

For Dockets See [08-4420](#)

United States Court of Appeals, Fourth Circuit.
 UNITED STATES OF AMERICA, Plaintiff/Appellee,
 v.
 Kinsey Cory HERDER, Defendant/Appellant.
 No. **08-4420**.
 July 24, 2008.

On Appeal from the United States District Court for the
 Eastern District of Virginia Alexandria Division (The Hon.
 Claude M. Hilton)

Brief of The Appellant

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to [18 U.S.C. § 3231](#). That court entered the judgment of conviction and sentence on March 24, 2008. J.A. 217. Kinsey Herder timely filed his notice of appeal on April 4, 2008. J.A. 222; see [Fed. R. App. P. 4\(b\)\(1\), \(b\)\(6\)](#). Therefore, this Court has jurisdiction over this appeal pursuant to [28 U.S.C. § 1291](#) and [18 U.S.C. § 3742](#).

STATEMENT OF THE ISSUES

I. Was the evidence sufficient to prove Mr. Herder possessed the drugs found in the car when the evidence showed only his mere proximity to the drugs?

II. Did the court err in refusing to give Mr. Herder's requested jury instruction on possession in light of the jury's question about that element?

III. Did the court impose a procedurally unreasonable sentence when it refused to consider the disparity in treatment between crack and powder cocaine?

IV. Did the court err in ordering the forfeiture of cash found on Mr. Herder when there was not a sufficient nexus between the money and the offenses of conviction?

V. Did the court make a clerical error in entering the judgment when the order listed a conviction on a count of which Mr. Herder had been acquitted by the court?

STATEMENT OF THE CASE

Kinsey Herder brings this appeal to challenge his conviction.

tion and sentence on drug charges. Mr. Herder was indicted on one count of possession with intent to distribute five grams of more of crack cocaine and one count of possession with intent to distribute marijuana, both in violation of [21 U.S.C. § 841\(a\)\(1\)](#). The charges arose from a consensual dog sniff search of Mr. Herder's car and the discovery of contraband hidden in false-bottomed containers in the back seat of the car.

Mr. Herder pled not guilty and proceeded to a trial by jury. The government presented evidence regarding the events surrounding the search, and expert testimony about methods of drug distribution. Mr. Herder presented evidence from two witnesses who testified concerning his actions on the night of the search, his business ventures, and his shared use of the car. The court refused to provide Mr. Herder's proposed jury instruction on the definition of possession even after the jury submitted a question on that element. At the conclusion of the one-day trial, the jury convicted Mr. Herder on both counts.

The presentence report proposed an advisory guideline range of 41 to 51 months of imprisonment. The district court imposed a sentence at the low end of this range after refusing to entertain Mr. Herder's argument that the court was free to disregard the Sentencing Commission policy used to establish that range. The court also forfeited to the government approximately \$1,200 found on Mr. Herder during the search. From these orders of conviction, sentence, and forfeiture, Mr. Herder appeals.

STATEMENT OF FACTS

A. Mr. Herder's Encounter With the Police

Around midnight on June 20, 2007, Fauquier County Sheriff's Deputy Paul Cable was on patrol in Warrenton, Virginia. J.A. 44-45. He drove by a commuter parking lot. J.A. 45. Commuters used the lot during the day, but it usually emptied out after business hours. J.A. 46. At night the vehicular traffic was minimal, although school buses and commuter vans were often left in the lot overnight. J.A. 46, 83, 101. There was no prohibition against being in the lot after normal working hours. J.A. 79. According to the police, the commuter lot was an area known for drug activity. J.A. 54, 100-01.

As he drove on patrol, Deputy Cable saw two cars leaving the commuter lot. J.A. 48. One was a Jeep Cherokee, and the other was a silver Buick. J.A. 48. Deputy Cable did not observe anything that happened before the cars left the lot,

did not observe any interaction between the drivers, and did not know how long either car had been in the parking lot. He made a U-turn and began to follow the Buick. J.A. 48. According to Deputy Cable, the Buick drove "over-cautiously." J.A. 49. Cable did not follow directly behind the Buick and did not try to pull it over. J.A. 50. Deputy Cable followed the Buick to a nearby Sheetz convenience store, where the driver of the Buick parked the car. J.A. 50.

The Buick's driver was Kinsey Herder. Deputy Cable parked his patrol car and approached Mr. Herder as he was getting out of the Buick. J.A. 51. Deputy Cable, who was in uniform, asked to speak with Mr. Herder, and Mr. Herder agreed. J.A. 45, 52. Mr. Herder immediately produced his license when Deputy Cable asked for it. J.A. 70-71. During the encounter, Mr. Herder answered his cell phone several times. J.A. 52.

Deputy Cable asked where Mr. Herder came from before he pulled into the Sheetz lot. J.A. 52. Mr. Herder stated that he had been out that evening having dinner at a Ruby Tuesday with a friend, Stephanie Umble. J.A. 110-11. Ms. Umble lived a few miles down the road from the commuter lot. J.A. 110. Whenever she and Mr. Herder went out, they met at the commuter lot, where she would leave her Jeep Cherokee. J.A. 110.

During the conversation at the convenience store, Deputy Cable became suspicious because the Ruby Tuesday was closer to the Sheetz than the commuter lot, and because he had observed Mr. Herder coming from the lot and not the restaurant. J.A. 52-53. Deputy Cable found this itinerary "implausible." J.A. 54. He asked Mr. Herder if there were any drugs in the car, and Mr. Herder said there were not. J.A. 53-54.

B. The Search of Mr. Herder's Car

Deputy Cable asked Mr. Herder's permission to allow a dog to sniff the Buick, and Mr. Herder immediately consented, replying that he had nothing to hide. J.A. 55, 71. While they were waiting for the officer with the dog to show up, Mr. Herder asked to go inside to use the restroom. As he headed towards the store, the K-9 unit arrived and Mr. Herder returned to the car. J.A. 55.

