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## For The Criminal Practitioner

CARL HORN

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# FOR THE CRIMINAL PRACTITIONER

## REVIEW OF FOURTH CIRCUIT OPINIONS IN CRIMINAL CASES DECIDED IN CALENDAR YEAR 1993

CARL HORN\*

### Table of Contents

	Page
I. Search and Seizure .....	162
A. Probable Cause to Search/Search Warrant Based on Tainted and Untainted Information .....	162
B. Nexus with Place to Be Searched .....	163
C. Execution of Search Warrant/"No Knock" Entry in "Exigent Circumstances" .....	163
D. Terry Stops .....	163
E. Detention of Property .....	164
F. Pretextual Stops .....	164
G. Warrantless Arrests/Corroboration of Informant Tips with "Innocent Facts" .....	165
H. Vehicle Searches/Vehicle Inventory Search .....	165
I. Good Faith Exception .....	166
J. Closed Military Base Searches .....	166
II. Confessions and Other Statements .....	166
A. Miranda Warnings/Volunteered Statements .....	166
B. Prior Testimony .....	166
C. Statements of Co-conspirators .....	167
III. Miscellaneous Pretrial Issues .....	167
A. Right to Counsel/Indigent Defendant's Right to Substitute Counsel .....	167
B. Venue .....	167
C. Double Jeopardy .....	168
D. Joinder and Severance .....	168
E. Pretrial Assertion of Privilege/Evidence of Assertion at Trial .....	169
F. Immunity/Non-prosecution Agreements .....	169
G. Guilty Pleas .....	171
H. Motions to Withdraw Guilty Plea .....	171
I. Government Breach of Plea Agreement .....	172

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	J. Speedy Trial Act .....	172
	K. Delay in Indictment .....	173
IV	Drug Offenses .....	173
	A. Use of "Drug Dogs" .....	173
	B. Possession with Intent to Distribute.....	174
	C. Drug Conspiracies .....	175
	D. Jury Instruction: Lesser-included Offense of Simple Possession.....	175
	E. Expert Testimony on Drug Distribution Methods and Organizations .....	175
	F. Quantity of Drugs .....	175
	G. Cocaine Base ("Crack").....	177
	H. Sentence Enhancement for Possession of Dangerous Weapon.....	177
	I. Drug Use as "Possession" .....	178
V	Firearms Offenses.....	178
	A. Restoration of Civil Rights .....	178
	B. Possession of Firearms in Home.....	178
	C. Possession of Gun Used in Another Crime.....	179
	D. Armed Career Criminal Act: Collateral Challenges to State Convictions .....	179
	E. Violent Felonies .....	180
	F. Restoration of Civil Rights—Effect on § 924(e) Enhancement .....	181
	G. Proof of "Firearm" in § 924(c) Prosecution.....	181
	H. Title 26 Violations.....	182
VI.	Miscellaneous Offenses .....	182
	A. Assimilative Crimes Act (18 U.S.C. § 13): Magistrate Judge Jurisdiction .....	182
	B. Conspiracy (18 U.S.C. § 371).....	182
	C. Pinkerton Liability for Crimes Committed by Co-conspirators.....	183
	D. Bribery Concerning Programs Receiving Federal Funds (18 U.S.C. § 666).....	183
	E. Arson of Private Home (18 U.S.C. § 844).....	183
	F. False Statements (18 U.S.C. § 1001).....	184
	G. Parental Kidnapping (18 U.S.C. § 1201 <i>et seq.</i> ).....	184
	H. Obstruction of Justice (18 U.S.C. § 1503) .....	185
	I. Retaliating Against a Witness (18 U.S.C. § 1513).....	185
	J. False Testimony Before Grand Jury (18 U.S.C. § 1623) .....	185
	K. Hobbs Act Violations (18 U.S.C. § 1951).....	185
	L. Travel Act Violations (18 U.S.C. § 1952) .....	187
	M. Money Laundering (18 U.S.C. §§ 1956 and 1957).....	187
	N. Racketeering (18 U.S.C. § 1961 <i>et seq.</i> ) .....	188
	O. Sexual Exploitation of Children (18 U.S.C. § 2251)...	189
	P. Endangered Species Act (16 U.S.C. § 1538).....	189

	Q. Lacey Act (16 U.S.C. § 3371 <i>et seq.</i> ).....	189
	R. Structuring Monetary Transactions (31 U.S.C. §§ 5322 and 5324) .....	189
	S. Environmental Crimes.....	190
	T International Emergency Economic Powers Act (50 U.S.C. § 1701 <i>et seq.</i> ).....	190
	U. Attempt to Commit a Crime.....	190
	V Statutory Interpretation Generally .....	191
VII.	Trial .....	191
	A. Jury Venire/"Fair Cross-section" Requirement.....	191
	B. Voir Dire/Peremptory Challenges.....	191
	C. Batson Challenges .....	192
	D. Juror Competency .....	193
	E. Bolstering .....	193
	F Polygraph Evidence .....	194
	G. Expert Testimony .....	194
	H. Cross Examination .....	195
	I. Rule 403.....	196
	J. Rule 404.....	196
	K. Entrapment .....	197
	L. Prosecutorial Misconduct.....	198
	M. Amendment of Indictment/Variance in Proof .....	199
	N. Judicial Misconduct.....	199
	O. Jury Instructions.....	199
	P Motion for New Trial.....	200
VIII.	Sentencing.....	201
	A. "Straddle Conspiracies" .....	201
	B. Relevant Conduct (§ 1B1.3).....	202
	C. "Significant Injury" (§ 2B3.1).....	202
	D. Value Based on Defendant's Statements (§§ 2F1.1 and 2Q2.1).....	202
	E. Perjury (§§ 2J1.3 and 2X3.1) .....	203
	F Environmental Crimes (§ 2Q1.3) .....	203
	G. "Vulnerable Victim" (§ 3A1.1).....	203
	H. Role in the Offense/Aggravating Role (§ 3B1.1) .....	203
	I. Reductions for Mitigating Role (§ 3B1.2).....	204
	J. Obstruction of Justice (§ 3C1.1) .....	204
	K. Acceptance of Responsibility (§ 3E1.1).....	204
	L. Criminal History (Chapter Four).....	205
	M. Career Offender/Related Offenses (§ 4B1.1) .....	206
	N. Motions for Downward Departure Based on "Substantial Assistance" (§ 5K1.1).....	206
	O. Downward Departures Generally (§ 5K2.0) .....	207
	P Fines.....	207
	Q. Restitution .....	207
	R. "No Limit" to What Sentencing Judge May Consider .....	208

S.	Sentencing Guidelines "Commentary" and "Application Notes" Presumed Authoritative.....	208
T	Overlapping Ranges Doctrine .....	209
U.	Supervised Release Violations .....	209
IX.	Appeal and Other Post-conviction Proceedings .....	209
A.	Failure to File Notice of Appeal.....	209
B.	Rule 35 Motions .....	210
C.	"Plain Error" Doctrine.....	210
D.	Harmless Error .....	210
E.	District Court's Failure to Follow Fourth Circuit's Mandate .....	211

This review covers published Fourth Circuit criminal opinions decided in calendar year 1993. The order and subject categories of the review correspond to those in the author's *Fourth Circuit Criminal Handbook*.<sup>1</sup>

The scope of coverage varies according to the significance of a particular decision. Where a decision simply follows well-established precedent, the proposition(s) for which the 1993 decision might be cited in the future may be noted without further comment. In some routine decisions, there may be cursory mention of pertinent facts, a brief comment, or citation to related cases. More detailed discussion is reserved to those relatively few decisions which expand or significantly alter existing case law

Whatever the scope or depth of coverage of a particular case, the purpose of this review is as its name suggests: to provide a practical and useful tool to the busy prosecutor or criminal defense attorney. Toward that end, the order of coverage is more or less in the chronological order in which issues might arise in a typical case.

## I. SEARCH AND SEIZURE

### A. Probable Cause to Search/Search Warrant Based on Tainted and Untainted Information

Where improper or otherwise tainted evidence is used to obtain a search warrant, this fact will not invalidate the search warrant so long as there is enough untainted information to support probable cause. *United States v Wright*, 991 F.2d 1182 (4th Cir. 1993). On this point, see also *United States v Gillenwaters*, 890 F.2d 679 (4th Cir. 1989); *United States v. Whitehorn*, 813 F.2d 646, 649 (4th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *United States v. Hawkins*, 788 F.2d 200, 203-04 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986).

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1. Judge Horn's *Fourth Circuit Criminal Handbook* will be published by The Michie Company, Charlottesville, Virginia, later this year.

### B. Nexus with Place to Be Searched

To pass constitutional muster there must be a sufficient nexus established between the criminal conduct, the items to be seized, and *the place* to be searched. In *United States v. Lalor*, 996 F.2d 1578, 1582-83 (4th Cir.), *cert. denied*, 114 S. Ct. 485 (1993), the court found insufficient nexus between certain drug activity and the defendant's residence—although admission of the improperly seized evidence was upheld under the “good faith exception” announced by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 925-26 (1984). *But cf. United States v. Williams*, 974 F.2d 480, 481-82 (4th Cir. 1992) (finding sufficient nexus between known drug dealer and motel room in which he was staying).

### C. Execution of Search Warrant/“No Knock” Entry in “Exigent Circumstances”

In *United States v. Lalor*, 996 F.2d 1578, 1584-85 (4th Cir.), *cert. denied*, 114 S. Ct. 485 (1993), the court upheld a “no knock” entry to execute a search warrant based on “exigent circumstances.” On the “no knock” exception to the “knock and announce” general rule, see also *Mensh v. Dyer*, 956 F.2d 36, 40 (4th Cir. 1992); *Simons v. Montgomery County Police Officers*, 762 F.2d 30, 32-33 (4th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); and *United States v. Couser*, 732 F.2d 1207, 1208 (4th Cir. 1984) (upholding no knock entry to prevent destruction of evidence), *cert. denied*, 469 U.S. 1161 (1985).

### D. Terry Stops

The legitimacy of an investigative or *Terry* stop turns on what constitutes “reasonable suspicion,” which the Fourth Circuit has called “a commonsensical proposition [properly] crediting the practical experience of officers who observe on a daily basis what transpires on the street.” *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993). In *Lender*, the factors approved as properly contributing to a finding of “reasonable suspicion” included (1) a person's presence in “a high crime area”; (2) observation by law enforcement of what they believe to be a drug transaction or other criminal activity, based upon their experience; and (3) evasive conduct. *Id.* at 154.

On the deference properly given to law enforcement investigating what they believe to be criminal conduct, based upon their experience “on the street,” see also *United States v. Turner*, 933 F.2d 240, 242-44 (4th Cir. 1991) (officer with experience in narcotics investigations had reasonable suspicion to stop and determine whether suspect was “cooking” illegal drugs after observing her carry cup of water out of convenience store, walk to car, and lean over front seat as if to hide something); and *United States v. Moore*, 817 F.2d 1105, 1106-07 (4th Cir.) (officer's nighttime observation of man walking away from otherwise deserted area where burglar alarm had just gone off constitutes reasonable suspicion to stop man), *cert. denied*, 484 U.S. 965 (1987).

In evaluating whether an initial stop constitutes a *Terry* stop or an arrest, the Fourth Circuit has squarely rejected the view that a show of force necessarily connotes arrest. See *United States v. Sinclair*, 983 F.2d 598 (4th Cir. 1993) (use of drawn weapons to detain subjects did not convert investigative stop into arrest). On this point, see also *United States v. Hensley*, 469 U.S. 221, 235 (1985); *United States v. Crittendon*, 883 F.2d 326 (4th Cir. 1989) (brief handcuffing of suspect necessary to maintain status quo and protect officer did not convert *Terry* stop into arrest); *United States v. Taylor*, 857 F.2d 210, 213-14 (4th Cir. 1988); and *United States v. Manbeck*, 744 F.2d 360, 384 (4th Cir. 1984) (calling drawn weapons "permissible safety precaution" in *Terry* stop), *cert. denied*, 469 U.S. 1217 (1985). Nor is the issue whether the subject is "free to leave," the essential assumption behind a *Terry* stop being that reasonable suspicion justifies brief investigative *detention*. See *Moore*, 817 F.2d at 1108.

### E. Detention of Property

The same standard that applies to an investigative stop of a person ("reasonable suspicion") also applies to the brief investigative detention of luggage or other personal property *United States v. Place*, 462 U.S. 696, 706-08 (1983); *United States v. McFarley*, 991 F.2d 1188 (4th Cir.) (reasonable suspicion to detain luggage found when subjects arrived from New York City, a source city for drugs, fit "drug courier profile," appeared nervous, and gave inconsistent stories about details of their travel), *cert. denied*, 114 S. Ct. 393 (1993).

When property is detained, typically for a drug dog sniff or other investigation in hopes of obtaining probable cause to search, the question becomes *how long* the property may be held. Just as in an investigative stop of a person, there are no bright-line rules to determine how long is too long. See, e.g., *Place*, 462 U.S. at 710 (90 minutes held in circumstances to be too long); *McFarley*, 991 F.2d at 1188 (distinguishing *Place*, approving 38 minute detention of defendant's bag to arrange for drug dog sniff).

### F. Pretextual Stops

Until recently, defendants could argue that a vehicle stop for a minor traffic violation (for example, a seat belt, license tag, or stop sign violation) was "pretextual." Defendants making this argument would urge the court to follow the Tenth and Eleventh Circuits in suppressing evidence if a "reasonable officer" would not have made the stop absent larger suspicions or investigative purposes.

However, in *United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993), *cert. denied*, No. 93-7067, 1994 WL 96102 (U.S. Mar. 28, 1994), the Fourth Circuit rejected the view of the Tenth and Eleventh Circuits on pretextual stops, adopting instead what is known as the "objective test." Under the objective test, so long as the officer has an objective right to stop a vehicle, irrespective of the officer's subjective motivation or suspicion, the subsequent seizure of evidence of a more serious offense will not be suppressed

on the ground that the stop was pretextual. *Accord United States v Mitchell*, 951 F.2d 1291 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1976 (1992); *United States v Cummins*, 920 F.2d 498, 500-01 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 428 (1991); *United States v Causey*, 834 F.2d 1179, 1184-85 (5th Cir. 1987) (en banc); *United States v Hawkins*, 811 F.2d 210, 213 (3d Cir.), *cert. denied*, 484 U.S. 833 (1987).

The court in *Hassan El*, 5 F.3d at 730, explained the objective test thus: "Under the objective test, if an officer has probable cause or a reasonable suspicion to stop a vehicle, there is no intrusion upon the Fourth Amendment. That is so regardless of the fact that the officer would not have made the stop but for some hunch or inarticulable suspicion of other criminal activity." This is true, notes the court, "however minor" the traffic violation in question.

#### G. Warrantless Arrests/Corroboration of Informant Tips with "Innocent Facts"

It is well settled that tips from informants may constitute or contribute to the probable cause necessary to justify a warrantless arrest. *See Alabama v. White*, 496 U.S. 325 (1990); *Illinois v. Gates*, 462 U.S. 213, 238-42 (1983); *Draper v. United States*, 358 U.S. 307, 313 (1959); *United States v Porter*, 738 F.2d 622, 625-26 (4th Cir.) (en banc), *cert. denied*, 469 U.S. 983 (1984); *United States v Shepherd*, 714 F.2d 316, 317 (4th Cir. 1983), *cert. denied*, 466 U.S. 938 (1984); *United States v Laughman*, 618 F.2d 1067, 1072 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980).

When the informant tip is of questionable reliability—and even when the information is from an anonymous source, as it was in *Gates*—probable cause may nevertheless be based on such information if it has been independently corroborated. In this context, corroboration does not mean verification of all the inculpatory information; even corroboration of certain "innocent facts" has been found sufficient. *See, e.g., Gates*, 462 U.S. at 241; *Draper*, 358 U.S. at 313; *United States v Lalor*, 996 F.2d 1578, 1581 (4th Cir.), *cert. denied*, 114 S. Ct. 485 (1993); *United States v Sinclair*, 983 F.2d 598, 601-02 (4th Cir. 1993); *United States v McCraw*, 920 F.2d 224, 228 (4th Cir. 1990).

#### H. Vehicle Searches/Vehicle Inventory Search

There are a number of potential grounds for a vehicle search, including a brief search during a *Terry* stop, a search incident to arrest, a warrantless search based upon probable cause and "exigent circumstances," and a vehicle inventory search.

The latter (vehicle inventory searches) are a well-established exception to the Fourth Amendment warrant requirement, based instead on governmental interests in protecting the owner's property, protecting the police from possible danger, and insuring against false claims. While not dependent on probable cause, vehicle inventory searches must be conducted according to standard operating procedure. *See, e.g., Florida v Wells*, 495 U.S. 1,



4-5 (1990); *Colorado v Bertine*, 479 U.S. 367, 371-72 (1987); *South Dakota v Opperman*, 428 U.S. 364, 372 (1976); *United States v. Ford*, 986 F.2d 57, 60 (4th Cir. 1993); *United States v. Brown*, 787 F.2d 929, 931-32 (4th Cir.), *cert. demed*, 479 U.S. 837 (1986).

