Washington and Lee Law Review

Volume 53 | Issue 2 Article 4

Spring 3-1-1996

For the Criminal Practitioner

Thomas R. Ascik

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

 Part of the Courts Commons

Recommended Citation
Thomas R. Ascik, *For the Criminal Practitioner*, 53 Wash. & Lee L. Rev. 465 (1996).
Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol53/iss2/4

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

For the Criminal Practitioner

A review of all 1995 criminal cases decided by the Fourth Circuit

Thomas R. Ascik*

Introductory Notes

1. This is the fifth annual review of all of the published criminal opinions of the United States Court of Appeals for the Fourth Circuit. The review covers calendar year 1995.

2. All cases have been analyzed for points of law. Each point of law is set out separately. Almost every case is cited for more than one point of law.

3. As in the past, there are three full sections devoted exclusively to specific federal statutory crimes. These are Parts IV, V, and VI, dealing with drug, firearm, and all other federal crimes, respectively. The longest section, Part VIII, concerns sentencing and the many constructions of the United States Sentencing Guidelines. Appeal of Sentences is the last subpart in that section.

4. The following subsections may be of special interest:

Cases Remanded for Resentencing and Appeals Dismissed, Parts VIII.A. and B., pages 539-41.

Appeal and Other Post-Conviction Proceedings, especially the subparts on standards of review, Part IX, pages 562-79.

Convictions Overturned and Other Cases Reversed and Remanded, subparts IX.A. and B., pages 562-64.

Table of Contents

I. ARREST, SEARCH AND SEIZURE 483
A. Search Warrants 483
1. Magistrate Judge's Finding of Probable Cause Entitled to "Great Deference" 483

* Assistant United States Attorney for the Western District of North Carolina.

2. Challenging the Facial Validity of a Search Warrant: Right to a *Franks* Hearing 483
3. Private Citizens May Aid Officers to Conduct Search (18 U.S.C. § 3105) 484
B. Exceptions to Requirement of Search Warrant 484
1. "Exit Search" Is Border Search 484
2. More Than "Routine" Border Search Requires Reasonable Suspicion 484
3. Consent to Search a Question of Fact 484
4. Police Need Not Inform Suspect of Right to Refuse Consent 484
5. Search Incident to Arrest of Driver of Vehicle 485
6. *Terry* (Terry v. Ohio, 392 U.S. 1 (1960)) Stops . . . 485
a. Definition 485
b. Based on "Reasonable Suspicion" 485
c. Reasonable Suspicion May Be Based on Tip with Some Corroboration 485
d. Scope 485
e. Length of Detention 486
f. Permissible Actions by Officers at *Terry* Stop . . 486
C. Exclusionary Rule 486
1. Limitations 486
2. Exclusion Not Required When Independent Basis Exists 486
3. Manner of Asserting Rights May Lead to *Leon* Good-Faith Exception to Exclusionary Rule 486
D. Standards for Review of Suppression Hearings 487
E. Standing to Assert Fourth Amendment Rights 487
1. Motions to Suppress Must Be Raised Pretrial (Fed. R. Crim. P. 12(b)(3)) 487
2. Person Who Abandons Property Has No Standing . . 487
3. No Standing to Contest Search of Third Party 488
4. No "Co-Conspirator Exception" to Standing Rule . . 488
F. Wiretapping (18 U.S.C. § 2510, et seq.) 488
1. Justification for Wiretap "Not Great" but Must Be Specific (§ 2518(3)(c)) 488
2. Wiretap Invasion of Privacy Must Be Minimized (§ 2518(5)) 488
G. Digital Display Pager Is Not Pen Register (18 U.S.C. §§ 3121-3127) 488
H. Standard for Warrantless Arrest 489

II. CONFESSIONS AND OTHER STATEMENTS 489
A. When Suspect Is "in Custody" for *Miranda* Purposes . . . 489
1. Definition of "Custody" 489
2. *Terry* and Vehicular Stops Are Not Custody 489
B. *Edwards* Rule and Subsequent Confessions 489
1. Interrogation Must Cease When Right to Counsel Invoked 489
2. *Miranda* Broader Than Fifth Amendment 490
C. Sound of Voice 490
1. Sound of Voice Is Not Testimonial 490
2. Sound of Voice Is Not Plea Negotiation (Fed. R. Crim. P. 11(e)(6)) 490
D. Conversants Assume Risk in Conversations 491

III. MISCELLANEOUS PRETRIAL ISSUES 491
A. Grand Jury 491
1. Quashing Indictment Because of Government Misconduct 491
2. Government's Failure to Disclose Exculpatory Evidence Is Not Misconduct 491
3. Standard of Review for Prosecutorial Misconduct: Clear Error 491
B. Venue (18 U.S.C. § 3237, Fed. R. Crim. P. 18) 491
1. Venue May Be in Multiple Districts 491
2. Proof of Venue 491
3. Venue in Conspiracies 492
4. "No Such Thing" as "Venue Entrapment" 492
C. Notice 492
1. Definition 492
2. Standard for Void-for-Vagueness Challenges 492
D. Joinder and Severance (Fed. R. Crim. P. 8, 14) 492
1. Severance of Defendants at Discretion of Trial Court 492
2. Standard When Need Asserted for Co-Defendant's Testimony 492
3. Joinder of Separate Offenses Is Permissible 493
E. Double Jeopardy 493
1. Double Jeopardy and Successive Conspiracies 493
2. Double Jeopardy Bars Multiple Trials as Well as Multiple Punishments 493
3. Even Erroneous Acquittal Is Bar to Reprosecution . . 493

4. No Double Jeopardy Bar If Defendant Consents to Mistrial . . . 493
5. Retrial May Be Barred Even If Defendant Caused Original Mistrial . . . 494
6. Retrial Barred Only When Issue Definitively Resolved . . . 494
F. Vindictive Prosecution and Legitimate Plea Negotiations . . . 494
1. Prosecutorial Vindictiveness . . . 494
2. Prosecutor Has Great Latitude in Plea Negotiations . . . 494
3. Prosecutor May Threaten Defendant With Greater Charges . . . 494
4. Prosecutor May Threaten Greater Charges Against Defendant Who Refuses to Cooperate . . . 495
5. Prosecutor Not Bound by Initial Charges . . . 495
G. Mental-Competency Hearing (18 U.S.C. § 4241) . . . 495
1. Test for Mental Competence . . . 495
2. When Hearing Required . . . 495
3. Retrospective Competency Hearing Is Possible . . . 496
H. Guilty Pleas (Fed. R. Crim. P. 11) . . . 496
1. Failure to Inform Defendant of Mandatory Minimum Sentence at Rule 11 Hearing Invalidates Plea . . . 496
2. Court Need Not Inform Defendant of Guideline Range . . . 496
3. Six-Factor Test for Withdrawal of Guilty Plea . . . 496
4. Three Factors Most Important . . . 496
5. Extremely Difficult to Withdraw Guilty Plea (Fed. R. Crim. P. 32(e)) . . . 497
6. To Withdraw Guilty Plea, Defendant Bears Burden of Proof . . . 497
7. To Withdraw Guilty Plea Because of Alleged Legal Innocence, An Actual Defense Must Be Shown . . . 497
8. To Withdraw Guilty Plea Because of Alleged Lack of Close Assistance of Counsel, Counsel Must Be Objectively Bad . . . 497
I. Speedy Trial (Sixth Amendment, 18 U.S.C. § 3161) . . . 497
1. Four-Part Constitutional Test . . . 497
2. Statutory Speedy Trial Right Triggered Only by Arrest or Indictment . . . 498

3. Replacement Attorney Has No Right to Re-Start Thirty Day Period (§ 3161(c)(2)) 498
4. Plea of Not Guilty Required (§ 3161(c)(1)) 498
5. Complexity of Case Is Rationale for Continuance (§ 3161(h)(8)(B)) 498
J. District Court May Not Deny Government's Motion to Dismiss an Indictment (Fed. R. Crim. P. 48(a)) 498
K. Substitute Appointed Counsel Not Required When Defendant's Own Behavior Creates Conflict with Counsel 499
L. Disclosure of Confidential Informant Not Required When Informant Was Used Only to Obtain Search Warrant 499
M. Motion for Return of Property (Fed. R. Crim. P. 41(c)) 499
1. Grounds 499
2. Federal Government Cannot Return Firearms It Does Not Possess 499
N. Equitable Estoppel Cannot Be Asserted to Uphold Crime 500
O. *Brady/Giglio* Violations 500
1. Standard for *Brady* Issues 500
2. When Prosecution Possesses *Brady* Material 500
3. No Disclosure Required If Evidence Available to Defense 500
P. Defendant Must Show Prejudice in Denial of Motion to Continue 500

IV. DRUG OFFENSES 501
A. Congress May Regulate Interstate and Intrastate Drug Activities Under the Commerce Clause 501
B. Quantity of Drugs 501
1. Proof at Trial 501
2. Proof at Sentencing 501
3. Relevant Conduct Versus Offense of Conviction . . . 502
4. Quantity of LSD (U.S.S.G. § 2D1.1(c), Comment n.18; App. C, Amend. 488) 502
5. Quantity of Crack from Quantity of Cocaine 502
6. Quantity of Marijuana (U.S.S.G. § 2D1.1(c)) 502
7. Standard of Review on Appeal: Clear Error 503
C. Aider and Abettor Subject to Mandatory Sentences (21 U.S.C. § 841) 503

D. Prosecution of Physician for Drug Dealing (21 U.S.C. § 841) 503
E. Statutory and Sentencing Distinctions Between "Crack" and Cocaine Upheld (21 U.S.C. § 841, U.S.S.G. § 2D1.1) 503
F. Drug Conspiracy (21 U.S.C. § 846) 504
1. Proof of Conspiracy 504
2. Cannot Conspire With Government Agent 504
3. No Overt Act Required for Drug Conspiracy 504
4. Only Slight Connection or One Level Required 504
5. Mere Knowledge or Acquiescence Not Enough 504
6. Single v. Multiple Conspiracies 505
7. Co-Conspirators May Also Be Competitors 505
8. Conspiracy May Be Loose-Knit Association 505
9. Co-Conspirators Need Not Know All Details or All Other Co-Conspirators 505
10. Double Jeopardy and Successive Conspiracies 505
11. Admission of Co-Conspirator's Statement (Fed. R. Evid. 801(d)(2)(E)) 506
12. No Redundant Convictions for Drug Conspiracy (§ 846) and Continuing Criminal Enterprise (§ 848) 506
G. Continuing Criminal Enterprise (21 U.S.C. § 848) 506
1. Four Essential Elements 506
2. The Head and Five Participants 506
3. Single Conspirator May Be Convicted Despite Acquittals of Co-Conspirators 507
4. Life Sentence Constitutional 507
H. Section 851 Information Does Not Apply to Sentencing Enhancements (21 U.S.C. § 851) 507
I. Forfeitures 507
1. Proof Is By Preponderance (21 U.S.C. § 853) 507
2. In Personam Forfeitures: When Proportionality Test Is Required (21 U.S.C. § 853) 507
3. In Rem Forfeitures: Instrumentality Test (18 U.S.C. §§ 881(a)(6) & (7)) 508

V. FIREARMS OFFENSES 508
A. Dysfunctional Bomb Is Dangerous Weapon (18 U.S.C. § 111(b)) 508

B. Felon in Possession (18 U.S.C. § 922(g)(1)) and Armed Career Criminal (18 U.S.C. § 924(e)(1)) 508
1. Armed Career Criminal Act Is Constitutional 508
2. Felon in Possession (18 U.S.C. § 922(g)(1)): Elements 508
3. Evidence of Possession 509
4. When Civil Rights Restored 509
5. Involuntary Manslaughter, Escape, and Robbery Are Violent Felonies 510
6. Prior Predicate Convictions Must Be "Separate and Distinct Criminal Episodes" 510
7. Prior Predicate Convictions May Be Old 510
C. Receiving Firearm While Under Indictment (18 U.S.C. § 922(n)) 510
D. Using or Carrying Firearm in Drug Trafficking or Violent Crime (18 U.S.C. § 924(c)(1)) 511
1. Supreme Court Causes Major Change in Law 511
2. Must Be Correct Jury Instruction on Underlying Crime 511
3. Destructive Device Punished More Severely 511
E. Dysfunctional Bomb Is Destructive Device (26 U.S.C. §§ 5845, 5861) 511

VI. MISCELLANEOUS OFFENSES 512
A. Securities Fraud (15 U.S.C. § 78j(b), 78ff, Rule 10b-5, 17 C.F.R. § 240.10b-5) 512
1. Same Facts Prosecutable as Both Wire and Securities Fraud 512
2. Misappropriation Theory Rejected 512
B. Migratory Bird Treaty Act (16 U.S.C. § 703 et seq., 50 C.F.R. § 20.1 et seq.) 512
C. Assimilated Crimes in National Parks (18 U.S.C. § 13, 36 C.F.R. § 4.2) 513
D. Dangerous Weapon Is Jury Question (18 U.S.C. § 113(a)(3)) 513
E. Intent to Deceive Is Immaterial (18 U.S.C. § 1001) 513
F. False Statement to Bank (18 U.S.C. § 1014) 513
1. Essential Elements 513
2. Intent to Deceive Is Immaterial 514
G. Only Minimal Interstate Nexus Required in Possession of Document-Making Implements (18 U.S.C. § 1028(a)(5)) 514

H. Fraud (18 U.S.C. §§ 1341, 1343, 1346) 514
1. Mail Fraud (18 U.S.C. § 1341) Stands Alone 514
2. Wire Fraud (18 U.S.C. §§ 1343, 1346) Need Not Succeed 514
3. Confidential Information Is Property 514
4. Public Corruption Is Prosecutable as Mail Fraud . . . 514
5. Same Analysis for Mail and Wire Fraud 515
I. Military Function Broadly Construed (18 U.S.C. § 1362) 515
J. Posse Comitatus Act (18 U.S.C. § 1385) 515
K. Two Types of Extortion (18 U.S.C. § 1951(b)(2)) 515
L. Money Laundering 516
1. "Specified Unlawful Activity" Need Not Be Elaborated Upon (18 U.S.C. § 1957(a)) 516
2. Completion of Specified Unlawful Activity Is Question of Proof (18 U.S.C. § 1957(a)) 516
3. Elements of 18 U.S.C. § 1956(a)(1) Money Laundering 516
M. Perjury (18 U.S.C. §§ 1621-1623) 516
1. Perjury Statute to Be Construed Narrowly (18 U.S.C. § 1623) 516
2. Subornation of Perjury Does Not Require Physical Threats or Coercion (18 U.S.C. § 1622) . . 517
N. Cigarette-Lighter Bomb Is Non-Mailable Matter (18 U.S.C. § 1716) 517
O. Proof of "Credit Union" Is Essential to Credit-Union Robbery (18 U.S.C. § 2113) 517
P. Video Hearing Approved for Involuntary Commitment (18 U.S.C. § 4245) 517
Q. Obstructing the Internal Revenue Code (26 U.S.C. § 7212(a)) 518
R. Money Structuring (31 U.S.C. § 5324) 518
S. False Social Security Number (42 U.S.C. § 408(a)(7)(B)) 518