The dog alerted to the Buick, and Deputy Cable began to search the car. J.A. 56. He found nothing in the console, glove box, front passenger area, or under the seats. J.A. 56. In the rear floorboard, however, Deputy Cable discovered three containers. J.A. 56. To the untrained eye, the con-

tainers appeared to be a Planters Cheez Mania cheese curls can, a can of Old Spice shaving cream, and a can of Ajax cleaner. J.A. 56-60; *see* J.A. 159 (photograph of evidence). According to Deputy Cable, the average observer would find nothing suspicious about these containers. J.A. 75.

In fact, the containers had false bottoms. Inside the cans, Deputy Cable found zip-top bags containing smaller zipped bags with individual rocks of crack cocaine, three bags containing marijuana, and bags of coffee grounds. J.A. 56-60. Deputy Cable did not fingerprint the containers or the bags holding the drugs. J.A. 81. Deputy Cable also found a pill bottle with a prescription label in the name of Tiffany Stokes, which contained twenty-four hydromorphone (Dilaudid) pills. J.A. 60,76-77. At that point, the police arrested Mr. Herder. J.A. 60. The police seized \$1,223 from Mr. Herder's person. J.A. 64-65.

C. Mr. Herder's Trial

A grand jury sitting in the Eastern District of Virginia indicted Mr. Herder on one count of possession with intent to distribute five grams of more of crack cocaine,^[FN1] and one count of possession with intent to distribute marijuana. J.A. 9-10. Mr. Herder pled not guilty and went to trial in December 2007. J.A. 4, 6.

FN1. The crack cocaine found in the Buick weighed a total of 3.8 grams. J.A. 258. The government did not present any evidence of additional crack cocaine, and the court granted Mr. Herder's motion to dismiss the "five grams or more" portion of the indictment. J.A. 107-08; *see infra* Argument, part V, regarding the error in the judgment order concerning this count.

At trial, Deputy Cable testified about his patrol and his encounter with Mr. Herder. J.A. 44-83. Lieutenant Cuno Andersen of the Fauquier County Sheriffs Department testified as an expert concerning methods of drug distribution. J.A. 84, 90. He discussed the manufacture, sale, and use of crack cocaine. J.A. 90-92. Lt. Andersen also testified about the money used to buy drugs, stating that the money is typically folded, and drug purchases usually are made with tens and twenties, but not fives and ones. J.A. 96-97.

Testifying on behalf of Mr. Herder, Stephanie Umble recounted the events before Mr. Herder left the commuter lot. Ms. Umble had previously used a different parking lot, but her car had been towed, so she used the commuter lot to park her car ever since. J.A. 111. On the night of June 20,

she and Mr. Herder met in the commuter lot and went to the Ruby Tuesday, where Mr. Herder paid in cash. J.A. 112, 114. Ms. Umble did not see Mr. Herder with any drugs that night. J.A. 113. Mr. Herder's car was very messy. J.A. 112. He returned her to her car and they both left the commuter lot. J.A. 112.

Tiffany Stokes, Mr. Herder's fiancée, offered an explanation of the source of Mr. Herder's money. Ms. Stokes and Mr. Herder had a T-shirt business, MVT's, along with a woman named Adia Hernandez. J.A. 116-17. All three of them drove the Buick in the course of the business. J.A. 118. As a result, the car was littered with their detritus, especially in the floorboards. J.A. 118.

Shortly before the search of the car, Mr. Herder had gone on a company delivery, and he collected money from the sale. J.A. 118-19. There were no T-shirts in the car when Deputy Cable searched it. J.A. 66-67. According to Ms. Stokes, Mr. Herder also had access to money because she had recently received a settlement after a car accident. The money (approximately \$16,000) was deposited in Mr. Herder's bank account. J.A. 119-20. After the accident, and during the time of the search, Ms. Stokes was prescribed Dilaudid for pain. J.A. 120.

In closing, the government argued that Mr. Herder had access to the drugs, and that both defense witnesses denied leaving drugs in the Buick, and that therefore he possessed the crack and marijuana. J.A. 130, 138. Counsel for Mr. Herder argued that the evidence showed merely that Mr. Herder was in the car when the drugs were found, and that two other people drove the car and had access to it. In addition, counsel noted that the false-bottom containers were inconspicuous and could easily be mistaken as genuine, and there was no evidence that Mr. Herder's fingerprints were on them. Moreover, Mr. Herder's actions during his encounter with Deputy Cable were more consistent with innocence than guilt. J.A. 131-37.

An issue arose concerning the jury instruction on possession. Prior to trial, Mr. Herder submitted a proposed instruction defining possession. J.A. 18. The instruction noted that possession could be actual, constructive, or joint, but had to be knowing. The instruction concluded, "Presence in a car from which the police recover contraband does not establish possession. In other words, the mere proximity of contraband to an occupant is insufficient to establish constructive possession." *Id.*

The district court refused to give this final portion of Mr.

Herder's proposed instruction. J.A. 128-29 (jury instruction conference); J.A. 140-41 (instruction as given to the jury). During deliberations, the jury returned with a two-part question: "Does possession mean knowing possession? Can the drugs be in the car and not be possession?" J.A. 151.^[FN2] The parties agreed that the court should answer the first part in the affirmative. J.A. 151-53. As for the second part, counsel for Mr. Herder reminded the court that the defense's proposed instruction would have addressed the jury's precise question. J.A. 152. Again, the court refused to give the instruction, over Mr. Herder's objection. J.A. 154. Shortly thereafter, the jury convicted Mr. Herder on both counts. J.A. 155.

FN2. The jury returned two times during deliberations. The first time, it asked a question about the timing of the intent to distribute drugs necessary to find that element of the offenses. J.A. 150-51. That jury question is not at issue in this appeal.

