20-2698
*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 23rd of September, two thousand twenty-one.

Present:

DEBRA ANN LIVINGSTON,
*Chief Judge,*
DENNY CHIN,
WILLIAM J. NARDINI,
*Circuit Judges.*

Appendix A

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UNITED STATES OF AMERICA,

*Appellee,*

v. 20-2698

JAMES EDWARD SANDFORD III, AKA "MALICE,"

*Defendant-Appellant.*[*]

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For Appellee: TIFFANY H. LEE, Assistant United States Attorney, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, Buffalo, New York.

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

[*] The Clerk of Court is respectfully directed to amend the official caption as set forth above.

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**.

Defendant-Appellant James Edward Sandford III ("Sandford") appeals from the district court's order of August 10, 2020, declining to conduct a resentencing proceeding. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

An appellate court "may remand [a] cause and . . . require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106; *see also United States v. Ojeda*, 946 F.3d 622, 629 (2d Cir. 2020) ("As a general matter, appellate courts have broad discretion to mandate further proceedings on remand."). In the sentencing context, an appellate court's discretion "extends to the scope of issues to be considered by the resentencing court." *Ojeda*, 946 F.3d at 629.

If a case is remanded for a limited (rather than *de novo*) resentencing, the "so-called 'mandate rule'" applies, which "forecloses relitigation of all issues previously waived by the defendant or decided by the appellate court." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002). The mandate rule "prevents relitigation in the district court not only of matters *expressly* decided by the appellate court, but also precludes re-litigation of issues *impliedly* resolved by the appellate court's mandate." *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 175 (2d Cir. 2014) (emphasis added) (internal quotation marks omitted). "Furthermore, where the mandate limits the issues open for consideration on remand, the district

court ordinarily may not deviate from the specific dictates or spirit of the mandate by considering additional issues on remand." *Id.*

In general, a district court is required to resentence a defendant "in light of the circumstances as they stood at the time of his resentencing." *Werber v. United States*, 149 F.3d 172, 178 (2d Cir. 1998); *see also United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) ("[A] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing."). In *Pepper v. United States*, the Supreme Court held that "a district court at resentencing *may* consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the . . . Federal Sentencing Guidelines range." 562 U.S. 476, 481 (2011) (emphasis added). Our Court has since clarified, however, that "*Pepper* held that where a Court of Appeals remands for a *plenary* resentencing, the district court must be allowed to consider the facts as they are at the time of imposing the new sentence." *Shabazz v. United States*, 923 F.3d 82, 84 (2d Cir. 2019) (emphasis added). But "*Pepper* did not preclude remands that would reopen only *limited* aspects of the previously imposed sentence . . . ." *Id.* (emphasis added). Indeed, "*Pepper* expressly clarified that it did not 'mean to preclude courts of appeals from issuing [limited] remand orders, in appropriate cases, that may render evidence of postsentencing rehabilitation irrelevant in light of the narrow purposes of the remand proceeding.'" *Id.* (quoting *Pepper*, 562 U.S. at 505 n.17).

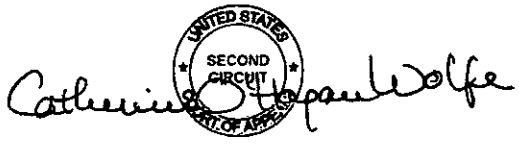
Sandford's argument that *Sandford I* required the district court to conduct a resentencing fails. The *Sandford I* decision cannot reasonably be read to support Sandford's position. The decretal language clearly instructs the district court to conduct a resentencing only if Sandford's corrected criminal history score would result in a different sentence. And in making that narrow

determination, the district court was not required to consider any evidence of Sandford's postsentencing rehabilitation.

