to 20 because of the drug charges. Then they were enhanced an additional 7 levels. He was sentenced to 156 months or 13 years, a sentence far greater than the 78-87 months he was facing before the start of the trial when he faced the drug counts which included an 18 U.S.C. 924 (c) count with a mandatory minimum of five (5) years. After having "beaten" these charges, and expecting a sentence near what his attorney had predicted, it is clear that Petitioner was prejudiced from this result.

After the filing of the Notice of Appeal and during the pendency thereof, this Court rendered its decision in *Rehaif v. United States*, 139 U.S. 2191 (2019). It should be noted that the Superceding Indictment herein did

not allege as an essential element knowledge that the Petitioner was aware of his felon status. At trial, Petitioner stipulated that he had been previously convicted of a felony but had not stipulated to knowledge of such felon status.

While the appeal was pending, a hearing was ordered concerning Petitioner's Rule 33 motion at which was taken from Petitioner and Mr. Nafus. The Rule 33 motion was ultimately denied and a notice of appeal was filed with respect to that ruling.

The Court of Appeals consolidated both appeals for argument and rendered a decision for both appeals in one summary order. (See Appendix A).

Reasons for Granting the Petition

1. The Court of Appeals decision did not apply this Court's ruling in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) to Petitioner's 18 U.S.C. § 922 g) conviction. This decision is in conflict with the Fourth Circuit on the plain error issue.

The Second Circuit based its decision upon its previous holding in *United States v. Miller*, 954 F. 3d 551 (2d Cir. 2020).[1] *Miller* was factually similar to Mr. Sandford's case in that both defendants had stipulated at trial that they had previously been convicted of felonies. In both cases however, neither defendant stipulated that he had knowledge or awareness of the

[1] A co-defendant of Mr. Miller, Dominique Mack, has a pending writ of certiorari before this court. (See Docket No. 20-5407).

conviction at the time of the commission of the alleged offense. In each case, the jury was instructed that knowledge of such conviction was not required.

In *Miller*, as in *Sandford*, the Second Circuit reviewed the issue under the plain error doctrine, which considers whether (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings, 954 F. 3d at 557-58.

The Second Circuit in *Miller* held that the first two prongs of plain-error review were satisfied. The Court could not determine whether the third prong had been satisfied. It found that in the fourth prong – that affecting the fairness, integrity and public reputation of the proceedings – had not been met. Following *Miller*, the Second Circuit panel in *Sandford* reached the same conclusion.

The decisions in *Miller* and *Sandford* are in direct contrast to the Fourth Circuit decision in *United States v. Gary*, 954 F. 3D 194 (4th Cir. 2020). In *Miller* and *Sandford* the Second Circuit looked to the respective PSRs to determine that both Appellants must have known that they had been convicted of felonies.

The defendant in *Gary* at the time of his plea to 18 U.S.C. § 922 (g) had been convicted of second degree burglary and had been sentenced to eight (8) years, suspended after three years, of which he served 691 days. There had been no acknowledgment during his Rule 11 canvass that *Rehaif* knowledge was an element of the offense and he had not admitted to such knowledge during the plea proceeding or elsewhere, 954 F. 3d at 199. As it did with Mr. Sandford, the government argued that *Gary* must have been aware that he had been convicted of a crime punishable by imprisonment of more than one year, 554 F. 3d at 201 N. 5.

The Fourth Circuit Court held that "regardless of evidence in the record that would tend to prove that Gary knew of his status as a convicted felon", 954 F. 3d at 207, the failure to inform him that by pleading guilty he was admitting the *Rehaif* – knowledge element of the offense was structural error that affected substantial rights. Acceptance of such a plea would seriously *affect* the fairness, integrity or reputation of the proceedings

The Government's motion for rehearing in *Gary* was denied on July 9, 2020. The Government immediately moved to stay that mandate. In its motion, the government asserted that the Fourth Circuit's *Gary* decision

> Has created two rapidly broadening circuit splits and 'an equally profound schism with the Supreme Court's whole approach to error review and remediation.' *United States v. Gary*, ---F. 3d ----, 2020 WL 3767152, at *1 (4th Cir. July 7, 2020) (Wilkinson, J., concurring

> in denial of petition for rehearing en banc). Because a petition for a writ of certiorari, if authorized, would set forth two substantial questions for the Supreme Court, the Government respectfully requests this Court grant its motion to stay the mandate.

United States Motion for Stay of Mandate United States v. Gary, Fourth Cir. 18-4578 (ECF #65) (filed July 8, 2020, granted July 9, 2020) at 5.

2. The Fourth Circuit's recent decision in *Medley* has occasioned an additional circuit plain error split with the Second Circuit.

Almost three months after the Second Circuit decision was rendered in this case, the Fourth Circuit rendered its decision in *United States v. Medley*, 972 F. 3d 493 (4th Cir. Dec. 8/21/20). There the court ruled that the failure of the Government to include the knowledge – of – status element in the indictment constituted plain error. In this case the Indictment did not allege in Count 12 that defendant had knowledge of his felon status. (CA-42).

The Court cited precedents from this Court which "have long held that an indictment that omits an essential element of an offense is deficient. See *Apprendi*, 530 U.S. at 500-158 (Thomas, J. concurring) . . . *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

The Court also found the jury instructions which failed to instruct that defendant must have had knowledge of his felon status at the time of his commission of crime also constituted plain error. As in *Gary*, there is a split in circuit authority with this case and *Miller* from the Second Circuit.

This Court should grant the petition in order to resolve this conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fourth Circuit.