D. Mr. Herder's Sentencing

Prior to sentencing, the probation officer prepared a presentence report. In the initial version, the amount of drugs attributed to Mr. Herder was erroneously calculated using nine grams of powder cocaine. J.A. 229. After a government objection, the amended report used the amount found at trial, 3.8 grams of crack cocaine. J.A. 256,259. The 3.8 grams of crack cocaine, when combined with the 7.3 grams of marijuana, converted to 50.54 kilograms of marijuana for sentencing. J.A. 261; [U.S.S.G. § 2D1.1\(a\)\(3\), \(c\)\(15\)](#). The resulting offense level was 20. *Id.* Mr. Herder had five criminal history points, placing him in criminal history category III. J.A. 263-65. His ultimate advisory guideline range was 41 to 51 months of imprisonment. J.A. 266.

Mr. Herder argued that the court should vary from this range in light of the vast disparity between the treatment of powder and crack cocaine. J.A. 175-79. In Mr. Herder's case, at offense level 20, the ratio was 67:1. In other words, a defendant would have to possess 67 times as much (or 254.6 grams) powder compared to the amount of crack Mr. Herder was convicted of possessing in order to receive the same sentence. J.A. 178-79. Put another way, if Mr. Herder had been convicted of possessing 3.8 grams of powder cocaine (in addition to the marijuana), his guideline range would have been six to twelve months of imprisonment. J.A. 178 n.2.

At the sentencing hearing, the court adopted the presentence report's recommended range of 41 to 51 months. J.A.

209. The court then stated, "I find that the low end of the guideline range here would meet the requirements of the [18 U.S.C. §] 3553 factors." J.A. 209. Counsel for Mr. Herder attempted to raise the powder/crack disparity issue, but the court interrupted and the following colloquy took place:

THE COURT: Well, we've already taken that into consideration. The sentencing guidelines have modified the discrepancy in the crack and powder cocaine. This was calculated under the new guidelines, was it not?

MR. McWILLIAMS: Yes, Your Honor. We would still have a 67 to 1 ratio between crack and powder.

THE COURT: I understand that. Congress has decided that that's an appropriate ratio to establish. J.A. 210. The court immediately moved on to the issue of forfeiture and did not further address or explain the prison sentence. *See also* J.A. 218 (judgment), 270-73 (statement of reasons).^[FN3]

FN3. The written statement of reasons filed with the judgment does not contain any additional reasoning or explanation. J.A. 270-73.

The court heard argument concerning the forfeiture of the cash found on Mr. Herder. J.A. 211-12. The government argued that the cash was folded in a manner consistent with drug transactions, and that Mr. Herder was alone in the car in which the drugs were found. J.A. 211. Counsel for Mr. Herder argued that there was considerable evidence concerning Mr. Herder's legitimate sources of income, that there was no evidence about actual drug transactions in this case, and that Mr. Herder's money included many bills of small denomination, all of which was inconsistent with the expert testimony regarding the denominations used in drug purchases. J.A. 212. The court conceded that the evidence of a nexus between the money and drug sales was circumstantial, but found it sufficient to order the money forfeited. J.A. 212; *see* J.A. 214-16 (forfeiture order). Mr. Herder noted a timely appeal from the district court's orders of conviction, sentencing, and forfeiture. J.A. 222-23.

SUMMARY OF ARGUMENT

I. The evidence presented at trial was insufficient to support the jury's conclusion that Mr. Herder possessed the drugs found in the Buick. The evidence showed only that Mr. Herder was present in the car where the drugs were located. Mere proximity, however, is not sufficient to establish knowing possession. The drugs were hidden in such a way that their contraband nature would not be ap-

parent to the casual observer. There was no evidence of furtive gestures or drug transactions by Mr. Herder, no evidence that anyone saw him with drugs, and no evidence that his fingerprints were on the containers or the drug packages. Thus, the government's evidence failed to prove beyond a reasonable doubt that Mr. Herder knowingly exercised dominion or control over the drugs. Accordingly, this Court should reverse Mr. Herder's convictions.

II. Alternatively, the Court should find that the district court erred in not providing Mr. Herder's requested jury instruction on possession. The instruction would have advised the jury that mere proximity to drugs does not establish possession. The jury returned during deliberations and asked, "Can the drugs be in the car and not be possession?" Still the court refused to instruct the jury. Mr. Herder's requested instruction was a correct statement of the law, and the court's refusal to provide it prejudiced Mr. Herder because it allowed the jury to convict based on Mr. Herder's mere proximity to the drugs. For that reason, this Court should vacate Mr. Herder's convictions and remand for a new trial.

III. Even if the Court affirms Mr. Herder's convictions, it must vacate his sentence because the district court committed significant procedural error. Mr. Herder asked the court to consider the disparate treatment between crack and powder cocaine offenders. The court refused to consider the 67:1 powder/crack ratio that applied to Mr. Herder, and imposed a sentence seven times higher than he would have received if he had been convicted for possessing the same weight of powder cocaine. The Supreme Court has held that the Sentencing Commission's ratios are not binding on district courts, and indeed that the disparity they create is a valid factor for the court to address at sentencing. Because the court refused to do so here, Mr. Herder's sentence is unreasonable. This Court should vacate his sentence and remand for a new sentencing hearing.

IV. The district court erred in ordering the forfeiture of the cash found on Mr. Herder at the time he was arrested. There was no evidence connecting this money to specific drug sales, and Mr. Herder provided substantial evidence concerning his legitimate sources of income. There was not a sufficient nexus between the cash and the offenses of conviction, and therefore, this Court must vacate the forfeiture order.

V. This Court should order the district court to correct a clerical error in the judgment order. Mr. Herder was indicted for possessing with intent to distribute five grams or

more of crack cocaine, but he was convicted and sentenced on only 3.8 grams. The district court granted Mr. Herder's motion for judgment of acquittal as to the "five grams or more" portion of the indictment. However, the judgment order lists his conviction using the "five grams or more" language. The Court should order the district court to correct this oversight so that the judgment order accurately reflects the offense of conviction.