### I. Good Faith Exception

As has been noted, in *United States v. Lalor*, 996 F.2d 1578 (4th Cir.), *cert. demed*, 114 S. Ct. 485 (1993), the Fourth Circuit upheld admission of improperly seized evidence under the "good faith exception" announced by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 925-26 (1984).

### J. Closed Military Base Searches

A narrow but well-accepted exception to the warrant requirement is the search of individuals on closed military bases. Such searches are justified by general security concerns and require neither a showing of probable cause nor of "particularized suspicion." *United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993) (reversing suppression of evidence seized at military base closed to public, and citing cases).

## II. CONFESSIONS AND OTHER STATEMENTS

### A. Miranda Warnings/Volunteered Statements

Miranda warnings are required when a subject is interrogated either in custody or its functional equivalent. *Miranda v. Arizona*, 384 U.S. 436 (1966). The test for determining whether an individual is "in custody" for *Miranda* purposes is whether, under the totality of the circumstances, the "suspect's freedom of action is curtailed to a degree associated with formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (internal quotations omitted).

On the other hand, *Miranda* only applies to custodial *interrogation*; statements *volunteered* by a defendant while in custody are not implicated. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility [is not implicated by *Miranda*]." *Rhode Island v. Inns*, 446 U.S. 291, 300 (1980). *See also Estelle v. Smith*, 451 U.S. 454, 469 (1981); *United States v. Wright*, 991 F.2d 1182, 1186 (4th Cir. 1993); *United States v. Rhodes*, 779 F.2d 1019, 1032 (4th Cir. 1985) (spontaneous statements that were not product of interrogation were not subject to *Miranda*), *cert. denied*, 476 U.S. 1182 (1986).

### B. Prior Testimony

Under FED. R. EVID. 804(b)(1), prior testimony is not excluded by the hearsay rule if, *inter alia*, the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Additionally, the Fourth Circuit had ad-

mitted prior testimony not subject to the prescribed examination or cross examination under FED. R. EVID. 804(b)(1), the so-called "residual hearsay exception," which admits "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness." *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993) (co-defendant's testimony at his own suppression hearing held admissible); *United States v. Murphy*, 696 F.2d 282, 286 (4th Cir. 1982) (grand jury testimony held admissible), *cert. denied*, 461 U.S. 945 (1983); *United States v. Garner*, 574 F.2d 1141, 1144 (4th Cir.) (same), *cert. denied*, 439 U.S. 936 (1978).

### C. Statements of Co-conspirators

In *United States v. Goins*, 11 F.3d 441 (4th Cir. 1993), the Fourth Circuit joined six other circuits in holding that the personal knowledge requirement of FED. R. EVID. 602 does not apply to statements of co-conspirators admissible as non-hearsay under FED. R. EVID. 801(d)(2)(E).

## III. MISCELLANEOUS PRETRIAL ISSUES

### A. Right to Counsel/Indigent Defendant's Right to Substitute Counsel

Once competent counsel is appointed to represent an indigent defendant, it is within the broad discretion of the trial court whether to grant or deny a motion for substitute counsel. Moreover, the reported fact that the defendant and counsel are not "getting along" is generally insufficient to require appointment of substitute counsel. *See, e.g., Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (Sixth Amendment does not guarantee "meaningful relationship" or good rapport with attorney, just constitutionally adequate representation); *United States v. Burns*, 990 F.2d 1426, 1437-38 (4th Cir.) (approving denial of motion for substitute counsel even though defendant had filed grievance complaint with State Bar against court-appointed counsel; "to hold otherwise would invite criminal defendants anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial. Such is not an invitation we wish to extend."), *cert. denied*, 113 S. Ct. 2949 (1993); *United States v. Hanley*, 974 F.2d 14 (4th Cir. 1992) (denying defense counsel's motion to withdraw filed one week before trial).

### B. Venue

Whether a particular defendant was ever physically present in the charging district is immaterial for purposes of determining proper venue. *United States v. Cofield*, 11 F.3d 413 (4th Cir. 1993) (Eastern District of Virginia proper venue in prosecution for beating of witness in Washington, D.C. for prior testimony in prosecuting district); *United States v. Newsom*, 9 F.3d 337 (4th Cir. 1993) (approving venue in prosecution of threats made in one district against Assistant U.S. Attorney located in prosecuting dis-

trict); *United States v Burns*, 990 F.2d 1427, 1436-37 (4th Cir. 1993) (proper venue for prosecution of Travel Act violations in any district in which travel occurred); *United States v Melia*, 741 F.2d 70 (4th Cir. 1984) (approving venue in prosecution for receiving stolen goods in district in which goods were stolen), *cert. denied*, 471 U.S. 1135 (1985); *United States v Kibler*, 667 F.2d 452 (4th Cir.), *cert. denied*, 456 U.S. 961 (1982).

### C. Double Jeopardy

In determining whether a successive prosecution is barred by the Double Jeopardy Clause, "the first step is to decide whether the government used the evidence that established the first offense to obtain a conviction on the second offense as well." *United States v Jarvis*, 7 F.3d 404, 410 (4th Cir. 1993) (indictment in Eastern District of Virginia after prosecution in Southern District of Florida held to be violation of double jeopardy in that both involved same conspiracy to transport cocaine from Florida to Virginia). *But cf United States v McHan*, 966 F.2d 134 (4th Cir. 1992) (holding 1984-86 conspiracy separate and distinct from 1988 conspiracy, and therefore upholding use of both as predicate offenses to prosecute defendant for conducting continuing criminal enterprise).

Another factual context in which the double jeopardy issue arises is when a defendant is reindicted or tried again following a mistrial. Whether a successive prosecution is permitted depends upon the circumstances resulting in mistrial.

If the mistrial is due to a hung jury, a successive prosecution is entirely permissible. *United States v Burns*, 990 F.2d 1426, 1434-35 (4th Cir. 1993) ("Ever since Justice Story delivered the Supreme Court's opinion in *United States v Perez*, 22 U.S. (9 Wheat) 579 (1824), it has been settled law that a mistrial declared on account of jury deadlock does not prevent the Government from reindicting and retrying the defendant."). On this point, see also *Richardson v United States*, 468 U.S. 317, 324 (1984).

On the other hand, when a mistrial is declared for some other reason and over the defendant's objection, a successive prosecution is not permitted except upon a showing of "manifest necessity" *Arizona v Washington*, 434 U.S. 497, 505 (1978); *United States v Shafer*, 987 F.2d 1054 (4th Cir. 1993) (reversing conviction, holding no "manifest necessity" to declare mistrial over defendant's objection when "less drastic alternatives" existed to deal with Government's failure to produce *Brady* material). *See also United States v Council*, 973 F.2d 251 (4th Cir. 1992) (counts on which Rule 29 motion was granted really in nature of dismissal on legal grounds and could be tried again, but counts mistried on Government's motion during jury deliberations could not).

### D. Joinder and Severance

No right to severance arises because the evidence against one or more defendants is stronger than the evidence against other defendants. *United States v Riley*, 991 F.2d 120, 125 (4th Cir.), *cert. denied*, 114 S. Ct. 392

(1993). On this point, see also *United States v Brooks*, 957 F.2d 1138, 1144-45 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992). To the contrary, except when “a miscarriage of justice” will result, there is a presumption that co-defendants should be tried together. *Richardson v. Marsh*, 481 U.S. 200, 206-11 (1987); *Zafiro v United States*, 113 S. Ct. 933, 937 (1992) (presumption that co-defendants should be tried together applies equally to co-defendants charged with conspiracy); *United States v Samuels*, 970 F.2d 1312, 1314 (4th Cir. 1992); *United States v. Chorman*, 910 F.2d 102, 114 (4th Cir. 1990); *United States v. Pryba*, 900 F.2d 748, 758 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990); *United States v Odom*, 888 F.2d 1014, 1017 (4th Cir. 1989), *cert. denied*, 498 U.S. 810 (1990); *United States v Spittler*, 800 F.2d 1267, 1271-72 (4th Cir. 1986) (“[T]o be entitled to a severance, a defendant must show more than merely that a separate trial would offer him a better chance of acquittal.”) (internal quotation and citation omitted).

“The grant or denial of a motion for severance under Rule 14 lies within the sound discretion of the trial court and its action on such a motion will be overturned only when there has been a clear abuse of such discretion [in that] the denial of a severance deprive[d] the movant a fair trial and result[ed] in a miscarriage of justice.” *United States v Santoni*, 585 F.2d 667, 674 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (citations omitted). In practical application, the decision of the trial court is seldom disturbed on appeal. *Riley*, 991 F.2d at 125; *Brooks*, 957 F.2d at 1145; *United States v Clark*, 928 F.2d 639, 645 (4th Cir. 1991) (burden on defendant to make particularized showing of prejudice); *United States v Haney*, 914 F.2d 602, 606 (4th Cir. 1990); *United States v LaRouche*, 896 F.2d 815 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990); *United States v Mitchell*, 733 F.2d 327, 331 (4th Cir.), *cert. denied*, 469 U.S. 1039 (1984); *United States v Hargrove*, 647 F.2d 411, 415 (4th Cir. 1981).

#### *E. Pretrial Assertion of Privilege/Evidence of Assertion at Trial*

Assuming the existence and proper pretrial assertion of a privilege, it may be reversible error to bring out the fact of its assertion at trial. *United States v Morris*, 988 F.2d 1335, 1337-43 (4th Cir. 1993) (reversible error for prosecutor to cross-examine testifying wife about her prior assertion of marital privilege before grand jury). In *Morris*, the Fourth Circuit drew on “the long line of cases which hold that it is error for a prosecuting attorney to ask a defense witness at trial about that witness’s invocation of the Fifth Amendment privilege against self-incrimination before the grand jury” in so holding. *Id.* at 1339.

#### *F Immunity/Non-prosecution Agreements*

Agreement by the Government not to prosecute may be conferred through a grant of formal immunity or through a less formal non-prosecution agreement. Whether formal immunity is granted or a less formal non-prosecution agreement is entered, the Government’s commitment may be either not to use the information obtained through the defendant’s

cooperation (commonly referred to as "use immunity"), or not to prosecute the defendant at all for any or certain categories of offenses (commonly referred to as "transactional immunity").

If a witness or defendant is prosecuted after being granted use immunity, the Government bears a "heavy burden of proving that all of the evidence it proposes to use was derived from sources" independent of the immunized testimony *Kastigar v United States*, 406 U.S. 441, 461-62 (1972) (footnote omitted). This is commonly referred to as the "independent source rule" and the hearing to make this determination as a "*Kastigar* hearing."

In applying the "independent source" rule, the Fourth Circuit has not hesitated to dismiss charges when the Government fails to meet its high burden. *See, e.g., United States v Smith*, 976 F.2d 861 (4th Cir. 1992) (reversing defendant's conviction as breach of agreement not to prosecute defendant "for any federal offense based on information now in the possession of the government"); *United States v Fant*, 974 F.2d 559 (4th Cir. 1992) (remanding for resentencing without obstruction enhancement based on defendant's post immunity statements to probation officer, finding further that enhancement was "plain error"); *United States v Harris*, 973 F.2d 333 (4th Cir. 1992) (affirming dismissal of most charges in indictment). *But cf United States v Reckmeyer*, 786 F.2d 1216, 1224 (4th Cir.) (promise by Government not to use information in further prosecutions did not prevent its use in that prosecution), *cert. denied*, 479 U.S. 850 (1986).

Two 1993 decisions made several refining points relative to immunity and non-prosecution agreements. First, a defendant is only entitled to a *Kastigar* hearing in the event of prosecution after a grant of *use* immunity. Prosecution following a grant of *transactional* immunity does not entitle the defendant to a *Kastigar* hearing. *United States v. Jarvis*, 7 F.3d 404, 414 (4th Cir. 1993). On this point, see also *United States v Harris*, 973 F.2d 333, 336 (4th Cir. 1992).

Second, a defendant who breaches any express conditions of the grant of immunity or a non-prosecution agreement will not be entitled to its subsequent protection. *United States v. Gerant*, 995 F.2d 505 (4th Cir. 1993) (affirming prosecution of cooperating defendant who understated his role and profits in drug organization, and falsely claimed to be government informant in past). On this point, see also *United States v Seeright*, 978 F.2d 842 (4th Cir. 1992) (upholding use of defendant's statements made during proffer meeting following defendant's material breach of plea agreement). The Government has the burden of proving a material breach of a plea or non-prosecution agreement by a preponderance of the evidence. This determination is for the trial court. *Gerant*, 995 F.2d at 508. The trial court's finding of a material breach will be reversed on appeal only if clearly erroneous. *Id.*

And third, failure to raise the immunity defense at some point in the proceedings before the trial court constitutes "forfeiture of the objection." *Jarvis*, 7 F.3d at 414. However, to overcome forfeiture the defense need not be raised pre-trial; indeed, raising the issue for the first time in a Rule 29 motion at the close of the Government's case-in-chief is sufficient. *Id.*

### G. Guilty Pleas

“A voluntary and intelligent plea of guilty is an admission of the elements of a formal criminal charge, and all material facts alleged in the charge. Furthermore, a guilty plea constitutes a waiver of all nonjurisdictional defects, including the right to contest the factual merits of the charges.” *United States v Willis*, 992 F.2d 489, 490 (4th Cir. 1993) (internal quotations and citations omitted). On these and closely related points, see also *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (defendant’s plea and statements and court’s findings “constitute a formidable barrier” to their subsequent attack); *Tollett v Henderson*, 411 U.S. 258 (1973) (guilty plea constitutes waiver of all nonjurisdictional defects); *United States v DeFusco*, 949 F.2d 114, 119 (4th Cir. 1991) (statements made during Rule 11 proceedings constitute strong evidence of voluntariness of plea), *cert. denied*, 112 S. Ct. 1703 (1992); and *Via v Superintendent, Powhatan Correctional Center*, 643 F.2d 167 (4th Cir. 1981).

On a related point, the Fourth Circuit held in *United States v Taylor*, 984 F.2d 618, 620-21 (4th Cir. 1993) that a trial court is not required to conduct a second Rule 11 inquiry when a defendant equivocates about his guilty plea at sentencing. Rather, “the Rule 11 colloquy has a burden-shifting effect. Prior to sentencing, the defendant may withdraw his guilty plea only if he demonstrates a ‘fair and just reason’ for doing so.” *Id.* at 621 (citing FED. R. CRIM. P. 32(d) and cases).

### H. Motions to Withdraw Guilty Plea

Rule 32(d), as amended in 1983, places the burden on a moving defendant to show a “fair and just reason” why withdrawal of a guilty plea should be allowed. *United States v Craig*, 985 F.2d 175, 178 (4th Cir. 1993) (attorney’s miscalculation of applicable Sentencing Guidelines range not “fair and just reason” for plea withdrawal); *United States v Pitino*, 887 F.2d 42, 46 (4th Cir. 1989); *United States v DeFreitas*, 865 F.2d 80 (4th Cir. 1989); *United States v. Haley*, 784 F.2d 1218 (4th Cir. 1986).

In *United States v. Moore*, 931 F.2d 245, 248 (4th Cir.), *cert. denied*, 112 S. Ct. 171 (1991), the court noted six factors to be considered in determining whether to grant a motion to withdraw: (1) whether the defendant provided credible evidence that his plea was not knowing or voluntary; (2) whether the defendant credibly asserted his legal innocence; (3) whether there was a delay between entering the plea and moving for withdrawal; (4) whether defendant had close assistance of competent counsel; (5) whether withdrawal will prejudice the government; and (6) whether withdrawal will inconvenience the court and waste judicial resources.

Denial of a motion to withdraw a guilty plea will be reversed on appeal only for an abuse of discretion. *Craig*, 985 F.2d at 178; *Pitino*, 887 F.2d at 46. In practical fact, the Fourth Circuit has been hesitant to find an abuse of discretion in this context. See, e.g., *United States v Lambert*, 994 F.2d 1088, 1093 (4th Cir. 1993) (no abuse of discretion in denial of motion to withdraw plea entered in expectation of significantly lower sentence);

*United States v. Lambey*, 974 F.2d 1389, 1394-96 (4th Cir. 1992) (en banc) (no abuse of discretion in denial of motion to withdraw plea and imposition of 360-month sentence on defendant who had relied on attorney's advice that he faced 70-108 month Sentencing Guidelines range); *United States v. McHan*, 920 F.2d 244 (4th Cir. 1990) (no abuse of discretion in denial of motion to withdraw plea after defendant learned his conviction might be used as predicate offense for Continuing Criminal Enterprise charge).

### I. Government Breach of Plea Agreement

Four 1993 decisions involved allegations that the Government had failed to honor commitments made to defendants in plea agreements. In three of the four cases the Fourth Circuit resolved the issues raised in favor of the Government; the fourth was remanded for resentencing.