3. The evidence was insufficient to establish Mr. Sandford's guilt of § 922 (g).

Mr. Sandford's conviction must also be vacated on the ground that the evidence before the jury was insufficient to sustain a conviction. In this case, Mr. Sandford filed a Rule 29 motion which was denied by the court in a written decision, (Appendix C). While Mr. Sandford did raise a plain error argument at the Court of Appeals, he also argued that the lack of proof of knowledge at trial rendered the evidence insufficient to sustain a conviction. The insufficiency of the evidence challenge is independent of and not subject to the plain error challenge which was addressed by the Court. The Second Circuit, in its decision, did not address the sufficiency challenge.

Here, as stated, the facts were stipulated that Appellant had been previously convicted of a felony at the time of the commission of the 922 (g) offense alleged in Count 12 of the Superseding Indictment. The stipulation did not set forth, nor did Appellant at any time admit he had knowledge of such conviction.

4. The Court should grant Certiorari because the record establishes Petitioner was denied his Sixth Amendment right to the effective assistance of counsel

Following his Rule 33 motion, the district court ordered a hearing at which petitioner and his trial attorney both testified. Petitioner testified that he received incomplete and wrong legal advice during the plea bargaining stage of the proceedings, and after the trial.

In their testimony both Mr. Sandford and his attorney, Mr. Nafus, agreed that Mr. Sandford had been told that there were three sets of charges against him – the "drug" charges and the "weapons" charges, and the "tampering" charge. (CA-260). They both agreed that Mr. Sandford had been told he need not be concerned too much about the witness tampering charge – even though it carried the longest maximum sentence of twenty (20) years. (CA 176, A-275).

During the proceedings the Petitioner received numerous plea offers both before and after the trial which he later testified he would have accepted if they had been adequately explained to him, along with the consequences of not accepting them. Specifically, Mr. Sandford expected that he would not be convicted of the drug charges and he was not. In his words, Mr. Sandford testified, that "(Mr. Nafus) never told me the drugs would come back to haunt me". (CA-203). They did. Applying enhancements, the Court increased his sentence on the Tampering charge to

13 years. This was the charge Mr. Nafus told Mr. Sandford he "didn't think was the most serious charge" (CA-275) and which Mr. Nafus didn't think he wouldn't get more than 3 to 4 years. (CA-311). Mr. Nafus admitted that he never told Petitioner that at sentencing the Court could consider the drug charges in determining his sentence on the Weapons and Tampering charges. (CA-312). At his sentencing hearing the Judge's comments almost exclusively discussed Petitioner's alleged drug conduct, for which he was not convicted. (CA-120-144).

At the hearing Petitioner testified that Mr. Nafus told him that Judge Larimer was more lenient than other judges on the Western District of New York bench in Rochester. Mr. Nafus admitted that "I did tell him that he would have a better chance on sentencing with Judge Larimer rather than some other federal judges, absolutely". This representation obviously also turned out to be a poor prediction as Petitioner received an eleven step above guidelines sentence.

By his own admission, Mr. Nafus never explained to the Petitioner that even if he did "beat" the drug charges, they could be considered as relevant conduct by the Court in sentencing the Petitioner on Weapons counts and even more importantly, on the Tampering charge, for which Petitioner faced a maximum sentence of 20 years. He was also never told about possible exposure to the guideline cross reference (USSG 2 K 2.1

(c) (1)) which ultimately led to a Pre-Sentence recommendation of forty (40) years.

After the trial was over and before preparation of the PSR, Mr. Nafus met with the Petitioner again and told him that he had heard from the prosecutor and that there were discussions about an 8 to 10 year sentence to wrap up the entire indictment, including the drug charges, which would need to be re-tried because of the hung jury. Even after trial, Mr. Nafus did not research the sentencing issue sufficiently enough to find the *Watts* case and its progeny and quickly advise and encourage Petitioner to accept the ten year offer before the PSR comes out because the drug counts will dramatically increase his sentencing exposure.

Petitioner turned down the ten year offer based upon Mr. Nafus' previous statements that he could expect to receive 46 to 57 months based upon the previous faulty guidelines calculations and he felt at that point he would take his chances on the retrial.

Sometime thereafter, the pre-Sentence report came out with a recommendation of a 40 year sentence. The report assessed relevant conduct for the drug activity and came up with a very high amount of synthetic drugs attributable to Petitioner's activity. Objections filed by Mr. Nafus established that he was not aware of well-established case law of this Court that a sentencing court can consider acquitted conduct in applying

sentencing enhancements on counts of conviction using the lower preponderance of the evidence standard at sentencing. (CA-504,509). (See *United States v. Watts*, 519 U.S. 148 (1997). Such may also be used where there is a hung jury, *United States v. Bayes*, 210 F. 3d 64 (1st Cir. 2000). Since defense counsel was not aware of this basic case law, he never made Petitioner aware of it during pre-trial or even post trial plea negotiations where offers of 70 to 87 months and then after trial 8 to 10 years were initially made to the Petitioner.

In its Summary Order, the Court of Appeals decision states however, assuming *arguendo* "that Sandford's counsel's performance fell below an objective standard of reasonableness" that no prejudice has been established because Petitioner had been advised of the statutory maximum and his attorney had told him he could get 15 to 25 years. The testimony of Mr. Nafus, however was that he could get 15 to 25 years "if he was convicted of everything". (CA-310-311). It is not accurate, however, to say he would get 15 to 25 years where Petitioner <u>*was*</u> <u>*not*</u> convicted of the drug charges. Both Petitioner and his attorney testified they were assuming they would "beat" the drug charges in their sentencing calculations. Where petitioner did "beat" the drug charges, and he was sentenced to 13 years after being told to expect 46 to 57 months – that is prejudice.

In finding no prejudice, the Court of Appeals relied on its previous holding in *United States v. Arteca*, 411 F. 3d 315 (2nd Cir. 2005). This case is factually distinguishable from the facts here. There the Defendant had entered a plea pursuant to a written plea agreement calling for a 46 to 57 month sentence. The Probation Report came back with a much higher recommended sentence and the judge refused to grant defendant's motion to withdraw his plea.