ARGUMENT

I. WHERE THE EVIDENCE SHOWED ONLY MR. HERDER'S MERE PROXIMITY TO THE DRUGS IN THIS CASE, THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE POSSESSED THE DRUGS FOUND IN THE CAR

A. *Standard of Review*

This Court reviews de novo the denial of Mr. Herder's [Rule 29](#) motion for judgment of acquittal.^[FN4] *United States v. Smith*, 451 F.3d 209,216 (4th Cir. 2006). In reviewing a challenge to the sufficiency of evidence, an appellate court must ask whether "there is substantial evidence, taking the view most favorable to the government, to support" the conviction. *Glasser v. United States*, 315 U.S. 60, 80 (1942). "[S]ubstantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt *16 beyond a reasonable doubt." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc). Even though the government may use circumstantial evidence and inferences, it must still prove each element of an offense beyond a reasonable doubt. *Id.* at 858.

FN4. Mr. Herder moved under [Fed. R. Crim. P. 29](#) for a judgment of acquittal at the close of the government's case and again at the close of all the evidence. J.A. 107-08, 125. Mr. Herder also submitted a written motion. J.A. 161-64.

If the evidence gives equal or nearly equal circumstantial support to a theory of guilt and to a theory of innocence, the reviewing court should reverse, as under these circumstances a reasonable factfinder must necessarily entertain a reasonable doubt. See *United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir. 1992). Further, the remedy for reversal of a conviction based on insufficiency of the evidence is entry of judgment of acquittal. See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 249 (1993) ("In the class of appeals premised on insufficiency of the

evidence,... retrial is not permitted in the event of reversal.”)

B. Argument

The evidence presented at trial was insufficient to establish that Mr. Herder possessed the drugs found in the Buick. The government may prove constructive possession “by demonstrating that the defendant exercised, or had the power to exercise, dominion and control over the item.” [United States v. Gallimore](#), 247 F.3d 134, 137 (4th Cir. 2001) (quoting [United States v. Jackson](#), 124 F.3d 607, 610 (4th Cir. 1997)). Mere proximity to the contraband is insufficient to establish constructive possession. [United States v. Samad](#), 754 F.2d 1091, 1096 (4th Cir. 1984). Instead, *17 “[t]here must be some action, some word, or some conduct that links the individual to the [contraband] and indicates that he had some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental bystander.” [United States v. Pardo](#), 636 F.2d 535, 549 (D.C. Cir. 1980).

For example, in [United States v. Blue](#), 957 F.2d 106, 108 (4th Cir. 1992), the evidence established that a police officer saw the defendant sitting in the passenger seat of a car and saw his shoulder dip as the officer approached the vehicle. The officer later found a firearm under the passenger's seat. The Fourth Circuit found that evidence insufficient to establish constructive possession, noting that the proximity of the defendant to the firearm established only accessibility rather than dominion and control. *Id.* The court further noted that the shoulder dip and the location of the pistol were insufficient because the government “did not produce fingerprints or other physical evidence which would link [the defendant] with the gun.” *Id.* In addition, there was “no evidence demonstrating that [the defendant] owned the gun or testimony that [the defendant] had been seen with the gun.” *Id.*

Similarly, in [United States v. Daley](#), 107 F. App'x 334 (4th Cir. 2004), the government presented evidence that the defendant made a “tugging or furtive movement” as the police officer approached the vehicle, leading the officer to suspect that the defendant had a weapon. The police then found a revolver and one kilogram of crack cocaine underneath the passenger seat in which the defendant had been *18 sitting. The Fourth Circuit found the evidence insufficient to establish constructive possession, noting the lack of physical evidence linking the defendant to the gun and the lack of testimony that anyone had seen the defendant with the gun. The furtive movement and proximity to

the contraband were insufficient to establish constructive possession. *Id.* at 337-38.

In [United States v. Wright](#), 24 F.3d 732, 735 (5th Cir. 1994), the Fifth Circuit held that a district court clearly erred in finding even by a preponderance at sentencing that the defendant possessed a gun where “[t]he only evidence the government proffered to support its theory was that Wright operated the vehicle, eluded the police, and made furtive movements near the glove box.” *Id.* (footnote omitted). The Fifth Circuit noted that the government did not produce any evidence, such as fingerprints, specifically linking the defendant to the gun. *Id.*; see also [United States v. Chairez](#), 33 F.3d 823, 825 (7th Cir. 1994) (collecting cases and noting that “[t]he mere fact that both Chairez and the gun were in the same car is an insufficient basis for a factfinder to determine that Chairez had knowledge of a firearm”).

In this case, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Herder knew of the presence of the drugs or that he had dominion and control over them. The small amounts of drugs were found in false-bottomed containers located amongst the trash-ridden backseat of a car Mr. Herder shared with *19 other people. Deputy Cable testified that the containers would look innocuous to the lay observer, and that they were “fairly common items.” J.A. 78.

Mr. Herder granted consent to have the car sniffed by a drug dog and made no effort to evade or mislead the police. Additionally, the police found prescription medication in the name of another person, corroborating the testimony that other people drove the car. Deputy Cable, however, testified that the discovery of the pill bottle, with a prescription label in the name of someone other than Mr. Herder, did not indicate to him even “the possibility that someone else had driven the car.” J.A. 77. There was no evidence that anyone saw Mr. Herder with the drugs, no evidence that the police witnessed any drug transactions or furtive movements, and there was no evidence that his fingerprints were on either the containers or the drugs themselves.

Although there was evidence concerning the intent to distribute element, the fact that someone may have intended to sell the drugs does not prove that Mr. Herder possessed them. This is so because of the way the drugs were concealed: an untrained observer likely would not notice anything amiss in the messy rear floorboard of the car. Moreover, the car did not contain any of the tools of

the trade of drug distribution - no razor blades, scales, cutting agents, owe-sheets, or the like. *20 J.A. 76. Mr. Herder was in possession of cash, but there was no evidence linking it to any drug sales.^[FN5]

FN5. Lt. Andersen testified that “[m]ost people usually have one wad [of cash], if you will, and it's folded over,” whereas Mr. Herder's money was not all folded in “one wad.” J.A. 96-97. The failure to keep one's money in a single fold should hardly characterize one as a drug dealer. Lt. Andersen testified that “[d]rug buys are not usually done with fives and ones. They're usually tens, twenties.” J.A. 97. Mr. Herder's money included hundreds, fifties, twenties, tens, fives, and ones. *Id.* The court sustained an objection to the government's question as to whether Mr. Herder's denominations were consistent with drug sales. *Id.*

In addition, the evidence about Mr. Herder's legitimate sources of income was uncontroverted. In closing, the government made much of the fact that no inventory from the T-shirt business was found in the car during the search. J.A. 131. But Ms. Stokes's testimony was that Mr. Herder had recently *delivered* an order of shirts, J.A. 118-19, which is wholly consistent with both the absence of shirts in the car and the presence of money on Mr. Herder's person.