In *United States v. Burns*, 990 F.2d 1426, 1434 (4th Cir.), cert. denied, 113 S. Ct. 2949 (1993), the court held that the Government's agreement not to prosecute the defendant for additional *marijuana* violations was not breached by his subsequent prosecution for interstate travel to facilitate *cocaine* distribution. Similarly, in *United States v. United Medical & Surgical Supply Corp.*, 989 F.2d 1390, 1400-01 (4th Cir. 1993), the court held that the Government's promise not to prosecute for offenses of "same or similar character" in a plea agreement involving filing of false cost reports to a federal agency was not violated by the defendant's subsequent prosecution for securities and mail fraud.

In *United States v. Ringling*, 988 F.2d 504 (4th Cir. 1993), the court did find the Government's failure to debrief defendant and advise the court of the extent of defendant's cooperation a material breach and remanded for resentencing; however, the prosecutor's post-sentencing, oral statement that he would file a Rule 35 motion, a decision later reversed by superiors, was held to be without consideration and therefore unenforceable.

On the other hand, as the court held in *United States v. West*, 2 F.3d 66, 70 (4th Cir. 1993), if a defendant materially breaches a plea agreement, he "forfeit[s] any right to its enforcement, [and] relieves the government of its obligation to conform to the agreement's terms."

This is true "even when defendant has relied to his substantial detriment by, for example, entering his guilty plea, subjecting himself to conviction, and beginning service of the sentence." *Id.* On this point, see also *Ricketts v. Adamson*, 483 U.S. 1 (1987).

### J. Speedy Trial Act

The Speedy Trial Act of 1974, codified at 18 U.S.C. § 3161 (1988), governs the time allowed between arrest and indictment, and between indictment and trial.

In computing the thirty days allowed between federal arrest and indictment, the days on which pretrial proceedings are held are excluded under 18 U.S.C. § 3161(h)(1)(F). This means that the date of an initial appearance and/or a detention hearing is excluded from the thirty days. *United States*

*v. Wright*, 990 F.2d 147 (4th Cir.), *cert. denied*, 114 S. Ct. 199 (1993). Moreover, when the thirtieth day falls on a weekend or holiday, indictment on the next business day is sufficient per FED. R. CRIM. P. 45(a). *Wright*, 990 F.2d at 149.

The Speedy Trial Act also provides for trial within seventy days of indictment, subject to specific delays that are excluded. 18 U.S.C. § 3161(c), (h) (1988).

All time between the filing of a pretrial motion and the conclusion of hearing and briefing on the motion is excluded. 18 U.S.C. § 3161(h)(1)(F) (1988); *Henderson v United States*, 476 U.S. 321, 331 (1986); *United States v Shear*, 825 F.2d 783, 786 (4th Cir. 1987), *cert. denied*, 489 U.S. 1087 (1989); *United States v Velasquez*, 802 F.2d 104, 105 (4th Cir. 1986).

“The plain terms of the statute exclude all time between the filing of and the hearing on a motion whether that hearing was prompt or not.” *Henderson*, 476 U.S. at 326. Thus, in *United States v Riley*, 991 F.2d 120, 123-24 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993), the court held that all time between filing of a pretrial motion to suppress and its resolution should be excluded, even if not resolved until trial. On this point, see also *Shear*, 825 F.2d at 786; and *Velasquez*, 802 F.2d at 105.

#### K. Delay in Indictment

In *United States v Burns*, 990 F.2d 1426, 1435 (4th Cir.), *cert. denied*, 113 S. Ct. 2949 (1993), the Fourth Circuit again noted “that it would offend the Due Process Clause for the government deliberately to delay indicting an individual suspected of crime in order to gain tactical advantage over the accused” (internal quotations and citations omitted), although the court found no due process violation in *Burns*.

Generally speaking, whether a pre-indictment delay violates the Due Process Clause is determined on a case-by-case basis. See *Howell v Barker*, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990); see also *United States v Lovasco*, 431 U.S. 783, 789-90 (1977). Reversible error will be found only when the delay violates “fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community’s sense of fair play and decency,” *Lovasco*, 431 U.S. at 790 (internal quotations and citations omitted), and the defendant has suffered actual prejudice. The burden of proving such prejudice is on the defendant. *United States v. Automated Medical Lab., Inc.*, 770 F.2d 399, 403 (4th Cir. 1985).

### IV DRUG OFFENSES

#### A. Use of “Drug Dogs”

Use of trained narcotics dogs, commonly referred to as “drug dogs,” has become an accepted investigative technique in the Fourth Circuit and elsewhere. Accordingly, when a trained narcotics dog “alerts” to an item,



this factor alone constitutes probable cause to obtain a search warrant to search the item, and probable cause to arrest whoever possesses it. *United States v. Sinclair*, 983 F.2d 598, 602 (4th Cir. 1993). On this point, see also *Florida v. Royer*, 460 U.S. 491, 506 (1983) (plurality opinion).

### B. Possession with Intent to Distribute

To sustain a conviction for possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841 the Government must prove that a defendant: (1) knowingly (2) possessed a controlled substance (3) with intent to distribute it. *United States v. Rusher*, 966 F.2d 868, 878 (4th Cir.), *cert. denied*, 113 S. Ct. 351 (1992); *United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984).

It is well settled that actual possession is not necessary to sustain a conviction for possession with intent to distribute; constructive possession is sufficient. *Rusher*, 966 F.2d at 878; *United States v. Zandi*, 769 F.2d 229, 234 (4th Cir. 1985); *United States v. Schocket*, 753 F.2d 336, 340 (4th Cir. 1985); *United States v. Watkins*, 662 F.2d 1090 (4th Cir. 1981), *cert. denied*, 455 U.S. 984 (1982). "Constructive possession exists when the defendant exercises, or has the power to exercise, dominion and control over the item." *United States v. Laughman*, 618 F.2d 1067, 1077 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980).

On the other hand, mere presence at a location where drugs are found is insufficient, standing alone, to establish constructive possession. See *Samad*, 754 F.2d at 1096 ("[M]ere presence on the premises where drugs are found, or association with one who possesses drugs, is insufficient to establish the possession needed for a conviction.").

It is in this general legal framework that the Fourth Circuit's three 1993 decisions pitting a constructive possession prosecution theory against a "mere presence" defense should be understood. In all three cases the juries had convicted; in all three appeals, the Fourth Circuit affirmed. See *United States v. Nelson*, 6 F.3d 1049, 1053 (4th Cir. 1993) (affirming convictions of multiple defendants for constructively possessing same quantity of drugs, noting that constructive possession may be sole or joint); *United States v. Morrison*, 991 F.2d 112 (4th Cir.) (rejecting "mere presence" defense on facts of this case), *cert. denied*, 114 S. Ct. 225 (1993); *United States v. Wright*, 991 F.2d 1182, 1187 (4th Cir. 1993).

However, in *United States v. Fountain*, 993 F.2d 1136 (4th Cir. 1993), a case which involved only 2.3 grams of marijuana, the Fourth Circuit found the evidence insufficient to prove intent to distribute. *Accord United States v. Jones*, 945 F.2d 747 (4th Cir. 1991) (reversing § 924(c) conviction that involved only residue quantity of cocaine). *But cf. Turner v. United States*, 396 U.S. 398, 405 (1970) (when defendant only possesses what might be user quantity of drugs, other evidence may nevertheless support finding of intent to distribute); *United States v. Fisher*, 912 F.2d 728, 730 (4th Cir. 1990) (upholding conviction for possession with intent to distribute 1.52 grams of cocaine apparently packaged for sale in four small "baggie corners"), *cert. denied*, 111 S. Ct. 2019 (1991).

### C. Drug Conspiracies

Proof of an overt act is not required to sustain a drug conspiracy conviction. *United States v. Burns*, 990 F.2d 1426, 1435 (4th Cir.), *cert. denied*, 113 S. Ct. 2949 (1993); *United States v. Mabry*, 953 F.2d 127, 130 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1951 (1992); *United States v. Clark*, 928 F.2d 639, 641 (4th Cir. 1991); *United States v. Goldman*, 750 F.2d 1221, 1226 (4th Cir. 1984).

### D. Jury Instruction: Lesser-included Offense of Simple Possession

“[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *Keeble v. United States*, 412 U.S. 205, 208 (1973). The Fourth Circuit has held that a lesser-included offense instruction is required in drug cases, if requested, unless the drug quantity or other evidence would “rule out the possibility of a finding of simple possession.” *United States v. Levy*, 703 F.2d 791, 793 n.7 (4th Cir. 1983) (reversible error for district court to refuse to instruct jury regarding lesser-included offense of simple possession of 4.75 ounces of cocaine); *accord United States v. Baker*, 985 F.2d 1248, 1258-60 (4th Cir. 1993) (reversible error for district court to refuse to instruct jury regarding lesser-included offense of conspiracy to possess one to three ounces of cocaine per week when defendant was affluent addict who might have been able to purchase and consume that amount), *cert. denied*, 114 S. Ct. 682 (1994).

### E. Expert Testimony on Drug Distribution Methods and Organizations

Because distribution of drugs is outside the sphere of experience of many jurors, expert testimony regarding drug distribution methods and organizations is proper. This includes expert testimony regarding cutting, packaging, pricing, and sale, as well as the use of accessories such as pagers, scanners, cellular and car telephones, and long distance calls to set up more substantial transactions. *United States v. Brewer*, 1 F.3d 1430, 1435-36 (4th Cir. 1993) (detective with seven years in vice narcotics properly qualified as expert on drug distribution methods and organization); *United States v. Safari*, 849 F.2d 891, 895 (4th Cir.) (expert testimony on drug cutting, packaging, pricing, and distribution did not invade jury’s province as finders of fact), *cert. denied*, 488 U.S. 945 (1988).

### F Quantity of Drugs

Apart from conviction, the quantity of drugs on which a defendant’s sentence should be based is the single most important issue in a drug case. How this issue is resolved can easily increase or decrease a defendant’s ultimate sentence by more than a decade.

Under the Sentencing Guidelines, § 1B1.3(a), drug quantities not specified in the count(s) of conviction are nevertheless to be considered for

sentencing purposes if they constitute “the same course of conduct” or were part of “a common scheme or plan,” collectively referred to as “relevant conduct.” See, e.g., *United States v McNatt*, 931 F.2d 251, 258 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 879 (1992); *United States v Cusack*, 901 F.2d 29, 32-33 (4th Cir. 1990); *United States v Williams*, 880 F.2d 804, 805-06 (4th Cir. 1989).

In the case of a conspiracy, a defendant “should be sentenced not only on the basis of *his* conduct, but also on the basis of conduct of co-conspirators that was known to the defendant or reasonably foreseeable to him.” *United States v Williams*, 986 F.2d 86, 90-91 (4th Cir.), *cert. denied*, 113 S. Ct. 3013 (1993); *accord United States v Willard*, 909 F.2d 780, 781 (4th Cir. 1990).

It is in this general legal framework that the Fourth Circuit’s two other 1993 decisions involving quantity of drug issues should be understood. In *United States v. Irvin*, 2 F.3d 72, 77-78 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1086 (1994), the Fourth Circuit held that the trial court must determine the quantity of drugs *reasonably foreseeable to a particular defendant* before imposing a mandatory minimum sentence; and in *United States v Gilliam*, 987 F.2d 1009, 1012-15 (4th Cir. 1993), that the trial court must make findings regarding drug quantity reasonably foreseeable to each defendant, even when a particular defendant pleads guilty to a conspiracy involving a certain quantity of drugs.

The *Irvin* and *Gilliam* decisions are probably best understood not as innovations or significant changes in the law, but as a refinement and re-emphasis of the pre-existing reasonably foreseeable requirement—and, in *Irvin*, as the requirement’s explicit application to mandatory minimum sentences.

For recent Fourth Circuit authority on computation of drug quantities for sentencing purposes generally, see *United States v Brooks*, 957 F.2d 1138, 1148-51 (4th Cir.) (standard of proof regarding drug quantities is by preponderance of evidence; negotiated but undelivered amounts should be included, unless defendant did not intend or was incapable of delivering his side of bargain), *cert. denied*, 112 S. Ct. 3051 (1992); *United States v Romulus*, 949 F.2d 713, 716-17 (4th Cir. 1991) (due to difference in standard of proof, acquitted conduct may be considered for sentencing purposes if supported by proper findings), *cert. denied*, 112 S. Ct. 1690 (1992); *United States v Hicks*, 948 F.2d 877, 882 (4th Cir. 1991) (“drug equivalent” of \$279,550 in cash properly considered in determining drug quantity for sentencing purposes); *United States v Johnson*, 943 F.2d 383, 387-88 (4th Cir.) (when drug quantities are uncertain, court should approximate), *cert. denied*, 112 S. Ct. 667 (1991); *United States v Bowman*, 926 F.2d 380, 381 (4th Cir. 1991) (court may consider any relevant and reliable evidence in determining drug quantity, including hearsay); and *United States v Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (when quantity of drugs found in presentence report is challenged, defendant has affirmative duty to show that finding is inaccurate or unreliable).

Finally, it is noted that the district court’s findings regarding drug quantity for sentencing purposes are factual in nature, and will be overturned

on appeal only if clearly erroneous. *Brooks*, 957 F.2d at 1148; *Hicks*, 948 F.2d at 881, *United States v Goff*, 907 F.2d 1441, 1444 (4th Cir. 1990); *United States v Vinson*, 886 F.2d 740, 742 (4th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990).

#### G. Cocaine Base ("Crack")

The Fourth Circuit has approved the 100-to-1 ratio the Sentencing Guidelines and certain Title 21 sentencing provisions ascribe to crack and powder cocaine, finding the ratio rationally related to a legitimate government purpose in that crack is a greater threat to society *United States v Thomas*, 900 F.2d 37, 39-40 (4th Cir. 1990).

Several circuits, excluding the Fourth Circuit, have likewise held that the alleged disparate impact the 100-to-1 ratio has on blacks does not violate equal protection. However, in *United States v Bynum*, 3 F.3d 769 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994), the Fourth Circuit did reject what it described as "a subtle variation on the rejected equal protection argument," holding that the alleged disparate impact of crack penalties on blacks was an insufficient basis for a downward departure under the Sentencing Guidelines. *Id.* at 774-75 (citing equal protection cases from other circuits).

#### H. Sentence Enhancement for Possession of Dangerous Weapon

U.S. Sentencing Guidelines § 2D1.1(b)(1) provides for a two-level enhancement "[i]f a dangerous weapon was possessed during the commission of the offense [unless] it is clearly improbable that the weapon was connected with the offense."

Possession of a dangerous weapon by a co-defendant is sufficient basis for the enhancement, whether or not charged in a common conspiracy, so long as the co-defendant's conduct is "in furtherance of jointly undertaken criminal activity and was reasonably foreseeable by the defendant." *United States v Nelson*, 6 F.3d 1049, 1054-57 (4th Cir. 1993) (quoting Application Note to U.S.S.G. § 1B1.3(a)(1)(B)); *United States v Falesbork*, 5 F.3d 715, 719-20 (4th Cir. 1993) (approving enhancement for defendant's admitted role in earlier drug-related murder); *accord United States v Brooks*, 957 F.2d 1138, 1148-49 (4th Cir.) (approving enhancement for possession of firearm by co-conspirators), *cert. denied*, 112 S. Ct. 3051 (1992); *United States v Johnson*, 943 F.2d 383, 386 (4th Cir.) (approving enhancement for possession of firearm by co-defendant), *cert. denied*, 112 S. Ct. 667 (1991); *United States v White*, 875 F.2d 427, 433 (4th Cir. 1989) (same).

Even if the defendant is acquitted of a § 924(c) charge, the sentence enhancement is properly applied if a dangerous weapon was present during any of the subject, or related, drug trafficking. *Nelson*, 6 F.3d at 1054-57; *accord United States v Romulus*, 949 F.2d 713, 716-17 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1690 (1992); *Johnson*, 943 F.2d at 386; *United States v Isom*, 886 F.2d 736, 739 (4th Cir. 1989).

### I. Drug Use as "Possession"

In deciding whether a defendant's supervised release should be revoked, the results of scientific tests showing drugs in the defendant's system is sufficient to show "possession" of the drugs in question. *United States v. Battle*, 993 F.2d 49, 50 (4th Cir. 1993) (positive urine test sufficient to support court's finding that defendant had illegally possessed controlled substance); U.S.S.G. § 7B1.4, cmt. n.5 (Nov 1992) (leaving "to the court the determination of whether evidence of drug usage established solely by laboratory analysis constitutes 'possession of a controlled substance' as set forth in 18 U.S.C. §§ 3565(a) and 3583(g)").

## V FIREARMS OFFENSES

### A. Restoration of Civil Rights

In prosecutions under 18 U.S.C. § 922(g), the Government has the affirmative duty to prove a felony conviction for which the defendant's civil right to possess the firearm has *not* been restored. *United States v. Essick*, 935 F.2d 28, 31 (4th Cir. 1991). Moreover, since the 1986 amendment of 18 U.S.C. § 921(a)(20), *state law* determines whether a particular defendant's civil rights have been restored for purposes of prosecution under § 922. *United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992); *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991); *United States v. McLean*, 904 F.2d 216, 217 (4th Cir.), *cert. denied*, 498 U.S. 875 (1990).