This case is clearly distinguishable from the facts here because Mr. Sandford was in fact told that he could receive 15 to 25 years <u>if</u> he was convicted of the drug charges. If that did in fact occur, his lawyer's advice would have been correct. But in this case both he and his attorney had made calculations assuming he would "beat" (or not be convicted) of the drug charges. Mr. Nafus never told him that the drug charges could be used to enhance his sentences on the Weapons and Tampering charges.

In his post-trial filings, Mr. Nafus said, in referring to passages of the pre-sentence report referring to the drug charges: "After extensive legal research, I have been unable to find any cases which permit a court to sentence a defendant for alleged conduct which is currently pending a trial" (referring to the hung counts which had been rescheduled for trial). (CA-510).

In his Statement with Respect to Sentencing Factors, Mr. Nafus asserted that the guideline sentence for the Weapons counts should be 46 to 57 months and the Tampering counts should be 37 to 46 months. (CA-504. He again asserted that consideration of drug enhancements would violate Petitioner's Sixth Amendment rights. The filings demonstrate further proof that he obviously had never warned petitioner that these enhancements could be used at sentencing. He also did not know of this court's holding in *United States v. Watts*, 519 U.S. 148 (1997) that even acquitted conduct can be considered by the Court if found by a preponderance of the evidence.

Clearly there was prejudice here where the testimonial and documentary evidence shows that petitioner received a much higher sentence than he expected after receiving a favorable result after trial. Both Petitioner and his lawyer expected a conviction on the Weapons counts and the Tampering charges were "50/50". (A-293). An acquittal, or at least no conviction on the drug charges would be a good result. Yet the sentence was much higher than the numbers being discussed before trial. This is the very definition of prejudice.

To establish prejudice under *Strickland v. Washington*, 466 U.S. 688 (1984), a defendant must show a "reasonable probability that, but or counsel's unprofessional errors, the result of the proceeding would have been different" *Id at* 694. Strickland made clear that the "result of the

proceeding" refers to the outcome of the defendant's prosecution as a whole. It defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome". *Id* at 691.

Here there was erroneous and dangerously inadequate legal advice given to a client facing serious criminal charges which could result in decades of time in prison. Such a situation certainly undermines confidence in the outcome. This type of erroneous legal advice was found to constitute *Strickland* error in *Laffler v. Cooper*, 566 U.S. 166 (2012). There a state prison inmate had rejected a plea bargain based upon erroneous legal advice. At trial he was convicted and received a much higher sentence. This Court found that both prongs under *Strickland* had been satisfied resulting in prejudice to the defendant. *Id* at 171.

CONCLUSION

Wherefore, it is respectfully requested that the Court grant the petition herein.

Respectfully Submitted:

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Addendum

APPENDIX A

18-288; 18-3703
United States v. Sandford

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of May, two thousand twenty.

Present:

BARRINGTON D. PARKER,
DEBRA ANN LIVINGSTON,
JOSEPH F. BIANCO,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 18-288
18-3703

JAMES EDWARD SANDFORD, III, AKA MALICE,

Defendant-Appellant,

EDWARD M. SANDFORD, AKA EDDIE,

Defendant.

For Appellee: BRETT A. HARVEY (Tiffany H. Lee, *on the briefs*), Assistant United States Attorneys, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, NY

For Defendant-Appellant: ROBERT WALTER WOOD, Law Office of Robert W. Wood, Rochester, NY

Appeal from a judgment of the United States District Court for the Western District of New York (Larimer, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED IN PART and REMANDED**.

James Edward Sandford, III, appeals from a January 29, 2018 judgment and a December 7, 2018 order. Sandford was charged with ten counts related to possession and distribution of synthetic marijuana in violation of 21 U.S.C. §§ 841, 846, 859, and 860, and one count each of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i), being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), possession of a stolen firearm in violation of 18 U.S.C. § 922(j), and witness tampering in violation of 18 U.S.C. § 1512(b)(1). Following trial, the jury deadlocked on all of the drug-related charges, including possession of a firearm in furtherance of a drug trafficking crime. But the jury convicted Sandford on the other two firearms charges and witness tampering. The district court ultimately imposed a total sentence of 156 months of imprisonment and a $1,000 fine. On appeal, Sandford challenges certain evidentiary rulings at trial, the jury instruction as to the felon in possession count, the district court's calculation and explanation of his sentence and fine, and the effectiveness of his counsel during the plea-bargaining process. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Evidentiary Rulings

Sandford challenges two of the district court's evidentiary rulings at trial. First, he claims that the district court erred by allowing Sandford's wife, Alisha Wheeler, to testify that Sandford

sold heroin before selling synthetic marijuana. Second, Sandford contends that the district court erred in admitting certain Facebook posts wherein he defended his selling of synthetic marijuana. Specifically, Sandford argues that both were improperly admitted under Federal Rule of Evidence 404, as the testimony regarding the heroin sales amounted to evidence of a prior crime and the Facebook posts were used as character evidence. Evidentiary rulings are reviewed for abuse of discretion. *United States v. Lebedev*, 932 F.3d 40, 49 (2d Cir. 2019).

Turning first to Wheeler's testimony about Sandford's prior acts of narcotics trafficking, we find no abuse of discretion in the district court's decision to allow her testimony. Sandford's defense at trial was that he did not know that synthetic marijuana was illegal. But Wheeler's testimony established that he had involved his wife in trafficking illicit narcotics and continued to involve her in largely the same manner when trafficking synthetic marijuana. As the district court concluded, her testimony regarding their past relationship and how it developed was relevant to the disputed issue of Sandford's knowledge that synthetic marijuana, like heroin, is a controlled substance. That conclusion was not an abuse of discretion.

