Nos. 06-1116 and 06-9398

In the Supreme Court of the United States

MASOUD AHMAD KHAN, PETITIONER

v.

UNITED STATES OF AMERICA

SEIFULLAH CHAPMAN AND HAMMAD ABDUR-RAHEEM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly sentenced to consecutive terms of imprisonment for multiple offenses of using, carrying, possessing, and discharging firearms, in violation of 18 U.S.C. 924(c).

2. Whether petitioners knowingly, intelligently, and voluntarily waived their right to a jury trial.

3. Whether petitioners were properly denied discovery in support of a claim of selective prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 461 F.3d 477.[1] The opinion of the district court (Pet. App. 35a-83a) is reported at 309 F. Supp. 2d 789.

[1] Unless otherwise noted, all references to "Pet. App." are to the Appendix filed in No. 06-1116.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2006. A petition for rehearing was denied on September 29, 2006 (Pet. App. 84a-85a). The petitions for a writ of certiorari were filed on December 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner Khan was convicted of conspiring to commit offenses against the United States, including enlisting with intent to serve in armed hostility against the United States, in violation of 18 U.S.C. 371 (Count 1); conspiracy to levy war against the United States, in violation of 18 U.S.C. 2384 (Count 2); conspiracy to contribute services to the Taliban, in violation of 50 U.S.C. 1705 (Count 4); conspiracy to contribute material support to terrorists, in violation of 18 U.S.C. 2339A (Supp. II 2002) (Count 5); conspiracy to possess and use a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 11); and three counts of using, carrying, possessing, and discharging firearms during and in relation to and in furtherance of crimes of violence, in violation of 18 U.S.C. 924(c) (Counts 24, 25, 27). Pet. App. 35a-36a, 70a. After an initial remand for resentencing of petitioners in light of *United States* v. *Booker*, 543 U.S. 220 (2005), see Pet. App. 7a, Khan was sentenced to 60 months of imprisonment on Count 1, a concurrent 120-month sentence on Count 2, a concurrent 120-month sentence on Count 4, a concurrent 120-month sentence on Count 5, a concurrent 120-month sentence on Count 11, a consecutive 120-month sentence on Count 24, a

consecutive 300-month sentence on Count 25, and a consecutive sentence of life imprisonment on Count 27. C.A. App. 3451-3453.

Petitioner Chapman was convicted of conspiring to commit offenses against the United States, including taking part in a military expedition against a foreign state with whom the United States was at peace, in violation of 18 U.S.C. 371 (Count 1); conspiracy to contribute material support to terrorists, in violation of 18 U.S.C. 2339A (Supp. II 2002) (Count 5); conspiracy to possess and use a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 11); and two counts of using, carrying, possessing, and discharging firearms during and in relation to, and in furtherance of crimes of violence, in violation of 18 U.S.C. 924(c) (Counts 20, 22). Pet. App. 35a-36a, 70a. He was sentenced to 60 months of imprisonment on Count 1, a concurrent 120-month sentence on Count 5, a concurrent 120-month sentence on Count 11, a consecutive 300-month sentence on Count 20, and a consecutive 360-month sentence on Count 22. C.A. App. 3459-3460.

Petitioner Hammad Abdur-Raheem (Hammad) was convicted of conspiring to commit offenses against the United States, including taking part in a military expedition against a foreign state with whom the United States was at peace, in violation of 18 U.S.C. 371 (Count 1); conspiracy to contribute material support to terrorists, in violation of 18 U.S.C. 2339A (Supp. II 2002) (Count 5); and conspiracy to possess and use a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 11). Pet. App. 35a-36a, 70a. He was sentenced to 52 months of imprisonment on Count 1, a concurrent 52-month sentence on Count 5, and a concurrent 52-month sentence on Count 11. C.A. App. 3465-3466.

The court of appeals affirmed petitioners' convictions and the sentences of Khan and Chapman. On the government's cross-appeal, the court of appeals reversed and remanded Hammad's sentence as an unreasonable variance from the advisory range under the Sentencing Guidelines. Pet. App. 1a-34a.

1. a. Between 1999 and September 11, 2001, petitioners, and their associates, including Muhammed Aatique, Randall Todd Royer, Young Ki Kwon, Khwaja Mahmood Hasan and Caliph Basha Ibn Absur-Raheem (Caliph), attended Dar al Arqam Islamic Center in Falls Church, Virginia where Ali Timimi, a religious leader, preached the necessity of engaging in a violent holy war, or jihad, against the enemies of Islam. Several of the attendees, including petitioners Chapman and Hammad, organized a group to prepare to engage in jihad by simulating combat through paintball exercises and practices at firing ranges. By the early summer of 2000, the group met every other weekend. Chapman, Hammad, and others brought AK 47-style rifles to paintball training and practiced marksmanship. Pet. App. 2a-3a. Because Chapman and Hammad had military experience, they also assisted in leading the paintball exercises and conducted training that was "out-of-character for a recreational paint-ball pastime." *Id.* at 3a.

During this period, members of the group had ties to Lashkar-e-Taiba (LET), the military arm of a Pakistani organization which, between 1999 and 2003, focused on expelling India from Kashmir and advertised free jihad training in Pakistan. Pet. App. 3a, 52a. Between April and September 2000, Royer, followed by Hamdi, traveled to Pakistan, where they received military training at LET camps and acknowledged participation in hostilities. *Id.* at 53a-54a. Upon their return, they rejoined

the paintball group and discussed their jihad experiences with LET with the other paintball participants. *Id.* at 3a, 55a. In the summer of 2001, Chapman, who sought more realistic combat experience, traveled to the LET camps in Pakistan where he participated in training that included firing various rifles and handguns, including an automatic weapon. *Id.* at 3a.