In sum, the government's evidence of possession boils down to Mr. Herder's possession of cash and his mere proximity to drugs found in hidden containers in a car driven or occupied by at least three other people. This meager quantum of evidence is utterly insufficient to support the jury's conclusion beyond a reasonable doubt that Mr. Herder knowingly exercised dominion or control over the drugs in the Buick. Therefore, this Court must reverse Mr. Herder's convictions on both counts.

***21 II. THE COURT ERRED IN REFUSING TO GIVE MR. HERDER'S REQUESTED JURY INSTRUCTION ON POSSESSION IN LIGHT OF THE JURY'S QUESTION ABOUT THAT ELEMENT**

A. Standard of Review

“Whether jury instructions were properly given is a question of law,” [United States v. Morrison, 991 F.2d 112, 116 \(4th Cir. 1993\)](#), although this Court reviews for abuse of discretion the district court's decision whether to give a

particular instruction, *see* [United States v. Abbas, 74 F.3d 506, 513 \(4th Cir. 1996\)](#). This Court “review[s] an entire charge to determine whether the court adequately instructed the jury on the elements of the offense and the accused's defenses.” [United States v. Fowler, 932 F.2d 306, 317 \(4th Cir. 1991\)](#). “[A] district court must instruct the jury on the law pertaining to the theory of defense.” *Id.* at 316. Ultimately, an appellate court must determine whether, taken as a whole, the instructions fairly state the controlling law. [United States v. Snyder, 766 F.2d 167, 170 \(4th Cir. 1985\)](#).

This Court will reverse the district court's decision to refuse to give a proposed jury instruction when the proposed instruction “(1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense.” [United States v. Lewis, 53 F.3d 29, 32 \(4th Cir. 1995\)](#).

***22 B. Argument**

The district court should have given Mr. Herder's proposed jury instruction on possession, if not in the original charge to the jury, then certainly when the jury returned with a question precisely addressed by Mr. Herder's proposed language. In light of the weakness of the evidence that Mr. Herder possessed the drugs, the court's error prejudiced Mr. Herder because it allowed the jury to convict based on his mere proximity to the drugs.

Mr. Herder's proposed instruction defined possession and explained that possession could be actual, constructive, or joint. J.A. 18. The instruction went on to explain that “[p]resence in a car from which the police recover contraband does not establish possession. In other words, the mere proximity of contraband to an occupant is insufficient to establish constructive possession.” *Id.*

In the jury instruction conference, the court rejected Mr. Herder's request to include these two sentences. J.A. 128-29. The court stated, “[T]hat's not the definition of possession.” J.A. 129. The court's instruction to the jury did not contain Mr. Herder's requested language. J.A. 140-41. Later, during deliberations, the jury returned with a question: “Does possession mean knowing possession? Can the drugs be in the car and not be possession?” J.A. 151.

The parties agreed that the court should inform the jury that

possession must be knowing. J.A. 152-54. Indeed, the court's original instruction included this *23 provision. J.A. 140. Mr. Herder, however, renewed his request that the court include the proposed language regarding mere presence. J.A. 152-54. The court disagreed and stated that giving that instruction would invade the province of the jury by "answering specific fact questions" or "directing a verdict." J.A. 152.

The court's refusal was erroneous. Mr. Herder's requested instruction was a correct statement of the law. See [United States v. Blue, 957 F.2d 106, 108 \(4th Cir. 1992\)](#). The district court acknowledged as much. J.A. 129, 154. The requested instruction was not substantially covered by the judge's other instructions, which defined possession but failed to give the jury any guidance in applying those abstract concepts. Moreover, the instruction was central to Mr. Herder's defense that, although he was present in the Buick, he did not know the drugs were there. See [Lewis, 53 F.3d at 32](#).

The court apparently believed that providing language about mere proximity would amount to "answering specific fact questions." J.A. 152. The court twice remarked that it would not provide the requested language because it was "not the definition of possession." J.A. 129. Yet other instructions the court did give contradict this purported concern.

For example, the court defined "intent to distribute" and then listed several factors the jury could consider as to that element, including "the purity of the controlled substance, the quality, the value, the presence of equipment used in *24 processing or sale of controlled substances, and large amounts of cash." J.A. 141. Notably, most of these factors were not at issue in this case. None of these factors could be called "the definition of intent."

Similarly, the court offered the jury guidance in its deliberations on intent: "In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done or amended by that person" J.A. 141. This is not "the definition of intent." The court also provided an example of distribution: "to distribute includes, but is not limited to, the sale of controlled substances by one person to another." J.A. 142. This is not "the definition of distribution," but rather a "specific fact question" the jury would have to address.

Yet because Mr. Herder's requested mere proximity in-

struction was not part of "the definition of possession," the court refused to give it. The distinction is inexplicable, and the lack of guidance left the jury unmoored. This became abundantly clear when the jury returned with its question. The question clearly demonstrated the jury's need for additional instruction, Mr. Herder's requested instruction was directly responsive to the jury's confusion, but the court nevertheless refused to provide the instruction. This refusal was error, and the error prejudiced Mr. Herder because it allowed the jury to find the possession element - an element it obviously considered close enough to ask the judge about - based solely on Mr. *25 Herder's mere presence in the car in which the drugs were found.^[FN6] Accordingly, this Court should vacate Mr. Herder's convictions and remand for a new trial.