However, under a 1993 refinement, if the parties *stipulate* that the defendant has been convicted of a felony as defined in the statute, the Government is relieved of proving the stipulated fact, and the trial court need not instruct on this element of the offense. *United States v. Reedy*, 990 F.2d 167, 168-69 (4th Cir.), *cert. denied*, 114 S. Ct. 210 (1993).

In *United States v. Jones*, 993 F.2d 1131 (4th Cir.), *cert. granted*, 114 S. Ct. 466 (1993), the Fourth Circuit also clarified that restoration of civil rights *by a state* does not restore civil rights as to a *federal* conviction, or as to convictions in other states. Rather, "[t]he legislative history leads to only one conclusion—that Congress intended for a state's post-conviction restoration scheme to affect only the rights of persons convicted in that state's courts." 993 F.2d at 1136 (acknowledging and rejecting Eighth and Ninth Circuit holdings to contrary).

### B. Possession of Firearms in Home

In *United States v. Shoemaker*, 2 F.3d 53 (4th Cir. 1993), *cert. granted*, 114 S. Ct. 698 (1994), the Fourth Circuit reversed the defendant's conviction for possession of firearms in his home. Applying its holdings in *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991); *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991); and *United States v. McLean*, 904 F.2d 216 (4th Cir.), *cert. denied*, 498 U.S. 875 (1990), the court held that North Carolina's law restoring civil rights to convicted felons only prohibited the

defendant from possessing certain firearms, for a period of five years, *outside his home*.

### C. Possession of Gun Used in Another Crime

U.S. Sentencing Guideline § 2k2.1(c)(2) (1989) provides that the offense level applicable to any offense committed while possessing a firearm should be applied "if the resulting offense level is greater than that determined" by application of § 2K2.1(a) and (b), the guidelines sections otherwise applicable to 18 U.S.C. § 922(g). In *United States v Carroll*, 3 F.3d 98 (4th Cir. 1993), which involved a defendant who allegedly pointed a gun at a police officer, the district court refused to apply § 2K2.1(c)(2) and held that the Sentencing Commission had exceeded its authority in enacting it. The Fourth Circuit reversed and remanded for a factual finding as to whether an assault occurred, and if so, for application of § 2K2.1(c)(2).

### D. Armed Career Criminal Act: Collateral Challenges to State Convictions

In determining whether a particular defendant is an "armed career criminal" under § 924(e), state as well as federal convictions are counted. *Taylor v. United States*, 495 U.S. 575 (1990); *United States v Etheridge*, 932 F.2d 318, 320-23 (4th Cir.), *cert. denied*, 112 S. Ct. 323 (1991).

Collateral challenges to predicate state convictions for purposes of § 924(e) are looked upon with disfavor. As the Fourth Circuit stated in *United States v Custis*, 988 F.2d 1355, 1362 (4th Cir.), *cert. granted in part*, 114 S. Ct. 299 (1993):

[W]e think that district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings *only* when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant.

*Id.* (emphasis added).

The Fourth Circuit proceeded in *Custis* to list four categories of constitutional violations in which "prejudice can be presumed." *Id.* (citing *Rose v Clark*, 478 U.S. 570, 577-79 (1986) and *Arizona v Fulminante*, 111 S. Ct. 1246, 1263-66 (1991)). The four presumptively prejudicial categories are: (1) coerced confessions; (2) complete denial of the right to counsel; (3) adjudication by a biased judge; and (4) direction of a guilty verdict by the court. *Custis*, 988 F.2d at 1362.

In *United States v Bradshaw*, 999 F.2d 798 (4th Cir. 1993), *petition for cert. filed*, No. 93-6448 (U.S. Oct. 21, 1993), the Fourth Circuit further defined and narrowed those circumstances in which collateral challenge to state convictions are required. The court in *Bradshaw* noted that "even coerced confessions are now treated by the Supreme Court as subject to harmless error analysis on appeal." The court held:

Therefore, with respect to constitutional challenges posted against prior state-court convictions, a district court must consider (1) whether prejudice can be “presumed” from the alleged constitutional violation, regardless of the facts, *and*, conjunctively, (2) whether the right asserted is “so fundamental” that its violation would undermine the court’s confidence in the defendant’s guilt. In conducting this two-part inquiry, district courts cannot “presume prejudice” beyond the four categories of error that *Rose* lists as “necessarily render[ing] a trial unfair.” 478 U.S. at 577 Within the *Rose* categories, district courts may further restrict collateral challenges to those fundamental errors that have not been subjected to harmless-error analysis by the Supreme Court or by the published views of this tribunal.

999 F.2d at 800.

Based on this stringent standard, the Fourth Circuit held in *Bradshaw*, 999 F.2d at 801-02, that prejudice could *not* be presumed, and, therefore, collateral review of state convictions was not required, when the defendant claimed improper trial of a juvenile as an adult and/or ineffective assistance of counsel. On the propriety of counting convictions of juveniles prosecuted as adults for purposes of the Armed Career Criminal enhancement, see also *United States v Lender*, 985 F.2d 151 (4th Cir. 1993).

#### *E. Violent Felonies*

The term “violent felony,” which specifically includes the crime of “burglary,” is defined with particularity in 18 U.S.C. § 924(e)(2)(B).

In *Taylor v United States*, 495 U.S. 575 (1990), the Supreme Court responded to confusion over whether certain “burglary” or “breaking and entering” convictions under various state statutes constituted “burglary” for purposes of the § 924(e) sentencing enhancement. Prescribing what it termed a “categorical approach,” the Supreme Court held that “a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Taylor*, 495 U.S. at 598-99

Under the “categorical approach” prescribed by the Supreme Court in *Taylor*, a district court must ordinarily determine whether a conviction qualifies as a “burglary,” and thus as a “violent felony,” based on the statutory definition of the crime, and not based on the particular facts of the offense. *Id.* at 602. Nevertheless, the Court recognized that in some cases, the statute may be ambiguous or inconclusive, and therefore a closer look at the particular facts of the case may be required. In any event, “[a]n offense constitutes ‘burglary’ for purposes of § 924(e) sentence enhancement if *either* its statutory definition substantially corresponds to ‘generic’ burglary *or* the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defen-

dant.” *Id.* (emphasis added). See, e.g., *United States v Bowden*, 975 F.2d 1080 (4th Cir. 1992) (convictions under North Carolina’s breaking and entering statute are “burglary” convictions for § 924(e) purposes), *cert. denied*, 113 S. Ct. 1351 (1993).

The Fourth Circuit has also held *attempted* burglary to be a “violent felony” for purposes of the § 924(e) sentence enhancement. *United States v Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) (attempted burglary in violation of New Jersey law held “violent felony” for § 924(e) purposes); *United States v Custis*, 988 F.2d 1355, 1364 (4th Cir. 1993) (attempted breaking and entering in violation of Maryland law held “violent felony” for § 924(e) purposes).

Finally, to qualify as a “violent felony” for § 924(e) purposes, the predicate conviction must be for a “crime punishable by imprisonment exceeding one year.” 18 U.S.C. § 924(e)(2)(B). Section 921(a)(20) further narrows the definition of “a crime punishable for a term exceeding one year” by *excluding* “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.”

However, the Fourth Circuit, construing these provisions strictly, counted predicate convictions for § 924(e) purposes unless expressly excluded by the statutory language. See, e.g., *United States v Hassan El*, 5 F.3d 726, 733-34 (4th Cir. 1993) (defendant’s misdemeanor conviction for common-law assault for which he received *three* year probationary sentence held to be “violent felony” for § 924(e) purposes); *Thomas*, 2 F.3d at 80-81 (aggravated assault classified only as “crime” under state law held to be “violent felony” for § 924(e) purposes).

#### F Restoration of Civil Rights—Effect on § 924(e) Enhancement

Convictions for which a defendant’s civil rights have been restored may not be used for purposes of a § 924(e) enhancement. *United States v Reedy*, 990 F.2d 167, 170 (4th Cir.), *cert. denied*, 114 S. Ct. 210 (1993). However, an older conviction may nevertheless qualify as a predicate conviction for § 924(e) purposes when the defendant’s subsequent convictions prevent effective restoration of the right to possess firearms. *United States v Clark*, 993 F.2d 402 (4th Cir. 1993) (civil right to possess firearm never restored under North Carolina law in regard to older convictions when defendant was never out of custody for five years between felony convictions); see also *United States v Etheridge*, 932 F.2d 318 (4th Cir.) (Armed Career Criminal enhancement upheld based on three convictions, each more than twenty years old and one more than thirty years old), *cert. denied*, 112 S. Ct. 323 (1991); *United States v Crittendon*, 883 F.2d 326 (4th Cir. 1989) (use of “old” convictions for Armed Career Criminal enhancement does not violate Eighth Amendment).

#### G. Proof of “Firearm” in § 924(c) Prosecution

Neither the firearm itself nor expert testimony about the firearm is necessary to sustain a conviction under 18 U.S.C. § 924(c). Rather, lay



testimony regarding the use of what witnesses believed to be a firearm is sufficient. *United States v Jones*, 907 F.2d 456, 460 (4th Cir. 1990), *cert. denied*, 498 U.S. 1029 (1991).

In what appears to be a further relaxation of the standard of proof of "firearm" in a § 924(c) prosecution, the Fourth Circuit expressed the view (in dicta) in a 1993 decision that the firearm also need not be currently operable. *United States v. Willis*, 992 F.2d 489, 490-91 (4th Cir. 1993) (citing definition of "firearm" in 18 U.S.C. § 921(a)(3) as "any weapon which is designed or may be readily converted to expel a projectile by the action of an explosive") (emphasis added), *cert. denied*, 114 S. Ct. 167 (1993). *But see United States v Hamrick*, 995 F.2d 1267 (4th Cir. 1993) (dysfunctional bomb held not to be "destructive device" for purposes of § 924(c), as defined in § 921(a)(4)(c)).

#### H. Title 26 Violations

A firearm need not be operational to support a conviction under 28 U.S.C. § 5861(d), so long as it is capable "of being readily restored to a firing condition." *United States v Wright*, 991 F.2d 1182, 1187-88 (4th Cir. 1993) (citing definition of "firearm" in 26 U.S.C. § 5845). *But see United States v Hamrick*, 995 F.2d 1267 (4th Cir. 1993) (reversing convictions for manufacture, possession, transfer, and use of "destructive device" where item in question was "dysfunctional bomb").

Knowledge (scienter) is not an element that must be proven in Title 26 prosecutions involving the possession of unregistered firearms, explosives, or destructive devices. "Section 5861(d) does not establish a specific intent crime requiring the defendant to know that it was unlawful to possess the weapon, but it is a strict liability crime. Therefore, [the defendant's] lack of knowledge is inconsequential." *Wright*, 991 F.2d at 1188; *see also United States v. Council*, 973 F.2d 251, 254 (4th Cir. 1992).

### VI. MISCELLANEOUS OFFENSES

#### A. Assimilative Crimes Act (18 U.S.C. § 13): Magistrate Judge Jurisdiction

In *United States v Kelly*, 989 F.2d 162 (4th Cir.), *cert. denied*, 114 S. Ct. 158 (1993), the court upheld the jurisdiction of a magistrate judge to try and sentence a defendant charged under the Assimilative Crimes Act with a state misdemeanor carrying a maximum term of imprisonment of 18 months. The court, citing *United States v Kendrick*, 636 F. Supp. 189, 191 (E.D.N.C. 1986), held that the magistrate judge had jurisdiction so long as the maximum term of imprisonment was understood not to exceed 12 months.

#### B. Conspiracy (18 U.S.C. § 371)

The conspiracy statute (18 U.S.C. § 371) proscribes two types of conspiracies: (1) conspiracy to commit a substantive offense proscribed by

another statute (the "offense clause"), and (2) conspiracy to defraud the United States (the "defraud clause"). In a prosecution under the defraud clause, the offense of conviction is self-contained in § 371. Hence, no reference to any other section of the criminal code is necessary. See *United States v Vogt*, 910 F.2d 1184, 1200-01 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); see also *United States v Arch Trading Co.*, 987 F.2d 1087, 1091-92 (4th Cir. 1993) (discussing overlap of offense and defraud clauses and emphasizing breadth of latter).

### C. *Pinkerton Liability for Crimes Committed by Co-conspirators*

Under the general rule established by the Supreme Court in *Pinkerton v. United States*, 328 U.S. 640, 645 (1946), "a conspirator may be convicted of substantive offenses committed by co-conspirators in the course of and in furtherance of the conspiracy." The Fourth Circuit affirmed and applied *Pinkerton* liability for crimes committed by co-conspirators again in *United States v. Irvin*, 2 F.3d 72, 75 (4th Cir. 1993). For other Fourth Circuit authority applying or affirming *Pinkerton* liability, see *United States v Cummings*, 937 F.2d 941, 944 (4th Cir.), cert. denied, 112 S. Ct. 395 (1991); *United States v Chorman*, 910 F.2d 102, 111 (4th Cir. 1990); and *United States v. Spoone*, 741 F.2d 680, 688 (4th Cir. 1984), cert. denied, 469 U.S. 1162 (1985).

In order for the *Pinkerton* rule imposing liability for the substantive crimes of other co-conspirators to apply, it must be proven beyond a reasonable doubt that: (1) the substantive offense was committed by one of the members of the conspiracy, (2) while the one committing the crime was a member of the conspiracy, (3) in furtherance of the conspiracy, and (4) that the substantive crime was a reasonably foreseeable part of the conspiracy. *Chorman*, 910 F.2d at 111, see also *Cummings*, 937 F.2d at 944.

### D. *Bribery Concerning Programs Receiving Federal Funds* (18 U.S.C. § 666)

Under 18 U.S.C. § 666(a)(2), it is a felony to corruptly give to any person in exchange for benefits received or to be received from any agency or program that received in excess of \$10,000 in the preceding one year period. In *United States v Grubb*, 11 F.3d 426 (4th Cir. 1993), the court affirmed the conviction of an elected West Virginia circuit judge under § 666(a)(2) for receiving payments, which the judge argued were campaign contributions, in exchange for a job in the local sheriff's department once he was elected.

### E. *Arson of Private Home* (18 U.S.C. § 844)

Although the legislative history suggests Congress did not intend 18 U.S.C. § 844(i) to cover arson of all private homes, see *Russell v United States*, 471 U.S. 858 (1985), business-related activity in a private home may sufficiently affect interstate commerce to warrant coverage. Accordingly, in

*Russell*, the Supreme Court held that the rental of a two-unit apartment building sufficiently "affects commerce." 471 U.S. at 862. In *United States v Parsons*, 993 F.2d 38 (4th Cir.), *cert. denied*, 114 S. Ct. 266 (1993), the Fourth Circuit came to a similar conclusion with respect to a single family rental home, even though the home was vacant and unrented at the time of the fire.

It is likely that a private home being used for business purposes would meet the jurisdictional condition of affecting commerce. *Russell*, 471 U.S. at 860-62. However, the circuits that have been called on to articulate the outer limits of § 844(i) coverage have not always agreed. *Compare, e.g., United States v Stilwell*, 900 F.2d 1104 (7th Cir.) (use of natural gas and electricity in private home held to be sufficient link to interstate commerce), *cert. denied*, 498 U.S. 838 (1990); *United States v Moran*, 845 F.2d 135, 137-38 (7th Cir. 1988) (business use of computer and telephone in private home held to be sufficient); *United States v Barton*, 647 F.2d 224, 232 (2d Cir.) (use of private home by illegal "gambling club" held to be sufficient), *cert. denied*, 454 U.S. 857 (1981) with *United States v Voss*, 787 F.2d 393 (8th Cir.) (rejecting Government argument that purchase of insurance from interstate carrier was sufficient, and reversing § 844(i) conviction accordingly), *cert. denied*, 479 U.S. 888 (1986).

#### F False Statements (18 U.S.C. § 1001)

"To establish a violation of § 1001, it must be proved that (1) the defendant made a false statement to a governmental agency or concealed a fact from it or used a false document knowing it to be false, (2) the defendant acted 'knowingly or willfully,' and (3) the false statement or concealed fact was material to a matter within the jurisdiction of the agency" *United States v Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993) (citing *United States v Seay*, 718 F.2d 1279, 1284 (4th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984)). "A material fact about a matter within the jurisdiction of the agency is one that has a natural tendency to influence agency action or is capable of influencing agency action." *Id.* (citing *United States v Norris*, 749 F.2d 1116, 1122 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985) (quotation omitted)).

The fact that a false statement prompted no official action is irrelevant to a § 1001 prosecution. *Arch Trading Co.*, 987 F.2d at 1095; *Norris*, 749 F.2d at 1121 ("There is no requirement that the false statement [actually] influence or effect the decision making process of a department of the United States government.").