Sandford further contends that the admission of certain Facebook posts violated Rule 404(a). Sandford concedes that he failed to object to the admission of this evidence, so we review for plain error. *See* Fed. R. Crim. P. 52(b); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904–05 (2018). We discern no plain error in the district court's decision to admit the Facebook posts, in which Sandford was criticized for "killing kids" and "destroying their lives" through his sale of synthetic marijuana. 18-288 App'x 216–18.[1] He defended his actions by saying that he

[1] "18-288 App'x" refers to the Appendix filed in *United States v. Sandford*, No. 18-288, Doc. Nos. 35–36 (2d Cir. Aug. 28, 2018). "18-3703 App'x" refers to the Appendix filed in *United States v. Sandford*, No. 18-3703, Doc. Nos. 36–37 (2d Cir. May 14, 2019).

"keep[s] the price down" and "feed[s] a lot of friends and family with the money [he] make[s]." 18-288 App'x 216–18. Sandford contends that these posts evince such a high degree of callousness that the jury consequently punished him for that character trait even in the absence of other evidence. But Rule 404(a) only prohibits admitting evidence "to prove that on a particular occasion the person acted in accordance with the character or trait." Fed. R. Evid. 404(a)(1). The examples given in the 1972 Advisory Committee Notes to Rule 404(a) are illustrative: "evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft" is not permissible. It is not clear or obvious that disregard for the well-being of others suggests that an individual has a propensity to knowingly deal an illicit substance, particularly where the evidence would otherwise be admissible to prove that Sandford did, in fact, sell synthetic marijuana. *See* Fed R. Evid. 801(d)(2). Thus, the district court did not commit plain error by admitting the Facebook posts.

II. Jury Instructions

Sandford next argues that his conviction for being a felon in possession of a firearm should be vacated in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—an argument he presents for the first time on appeal. Our recent decision in *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020), forecloses this argument. In *Miller*, we held, on plain error review, that a defendant who "stipulate[d] to the existence of his prior felony in order to prevent its details . . . from being placed before the jury" could not successfully mount a *Rehaif* challenge. *Id.* at 558. Similarly, here, "rejecting [Sandford's] argument will [not] seriously affect the fairness, integrity, or public reputation of judicial proceedings" because, looking beyond the trial record, "we have no doubt that, had the *Rehaif* issue been foreseen by the district court, [Sandford] would have stipulated to knowledge of his felon status to prevent the jury from hearing evidence of his actual sentence."

Id. at 559–60. Indeed, Sandford has three prior felony convictions. For two of these felonies, Sandford ultimately served over one year in prison. In short, *Miller* controls, so Sandford's *Rehaif* claim fails.

III. Sentence

Sandford claims that the district court erred in calculating his criminal history score by adding two points for the misdemeanor of aggravated unlicensed operation of a motor vehicle as opposed to one point. The government concedes that, because the maximum sentence for that misdemeanor is thirty days, only one point should have been added. "A district court commits procedural error where it . . . improperly calculates[] the Sentencing Guidelines range," although such an error may be harmless if "the record indicates clearly that the district court would have imposed the same sentence in any event." *United States v. Cramer*, 777 F.3d 597, 600–01 (2d Cir. 2015). It is not clear to us, on the present record, that the district court would have imposed the same sentence if it knew of the error in calculating Sandford's criminal history score. The district court indicated that it believed Sandford's score was 18, one point higher than the erroneous score calculated by the Probation Department and two points higher than Sandford's actual score. Even though Sandford would have fallen into the same criminal history category whether his score was 16 or 18, the district court may not have departed upward so significantly if it correctly calculated Sandford's criminal history score. Accordingly, we remand to the district court for the limited purpose of resentencing Sandford in light of the correct criminal history score. We note, however, that we find no error in the district court's decision to consider the conduct underlying the charges on which the jury deadlocked, *see United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam), the harm to the community caused by Sandford's trafficking in synthetic marijuana, its finding that Sandford knew that synthetic marijuana was illegal, and Sandford's

extensive criminal history in its decision to depart upward. We merely require that the district court assess those factors against the backdrop of a properly calculated criminal history score.

IV. Fine

Sandford next argues that the district court failed to consider evidence of his ability to pay in imposing a $1,000 fine and therefore the fine was improperly imposed. We disagree. "[T]he defendant bears the burden to show indigence that will avoid imposition of a fine." *United States v. Corace*, 146 F.3d 51, 56 (2d Cir. 1998). Accordingly, "the sentencing judge must afford the defendant an opportunity to present evidence of his financial inability to pay a fine." *Id.* But where, as here, a defendant refuses to disclose certain information at the sentencing phase, that "lack of disclosure" cannot "work to his advantage on an appeal from that sentence." *United States v. Tocco*, 135 F.3d 116, 133 (2d Cir. 1998). Sandford refused to answer any of the Probation Department's questions regarding his ability to pay, and, while he articulated concerns regarding the possible imposition of a fine in his sentencing memorandum, he failed to provide any evidence supporting his claim. Under these circumstances, we discern no error in the district court's decision to impose a $1,000 fine based on the Probation Department's unchallenged recommendation that such a fine could be paid while Sandford is incarcerated through the Inmate Financial Responsibility Program or while on supervised release. *See United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996) (no plain error where defendant ordered to pay fine out of money earned in prison).