FN6. The court's statement that "there's far more evidence than just simply someone being in the car with the drugs in this case" is not dispositive. J.A. 152. First, as to the possession element, Mr. Herder contends that the evidence was in fact that insubstantial. Most of the trial evidence went to the intent element, but the fact that someone intended to sell these drugs does not prove they were Mr. Herder's. In addition, the jury's question is some indication that it might have convicted based on nothing more than Mr. Herder's mere proximity to the drugs.

III. THE COURT IMPOSED A PROCEDURALLY UNREASONABLE SENTENCE BECAUSE IT REFUSED TO CONSIDER THE DISPARITY IN TREATMENT BETWEEN CRACK AND POWDER COCAINE

A. Standard of Review

Following the Supreme Court's decision in [United States v. Booker, 543 U.S. 220, 260-62 \(2005\)](#), this Court now reviews sentences imposed in federal criminal cases for reasonableness. [United States v. Johnson, 445 F.3d 339, 341 \(4th Cir. 2006\)](#); [United States v. Green, 436 F.3d 449, 456 \(4th Cir.\), cert. denied, 126 S. Ct. 2309 \(2006\)](#); see [Rita v. United States, 127 S. Ct. 2456, 2465 \(2007\)](#) (equating reasonableness review with review for abuse of discretion). As this Court has explained, "[a] sentence after *Booker* may be unreasonable for both procedural and substantive reasons." [United States v. Montes-Pineda, 445 F.3d 375, 378 \(4th Cir. 2006\), cert. denied, 127 S. Ct. 3044 \(2007\)](#). Put another way, "[t]he determination of reasonableness depends not only on an evaluation of the actual sentence imposed *26 but also on the method employed in

determining it.” [United States v. Hughes](#), 401 F.3d 540, 556 n. 14 (4th Cir. 2005); see [United States v. Moreland](#), 437 F.3d 424,434 (4th Cir.) (“Reasonableness review involves both procedural and substantive components.”), *cert. denied*, [126 S. Ct. 2054 \(2006\)](#).

Reasonableness review asks whether a district court abused its discretion in selecting a sentence, regardless of whether that sentence was imposed inside or outside the advisory guideline range. [Gall v. United States](#), 128 S. Ct. 586, 597 (2007); [United States v. Pauley](#), 511 F.3d 468, 473 (4th Cir. 2007). Reasonableness review involves two steps: first, examination of the sentence for significant procedural errors, and second, evaluation of the substance of the sentence, taking into account the “totality of the circumstances.” [Gall](#), 128 S. Ct. at 597.

Crack Base Offense Level	Ratio of Powder to Crack at Low-End of Guideline Range
38	33:1
36	33:1
34	30:1
32	33:1
30	70:1
28	57:1
26	25:1
24	80:1
22	75:1
20	67:1
Lower	50:1

Although the new ratios reduce the 100:1 disparity from the pre-amendment guidelines, vast disparities still exist. Mr. Herder's case is a perfect example. His offense level of 20 was based on his conviction for possessing 3.8 grams of crack cocaine.^[FN7] At offense level 20, the ratio between powder and crack cocaine is 67:1. *28 In other words, while three to four grams of crack cocaine results in offense level 20, it requires 200 to 300 grams of powder cocaine to achieve the same result. U.S.S.G. § 2D 1.1(c)(10) (drug quantity table).

FN7. The 7.3 grams of marijuana did not affect the guidelines calculation. J.A. 258. The crack converted to 50.54 kilograms of marijuana, using the 13.3 kilograms of marijuana per gram of crack

B. Argument

Even if the Court affirms Mr. Herder's convictions, it should nevertheless vacate and remand his sentence because the sentence imposed by the district court is procedurally unreasonable.

Prior to sentencing, Mr. Herder asked the court to consider varying from the advisory guideline range in light of the 67:1 disparity in treatment between powder and crack cocaine at his offense level. J.A. 175-79. Mr. Herder noted that recent Sentencing Commission amendments to the cocaine guidelines had lowered the base offense levels for crack, but had created varying ratios between powder and crack at *27 different offense levels. J.A. 176-77; see also [U.S.S.G. § 2D1.1\(c\)](#). This table reflects the revised ratios:

conversion factor. [U.S.S.G. § 2D1.1\(c\)](#), comment. n.10(D)(i)(II). Adding the marijuana produced a grand total of 50.5473 kilograms of marijuana, but any amount of marijuana between 40 and 60 kilograms results in offense level 20. [U.S.S.G. § 2D1.1\(c\)\(10\)](#).

In his sentencing pleading, Mr. Herder asked the court to consider the irrationality of these ratios in imposing a sentence compliant with the factors in [18 U.S.C. § 3553\(a\)](#). Instead, before hearing argument, the court adopted the presentence report's recommended range and announced a sentence of 41 months. J.A. 209. At that point, counsel for Mr. Herder asked the court to reconsider the sentence in light of [Kimbrough v. United States](#), 128 S. Ct. 558 (2007), as well as the continuing disparities. J.A. 210.

The court's response suggests that it felt no need to independently evaluate the guideline range. First, the court stated that “we've already taken that into consideration” because “[t]his was calculated under the new guidelines, was it not?” J.A. 210. Thus, the court appeared to believe that the new cocaine amendments obviated the need to address the powder/crack disparity. The court concluded the matter by stating, “Congress has decided that that's an appropriate ratio to establish.” J.A. 210.

The district court erred in refusing to consider Mr. Herder's argument regarding the powder/crack disparity for three reasons. First, the Supreme Court has held that, far from being a settled issue, the disparate treatment of crack versus *29 powder is a valid consideration for sentencing courts. Second, the court abused its discretion as a matter of law when it apparently misperceived its authority to vary from the advisory guideline range. Third, the sentence does not serve the [§ 3553\(a\)](#) factors because it creates unwarranted disparities.

To begin, in *Kimbrough*, the Supreme Court held that “it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve [§ 3553\(a\)](#)'s purposes, even in a mine-run case.” *Kimbrough*, 128 S. Ct. at 575. This holding was not limited to the 100:1 ratio at issue in that case. In fact, the newly amended guidelines had gone into effect by the time of the *Kimbrough* decision. The Court described the reductions implemented by the 2007 amendment as “modest” and noted that the Commission itself described the amendment “as ‘only ... a partial remedy’ for the problems generated by the crack/powder disparity.” *Id.* at 569.