#### G. Parental Kidnapping (18 U.S.C. § 1201 et seq.)

So-called "parental kidnapping" is not actionable under the Federal Kidnapping Act, 18 U.S.C. § 1201 et seq. Thus, in *United States v Sheek*, 990 F.2d 150 (4th Cir. 1993), the Fourth Circuit affirmed the dismissal of charges of kidnapping and interstate transportation of kidnapped children against the mother of the children—even though the mother's parental rights

had been permanently terminated. The court conceded that parental rights had been properly terminated, but held nevertheless that the exemption of parents from prosecution under 18 U.S.C. § 1201(a) continued to protect the children's biological mother from federal prosecution. Judge Hall, dissenting, argued that once parental rights are terminated the defendant should no longer be regarded as a "parent" within the meaning of the statute.

#### H. Obstruction of Justice (18 U.S.C. § 1503)

"[T]he elements of obstruction of justice, pursuant to the omnibus clause of section 1503, are (1) a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding in its due administration of justice." *United States v Grubb*, 11 F.3d 426, 437 (4th Cir. 1993) (giving false information to FBI agent conducting grand jury investigation held to be sufficient to support conviction under § 1503).

#### I. Retaliating Against a Witness (18 U.S.C. § 1513)

"The elements of an offense under 18 U.S.C. § 1513 are (1) knowing engagement in conduct (2) either causing, or threatening to cause, bodily injury to another person (3) with the intent to retaliate for, *inter alia*, the attendance or testimony of a witness at an official proceeding." *United States v. Cofield*, 11 F.3d 413, 419 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

#### J. False Testimony Before Grand Jury (18 U.S.C. § 1623)

In *United States v Bennett*, 984 F.2d 597, 608-09 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993), the court upheld a conviction under § 1623 against expert defense testimony that defendant had insufficient mental capacity to intend to perjure himself. The Government was entitled to rely on the trial jury's assessment of the grand jury testimony itself and was not otherwise required to call any expert to rebut the defendant's "technical" defense.

#### K. Hobbs Act Violations (18 U.S.C. § 1951)

"To obtain a conviction under the Hobbs Act [18 U.S.C. § 1951], the government must prove: (1) that the defendant coerced the victim to part with property; (2) that the coercion occurred through the wrongful use of threatened force, violence or fear or under color of official right; and (3) that the coercion occurred in such a way as to affect adversely interstate commerce." *United States v Buffey*, 899 F.2d 1402, 1403 (4th Cir. 1990) (quoting *United States v. De Parias*, 805 F.2d 1447, 1450 (11th Cir. 1986) (internal quotations omitted), *cert. denied*, 482 U.S. 916 (1987)).

One of the more problematic applications of the Hobbs Act in recent years has been to alleged political corruption. On the one hand, it is clear that payment of money to a public official in exchange for a vote or direct benefit is proscribed. On the other hand, the principal difficulty lies in distinguishing legitimate campaign contributions to candidates or elected officials with the proper hope and expectation that the candidate would vote a particular way. See, e.g., *McCormick v United States*, 500 U.S. 257 (1991), *rev'g* 896 F.2d 61 (4th Cir. 1990) (Hobbs Act violation by candidate or public official requires proof of explicit quid pro quo, that is, payment in return for "explicit promise or understanding by the official to perform or not to perform an official act," distinguishing legitimate political contributions); see also *Evans v United States*, 112 S. Ct. 1881, 1889 (1992) (Hobbs Act violation by candidate or public official does *not* require proof of affirmative act of inducement; Government "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts").

Accordingly, after *McCormick* and *Evans*, it is of central importance any time a candidate or public official is prosecuted under the Hobbs Act that jury instructions include the *McCormick* quid pro quo and the *Evans* "in return for official acts" language. See, e.g., *United States v. Taylor*, 993 F.2d 382 (4th Cir.) (reversing Hobbs Act conviction due to deficient jury instructions in light of *McCormick* and *Evans*), *cert. denied*, 114 S. Ct. 249 (1993).

On the other hand, challenges to Hobbs Act convictions for failure to satisfy the interstate commerce element have been less successful. See, e.g., *Stirone v United States*, 361 U.S. 212, 215 (1960) ("[The] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce"); *United States v Bailey*, 990 F.2d 119, 125-26 (4th Cir. 1993) (effect on interstate commerce need not be adverse, citing cases); *United States v. Taylor*, 966 F.2d 830, 835-36 (4th Cir. 1992) (finding economics professor's testimony that defendant's efforts to pass pari-mutuel betting bill would have increased tourism if successful sufficient to support finding of effect on interstate commerce), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *cert. denied*, 114 S. Ct. 249 (1993); *Buffey*, 899 F.2d at 1404 (reasonable probability that defendant's actions would have effect of depleting assets of entity engaged in interstate commerce was sufficient); *De Parias*, 805 F.2d at 1450 ("[T]he government need not prove specific intent to affect interstate commerce. Instead, the government need prove only that their actions were likely to [affect interstate commerce]."); *United States v Brantley*, 777 F.2d 159, 162 (4th Cir. 1985) (interstate commerce element "may be satisfied though the impact on commerce is small, and it may be shown by proof of probabilities without evidence that any particular commercial movements were affected"), *cert. denied*, 479 U.S. 822 (1986); *United States v Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976) (no need to prove that defendant intended to affect interstate commerce, only that actions had "a reasonable probable effect"), *cert. denied*, 433 U.S. 909 (1977).

Finally, in *Bailey*, 990 F.2d at 126, the Fourth Circuit also rejected the argument that prosecution by the Federal Government of a state legislator "violates the letter and the spirit of the Tenth Amendment." Not so, said the court: "the Tenth Amendment does not prohibit the federal government from enforcing its laws, even when there are state laws addressing the same criminal act." *Id.* (citing *United States v Santoni*, 585 F.2d 667, 672 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) and *United States v Culbert*, 435 U.S. 371, 379-80 (1978)).

#### L. Travel Act Violations (18 U.S.C. § 1952)

In *United States v Aragon*, 983 F.2d 1306 (4th Cir. 1993), a case of apparent first impression, the Fourth Circuit held that assisting a prisoner to escape in violation of the Travel Act is a "crime of violence" as defined in 18 U.S.C. § 16(b), and that this is a determination for the court rather than for the jury

#### M. Money Laundering (18 U.S.C. §§ 1956 and 1957)

The money laundering statutes are lengthy and complex, and the case law interpreting them is still developing in the Fourth Circuit and elsewhere. Accordingly, this section includes brief mention of those miscellaneous points covered in Fourth Circuit published opinions, but should not in any sense be regarded as a systematic overview of the subject.

To sustain a money laundering conviction under 18 U.S.C. § 1956(a)(1)(B)(i), the Government must prove that (1) the defendant conducted a financial transaction affecting interstate commerce that involved the proceeds of specified unlawful activity; (2) the defendant did so knowing that the transaction was designed in whole or in part to disguise the nature, the source, the ownership, or the control of the proceeds; and (3) the defendant knew that the property involved in the transaction was derived from unlawful activity. *See United States v Winfield*, 997 F.2d 1076 (4th Cir. 1993); *United States v. Baker*, 985 F.2d 1248, 1252 (4th Cir.), *cert. denied*, 114 S. Ct. 682 (1993); *United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1331 (1993).

In addition to the proof required for a § 1956(a)(1)(B)(i) conviction, to obtain a money laundering conviction under § 1956(a)(1)(A)(i), the Government must prove that the defendant intended to promote the carrying on of a "specified unlawful activity" *See* 18 U.S.C. § 1956(c)(7)(A) (incorporating 18 U.S.C. § 1961(1)(D)); *Winfield*, 997 F.2d at 1079 n.3.

Constitutional challenges to the money laundering statutes have generally been unsuccessful in the Fourth Circuit. *See, e.g., United States v McLamb*, 985 F.2d 1284, 1292 (4th Cir. 1993) (affirming money laundering convictions under § 1956(a)(3)(A) related to sales of vehicles through defendant's car dealership against defense claims of unconstitutional vagueness and cruel and unusual punishment); *United States v Gilliam*, 975 F.2d 1050, 1056 (4th Cir. 1992) (affirming money laundering conviction under § 1956 in-

volving third party real estate purchases against defense claims of unconstitutional vagueness).

*N Racketeering (18 U.S.C. § 1961 et seq.)*

The statute governing Racketeer Influenced and Corrupt Organizations (RICO) provides in 18 U.S.C. § 1962(c):

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Pertinent definitions are included in § 1961, including the lengthy definition of "racketeering activity" itself. Section 1961(5) further defines a "pattern of racketeering activity"

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity

In *United States v Bennett*, 984 F.2d 597 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993), the Fourth Circuit upheld a RICO conviction against the defendant's argument that this statutory prohibition of a "pattern of racketeering" was unconstitutionally vague—at least as applied to the facts in *Bennett*. After a lengthy discussion of related Supreme Court decisions, however, the Fourth Circuit declined the Government's invitation to join the circuits that bar vagueness challenges to RICO prosecutions generally. Henceforth, vagueness challenges will continue to be permitted in Fourth Circuit RICO prosecutions, although the merits of any such challenge will depend on the facts of each case. *Bennett*, 984 F.2d at 605-07

As to whether the racketeering activity must *benefit* the RICO enterprise, see *United States v Webster*, 639 F.2d 174 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981) (*Webster I*), *modified in part on reh'g*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982) (*Webster II*). In a nutshell, after initially holding that a legitimate enterprise must be benefitted, promoted, or advanced by the racketeering activity in *Webster I*, the Fourth Circuit reversed itself in *Webster II* and rejected any requirement that the racketeering activity benefit the RICO enterprise. In *Webster II*, the Court recognized that such a requirement would be particularly problematic "in cases where the enterprise is governmental in nature and almost certainly not organized for profit." 669 F.2d at 186.

The court had an opportunity to apply this insight in *United States v Grubb*, 11 F.3d 426 (4th Cir. 1993) (judgeship can be RICO enterprise, where judge used office to accept and arrange illegal "campaign contributions" in exchange for public employment, whether or not judicial office is benefitted by corruption); *see also United States v Hunt*, 749 F.2d 1078,

1088 (4th Cir. 1984) (judgeship can be enterprise for RICO purposes), *cert. denied*, 472 U.S. 1018 (1985).

*O. Sexual Exploitation of Children (18 U.S.C. § 2251)*

Section 2251(a) proscribes certain acts involving visual depictions of minors engaged in sexually explicit conduct. In *United States v Bell*, 5 F.3d 64 (4th Cir. 1993) (*Bell II*), the Fourth Circuit reversed the district court's downward departure in imposing sentence under this section. The sentencing judge had articulated two grounds for departure: (1) the defendant had no "commercial purpose" in making the videotape in question; and (2) the children were not true "victims" because they did not know they were being filmed. *Id.* at 67-68. The court squarely rejected both bases for downward departure and held that the statute contains "no element of direct or implied commercial purpose" and that "[whether] the children were aware that [the defendant] was videotaping them is wholly irrelevant to sentencing considerations." *Id.* The underlying facts were set forth with particularity in *United States v Bell*, 974 F.2d 537 (4th Cir. 1992) (*Bell I*), and were not repeated in *Bell II*.

*P. Endangered Species Act (16 U.S.C. § 1538)*

In *United States v Clark*, 993 F.2d 402 (4th Cir. 1993), the Fourth Circuit affirmed convictions under the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(F), for offering to sell a Siberian tiger skin rug and for sale of a Bengal tiger skin rug. The court found unpersuasive the defendant's reliance on alleged statements of a museum official, a taxidermist, and a former official of the U.S. Department of the Interior to the effect that the sale of "pre-Act skins" (that is, skins of animals killed before the effective date of the Act) were legal.

*Q. Lacey Act (16 U.S.C. § 3371 et seq.)*

In *United States v Borden*, 10 F.3d 1058 (4th Cir. 1993), the Fourth Circuit was called on to determine the applicable statute of limitations for charges under the Lacey Act, 16 U.S.C. § 3371 *et seq.*, which prohibits the transportation, sale, or purchase of fish or wildlife obtained in violation of any state law or regulation. The court held that the federal "catchall" statute of limitations in 18 U.S.C. § 3282 applied to Lacey Act crimes, and that a defendant can therefore be charged under the Lacey Act even when the statute of limitations for the predicate state offense has run.

*R. Structuring Monetary Transactions (31 U.S.C. §§ 5322 and 5324)*

In *United States v Rogers*, 962 F.2d 342 (4th Cir. 1992), the Fourth Circuit held that proof of a *willful* violation of 31 U.S.C. § 5324 (structuring monetary transactions to avoid reporting requirements) does *not* require proof that a defendant *knew* that structuring was *illegal*. Although the specific holding in *Rogers* is no longer good law following *Ratzlaf v United*



*States*, 114 S. Ct. 655 (1994) (knowledge of illegality must be shown to sustain structuring conviction), this remains perhaps the most systematic Fourth Circuit discussion of the law governing structuring.

Recent Fourth Circuit decisions in which sufficiency of the evidence to support structuring convictions were challenged have gone both ways. *Compare United States v Winfield*, 997 F.2d 1076 (4th Cir. 1993) (holding evidence to be sufficient as to one defendant and insufficient as to other) with *United States v McLamb*, 985 F.2d 1284 (4th Cir. 1993) (discussing and affirming structuring conviction).

### S. *Environmental Crimes*

In *United States v Strandquist*, 993 F.2d 395 (4th Cir. 1993), the court upheld conviction under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, of the manager of a marina and campground located in Chesapeake Beach, Maryland. The evidence showed that raw sewage was dumped into a storm grate that spilled into the basin on which the marina and campground were located. The court rejected the defendant's argument on appeal that there was insufficient evidence to prove that the sewage ever reached "navigable waters," as required for conviction. *See* 33 U.S.C. §§ 1311(a) and 1362(12).

### T. *International Emergency Economic Powers Act* (50 U.S.C. § 1701 *et seq.*)

In *United States v Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993), the court upheld the conviction of a Virginia corporation for violating President Bush's 1990 executive orders prohibiting U.S. citizens from engaging in business with the government of Iraq or its agents. The defendant corporation unsuccessfully argued, *inter alia*, that the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, impermissibly delegated legislative authority to the Executive Branch. The court's opinion contains a thoroughgoing analysis of the limits on Congress's constitutional authority to delegate the definition of specific criminal conduct (the so-called "nondelegation doctrine").

### U. *Attempt to Commit a Crime*

"Conviction for attempt requires culpable intent and a substantial step toward the commission of the crime strongly corroborative of that intent." *United States v McLamb*, 985 F.2d 1284, 1292 (4th Cir. 1993); *see also United States v Sutton*, 961 F.2d 476, 478 (4th Cir.) (producing cash to purchase drugs and making plans to close deal later held to be sufficient to sustain attempt conviction), *cert. denied*, 113 S. Ct. 171 (1992); *United States v Pelton*, 835 F.2d 1067, 1074 (4th Cir. 1987) (setting out elements of attempt offense), *cert. denied*, 486 U.S. 1010 (1988); *United States v McFadden*, 739 F.2d 149 (4th Cir.) (same), *cert. denied*, 469 U.S. 920 (1984).

### V Statutory Interpretation Generally

Absent ambiguity or a clearly expressed legislative intent to the contrary, the language of a statute is to be given its plain and ordinary meaning. *United States v. Sheek*, 990 F.2d 150, 152-53 (4th Cir. 1993); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989). Although the results appear anomalous or even "absurd" in a particular case, courts are not free to disregard the plain meaning of the statute itself. *United States v. Harvey*, 814 F.2d 905, 913 (4th Cir. 1987). A long line of Supreme Court decisions have held in accord. See, e.g., *Moskal v. United States*, 498 U.S. 103 (1990); *Russello v. United States*, 464 U.S. 16, 20-28 (1983); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-16 (1980).

Questions of statutory interpretation are reviewed on appeal *de novo*. *United States v. Hall*, 972 F.2d 67, 69 (4th Cir. 1992).

## VII. TRIAL

### A. Jury Venure/"Fair Cross-section" Requirement

A defendant has the right to trial by a jury selected from a fair cross-section of the community *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *United States v. Lewis*, 10 F.3d 1086, 1089-90 (4th Cir. 1993); *United States v. Espinoza*, 641 F.2d 153, 168 (4th Cir.), *cert. denied*, 454 U.S. 841 (1981). "In order to establish a *prima facie* violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venures from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364.

In *United States v. Cecil*, 836 F.2d 1431 (4th Cir.), *cert. denied*, 487 U.S. 1205 (1988), the Fourth Circuit upheld use of voter registration lists to select potential jurors, even if minorities were underrepresented on those lists, so long as there has been no affirmative discrimination in voter registration. See *id.* at 1448 ("[T]here is no violation of the jury cross-section requirement where there is merely underrepresentation of a cognizable class by reason of failure to register, when that right is fully open."). On this point, see also *Lewis*, 10 F.3d at 1089-90 (upholding juror selection from voter registration lists in District of South Carolina against challenge that African-Americans were underrepresented on those lists).