On September 16, 2001, Timimi met with a small group, including petitioners Khan and Hammad, and stated that the September 11, 2001, terrorist attacks against the United States were justified. He exhorted those present to defend the Taliban against United States armed forces who were expected to invade Afghanistan in response to the attack. Several attendees, including Khan, expressed their intent to train at LET camps as preparation for serving with the Taliban in Afghanistan. Pet. App. 4a, 56a-57a.

Following the September 16, 2001, meeting with Timimi, Khan "exhorted the others to go with him to Afghanistan because 'the cowards and the weak hearted are the first to run away.'" Pet. App. 8a (quoting C.A. App. 1013). Petitioner Khan, along with Kwon, Aatique and Hasan, agreed to go to Pakistan for jihad training with the intent to fight in Afghanistan upon its completion. Pet. App. 8a-9a, 57a. Kwon, Hasan, and Khan agreed that Khan would be their "emir" or leader. *Id.* at 4a, 9a.

Khan, Hasan, and Kwon spent about six weeks in the LET camps during which they received training in commando tactics, reconnaissance, hand-to-hand combat and survival. They also received instruction on and used various firearms, including the AK-47 automatic rifle, an anti-aircraft gun, a rocket-propelled grenade, and mines. Pet. App. 4a, 57a-59a.

In November 2001, while at an LET camp, Khan, Hassan, and Kwon learned through radio reports that American forces were defeating the Taliban in Afghanistan and that, because Pakistan had closed the border with Afghanistan, LET would not facilitate their travel there. Moreover, Pakistani authorities were aggressively removing foreigners from their camps. As a result, the three men left the camps without ever reaching Afghanistan. Pet. App. 5a, 59a.

b. In February 2003, law enforcement authorities executed a search warrant on Timimi's residence. On March 24, 2003, the Federal Bureau of Investigation approached Caliph, one of the participants in the paintball training. Caliph informed them that the training was intended as preparation for jihad and that the trainees had purchased AK-47-style rifles because they were the type of rifles used overseas. When Hammad learned of Caliph's admissions, he called a colleague "with the 'bad news' that Caliph had 'cracked.'" Pet. App. 5a. In June 2003, as a result of the investigation, petitioners, along with eight co-defendants, including Caliph, Kwon, Aatique, Hasan, and Royer, were indicted for various offenses, including conspiracy to engage in military expeditions against the United States and India. Four of the defendants, including Kwon, Aatique, and Hasan, entered pleas of guilty and agreed to cooperate with the government. *Ibid.* In September 2003, the government charged the remaining defendants in a 32-count superseding indictment which alleged that petitioner Khan, but not petitioners Chapman and Hammad, conspired to levy war against the United States, to provide material

support to Al-Qaeda, and to contribute services to the Taliban. *Id.* at 5a & n.3.[2]

2. a. Before trial, Chapman, Hammad, and two co-defendants moved to sever their trial from that of Kahn and Royer on the ground that Khan and Royer were the only defendants charged with conspiring to levy war against the United States and to support Al-Qaeda and the Taliban. C.A. App. 186. The district court denied the motion. *Id.* at 189.

Chapman later renewed the severance motion in writing and, in the alternative, requested a bench trial. C.A. App. 218-221. The motion observed that "[a] bench trial would likely result in a much shorter trial, and most certainly, would afford the accused with the opportunity to receive a fair trial." *Id.* at 220-221; Pet. App. 6a. At a hearing with petitioner Chapman present, the district court indicated it would deny the renewed severance motion. C.A. App. 224-226. The court noted Chapman's "alternative * * * motion to waive jury," and requested the government's position: "The government has a right to trial by jury as well as the defendant, and so both sides have to agree to a waiver." *Id.* at 225.

Hammad, through counsel, filed a written motion to join Chapman's renewed motion for severance or, in the alternative, to waive a jury (Docket No. 387; C.A. App. 302; Pet. App. 6a), and Khan, through counsel, filed a written motion to join Chapman's motion to waive a jury (C.A. App. 281). The government filed a written concur-

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[2] In addition to petitioners, the superseding indictment named as defendants Royer, Ibrahim Ahmed Al-Hamdi, Caliph, and Sabri Benkhala. Royer and Hamdi entered pleas of guilty. Benkhala was tried separately and acquitted. Pet. App. 5a-6a. Caliph, who was tried with petitioners, was granted an acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 6a.

rence to a bench trial. *Id.* at 300. In a written order, the district court denied the renewed severance motions but granted the motions for a bench trial. Pet. App. 6a; C.A. App. 302-303.[3]

b. Petitioners filed a pretrial motion alleging selective prosecution and seeking dismissal of the indictment or, in the alternative, discovery to support such a claim. They alleged that they were targeted for prosecution because of their Muslim religion and that, before their indictment, the government had not undertaken any prosecutions under the Neutrality Act, 18 U.S.C. 960, in the Eastern District of Virginia in over 100 years. C.A. App. 189-190. The district court denied the motion, stating that petitioners "have not identified any similarly situated persons not prosecuted" and that the inclusion of information about Islam in the indictment was "relevant to the offenses charged" and "its inclusion d[id] not show animus by the Government." *Id.* at 190. At the close of trial, petitioners renewed the motion, alleging that the Cambodian Freedom Fighters (CFF), led by one Yasith Chhun, and the Irish Republican Army (IRA) engaged in similar conduct in an open and notorious manner yet were not prosecuted. *Id.* at 3234-3240. The district court again denied the motion, reasoning that the government had adequately demonstrated that LET had links to anti-American activity whereas there was no similar evidence with respect to the other identified groups. *Id.* at 3385-3386.

