

FOURTH CIRCUIT UPDATE  
September 12, 2006

**Terrorism charges; reasonableness of below-guideline sentence**

*United States v. Khan*, Docket Nos. 04-4519, 04-4520, 04-4521, 05-4811, 05-4818, 05-4893 (1 September 2006)

Three defendants appealed their convictions, two of whom appealed their sentences. The third defendant was sentenced far below the guideline range and the government cross-appealed. The Fourth Circuit affirmed the convictions of the three defendants, affirmed the sentences of the two defendants appealing their sentences, and reversed and remanded the below-guideline sentence of the third defendant, finding it “unreasonable.” Slip op. at 3. One judge concurred and dissented in part. Defendants were convicted of several charges involving “a conspiracy to wage armed conflict against the United States and a conspiracy to wage armed conflict against a country with whom the United States is at peace.” *Id.*

Defendants unsuccessfully challenged their convictions on multiple grounds. These included denial of a motion to sever, challenges to counts of conspiracy as they constituted conspiracies to conspire, a confrontation clause challenge, and a selective prosecution claim. The defendants also were unsuccessful in their argument that long sentences resulting from 18 U.S.C. § 924(c) violated their due process, equal protection, and Eighth Amendment rights.

The government cross-appealed the third defendant’s sentence of 52 months in prison, when his guideline range was 97-121 months. The Court found his sentence unreasonable, as in *United States v. Green*, 436 F.3d 449, 455-6 (4th Cir. 2006), the Fourth Circuit held that a trial judge must consider the factors in 18 U.S.C. § 3553(a) for a sentencing variance, but the district court here gave “excessive weight” to just one factor: cooperating co-defendant’s sentence of 46 months. Slip op. at 31. The district court had found the defendant in question and his co-defendant similarly situated, as the men had similar records and similar conduct in the case, but the Court emphasized that the guidelines treated the men differently because the co-defendant accepted responsibility and cooperated with the government, while this defendant obstructed justice.

Judge Goodwin concurred with the majority opinion but dissented on one defendant’s consecutive firearm sentences under 18 U.S.C. § 924(c). While conceding that the Fourth Circuit “allow[s] multiple § 924(c) convictions for conduct in the same underlying offense,” the judge indicated that the majority should have considered whether the conduct in question could be separated into distinct firearm “uses” for sentencing purposes. Slip op. at 35-36 (discussing *United States v. Camps*, 32 F.3d 102 (4th Cir. 1994)). Distinct “uses” under the statute should be determined by the court’s examination of “the objectives, the effects, and the timing of the defendant’s conduct;” here, the defendant should have received a merged sentence due to a lack of evidence to support separate “uses.” Slip op. at 36-37 (citations omitted).

**Cocaine base**

*United States v. Ramos*, Docket No. 05-4187 (5 September 2006)

A panel of the Fourth Circuit affirmed the defendant's convictions for cocaine base distribution, possession, and knowingly using a firearm in a drug trafficking crime.

Defendant challenged his convictions on four grounds. First, that a variance existed between the indictment and evidence at trial. Defendant was indicted for "distributing or possessing 'a mixture or substance containing a detectable amount of cocaine base, commonly known as crack.'" Slip op. at 4. He was sentenced under a statute that carried a greater penalty for crimes involving drugs 'contain[ing] cocaine base' and argued that "the government should have been required to prove that the cocaine base in question was crack cocaine and not some other form of cocaine base." Slip op. at 3-4.

The Court rejected defendant's challenge for various reasons, including that the parties had not objected to a special verdict form that did not specify crack cocaine, that the government's expert had testified that the drugs in question were cocaine base, and that ATF agents as well as the defendant had identified the drugs as 'crack' or "crack cocaine." Slip op. at 4. Defendant also did not prevail on an *Apprendi/Booker*-style argument that the portion of the statute under which he was sentenced was based on crack cocaine, and the jury had not found the substance was crack cocaine. Overall, the Court did not find a variance as the statute required "cocaine base" and the evidence at trial and the jury's findings involved cocaine base.

Defendant's second challenge was the jury instructions improperly failed to specifically include that the jury must find he distributed crack cocaine. As the defendant did not object to the jury instructions, the Court performed a plain error analysis, and found no error because the statute only required the jury to find cocaine base. Third, the defendant challenged the trial judge's failure to give an entrapment instruction on his gun charges. As entrapment requires government inducement and a lack of predisposition on the part of the defendant, the Court held the trial judge properly did not give the instruction as the evidence showed defendant was "a willing participant in the firearms sales." Slip op. at 8. Finally, the Court rejected defendant's argument that he was a victim of sentencing entrapment as he should have been sentenced only for the drugs from the first transaction. Considering whether the government's conduct was "outrageous enough to offend due process to an extent warranting a downward departure with respect to a defendant's sentencing," the Court rejected defendant's claim as it was "not outrageous for the government to continue to purchase narcotics from willing sellers even after a level of narcotics relevant for sentencing purposes has been sold." Slip op. at 9 (citing *United States v. Jones*, 18 F.3d 1145, 1154-55 (4th Cir. 1994)).