VII. TRIAL 518
A. Indictment 518
1. Sufficiency: Tracking Statute Is Usually Sufficient (Fed. R. Crim. P. 7(c)) 518
2. Sufficiency: Each Count Considered Separately 519

3. Variance Between Indictment and Proof (Fed. R. Crim. P. 52(a)) 519
B. Voir Dire 519
1. Broad Discretion in District Court 519
2. Contemporaneous Objection Required 519
3. Individual Voir Dire Not a Right 519
4. Standard for Prosecutorial Rebuttal to *Batson* Challenge 520
5. Trial Court Has Discretion To Dismiss Jurors 520
C. Jencks Act (18 U.S.C. § 3500, Fed. R. Crim. P. 26.2) 520
1. Jencks Act Applies Only to Statements in Prosecution's Possession 520
2. Rules for Hearings on Jencks Act Requests 520
D. Civil Rulings Not Dispositive in Criminal Proceedings . . 521
E. Prosecutorial Misconduct 521
1. Test for Improper Closing Argument 521
2. Prosecutorial Use of Perjured Testimony Must Be Knowing 521
3. Coercion of Witnesses 521
F. Earlier Proceedings and Rulings Not Basis for Judicial Recusal (28 U.S.C. § 455(a)) 522
G. Judicial Bias 522
1. Judge Must Appear Unbiased 522
2. When Judge Must Recuse Himself (28 U.S.C. § 455) 522
H. Admissibility of Evidence 522
1. Multiple Theories 522
2. District Court May Be Upheld on Different Grounds 522
3. Relevance (Fed. R. Evid.401, 402) 523
I. Cross-Examination 523
1. Cross-Examination Limited to Relevant Matters . . . 523
2. Trial Judge Has Broad Latitude to Control Cross-Examination 523
3. Defendant May Not Immunize His Witness from Cross-Examination 523
J. Prejudicial Generalizations Based on Nationality: "Jamaicans" 523
K. "Just Cause" to Refuse to Testify (28 U.S.C. § 1826(a)) 524
L. Testimony Regarding Voice Identification 524

M. In-Court Identifications 524
1. "Suggestive" Photo Displays and Later In-Court Identifications 524
2. Independent In-Court Identifications: Standard of Review 525
N. Tape Recordings and Transcripts 525
1. Trial Court Has Latitude over Foundation 525
2. Transcripts Normally Permissible 525
O. When Admissible Evidence May Be Excluded (Rule 403) 525
1. When Excluded 525
2. When Prejudice Is Fair 525
3. Trial Court's Rule 403 Ruling Will Almost Always Be Upheld 526
P. Evidence of Prior Bad Acts (Fed. R. Evid. 404(b)) 526
1. A Broad, Inclusive Rule 526
2. Four-Part Test for Admissibility 526
3. Rule 404(b) Evidence in Significant Sexual Abuse Case 527
4. Evidence Upheld or Rejected 527
5. Standard of Review on Appeal 528
Q. Victim's Other Sexual Conduct (Fed. R. Evid. 412) . . . 528
R. Marital Privilege: Two Types (Fed. R. Evid. 501) 528
S. Summary-of-Testimony Charts Admissible Under Fed. R. Evid. 611(a) 529
T. Expert Testimony (Fed. R. Evid. 702) 529
1. Standard for Admission into Evidence 529
2. Defendant's Surprise Expert Witness 530
3. Anthropologists' Analysis of Bank Photographs for Mistaken Identity Not Scientific Knowledge 530
4. Penile Plethysmograph Not Scientific Evidence 530
5. Psychological Profile for Pedophilia Excluded 530
U. Prior Testimony May Not Be Summarized as "Expert Knowledge" (Fed. R. Evid. 703) 531
V. Hearsay 531
1. Confrontation Clause v. Hearsay Exceptions 531
2. Admission of Co-Conspirator's Statement (Fed. R. Evid. 801(d)(2)(E)) 531
3. Impeachment Must Occur Before Prior Consistent Statement Admitted (Fed. R. Evid. 801(d)(1)(B)) . . 532

4. Test for Trustworthiness of Residual Exceptions to Hearsay Rule (Fed. R. Evid. 803(24), 804(b)(5)) . . 532
5. Corroboration of Unavailable Witness's Statement Against Interest (Fed. R. Evid. 804(b)(3)) 532
6. Test for Residual Exception When Declarant Is Unavailable (Fed. R. Evid. 804(b)(5)) 533
7. Distinguishing Between Hearsay and Nonhearsay Uses of Evidence 533
W. Chain of Custody (Fed. R. Evid. 901(a)) 533
1. Chain of Custody Is Only One Method of Authentication 533
2. "Missing Link" Is Not Necessarily Fatal 533
X. Note-Taking by Jurors 534
Y. Jury Misconduct: Defendant Bears Initial Burden of Showing Improper Contact Between Juror and Parties . . 534
Z. Defenses 534
1. Ignorance of Law Is No Defense 534
2. Mistake of Law Is No Defense 534
3. Legal Impossibility, Definition 534
4. Factual Impossibility Is No Defense In Attempt Crime 534
5. Government May Solicit But Not Entrap 535
6. Standard for Justification Defense 535
AA. Jury Instructions 535
1. No Definition of "Reasonable Doubt" 535
2. No "Missing Witness" Instruction When Witness Is Available to Both Sides 535
3. Requested Jury Instructions Must Be Supported by the Evidence 536
4. Failure to Instruct Jury on Essential Element Is Constitutional Error, Almost Always Requiring Reversal 536
5. Error in Reasonable Doubt Instruction Can Never Be Harmless 536
6. *Allen* Charge Must Be Balanced 536
7. Conflicting Jury Instructions: When Retrial Is Required 536
8. Supplemental Argument After Supplemental Instruction 537

9. Trial Judge Has Discretion Over Wording of Initial and Clarifying Jury Instructions and over Whether To Issue Any Particular Jury Instruction 537
10. Test for Reversible Error When Trial Court Refuses Defendant's Requested Jury Instruction . 537
11. Standard of Review: Abuse of Discretion 537
BB. Verdict by Fewer Than Twelve Jurors (Fed. R. Crim. P. 23(b)) 538
CC. Mistrial 538
1. Mistrial Disfavored But Left to Discretion of Trial Court 538
2. Defendant Must Show Actual Prejudice Caused by Interruption in Trial 538
DD. Motion for New Trial 539
1. Based on Newly Discovered Evidence 539
2. Based on Newly Discovered "Information" 539
3. Ineffective Assistance of Counsel May Be Grounds for Motion for New Trial 539
EE. Limited Post-Trial Right to Contact Juror (28 U.S.C. § 1867(a)) 539

VIII. SENTENCING 539
A. Cases Remanded for Resentencing 539
B. Appeals Dismissed 541
C. Plea Negotiations and Agreements 541
1. Plea Agreement Is Contract 541
2. The "Prisoners' Dilemma" and Government "Hardball" 541
3. Failure to Appear Is Breach of Plea Agreement .. 541
D. Sentencing Commission May Overturn Court Interpretations of Guidelines 541
E. Rule of Lenity Favors Defendant at Sentencing 541
F. Hearsay Is Allowed at Sentencing (§ 6A1.3(a)) 542
G. Uniform Sentencing Is Goal of Guidelines 542
H. Sentences May Be Lowered If Guidelines Are Later Amended (18 U.S.C. § 3582(c)(2)) 542
I. Current Version of Guidelines Is Not Used When Ex Post Facto Clause Is Implicated 542
J. Factual Findings at Sentencing 542
1. Findings Must Be Specific Enough for Review .. 542

2. Sentencing Court May Adopt Findings in Pre-Sentence Report 542
3. Sentencing Court May Adopt Government's Objections If Specific Facts Are Included in Objections 543
4. Standard of Review: Clear Error 543

K. Interpretation of Sentencing Guidelines 543
1. Binding Nature of Commentary in Guidelines . . . 543
2. State Law Is Not Needed 543
3. Date of Sentencing Controls Guidelines Version Used (§ 1B1.11(a)) 543
4. When Guidelines Amendments Are Retroactive (§ 1B1.10) 543

L. Double Counting 544

M. Defendant May Not Protest Lesser Sentence of Codefendant 544

N. Defendant's Knowledge of Presentence Report (Fed. R. Crim. P. 32(c)(3)(A)) 544

O. Mandatory Life Sentences Are Constitutional 544

P. Sentence Less than Life Sentence Is Not Reviewable as Cruel and Unusual Punishment 544

Q. Almost No Limit to What Court May Consider at Sentencing (18 U.S.C. § 3661, § 1B1.4, Fed. R. Crim. P. 32(b)(4)(G)) 545

R. Not Abuse of Discretion for Court to Refuse to Consider Tardy Objections to Presentence Report . . . 545

S. Defendant Need Not Have Been Armed to Receive Enhancement for "Express Threat of Death" During Robbery (§ 2B3.1(b)(2)(F)) 545

T. Decision-Making or Sensitive Position (U.S.S.G. § 2C1.7(b)(1)(B)) 545

U. Loss (§ 2B1.1, 2F1.1) 546
1. Loss under § 2F1.1 546
2. Gain to Defendant or to Manufacturer Is Not Loss 546
3. Gain to the Defendant Is an Alternative Measure of Loss 546
4. Standard of Review 546

V. When Perjury Guideline (§ 2J1.2) Is Cross-Referenced to Accessory Guideline (§ 2X3.1) 547

W. When Victim Is "Vulnerable" (§ 3A1.1) 547

X. Role in Offense (§§ 3B1.1, 1.2) 547
1. Reduction Based on Comparison Both of Defendants and Elements of Offense 547
2. Burden to Prove Reduction Is on Defendant 547
Y. Abuse of Position of Trust (§ 3B1.3) 548
1. Physician May Hold Position of Trust 548
2. Bank Teller May Hold Position of Trust 548
Z. Obstructing or Impeding Justice (§ 3C1.1) 548
1. Threatening as Obstruction 548
2. Perjury as Obstruction 548
AA. Acceptance of Responsibility (§ 3E1.1) 549
1. Defendant Has Burden of Proof 549
2. Defendant Who Goes to Trial Will Rarely Get Acceptance of Responsibility 549
3. Relevant Factors 549
4. Standard of Review: Clear Error, Great Deference 549
BB. When Pretrial Detention Is Not "Imprisonment on a Sentence" (§ 4A1.1(e)) 550
CC. When Prior Sentences Are "Related" (§ 4A1.2(a)(2)) . 550
DD. Career Offender (§ 4B1.1) 550
1. Guidelines Commission Did Not Exceed Authority When It Classified Certain Offenses Under Career Criminal Guideline (§ 4B1.2) 550
2. Extortion Is Crime of Violence (§ 4B1.2, cmt. n.2) 550
3. Attempt Is Prior Predicate Conviction (§ 4B1.2, cmt. n.1) 550
4. Using Telephone for Drug Distribution Is Prior Predicate Conviction (§ 4B1.2, cmt. n.1) 551
EE. Restitution (§ 5E) 551
1. Ability to Pay Must Be Specifically Addressed (18 U.S.C. § 3664(a)) 551
2. Restitution May Be Imposed on Defendant with Negative Income Based on Earning Ability 551
3. Court May Not Force Payments of ERISA Pension Benefits 551
4. Court May Not Delegate Essential Decisions About Restitution to Probation Office 552
5. When Restitution May Be Ordered (18 U.S.C. § 3663) 552

FF. Fines (§ 5E) 552
1. Ability to Pay Must Be Specifically Addressed (18 U.S.C. § 3572(a)) 552
2. Upward Departure from Fine Range 552
3. Defendant May Not Evade His Burden of Proving Inability to Pay Fine (§ 5E1.2(a)) 552
GG. Reasonable Incremental Punishment to Undischarged Term of Imprisonment (§ 5G1.3(c)) 553
1. Enforced as Guideline 553
2. Definition of "Reasonable Incremental Punishment" 553
3. How to Calculate Reasonable Incremental Punishment 553
4. "Reasonable Alternate Method" of Calculation . . . 554
5. No Need to Predict Effect of Federal Sentence on State Parole Board 554
HH. Departures (§§ 5H, 5K, 18 U.S.C. § 3553(b)) 554
1. No Departures Without Notice 554
II. Downward Departures 554
1. No Appeal of Court's Refusal to Depart Downwards 554
2. No Appeal of Extent of Downward Departure . . . 555
3. No Right to Continue Sentencing in Order to Have Opportunity to Render Substantial Assistance (§ 5K1.1, Fed. R. Crim. P. 35) 555
4. No Appeal of Court's Denial of Government's Motion for Downward Departure for Substantial Assistance 555
5. "Substantial Assistance to the Judicial System" Is Not Basis for Downward Departure 555
6. Equitable Estoppel Is Not Basis for Downward Departure 555
7. Downward Departure for Substantial Assistance Only at Motion of Government (§ 5K1.1) 555
8. No General Duty on Government to Move to Depart Downwards (§ 5K1.1) 556
9. Two Rare Grounds for Challenging Government's Refusal to Move for Downward Departure (§ 5K1.1) 556
10. Bargained-For Duty on Government to Move to Depart Downwards (§ 5K1.1) 556

11. Government Need Not Make Motion If Defendant Has Breached Plea Agreement (§ 5K1.1) 556
12. Downward Departure for "Extraordinary Vulnerability to Victimization in Prison" 556
13. Mental and Emotional Conditions Are Not Ordinarily Basis for Downward Departure (§ 5H1.3) 557
14. Family Responsibilities and Ties Are Not Ordinarily Basis for Downward Departure (§ 5H1.6) 557
15. Court Need Not Hold Evidentiary Hearing on Motion for Downward Departure 557
JJ. Upward Departures 557
1. Strict Procedures Promulgated for Departure Based on Inadequacy of Criminal History (§ 4A1.3) 557
2. District Court May Use Analogy to Another Guideline 558
3. Refusal to Depart Upwards Is Not Appealable . . . 558
4. Sentencing Court Must Rule on Record Whether the Sentencing Guidelines Already Take Factors into Consideration 558
5. When Error Is Harmless 558
6. Standard of Review: "Multi-Part Test of Reasonableness" 559
KK. Violations of Probation or Supervised Release (Chapter 7) 559
1. Consecutive Sentences upon Revocation (§§ 7B1.3, 5G1.3) 559
2. Chapter Seven Policy Statements Are Not Binding for Revocations of Supervised Release . . . 559
LL. Appeal of Sentences 560
1. Four Bases for Appeal of Sentence (18 U.S.C. § 3742(a)) 560
2. Only Limited Appeals Under Guidelines (18 U.S.C. § 3742(a)) 560
3. No Appeal of Sentence Within Guideline Range . . 560
4. De Novo 560
5. Abuse of Discretion 561
6. Clear Error 561

