

1 KENNETH PETTWAY, JR. aka KPJ, DEMETRIUS
2 BLACK, DEE BLACK,
3 *Defendants-Appellees.*

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FOR APPELLANT: JOSEPH J. KARASZEWSKI, Assistant United States Attorney, *for* JAMES P. KENNEDY, JR., Acting United States Attorney for the Western District of New York, Buffalo, New York.

FOR DEFENDANTS-APPELLEES: HERBERT L. GREENMAN, Lipsitz Green Scime Cambria, LLP, Buffalo, New York (SEAN DENNIS HILL, *on the brief*, Lipsitz Green Scime Cambria, LLP, Buffalo, New York).

5 Appeal from the United States District Court for the Western District of New
6 York (Skretny, J.).

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8 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,**
9 **AND DECREED** that the interlocutory ruling of the district court excluding evidence is
10 **AFFIRMED IN PART** and **VACATED IN PART**, and the case is **REMANDED for**
11 **further proceedings.**

12
13 The government brings interlocutory appeal from the district court’s pre-trial
14 order excluding any evidence of the defendants’ possession of a J.P. Sauer & Sohn .32-
15 caliber Model 38 pistol with serial number 355206 (hereinafter, “J.P. Sauer & Sohn
16 Pistol”). Trial has been postponed to await the resolution of this issue. We assume the
17 parties’ familiarity with the underlying facts, procedural history, and issues on appeal.

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19 The Fourth Superseding Indictment charges defendants Kenneth Pettway and
20 Demetrius Black with: conspiracy to possess with intent to distribute 280 grams or more
21 of cocaine base (Count 1); possessing unspecified firearms in furtherance of the
22 conspiracy alleged in Count 1 (Count 2); possession on January 18, 2012 of heroin and
23 cocaine with intent to distribute (Count 3); and possession on January 18, 2012 of two
24 specifically described firearms in furtherance of the controlled substance offense alleged
25 in Count 3 (Count 4). In addition, it charges Pettway, as a convicted felon, with illegal
26 possession on January 18, 2012 of the same two specifically identified firearms that are
27 specified in Count 4, as well as ammunition (Count 5).

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1 The two guns specified in Counts 4 and 5 are described as a “J.P. Shuer & Suhl
2 CHL 7.65 mm pistol with no serial number,” and a “Smith and Wesson 9 mm model
3 6906 pistol, serial no. TCA6469.” Count 5 also alleges that Pettway possessed “eight (8)
4 rounds of .32 caliber ammunition and nine (9) rounds of 9 mm ammunition.” According
5 to the government, the indictment’s description of the “J.P. Shuer & Suhl CHL 7.65 mm
6 pistol with no serial number” was inaccurate. The gun in fact was a J.P. Sauer & Sohn
7 .32 caliber Model 38 pistol with serial number 355206.

8
9 Four and a half years after filing the original indictment containing the mistaken
10 description of the gun, during which time the government filed four superseding
11 indictments each perpetuating the inaccurate description notwithstanding the
12 government’s awareness throughout this period of the correct description of the gun, on
13 the eve of trial the government brought a motion asking the district court to amend the
14 indictment to reflect the correct description of the J.P. Sauer & Sohn Pistol. In the
15 alternative, the government asked the court to instruct the jury that a misspelling in the
16 indictment is not fatal, or to amend the indictment by striking all reference to that pistol
17 from Counts 4 and 5. The court denied all aspects of the motion to amend the
18 indictment and instruct the jury. In addition, the court *sua sponte* ruled that any
19 evidence concerning the J.P. Sauer & Sohn Pistol would be irrelevant and inadmissible
20 and that the court would sustain an objection to introducing it.

21
22 We have no appellate jurisdiction to rule on the court’s interlocutory rulings on
23 amendment of the indictment or instructions to the jury, and the government does not
24 ask for rulings reviewing those decisions. Only the court’s ruling “excluding evidence”
25 is subject to the government’s interlocutory appeal. 18 U.S.C. § 3731.

26
27 With respect to the court’s exclusion of *all evidence* of the defendants’ possession
28 of the J.P. Sauer & Sohn Pistol, we think the ruling should be viewed as having two
29 distinct parts that are subject to different considerations. First, to the extent that the
30 government asks us to overturn the ruling that the J.P. Sauer & Sohn .32 caliber pistol
31 with a serial number would not be admitted to prove the allegations of possession of a
32 “J.P. Shuer & Suhl CHL 7.65 mm pistol with no serial number,” giving due
33 consideration to all the circumstances, in particular the government’s inordinate delay
34 in seeking to correct the error, and its failure in filing four superseding indictments to
35 use any of them to correct this error, we cannot say the district court abused its
36 discretion. Accordingly, we affirm that aspect of the court’s ruling.

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38 It does not follow, however, that the J.P. Sauer & Sohn Pistol should be excluded
39 for all purposes, and the court gave no explanation why evidence of the defendants’
40 possession of this pistol “would be irrelevant” if offered for other purposes than to

1 prove the explicit possession charged in Counts 4 and 5. A-107 Evidence of gun
2 possession is routinely admitted to prove knowledge and intent with respect to
3 narcotics charges without need for allegation in the indictment of such gun possession.
4 *See United States v. Mercado*, 573 F.3d 138, 142 (2d Cir. 2009). The court gave no
5 explanation why possession of the J.P. Sauer & Sohn Pistol was not relevant to proving
6 knowledge and intent to possess and distribute narcotics as charged in Counts 1 and 3,
7 or prove that unspecified guns were possessed in furtherance of the Count 1 narcotics
8 offense, as charged in Count 2. As for Count 4, even though we affirm the court's ruling
9 that the J.P. Sauer & Sohn Pistol could not be used to prove the possession of the "J.P.
10 Shuer & Suhl" pistol, the court did not explain why it could not be received as evidence
11 that the Smith and Wesson pistol properly named in that count was possessed in
12 furtherance of the controlled substance offense charged in Count 3, as alleged. And with
13 respect to Count 5, the court did not explain why Pettway's possession of a .32 pistol
14 that is not identified in the indictment would not be relevant evidence to show that his
15 possession of eight rounds of .32 caliber ammunition was knowing and intentional. The
16 fact that possession of a different gun (a "J.P. Shuer & Suhl" pistol) was charged in
17 Counts 4 and 5, which the government will be unable to prove, did not mislead the
18 defendants to justifiably believe that there would be no evidence of possession of a J.P.
19 Sauer & Sohn Pistol to support these other purposes. Accordingly, to the extent the
20 court ruled without explanation that the pistol was irrelevant for all these purposes, we
21 vacate that ruling.

22
23 In vacating the ruling, however, we do not purport to require the district court to
24 admit the gun for these purposes. As of yet, neither we, nor the district court, has heard
25 full argument on whether the J.P. Sauer & Sohn Pistol should be received for such
26 purposes. In the event the government offers the J.P. Sauer & Sohn Pistol at trial for
27 purposes other than to prove the alleged possession of the "J.P. Shuer & Suhl" weapon
28 charged in Counts 4 and 5, we leave it open to the district court to rule as it sees fit,
29 noting only that, so far as we are aware, the *present* record shows no reason why the
30 defendants would be prejudiced by such offer or why the pistol would not be relevant.

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32 Accordingly, the judgment of the district court is **AFFIRMED IN PART and**
33 **VACATED IN PART**, and the case is **REMANDED for further proceedings**.

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35 FOR THE COURT:
36 Catherine O'Hagan Wolfe, Clerk