The holding in *Kimbrough* - that the offense levels established in the cocaine guidelines are not binding - applies with no less force to Mr. Herder's case. The district court stated that Congress had established the ratio, and thus refused to consider a deviation. J.A. 210. To the contrary, the ratio was set by the United States Sentencing Commission. See U.S.S.G. App. C, Amend. 711; see also *Kimbrough*, 128 S. Ct. at 570-73 (explaining that Congress did not enact intermediate 100:1 ratios beyond those established by mandatory minimum thresholds). At least two bills to *30 reduce or eliminate the crack/powder disparity are currently pending in Congress. See Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, H.R. 4545, 110th Cong. § 3 (2007) (eliminating disparity

altogether); Fairness in Drug Sentencing Act of 2007, S. 1685, 110th Cong. § 2 (2007) (reducing disparity to 20:1).

Thus, the district court was simply incorrect when it stated that Congress had spoken at all, much less given the final word on the subject. Even assuming the district court made a slip of the tongue and intended to say that the Sentencing Commission's establishment of the ratios prevented it from considering Mr. Herder's argument, the court erred. As noted, the Commission itself sees the current guideline as a work in progress. See *Kimbrough*, 128 S. Ct. at 569. More importantly, the Commission's judgment is not binding on the district court. *Gall*, 128 S. Ct. at 594.

Further, the Supreme Court also noted that district courts do not owe special deference to the cocaine guidelines because they were not a product of the Sentencing Commission's institutional expertise. The cocaine guidelines were not based on “empirical data and national experience.” *Kimbrough*, 128 S. Ct. at 575 (citation omitted). Therefore, a sentencing court cannot have any assurance that cocaine guidelines promulgated by the Commission “reflect a rough approximation of sentences that might achieve [§ 3553\(a\)](#)'s objectives.” *Id.* at 574 (quoting *Rita*, 127 S. Ct. at 2465).

*31 The district court also erred when it concluded that it could not reconsider the disparate ratios because that judgment represented a mistake as to the scope of the court's authority. Because the court was mistaken regarding the extent of its authority and discretion, it applied the wrong legal standard and committed an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”). This Court has long recognized that a district court cannot properly exercise its discretion if it is mistaken about the scope of that discretion. See *United States v. Brewer*, 520 F.3d 367, 371 (4th Cir. 2008) (re-affirming rule that departure decisions are reviewable if district court incorrectly believed it lacked power to depart).

As the Supreme Court has held, consideration of the powder/crack disparity is appropriate even in the ordinary case. *Kimbrough*, 128 S. Ct. at 575. Such consideration was especially appropriate in Mr. Herder's case. In *Kimbrough*, the Court discussed the Sentencing Commission's reasons for amending the cocaine guidelines, and these reasons all apply to Mr. Herder.

First, the Commission concluded that the 100:1 ratio

“rested on assumptions about ‘the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.’ ” *Kimbrough*, 128 S. Ct. at 568 (quoting U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 8 (May *32 2007)). The “relative harmfulness” of the drugs does not justify the 67:1 ratio in Mr. Herder's case, and certainly does not justify a sentence seven times longer than he would have received if he had been convicted for possessing 3.8 grams of powder cocaine.^[FN8] Nor are there any aggravating factors or associated harmful conduct in Mr. Herder's case that would support such a disparity. For instance, there were no violence or weapons in this case. The government's drug culture expert, Lt. Andersen, even testified that the weight of the drugs seized from Mr. Herder's car could be consistent with user amounts. J.A. 99, 103-04.

FN8. If Mr. Herder had 3.8 grams of powder cocaine, that would convert to 760 grams of marijuana. U.S.S.G. § 2D1.1(c), comment. (n.10(E)) (drug equivalency tables). Added to the 7.3 grams of marijuana in this case, the grand total would be 767.3 grams of marijuana, which results in offense level 8. U.S.S.G. § 2D1.1(c)(16). At criminal history category III, the advisory guideline range would be 6 to 12 months. Mr. Herder's 41-month sentence is thus virtually seven times longer than a low-end sentence for the same weight of powder cocaine.

Second, the Commission determined that “the crack/powder disparity is inconsistent with the 1986 [Anti-Drug Abuse] Act's goal of punishing major drug traffickers more severely than low-level dealers.” *Kimbrough*, 128 S. Ct. at 568. Mr. Herder, however, was not a major drug trafficker, and there was no evidence at all at trial regarding drug sales.

Third, the Court noted that the Commission “stated that the crack/powder sentencing differential fosters disrespect for and lack of confidence in the criminal *33 justice system because of a widely-held perception that it promotes unwarranted disparity based on race.” *Id.* (quotations omitted). The district court's refusal even to consider varying from the 67:1 ratio in the case of Mr. Herder, an African-American, J.A. 226, perpetuates this perception by proving the *Kimbrough* Court's observation that the severe sentences required by the crack Guidelines “are imposed primarily upon black offenders.” *Id.* (quotation omitted).

For these reasons, the sentence does not meet the goals of § 3553(a) because it creates unwarranted disparities among defendants convicted of similar conduct. See 18 U.S.C. § 3553(a)(6). The district court should have considered this factor when it imposed the sentence. A court abuses its discretion when important and necessary factors “that Congress has deemed pertinent” are “ignored or slighted.” *United States v. Taylor*, 487 U.S. 326, 337 (1988).

In sum, the district court committed procedural error in evaluating the advisory guideline range in this case. See *Pauley*, 511 F.3d at 473 (“Our appellate review of the reasonableness of a sentence focuses on whether the sentencing court abused its discretion in imposing the chosen sentence.”); see also 18 U.S.C. § 3553(c) (requiring sentencing courts to explain in open court the reasons for the sentence). Because the district court misunderstood the scope of its discretion, because there are substantial reasons why the court should consider the 67:1 ratio in light of the § 3553(a) factors, because the district court did not adequately explain its reasoning, and because the *34 logic and holding of *Kimbrough* apply even to ratios lower than 100:1, this Court should vacate Mr. Herder's sentence and remand for resentencing.