V. Ineffective Assistance of Counsel

Finally, Sandford argues that his counsel throughout the plea negotiations—his third counsel in the proceedings—was ineffective. Sandford claims that his counsel failed to inform him that the district court could consider all relevant conduct—including the deadlocked drug

charges—at sentencing, which led Sandford to reject plea offers he otherwise would have accepted. "To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation 'fell below an objective standard of reasonableness' and that he was prejudiced as a result." *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984)). "We review *de novo* the issues of whether the defendant has met the two prongs of the *Strickland* test; we review the district court's ultimate decision on a Rule 33 motion for abuse of discretion." *United States v. DiTomasso*, 932 F.3d 58, 70 (2d Cir. 2019). Although we usually decline to decide ineffectiveness claims on direct review, we may entertain such claims "where: (1) as here, the defendant has a new counsel on appeal; and (2) argues no ground of ineffectiveness that is not fully developed in the trial record." *United States v. Yauri*, 559 F.3d 130, 133 (2d Cir. 2009) (per curiam) (citation omitted).

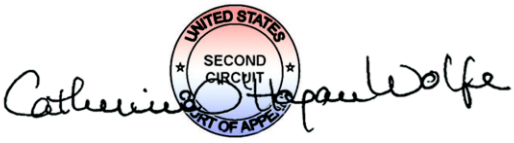
Exercising that discretion here, and assuming, *arguendo*, that Sandford's counsel's performance fell below an objective standard of reasonableness, we conclude that Sandford has failed to establish prejudice stemming from his counsel's performance. Sandford admitted that he was fully apprised of the relevant statutory maximum sentences he faced. And Sandford's counsel confirmed that he told Sandford that he could be sentenced to between fifteen- and twenty-five-years' imprisonment. *See United States v. Arteca*, 411 F.3d 315, 321 (2d Cir. 2005) (no prejudice where defendant informed "that in any event the court could impose a sentence . . . up to the statutory maximum of 20 years"). Moreover, Sandford's own testimony regarding whether he would have accepted a plea offer that guaranteed a lower sentence is equivocal at best. Sandford testified both that he was aware that a ten-year sentence was possible and that, "[i]f [he] knew [he] could get more than 70 to 87 months, [he] would have [taken] the 70 to 87 months." 18-3703 App'x 207–08. Accordingly, the district court properly rejected Sandford's "*post hoc*

assertions . . . about how he would have pleaded but for his attorney's deficiencies," particularly in the absence of Sandford's failure to produce any "contemporaneous evidence to substantiate" his purported preferences. *Lee*, 137 S. Ct. at 1967.

* * *

We have considered Sandford's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM IN PART** the judgment of the district court, and **REMAND** to the district court with instructions to resentence Sandford if, applying the correct criminal history score, it concludes that a different sentence is appropriate.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

SPA-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES EWARD SANDFORD,

Defendant.

DECISION AND ORDER

15-CR-6101L

Defendant James Sandford ("Sandford") was indicted by Superseding Indictment (Dkt. #105) filed on March 15, 2016, charging him in eleven counts of distributing a controlled substance, two counts charging firearm offenses and a single count of witness tampering. Defendant was represented commencing in about March, 2016 by attorney Matthew Nafus, Esq. ("Nafus"), Nafus was the third lawyer tasked with representing this defendant.

A jury trial commenced on January 4, 2017 and after a twelve-day trial, defendant was convicted on the two firearms counts and the single count of witness tampering. The jury was unable to agree on all of the narcotics-related counts and a mistrial was declared.

In due course, the Probation Department filed a Presentence Report ("PSR") (and later a revised PSR). Based on that report and its high guideline range recommendation, Sandford addressed the Court on July 27, 2017 in open court and read a lengthy letter (Dkt. #219). In essence, Sandford claimed that Nafus had provided ineffective assistance of counsel and he requested new counsel or be allowed to proceed *pro se*. Thereafter, Nafus was relieved from any further responsibility on the file based on Sandford's charges against him.

Several months later, on October 24, 2017 (Dkt. #235), Sandford filed, *pro se*, a motion pursuant to Fed. Crim. P. Rule 33 for a new trial. A motion alleged that attorney Nafus had provided ineffective assistance of counsel, which prejudiced the defendant. The gist of the motion was that Nafus had not properly advised Sandford of the risks of proceeding to trial and the potential penalties that could result.

The Government responded to the motion (Dkt. #239) and suggested, among other things, that the motion was premature since Sandford had not yet been sentenced by the court and, therefore, it was unclear whether the dire consequences claimed by Sandford would come to pass. The Court concurred and the parties proceeded to prepare for sentencing.

On January 22, 2018, after a lengthy sentencing proceeding, Sandford was sentenced to a term of 13 years on Count 14 (witness tampering) and two 10-year sentences on the two firearms offenses (Counts 12 and 13), all to run concurrently for an aggregate sentence of 13 years.

Sandford filed an appeal from that Judgment and that appeal is still pending. New counsel was appointed by the Second Circuit Court of Appeals to represent Sandford on the appeal.

In spite of the fact that the appeal is pending, this Court determined, in a Decision filed on April 2, 2018 (Dkt. #280), that it had jurisdiction to consider the Rule 33 motion and, therefore, the Court scheduled a hearing on the matter for May 30, 2018. The Court appointed yet another lawyer, Robert Wood, Esq. – the sixth lawyer that has represented Sandford in this case – to represent Sandford at the May 30th hearing.

At the hearing, two witnesses testified: the defendant Sandford and Attorney Nafus. Both sides submitted exhibits, including transcripts of several court proceedings. Defendant and the Government filed post-hearing legal memoranda, which the Court has considered and reviewed.[1]

[1] Sandford was given an opportunity to file his own *pro se* memorandum but he has not done so.

Defendant's motion under Rule 33 did not seek a "new trial" on all of the charges, but rather requested that he be allowed to now "take" one of the several plea offers presented by the Government during the several months prior to trial, and be sentenced according to those offers rather than to the term imposed by this Court on January 22, 2018.

