

For Dockets See [08-4420](#)

United States Court of Appeals, Fourth Circuit.
UNITED STATES OF AMERICA, Plain-
tiff/Appellee,
v.
Kinsey Cory HERDER, Defendant/Appellant.
No. **08-4420**.
September 2, 2008.

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

Reply Brief of the Appellant

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***1 ARGUMENT**

I. THE DISTRICT COURT ERRED IN REFUSING
TO GIVE MR. HERDER'S PROPOSED INSTRU-
TION ON CONSTRUCTIVE POSSESSION IN
LIGHT OF THE JURY'S QUESTION

Although Mr. Herder maintains his argument that the
evidence at trial was insufficient to support the jury's
verdict, this brief will not address that issue, and Mr.
Herder relies on the arguments made in his opening
brief. *See* Appellant's Br. at 15-20. The weakness,
however, of the government's evidence that Mr.
Herder *2 possessed the drugs found hidden in the
Buick was highlighted by the jury's question during
deliberations, "Does possession mean knowing pos-
session? Can the drugs be in the car and not be pos-
session?" J.A. 151.

Mr. Herder requested a jury instruction that mere

proximity to drugs was not sufficient to prove possession of them, but the court refused to provide this instruction. J.A. 128-29, 152-54. The jury's question clearly indicates that it struggled over this question, and that the court's instruction was inadequate. The court's failure to provide the requested instruction severely prejudiced Mr. Herder's defense.

At no point does the government argue that Mr. Herder's requested instruction was an incorrect statement of the law. The government merely argues that the district court's broader possession instruction somehow subsumed the notion of mere proximity. *See* Gov't Br. at 23. According to the government, the jury "could not have convicted the defendant if [it] believed he was merely present in the car and simply proximate to the canisters." *Id.* But the jury's question belies this theory. The court's refusal to provide a mere proximity instruction - when the jury raised this very issue - left open the strong possibility that the jury convicted Mr. Herder based on nothing more than mere proximity. The government's conclusory statement thus begs the question presented by this appeal.

*3 The government also suggests that the court's refusal to provide the instruction was not erroneous because Mr. Herder remained free to argue the issue to the jury. *See* Gov't Br. at 24. The government, however, cites no authority for this proposition. Further, this Court has explicitly rejected the "contention that assumes a defendant may be denied an otherwise proper instruction on the theory of his defense because he may argue that theory in closing argument." [United States v. Lewis](#), 53 F.3d 29, 35 (4th Cir. 1995).

In *Lewis*, this Court found error in the district court's refusal to give a requested instruction that a defendant may not be convicted of conspiring with government agents. The government argued that the court's general instruction on conspiracy sufficed, and that the jury must have convicted the defendant for conspiring with other members of the drug ring. *Id.* at 33-35. This Court held that the district court's refusal to give a more detailed instruction prejudiced the defendant, because there remained the "strong possibility" that the jury convicted the defendant for conspiring with the government agents.

Likewise, in Mr. Herder's case, it is "irrelevant" that the jury might have rejected a mere proximity theory. In light of the jury's question, the possibility the jury in

fact convicted him based on mere proximity is too strong to ignore. *Id.* at 35. "Thus, for [Mr. Herder] to present his theory of defense, it was incumbent on the district court to instruct the jury that [Mr. Herder] could not be convicted [based on *4 mere proximity to drugs]." *Id.* The court's failure to do so seriously impaired Mr. Herder's ability to present his defense. For that reason, this Court should vacate Mr.

Herder's convictions and remand for a new trial.^[FN1]

FN1. The cases relied on by the government, where circuit courts approved district courts' refusals to give "mere proximity" instructions, are all distinguishable because in none of those cases did the jury ask a question relating to that issue. *See* Gov't Br. at 21-22. The jury's question in Mr. Herder's case indicated the importance it placed on the issue and the need for a clarifying instruction. Moreover, one of the cases the government cites points out that "it would have been preferable for the court to incorporate Vasquez's requested instruction as a more specific statement of his defense." [United States v. Vasquez](#), 82 F.3d 574, 578 (2d Cir. 1996). The court in that case also "emphasiz[ed] that possession could not be established by an accident or mistake, [and] informed the jury that it could not convict the defendant for simple misfortune." *Id.* Nothing comparable happened in Mr. Herder's case. *Cf.* J.A. 140-41.