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[3] Caliph separately moved for a severance. When his motion was denied at a hearing at which he was the only defendant present, Caliph orally moved, through counsel, to join Chapman's motion for a bench trial. Pet. App. 6a n.4; C.A. App. 295-296. At that time, the district court questioned Caliph directly about his knowledge of his right to a jury trial. Pet. App. 89a-90a; C.A. App. 296-297.

c. Various combinations of petitioners and their co-defendants were charged in 16 separate counts alleging the use, discharge, or possession of a firearm during and in relation to or in furtherance of federal crimes of violence, in violation of 18 U.S.C. 924(c)(1)(B)(ii). The separate counts were preceded by an introductory paragraph incorporating by reference the general allegations and overt acts in Count 1 of the indictment, which included reference to five separate conspiracy counts. The Section 924(c) counts then listed the identities of the particular petitioners or co-defendants charged with the violation, the date and location of the offense, the type of firearm involved, and an allegation whether the firearm was used, possessed, or discharged. C.A. App. 151-152.

At the conclusion of the trial, the district court made particularized findings concerning each of the counts. It linked Chapman's possession of a Saiga .308 rifle charged in Count 20 to the conspiracy to violate the Neutrality Act alleged in Count 1 and therefore convicted him on that firearms count. Pet. App. 81a. It likewise convicted him of firing an AK-47, as alleged in Count 22, observing that such conduct, which occurred at an LET camp, was during and in relation to both the conspiracy to violate the Neutrality Act and the conspiracy to provide material support to LET. *Id.* at 82a-83a. The court found that, at an LET camp, petitioner Khan fired an AK-47 rifle, as alleged in Count 24; an anti-aircraft gun, as alleged in Count 25; and a rocket-propelled grenade, as alleged in Count 27. It further found that "firing these weapons at the LET camp was during and in relation to the predicate conspiracy crimes of violence." *Id.* at 83a. At sentencing, the district court imposed sentences on these counts that, as required by Section 924(c), were consecutive to both the sentences

on the underlying crimes of violence, *i.e.*, the conspiracy counts, and to the sentences on the other Section 924(c) counts. C.A. App. 3451-3453, 3459-3460.

2. The court of appeals affirmed. Pet. App. 1a-34a.[4] It rejected petitioners' claim that their jury-trial waivers were invalid because the district court failed to obtain written waivers from petitioners, as opposed to their counsel, and did not conduct a colloquy directly with petitioners. Although the court observed that "it would be 'better practice' for a district judge to interrogate a defendant who claims through counsel that he wants to waive his jury trial right," the court concluded that neither Rule 23(a) of the Federal Rules of Criminal Procedure nor the Constitution requires it. *Id.* at 15a (quoting *United States* v. *Hunt*, 413 F.2d 983, 984 (4th Cir. 1969) (per curiam)). It found that the record here supported the conclusion that the waivers were voluntary, knowing, and intelligent "even though signed by counsel and in the absence of a colloquy." *Id.* at 16a. The court concluded that the motions for waiver were made as an alternative to the motions for severance "as a calculated part of [petitioners'] trial strategy to prevent 'inflammatory and prejudicial evidence' from biasing a jury." *Ibid.* (quoting C.A. App. 220). The court likewise rejected the arguments of Chapman and Hammad that their waivers were not knowing and voluntary because, by denying their motions to sever, the district court forced them to relinquish their right to a jury trial. The court reasoned that the fact that petitioners "would have preferred severed jury trials [did]

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[4] On the government's appeal, the court reversed Hammad's sentence and remanded for resentencing. Pet. App. 26a-30a.

not make their choice of a non-severed bench trial" unknowing or involuntary. *Ibid.*

b. The court rejected Khan and Chapman's argument that they should not have received separate, consecutive sentences on their 18 U.S.C. 924(c) offenses because the underlying predicate offenses for those convictions all related to the same criminal "episode." The court reasoned that convictions for separate crimes of violence can lead to multiple consecutive sentences under Section 924(c) as long as the predicate offenses are distinct under the Double Jeopardy Clause. Pet. App. 17a-19a. The court explained that, if the predicate offenses are not identical under *Blockburger* v. *United States*, 284 U.S. 299 (1932), consecutive sentences under Section 924(c) are permissible. Pet. App. 18a-19a.

The court noted that Khan was convicted of "*four* predicate crimes of violence," Pet. App. 18a, and that "each may support a consecutive § 924(c) sentence without requiring the court first to enumerate 'uses' of firearms." *Id.* at 19a. In the court's view, it was inconsequential that the Section 924(c) counts listed all the predicate offenses as part of the same general factual allegation. It reasoned that "there is no housekeeping requirement" under either Section 924(c) obliging the government or the district court "to align the use of a particular firearm with a particular predicate offense." *Id.* at 20a.

c. The court of appeals rejected petitioners' claim that they had been improperly denied discovery on their selective prosecution claim. The court reasoned that, to obtain discovery on such a claim, a defendant must make "a credible showing of different treatment of similarly situated persons." Pet. App. 25a (quoting *United States* v. *Armstrong*, 517 U.S. 456, 470 (1996)). The court con-

cluded that petitioners' claim that the only distinguishing factor between themselves and the other groups they identified as similarly situated is that they are "Muslim in a post-9/11 world," *id.* at 26a (quoting Pet'rs C.A. Br. 88), disregarded "the very obvious fact that [petitioners] were accused of supporting LET, a terrorist group that supported the Taliban and Al-Qaeda, which were in direct conflict with the United States." *Ibid.* The court observed that the Executive has "the right to focus its prosecutorial energies on alleged terrorist[] groups that present the most direct threat to the United States and its interests." *Ibid.* Accordingly, the court held that the district court did not err in denying discovery on petitioners' selective prosecution claims. *Ibid.*[5]

d. Judge Goodwin dissented in part, stating that he would merge Khan's three Section 924(c) convictions into one 120-month sentence. Pet. App. 30a-34a. In his view, under the governing law of the Fourth Circuit, each use of a firearm during and in relation to a qualifying conspiracy offense constitutes a basis for a separate prosecution and, upon conviction, a consecutive sentence. Judge Goodwin concluded, however, that only