The five additional arguments that Sandford raises in his *pro se* supplemental brief fail as well. Sandford's first argument, that the district court erred in not considering his postsentencing rehabilitation, fails for the reasons described above. His second and third arguments — that his sentence was substantively unreasonable and that the district court made additional errors in calculating his criminal history score — were rejected in *Sandford I* and are therefore barred by the mandate rule. *Sompo Japan*, 762 F.3d at 175. Sandford's fourth and fifth arguments, while not barred by the mandate rule, are likewise meritless. Sandford argues that this Court failed to consider his strongest arguments in his initial appeal and ignored his request to stay the mandate so that he could request an extension of time to petition for a rehearing *en banc*. But an appeal of a district court's resentencing order is not the proper channel for the review of a prior decision of this Court.

We have considered Sandford's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES EDWARD SANDFORD, III,

Defendant.

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DECISION AND ORDER

15-CR-6101L

Appendix B

Defendant James Edward Sandford, III ("Sandford") was convicted after trial of two firearms offenses, Counts Twelve and Thirteen, and a charge of witness tampering, Count Fourteen. Sandford appeared for sentencing on January 22, 2018. The fifty-seven-page transcript of that proceeding is filed at Docket #284. After extensive proceedings on various objections, the Court concluded that under the United States Sentencing Guidelines ("Guidelines"), based on a criminal history category of VI, Sandford's Guideline sentencing range was 70-87 months. The Court determined that an upward departure was warranted, and discussed at length (Dkt. #284, at 39-49) the reasons for that determination. The Court imposed a sentence of 156 months on Count 14 and 120 months each on Counts 12 and 13, all to run concurrently, for an aggregate sentence of 156 months.

Sandford appealed that judgment and sentence. In a Summary Order issued May 29, 2020, the Court of Appeals affirmed the judgment of this Court, but issued a limited remand on one matter relating to sentencing. *See* Dkt. #336.

The remand was occasioned because the Court of Appeals concluded that Probation and this Court erred in calculating Sandford's criminal history score relating to a misdemeanor

conviction of aggravated unlicensed operation of a motor vehicle which occurred in May 2010 in Southeast (N.Y.) Town Court, *see* Revised Presentence Report (Dkt. #338) ¶ 128.

The Court of Appeals ruled that the Probation Department and this Court erred in giving Sandford two criminal history points for that offense rather than one. The result was that this Court believed Sandford's criminal history point total was 18, when the actual score should have been 16. In all other respects, the Second Circuit affirmed this Court's judgment and the sentence.

As mentioned, the Probation Department issued a Revised Presentence Report on June 23, 2020, and this Court issued an Order (Dkt. #335) directing the Government and defense counsel to express their views as to the nature of the remand. The Government responded by letter dated July 7, 2020 (Dkt. #342) and opined that the remand was limited; defense counsel filed his memorandum urging a full resentencing (Dkt. #339). The defendant also filed his own ten-page *pro se* response to the Court's Order (Dkt. #340).[1] Defense counsel also filed several supplemental letters requesting that the defendant be returned to the district and other matters relating to the Revised Presentence Report (Dkt. ##341, 343).

After carefully reviewing the Second Circuit's Summary Order, and the responses of the parties, it is clear that the Circuit's remand is a very limited one. The Court of Appeals affirmed the conviction and rejected all of defendant's arguments. It determined that the criminal history category was determined to be higher than it should have been and it was only as to that that the remand was ordered.

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[1] In his *pro se* Response, Sandford stated that the Revised Presentence Report was mailed to him at the facility but he was not allowed to receive and retain it. The Probation Office has advised the Court that the full Presentence Report was sent to Sandford's case manager at FCC Hazelton and that Sandford had a full opportunity to review the PSR. It was reported that Sandford declined to do so. In light of the limited remand and the fact that this is not a *de novo* resentencing, matters concerning review of the Revised Presentence Report are of little moment.

The decretal paragraph in the Second Circuit's Decision could not have been any clearer. I set forth the relevant language concerning remand in full here:

> 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.

The remand is clear. This Court was directed to resentence Sandford if, but only if, it determines that a different sentence would be appropriate in light of the changed criminal history category score. The Government agrees with this analysis, but both defense counsel and defendant himself essentially seek a do-over. Both counsel and the defendant essentially seek a *de novo* resentencing, but that clearly is not the nature of the remand directed by the Second Circuit.