### B. Voir Dire/Peremptory Challenges

Regarding peremptory challenges, the Supreme Court noted again recently that the right to exercise a peremptory challenge is not itself a constitutional right. Rather, peremptory challenges are "means to the constitutional end of an impartial jury and a fair trial." *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992); see also *United States v. Rucker*, 557 F.2d

1046, 1048 n.4 (4th Cir. 1977) (“The right of peremptory challenge is conferred by Congress and the Federal Rules of Criminal Procedure, and is not required by the Constitution.”).

Accordingly, in *United States v Williams*, 986 F.2d 86, 87-88 (4th Cir. 1993), *cert. denied*, 113 S. Ct. 3013 (1993), the Fourth Circuit deferred to local rule and practice in upholding the trial court’s refusal to allow out-of-district counsel to “back strike” a previously passed over juror. *But cf United States v Ricks*, 802 F.2d 731, 733 (4th Cir.) (en banc) (“*absent a local rule of court or established local practice* about how a jury will be selected and how peremptory strikes should be exercised . . . there is a duty on the part of the court to give clear, unambiguous instructions to counsel about the procedure to be followed. ”) (quoting *United States v Ricks*, 776 F.2d 455, 461 n.9 (4th Cir. 1985) (emphasis added)), *cert. denied*, 479 U.S. 1009 (1986).

### C. Batson Challenges

In 1993, the Fourth Circuit added to the list of approved race-neutral, non-pretextual reasons for striking minority jurors consistent with the dictates of *Batson v Kentucky*, 476 U.S. 79 (1986). For key Fourth Circuit decisions applying *Batson* generally, see *Nickerson v Lee*, 971 F.2d 1125 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993); *United States v Malindez*, 962 F.2d 332 (4th Cir.), *cert. denied*, 113 S. Ct. 215 (1992); *United States v Joe*, 928 F.2d 99 (4th Cir.), *cert. denied*, 112 S. Ct. 71 (1991); *United States v Lane*, 866 F.2d 103 (4th Cir. 1989); *United States v Grandison*, 885 F.2d 143 (4th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 934 (1990); and *United States v Woods*, 812 F.2d 1483 (4th Cir. 1987).

Building on this line of authority, the Fourth Circuit published two decisions in 1993 in which *Batson* issues were raised. In each case, the defendant asserted that the reasons given by the prosecutor were pretextual and not race-neutral, albeit without success either in the trial court or on appeal. See *United States v Bynum*, 3 F.3d 769 (4th Cir. 1993) (having same last name as person from same town whom AUSA previously prosecuted, unemployment, having trouble arranging transportation to court, and having relatives who use drugs not clearly erroneous reasons for peremptory strikes of minority jurors), *cert. denied*, 114 S. Ct. 1105 (1994); *United States v Banks*, 10 F.3d 1044, 1049 (4th Cir. 1993) (juror’s unemployment, suspected alcoholism, having family member in neighborhood where defendants now or formerly lived, shabby dress suggesting irresponsible attitude toward jury service, and criminal history all accepted as race-neutral reasons).

For other Fourth Circuit decisions treating specific reasons given for striking minority jurors in the context of a formal *Batson* challenge, see *United States v Campbell*, 980 F.2d 245 (4th Cir. 1992) (no *Batson* violation in striking only black in jury venue because she had been victim of crime and therefore might be dissatisfied with police), *cert. denied*, 113 S. Ct.

2446 (1993); *United States v Mitchell*, 877 F.2d 294, 302-03 (4th Cir. 1989) (en banc) (no *Batson* violation in using seven of ten peremptories to strike black veniremen, four of whom were struck because they lived in congressional district of popular black Congressman who was to testify for defense, sometimes referred to as "locale based strike"); *United States v Lane*, 866 F.2d 103, 105 (4th Cir. 1989) (striking juror who was high school dropout because prosecutor was seeking "higher educational level" found to be sufficient); and *United States v Tindle*, 860 F.2d 125 (4th Cir. 1988) (en banc) (juror's employment at shopping mall associated with drug trafficking was sufficient reason for strike), *cert. denied*, 490 U.S. 1114 (1989).

#### D. Juror Competency

A defendant is constitutionally entitled to mentally competent jurors. *Jordan v Massachusetts*, 225 U.S. 167, 176 (1912) (due process implies mentally competent jurors); *United States v. Rucker*, 557 F.2d 1046, 1047-48 (4th Cir. 1977) ("[M]ental incapacity to serve, no less than the existence of bias, strikes at the very fitness of a venireman to sit as a juror.") (footnote omitted); 28 U.S.C. § 1865(b)(4).

However, as was made clear in *United States v. Hall*, 989 F.2d 711 (4th Cir. 1993), the Fourth Circuit will not overturn a jury verdict except when the evidence of juror incompetence is extraordinarily clear. In *Hall*, the defendant presented evidence during post-trial hearings that "Juror X had been involuntarily committed nine times; had been diagnosed as schizophrenic by thirteen different psychiatrists and by the Virginia Department of Mental Health and Mental Retardation; had experienced episodes of extremely violent behavior, including attempts to kill his family members; had a history of refusing medication; and had been certified as disabled ("unable to engage in any substantial gainful activity") by his present treating physician." *Id.* at 714. The defendant "also presented expert witness testimony regarding the general effects of mental illness." *Id.*

In response, the Government presented evidence in *Hall* that Juror X's prior diagnosis of "schizophrenia" had been changed to "bipolar disorder"; that his wife, sister, and social worker considered him competent to serve as a juror; that "X did not suffer an occurrence of manic behavior during the trial"; and the treating physician's opinion that the Juror "had been stable for a long time and that his condition would not have affected his ability to enter competent judgment." *Id.* (internal quotations omitted).

The court concluded: "Each side presented strong, conflicting evidence. However, after reviewing all of the evidence, we are not left with the definite and firm conviction that Juror X was incompetent during Hall's trial. Therefore, the district court's factual finding was based upon a permissible view of the evidence and is not clearly erroneous." *Id.* (citation and internal quotations omitted).

#### E. Bolstering

It is error for the Government to bolster or vouch for its own witnesses. *United States v Samad*, 754 F.2d 1091, 1100 (4th Cir. 1984). "Vouching

generally occurs when the prosecutor's actions are such that a jury could reasonably believe that the prosecutor was indicating a personal belief in the credibility of the witness. Consequently, the prosecutor may not, among other things, make explicit personal assurances that a witness is trustworthy or implicitly bolster the witness by indicating that information not presented to the jury supports the testimony." *United States v Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993) (citations omitted).

However, it is not improper bolstering for the Government to explain its investigation, procedures, or relationship with its witnesses. *Lewis*, 10 F.3d at 1089; *United States v Evans*, 917 F.2d 800, 809 (4th Cir. 1990). This includes the Government's right to present evidence of the details of plea agreements with its witnesses, including those witnesses' promises to testify truthfully. *United States v Henderson*, 717 F.2d 135, 138 (4th Cir. 1983) (no error in Government's eliciting evidence of promise to testify truthfully made in plea agreement, whether or not defense intends to use plea agreement to impeach witness's credibility), *cert. denied*, 465 U.S. 1009 (1984).

#### F Polygraph Evidence

In *United States v Chambers*, 985 F.2d 1263, 1270-71 (4th Cir.), *cert. denied*, 114 S. Ct. 107 (1993), the Fourth Circuit upheld exclusion of polygraph results to impeach one of the Government's witnesses. On this point, see also *United States v A & S Council Oil Co.*, 947 F.2d 1128, 1134 (4th Cir. 1991) (polygraph results not admissible to impeach credibility of witness).

#### G. Expert Testimony

In *United States v Harris*, 995 F.2d 532 (4th Cir. 1993), the Fourth Circuit affirmed the trial court's exclusion of expert testimony on the reliability of eyewitness identification. The court did acknowledge, however, that there may be "narrow circumstances" when such expert testimony should be admitted (e.g., one eyewitness, under stress, and/or lengthy time before identification) (citing *United States v Sebetich*, 776 F.2d 412, 418-19 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988)). The court also noted in *Harris* that insufficient notice was given to the Government of the defendant's intention to use such an expert and cited with approval decisions from other circuits holding four or five days notice to be insufficient. *Id.* at 536 n.4.

On the other hand, in *United States v. Bynum*, 3 F.3d 769, 772-73 (4th Cir. 1993), the Fourth Circuit affirmed the trial court's admission of expert testimony on "gas chromatography," which included a relatively new test used to determine whether certain drugs came from the "same batch." The court rejected the defendant's claim that the jury should have been appropriately instructed and cautioned that gas chromatography involved "new science." In doing so, the court cited the Supreme Court's recent decision in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993)

(determining whether proffered expert testimony has scientific foundation is within discretion of trial court).

#### H. Cross Examination

Six 1993 cases raised significant issues pertaining to cross examination. Three of the cases (*United Medical, Curry, and Bynum*) dealt with the defendant's right to effective cross examination. The remainder (*Williams, Hall, and Mason*) dealt with proper limits on Government cross examination. In two of the three cases dealing with Government cross examination (*Hall and Mason*), the Fourth Circuit found reversible error.

In *United States v. United Medical and Surgical Supply Corp.*, 989 F.2d 1390, 1405-06 (4th Cir. 1993), at issue was the defendant's right to cross examine a testifying Government expert about how much he was being paid for his trial testimony. The Fourth Circuit found no abuse of discretion in the trial court's limiting defendant to establishing that the witness had a contractual relationship with the Government and that he would be paid, but stopping the cross examination short of inquiry into the exact amount of expert witness compensation.

In *United States v. Curry*, 993 F.2d 43, 45 (4th Cir. 1993), at issue was whether the testimony of a cooperating Government witness should be stricken after the witness pleaded the Fifth Amendment when asked about his past drug dealing on cross examination. The Fourth Circuit found that striking the witness testimony "was not warranted in this case because he only invoked his Fifth Amendment rights with respect to his recent drug activities, which is a collateral matter." *Id.*

In *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994), at issue was whether the defendant could call a witness to rebut denial by a cooperating Government witness on cross examination that he had ever sold crack cocaine in a particular area. The Fourth Circuit called this "[a] textbook Rule 608(b) situation," finding no error in the trial court's prohibition of extrinsic evidence of specific bad acts. *Id.* "A cross examiner may inquire into specific incidents of conduct, but does so at the peril of not being able to rebut the witness's denials. The purpose of this rule is to prohibit things from getting too far afield—to prevent the proverbial trial within a trial." *Id.*

In *United States v. Williams*, 986 F.2d 86, 88-89 (4th Cir.), *cert. denied*, 113 S. Ct. 3013 (1993), at issue was the trial court's ruling that the Government could cross examine the defendant or any character witness he might call regarding defendant's use of false identification to cash stolen checks. The Fourth Circuit noted that although inquiry into the defendant's arrest for this conduct would have been error, inquiry into the conduct itself was within the realm of "legitimate and pertinent cross-examination to test his veracity and credibility." *Id.* at 89 (citing *United States v. Zandi*, 769 F.2d 229, 236 (4th Cir. 1985); *United States v. Pennix*, 313 F.2d 524, 528 (4th Cir. 1963)).

On the other hand, in *United States v. Hall*, 989 F.2d 711, 716-17 (4th Cir. 1993), the Fourth Circuit reversed the defendant's conviction for

improper use of prior statements made by the defendant's wife, who subsequently decided to assert her marital privilege and refused to testify. The Fourth Circuit, citing "numerous deficiencies" with the cross examination, found it "inadmissible as hearsay thus violating FED. R. EVID. 802, and perhaps, the Confrontation Clause," as well as violating the wife's marital privilege. *Id.* at 716. Thus, in spite of a curative jury instruction, the court found the improper cross examination sufficiently harmful to constitute reversible error.

Likewise, in *United States v Mason*, 993 F.2d 406 (4th Cir. 1993), the Fourth Circuit reversed the defendant's conviction for the Government's improper cross examination of the defendant's character witnesses. Specifically, the court unequivocally disapproved of questions put to character witnesses on cross examination that assumed the defendant's guilt. ("Would your opinion of [the defendant] change if you knew he distributed drugs?") The court cited its opinion in *United States v Siers*, 873 F.2d 747 (4th Cir. 1989) (condemning practice of guilt assuming questions on cross examination, but finding error harmless on particular facts in *Siers*).

### I. Rule 403

FED. R. EVID. 403 provides, *inter alia*, that otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Generally speaking, the trial court's Rule 403 balancing is shown great deference and will not be upset on appeal unless the trial court acted "arbitrarily or irrationally." *United States v Simpson*, 910 F.2d 154, 157 (4th Cir. 1990); *Mullen v Princess Anne Volunteer Fire Co. Inc.*, 853 F.2d 1130, 1134 (4th Cir. 1988); *United States v Masters*, 622 F.2d 83, 88 (4th Cir. 1980).

The broad discretion generally shown to the trial court's Rule 403 weighing makes the Fourth Circuit's decision in *United States v Ham*, 998 F.2d 1247 (4th Cir. 1993), all the more noteworthy. In *Ham*, in which members of the Hare Krishna religion were charged with RICO and mail fraud violations, the trial court admitted evidence of child abuse, homosexuality, and subordination of women within the religious community over the defendants' Rule 403 objections. The Fourth Circuit, reversing the trial court's decision, found in the contested evidence "a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence." *Id.* at 1252 (citations omitted).

### J. Rule 404

Five 1993 cases raised Rule 404(b) issues, and in each the Fourth Circuit approved the questioned evidence. See *United States v Grubb*, 11 F.3d 426, 432 (4th Cir. 1993) (approving 404(b) evidence in prosecution of state judge for bribery, obstruction of justice, and RICO offenses of advice given to former clients to misrepresent facts to U.S. Bankruptcy Court and his resulting disbarment); *United States v. Grooms*, 2 F.3d 85 (4th Cir. 1993)

(approving evidence of arrest on unrelated charges in same town on same date as alleged offense and finding admission of evidence of fabricated alibi harmless error), *petition for cert. filed*, No. 93-7459 (U.S. Jan. 10, 1994); *United States v West*, 2 F.3d 66, 70 (4th Cir. 1993) (approving evidence of incriminatory tax returns filed by one defendant and fact of no tax returns filed by another); *United States v Brewer*, 1 F.3d 1430, 1434-37 (4th Cir. 1993) (approving evidence of drug transactions outside prosecuting jurisdiction and holding it not plain error to allow Government over defendant's general objection to ask witness, "Is [defendant] a drug dealer?"); *United States v Bailey*, 990 F.2d 119, 122-25 (4th Cir. 1993) (approving evidence in Hobbs Act prosecution of former state legislator that he previously accepted payments for political assistance on unrelated road project).

For cases illustrating the Fourth Circuit's approach to Rule 404(b) issues generally—and cases often cited in their resolution—see *United States v Hernandez*, 975 F.2d 1035 (4th Cir. 1992); *United States v Mark*, 943 F.2d 444 (4th Cir. 1991); *United States v Haney*, 914 F.2d 602, 607 (4th Cir. 1990); *United States v. Watford*, 894 F.2d 665 (4th Cir. 1990); *United States v Rawle*, 845 F.2d 1244 (4th Cir. 1988); *United States v Greenwood*, 796 F.2d 49 (4th Cir. 1986); *United States v Hadaway*, 681 F.2d 214 (4th Cir. 1982); and *United States v Masters*, 622 F.2d 83 (4th Cir. 1980).

### K. Entrapment

Two 1993 cases raised entrapment issues on appeal, although neither successfully

In *United States v Daniel*, 3 F.3d 775, 778-79 (4th Cir.), *cert. denied*, 114 S. Ct. 272 (1993), the defendant medical doctor came to the attention of DEA after one of his disgruntled patient/customers reported him. Two undercover DEA agents, wearing body recorders, proceeded to make various illicit purchases from the doctor, resulting in his subsequent indictment and conviction. The Fourth Circuit affirmed the trial court's rejection of the defendant doctor's entrapment defense and its refusal to instruct the jury on entrapment.

The court in *Daniel* pointed out that "[a]n entrapment defense has two elements: government inducement and lack of predisposition to commit the crime on the defendant's part." *Id.* at 778. The court agreed with the trial court that the defendant had shown too little evidence of government inducement to justify sending the entrapment defense to the jury. On this point, see also *United States v Osborne*, 935 F.2d 32, 39 (4th Cir. 1991); *United States v. Hunt*, 749 F.2d 1078, 1085-86 (4th Cir. 1984), *cert denied*, 472 U.S. 1018 (1985); *United States v Perl*, 584 F.2d 1316, 1321 (4th Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); and *United States v DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), *cert denied*, 402 U.S. 950 (1971).

In *United States v Clark*, 986 F.2d 65, 69-70 (4th Cir. 1993), the Fourth Circuit likewise affirmed the trial court's rejection of the defendant's "entrapment by estoppel" defense. As the court explained it, "[t]he defense of entrapment by estoppel is available when a government official tells the



defendant that certain activity is legal, the defendant commits the activity in reasonable reliance on the advice, and prosecution for the conduct would be unfair." *Id.* at 69 (citations omitted).