7. Due Deference 561
8. Unreviewable 562

IX. APPEAL AND OTHER POST-CONVICTION PROCEEDINGS 562
A. Convictions Overturned 562
B. Other Cases Reversed and Remanded 563
C. No Constitutional Right to Appeal 564
D. Appeals Court Reluctant to Decide Constitutional Issues 564
E. Panel Bound by Circuit Precedent 564
F. District Court May Be Affirmed on Any Basis Supported by Record 564
G. Appeals Court Need Not Consider Argument Raised for First Time in Reply Brief 565
H. Appeals Court May Consider Constitutional Issue Sua Sponte 565
I. Waiver of Appeals 565
1. Specific Question About Waiver of Appeal Is Not Mandatory 565
2. Waiver of Appeal Will Not Overcome Improper Order of Restitution 565
J. Standards of Review 565
1. Appeal of Sentences [see Part VIII.LL.] 565
2. Constitutional Error [see also subparts J.4.c. and M.2.] 565
3. Plain Error (Fed. R. Crim. P. 52(b)) 566
a. Standard of Review 566
b. Issues Reviewed Under Plain Error Analysis 566
4. Harmless Error (Fed. R. Crim. P. 52(a)) 567
a. Standard on Review 567
b. Issues Reviewed Under Harmless Error Analysis 567
c. When Constitutional Error Is Harmless 567
5. Construction of Statutes and Regulations 567
a. Basic Canon of Construction 567
b. Statutes Are Presumed Constitutional 568
c. Standards for Some Specific Constitutional Challenges 568

d. Presumption That Congress Knows Law Includes Presumption That It Knows Court Interpretations 568
e. Presumption That Congress Is Clear When It Intends to Change Law 568
f. Plain Language Controls over Legislative History 568
g. Mens Rea Is Essential Element of Criminal Law 569
h. "Willfully" Versus "Knowingly" 569
i. Other Rules of Statutory Construction 569
j. Reviewed De Novo 569
k. When Regulations Have Effect of Law 569
l. Construction of Regulations Is Reviewed De Novo 569
m. When Courts Should Avoid Literal Construction 570
6. Reasonableness 570
7. De Novo 570
8. Abuse of Discretion 571
a. Wrong Legal Principle May Be Abuse of Discretion 571
b. Issues Reviewed Under Abuse of Discretion . . 571
9. Clearly Erroneous 573
10. Sufficiency of the Evidence 573
11. Great Deference 574
K. Ineffective Assistance of Counsel 574
1. Elements of Ineffective Assistance of Counsel . . . 574
2. Failure to File Requested Appeal 575
3. Failure to Know Law 575
4. Failure to Anticipate New Rule of Law 575
5. Failure to Raise Mental Defense 575
6. Plea Proceedings Can Cure Misstatement of Counsel 575
7. "Tactical Retreat" Is Not Ineffective Assistance . . . 575
8. Standard of Review 576
L. The "New Rule" Doctrine of Collateral Review (*e.g.*, Habeas Corpus) 576
1. Definition 576
2. New Rule Applies to All Cases Not Yet Final 576

M. Habeas Corpus 576
1. Pretrial Habeas Corpus (28 U.S.C. § 2241) 576
2. Habeas Corpus — Standard for Review of Constitutional Error 577
N. Habeas Corpus from State Conviction (28 U.S.C. § 2254) 577
1. Jurisdiction for Federal Relief and "Cause and Prejudice" Rule on Default 577
2. Facts Must Be Developed at State Level 577
3. "Raise It or Waive It" at State Level 578
4. State Remedies Must Be Exhausted 578
5. State Basis as Alternative Basis for Decision 578
6. Harmless-Error Test Applies 578
7. State Factual Findings "Presumed to Be Correct" 579
8. Federal Court Reluctance to Resolve Undecided Point of State Law 579
9. New Constitutional Rights Not Applied in Habeas Corpus 579
10. No Constitutional Right to Counsel 579
11. Standard of Review 579

TABLE OF FOURTH CIRCUIT CASES 580

I. ARREST, SEARCH AND SEIZURE

A. Search Warrants

1. Magistrate Judge's Finding of Probable Cause Entitled to "Great Deference." "[A]n appellate court must accord great deference to a magistrate's finding of probable cause. . . . [T]he magistrate's determination should be overturned . . . only if there is no 'substantial basis' for concluding that probable cause existed." *Simmons v. Poe*, 47 F.3d 1370, 1380 (4th Cir. 1995).

2. Challenging Facial Validity of Search Warrant: Right to Franks *Hearing.* In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court stated the narrow basis upon which a facially valid search warrant may be challenged: (1) if the defendant makes a substantial preliminary showing of a recklessly false statement in the affidavit *and* (2) if the defendant also

shows that the false statement was necessary to the finding of probable cause. In *Simmons v. Poe*, 47 F.3d 1370 (4th Cir. 1995), the Fourth Circuit upheld the district court's denial of a *Franks* hearing and restated its policy of construing *Franks* "very strictly, . . . in large part . . . *Franks* hearings are not required unless an omission from a warrant affidavit is the product of a deliberate falsehood or done in reckless disregard of the truth." *Simmons*, 47 F.3d at 1383.

3. Private Citizens May Aid Officers to Conduct Search (18 U.S.C. § 3105). Section 3105 of Title 18 authorizes the use of private citizens to act "in aid of" law enforcement officers conducting searches pursuant to search warrants. There must not be an independent purpose for the private citizens to be accompanying the officers. *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (denying defendant-officers' qualified immunity claim against allegation that private citizens with police were acting independently of police and were looking for items not named in search warrant).

B. Exceptions to Warrant Requirement

1. "Exit Search" Is Border Search. "[W]e join the several other circuit courts which have held that the *Ramsey* border search exception extends to all routine searches at the nation's borders, irrespective of whether persons or effects are entering or exiting from the country." *United States v. Oriakhi*, 57 F.3d 1290, 1297 (4th Cir.) (citing *United States v. Ramsay*, 431 U.S. 606 (1977)), *cert. denied*, 116 S. Ct. 400 (1995).

2. More Than "Routine" Border Search Requires Reasonable Suspicion. "[A] border search that goes beyond the routine is nevertheless justified by reasonable suspicion, a lesser standard than required for analogous non-border searches." *United States v. Oriakhi*, 57 F.3d 1290, 1297 (4th Cir.) (justifying exit search on basis of sovereign's need to protect itself from illegal currency export, especially as part of narcotics trade), *cert. denied*, 116 S. Ct. 400 (1995).

3. Consent to Search a Question of Fact. Determining whether consent to search was voluntary and free from express or implied duress or coercion requires resolution of questions of fact. *United States v. McDonald*, 61 F.3d 248, 254-55 (4th Cir. 1995) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); *United States v. Perrin*, 45 F.3d 869, 875 (4th Cir.), *cert. denied*, 115 S. Ct. 2287 (1995).

4. Police Need Not Inform Suspect of Right to Refuse Consent. "*Schneckloth* does not require that the subject of a search have knowledge of his right to refuse consent." *United States v. Perrin*, 45 F.3d 869, 875

(4th Cir.) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)), *cert. denied*, 115 S. Ct. 2287 (1995).

5. Search Incident to Arrest of Driver of Vehicle. Upon the arrest and removal of a driver from his vehicle, law officers are "free to conduct a search of the interior compartment of the vehicle, including the glove compartment." *United States v. Milton*, 52 F.3d 78, 80 (4th Cir.) (upholding warrantless search that found firearm in glove compartment), *cert. denied*, 116 S. Ct. 222 (1995).

6. Terry *(Terry v. Ohio, 392 U.S. 1 (1960)) Stops*

a. Definition. A *Terry* stop is a limited detention less intrusive than an arrest. "A brief but complete restriction of liberty is valid under *Terry*." *United States v. Leshuk*, 65 F.3d 1105, 1109 (4th Cir. 1995) (citations omitted) (determining that detention of those found near rural marijuana patch was justified). A *Terry* stop is evaluated objectively according to the facts of the stop, not by the subjective views of either the officers or the suspect. *Id.*; *United States v. McDonald*, 61 F.3d 248, 254 (4th Cir. 1995) (finding that illegal license tags justified stop regardless of whether officer also had reasonable suspicion from another source).

b. Based on "Reasonable Suspicion." "[R]easonable suspicion can arise from information that is less reliable than that required to show probable cause." *United States v. Perrin*, 45 F.3d 869, 872 (4th Cir.) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)), *cert. denied*, 115 S. Ct. 2287 (1995).

c. Reasonable Suspicion May Be Based on Tip with Some Corroboration. "We have held that [a]n informant's tip can provide the justification for a *Terry* stop even if the informant's reliability is unknown, and certainly can do so if . . . the information is corroborated." *United States v. Perrin*, 45 F.3d 869, 872 (4th Cir.) (finding officer had reasonable suspicion in light of two similar call-in tips, officer's personal knowledge of defendant, and reasonable inference that person suspected of dealing drugs might be armed), *cert. denied*, 115 S. Ct. 2287 (1995).

d. Scope. A *Terry* stop or detention must be "reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Leshuk*, 65 F.3d 1105, 1109 (4th Cir. 1995) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Officers may take actions, such as searches, that are "necessary to protect their safety, maintain the status quo, and confirm or dispel their suspicions." *Id.* at 1109 (quoting *United States v. Hensley*, 469 U.S. 221, 235 (1985)). They may question an

individual or attempt "to obtain his consent to a search when reasonable suspicion exists." *Id.* at 1110.

e. Length of Detention. "*Terry* stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion." *United States v. Leshuk*, 65 F.3d 1105, 1109 (4th Cir. 1995).

f. Permissible Actions by Officers at Terry *Stop.* The following actions do not necessarily elevate a *Terry* stop into an arrest or custodial detention: asking questions, asking for permission to conduct a search, drawing weapons, handcuffing a suspect, placing a suspect into a patrol car for questioning, or threatening or actually using force. *United States v. Leshuk*, 65 F.3d 1105, 1109-10 (4th Cir. 1995) (listing actions which do not necessarily elevate *Terry* stop to arrest).

C. Exclusionary Rule

1. Limitations. The Supreme Court has ruled that the exclusionary rule should be restricted to "those areas where its remedial objectives are most efficaciously served." *United States v. Al-Talib*, 55 F.3d 923, 930 (4th Cir. 1995) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)) (concluding that exclusionary rule is not remedy for alleged violation of Posse Comitatus Act, 18 U.S.C. § 1385).

2. Exclusion Not Required When Independent Basis Exists. "The Supreme Court has recognized that the Fourth Amendment does not require the suppression of evidence initially discovered during the government's illegal entry of private premises, if that evidence is also uncovered during a later legal search that is wholly independent of the improper one." *United States v. McDonald*, 61 F.3d 248, 254 (4th Cir. 1995) (citing *Murray v. United States*, 487 U.S. 533, 542 (1988)) (determining that regardless of legality of warrantless search of residence, same evidence subsequently discovered during unquestionably legal car stop was admissible). *United States v. Walton*, 56 F.3d 551, 554 (4th Cir. 1995) (finding subsequent search warrant to be independent of initial illegal entry).

3. Manner of Asserting Rights May Lead to Leon *Good-Faith Exception to Exclusionary Rule.* In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court established the good-faith exception to the exclusionary rule whereby an officer's objectively reasonable reliance on a search warrant may validate a search even if the search warrant is later ruled to be defective. In *United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995), the Fourth Circuit ruled that a search warrant based on a suspect's refusal to allow officers to

search his residence was improper and that the officers should have known that the mere assertion of constitutional rights cannot establish probable cause. However, the court of appeals allowed a good-faith exception because it found that the officers could have reasonably relied on the circumstances and nervous and aggressive manner in which the defendant asserted his rights. "Because the officers reasonably could have relied on the magistrate's determination that the manner in which Hyppolite asserted his rights could support a finding of probable cause, we affirm the district court's denial of Hyppolite's motion to suppress." *Id.* at 1157.

D. Standards for Review of Suppression Hearings

Factual findings by the district court at a suppression hearing are reviewed by an appeals court for clear error, but legal determinations are reviewed *de novo*. *United States v. Leshuk*, 65 F.3d 1105, 1108 (4th Cir. 1995); *United States v. McDonald*, 61 F.3d 248, 254 (4th Cir. 1995). "[I]t is the role of the district court to observe witnesses and weigh their credibility during a pre-trial motion to suppress. . . . We review credibility determinations and resulting factual findings for clear error, according deference to the district court." *United States v. Murray*, 65 F.3d 1161, 1169 (4th Cir. 1995) (citing *United States v. Locklear*, 829 F.2d 1314, 1317 (4th Cir. 1987)).

E. Standing to Assert Fourth Amendment Rights

1. Motions to Suppress Must Be Raised Pretrial (Fed. R. Crim. P. 12(b)(3)). Rule 12(b)(3) requires that motions to suppress be raised pretrial or they are waived under Rule 12(f). "Like all waiver rules, this one may sometimes operate to a defendant's significant disadvantage — even provable prejudice — but there are significant reasons for applying the rule with vigor." *United States v. Ricco*, 52 F.3d 58, 62 (4th Cir.), *cert. denied*, 116 S. Ct. 254 (1995). The rule places on the defendant a duty to inform his counsel of any evidence that might support a motion to suppress. *Id.* (finding irrelevant claim that *defense counsel* did not learn of evidence in time for filing motion).

2. Person Who Abandons Property Has No Standing. A person who voluntarily abandons property may not later assert a Fourth Amendment right concerning the property. Thus, he may not move to suppress evidence taken from the property. *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995) (finding bags and backpack were abandoned because defendants disclaimed ownership); *United States v. McDonald*, 61 F.3d 248 (4th Cir.

1995) (refusing to suppress evidence from abandoned car and apartment from which evicted).

3. No Standing to Contest Search of Third Party. "It is well-established that a criminal defendant does not have standing to contest the search of a third party unless he can show he had a reasonable expectation of privacy in the area searched or the property seized." *United States v. Al-Talib*, 55 F.3d 923, 930 (4th Cir. 1995) (citations omitted) (discussing search of car of third party); *see United States v. McDonald*, 61 F.3d 248 (4th Cir. 1995) (same).

4. No "Co-Conspirator Exception" to Standing Rule. A co-conspirator cannot assert a right of privacy in the property of another co-conspirator. *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995) (citing *United States v. Padilla*, 113 S. Ct. 1936, 1939 (1993)) (discussing admissibility of evidence seized in search of co-conspirator's car).

F. Wiretapping (18 U.S.C. § 2510, et seq.)

1. Justification for Wiretap "Not Great" but Must Be Specific (§ 2518(3)(c)). A wiretap is authorized only if normal investigative techniques have failed or are likely to fail. The burden on the government to demonstrate this justification is "not great," but it must be specific and based on the facts of the investigation. *United States v. Oriakhi*, 57 F.3d 1290 (4th Cir.) (finding wiretap appropriate because government showed, *inter alia*, that it had exhausted investigative techniques using surveillance, telephone tolls, informants, and undercover operatives), *cert. denied*, 116 S. Ct. 400 (1995).

2. Wiretap Invasion of Privacy Must Be Minimized (§ 2518(5)). "The minimization requirement [of the wiretap statute] is satisfied if on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *United States v. Oriakhi*, 57 F.3d 1290, 1300 (4th Cir.) (concluding that telephone call between defendant and his sister-in-law that included discussion of money was relevant to investigation of defendant for exporting drug proceeds), *cert. denied*, 116 S. Ct. 400 (1995).