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[5] The court of appeals also considered and rejected petitioners' claims that they were entitled to reversal of their convictions because the evidence was insufficient to support them (Pet. App. 8a-13a); that the severance motions of Chapman and Hammad were improperly denied (*id.* at 13a-14a); that Counts 5 and 11 were invalid as conspiracies to conspire (*id.* at 16a-17a); that the Section 924(c) sentences were unconstitutional (*id.* at 20a-21a); that the district court improperly admitted co-defendant Caliph's out-of-court statements for use against them (*id.* at 22a-23a) and that it improperly admitted Chapman's unwarned statements to law enforcement authorities against him for the purpose of impeachment (*id.* at 23a-25a). Petitioners do not press these claims in this Court.

uses of a firearm that are distinct from one another justify multiple sentences. *Id.* at 31a-34a. Thus, where the "uses" of "different firearms relate to the same objective, have the same effect on the predicate crime, and are used or carried proximately in time," he would impose only one Section 924(c) sentence. *Id.* at 32a. In his view, Khan had only one objective when firing the weapons that supported his three Section 924(c) convictions—enhancement of his training in preparation for movement to Afghanistan. In addition, he found no evidence establishing the objectives, effects, and proximity of each such use of a firearm. Accordingly, Judge Goodwin would not have imposed separate sentences. *Id.* at 34a.

ARGUMENT

1. Petitioners Khan and Chapman contend (06-1116 Pet. 7-15; 06-9398 Pet. 7-14) that the district court erred in imposing consecutive terms of imprisonment for their multiple violations of 18 U.S.C. 924(c) because (in their view) the predicate offenses resulted from a single criminal episode involving a single objective. The court of appeals correctly rejected that claim, and no further review is warranted.

a. Section 924(c) prohibits using or carrying a firearm during and in relation to a federal crime of violence or drug trafficking crime, or possessing a firearm in furtherance of any such crime. It further provides:

> no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. 924(c)(1)(D)(ii).

The majority of the courts of appeals that have addressed the question have held that each underlying predicate crime of violence or drug trafficking crime can support a separate Section 924(c) conviction and consecutive sentence. See *United States* v. *Morris*, 247 F.3d 1080, 1084 (10th Cir. 2001); *United States* v. *Casiano*, 113 F.3d 420, 425-426 (3d Cir.), cert. denied, 522 U.S. 887 (1997); *United States* v. *Anderson*, 59 F.3d 1323, 1334 (D.C. Cir.) (en banc), cert. denied, 516 U.S. 999 (1995); *United States* v. *Cappas*, 29 F.3d 1187, 1189 (7th Cir. 1994); *United States* v. *Taylor*, 13 F.3d 986, 992-994 (6th Cir. 1994); *United States* v. *Lindsay*, 985 F.2d 666, 674-675 (2d Cir.), cert. denied, 510 U.S. 882 (1993); *United States* v. *Hamilton*, 953 F.2d 1344, 1346 (9th Cir.) (per curiam), cert. denied, 506 U.S. 871, 506 U.S. 884, and 506 U.S. 1020 (1992); *United States* v. *Privette*, 947 F.2d 1259, 1262-1263 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992);[6] but see *United States* v. *Edwards*, 994 F.2d 417, 423-424 (8th Cir. 1993) (holding that separate uses of different weapons at different times during the course of a single, continuing predicate offense can support separate Section 924(c) convictions), cert. denied, 510 U.S. 1048 (1994). The court of appeals applied the majority approach to petitioners' multiple Section 924(c) convictions, upholding their consecutive sentences under that statute on the basis of separate underlying predicate convictions. See Pet. App. 17a-20a; *id.* at 19a

[6] The majority's position accords with that taken by the Department of Justice with respect to prosecution of multiple Section 924(c) counts. See Memorandum from the Assistant Att'y Gen., Criminal Div. DOJ, regarding multiple convictions and sentences under 18 U.S.C. 924(c) (Aug. 24, 1999), *reprinted in* U.S. Dep't of Justice, *Federal Firearms Manual* App. A at 333-336 (3d ed. 2001).

(holding that Khan's four predicate crime-of-violence convictions may each support a consecutive Section 924(c) sentence); *id.* at 81a-83a.[7]

Petitioners maintain (06-1116 Pet. 8-9; 06-9398 Pet. 8-9), that several circuits have held that, even when multiple Section 924(c) counts are based upon different predicate offenses, consecutive Section 924(c) sentences are improper if the predicate offenses involve the same criminal "episode." Because adoption of that principle would not have affected petitioners' sentences, any inter-circuit conflict on that issue does not warrant this Court's review in this case.

In *United States* v. *Finley*, 245 F.3d 199, 207-208 (2d Cir. 2001), the defendant was convicted of possessing drugs with intent to distribute and drug distribution after an undercover officer purchased drugs and, imme-

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[7] In *United States* v. *Camps*, 32 F.3d 102, 106-109 (1994), cert. denied, 513 U.S. 1158 (1995), a different panel of the Fourth Circuit held, contrary to the majority view, that a single, continuing federal crime of violence can support multiple convictions and consecutive sentences under Section 924(c) when a defendant has used or carried a firearm on separate occasions during the course of the offense. Significantly, however, as petitioners acknowledge (06-1116 Pet. 3 n.2; 06-9398 Pet. 4 n.2), the panel in this case did not base its affirmance of petitioners' sentences on that principle. See Pet. App. 18a (noting that, because "Khan was convicted of *four* predicate crimes of violence, not a 'single predicate offense,' * * * we therefore [do] not need to count 'uses' "). Accordingly, this case provides no occasion for the Court to resolve any inter-circuit conflict on whether, and under what circumstances, a single predicate offense can support multiple Section 924(c) convictions. As the court below recognized, *id.* at 18a n.9, Judge Goodwin's dissent was premised on the mistaken assumption that the majority's holding rested on *Camps* and that consequently, under the reasoning of that case, it was necessary to determine whether the charged uses of a firearm were sufficiently distinct from one another to justify multiple, consecutive sentences.