IV. THE COURT ERRED IN ORDERING THE FORFEITURE OF CASH FOUND ON MR. HERDER BECAUSE THERE WAS NOT A SUFFICIENT NEXUS BETWEEN THE MONEY AND THE OFFENSES OF CONVICTION

A. Standard of Review

In reviewing a criminal forfeiture imposed under 21 U.S.C. § 853, this Court reviews de novo the district court's legal conclusions and its findings of fact for clear error. See *United States v. Nava*, 404 F.3d 1119, 1127 n.3 (9th Cir. 2005) (review of forfeiture of third-party assets under 21 U.S.C. § 853(n)); *United States v. Gaskin*, 364 F.3d 438, 462 (2d Cir. 2004) (forfeiture under § 853(a)(2))

B. Argument

If the Court reverses Mr. Herder's convictions, then it must also vacate the district court's forfeiture order based on those convictions as a “necessary consequence.” *United States v. Wittig*, 525 F. Supp. 2d 1281, 1287 (D. Kan. 2007). However, even if the Court affirms Mr. Herder's convictions, it must vacate the forfeiture order because the

cash seized from Mr. Herder lacks a sufficient nexus to the offenses of conviction.

“If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the *35 property and the offense.” [Fed. R. Crim. P. 32.2\(b\)](#). In other words, in criminal forfeiture actions, there must be a “factual nexus” between the amount ordered forfeited and the proceeds of the crime. [Libretti v. United States, 516 U.S. 29, 44 \(1995\)](#); see also [United States v. Juluke, 426 F.3d 323, 326 \(5th Cir. 2005\)](#). In Mr. Herder's case, that nexus is absent.

First, there was no evidence in this case regarding any drug transactions of any kind. The amount of drugs recovered were consistent with user amounts. J.A. 99, 103-04. The government's evidence about “folds” of money is of limited probative value given that there was nothing inherently unusual about the way Mr. Herder folded his money. Mr. Herder presented uncontradicted evidence about his legitimate sources of income.

During the sentencing hearing, the district court acknowledged that the connection between the drugs and the cash was at best circumstantial. J.A. 212. However, there must be a “substantial connection” between the forfeited property and the offense undergirding the district court's decision. See [United States v. Heldeman, 402 F.3d 220, 222 \(1st Cir. 2005\)](#). There was no such substantial connection in this case. Accordingly, even if the Court affirms Mr. Herder's convictions, it should vacate the district court's order forfeiting Mr. Herder's \$1,223.

***36 V. THE COURT MADE A CLERICAL ERROR IN ENTERING THE JUDGMENT WHEN THE ORDER LISTED A CONVICTION ON A COUNT OF WHICH MR. HERDER HAD BEEN ACQUITTED BY THE COURT**

A. Standard of Review

This Court reviews de novo whether the district court has the authority to amend the judgment. See [United States v. Hamby, No. 99-4851, 2000 WL 673945, at *1 \(4th Cir. May 24, 2000\)](#); [United States v. Burd, 86 F.3d 285, 287 \(2d Cir. 1996\)](#); [United States v. Daddino, 5 F.3d 262, 264 \(7th Cir. 1993\)](#).

B. Argument

Under [Fed. R. Crim. P. 36](#), “the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.” This Court routinely exercises its power to order a district court to correct or amend a judgment order containing a misstatement as to the actual offense of conviction. See [United States v. Blackwell, 515 F.2d 125, 127 \(4th Cir. 1975\)](#); see also [United States v. Chase, 222 F. App'x 253, 253-54 \(4th Cir. 2007\)](#) (directing district court to amend judgment pursuant to [Rule 36](#)); [United States v. Douglas, No. 93-5128, 1995 WL 45523, at *3 \(4th Cir. 1995\)](#) (affirming conviction but amending to reflect actual offense of conviction).

In this case, Mr. Herder was indicted in Count One for possession with intent to distribute five grams or more of crack cocaine. J.A. 9. However, at trial, the only *37 evidence regarding crack concerned the 3.8 grams of crack found in the Buick. Accordingly, the government declined to go forward on the higher amount, and the court granted Mr. Herder's motion for judgment of acquittal as to that portion of the indictment. J.A. 107-08; see also J.A. 258 (offense conduct in presentence report).

Thus, Mr. Herder was convicted and sentenced for possession with intent to distribute 3.8 grams of crack cocaine. The judgment order, however, repeats the language of the indictment and indicates that Mr. Herder was convicted of possession with intent to distribute five grams or more of crack. J.A. 217. The error is an obvious clerical mistake arising from oversight. In the event that the Court affirms Mr. Herder's convictions and sentence, he asks this Court to order the district court to correct the clerical error in the judgment to reflect that he was convicted only of possession with intent to distribute crack cocaine.

CONCLUSION

This Court should reverse Mr. Herder's convictions because the evidence was insufficient to prove that he knowingly possessed the drugs found in the Buick. In the alternative, the Court should vacate his convictions and remand for a new trial because the district court erred in not providing Mr. Herder's requested jury instruction on possession. Even if the Court affirms Mr. Herder's convictions, it should vacate his sentence and remand for resentencing because the district court *38 imposed a procedurally unreasonable sentence. The Court should also vacate the district court's forfeiture order because there was not a sufficient nexus between the offenses of conviction

and the cash ordered forfeited. In addition, the Court should order the district court to correct the judgment order so that it accurately reflects the offenses of conviction.

REQUEST FOR ORAL ARGUMENT

Counsel for appellant asserts that the issues raised in this brief may be more fully developed through oral argument, and respectfully requests the same.

UNITED STATES OF AMERICA, Plaintiff/Appellee, v.
Kinsey Cory HERDER, Defendant/Appellant.
2008 WL 2959068 (C.A.4) (Appellate Brief)

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