G. Digital Display Pager Is Not Pen Register (18 U.S.C. §§ 3121-3127)

Sections 3121-3127 of Title 18 permit the government to seek a court order allowing the attachment of pen registers that record outgoing telephone numbers and trap-and-trace devices that record incoming telephone numbers to suspects' telephone lines. The Supreme Court ruled in *Smith v. Mary-*

land, 442 U.S. 735 (1979), that because these two apparatuses record only phone numbers without any substantive conversation, they do not violate the Fourth Amendment. In *Brown v. Waddell*, 50 F.3d 285 (4th Cir. 1995), the Fourth Circuit ruled that because they are capable of receiving *substantive* messages in code, digital display pagers are not pen registers or trap-and-trace devices. Therefore, use of digital display pagers according to a mere "certification" standard, which is less than probable cause, is not sanctioned by 18 U.S.C. §§ 3121-3127.

H. Standard for Warrantless Arrest

"A warrantless arrest . . . requires that the arresting officers possess probable cause to believe that the person has committed or is committing a felony offense. If probable cause was lacking, . . . the evidence seized as a result of [the] arrest should have been suppressed. To determine whether probable cause existed, courts look to the totality of the circumstances known to the officers at the time of the arrest." *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995) (citations omitted) (upholding warrantless arrest).

II. CONFESSIONS AND OTHER STATEMENTS

A. When Suspect Is "in Custody" for Miranda *Purposes*

1. Definition of "Custody." *Miranda* warnings are required when a suspect is subjected to custodial interrogation. "A suspect is 'in custody' for *Miranda* purposes if the suspect has been formally arrested or if he is questioned under circumstances in which his Freedom of action is curtailed to the degree associated with a formal arrest." *United States v. Leshuk*, 65 F.3d 1105, 1108 (4th Cir. 1995) (citations omitted) (finding that defendant was not in custody, but only subjected to *Terry* stop).

2. Terry *and Vehicular Stops Are Not Custody.* "In *Berkemer* [*v. McCarty*, 468 U.S. 420 (1984)], the Supreme Court held that *Miranda* warnings are not required when a person is questioned during a routine traffic stop or stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968)." *United States v. Leshuk*, 65 F.3d 1105, 1108 (4th Cir. 1995) (citing *Berkemer*, 468 U.S. at 437-42).

B. Edwards *Rule and Subsequent Confessions*

1. Interrogation Must Cease When Right to Counsel Invoked. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court ruled that a

custodial interrogation must cease when an accused invokes his right to counsel. There can be no further interrogation without counsel unless the accused himself initiates further conversation. But even if the police wrongfully proceed with interrogation, subsequent statements of the accused may not be tainted if a break in custody occurs. *Correll v. Thompson*, 63 F.3d 1279 (4th Cir.) (finding *Edwards* violation harmless), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995).

2. Miranda *Broader Than Fifth Amendment.* "*Elstad* thus makes clear that when the initial confession is obtained in violation of the Fifth Amendment, a later voluntary confession may be tainted by the earlier one, but when the earlier confession merely violated the technical proscriptions of *Miranda*, no taint analysis is necessary." *Correll v. Thompson*, 63 F.3d 1279, 1290 (4th Cir.), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995). Thus, a confession obtained in violation of *Miranda* and *Edwards* may still be voluntary. The rules established by those two cases may be violated without a violation of the Fifth Amendment. *Id.* at 1289-90 (citing *Oregon v. Elstad*, 470 U.S. 298 (1985)) (finding that despite prior *Edwards* violation, later confession was valid).

C. Sound of Voice

1. Sound of Voice Is Not Testimonial. "[T]he sound of a defendant's voice, even if heard during privileged communications, is not itself testimonial, and therefore is not protected by the Fifth Amendment's privilege against self-incrimination." Furthermore, it is not a violation of the right to counsel for an agent to hear the sound of a defendant's voice outside of the presence of counsel. *United States v. Oriakhi*, 57 F.3d 1290, 1299 (4th Cir.) (discussing use of agent's testimony that he heard defendant's voice while escorting him as prisoner to lay foundation for trial testimony that agent knew defendant's voice), *cert. denied*, 116 S. Ct. 400 (1995).

2. Sound of Voice Is Not Plea Negotiation (Fed. R. Crim. P. 11(e)(6)). "This rule, which is intended to promote active and open plea negotiations, limits the admissibility of *statements*, but does not protect the sound of an accused's voice, no more than it protects against any other descriptive aspect of the accused." *United States v. Oriakhi*, 57 F.3d 1290, 1299 (4th Cir.) (discussing agent's testimony that he heard defendant's voice at plea negotiations), *cert. denied*, 116 S. Ct. 400 (1995).

D. Conversants Assume Risk in Conversations

The Fourth Amendment does not guarantee the privacy of all conversations. If a criminal is conversing unwittingly with a police informant and if his conversation is being broadcast over radio, for example, then the criminal is assuming the risks that the conversation will not be kept private. *In re Askin*, 47 F.3d 100 (4th Cir.) (discussing congressional protection of privacy of radio portion of portable telephone conversations), *cert. denied*, 116 S. Ct. 382 (1995).

III. MISCELLANEOUS PRETRIAL ISSUES

A. Grand Jury

1. Quashing Indictment Because of Government Misconduct. A district court has the power to quash an indictment because of government misconduct but only when the misconduct "'substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *United States v. McDonald*, 61 F.3d 248, 253 (4th Cir. 1995) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988)).

2. Government's Failure to Disclose Exculpatory Evidence Is Not Misconduct. "The Court's ruling in *United States v. Williams*, 504 U.S. 36 (1992), made clear that a failure by the government to disclose even substantial exculpatory evidence to the grand jury does not constitute . . . misconduct." *United States v. McDonald*, 61 F.3d 248, 253 (4th Cir. 1995).

3. Standard of Review for Prosecutorial Misconduct: Clear Error. "Because the issue of prosecutorial misconduct is primarily a fact-based inquiry, we now hold that a district court's findings on that issue are reviewed for clear error." *United States v. McDonald*, 61 F.3d 248, 253 (4th Cir. 1995) (applying *de novo* review in this case because district court made no factual findings).

B. Venue (18 U.S.C. § 3237, Fed. R. Crim. P. 18)

1. Venue May Be in Multiple Districts. "For continuing offenses, Congress has provided that venue may be established in any district 'in which such offense was begun, continued, or completed.'" *United States v. Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995) (quoting 18 U.S.C. § 3237).

2. Proof of Venue. Venue is proved by a preponderance of the evidence. *United States v. Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995).

3. Venue in Conspiracies. Since an act of a single co-conspirator can be attributed to all co-conspirators, venue can be established in any district where any co-conspirator commits a conspiratorial act. *United States v. Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995).

4. "No Such Thing" as "Venue Entrapment." "There is no such thing as 'manufactured venue' or 'venue entrapment.' . . . Entrapment rules have no applicability to venue." *United States v. Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995).

C. Notice

1. Definition. "It is axiomatic that [d]ue process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Bryan*, 58 F.3d 933, 941 (4th Cir. 1995) (citing *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)).

2. Standard for Void-for-Vagueness Challenges. "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)). "The general rule [is] that '[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'" *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)).

D. Joinder and Severance (Fed. R. Crim. P. 8, 14)

1. Severance of Defendants at Discretion of Trial Court. The trial court has discretion whether to grant or deny a severance of defendants. The moving party may not simply establish that he would have a better chance of acquittal; he must establish actual prejudice from a joint trial. *United States v. Reavis*, 48 F.3d 763, 767 (4th Cir.), *cert. denied*, 115 S. Ct. 2597 (1995); *United States v. Smith*, 44 F.3d 1259, 1266 (4th Cir.) (holding that moving party must show that nonseverance "would compromise a specific trial right"), *cert. denied*, 115 S. Ct. 1970 (1995).

2. Standard When Need Asserted for Co-Defendant's Testimony. When a defendant seeks a severance of defendants because of an asserted need for a co-defendant's testimony, he must show: "(1) a bona fide need for the testimony of his co-defendant; (2) the likelihood that the co-defendant would testify at a second trial and waive his Fifth Amendment privilege; (3) the

substance of his co-defendant's testimony; and (4) the exculpatory nature and effect of such testimony." *United States v. Reavis*, 48 F.3d 763, 767 (4th Cir.) (upholding denial of severance because co-defendant put conditions on his willingness to testify), *cert. denied*, 115 S. Ct. 2597 (1995).

3. Joinder of Separate Offenses Is Permissible. "In cases where the offenses are identical or strikingly similar in the method of operation and occur over a short period of time, it is not an abuse of discretion to deny severance [of counts]." *United States v. Acker*, 52 F.3d 509, 514 (4th Cir. 1995) (denying severance of counts for four bank robberies over nine months).

E. Double Jeopardy

1. Double Jeopardy and Successive Conspiracies. See Drug Conspiracies: Double Jeopardy and Successive Conspiracies, *infra*, Part IV.F.10.

2. Double Jeopardy Bars Multiple Trials as Well as Multiple Punishments. "[T]he right conferred by the Double Jeopardy Clause cannot fully be vindicated by post-conviction relief because it is a prohibition not only of multiple punishments, but also of multiple trials." *Gilliam v. Foster*, 61 F.3d 1070, 1081 (4th Cir. 1995) (en banc) (8-5 decision) (enjoining state criminal trial).

3. Even Erroneous Acquittal Is Bar to Reprosecution. "[A] verdict of acquittal is final and a bar to all subsequent prosecution for the same offense, even where the acquittal was based upon an egregiously erroneous foundation." *United States v. Ham*, 58 F.3d 78, 82 (4th Cir.) (citing *Arizona v. Washington*, 434 U.S. 497, 503 (1978)), *cert. denied*, 116 S. Ct. 513 (1995).

4. No Double Jeopardy Bar If Defendant Consents to Mistrial. "If a judge declares a mistrial over the defendant's objection or without the defendant's consent, the defendant cannot be retried unless there was 'manifest necessity' for the termination of the first trial. . . . However, if the defendant moved for mistrial or otherwise consents to the mistrial, the defendant can be reprosecuted unless he can demonstrate that the prosecutor or judge provoked the mistrial." *United States v. Ham*, 58 F.3d 78, 82-83 (4th Cir.) (noting that because defendant did not object when court erroneously dismissed jury before special forfeiture verdict rendered, he could be retried on forfeiture charge), *cert. denied*, 116 S. Ct. 513 (1995); *see also United States v. Johnson*, 55 F.3d 976 (4th Cir. 1995) (finding no double jeopardy problem because defendant, albeit at trial court's invitation, moved

for mistrial at first trial); *Gilliam v. Foster*, 61 F.3d 1070 (4th Cir. 1995) (8-5 decision) (en banc) (enjoining state criminal trial because prior trial judge erroneously granted mistrial over defendant's objection).

5. Retrial May Be Barred Even If Defendant Caused Original Mistrial. As long as there was no bad faith, a mistake by defense counsel that caused the trial judge to grant a mistrial over the defense's objection may bar retrial. *Gilliam v. Foster*, 63 F.3d 287 (4th Cir. 1995) (habeas corpus ruling) (8-5 decision) (en banc).

6. Retrial Barred Only When Issue Definitively Resolved. In *United States v. Ham*, 58 F.3d 78 (4th Cir.), *cert. denied*, 116 S. Ct. 513 (1995), the defendant was convicted of racketeering at his first trial, but the jury found that only some of the alleged predicate acts had been proven. When the first conviction was overturned on appeal, the defendant argued that double jeopardy barred retrial of the omitted predicate acts. The Fourth Circuit ruled that "[a] jury's failure to decide an issue will be treated as an implied acquittal only where the jury's verdict necessarily resolves an issue in the defendant's favor." *Id.* at 85. The Fourth Circuit reasoned that the original jury's decision not to check some of the predicate acts could mean that the jury found either that he did not commit those acts or that the jury could not reach agreement on those acts. Therefore, the issue was not definitively or "necessarily" resolved. *Id.*

F. Vindictive Prosecution and Legitimate Plea Negotiations

1. Prosecutorial Vindictiveness. Prosecutorial vindictiveness almost always concerns *post-trial* or *post-some-other-judicial-proceedings* actions by the prosecutor designed to retaliate against a defendant for vindicating a legal right. *United States v. Williams*, 47 F.3d 658 (4th Cir. 1995).

2. Prosecutor Has Great Latitude in Plea Negotiations. "[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prose-cution's offer." *United States v. Williams*, 47 F.3d 658, 661 (4th Cir. 1995) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

3. Prosecutor May Threaten Defendant With Greater Charges. "*Bordenkircher* and *Goodwin* have made it clear that a prosecutor, in the context of plea negotiations, can threaten to bring a more severe indictment against a defendant to pressure him into pleading guilty." *United States v. Williams*, 47 F.3d 658, 662 (4th Cir. 1995) (citing *United States v. Goodwin*, 457 U.S. 368 (1982), and *Bordenkircher v. Hayes*, 434 U.S. 357

(1978)); *see also United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995) (noting that greater penalty was allowed for same charges), *cert. denied*, 116 S. Ct. 749 (1996).

4. Prosecutor May Threaten Greater Charges Against Defendant Who Refuses to Cooperate. "It follows from *Bordenkircher* and *Goodwin* that a prosecutor, in the context of plea negotiations, may threaten a defendant with a more severe prosecution and carry out those threats if the defendant refuses to cooperate with the police in the criminal investigation of another person. A defendant's cooperation with the police is a legitimate concession for a prosecutor to seek during plea negotiations." *United States v. Williams*, 47 F.3d 658, 662 (4th Cir. 1995) (citing *United States v. Goodwin*, 457 U.S. 368 (1982), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)) (reversing district court and agreeing with Third, Seventh, and Ninth Circuits).

5. Prosecutor Not Bound by Initial Charges. "The Supreme Court has already made clear, however, that a prosecutor is not bound by his initial assessment of the case embodied in the original charges. Before trial, the prosecutor's assessment of the proper extent of prosecution may not have crystallized, and the prosecutor should have the freedom to reassess the case and bring new charges if they are warranted." *United States v. Williams*, 47 F.3d 658, 664 (citing *United States v. Goodwin*, 457 U.S. 368, 381 (1982)).

G. Mental-Competency Hearing (18 U.S.C. § 4241)

1. Test for Mental Competence. "The conviction of a defendant when he is legally incompetent is a violation of due process. . . . The test for mental competence is whether the defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him.'" *United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

2. When Hearing Required. According to 18 U.S.C. § 4241, the issue of the defendant's mental competency to assist his lawyer in his defense and to understand the proceedings against him may be raised by either party or by the court *at any time prior to sentencing*. If "reasonable cause" exists that a defendant is mentally incompetent, the district court is obliged to conduct a competency hearing. *United States v. Mason*, 52 F.3d 1286 (4th Cir. 1995) (remanding for competency hearing or new trial because district court used stricter legal standard than "reasonable cause" and because "reasonable cause" did exist).