diately thereafter, the arresting officers discovered the remainder of his drug stash along with a firearm that he had stored near the distribution operation. The defendant was also convicted and sentenced on two counts of using the firearm, one during and in relation to the possession-with-intent-to-distribute count and the other during and in relation to the distribution count. The court set aside the second Section 924(c) conviction on the ground that the statute "does not clearly manifest an intention to punish a defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct." *Id.* at 207. That court has since described the principle of *Finley* as requiring that "a defendant who commits two predicate offenses with a *single* use of a firearm may only be convicted of a single violation of § 924(c)(1)." *United States* v. *Wallace*, 447 F.3d 184, 188 (2d Cir.) (emphasis added), cert. denied, 127 S. Ct. 541 (2006); see *United States* v. *Salameh*, 261 F.3d 271, 278 (2d Cir. 2001) (per curiam), cert. denied, 536 U.S. 967, and 537 U.S. 847 (2002).

Similarly, in *United States* v. *Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998), cert. denied, 528 U.S. 828 (1999), the court vacated the second of two Section 924(c) convictions, where there was "only one firearm and one use," in the course of two simultaneous violent felonies on a single victim, first degree murder and killing a witness. The court distinguished those facts, where "there was only one use of the firearm," from cases involving "distinct conduct giving rise to multiple crimes." *Ibid.* In *United States* v. *Johnson*, 25 F.3d 1335, 1336-1338 (6th Cir. 1994) (en banc), the court held that multiple convictions for violations of Section 924(c) were improper when the defendant used two firearms while "si-

multaneously" possessing two different controlled substances. *Id.* at 1336. And, in *United States* v. *Phipps*, 319 F.3d 177, 189 (5th Cir. 2003), the court held that multiple Section 924(c) convictions were unwarranted when defendants used "a single firearm a single time for a dual criminal purpose, then immediately discarded it." *Ibid.* It stressed the limited nature of its holding, noting that the result might have been different if the offenses were not virtually simultaneous or had involved different firearms. *Id.* at 188-189.

The analysis in those cases does not aid petitioners. As Chapman acknowledges (06-9398 Pet. 13), his first Section 924(c) conviction (Count 20) was predicated on his possession of a Saiga .308 caliber rifle and its transfer to a co-conspirator in December 2000. Pet. App. 81a. The purpose of the possession and transfer was to further the conspiracy to violate the Neutrality Act. *Ibid.* Chapman's second Section 924(c) conviction was predicated on the use and discharge of an AK-47 automatic rifle in September 2001, during his attendance at the LET camp in Pakistan, which the district court found to be not only in furtherance of a conspiracy to violate the Neutrality Act but also in furtherance of a conspiracy to provide material support to LET. *Id.* at 82a-83a. Thus, Chapman's Section 924(c) offenses plainly did not involve the use of a firearm on a single occasion during the simultaneous commission of multiple predicate offenses.

Similarly, the three Section 924(c) counts on which Khan was convicted and consecutively sentenced involved three different types of firearms—an AK-47 automatic rifle, a rocket-propelled grenade, and an anti-aircraft gun—each of which he possessed at different LET training camps in Pakistan. Pet. App. 82a-83a; C.A. App. 1033-1034, 1036, 1397-1398, 1400, 1619, 1624.

He received instruction involving the use of such firearms, during which he discharged such firearms, over a period of several weeks in September and October 2001. Pet. App. 82a-83a; C.A. App. 1397-1400, 1618-1625. Thus, Khan's Section 924(c) convictions likewise did not grow out of the use of a firearm on a single occasion during the commission of simultaneous predicate offenses; he therefore cannot benefit from the reasoning of *Finley* and similar cases. This case, therefore, presents no occasion to resolve any variation among the courts of appeals on this issue.[8]

b. Petitioners Khan and Chapman further maintain (06-1116 Pet. 9, 15; 06-9398 Pet. 9, 14) that "the Fourth Circuit's refusal to require that each firearm use be tied to a particular predicate is contrary to the rule in other circuits." That claim does not warrant this Court's review. As discussed above, the majority of the courts of appeals that have addressed the question have concluded that Section 924(c) requires that each firearm conviction be predicated on a different predicate crime of violence or drug trafficking offense. Consistent with that principle, the court below concluded that separate

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[8] Petitioners also invoke the rule of lenity as a justification for setting aside their multiple, consecutive Section 924(c) sentences. 06-1116 Pet. 14; 06-9398 Pet. 14. That principle has been applied by some courts of appeals where a single use of a firearm results in more than one Section 924(c) conviction (see *Anderson*, 59 F.3d at 1333) or where multiple Section 924(c) counts are based upon the continuing possession of a single firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct. See *Phipps*, 319 F.3d at 187-189. The purported statutory ambiguity that has prompted the application of the rule of lenity in such situations has never been held to extend to situations where, as in this case, the Section 924(c) violations involved different firearms with respect to multiple predicate offenses that are not virtually coterminous with one another.

predicate convictions supported each Section 924(c) conviction. Pet. App. 18a-20a; see *id.* at 82a-83a.

Petitioners' reliance upon *Cappas*, *supra*, is misplaced. In *Cappas*, a jury instruction permitted conviction on one of the Section 924(c) counts on the basis of either a predicate drug conspiracy count *or* a predicate extortion count. The drug conspiracy count was also the predicate offense for a second Section 924(c) conviction. 29 F.3d at 1191. Given the jury instruction, the court concluded that it was unable to determine whether the jury based the first Section 924(c) conviction on that same drug conspiracy. *Id.* at 1195. See *Privette*, 947 F.2d at 1262-1263 (holding that, because it could not determine whether the jury had based two Section 924(c) counts on the same predicate conviction, one Section 924(c) conviction must be vacated).