The Second Circuit in its Summary Order rejected Sandford's arguments concerning evidentiary matters, the Court's jury instructions, and claims of ineffective assistance of counsel. Significantly, the Second Circuit also found "no error" in the District Court's decision to consider the underlying charges on which the jury deadlocked as part of its decision to depart upward. The Circuit also acknowledged that the harm to the community caused by Sandford's drug trafficking, the fact that he knew the synthetic marijuana was illegal and defendant's extensive criminal history were proper factors for an upward departure. In sum, the Second Circuit rejected all of Sandford's arguments concerning evidentiary issues at trial, his claims of ineffective assistance of counsel, and his claims that this Court erred in its decision to depart upward. Again, the only matter now before the Court is to respond to the Circuit's directive and determine whether, applying the correct criminal history score, this Court believes a different sentence is appropriate.

The short answer to the question presented by the Second Circuit's remand is that this Court's sentence would not have been changed one iota had the Court determined that

Sandford's criminal history points totaled 16 rather than 18. In coming to that conclusion, I have reviewed the Revised Presentence Report, as well as the lengthy transcript of the sentencing proceedings on January 22, 2018 (Dkt. #284). The Court set forth on the record several reasons why the Court believed an upward departure was warranted from the Guideline range of 70-87 months.

Sandford had several prior felonies and his numerous convictions placed him in the highest criminal history category: VI. As the Second Circuit pointed out in its Decision, the modest change of criminal history points from 18 to 16 still placed Sandford squarely in that category. The Guidelines provide that a total of 13 or more points results in a criminal history score of VI. So, Sandford remains at the highest criminal history category, VI and, therefore, the changed criminal history points are not significant.

The eight-year-old traffic misdemeanor in the Southeast Town Court was never mentioned at all by this Court in setting forth the list of its reasons for departure. In fact, that conviction had no effect whatsoever on the Court's ultimate sentence. In fact, that misdemeanor traffic offense was insignificant in terms of the Court's sentencing decision. The fact remains that Sandford was in the highest criminal history category, regardless of how many points are attributable to that relatively minor conviction.

A review of the Court's comments at sentencing demonstrates what *were* the principal bases for the departure: Sandford's dreadful conduct in connection with his drug distribution activities, often involving minors. I incorporate by reference here all the comments that this Court made at sentencing (Dkt. #284) as to why the Court believed, and continues to believe, that a departure was warranted.

The Court chose to depart seven levels to offense level 27. That level, with the criminal history category of VI, established a Guideline range of 130-162 months. On Count 14, the Court imposed a 156-month sentence, which was within the new Guideline range. The Court imposed 120 months, the maximum, on the two firearms offenses.

Therefore, in response to the Second Circuit's remand directive, I state unequivocally that the modest reduction in criminal history points from 18 to 16, which still placed Sandford squarely in the highest criminal history category, VI, would not have changed this Court's sentence in any way. Understanding what the correct criminal history score now is, I explicitly find and rule that there is no basis to impose a different sentence, and therefore no need to conduct a resentencing proceeding. In sum, all of the reasons that the Court set forth for departure when I imposed the original sentence remain as convincing today as they were when the Court originally imposed sentence on January 22, 2018, regardless of whether Sandford had 16 criminal history points rather than 18.

IT IS SO ORDERED.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
August 10, 2020.

# UNITED STATES COURT OF APPEALS
## FOR THE
## SECOND CIRCUIT

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 1st day of December, two thousand twenty-one.

Appendix C

United States of America,

Appellee,

v.

James Edward Sandford, III, AKA "Malice",

Defendant - Appellant.

**ORDER**

Docket No: 20-2698

Appellant, James Edward Sandford, III, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Catherine O'Hagan Wolfe

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.*

Appendix D

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UNITED STATES OF AMERICA,

*Appellee,*

v.

18-288
18-3703

JAMES EDWARD SANDFORD, III, AKA MALICE,

*Defendant-Appellant,*

EDWARD M. SANDFORD, AKA EDDIE,

*Defendant.*

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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