3. Retrospective Competency Hearing Is Possible. Although obviously difficult, a hearing to determine if a defendant was competent at some prior stage of the proceedings is possible. *United States v. Mason*, 52 F.3d 1286 (4th Cir. 1995) (indicating that district court must grant new trial if it finds that retrospective hearing is impossible).

H. Guilty Pleas (Fed. R. Crim. P. 11)

1. Failure to Inform Defendant of Mandatory Minimum Sentence at Rule 11 Hearing Invalidates Plea. In *United States v. Goins*, 51 F.3d 400 (4th Cir. 1995), the Fourth Circuit overturned a guilty plea because the district court did not inform the defendant of a mandatory minimum sentence at the Rule 11 hearing and because there was no indication in the record that the defendant (or his counsel) otherwise knew of the mandatory sentence. Although the mandatory sentence was included in the presentence report, the Fourth Circuit held that the presentence report issued subsequent to the Rule 11 hearing could not cure the Rule 11 failure.

2. Court Need Not Inform Defendant of Guideline Range. "In *United States v. Good*, 25 F.3d 218, 219 (4th Cir. 1994), we held that Rule 11(c)(1) does not require a district court to advise the defendant about the applicable guideline range before accepting a guilty plea." *United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995).

3. Six-Factor Test for Withdrawal of Guilty Plea. In *United States v. Moore*, 931 F.2d 245, 248 (4th Cir.), *cert. denied*, 112 S. Ct. 171 (1991), the Fourth Circuit laid out the six factors that it will consider in assessing whether a defendant had a "fair and just" reason in support of his motion to withdraw his guilty plea: "(1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between the entering of the plea and the filing of the motion; (4) whether the defendant has had close assistance of competent counsel; (5) whether withdrawal will cause prejudice to the government; (6) and whether it will inconvenience the court and waste judicial resources." *United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995); *see also United States v. Sparks*, 67 F.3d 1145 (4th Cir. 1995).

4. Three Factors Most Important. "The factors that speak most straightforwardly to the question whether the movant has a fair and just reason to upset settled systemic expectations by withdrawing her plea are the first, second, and fourth. In contrast, the third, fifth, and sixth factors are better understood as countervailing considerations that establish how heavily

the presumption should weigh in any given case." *United States v. Sparks*, 67 F.3d 1145, 1154 (4th Cir. 1995).

5. Extremely Difficult to Withdraw Guilty Plea (Fed. R. Crim. P. 32(e)). An "appropriately conducted Rule 11 proceeding . . . raise[s] a strong presumption that the plea is final and binding." *United States v. Puckett*, 61 F.3d 1092, 1099 (denying withdrawal of plea) (quoting *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992) (en banc), *cert. denied*, 115 S. Ct. 672 (1994). "A district court's assessment of these factors is reviewed on appeal for abuse of discretion." *United States v. Sparks*, 67 F.3d 1145, 1150 (4th Cir. 1995) (upholding district court's refusal to allow withdrawn plea based on defendant's claim of good-faith belief that her acts were legal).

6. To Withdraw Guilty Plea, Defendant Bears Burden of Proof. "Because it is essential to an orderly working of the criminal justice system that guilty pleas tendered and accepted in conformity with Rule 11 can be presumed final . . . , it is the defendant's burden to demonstrate that she should be permitted to withdraw her plea." *United States v. Sparks*, 67 F.3d 1145, 1154 (4th Cir. 1995) (concluding that defendant failed to carry burden).

7. To Withdraw Guilty Plea Because of Alleged Legal Innocence, An Actual Defense Must Be Shown. Under the second part of the six-part *Moore* test, a defendant seeking to withdraw his guilty plea must do more than assert his legal innocence. He must show that he has an actual legal defense. *United States v. Sparks*, 67 F.3d 1145 (4th Cir. 1995) (noting that good-faith belief in legal innocence is not enough).

8. To Withdraw Guilty Plea Because of Alleged Lack of Close Assistance of Counsel, Counsel Must Be Objectively Bad. "A defendant can demonstrate the absence of close assistance of counsel for purposes of the *Moore* test only by showing that her counsel's performance fell below an objective standard of reasonableness." *United States v. Sparks*, 67 F.3d 1145, 1153 (4th Cir. 1995) (citations and internal quotations omitted) (noting that evidence against defendant was one factor proving that counsel's performance was satisfactory).

I. Speedy Trial (Sixth Amendment, 18 U.S.C. § 3161)

1. Four-Part Constitutional Test. "To establish a violation of the Sixth Amendment right to a speedy and public trial, a defendant must show first that the Amendment's protections have been triggered by 'arrest, indictment,

or other official accusation.' The defendant must then show that on balance, four separate factors weigh in his favor: 'whether the delay before trial was uncommonly long, whether the government or the defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.'" *United States v. Thomas*, 55 F.3d 144, 148 (4th Cir.) (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)) (concluding that although uncommonly long delay of more than two years and prejudice were shown, record showed that defendant waived his rights and had state prosecution pending against him), *cert. denied*, 116 S. Ct. 266 (1995).

2. Statutory Speedy Trial Right Triggered Only by Arrest or Indictment. Under 18 U.S.C. § 3161 *et seq.*, statutory speedy trial rights are triggered only by an arrest or an indictment. In *United States v. Thomas*, 55 F.3d 144 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995), the Fourth Circuit rejected the defendant's claim that his speedy trial rights were triggered by a complaint, an unexecuted arrest warrant, and a detainer filed against him.

3. Replacement Attorney Has No Right to Re-Start Thirty Day Period (§ 3161(c)(2)). The trial of a defendant who has appeared with counsel may not commence sooner than thirty days after appearance with counsel. However, if the defendant replaces his counsel, he has no right to an additional continuance of thirty days. *United States v. Hoyte*, 51 F.3d 1239 (4th Cir.), *cert. denied*, 116 S. Ct. 346 (1995).

4. Plea of Not Guilty Required (§ 3161(c)(1)). The seventy-days-until-trial rule is triggered by § 3161(c)(1) only when a plea of not guilty has been entered. *United States v. Tootle*, 65 F.3d 381 (4th Cir. 1995) (concluding that indictment that was dismissed by district court should be reinstated), *cert. denied*, 64 U.S.L.W. 3657 (U.S. Apr. 1, 1996) (No. 95-7756).

5. Complexity of Case Is Rationale for Continuance (§ 3161(h)(8)(B)). Under this subsection, a trial may be continued if the number of defendants or charges, or difficult questions of law or fact make the case "unusual" or "complex." *United States v. Reavis*, 48 F.3d 763 (4th Cir.), *cert. denied*, 115 S. Ct. 2579 (1995).

J. District Court May Not Deny Government's Motion to Dismiss an Indictment (Fed. R. Crim. P. 48(a))

Absent bad faith on the part of the government, a district court may not refuse to grant the government's motion to dismiss an indictment. Prosecu-

torial discretion is a power of the Executive under the Constitution. *United States v. Smith*, 55 F.3d 157 (4th Cir. 1995).

K. Substitute Appointed Counsel Not Required When Defendant's Own Behavior Creates Conflict With Counsel

"In *United States v. Hanley*, we enumerated three points of consideration in determining whether a district court may properly deny a request for substitute counsel: (1) whether the motion for substitute counsel was timely; (2) whether the district court's inquiry into the defendant's complaint was sufficient; and (3) whether the conflict between attorney and client was so great as to amount to a 'total lack of communication,' thereby preventing an adequate defense. 974 F.2d 14, 17 (4th Cir. 1992). . . . The district court is not compelled to substitute counsel when the defendant's own behavior creates a conflict." *United States v. Morsley*, 64 F.3d 907, 918 (4th Cir. 1995) (concluding that defendant should be denied third appointed counsel), *cert. denied*, 116 S. Ct. 749 (1996).

L. Disclosure of Confidential Informant Not Required When Informant Was Used Only to Obtain Search Warrant

The government is not required to disclose the identity of a confidential informant when the informant was used by the government only for the limited purpose of obtaining a search warrant. *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995).

M. Motion for Return of Property (Fed. R. Crim. P. 41(e))

1. Grounds. Federal Rule of Criminal Procedure 41(e) allows a "person aggrieved by an unlawful search and seizure" or by the government's retention of property that it no longer has need of, to move the district court for a return of property. The rule applies to anyone, whether or not one is a criminal defendant, at any time, or whether or not criminal proceedings are pending. *United States v. Garcia*, 65 F.3d 17, 19-20 (4th Cir. 1995).

2. Federal Government Cannot Return Firearms It Does Not Possess. In *United States v. Presley*, 52 F.3d 64 (4th Cir.), *cert. denied*, 116 S. Ct. 237 (1995), the trial court sua sponte ordered the forfeiture of fifty-two firearms seized in the case. The Fourth Circuit ruled that while the order may have been premature in the absence of a motion, the order was essentially meaningless because state authorities, rather than the federal government, had seized and retained the firearms.

N. Equitable Estoppel Cannot Be Asserted to Uphold Crime

"The doctrine of equitable estoppel is rarely invoked against the government," and "a calculated decision to commit a felony cannot be termed reasonable reliance." *United States v. Agubata*, 60 F.3d 1081, 1083-84 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 929 (1996).

O. Brady/Giglio *Violations*

1. Standard for Brady *Issues.* "Under *Brady v. Maryland*, 373 U.S. 83, 87. . . (1963), the defendants have the right to *favorable* evidence that is of *material* import in the determination of guilt or punishment. . . . '[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *United States v. Hoyte*, 51 F.3d 1239, 1242 (4th Cir.) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)) (noting probable *Brady* violation but concluding that violation was not serious enough to undermine confidence in outcome), *cert. denied*, 116 S. Ct. 346 (1995); *see also United States v. Johnson*, 54 F.3d 1150 (4th Cir.) (noting that allegedly withheld evidence was ultimately disclosed at trial and concluding that outcome of case was not affected), *cert. denied*, 116 S. Ct. 266 (1995).

2. When Prosecution Possesses Brady *Material.* The prosecution is responsible for turning over to the defense any *Brady* material that is in its "actual or constructive possession." *United States v. Capers*, 61 F.3d 1100, 1103-04 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995). But if the prosecution team, which includes its investigators, does not know of the existence of *Brady* material, it cannot be deemed to have possessed it. *Id.* at 1104.

3. No Disclosure Required If Evidence Available to Defense. If exculpatory or impeaching evidence was available to the defense from other sources or through diligent investigation, then the defense is deemed to have had the ability to possess the evidence and the government was not required to disclose it. *Barnes v. Thompson*, 58 F.3d 971 (4th Cir.), *cert. denied*, 116 S. Ct. 435 (1995).

P. Defendant Must Show Prejudice in Denial of Motion to Continue

"We review the district court's refusal to grant a continuance for abuse of discretion. . . . Abuse of discretion has been defined in such circum-

stances as 'an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for a delay' . . . . However, in order to gain a reversal of the district court's denial of a continuance, the defendant must show prejudice. . . . [T]he defendants were required to assert specific ways in which their defense could have been improved with the grant of a continuance." *United States v. Myers*, 66 F.3d 1364, 1369-70 (4th Cir. 1995) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)).

IV. DRUG OFFENSES

A. Congress May Regulate Interstate and Intrastate Drug Activities Under the Commerce Clause

In *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Supreme Court found unconstitutional the federal statute (18 U.S.C. § 922(q)) prohibiting the possession of firearms in school zones. The Court found that Congress did not have constitutional authority to enact the statute because there was no "substantial effect" on interstate commerce. In *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995), the Fourth Circuit rejected a *Lopez*-inspired attack on the primary federal drug trafficking statute, 21 U.S.C § 841. The Fourth Circuit upheld congressional findings that intrastate drug activities have a substantial effect on interstate commerce. *Id.* The court of appeals also pointed out that because the statute itself is constitutional, the government has no additional burden to prove the intrastate aspect in each case. *Id.*

B. Quantity of Drugs

1. Proof at Trial. The quantity of drugs is a sentencing issue; the government need only show a measurable amount of drugs at trial. *United States v. Johnson*, 54 F.3d 1150 (4th Cir.) (noting amount of drugs required for finding of continuing criminal enterprise), *cert. denied*, 116 S. Ct. 266 (1995).

2. Proof at Sentencing. The government is required to prove the quantity of drugs at sentencing by a preponderance of the evidence. The decision of the sentencing court regarding quantity will not be overturned on appeal unless it was clearly erroneous. *United States v. Al-Talib*, 55 F.3d 923 (4th Cir. 1995); *United States v. McDonald*, 61 F.3d 248 (4th Cir. 1995) (concluding that statements, direct and hearsay, of cooperating co-conspirators together with quantity seized proved total quantity); *United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995) (remanding case because of miscalculation and lack of evidence of total amount of cocaine), *cert. denied*,

116 S. Ct. 749 (1996). If the quantity is disputed, the sentencing court must make an independent resolution of the factual issue at sentencing. *United States v. Heater*, 63 F.3d 311 (4th Cir. 1995) (upholding sentencing range), *cert. denied*, 116 S. Ct. 796 (1996).

3. Relevant Conduct Versus Offense of Conviction. In calculating drug quantities for sentencing, a distinction must be made between the drug trafficking offense of conviction (*e.g.*, 21 U.S.C. § 841) and relevant conduct (U.S.S.G. § 1B1.3) of other drug trafficking. Only the amounts attributable (reasonably foreseeable to the defendant) to the statutory offense of conviction can be used to trigger any statutory minimum terms of imprisonment. Relevant conduct can be used to add additional imprisonment after it is determined whether any statutory minimums apply. *United States v. Estrada*, 42 F.3d 228 (4th Cir. 1994) (concluding that application occurs irrespective of plea agreement provisions).

4. Quantity of LSD (U.S.S.G. § 2D1.1(c), comment. (n.18); App. C, Amend. 488). When LSD is in solid form on a solid-carrier medium (*e.g.*, on a blotter paper), the quantity for sentencing is calculated by multiplying the number of doses by .4 milligrams. When LSD is in liquid form in a liquid-carrier medium and it is possible to determine the actual weight of the LSD in the medium, the actual weight must be used at sentencing. When LSD is in liquid form and it is not possible to determine the actual weight of the LSD in the medium, then the number of doses should be determined and that number multiplied by .05 milligrams to determine the weight for sentencing. *United States v. Turner*, 59 F.3d 481 (4th Cir. 1995).

5. Quantity of Crack From Quantity of Cocaine. In a cocaine base (crack) conspiracy, the court must convert the known amount of cocaine into cocaine base to determine the final quantity of drugs. *United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995). The Fourth Circuit upheld in *United States v. Paz*, 927 F.2d 176 (4th Cir. 1991), the trial court's use of a formula to the effect that 100 grams of cocaine will yield 88 grams of crack. *United States v. Ricco*, 52 F.3d 58, 63 (4th Cir.) (upholding use of *Paz* formula and recognizing "the necessarily imperfect nature of the sentencing court's determination" but upholding it nonetheless), *cert. denied*, 116 S. Ct. 254 (1995).