Here, in contrast, the district court was the factfinder. The court of appeals thus had no need to parse the jury instructions to ensure that the factfinder applied the correct law. With respect to Chapman's Section 924(c) convictions, the district court expressly found that each conviction was supported by a different predicate offense. Pet. App. 82a-83a. Although the findings were less explicit for Khan's Section 924(c) convictions, the court found that they were during and in relation to "the predicate conspiracy crimes of violence," *id.* at 83a, and Khan was convicted of sufficient predicate offenses to separately support each of his Section 924(c) convictions. *Id.* at 18a-20a. As the court of appeals concluded, because the district court was the factfinder, it did "not have to worry that the fact finder did not understand the law simply because she did not spell it out in detail." *Id.* at 20a n.11.

2. a. Petitioners claim (06-1116 Pet. 15-24; 06-9398 Pet. 15-24) that the trial court erred in failing to obtain written jury-trial waivers signed personally by petitioners, as opposed to their counsel, and by failing to inquire directly of petitioners whether they wished to waive a jury trial. Rule 23(a) of the Federal Rules of Criminal Procedure provides that "[i]f the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; (3) the court approves." Here, petitioners, through counsel, filed written motions to waive the right to a jury trial, the government concurred in those requests, and the court approved the motions. Pet. App. 6a; see pp. 7-8, *supra*.

Even assuming that written motions by counsel do not comply with the writing requirement of Rule 23(a)(1), see *United States* v. *Robertson*, 45 F.3d 1423, 1430-1431 (10th Cir.), cert. denied, 515 U.S. 1108, and 516 U.S. 844 (1995), the courts are in accord that no relief is warranted for failure to comply with Rule 23(a)'s formal requirements when the circumstances demonstrate that the defendant was not ignorant of his right to a jury trial and consented to the waiver. See, *e.g.*, *United States* v. *Leja*, 448 F.3d 86, 93-94 (1st Cir. 2006) (the absence of a personally-signed waiver or a colloquy relating to such waiver "does not require reversal where the evidence establishes that the defendant's waiver was knowingly and intelligently made") (collecting cases); *Robertson*, 45 F.3d at 1431 ("strict compliance with Rule 23(a) is not justified * * * where the record clearly reflects a defendant's waiver of the right is voluntary"); *United States* v. *Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984) (purely technical violations of Rule 23(a) not a basis for relief if the government demonstrates that, at the

time of the waiver, the defendant was not ignorant of his jury right), aff'd, 471 U.S. 773 (1985); *United States* v. *Page*, 661 F.2d 1080, 1083 (5th Cir. 1981) (where, despite non-compliance with Rule 23(a), it is apparent from the record that the defendant intentionally waived his right to a jury for tactical reasons, "[a defendant] cannot claim [on appeal] of the manner in which the trial court carried out his wishes"), cert. denied, 455 U.S. 1018 (1982).

In determining whether the trial record demonstrates that the waiver of the right to a jury trial was made knowingly, voluntarily, and intentionally, the courts consider a variety of factors circumstantially demonstrating that a waiver was validly given. These include: the defendant's education, background, and intellect (*Leja*, 448 F.3d at 94; *Page*, 661 F.2d at 1082); his presence in court when the trial judge's comments make it clear that the trial will be to the bench and the absence of surprise or objection with respect to such remarks (*e.g.*, *Leja*, 448 F.3d at 94; *Page*, 661 F.2d at 1083); and circumstances demonstrating a considered and deliberate "tactical decision that a bench trial would be to [the defendant's] advantage." *Page*, 661 F.2d at 1083 & n.5.

In this case, the record demonstrates, by similar circumstances, that petitioners knowingly and voluntarily consented to the waiver of their right to a jury trial. First, as the court below observed (Pet. App. 16a), it is apparent that petitioners' written requests for a bench trial, which were signed by counsel, were the product of a calculated trial strategy. The request by Chapman and joined by Hammad was presented as an alternative to a severance of their trial from that of Khan, against whom they maintained "inflammatory and prejudicial

evidence" would be presented that would be inadmissible in a trial involving only themselves. *Ibid.* Consequently, as in *Page*, 661 F.2d at 1083 n.5, "there was * * * a plausible reason for [these petitioners] and the experienced counsel who then represented [them] to conclude that a judge might approach the case more objectively and dispassionately than a jury."[9]

Further, during a pretrial hearing involving Chapman, the district court announced that it had before it his renewed motion for prejudicial joinder or, in the alternative, a motion to waive a jury. Addressing the motion, the court further observed that "if [the proceeding] continues as a jury trial as to Mr. Chapman, I will instruct the jury to try to segregate the information. However, you do have as the alternative a motion to waive jury, and I don't know what the government's view is on that * * *. The government has a right to trial by jury *as well as the defendant*, and so both sides have to agree on a waiver." C.A. App. 224-225 (emphasis added). The court then explained that, even if the co-defendants did not waive a jury, as to those who did, it would decide the question of guilt or innocence. *Id.* at 226. Chapman never suggested that he did not person-

[9] Khan's written motion sought to join Chapman's motion for a bench trial. C.A. App. 281. Chapman's motion averred that trial to the court would "afford the accused with the opportunity to receive a fair trial." *Id.* at 221. It therefore appears that Khan also sought a bench trial for tactical reasons—avoidance of a trial by a jury which was not as likely to possess the same measure of objectivity as the court. Khan now suggests (06-1116 Pet. 25) that either the government or his co-defendants may have coerced him into waiving a jury and that, consequently, the district court should have conducted a separate inquiry to ensure that his waiver of a jury trial was truly voluntary. Khan has, however, failed to claim coercion, present evidence supporting such a claim, or otherwise demonstrate a particularized need for such an inquiry.

ally participate in the motion to waive a jury or that a bench trial, in which the court would return the verdict, was not in accordance with his wishes.