II. MR. HERDER'S SENTENCE IS UNREASONABLE BECAUSE THE DISTRICT COURT REFUSED TO CONSIDER THE DISPARITY IN TREATMENT BETWEEN CRACK AND POWDER COCAINE

The government argues that the district court was fully aware of its power to vary from the advisory guideline range based on the drug guideline's disparate treatment of crack and powder cocaine, and further argues that "the record reveals careful consideration by the district court" in imposing Mr. Herder's 41-month sentence. *See* Gov't Br. at 26. This argument mischaracterizes the record.

It is telling that the court announced the sentence *before* giving Mr. Herder a belated opportunity to

address the [18 U.S.C. § 3553\(a\)](#) factors at sentencing. *See* J.A. 209-10. When counsel for Mr. Herder began to address the disparity argument, the *5 court interjected, “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?” After counsel noted that even the new guideline retained a 67:1 powder/crack ratio, the court cut off further discussion by stating, “Congress has decided that that’s an appropriate ratio to establish.” J.A. 210.

Even the government admits that these statements by the district court are, at best, “cryptic.” Gov’t Br. at 27. The government, however, repeats the court’s mistakes by arguing that “Congress ha[s] recently altered the guidelines to account for the crack/powder disparity.” Gov’t Br. at 28. However, as discussed at greater length in Mr. Herder’s opening brief, it was the Sentencing Commission, not Congress, that established the ratios used in the drug guideline. *See* Appellant’s Br. at 28-30. In addition, the Supreme Court has acknowledged that the 2007 amendments to the guidelines were but a “modest” step and a “partial remedy.” [Kimbrough v. United States, 128 S. Ct. 558, 569](#) (2007).

The Eighth Circuit recently held, “We believe that the rationale of *Kimbrough* applies here even though [the defendant] was sentenced under the 2007 version of the guidelines, which decreased somewhat the disparity between powder and crack cocaine sentences by adjusting downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity *6 Table.” [United States v. Davis, ___ F.3d ___, ___, 2008 WL 3477121, at *2](#) (8th Cir. Aug. 14, 2008) (quotation marks and alteration omitted). The court noted that “a substantial disparity between sentences for equal weights of crack and powder cocaine remains.” *Id.*

The holding in *Kimbrough* was not limited to the 100:1 disparity in place in that case. Here, the district court’s statements, when read in context, indicate that the court refused to consider the 67:1 disparity in Mr. Herder’s case, believing the subject to be foreclosed. The district court thus committed an error of law, which is by definition an abuse of discretion. [United States v. Diaz-Ibarra, 522 F.3d 343, 347](#) (4th Cir. 2008) (citing [Koon v. United States, 518 U.S. 81, 100](#) (1996)). Thus, the district court imposed an unrea-

sonable sentence, and this Court must vacate and remand for resentencing.

CONCLUSION

For the reasons stated above, as well as those presented more fully in Mr. Herder’s opening brief, this Court must vacate Mr. Herder’s convictions and sentence. The evidence at trial was insufficient to support the jury’s verdict. *See* Appellant’s Br. at 15-20. The district court committed reversible error and seriously impaired Mr. Herder’s defense by refusing to provide Mr. Herder’s requested jury instruction on possession. The court imposed an unreasonable sentence when it *7 refused to consider the crack/powder sentencing disparity. There was an insufficient nexus between Mr. Herder’s offenses of conviction and the money the court ordered Mr. Herder to forfeit. *See* Appellant’s Br. 34-35. Finally, as the government concedes, *see* Gov’t Br. at 35 n.7, this Court should order the district court to correct the judgment order so that it accurately reflects the offense of conviction in Count One.

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. Kinsey Cory HERDER, Defendant/Appellant.

2008 WL 4189837 (C.A.4) (Appellate Brief)

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