Sandford has failed to carry his burden of demonstrating that Nafus provided ineffective assistance of counsel. After considering all of the evidence from the hearing and the above-referenced memoranda, I find that the defendant has failed to establish that his trial attorney provided ineffective assistance of counsel under the standards set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To the contrary, I find the evidence demonstrates careful and competent advice in a complex case involving a very difficult client. Therefore, I find the defendant has failed to establish either prong of the *Strickland* test: (1) he has failed to demonstrate that counsel's performance was deficient; and (2) he failed to show or demonstrate any prejudice resulting from counsel's performance. Defendant's motion pursuant to Rule 33 is in all respects denied.

DISCUSSION

Although presented differently from time-to-time, defendant's principal claim now is that he received incomplete or insufficient advice prior to trial and subsequent to it, and therefore did not accept various guilty plea offers that had been made by the Government. As mentioned, although defendant's motion is styled as a motion for a new trial, the requested relief is that he be resentenced according to the terms of one of the plea offers, 70-87 months, which of course is much lower than the sentence Sandford actually received by the Court.

After reviewing the testimony at the hearing on the motion, as well as the post-hearing memoranda, and in view of the prior record and numerous court appearances where pleas were

discussed, it is clear that defendant's motion is little more than a classic case of buyer's remorse. The evidence is clear, and of record, that defendant was advised several times of proposed plea offers and he rejected each and every one of them. This rejection came after Sandford had been advised repeatedly on the record by the Government and this Court as to the nature of the plea offer and the maximum penalties Sandford faced should there be a conviction.

In the *Strickland* case, the United States Supreme Court established a performance and prejudice test for the Court to analyze in determining whether trial counsel in a criminal case provided ineffective assistance. The burden is clearly on the defendant. The test is often described as a two-prong test. The defendant, who carries a heavy burden, must prove that counsel's performance was deficient, that is that it fell below an objective standard of reasonableness and also that the alleged deficient performance prejudiced the defense.

Both prongs must be satisfied. Sandford has failed to prove either here.

Concerning allegations of ineffective assistance, defendant must show more than differences of strategy and the errors must be serious and material. As to the second prong under *Strickland*, defendant must show that because of the deficient performance he sustained prejudice.

Often where it is clear defendant has suffered no prejudice, therefore failing to establish the second prong under *Strickland*, a reviewing court can dispose of the motion without considering whether the performance was defective. In this case, as the Government points out in its thorough Post-Hearing Submission In Response to Defendant's Motion Pursuant to Rule 33, Dkt. # 327 (hereinafter "Gov't. Response") at pp. 6-7, Sandford has failed to show any prejudice in at least two respects. Sandford seems to suggest that he received ineffective assistance because he was not advised that sentences on the firearm counts could run consecutively. As the Government notes, all of the Court's sentences were imposed concurrently, and therefore Sandford

suffered no prejudice. Based on the testimony at the hearing, however, I accept attorney Nafus's testimony that Sandford was fully advised of the sentencing options presented to the Court.

The second matter relates to defendant's insistence that he was never advised that the Court could use the so-called cross-reference Sentencing Guideline rules under Section 2K2.1(c). It was under this Section that the Probation Department determined Sandford's Guideline range to be exceptionally high, 360-480 months imprisonment. The record is clear that attorney Nafus filed objections to the Presentence Report challenging Probation's determination on this point. More to the point, this Court rejected those calculations as well and did not use the cross-reference section at all and, therefore, determined Sandford's Guideline Range to be literally decades lower than what had been determined to be the case by Probation. Therefore, Sandford complains now and seeks relief for a sentencing consequence that never occurred. There is no prejudice here and therefore that part of Sandford's claim must be rejected and denied.

Maximum Penalties

Sandford's claim that he did not receive information from counsel as to the maximum penalties is belied by numerous transcripts of court proceedings. The Government, charitably, describes this claim as "a complete fiction." (Gov't. Response, at p. 7). Sandford was cross-examined by Government's counsel at the Rule 33 hearing and he admitted knowing what the statutory maximums were (Gov't. Response, Exhibit (hereinafter "Ex.") 1), Tr. of 5/30/18, at pp. 70, 97).[2]

Transcripts of court proceedings show that Sandford was repeatedly advised of his maximum exposure. This occurred at defendant's initial appearance on the original indictment

[2] Exhibits 1-11 are attachments to the Gov't. Response.

(Gov't. Response, Ex. 2; Tr. of 7/15/15, at pp. 3-8). Thereafter, upon defendant's arraignment on the Superseding Indictment on March 22, 2016, he was once again advised of the maximum penalties. (*See* Gov't. Response, Ex. 3, Tr. of 3/22/16, at pp. 5-8).

Pretrial offers to dispose of the indictment were discussed with defendant and his attorney for over several months prior to commencement of the trial in January 2017. The parties met in court several times during that period and on each occasion discussion of a plea offer was broached, as well as the significant exposure faced by Sandford should he be convicted on all charges.

The offers varied a bit but in each case they were emphatically rejected by Sandford often with a "counteroffer" for a lesser sentence. All of the offers made by the Government were submitted to Sandford and he does not now claim otherwise.

The first proposal was contained in an exchange of emails between the then-prosecutor, Jennifer Noto, and defense counsel (Gov't. Response, Ex. 8). The proposal was a plea to a violation of 18 U.S.C. § 922(g) with a 10-year term of imprisonment. The parties appeared before this Court on September 20, 2016, shortly before the then-scheduled trial and the Government placed on the record defendant's exposure under the statute and the Sentencing Guidelines, as well as the plea offer (Gov't. Response, Ex. 11, Tr. of 9/20/16). The proposal presented was for a plea to one count of a felon-in-possession (Section 922(g)) with an agreed-upon range under Federal Criminal Procedure 11(c)(1)(C) of 7-10 years imprisonment (Gov't. Response, Ex. 11, Tr. of 9/20/16, at p. 4). Defense counsel confirmed that the offer had been conveyed but the defendant was "not interested" (Gov't. Response, Ex. 11, Tr. of 9/20/16, at p. 7). Sandford himself confirmed his understanding of the offer and his rejection of it, stating that "I'm not guilty, your Honor" (Gov't. Response, Ex. 11, Tr. of 9/20/16, at p. 6).