6. Quantity of Marijuana (U.S.S.G. § 2D1.1(c)). There is no constitutional problem with the Sentencing Commission having created an irrebuttable presumption that when an offense involves at least fifty marijuana plants that each plant shall be treated for sentencing purposes as weighing one kilogram. *United States v. Heater*, 63 F.3d 311, 323 (4th Cir. 1995) (de-

clining to decide issue of weight of live versus harvested plants), *cert. denied*, 116 S. Ct. 796 (1996) .

7. Standard of Review On Appeal: Clear Errror. A district court's calculation of the quantity of drugs at sentencing is reviewed on appeal for clear error. *United States v. Hyppolite*, 65 F.3d 1151, 1158 (4th Cir. 1995); *United States v. Tanner*, 61 F.3d 231, 238 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 925 (1996).

C. Aider and Abettor Subject to Mandatory Sentences (21 U.S.C. § 841).

In *United States v. Pierson*, 53 F.3d 62 (4th Cir. 1995), the Fourth Circuit ruled that both the federal aiding-and-abetting statute, 18 U.S.C. § 2, and the Sentencing Guidelines, § 2X2.1, require that an aider and abetter of a drug trafficking offense is subject to the same mandatory minimum sentences as a principal drug trafficker. *Pierson*, 53 F.3d at 64-65.

D. Prosecution of Physician for Drug Dealing (21 U.S.C. § 841)

In prosecuting a physician for illegally distributing a controlled substance, the government must show that the physician acted outside of the bounds of medical practice or not for legitimate medical purposes in the usual course of his professional medical practice. "There are no specific guidelines concerning what is required to support a conclusion that an accused acted outside the usual course of professional practice. Rather, the courts must engage in a case-by-case analysis of evidence to determine whether a reasonable inference of guilt may be drawn from specific facts." *United States v. Singh*, 54 F.3d 1182, 1187 (4th Cir. 1995) (quoting *United States v. August*, 984 F.2d 705, 713 (6th Cir. 1992) (citations omitted), *cert. denied*, 114 S. Ct. 158 (1993)) (finding that evidence was sufficient for conviction); *see also United States v. Tran Trong Cuong*, 18 F.3d 1132, 1141 (4th Cir. 1994) (explaining requirements for convicting physician of illegally distributing controlled substance).

E. Statutory and Sentencing Distinctions Between "Crack" and Cocaine Upheld (21 U.S.C. § 841, U.S.S.G. § 2D1.1)

The drug statute is not ambiguous about the distinction between "crack" and cocaine, nor is it a violation of equal protection or due process to sentence crack cases more severely. *United States v. Fisher*, 58 F.3d 96, 99-100 (4th Cir.), *cert. denied*, 116 S. Ct. 329 (1995); *United States v. Johnson*, 54 F.3d 1150, 1163-64 (4th Cir.) (concluding that crack penalties are not racially discriminatory), *cert. denied*, 116 S. Ct. 266 (1995).

F. Drug Conspiracy (21 U.S.C. § 846)

1. Proof of Conspiracy. "To sustain a conspiracy conviction, the government must show beyond a reasonable doubt that a defendant knew of the existence of, and voluntarily participated in, the conspiracy . . . . Of course, knowledge and participation may be proven by circumstantial evidence." *United States v. Morsley*, 64 F.3d 907, 919 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996). "The government must prove: '(1) an agreement between two or more persons (who are not government agents), (2) to commit in concert an unlawful act.'" *United States v. Heater*, 63 F.3d 311, 323 (4th Cir. 1995) (quoting *United States v. Giunta*, 925 F.2d 758, 764 (4th Cir. 1991)) (explaining that proof is *usually* by circumstantial evidence), *cert. denied*, 116 S. Ct. 796 (1996).

2. Cannot Conspire With Government Agent. "In *United States v. Hayes*, 775 F.2d 1279, 1283 (4th Cir. 1995), we held a defendant cannot be convicted for conspiring with a government agent." *United States v. Lewis*, 53 F.3d 29, 33 (4th Cir. 1995).

3. No Overt Act Required for Drug Conspiracy. Proof of a drug conspiracy under 21 U.S.C. § 846, unlike proof of a general conspiracy under 18 U.S.C. § 371, does not require proof of an overt act. *United States v. Heater*, 63 F.3d 311, 323-24 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996).

4. Only Slight Connection or One Level Required. "[O]nce a drug conspiracy is established, all that is required is a 'slight connection between the defendant and the conspiracy to support the conviction.'" *United States v. Al-Talib*, 55 F.3d 923, 931-32 (4th Cir. 1995) (quoting *United States v. Brooks*, 957 F.2d 1138 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992)). "Moreover, a defendant can be convicted of conspiracy if the evidence shows a defendant's participation in only one level of the conspiracy charged in the indictment." *United States v. Johnson*, 54 F.3d 1150, 1154 (4th Cir.) (deciding that all defendants participated in some level of conspiracy), *cert. denied*, 116 S. Ct. 266 (1995); *see also United States v. Morsley*, 64 F.3d 907, 919 (4th Cir. 1995) (concluding that even minor role is adequate), *cert. denied*, 116 S. Ct. 749 (1996).

5. Mere Knowledge or Acquiescence Not Enough. "[M]ere knowledge, acquiescence, or approval of a crime is not enough to establish that an individual is part of a conspiracy to distribute drugs." *United States v. Heater*, 63 F.3d 311, 314 (4th Cir. 1995) (quoting *United States v. Pupo*,

841 F.2d 1235, 1238 (4th Cir.), *cert. denied*, 488 U.S. 842 (1988)), *cert. denied*, 116 S. Ct. 796 (1996).

6. Single v. Multiple Conspiracies. "A single conspiracy exists when '[t]he conspiracy had the same objective, it had the same goal, the same nature, the same geographic spread, the same results, and the same product.'" *United States v. Johnson*, 54 F.3d 1150, 1154 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995); *see also United States v. Capers*, 61 F.3d 1100, 1107 (4th Cir. 1995) (quoting *Johnson*, 54 F.3d at 1154), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995). *United States v. Gray*, 47 F.3d 1359, 1368-69 (4th Cir. 1995) (deciding that court must instruct on multiple theories only if supported by facts).

7. Co-Conspirators May Also Be Competitors. The fact that drug dealers compete for supplies and customers does not alone rule out the fact that they are also part of the same conspiracy. *United States v. Johnson*, 54 F.3d 1150, 1154 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995).

8. Conspiracy May Be Loose-Knit Association. A drug conspiracy need not have an identifiable organizational structure, nor need every co-conspirator know the full scope, all the activities, or all the members of the conspiracy. *United States v. Johnson*, 54 F.3d 1150, 1154 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995). "Even if 'no formal structure could have been inferred, the interdependence of participants charged . . . in pursuing the ultimate illegal object, easily could be.'" *United States v. Capers*, 61 F.3d 1100, 1108 (4th Cir. 1995) (quoting *United States v. Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993)), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995).

9. Co-Conspirators Need Not Know All Details or All Other Co-Conspirators. "But the government need not prove that a defendant knew everyone in the conspiracy. Nor does the government have to prove that the defendant participated in all phases or knew all the details of the conspiracy." *United States v. Capers*, 61 F.3d 1100, 1108 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995); *see also United States v. Morsley*, 64 F.3d 907, 919 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996).

10. Double Jeopardy and Successive Conspiracies. In determining whether successive conspiracy charges have implicated double jeopardy, the Fourth Circuit considers five factors: "(1) the time periods of the conspiracies; (2) the place where the conspiracies occurred; (3) the co-conspirators; (4) the overt acts done in furtherance of the conspiracies; and (5) the sub-

stantive statutes involved." *United States v. Hoyte*, 51 F.3d 1239, 1245-46 (4th Cir.) (finding that alleged conspiracies were separate and therefore no double jeopardy violation occurred), *cert. denied*, 116 S. Ct. 346 (1995).

11. Admission of Co-Conspirator's Statement (Fed. R. Evid. 801(d)(2)(E)). "In order to admit evidence under 801(d)(2)(E), the moving party must show by a preponderance of independent evidence that (1) a conspiracy existed; (2) the declarant and the defendant were members of the same conspiracy; and (3) the statement was made in the course of and in furtherance of that conspiracy." *United States v. Heater*, 63 F.3d 311, 324 (4th Cir. 1995) (concluding that government's failure to link declarant to conspiracy was harmless error and, alternatively, that statement could be admitted as statement of defendant), *cert. denied*, 116 S. Ct. 796 (1996).

12. No Redundant Convictions for Drug Conspiracy (§ 846) and Continuing Criminal Enterprise (§ 848). Under the same set of facts, a defendant may not be convicted for both a drug conspiracy and a continuing criminal enterprise. *United States v. Heater*, 63 F.3d. 311, 318 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996); *United States v. Johnson*, 54 F.3d 1150, 1162-63 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995); *United States v. Reavis*, 48 F.3d 763, 772 (4th Cir.), *cert. denied*, 115 S. Ct. 2597 (1995).

G. Continuing Criminal Enterprise (21 U.S.C. § 848)

1. Four Essential Elements. "Conviction for participating in a continuing criminal enterprise (CCE) requires that the government prove four elements: (1) the defendant committed a felony violation of the federal drug laws; (2) the violations were part of a continuing series of violations of the drug laws; (3) the series of violations were undertaken by the defendant in concert with five or more other persons with respect to whom the defendant occupied a position of organizer, supervisor or any other position of management; (4) the defendant obtained substantial income or resources from the continuing series of violations." *United States v. Heater*, 63 F.3d 311, 316-17 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996).

2. The Head and Five Participants. A continuing criminal enterprise may have more than one head, and it is not necessary to show that a defendant supervised or acted in concert with five other individuals at the same time. *United States v. Johnson*, 54 F.3d 1150, 1155 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995). Every defendant need not have personal contact with the five participants because organizational authority and responsibility may

be delegated. *United States v. Heater*, 63 F.3d 311, 317 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996).

3. Single Conspirator May Be Convicted Despite Acquittals of Co-Conspirators. "[A]cquittals of some co-defendants on conspiracy charges does not prevent the jury from returning a conviction against one remaining conspirator." *United States v. Heater*, 63 F.3d 311, 317 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996).

4. Life Sentence Constitutional. A life sentence, even for a first-time drug offender, under this statute does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *United States v. Johnson*, 54 F.3d 1150, 1164 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995).

H. Section 851 Information Does Not Apply to Sentencing Enhancements (21 U.S.C. § 851)

Section 851 of Title 21 requires the government to file prior to trial or plea an information stating a defendant's prior convictions if it is seeking to increase the defendant's sentence because of the prior convictions. *United States v. Foster*, 68 F.3d 86, 89 (4th Cir. 1995). However, § 851 applies only to increased sentences provided for by statute. *Id.* It does not apply to sentencing enhancements under the Guidelines. *Id.*

I. Forfeitures

1. Proof Is By Preponderance (21 U.S.C. § 853). A forfeiture under § 853 is a penalty, not an element of a substantive drug offense. Proof is, therefore, only by a preponderance of the evidence. *United States v. Tanner*, 61 F.3d 231, 234-35 (4th Cir. 1995) (agreeing with six other circuits by upholding preponderance jury instruction), *cert. denied*, 116 S. Ct. 925 (1996).

2. In Personam Forfeitures: When Proportionality Test Is Required (21 U.S.C. § 853). Forfeitures under § 853 are *in personam* and are fines. Therefore, they are subject to proportionality review (whether fine is proportional to seriousness of offense) under the Excessive Fines Clause of the Eighth Amendment. In *United States v. Wild*, 47 F.3d 669, 676 (4th Cir.), *cert. denied*, 116 S. Ct. 128 (1995), the Fourth Circuit held that the value of the property forfeited under subsections 853(a)(2) and (3) must be considered in order to determine whether the forfeiture constitutes an excessive fine. Because the property involved under subsection 853(a)(1) is "derived from" illegal activity, no excessiveness analysis is required. *Id.*

3. In Rem Forfeitures: Instrumentality Test (18 U.S.C. §§ 881(a)(6) & (7)). Concerning *in rem* forfeitures under this subsection, an instrumentality test focusing on the forfeited property's role in the offense is required to determine whether the forfeiture violates the Excessive Fines Clause of the Eighth Amendment. *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994). Under the instrumentality test, courts must consider "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder." *Id.*

V. FIREARMS OFFENSES

A. Dysfunctional Bomb Is Dangerous Weapon (18 U.S.C. § 111(b))

Even a dysfunctional bomb is a "dangerous weapon" under 18 U.S.C. § 111(b) (prohibiting assault on federal officers). *United States v. Hamrick*, 43 F.3d 877, 883 (4th Cir.) (en banc), *cert denied*, 116 S. Ct. 90 (1995). "A bomb is always dangerous . . . . [T]he display of a bomb, like the display of a gun, instills fear in the average citizen . . . . Even a dysfunctional bomb engenders in the assault victims the fear of bodily injury beyond that instilled by a simple assault . . . . [A]n inoperable bomb creates a danger that a violent response will ensue." *Id.* at 881-83. The *Hamrick* Court agreed with all circuits that have ruled in similar contexts and held that a mail bomb, whether functional or not, is a dangerous weapon. *Id.*

B. Felon in Possession (18 U.S.C. § 922(g)(1)) and Armed Career Criminal (18 U.S.C. § 924(e)(1))

1. Armed Career Criminal Act Is Constitutional. In *United States v. Presley*, 52 F.3d 64, 67-68 (4th Cir.), *cert. denied*, 116 S. Ct. 237 (1995), the Fourth Circuit sustained the Armed Career Criminal Act against constitutional challenges based on the Commerce Clause, the Equal Protection Clause, the Due Process Clause, the Double Jeopardy Clause, the Ex Post Facto Clause, and the Cruel and Unusual Punishments Clause.

2. Felon in Possession (18 U.S.C. § 922(g)(1)): Elements. In *United States v. Langley*, 62 F.3d 602, 615 (4th Cir. 1995) (en banc), *cert denied*, 116 S. Ct. 797 (1996), the Fourth Circuit agreed with the First and Second Circuits and affirmed the standard construction of the felon-in-possession statute, namely, that the government must show only that the convicted felon *knowingly possessed* a firearm and that the firearm had an interstate nexus. The defendant had asserted that a 1986 amendment (18 U.S.C. § 924(a)) to

the sentencing part of the statute meant that the government must prove not only *knowing possession* but also that the felon *knew of his prior conviction* and *knew* of the *interstate nexus* of the firearm. *Id.* at 608. But, in *United States v. Tomlinson*, 67 F.3d 508 (4th Cir. 1995), the Fourth Circuit ruled that "when a defendant's status as a convicted felon turns on the possession of a particular type of firearm [*e.g.*, machine gun, short-barreled shotgun], a jury must be instructed that a defendant is not a convicted felon if, despite possessing such a firearm, he did not know it had the particular nature on which his 'convicted' status turns." *Id.* at 513-14. In *United States v. Milton*, 52 F.3d 78 (4th Cir.), *cert denied*, 116 S. Ct. 222 (1995), the Fourth Circuit agreed with three other circuits and ruled that the jury *must* hear of the fact of the prior felony conviction, which is an essential element of the crime. Otherwise the jurors mistakenly might think that the defendant was standing trial merely for possessing a firearm. *Id.* at 81.