In *Clark*, which involved a prosecution under the Endangered Species Act for offering to sell and selling tiger skins, the defendant alleged reliance on the advice of three individuals that sale of skins from animals killed before the effective date of the Act was not illegal: an official at the American Museum of Natural History in New York; a taxidermist to whom this official referred him; and a former Assistant Secretary of the Interior for Fish, Wildlife and Parks. The court found the defendant's showing inadequate to establish a defense of "entrapment by estoppel."

#### L. Prosecutorial Misconduct

"[R]eversible prosecutorial misconduct generally has two components: that (1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial." *United States v Chorman*, 910 F.2d 102, 113 (4th Cir. 1990) (internal quotations omitted). In *United States v Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984), the Fourth Circuit listed four factors to consider in determining whether a prosecutor's remarks have sufficiently prejudiced a defendant to warrant relief: (1) the degree to which the remarks tended to mislead; (2) whether the remarks were isolated or extensive; (3) the strength of the evidence against the defendant; and (4) whether the remarks appear to be a deliberate attempt to divert the jury's attention to extraneous matters.

Three 1993 cases raised prosecutorial misconduct on appeal, one of them successfully

In *United States v Curry*, 993 F.2d 43, 45-46 (4th Cir. 1993), the prosecutor took umbrage with defense counsel's suggestion that the investigating DEA agent, "a man who puts his life on the line every day," would solicit perjury from Government witnesses—which the prosecutor characterized as "an insult to the United States and an insult to the DEA." The Fourth Circuit made no finding as to impropriety, but found in any event no prejudice to the defendant. The court cited as the basis for this decision the isolated and "unintentional" nature of the remarks and the overwhelming evidence of defendant's guilt.

In *United States v Moore*, 11 F.3d 475 (4th Cir. 1993), the Fourth Circuit did find improper the prosecutor's reference to the defendant and a defense witness as "liars." However, although characterizing the prosecutor's remarks as "plain error," the court found further that the defendant had "failed to establish that the error in this case affected his substantial rights, i.e., affect the outcome of the trial." *Id.* at 482. Accordingly, the prosecutor's "plain error" was found harmless on the facts of this case.

However, the prosecutor did not fare so well in *United States v Mitchell*, 1 F.3d 235 (4th Cir. 1993), where his disparaging remarks about a defense

witness's credibility and prior conviction were found sufficiently pervasive to constitute reversible error. Of particular concern to the court was the prosecutor's emphasis, on cross examination and in closing argument, that the jury which convicted the witness on related charges had apparently not believed his story

#### M. Amendment of Indictment/Variance in Proof

In *United States v Brewer*, 1 F.3d 1430, 1437 (4th Cir. 1993), the defendant objected to the variance between proof of drug activity in March or April 1990 and an indictment charging "[i]n or about February 1990." The Fourth Circuit found the proof sufficient. *Id.* (citing *United States v De Brouse*, 652 F.2d 383, 389 (4th Cir. 1981)).

#### N. Judicial Misconduct

In *Brasfield v United States*, 272 U.S. 448 (1926), the Supreme Court established that it is per se error for a trial court to *inquire* into a jury's numerical division during its deliberations. On this point, see also *Ellis v Reed*, 596 F.2d 1195, 1197 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979).

In *United States v Parsons*, 993 F.2d 38, 41-42 (4th Cir.), *cert. demed*, 114 S. Ct. 266 (1993), in response to the court's *ex parte* inquiry whether the jury was "making progress," the jury revealed their numerical division. The Fourth Circuit, citing authority from other circuits, rejected the defendant's argument that the prophylactic rule of *Brasfield* and *Ellis* should be extended from *inquiries* as to numerical division to situations when the jury *reveals* its division. In response to the defendant's argument that the *ex parte* nature of the trial court's communication with the jury violated his "right of presence" guaranteed by FED. R. CRIM. P 43(a), the court held that if there was any error it was "technical" and ultimately harmless. *Id.* at 42. On this latter point (technical violations of a defendant's "right of presence" as harmless error), see also *Rogers v United States*, 422 U.S. 35, 40 (1975); and *United States v. Harris*, 814 F.2d 155, 157 (4th Cir. 1987).

#### O. Jury Instructions

Six 1993 cases raised noteworthy jury instruction issues, two resulting in reversal.

In *United States v Banks*, 10 F.3d 1044, 1049-50 (4th Cir. 1993), the Fourth Circuit approved the trial court's taking the safe course and simply re-reading the original instructions in response to a request from the jury for supplemental instructions. The court found no duty on the trial court's part to add to the original charge simply because the jury requested additional guidance. *Cf. United States v United Medical & Surgical Supply Corp.*, 989 F.2d 1390, 1406-07 (4th Cir. 1993) (rejecting defendant's argument that supplemental instruction prejudiced defendant by "focus[ing] the jury's attention on only one portion of the court's original instructions").

On appellate review of requests for supplemental jury instructions generally, see *United States v Horton*, 921 F.2d 540, 546 (4th Cir. 1990) (deference shown to trial court's broad discretion in handling requests for supplemental instructions), *cert. denied*, 498 U.S. 846 (1991); and *United States v Lozano*, 839 F.2d 1020, 1024 (4th Cir. 1988).

In *United States v Brewer*, 1 F.3d 1430, 1435 (4th Cir. 1993), the Fourth Circuit acknowledged that the defendant would have been entitled to a limiting instruction regarding certain impeachment evidence *if he had requested it*. However, since he did not request the limiting instruction, the court's review on appeal was for "plain error" only—and it found none. See *United States v Olano*, 113 S. Ct. 1770 (1993) (clarifying role of appellate courts conducting review for plain error); *United States v Mark*, 943 F.2d 444, 449 (4th Cir. 1991) (limiting instruction need only be given upon defendant's request); and *United States v Echeverri-Jaramillo*, 777 F.2d 933, 937 (4th Cir. 1985) (same), *cert. denied*, 475 U.S. 1031 (1986).

In *United States v McLamb*, 985 F.2d 1284, 1293 (4th Cir. 1993), the Fourth Circuit did not tarry long with the claim that the trial judge's "failure to reiterate one of [his instructions] in his summary constitutes plain error." In rejecting the defendant's argument, the court cited *United States v Park*, 421 U.S. 658, 674-75 (1975) (challenged jury instructions are to be reviewed as whole and in context of trial, not in isolation).

However, as noted, the Fourth Circuit did find the jury instructions in two 1993 cases sufficiently deficient to warrant reversal in published decisions.

In *United States v Winfield*, 997 F.2d 1076 (4th Cir. 1993), the Fourth Circuit reversed money laundering and structuring convictions, in part, due to insufficient jury instructions. However, because of the confused nature of the facts and the blatantly incomplete nature of the jury charge, the precedential value of this decision is uncertain.

More significant as a precedent was the court's decision in *United States v Baker*, 985 F.2d 1248, 1258-60 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 682 (1994), reversing a drug conviction because the trial court refused to instruct the jury on the lesser-included offense of simple possession.

The court noted in *Baker* that "it is now beyond dispute that the defendant is entitled to an instruction on a lesser-included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.* at 1258 (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). The Fourth Circuit proceeded to hold that whether the lesser-included offense is charged is irrelevant; that the trial court has no discretion to refuse to give the instruction if the evidence warrants and the defendant requests it; and that on the facts of this case (affluent defendant purchasing one to three ounces of cocaine per week) it was reversible error to refuse to give it. *Baker*, 985 F.2d at 1258-60.

#### *P Motion for New Trial*

The Fourth Circuit has a five-part test for evaluating motions for a new trial based on newly discovered evidence. Under *United States v Chavis*,

880 F.2d 788, 793 (4th Cir. 1989), a motion for a new trial should only be granted if: (1) the evidence is newly discovered; (2) the movant exercised due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issues; and (5) the evidence would probably result in an acquittal at a new trial.

In *United States v Bynum*, 3 F.3d 769, 773-74 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994), the Fourth Circuit found no abuse of discretion in the trial court's denial of a new trial. The court, applying the *Chavis* five-part test, found the "new evidence" (proffered testimony by a co-defendant about where a portion of the cocaine had been purchased, offered to impeach scientific testimony on "gas chromatography" at trial) insufficient to warrant a new trial. *Id.* at 773-74.

In *United States v Custis*, 988 F.2d 1355 (4th Cir.), *cert. granted*, 114 S. Ct. 299 (1993), the Fourth Circuit reversed the trial court's grant of a new trial based on newly discovered *impeachment* evidence. The court found insufficient the intervening indictment for unrelated perjury of three Baltimore City police officers who had testified against the defendant. The court emphasized that "merely impeaching" evidence is ordinarily insufficient and recited again "the general rule that a motion for a new trial requires a defendant to establish *each* of the five elements." *Id.* at 1359 (citing *Chavis*, 880 F.2d at 793).

In general, the Fourth Circuit's long term practice has been to leave motions for a new trial to the broad discretion of the trial court and to require or allow new trials only in very limited circumstances. *See, e.g., United States v. Bales*, 813 F.2d 1289, 1295 (4th Cir. 1987); *United States v. Stockton*, 788 F.2d 210, 220 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986); *United States v. Christian*, 786 F.2d 203, 210 (4th Cir. 1986); *United States v. Arrington*, 757 F.2d 1484, 1486 (4th Cir. 1985); *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973); *United States v. Williams*, 415 F.2d 232, 233-34 (4th Cir. 1969).

## VIII. SENTENCING

### A. "Straddle Conspiracies"

In *United States v Bennett*, 984 F.2d 597, 609-10 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993), the Fourth Circuit held again that "straddle conspiracies" (conspiracies which began before November 1, 1987, when the Sentencing Guidelines became effective, and continued beyond the effective date) are subject to the Sentencing Guidelines. On this point, see also *United States v Barsanti*, 943 F.2d 428 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1992); *United States v Bakker*, 925 F.2d 728 (4th Cir. 1991); *United States v Meitinger*, 901 F.2d 27 (4th Cir.), *cert. denied*, 111 S. Ct. 519 (1990); and *United States v Sheffer*, 896 F.2d 842 (4th Cir.), *cert. denied*, 111 S. Ct. 432 (1990).

Moreover, "[o]nce it is proven that a defendant was a member of the conspiracy, the defendant's membership in the conspiracy is presumed to

continue until he withdraws from the conspiracy by affirmative action." *Bennett*, 984 F.2d at 609 (citing *United States v West*, 877 F.2d 281, 289 (4th Cir. 1989)) (internal quotations omitted). And finally, so long as the Government proves that the defendant joined a conspiracy that continued beyond November 1, 1987, it is *not* necessary to prove that a particular defendant committed an overt act after November 1, 1987 *Bennett*, 984 F.2d at 610.

### B. Relevant Conduct (§ 1B1.3)

In *United States v Kidd*, 12 F.3d 30 (4th Cir. 1993), the court held that evidence of undercover purchases of drugs from an indicted and represented defendant was "relevant conduct" under U.S.S.G. § 1B1.3, and that its use for sentencing purposes did not violate the defendant's Sixth Amendment right to counsel.

In *United States v Gilliam*, 987 F.2d 1009 (4th Cir. 1993), the court applied the now familiar principle that a sentence should be enhanced for the "relevant conduct" of partners in crime only when the related acts are "reasonably foreseeable" to the defendant being sentenced. The court held in *Gilliam* that the defendant's guilty plea to a conspiracy charge alleging more than a certain amount of cocaine was insufficient to satisfy the reasonable foreseeability requirement and thus remanded the case for specific findings and resentencing.

### C. "Significant Injury" (§ 2B3.1)

U.S.S.G. § 2B3.1(b)(3) provides for enhancements when a robbery victim sustains "bodily injury"

In *United States v Lancaster*, 6 F.3d 208 (4th Cir. 1993), the defendants robbed an armored car parked outside a bank, and in the course of the robbery sprayed mace in the eyes of a security guard. Although the mace stunned the guard and caused "severe burning in his eyes and cheeks," the trial court refused to apply the enhancement for bodily injury because the injuries were deemed "insignificant." In affirming the trial court's decision, the Fourth Circuit distinguished several circuit decisions, including one of its own, which had applied the enhancement for what might reasonably appear to the layman to be similar injuries. See *United States v Greene*, 964 F.2d 911, 911-12 (9th Cir. 1992) (finding swelling and pain in cheek that lasted one week to be "significant injury"); *United States v. Muhammad*, 948 F.2d 1449, 1456 (6th Cir. 1991) (finding abrasions, "hyperextension" of shoulder, and soreness in knees and elbow that lasted two weeks to be significant injury), *cert. denied*, 112 S. Ct. 1239 (1992); *United States v. Isaacs*, 947 F.2d 112, 114 (4th Cir. 1991) (finding redness and puffiness in face and ringing in ear that lasted four hours to be "significant injury" justifying enhancement).

### D. Value Based on Defendant's Statements (§§ 2F1.1 and 2Q2.1)

In *United States v Clark*, 986 F.2d 65, 70 (4th Cir. 1993), the defendant objected to what he contended was an inflated estimate of the Siberian

tiger rug he had offered for sale. The Fourth Circuit affirmed the valuation (\$15,000), which was based on *statements made by the defendant* during commission of the crime.

*E. Perjury (§§ 2J1.3 and 2X3.1)*

In *United States v Jamison*, 996 F.2d 698 (4th Cir. 1993), the Fourth Circuit reversed the trial court for refusing to apply the Sentencing Guidelines cross reference from § 2J1.3 (perjury) to § 2X3.1 (accessory after the fact). On remand, the court directed that the defendant, who was convicted of making a false declaration under oath in a drug investigation, be sentenced under the higher range applicable to drug offenses. The court distinguished the exception to this general rule, which arises when the defendant "lies to protect himself, rather than another, from criminal punishment." *Id.* at 701 (citing *United States v. Pierson*, 946 F.2d 1044 (4th Cir. 1991)). In such circumstances the higher Sentencing Guidelines range should *not* be applied.

*F Environmental Crimes (§ 2Q1.3)*

In *United States v Strandquist*, 993 F.2d 395, 399-401 (4th Cir. 1993), the defendant argued that the Sentencing Commission exceeded its authority and ignored congressional intent by "fail[ing] to differentiate among environmental crimes of varying seriousness, and as a result, prison terms will be imposed on virtually all environmental offenders, be they first or repeat offenders." *Id.* at 399. The court rejected the defendant's argument and upheld the applicable Sentencing Guidelines provisions both in general and as applied in this case. See also *United States v Ellen*, 961 F.2d 462 (4th Cir.), *cert. denied*, 113 S. Ct. 217 (1992).

*G. "Vulnerable Victim" (§ 3A1.1)*

In *United States v Bengali*, 11 F.3d 1207 (4th Cir. 1993), the Fourth Circuit approved a "vulnerable victim" enhancement in an extortion case in which the victim recently came to the United States from Bulgaria, was unfamiliar with U.S. customs, and was hesitant to report the incident to the police because where he came from police corruption was widespread. The trial court explained that the recent immigrant's "lack of knowledge about the conditions in the U.S. and about the way we do business here and handle crime made him . . . a vulnerable victim." *Id.* at 1212.

*H. Role in the Offense/Aggravating Role (§ 3B1.1)*

In *United States v Chambers*, 985 F.2d 1263, 1267-69 (4th Cir.), *cert. denied*, 114 S. Ct. 107 (1993), the Fourth Circuit held again that one need not manage or supervise *people* to be considered a manager or supervisor within the meaning of § 3B1.1(b). Being a manager or supervisor of property, money, or operations is sufficient. On this point, see also *United States v Paz*, 927 F.2d 176 (4th Cir. 1991) (affirming enhancement under

§ 3B1.1(b) based on management of drugs, money, and property).

The Fourth Circuit has consistently rejected the defense argument that enhancement for role in the offense, when coupled with other enhancements based on the same or closely related facts, constitutes impermissible "double counting." *United States v. Molen*, 9 F.3d 1084, 1087 (4th Cir. 1993) (approving enhancements for "more than minimal planning" and for role in offense). On this point, see also *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991) (multiple enhancements based on same or closely related facts not impermissible "double counting").

Finally, in *United States v. Hartzog*, 983 F.2d 604, 608 (4th Cir. 1993), the Fourth Circuit approved an enhancement for a managerial role over defendant's objection that he was clearly not a manager with respect to three of the five firearms offenses for which he was convicted. The court held that as long as the five counts were properly grouped and the defendant was in a managerial role with respect to at least one of them, the enhancement was proper.

#### I. Reductions for Mitigating Role (§ 3B1.2)

In *United States v. Nelson*, 6 F.3d 1049, 1057-58 (4th Cir. 1993), the Fourth Circuit found no merit in the defendant's argument that he was entitled to a reduction because he was a minimal or minor participant in the subject drug transactions. The court noted again that "[a] defendant seeking a downward adjustment for his minor role in a criminal offense bears the burden of proving by a preponderance of the evidence that he is entitled to such an adjustment." *Id.* at 1058 (citing *United States v. Urrego-Linares*, 879 F.2d 1234, 1239 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989)).