The prosecutor then also presented a detailed summary of the statutory maximum penalties, as high as 40 years, if convicted of selling drugs with 1,000 feet of a school and that the Sentencing Guidelines could be as much of 324-405 months on the drug charges (Gov't. Response, Ex. 11, Tr. of 9/20/16, at p. 5).

The parties next appeared at a status conference before trial on December 1, 2016.[3] By then AUSA Noto had left the office and a new prosecutor, Brett Harvey, was assigned to the case. At that time, Harvey announced a somewhat more lenient plea offer. Under that proposal, defendant would plead to one count of Section 922(g) and his exposure would be 70-87 months (Gov't. Response, Ex. 4, Tr. of 12/1/16, at p. 4). AUSA Harvey stated that he had "been talking periodically with Mr. Nafus" about the new offer. (*Id.* at p. 4). Once again, Sandford was advised of the high Guideline calculation of 324-405 months if convicted on the drug charges. The Government agreed to keep the offer open for a day or so since trial was fast approaching. Sandford then volunteered that "we're close" when the Court inquired if he was interested at all in a disposition. (Gov't. Response, Ex. 4, Tr. of 12/1/16, at p. 8).

Later that month, on December 29, 2016, the parties appeared in Court for a pretrial conference in anticipation of the trial start on January 4, 2017 (Gov't. Response, Ex. 6, Tr. of 12/29/16). The Court then confirmed that defendant was not interested in the plea that had been offered and that the case would then proceed to trial. However, even after trial had commenced, the parties continued to discuss a plea. On January 5, 2017, the prosecutor, Harvey, advised the Court that "a revised" plea offer had been made to the defendant after court on the previous day. Alternate versions had been proposed with an agreed-upon sentencing range under Federal

[3] The trial had been adjourned for several months in the hope that the Second Circuit might decide a case before it involving the same or similar drugs as those in Sandford's Indictment. As it turned out, that clarifying decision (*United States v. Demott*, 906 F.3d 231) was not issued until October 9, 2018, well after the trial and sentencing of Sandford.

Criminal Procedure 11(c)(1)(C) of between 72-84 or 70-87 months (Gov't. Response, Ex. 7, Tr. of 1/5/17, at p. 2). Nafus advised the Court at that time that Sandford was not interested in the offers.

At the hearing on the Rule 33 motion, Nafus testified at this point during trial, since he was very familiar with the case and its weaknesses, he told Sandford that he should "seriously consider" taking the 70-87 month offer. Sandford refused.

Now, after rejecting the plea offers that had been made numerous times prior to trial, Sandford asks this Court to give him the benefit of such a plea. There is no justification whatsoever for such relief. Defendant made his choice; he knew the risks and he elected to take his chances at trial.

Sandford was actively involved in his case and was knowledgeable about the statute and the Guidelines, although it appears that he had a more optimistic view of his case than anyone else. At the hearing on defendant's Rule 33 motion, his attorney, Nafus, discussed the numerous times that he and Sandford discussed the case and the risk of going to trial. (Gov't. Response, Ex. 1, Tr. of 5/30/18, at pp. 99-103, 120).

Nafus is a very experienced criminal defense lawyer who has practiced in this Federal Court and in local state courts for decades. He was an Assistant District Attorney for 9 years and has been in private practice for 12 years, doing criminal defense work. Nafus testified that defendant was a very difficult client and that he repeatedly went over many facts about the case and the potential outcomes with Sandford. He estimated that he visited Sandford, who was in custody, 35-36 times during the course of his 15-months representation.

Sandford rejected all plea offers, but did make counteroffers, at one time to 57 months. Nafus advised Sandford that he had the highest criminal history category (VI) and he told Sandford

that there were several aggravating factors that might impact sentencing adversely. For example, Sandford was selling very powerful drugs to 14 to 16-year-old teenagers and that he had used his family members to sells drugs as well. Nafus testified that he told Sandford repeatedly that the Guidelines were advisory only and that he never promised Sandford that he would get a particular sentence, especially a sentence below that offered to settle the case, after trial.

As trial became imminent, Nafus told Sanford that the risks were too great; he advised Sandford not to risk going to trial over merely a one-year difference between what was offered and what was acceptable.

I accept the testimony of Nafus as to the scope and extent of his advice to Sandford. He did what a good lawyer would do; he explained all the options and gave the client his view that the offer made just before trial should be accepted. Defendant was of course free to reject that advice, but he obviously did so at his peril.

I do not credit Sandford's version presented at the Rule 33 hearing. Such testimony at such a proceeding after trial and sentencing is always suspect. It appears clear now that defendant has second thoughts about not taking the plea when it had been offered. He failed to listen to his lawyer and now wants the Court to give him the benefit of the bargain that he rejected numerous times. After reviewing Sandford's testimony and the admissions he made at the hearing, I do not find his testimony credible concerning his claims that Nafus promised that he would receive a sentence lower than the plea offers after trial. Such a claim strains credulity. In sum, this case really boils down to nothing more than "buyer's regret." Sandford made a choice to proceed to trial, contrary to the advice of his lawyer and now seeks relief in this Court by turning against his lawyer, a lawyer who performed remarkably well at the trial obtaining a hung jury on the various serious drug counts.

CONCLUSION

Defendant's motions for a new trial (Dkt. ##235, 282[4]) are in all respects DENIED.

IT IS SO ORDERED.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
December 7, 2018.

[4] On May 8, 2018 (Dkt. #282), just prior to the scheduled hearing on defendant's Rule 33 motion concerning alleged ineffective assistance of counsel of attorney Nafus, Sandford filed a four-page affidavit complaining about the way two other of his prior attorneys handled portions of the case. One dealt with pretrial matters and the other with sentencing.