3. Evidence of Possession. In *United States v. Johnson*, 55 F.3d 976 (4th Cir. 1995), the Fourth Circuit ruled that there was sufficient evidence of possession when pursuing police saw the defendant stick his hand out of his car and drop a dark object at a spot where they later found a revolver. *Id.* at 979-80. *But cf. United States v. Blue*, 957 F.2d 106, 108 (4th Cir. 1993) (concluding that evidence of possession was insufficient when firearm found beneath car seat of defendant and defendant only "dipped" his shoulder in sight of police).

4. When Civil Rights Restored. A defendant may not be convicted of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), if his right to possess a firearm has been restored by state law, 18 U.S.C. § 921(a)(20). "If a felon has not received a certificate restoring civil rights, a court looks to 'the whole of state law' of the jurisdiction in which the predicate conviction occurred to determine whether a felon's civil rights have been restored . . . . The restoration of civil rights need not be complete, but it must be substantial . . . . The term 'civil rights' generally includes 'the right to vote, the right to hold public office, and the right to serve on a jury' . . . . This Court has held that the loss of the right to sit on a jury 'precludes a finding of a substantial restoration of civil rights necessary to satisfy § 921(a)(20).'" *United States v. Morrell*, 61 F.3d 279, 280-81 (4th Cir. 1995) (citations omitted). In *United States v. Thomas*, 52 F.3d 82 (4th Cir. 1995), the Fourth Circuit ruled that the government did not have to prove the specific fact that the defendant's civil rights had not been restored when it already had proved that the defendant had possessed the firearm within a year of the commission of the prior felony crime. North Carolina state law restores

civil rights only after five years from final release from custody or parole. *Id.* at 85-86.

5. Involuntary Manslaughter, Escape, and Robbery Are Violent Felonies. A felon in possession of a firearm (18 U.S.C. § 922(g)(1)) can be sentenced as an armed career criminal (18 U.S.C. § 924(e)) if he has three prior convictions for violent or drug felonies. In *United States v. Williams*, 67 F.3d 527 (4th Cir. 1995), the Fourth Circuit rejected an argument based on legislative history that involuntary manslaughter is not a violent felony because it is not a specific-intent crime. *Id.* at 528-29. In *United States v. Hairston*, 71 F.3d 115 (4th Cir. 1995), the Fourth Circuit cited 18 U.S.C. § 24(e)(2)(B)(ii) and ruled that felony escape from custody is a violent felony because it "involves conduct that presents a serious potential risk of physical injury to another." The Fourth Circuit emphasized that it was not looking at the facts of the prior escape conviction but only at the conviction and the statutory definition of the escape offense. *Id.* at 117-18. In *United States v. Presley*, 52 F.3d 64 (4th Cir.), *cert denied*, 116 S. Ct. 237 (1995), the Fourth Circuit ruled that robbery under Virginia law is a violent felony and again noted that what constitutes a violent felony is based only on the statutory definition of the violent felony, not on the particular facts of the violent-felony conviction. *Id.* at 69.

6. Prior Predicate Convictions Must Be "Separate and Distinct Criminal Episodes." Each of the three prior predicate convictions necessary to convict a felon-in-possession as an armed career criminal must be "separate and distinct criminal episodes," but these episodes can occur close in time. *United States v. Letterlough*, 63 F.3d 332, 335 (4th Cir.) (concluding that two drug sales ninety minutes apart were separate episodes), *cert. denied*, 116 S. Ct. 406 (1995).

7. Prior Predicate Convictions May Be Old. Unlike the Sentencing Guidelines that normally do not count convictions older than fifteen years, the three predicate violent or drug felony convictions under the Armed Career Criminal Act may be old. "There is no temporal restriction on prior felonies for the purposes of ACCA." *United States v. Presley*, 52 F.3d 64, 69 (4th Cir.), *cert denied*, 116 S. Ct. 237 (1995).

C. Receiving Firearm While Under Indictment (18 U.S.C. § 922(n))

To convict under 18 U.S.C. § 922(a), the government must show that the defendant *knew* that he was under indictment at the time that he received the firearm. *United States v. Forbes*, 64 F.3d 928, 934 (4th Cir. 1995) (agreeing with Fifth Circuit).

D. Using or Carrying Firearm in Drug Trafficking or Violent Crime (18 U.S.C. § 924(c)(1))

1. Supreme Court Causes Major Change in Law. In *Bailey v. United States*, 116 S. Ct. 501 (1995), the Supreme Court changed dramatically the law of most of the federal circuits, including the Fourth Circuit, by unanimously concluding that "using" a firearm in a violent or drug crime requires "active employment," rather than mere accessibility or proximity. The decision apparently does not affect cases wherein the "carrying" of a firearm is charged.

2. Must Be Correct Jury Instruction on Underlying Crime. If the trial court gives an erroneous jury instruction requiring reversal of the conviction of the underlying violent or drug crime, then the firearms conviction must be reversed as well. *United States v. Johnson*, 71 F.3d 139, 145-46 (4th Cir. 1995) (concluding that erroneous instruction on underlying violent crime was not harmless).

3. Destructive Device Punished More Severely. A mandatory sentence of thirty years plainly is required by this statute when a destructive device, rather than an ordinary firearm, is used in drug trafficking or a violent crime, even though the definition of a "firearm" in 18 U.S.C. § 921(a)(3) includes the term "destructive device." *United States v. Hamrick*, 43 F.3d 877, 886 (4th Cir.) (en banc) (considering use of mail bomb), *cert. denied*, 116 S. Ct. 90 (1995).

E. Dysfunctional Bomb Is Destructive Device (26 U.S.C. §§ 5845, 5861)

Even a dysfunctional bomb is a "destructive device" (firearm) under this statute prohibiting the making and unlawful possession and transfer of a destructive device. "A bomb is always dangerous . . . . [T]he display of a bomb, like the display of a gun, instills fear in the average citizen . . . . Even a dysfunctional bomb engenders in the assault victims the fear of bodily injury beyond that instilled by a simple assault . . . [A]n inoperable bomb creates a danger that a violent response will ensue." *United States v. Hamrick*, 43 F.3d 877, 881-83 (4th Cir.) (en banc), *cert. denied*, 116 S. Ct. 90 (1995). The Fourth Circuit agreed with all the circuits that have ruled in similar contexts and concluded that a mail bomb, whether functional or dysfunctional, was a destructive weapon. *Id.* at 884.

VI. MISCELLANEOUS OFFENSES

A. Securities Fraud (15 U.S.C. § 78j(b), 78ff, Rule 10b-5, 17 C.F.R. § 240.10b-5)

1. Same Facts Prosecutable as Both Wire and Securities Fraud. "[T]here is no multiplicity issue when prosecuting the same purchase or sale of securities under both the securities fraud statute and the wire fraud statute." *United States v. ReBrook*, 58 F.3d 961, 967 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995).

2. Misappropriation Theory Rejected. "Manipulation and deception are the touchstones of section 10(b) liability: . . . In essence the misappropriation theory disregards the specific statutory requirement of deception . . . . Accordingly, we hold that criminal liability under section 10(b) cannot be predicated upon the mere misappropriation of information in breach of a fiduciary duty owed to one who is neither a purchaser nor seller of securities, or in any other way connected with, or financially interested in, an actual or proposed purchase or sale of securities, even when such a breach is followed by the purchase or sale of securities. Such conduct simply does not constitute fraud in connection with the purchase or sale of securities, within the meaning of section 10(b)." *United States v. Bryan*, 58 F.3d 933, 945 (4th Cir. 1995). In *Bryan*, the Fourth Circuit disagreed with the Second, Seventh, and Ninth Circuits and overturned a securities fraud conviction of a director of the West Virginia state lottery because there was no deception in misappropriating nonpublic information relating to video lottery contracts. *Id.* at 961. The *Bryan* court did not allow fraud and perjury convictions to stand. *Id.*; *see also United States v. ReBrook*, 58 F.3d 961, 966 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995) (reversing securities fraud conviction of West Virginia lottery official because there was no deception and allowing wire fraud conviction to stand).

B. Migratory Bird Treaty Act (16 U.S.C. § 703 et seq, 50 C.F.R. § 20.1 et seq.)

Misdemeanor violations of the Migratory Bird Treaty Act are strict liability crimes. Consequently, the government does not have to prove intent. *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995) (upholding conviction for hunting birds over scattered bait).

C. Assimilated Crimes in National Parks (18 U.S.C. § 13, 36 C.F.R. § 4.2)

"[T]he United States may invoke the Assimilative Crimes Act [18 U.S.C. § 13] to prosecute an offense under state law [on federal property] only when there is no enactment of Congress that punishes the offender." *United States v. Fox*, 60 F.3d 181, 183 (4th Cir. 1995). Concerning offenses within national parks, the Congress provided legal authority for the Department of the Interior to issue a criminal code: 36 C.F.R. § 1 *et seq.* When any of those C.F.R. offenses apply, the government must charge them and may not use the Assimilative Crimes Act. (Virginia state habitual offenders law allowed to be assimilated because no identical C.F.R. offense).

D. Dangerous Weapon Is Jury Question (18 U.S.C. § 113(a)(3))

Assault with a dangerous weapon on federal property is prohibited by this statute. In *United States v. Sturgis*, 48 F.3d 784 (4th Cir.), *cert. denied*, 116 S. Ct. 107 (1995), the Fourth Circuit held that "what constitutes a dangerous weapon depends not on the object's intrinsic character but on its capacity, given 'the manner of its use,' to endanger life or inflict serious physical harm." *Id.* at 787 (quoting *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963)). "[D]etermination of whether a given instrumentality was used as a 'dangerous weapon' must be left to the jury." *Id.* at 788. The court specifically stated that body parts, including the teeth of an HIV-infected person, could be dangerous weapons. The court cited with approval a case wherein it was held that fists and feet can be dangerous weapons.

E. Intent to Deceive Is Immaterial (18 U.S.C. § 1001)

"[W]e have expressly held that intent to deceive is immaterial in a prosecution under the general federal criminal fraud statute, 18 U.S.C. § 1001. *United States v. Sparks*, 67 F.3d 1145, 1152 (4th Cir. 1995) (citing *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362, 367 (4th Cir.), *cert. denied*, 474 U.S. 818 (1985)). *But cf.* 18 U.S.C. §§ 1002, 1005, 1006, 1012, 1013 (requiring specific intent to deceive to be held criminally liable).

F. False Statement to Bank (18 U.S.C. § 1014)

1. Essential Elements. To prove its case, the government must show that the defendant (1) made a false statement to a bank or similar institution, (2) that the defendant made the false statement for the purpose of influencing the actions of the bank, (3) that the statement was false as to a material fact,

and (4) that the statement was made knowingly. *United States v. Sparks*, 67 F.3d 1145, 1151 (4th Cir. 1995); *United States v. Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

2. Intent to Deceive Is Immaterial. Like the similar 18 U.S.C. § 1001, this statute contains no requirement that the government prove an intent to deceive. *United States v. Sparks*, 67 F.3d 1145, 1152 (4th Cir. 1995). *But cf.* 18 U.S.C. §§ 1002, 1005, 1006, 1012, 1013 (requiring specific intent to deceive to be held criminally liable).

G. Only Minimal Interstate Nexus Required in Possession of Document-Making Implements (18 U.S.C. § 1028(a)(5))

Under this statute which prohibits the possession of implements and machines for producing phony documents, only a minimal interstate (or foreign) nexus is required. *United States v. Pearce*, 65 F.3d 22, 24 (4th Cir. 1995) (upholding jury instruction which stated that nexus was proven if any implements or their parts had crossed state line previously or if intended use of implements would affect interstate commerce adversely).

H. Fraud (18 U.S.C. §§ 1341, 1343, 1346)

1. Mail Fraud (18 U.S.C. § 1341) Stands Alone. The mail fraud statute contains all the necessary elements for a criminal conviction. It does not include a requirement that violations of other laws or regulations be proved. *United States v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995).

2. Wire Fraud (18 U.S.C. §§ 1343, 1346) Need Not Succeed. "The gravamen of the offense of wire fraud is simply the execution of a 'scheme to defraud.'" It is not necessary for the fraud to succeed nor that gain be realized. *United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995) (citations omitted).

3. Confidential Information Is Property. "[C]onfidential information is 'property,' the deprivation of which can constitute wire fraud." *United States v. Bryan*, 58 F.3d 933, 943 (4th Cir. 1995) (citing *Carpenter v. United States*, 484 U.S. 19, 26 (1987)).

4. Public Corruption Is Prosecutable as Mail Fraud. In agreement with other circuits, the Fourth Circuit held in *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995), that various kinds of dishonesty by public officials are denials of the "honest services" of 18 U.S.C. § 1346 and therefore prosecutable as mail fraud. In *Bryan*, the director of the West Virginia Lottery used the mails to rig bids relating to the lottery.

5. Same Analysis for Mail and Wire Fraud. "The wire fraud statute tracks the language of the mail fraud statute . . . . The statutes are given a similar construction and are subject to the same substantive analysis." *United States v. ReBrook*, 58 F.3d 961, 967 n.6 (4th Cir.) (quoting *Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989)), *cert. denied*, 116 S. Ct. 431 (1995); *see also Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987)).

I. Military Function Broadly Construed (18 U.S.C. § 1362)

Section 1362 prohibits damaging communication lines used for military or civil defense functions. In the first case to address the scope of § 1362, the Fourth Circuit broadly construed the statute and ruled that shipment by rail of military material by a defense contractor is a military function and that communication lines vital to such shipment are also used for a military function. *United States v. Turpin*, 65 F.3d 1207, 1212 (4th Cir. 1995) (examining language and legislative history of statute), *cert. denied*, 64 U.S.L.W. 3640 (U.S. Mar. 25, 1996) (No. 95-7260).

J. Posse Comitatus Act (18 U.S.C. § 1385)

"The purpose of this Act is to uphold the American tradition of restricting military intrusions into civilian affairs, except where Congress has recognized a special need for military assistance in law enforcement . . . . As a general matter, the exclusionary rule is not a remedy for violations of the [Act]." *United States v. Al-Talib*, 55 F.3d 923, 929-30 (4th Cir. 1995) (citations omitted). In *Al-Talib*, the government used the Air Force to transport a car and the drugs used in a sting operation. The Fourth Circuit found that this use of the military had no direct impact on the defendants.

K. Two Types of Extortion (18 U.S.C. § 1951(b)(2))

"The Act proscribes two types of extortion. The *first* requires proof that the defendant induced payment by use of threats or fear. To prove extortion by fear of economic harm, the government must establish that the threat of such harm generated fear in the victim. . . . The *second* type of extortion involves obtaining property from another under color of official right. To prove this type of extortion the government need not show that the defendant demanded or induced payment. . . . [W]e have stated that the government must prove a quid pro quo when it charges extortion under color of official right. . . . *Neither* type of extortion requires a direct benefit to the extortionist. The 'gravamen of the offense is loss to the victim.'"