During a second pretrial hearing, in which all three petitioners and their attorneys participated, the court observed that, because the proceeding would be without a jury, counsel would no longer need to prepare jury questionnaires and would therefore have additional time to prepare for trial. C.A. App. 307. Thereafter, when the trial commenced, the court repeatedly stated that the proceeding would be a bench trial. See *id.* at 311-312, 314. Despite petitioners' presence on these occasions, none indicated that such proceedings were not in accord with their wishes. Cf. *Leja*, 448 F.3d at 94-95 (noting defendant's presence and lack of disagreement when, at the start of the trial, the court reiterated that the parties had waived a jury); *Page*, 661 F.2d at 1082 (noting that defendant, "a highly educated and articulate man, * * * in no manner exhibit[ed] objection or surprise as his counsel waive[d] jury trial").

Petitioners, who were all American-born and native English speakers, were well educated and fully capable of comprehending the trial judge's courtroom references to the absence of a jury and to the fact that the proceeding would be a bench trial.[10] Thus, the court of appeals properly concluded that the record sufficiently reflected that their waiver of a jury was knowing, intelligent, and voluntary.

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[10] Chapman held a bachelor's degree in Criminal Justice, had taken a course in criminal litigation, and had worked for the Virginia State Police. C.A. App. 258-260. Hammad excelled in junior college, and obtained an associate's degree. *Id.* at 2238, 2242, 2245. Khan, the son of a physics professor and a legal secretary, had also attended a community college. *Id.* at 2122-2123, 3523.

Indeed, to the extent that petitioners, with counsel, made a deliberate tactical decision to waive a jury in favor of a bench trial and asked the judge for that procedure, they invited any error and cannot complain of the procedure on appeal. See *Page*, 661 F.2d at 1083; see *Garrett*, 727 F.2d at 1012-1013. In this case, neither petitioners nor their counsel objected to a bench trial and petitioners expressed no surprise at such a proceeding. Significantly, petitioners do not claim that they were ignorant of their right to a trial by jury or that, if properly advised, they would have elected a jury trial. At the very least, the failure of petitioners to object to a bench trial at any point in the district court subjects their claim to review only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (all claims raised for the first time on appellate review are subject to the plain error rule); see *United States* v. *Vonn*, 535 U.S. 55, 73 (2002) (plain error rule applies to failure to object to deficient guilty plea colloquy under Federal Rule of Criminal Procedure 11). Petitioners have made no effort to meet that standard and, in any event, cannot show that it seriously affects the fairness, integrity, and public reputation of judicial proceedings (as is required to show reversible plain error) for a judge to grant a jury-trial waiver that petitioners requested for strategic reasons.[11]

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[11] Petitioners also maintain that this Court should grant review to direct district courts to conduct a colloquy with the defendant in each case to ensure that he understands his right to a jury trial and is voluntarily and knowingly waiving that right. See 06-1116 Pet. 19-20. That claim does not warrant this Court's review. Neither the Constitution nor Rule 23(a) contains a requirement that, when a jury waiver is proffered, the district court must conduct such a colloquy. See, *e.g.*, *Marone* v. *United States*, 10 F.3d 65, 67 (2d Cir. 1993). Some courts of

b. Petitioners' contention (06-1116 Pet. 17-19; 06-9398 Pet. 16-18) that the decision below conflicts with that of the Tenth Circuit in *Robertson* is incorrect. The holding in that case—that the absence of a written jury waiver signed by the defendant "is not necessarily fatal to the validity of that waiver" (45 F.3d at 1433)—is not materially different from the holding of the court below and the decisions of the other courts of appeals that have addressed the issue. Instead, reversal of the conviction in *Robertson* was based on the particular facts in that case, *i.e.*, that, where the district court not only failed to inquire concerning the defendant's decision as to the circumstances surrounding the waiver, but also never discussed, in the defendant's presence, the decision to waive the right to a jury, "there is nothing in the record * * * indicating [the defendant] personally understood her right and knowingly waived it." *Ibid.* Here, in contrast, the court below concluded that "the record reflects that [petitioners'] Rule 23 waivers were

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appeals (including the Fourth Circuit) have adopted such a colloquy requirement under their supervisory power or have suggested conducting such colloquies as a matter of prudence. See *e.g.*, *Leja*, 448 F.3d at 93 (collecting cases); *Marone*, 10 F.3d at 67 ("suggest[ing] the district courts inform each defendant, on the record, of the fundamental attributes of a jury trial before accepting a waiver"); *United States* v. *Cochran*, 770 F.2d 850, 852-853 (9th Cir. 1985) ("implor[ing]" district courts to conduct jury waiver colloquies but declining to adopt a mandatory supervisory rule requiring them); *United States* v. *Hunt*, 413 F.2d 983, 984 (4th Cir. 1969) (per curiam). Indeed, the court here reiterated that such colloquies "would be 'better practice.'" Pet. App. 15a (quoting *Hunt*, 413 F.2d at 984). But even courts of appeals that have adopted a supervisory rule requiring district courts to conduct waiver colloquies do not reverse convictions for failure to do so when the waiver is otherwise shown to be valid. See *United States* v. *Bishop*, 291 F.3d 1100, 1113-1114 (9th Cir. 2002), cert. denied, 537 U.S. 1176 (2003); *United States* v. *Rodriguez*, 888 F.2d 519, 527 (7th Cir. 1989).