Such matters were never discussed further or pursued at the hearing on the Rule 33 motion. Defendant has made allegations and challenged many activities of the half-a-dozen attorneys that represented him at various portions of the case. But, in any event, there is no merit to these present claims that were raised but not pursued.

Two of the matters relate to possible suppression issues concerning seizure of a firearm from a storage unit and relating to the initial traffic stop of defendant. These were litigated before a magistrate judge and this Court. The matters complained of now to some extent were tactical decisions made by then counsel. There was a full opportunity to litigate the matters and that occurred. At trial, defendant's mother, who testified for the Government advised that she consented to the search of the storage unit where the stolen weapon was found. In any event, there was ample evidence from other witnesses connecting defendant to the purchase of the stolen shotgun for a few bags of drugs.

Concerning sentencing, there were lengthy proceedings on sentencing issues. Defendant's then-attorney James Riotto did file a Sentencing Memorandum (Dkt. #257), although for most of the proceedings prior to sentencing, Sandford elected to proceed *pro se*. At sentencing, the Court did impose an upward departure to a degree. The parties were given notice by Text Order of July 14, 2017 (Dkt. #215) to be prepared to discuss whether the facts supported an upward departure or variance. Therefore, the parties had notice of this possibility. But, in any event, as the United States Supreme Court determined in *United States v. Irizarry*, 553 U.S. 708 (2008), a sentencing court need not now notify the parties of its intent to impose a non-Guidelines sentence.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

DECISION AND ORDER

15-CR-6101L

v.

JAMES EDWARD SANDFORD III,

Defendant.

Defendant James Edward Sandford III ("Sandford") proceeded to trial on a multi-count indictment charging narcotics and firearms violations. On January 20, 2017, he was found guilty on three counts of the indictment, Count 12 (Felon in Possession of a Firearm), Count 13 (Possession of a Stolen Firearm), and Count 14 (Witness Tampering). The jury was unable to reach a verdict on the remaining counts of the indictment and a mistrial was declared and the jury discharged. Sandford now moves (Dkt. #193) for a Judgment of Acquittal pursuant to FED. R. CRIM. P. 29 on the grounds that the Government failed to produce sufficient evidence to sustain a conviction on some of the counts.

The motion addresses the three counts that resulted in a conviction, as well as two counts, Counts 6 and 7, which were counts upon which the jury was unable to agree. The Government has filed a Response (Dkt. #199) to the motion.

I have carefully reviewed the pending motion and the Government's Response, as well as my notes from the trial. The law is clear that a defendant bears a heavy burden to overturn a conviction on the grounds that there was insufficient evidence. The test is whether after reviewing the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). In light of this standard, defendant's motion is denied.

Concerning the motion as to Counts 6 and 7, the defendant argues that there was a lack of proof as to whether a controlled substance was sold to a minor as charged in the indictment. Testimony relating to that count came from two witnesses, Jonathan Connelly and Dustin White. In addition, there were some Facebook communications and testimony of other witnesses who observed the transfer of the shotgun in question. Although the drugs that were received from the defendant as part of the sale and transfer of the firearm were not recovered and tested, the witnesses testified that they were packaged in the same manner as other drugs sold and used by the witnesses. The witnesses identified several different brands which were clearly labeled on the packages themselves and these brands were similar to numerous other such packages distributed and possessed throughout the case, many of which were in fact submitted for chemical analysis which demonstrated their illegal character.

I believe the jury, relying on both direct and circumstantial evidence, could conclude that these labeled drugs had the same properties as other similarly labeled drugs which were found to contain contraband. In light of the relationship between the parties and the transfer of the shotgun in question, I believe a rational trier of fact could have concluded, as to Count 6, that the defendant did distribute a controlled substance to a minor in consideration for receipt of the

shotgun. Therefore, Count 7 withstands scrutiny as well. The jury could have found that a firearm was possessed or used in connection with the drug trafficking crime charged in Count 6. Of course, the jury was unable to reach a verdict on these two counts but, nevertheless, I believe the evidence was sufficient for a rational trier of fact to have found guilt.

Defendant also moves for a judgment of acquittal on those counts which resulted in a conviction, Counts 12, 13 and 14.

Considering the evidence in the light most favorable to the Government, I believe the evidence on all counts is sufficient. Counts 12 and 13 relate to defendant's possession of the stolen shotgun and was supported by the testimony of several witnesses who described the theft of the shotgun and the transfer of it to the defendant. There was proof that he had been previously convicted of a felony and, therefore, was prohibited from possessing the shotgun. The evidence was clear that the witnesses Connelly and White testified about the theft of the shotgun from Connelly's grandmother's house and the exchange of that firearm for two and one-half bags of synthetic marijuana. Defendant was in possession of the shotgun at that time and others testified that he was in possession of the firearm at various times after the sale. In addition, there was evidence concerning statements made by the defendant relative to his obtaining the shotgun.

Defendant also challenges the verdict on Count 14, the Witness Tampering Count. In my view, the evidence supported the jury's verdict on that count. Viewing the evidence in the light most favorable to the Government, there was testimony that defendant yelled out a threat to Connelly who Sandford described as a "snitch." The inference was clear that Sandford intended to come after Connelly. Considering all the evidence, including the nature of the statements, the

effect it had on the victim Connelly, and other circumstances in the case, I believe a rational trier of fact could have found that such activity constituted tampering with a witness as charged in Count 14.

CONCLUSION

Defendant's motion (Dkt. #193) for a Judgment of Acquittal as to Counts 6, 7, 12, 13 and 14 are in all respects denied.

IT IS SO ORDERED.

Dated: May 24, 2017
Rochester, New York

DAVID G. LARIMER
United States District Judge