#### J. Obstruction of Justice (§ 3C1.1)

On February 23, 1993, the Supreme Court reversed the Fourth Circuit's 1991 *Dunnigan* decision. *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), *rev'd*, 113 S. Ct. 1111 (1993). In a decision written by Justice Kennedy, the Supreme Court unanimously agreed that a defendant who commits perjury at trial may constitutionally have his sentenced enhanced under § 3C1.1 for "obstruction of justice." Accordingly, in at least one published 1993 decision, the Fourth Circuit approved an obstruction of justice enhancement for perjury. See *United States v. Torcasio*, 993 F.2d 368 (4th Cir. 1993).

In *United States v. Riley*, 991 F.2d 120, 125-26 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993), the court also approved an obstruction of justice enhancement based on defendant's efforts to influence witness testimony through threats. The threats were found implicit in defendant's showing an incarcerated witness a copy of grand jury testimony and telling him, "You had better get it right."

#### K. Acceptance of Responsibility (§ 3E1.1)

The Fourth Circuit is reluctant to overrule a district court's denial of a reduction for acceptance of responsibility. As the court put it in *United*

*States v Strandquist*, 993 F.2d 395, 401 (4th Cir. 1993) (approving trial court's denial of reduction for acceptance of responsibility):

The determination of whether a defendant should receive a reduction for acceptance of responsibility is a factual finding to be reviewed under the clearly erroneous standard. *United States v. Gordon*, 895 F.2d 932, 937 (4th Cir.), *cert. denied*, 498 U.S. 846 (1990). The Fourth Circuit has stated that the sentencing court is in a "unique position" to consider a departure, and "[i]n the final analysis, it is the district judge who must evaluate the acts and statements of a defendant." *White*, 875 F.2d at 431-32. In order to receive a downward departure, the "defendant must first accept responsibility for all of his criminal conduct." *Gordon*, 895 F.2d at 936.

In *United States v Choate*, 12 F.3d 1318 (4th Cir. 1993), the Fourth Circuit reaffirmed its long-term position that a defendant must accept responsibility for *all* criminal conduct to be entitled to a reduction. In *Choate*, the court affirmed denial of a reduction based on defendant's refusal to accept responsibility for crimes charged in *dismissed* counts—even though the substance of the dismissed counts was not considered "relevant conduct." The court explained that its "customary deference to district courts regarding acceptance of responsibility determinations gave the district court ample room to conclude that [the defendant] had a greater connection to the dismissed offenses than she was admitting—even if the court was not prepared to increase her sentence based on that connection." *Id.* at 1320.

#### L. Criminal History (Chapter Four)

At least seven published 1993 decisions involved challenges to inclusion of convictions in computing a defendant's criminal history. In each instance the Fourth Circuit rejected defense challenges and affirmed consideration of the convictions for sentencing purposes. See *United States v. Fonville*, 5 F.3d 781, 785 (4th Cir. 1993) (convictions as "adult" before age 18 may serve as predicate offenses for career offender purposes), *petition for cert. filed*, No. 93-7612 (U.S. Jan. 24, 1994); *United States v. Falesbork*, 5 F.3d 715, 717-19 (4th Cir. 1993) (uncounselled misdemeanor conviction may be included in criminal history); *United States v. Bagheri*, 999 F.2d 80 (4th Cir. 1993) (prosecution resulting in "probation without entry of judgment" properly counted in criminal history, rejecting defendant's due process and equal protection arguments); *United States v. Inglesi*, 988 F.2d 500 (4th Cir. 1993) (juvenile convictions properly counted in criminal history); *United States v. Adams*, 988 F.2d 493, 496-97 (4th Cir. 1993) (sentence of eight months in center for youthful offenders properly counted in criminal history as "sentence of imprisonment of at least sixty days").

Finally, in *United States v. Byrd*, 995 F.2d 536 (4th Cir.), *petition for cert. filed*, No. 93-6385 (U.S. Oct. 18, 1993); and *United States v. Custis*, 988 F.2d 1355, 1362 (4th Cir.), *cert. granted*, 114 S. Ct. 299 (1993), the



Fourth Circuit joined several other circuits in strictly limiting when a prior state conviction may be challenged as unconstitutional. As the court explained the rule in *Byrd*, 995 F.2d at 539-40:

[T]he guidelines provide that prior convictions that have not previously been ruled constitutionally invalid must be counted under § 4A1.2 unless the Constitution or federal statute requires that the district court entertain a challenge to the conviction.

Recently [citing *Custis*], we stated that district courts are obliged to hear constitutional challenges to state convictions in federal sentencing proceedings *only when prejudice can be presumed from the alleged constitutional violation*, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant.

(internal quotation and citations omitted; emphasis added).

In *Custis*, the Fourth Circuit squarely held that claims of ineffective assistance of counsel and unknowing guilty pleas were insufficient to justify collateral review of the resulting convictions. The court noted the potential practical problems and the challenges to federalism if a defendant were allowed to attack the validity of state convictions for anything less than the most egregious circumstances (citing the complete denial of counsel as an example). *Custis*, 988 F.2d at 1360-63.

#### M. Career Offender/Related Offenses (§ 4B1.1)

In *United States v. Fonville*, 5 F.3d 781, 784-85 (4th Cir. 1993), the Fourth Circuit held again that prior convictions are not "related" for career offender purposes simply because "they were close in time and place, involved the same defendants and motive (financial support), were solved by a single police investigation [and] received concurrent [or consolidated] sentences." *Id.* at 785. On this point, see also *United States v. Sanders*, 954 F.2d 227, 232 (4th Cir. 1992); and *United States v. Rivers*, 929 F.2d 136, 140 (4th Cir.), *cert. demed.*, 112 S. Ct. 431 (1991).

#### N. Motions for Downward Departure Based on "Substantial Assistance" (§ 5K1.1)

In *United States v. Dixon*, 998 F.2d 228 (4th Cir. 1993), the defendant entered a plea agreement in which the Government agreed to move for a downward departure if the defendant provided "substantial assistance" in either the investigation or prosecution of others. Although the Government acknowledged that the defendant had provided substantial assistance in an investigation prior to his sentencing, the prosecutor preferred to wait until after the defendant had testified to make his 5K1.1 motion. The Fourth Circuit reversed, finding the Government in breach of the plea agreement, which expressly entitled the defendant to a 5K1.1 motion if he provided substantial assistance in an investigation *or* a prosecution.

### O. Downward Departures Generally (§ 5K2.0)

In *United States v Fonville*, 5 F.3d 781, 783-84 (4th Cir. 1993), the Fourth Circuit held again that sentencing disparity between similarly situated co-defendants is *not* a proper basis for a downward departure. On this point, see also *United States v Hall*, 977 F.2d 861, 863-65 (4th Cir. 1992); and *United States v. Ellis*, 975 F.2d 1061, 1066 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1352 (1993).

Finally, in *United States v Lewis*, 10 F.3d 1086, 1092-93 (4th Cir. 1993), the district judge told the defendant immediately after pronouncing sentence: "That's more time than a man should receive, but that is what the Guidelines say and I don't know what I can do about them." From this the defendant and the Government gleaned very different messages, the defendant concluding that the judge believed he lacked authority to depart downward—and, therefore, making the judge's refusal to depart appealable under *United States v Bayerle*, 898 F.2d 28 (4th Cir.), *cert. denied*, 498 U.S. 819 (1990).

The Fourth Circuit disagreed, however. "It is obvious that the judge knew he had the ability to depart downward . . . His comment demonstrated only that he realized he did not have authority to depart from the Guidelines *when neither party presented any mitigating or aggravating circumstances.*" *Lewis*, 10 F.3d at 1093 (emphasis added).

### P Fines

In *United States v Taylor*, 984 F.2d 618, 621-22 (4th Cir. 1993), the court upheld imposition of a \$2,000 fine in spite of there being no specific finding regarding the defendant's ability to pay the fine, as required by *United States v. Harvey*, 885 F.2d 181, 182 (4th Cir. 1989); *United States v Shulman*, 940 F.2d 91, 94-95 (4th Cir. 1991) (vacating \$10,000 fine under *Harvey*); and *United States v. Arnoldt*, 947 F.2d 1120, 1127 (4th Cir. 1991) (vacating \$5,000 fine under *Harvey*).

Without quite articulating a "de minimis fine exception" to the *Harvey* line of cases, the court in *Taylor* noted the years in prison in which the defendant could participate in the Inmate Financial Responsibility Program, the years following on Supervised Release, and the general information about the defendant's financial circumstances included in the presentence report. The defendant's argument for reversal of a relatively small fine because there was no precise finding regarding his ability to pay "embraces technical nicety at the expense of common sense," wrote the court. *Taylor*, 984 F.2d at 622.

### Q. Restitution

The Victim and Witness Protection Act, 18 U.S.C. §§ 3663 and 3664, authorizes restitution to victims of crime. However, the Act also directs the sentencing court to "consider . . . the financial resources of the defendant, [and] the financial needs and earning ability of the defendant and the defendant's dependents." 18 U.S.C. § 3664(a).

In *United States v Bruchey*, 810 F.2d 456, 458 (4th Cir. 1987), the Fourth Circuit described the task for the sentencing court as “balanc[ing] the victim’s interest in compensation against the financial resources and circumstances of the defendant.” To accomplish this, the court has consistently required specific findings of fact in support of any order of restitution. *Id.* at 458-59; see also *United States v Piche*, 981 F.2d 706, 718 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2356 (1993); and *United States v Bailey*, 975 F.2d 1028, 1031 (4th Cir. 1992).

As an alternative to making separate findings of fact, the Fourth Circuit has approved adoption of findings in a presentence report prepared by the probation office—assuming, of course, the findings in the presentence report are themselves adequate. See *United States v Gresham*, 964 F.2d 1426, 1431 (4th Cir. 1992); and *United States v Morgan*, 942 F.2d 243, 245 (4th Cir. 1991).

Two published 1993 decisions dealt with the sufficiency of a sentencing court’s findings in support of orders of restitution. In both instances, the orders of restitution were vacated and remanded for proceedings consistent with the *Bruchey* line of authority. *United States v Molen*, 9 F.3d 1084 (4th Cir. 1993) (vacating order that defendants pay over \$209,000 in restitution and holding that findings in presentence report on which sentencing court relied were inadequate); *United States v Plumley*, 993 F.2d 1140 (4th Cir. 1993) (vacating order that defendant bank robber pay \$10,709 in restitution to victim bank and remanding for findings required by *Bruchey*), *cert. denied*, 114 S. Ct. 279 (1993).

#### R. “No Limit” to What Sentencing Judge May Consider

In spite of the apparent strictures and requirements imposed by the Sentencing Guidelines, in *United States v Falesbork*, 5 F.3d 715, 722 (4th Cir. 1993), the Fourth Circuit noted “the broad scope of information that 18 U.S.C. § 3661 permits a sentencing judge to consider.” The cited section itself provides that:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Accordingly, in *Falesbork*, the court rejected the defendant’s argument that his sentence was based partly on what an informant had witnessed while under the influence of cocaine. “[The defendant] cites no authority for this contention, and we find it to be inconsistent with the broad scope of information that 18 U.S.C. § 3661 permits a sentencing judge to consider.” *Falesbork*, 5 F.3d at 722.

#### S. Sentencing Guidelines “Commentary” and “Application Notes” Presumed Authoritative

In *United States v Nelson*, 6 F.3d 1049, 1056 (4th Cir. 1993), the court noted:

The Application Notes under the Sentencing Guidelines are included as Commentary, and in *Stinson v United States*, 113 S. Ct. 1913, 123 L.Ed.2d 598 (decided May 3, 1993), the court held: "We decide that Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."

#### T *Overlapping Ranges Doctrine*

In *United States v Strandquist*, 993 F.2d 395, 401 (4th Cir. 1993), the Fourth Circuit applied again what it has called the "overlapping ranges doctrine." As the court has explained it in the past, "[t]he overlapping ranges doctrine obviates the necessity of selecting the appropriate range only when the district court expressly makes an independent determination that the sentence would be the same under either of the [potentially applicable] ranges in the absence of any dispute." *United States v Willard*, 909 F.2d 780, 783 (4th Cir. 1990); see also *United States v White*, 875 F.2d 427, 432-33 (4th Cir. 1989).

#### U. *Supervised Release Violations*

Two published 1993 decisions raised issues involving supervised release violations.

In *United States v Allen*, 2 F.3d 538 (4th Cir. 1993), the defendant objected to modification of his supervised release that required him to reside for six months in a community service center. The Fourth Circuit, in affirming, approved modifications of the terms of supervised release which do not extend its term and distinguished *United States v Cooper*, 962 F.2d 339 (4th Cir. 1992) (holding that sentencing court was without authority to impose second term of supervised release following imprisonment for violating terms of first term of supervised release).

In *United States v Battle*, 993 F.2d 49 (4th Cir. 1993), the Fourth Circuit held that a defendant's *possession* of a controlled substance (here, while on supervised release) can be shown by proving the defendant used the drug. Other circuits have held likewise. See, e.g., *United States v Rockwell*, 984 F.2d 1112, 1114-15 (10th Cir. 1993) (citing cases), *cert. denied*, 113 S. Ct. 2945 (1993).

### IX. APPEAL AND OTHER POST-CONVICTION PROCEEDINGS

#### A. *Failure to File Notice of Appeal*

An attorney's failure to file Notice of Appeal, when requested by his client to do so, is per se ineffective assistance of counsel. Prejudice to the defendant is presumed irrespective of the merits of the appeal. *United States v Peak*, 992 F.2d 39 (4th Cir. 1993). Accordingly, on a showing that counsel was requested to appeal but failed to do so, the prescribed remedy is to vacate the original judgment and enter a new judgment from which an appeal can be taken. *Id.* at 42.

### B. Rule 35 Motions

In *United States v Fraley*, 988 F.2d 4 (4th Cir. 1993), the Fourth Circuit reversed the trial court's reduction of the defendant's sentence due to the impact his father's illness was having on the family business. The Fourth Circuit was unpersuaded that the trial court's Rule 35 reduction should be allowed under the narrow "obvious mistake" exception articulated in *United States v Cook*, 890 F.2d 672, 675 (4th Cir. 1989). "[T]he district court's inherent power to amend a sentence does not extend to a situation where the district court simply changes his mind about the sentence." *Fraley*, 988 F.2d at 6 (internal quotations and citations omitted). Accordingly, the Fourth Circuit reversed and remanded for reinstatement of the original sentence.

### C. "Plain Error" Doctrine

A number of 1993 decisions discussed and applied the "plain error" doctrine to errors raised on appeal that had not been properly preserved in the trial court. Each cites the Supreme Court's decision in *United States v Olano*, 113 S. Ct. 1770 (1993), which clarified the role of appellate courts in undertaking plain error review. Under *Olano*, "to reverse for plain error the reviewing court must (1) identify an error, (2) which is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v Brewer*, 1 F.3d 1430, 1434-35 (4th Cir. 1993) (internal quotations and citations omitted). Moreover, when a defendant fails to make a timely objection to the alleged error, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v Moore*, 11 F.3d 475, 481 (4th Cir. 1993).

As the Fourth Circuit noted in *United States v Jarvis*, 7 F.3d 404, 410 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1200 (1994), "Rule 52(b) [codifying the plain error doctrine] is to be applied sparingly and saves only particularly egregious errors in those circumstances in which a miscarriage of justice would otherwise result" (internal quotations and citations omitted). At least two other 1993 published Fourth Circuit decisions made essentially the same point. *United States v Reedy*, 990 F.2d 167, 168 n.2 (4th Cir.), *cert. denied*, 114 S. Ct. 210 (1993); *United States v Hall*, 989 F.2d 711, 718 n.12 (4th Cir. 1993).

### D. Harmless Error

In *United States v Sarin*, 10 F.3d 224 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1221 (1994), the court held admission of improper evidence relating to a count on which the defendant was *acquitted* was harmless error with respect to the counts on which he was *convicted*. On this point, see also *United States v Bernard*, 757 F.2d 1439, 1443 (4th Cir. 1985); and *United States v Wilkins*, 385 F.2d 465 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

*E. District Court's Failure to Follow Fourth Circuit's Mandate*

A trial court was taken to the proverbial woodshed for failing to follow the Fourth Circuit's mandate in *United States v Bell*, 5 F.3d 64, 66-67 (4th Cir. 1993).

"Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is controlling as to matters within its compass. Indeed, it is indisputable that a lower court generally is bound to carry the mandate of the upper court into execution and may not consider the questions which the mandate laid at rest." *Id.* at 66 (internal quotations and citations omitted). The court in *Bell* proceeded to review the history and scope of the "mandate rule", reminded the trial court that it was obligated to obey "both the letter and the spirit of the mandate"; and discussed briefly certain limited and narrow exceptions (not found to apply in this case). *Id.* at 66-67