a knowing, voluntary, and intelligent part of their trial strategy." Pet. App. 16a. Such factbound distinctions do not merit this Court's review.[12]

3. Petitioners maintain (06-1116 Pet. 26-29; 06-9398 Pet. 24-27) that the district court erred in failing to order discovery concerning their claims that their indictments for violations involving the Neutrality Act, 18 U.S.C. 960 (Counts 7-10), constituted impermissible selective prosecution. In the first place, petitioners were not convicted on the substantive Neutrality Act counts (Pet. App. 70a-71a, 78a, 83a). Although one of the conspiracy counts on which they were convicted (Count 1) included a Neutrality Act violation as an object offense (in which both Chapman and Hammad were found to be implicated), that count also included other object offenses, including conspiracy to provide material support to a terrorist group (LET) knowing and intending that the support was to be used to carry out crimes of vio-

[12] Chapman and Hammad further maintain (06-9398 Pet. 22) that their election to proceed without a jury was the product of an impermissible "Hobson's choice * * * between a biased jury and a fair judge." But instead of conducting a voir dire examination of the venire to determine whether a jury could segregate the evidence, and independently and impartially assess the culpability of each defendant, these petitioners decided to forgo such an examination in favor of opting for a bench trial. Under such circumstances, a "purely subjective fear of inability to select an impartial jury, manifested by [the defendant's] waiver of a jury trial before even attempting voir dire, does not make [the defendant's] waiver involuntary in a constitutional sense." *Johnson* v. *Nix*, 763 F.2d 344, 348 (8th Cir. 1985). Defendants frequently must choose between options, even when electing one of the options may entail submitting to a factfinder believed to lack impartiality (with a consequent ability to raise such a claim on appeal). *United States* v. *Martinez-Salazar*, 528 U.S. 304, 315 (2000). Nothing would have foreclosed petitioners from going to trial before a jury, thereby preserving any claim they believed they had that a jury would be biased.

lence (Count 5), on which they were all convicted and which is not subject to a similar challenge. Thus, the question whether petitioners were prejudiced by the district court's failure to order discovery concerning selective prosecution with respect to the Neutrality Act is of limited significance.[13] In any event, the claim was properly rejected by the court of appeals and that fact-bound determination does not warrant this Court's review.

"The Attorney General and United States Attorneys retain 'broad discretion' to enforce the nation's criminal laws." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)). "'The presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *Ibid.* (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)); see *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) ("Because [selective prosecution] claims invade a special province of the Executive * * * we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that the prosecutor has acted lawfully.") (quoting *Armstrong*, 517 U.S. at 465). Thus, "so long as the prosecutor has probable

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[13] The district court, however, predicated one of petitioner Chapman's Section 924(c) convictions on his conspiracy conviction (Count 1) insofar as it embraced a conspiracy to violate the Neutrality Act. Pet. App. 81a. That conspiracy count also constituted a basis (albeit unnecessary) for one of Khan's Section 924(c) convictions, but the district court determined that his participation in the conspiracy did not include the Neutrality Act. *Id.* at 70a-71a.

cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978).

Nonetheless, "'[s]electivity in the enforcement of criminal laws is . . . subject to constitutional constraints.' In particular, the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of protected statutory and constitutional rights." *Wayte*, 470 U.S. at 607-608 (quoting *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979), and *Hayes*, 434 U.S. at 364); see *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). As a consequence, to establish a claim alleging impermissible selective prosecution, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 608).

Because a demand for discovery to support a selective prosecution claim "imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution" (*Armstrong*, 517 U.S. at 468), "the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." *Id.* at 464. In particular, "[t]he Courts of Appeals 'require some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." *Id.* at 468 (quoting *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)). As to the element of "discriminatory effect," the courts require the production of "some evidence that similarly situated defendants * * * could

have been prosecuted but were not, * * * [a] requirement * * * consistent with [the Court's] equal protection case law." *Id.* at 469 (collecting cases).

Petitioners identify two groups, the CFF and the IRA, as "similarly situated" to them by virtue of the fact that their members also traveled from the United States to foreign nations for the specific purpose of engaging in armed conflict with a friendly government. Neither group, however, was "similarly situated" to LET, with which petitioners aligned themselves, because neither was in direct conflict with the United States. Shortly after the September 11, 2001, terrorist attack on the United States, LET proclaimed that, if the United States attacked Afghanistan, its members would "not leave [their] Afghanistan brethren in the lurch [but would] sacrifice their lives along with other Muslims against America and other disbelievers." C.A. App. 1867. On October 7, 2001, LET proclaimed that America had launched a war against Islam as part of a plan to massacre all Muslims in the world, and shortly thereafter, it called on the Muslim world to support the Taliban against the Americans. *Id.* at 1867-1869. Petitioners presented no similar evidence on the part of either CFF or the IRA of overt hostility against the United States or expressions of intent to support other terrorist groups in undertaking military action against it.[14] Thus,

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[14] Furthermore, petitioners err in their assertion that members of CFF have not been the subject of Neutrality Act prosecutions for their activities. Yasith Chhun, the President of that group, who petitioners have identified as a similarly situated but not charged person (C.A. App. 3235), has been charged in the Central District of California with a violation of the Neutrality Act and related offenses. See *United States* v. *Chhun*, No. 2:05-cr-00519-DDP-ALL (C.D. Cal. filed May 31, 2005); Press Release, U.S. Att'y C.D. Calif., DOJ, President of

as the court below observed (Pet. App. 26a), because LET presented a direct threat to the United States and its interests, it was a perfectly proper exercise "of the Government's enforcement priorities" (*Armstrong*, 517 U.S. at 465), to charge petitioners with supporting it.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Cambodian Freedom Fighters Arrested in Alleged Plot to Overthrow Cambodian Government (June 1, 2005) <http://www.usdoj.gov/usao/cac/news/pr2005/079.html>.