United States v. Hairston, 46 F.3d 361, 365 (4th Cir.) (emphasis added) (citations and internal quotations omitted) (upholding multiple counts of conviction but overturning three counts because duplicative of other counts), *cert. denied*, 116 S. Ct. 124 (1995).

L. Money Laundering

1. "Specified Unlawful Activity" Need Not Be Elaborated Upon (18 U.S.C. § 1957(a)). "Just because the statute requires that funds be obtained from '*specified*' unlawful activity does not mean that the government is required to detail [in the indictment] the circumstances of the unlawful activity." *United States v. Smith*, 44 F.3d 1259, 1264 (4th Cir.) (holding that it is sufficient to name wire fraud, without details, as specified unlawful activity because it is one of such activities listed in statute and because "core transaction" of money laundering is not illegal obtaining of funds used in laundering), *cert. denied*, 115 S. Ct. 1970 (1995).

2. Completion of Specified Unlawful Activity Is Question of Proof (18 U.S.C. § 1957(a)). In *United States v. Smith*, 44 F.3d 1259 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995), the defendant challenged the sufficiency of the count in the indictment charging money laundering by asserting that the specified unlawful activity — wire fraud — was not com-pleted when the alleged money laundering took place. Therefore, the defendant argued that the money had not yet been derived from an unlawful activity. The Fourth Circuit doubted this contention as a matter of fact but ruled, nonetheless, that it was an issue of proof for the finder of fact, not an issue of the legal sufficiency of the indictment. *Id.* at 1264.

3. Elements of 18 U.S.C. § 1956(a)(1) Money Laundering. The essential elements of this version of money laundering are (1) a financial transaction in interstate commerce, (2) the transaction involved proceeds of one of the specified unlawful activities, (3) the defendant knew that the proceeds were derived from the specified unlawful activity, and (4) the transaction was intended to conceal or disguise the nature of the proceeds or to avoid the transaction reporting requirements of state or federal law. *United States v. Heater*, 63 F.3d 311, 318 (4th Cir. 1995) (sustaining conviction), *cert. denied*, 116 S. Ct. 796 (1996).

M. Perjury (18 U.S.C. §§ 1621-1623)

1. Perjury Statute to Be Construed Narrowly (18 U.S.C. § 1623). The Supreme Court requires the lower courts "to construe the perjury statute narrowly." *United States v. Bryan*, 58 F.3d 933, 960 (4th Cir. 1995); *see*

also Bronston v. United States, 409 U.S. 352, 360-62 (1973) (concluding that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner — so long as the witness speaks the literal truth . . . precise questioning is imperative as a predicate for the offense of perjury"); *United States v. Heater*, 63 F.3d 311 (4th Cir. 1995) (affirming perjury conviction because questions were neither vague nor misleading), *cert. denied*, 116 S. Ct. 796 (1996); *United States v. Hairston*, 46 F.3d 361, 376 (4th Cir.) (overturning perjury conviction because prosecutor's questions were not specific enough), *cert. denied*, 116 S. Ct. 124 (1995).

2. Subornation of Perjury Does Not Require Physical Threats or Coercion (18 U.S.C. § 1622). "[T]his court has never included actual physical coercion as an element of subornation of perjury . . . . A defendant can [procure or] 'instigate' without making threats of physical harm." *United States v. Heater*, 63 F.3d 311 (4th Cir. 1995) (upholding conviction), *cert. denied*, 116 S. Ct. 796 (1996).

N. Cigarette-Lighter Bomb Is Nonmailable Matter (18 U.S.C. § 1716)

Under this postal statute, devices that may ignite or explode are among the devices that are classified as "nonmailable." In *United States v. Hamrick*, 43 F.3d 877 (4th Cir.) (en banc), *cert. denied*, 116 S. Ct. 90 (1995), the Fourth Circuit ruled that a possibly dysfunctional bomb (even if it could not explode) may have ignited because it was constructed with cigarette lighters containing butane. *Id.* at 884.

O. Proof of "Credit Union" Is Essential to Credit-Union Robbery (18 U.S.C. § 2113)

In a prosecution for robbery of a federally insured credit union, it was error for the trial court to instruct conclusively the jury that the place robbed was a credit union under the statute. *United States v. Johnson*, 71 F.3d 139, 143 (4th Cir. 1995) (holding that although government conceded error on appeal, it argued unsuccessfully that error was harmless beyond reasonable doubt).

P. Video Hearing Approved for Involuntary Commitment (18 U.S.C. § 4245)

In *United States v. Baker*, 45 F.3d 837 (4th Cir.), *cert. denied*, 116 S. Ct. 114 (1995), the Fourth Circuit approved, against constitutional and statutory challenges, an involuntary commitment hearing pursuant to 18

U.S.C. § 4245 that was conducted as part of a pilot program by video transmission between the judge and the prosecutor in a courtroom and the defendant and his attorney at a psychiatric facility.

Q. Obstructing the Internal Revenue Code (26 U.S.C. § 7212(a))

Actions, even if they are not illegal per se, that are intended, even if unsuccessful, to corruptly impede the administration of the Internal Revenue Code are proscribed by 26 U.S.C. § 7212(a). The word "corruptly" in this statute is to be construed broadly. *United States v. Bostian*, 59 F.3d 474, 478 (4th Cir. 1995) (discussing defendant's attempt to evade tax lien on real estate by filing *lis pendens* against property in favor of his wife), *cert. denied*, 116 S. Ct. 929 (1996); *see United States v. Mitchell*, 985 F.2d 1275 (4th Cir. 1993) (analyzing § 7212(a)).

R. Money Structuring (31 U.S.C. § 5324)

In its decision in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), the Supreme Court ruled that in order to prove the required "willful" violation of the statute, the government must show that the defendant knew that his conduct was unlawful under the statute. *United States v. Gray*, 47 F.3d 1359, 1363 (4th Cir. 1995).

S. False Social Security Number (42 U.S.C. § 408(a)(7)(B))

"The elements of that offense are that the defendant (1) falsely represented a number to be her social security number (2) with the intent to deceive another person (3) for the purpose of obtaining something of value." *United States v. Sparks*, 67 F.3d 1145, 1152 (4th Cir. 1995) (stating that facts in case showed that defendant intended to deceive).

VII. TRIAL

A. Indictment

1. Sufficiency: Tracking Statute Is Usually Sufficient (Fed. R. Crim. P. 7(c)). "When considering whether an indictment properly charges an offense, we are guided by basic principles that (1) the indictment must contain a statement of 'the essential facts constituting the offense charged,' (2) it must contain allegations of each element of the offense charged, so that the defendant is given fair notice of the charge that he must defend, and (3) its allegations must be sufficiently distinctive so that an acquittal or conviction on such charges can be pleaded to bar a second prosecution for

the same offense. *See* Fed. R. Crim. P. 7(c)(1); . . . . The allegations of an offense are generally sufficient if stated in the words of the statute itself." *United States v. Smith*, 44 F.3d 1259, 1263-64 (4th Cir.) (citations omitted) (finding money laundering indictment sufficient), *cert. denied*, 115 S. Ct. 1970 (1995).

2. Sufficiency: Each Count Considered Separately. "If an indictment contains multiple counts, each count is viewed as a separate indictment for purposes of determining its sufficiency." *United States v. Smith*, 44 F.3d 1259, 1264 (4th Cir.) (citations omitted) (noting that sections of other counts may be incorporated into another count), *cert. denied*, 115 S. Ct. 1970 (1995).

3. Variance Between Indictment and Proof (Fed. R. Crim. P. 52(a)). A variance between indictment and proof that does not "affect substantial rights" of the defendant will be disregarded. "So long as the defendant has been informed of the charges against him and is able to present a defense without being taken by surprise by evidence offered at trial, . . . there will have been no substantial infringement of rights." *United States v. Heater*, 63 F.3d 311, 319 (4th Cir. 1995) (citations omitted) (disregarding variance in purchase price of item in money laundering indictment), *cert. denied*, 116 S. Ct. 796 (1996).

B. Voir Dire

1. Broad Discretion in District Court. "[T]he district court has broad discretion in the conduct of voir dire and will be reversed only for an abuse of discretion." *United States v. ReBrook*, 58 F.3d 961, 969 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995); *see also United States v. Heater*, 63 F.3d 311 (4th Cir. 1995) (allowing broad discretion over phrasing of questions asked and noting that court is not obliged to ask each question proposed by defendant), *cert. denied*, 116 S. Ct. 796 (1996).

2. Contemporaneous Objection Required. "Where the defendant fails specifically to object to the manner in which the district court conducted voir dire, as here, we review the issue for plain error affecting substantial rights." *United States v. ReBrook*, 58 F.3d 961, 969 (4th Cir.) (citation omitted), *cert. denied*, 116 S. Ct. 431 (1995).

3. Individual Voir Dire Not a Right. In *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995), the district court conducted voir dire exclusively. The defendant argued that he had a right to question potential jurors directly because of extensive pretrial publicity

concerning the case. The Fourth Circuit disagreed and pointed out that the record showed that the trial court had itself carefully dealt with the adverse publicity issue. *See also United States v. Bakker*, 925 F.2d 728, 734 (4th Cir. 1991) ("It is well settled that a trial judge may conduct *voir dire* without allowing counsel to pose questions directly to the potential jurors.").

4. Standard for Prosecutorial Rebuttal to Batson Challenge. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), the prosecutor may not strike a juror solely on account of race. When the defense raises a prima facie challenge to a strike, the prosecution must rebut the challenge by showing racially neutral reasons that must not be "intrinsically suspect" and must be "adequately supported by observable fact." *United States v. Johnson*, 54 F.3d 1150, 1163 (4th Cir.) (quoting *United States v. Banks*, 10 F.3d 1044, 1049 (4th Cir. 1993) (discussing prosecution's rebuttal of challenge by showing criminal activity of husband of one juror and potential bias of another juror), *cert. denied*, 116 S. Ct. 266 (1995).

5. Trial Court Has Discretion to Dismiss Jurors. The trial court's refusal to dismiss a particular juror is reviewed on appeal for abuse of discretion. *United States v. Capers*, 61 F.3d 1100, 1104 (4th Cir. 1995) (noting that juror who expressed doubts about his impartiality later confirmed that he would be impartial), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995).

C. Jencks Act (18 U.S.C. § 3500, Fed. R. Crim. P. 26.2)

1. Jencks Act Applies Only to Statements in Prosecution's Possession. If the defense makes a request, the prosecution is responsible for turning over to the defense any statements of its witnesses "in its possession" after their testimonies. *United States v. Capers*, 61 F.3d 1100, 1103 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995). Federal Rule of Criminal Procedure 26.2 extends the same right to the prosecution.

2. Rules for Hearings on Jencks Act Requests. If the government refuses a defendant's Jencks' Act request for production of witnesses' statements, the trial court must hold an "independent inquiry," but the extent of the inquiry is at the discretion of the court. Frequently, the court inspects the statements *in camera*, but the defendant must "provide some foundation" before such an inspection is necessary. The trial court's ruling on whether statements must be turned over to the opposing party is a factual one and will not be disturbed on appeal unless clearly erroneous. *United States v. Boyd*, 53 F.3d 631, 634 (4th Cir.), *cert. denied*, 116 S. Ct. 322 (1995).

D. Civil Rulings Not Dispositive in Criminal Proceedings

"As a general rule, evidence of a determination made in a civil action where the party with the burden of persuasion must establish facts only by a preponderance of the evidence is not admissible to prove an element of a criminal prosecution where the government must establish elements of the charged offense beyond a reasonable doubt." *United States v. Bostian*, 59 F.3d 474, 480 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 929 (1996).

E. Prosecutorial Misconduct

1. Test for Improper Closing Argument. "First, the prosecutor's comments must, in fact, have been improper. Second, the remarks must have so prejudiced the defendant's substantial rights that the defendant was denied a fair trial . . . . Factors to be considered under this [second] prong of the analysis include: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." *United States v. Morsley*, 64 F.3d 907, 913 (4th Cir. 1995) (citations and internal quotations omitted) (holding that prosecutor's reference to fact not in evidence and prosecutor's false statement that defendant had confessed were both improper but harmless because of curative instructions and strong evidence of guilt), *cert. denied*, 116 S. Ct. 749 (1996); *see also United States v. Adam*, 70 F.3d 776, 780 (4th Cir. 1995) (concluding that prosecutor's use of "I think" several times in closing argument was innocuous).

2. Prosecutorial Use of Perjured Testimony Must Be Knowing.

To violate the due process rights of the defendant, it must be shown that the prosecution knew or should have known of the perjury. *United States v. Tanner*, 61 F.3d 231, 236 (4th Cir. 1995) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)), *cert. denied*, 116 S. Ct. 925 (1996).

3. Coercion of Witnesses. In *United States v. Thomas*, 55 F.3d 144 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995), the Fourth Circuit ruled that the government did not intimidate or coerce a witness when it attempted to sift out inconsistencies in her testimony and to caution her about her obligation to testify truthfully. The Court stated that "[a]lthough a defendant has a right to unhampered testimony in his defense, . . . he has no right to perjured testimony." *Id.* at 151 (citations omitted).

F. Earlier Proceedings and Rulings Not Basis for Judicial Recusal (28 U.S.C. § 455(a))

A party may not successfully challenge a judge's impartiality simply on the basis that the judge formed opinions from earlier proceedings or earlier rulings in the case. *United States v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995); *see also Liteky v. United States*, 114 S. Ct. 1147 (1994) (stating that partiality requires wrongful or inappropriate disposition toward party).

G. Judicial Bias

1. Judge Must Appear Unbiased. The presiding judge in a criminal trial must not only be impartial but also must give the appearance of impartiality. Although he may question witnesses directly under Federal Rules of Evidence 614(b), the judge may not undermine the appearance of impartiality by continuously intervening on one side. Nevertheless, Federal Rule of Evidence 611(a) allows the court to control the interrogation of witnesses to make effective ascertainment of truth, to avoid the waste of time, and to protect witnesses from harassment or embarrassment. *United States v. Castner*, 50 F.3d 1267, 1272 (4th Cir. 1995) (finding no judicial bias).

2. When Judge Must Recuse Himself (28 U.S.C. § 455). According to 28 U.S.C. § 455, a presiding judge must recuse himself from a case when in private practice he or his partners had served as a lawyer in the *matter currently in controversy* or whenever his impartiality might reasonably be questioned. In *United States v. Walton*, 56 F.3d 551 (4th Cir. 1995), the Fourth Circuit ruled that recusal was not required even though the law firm in which the trial judge was a former partner had represented the defendant in drug cases four times in the 1970s.

H. Admissibility of Evidence

1. Multiple Theories. "[S]imply because evidence might be inadmissible on one ground, it does not follow that the evidence is not admissible under other theories." *United States v. Powers*, 59 F.3d 1460, 1466 n.6 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996).

2. District Court May Be Upheld on Different Grounds. "[E]ven if the grounds that the district court gave for admitting the evidence are improper, generally this Court will reverse only if there are no grounds upon which the district court could have properly admitted the evidence." *United States v. Johnson*, 54 F.3d 1150, 1156 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995).

3. Relevance (Fed. R. Evid. 401, 402). "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Boyd*, 53 F.3d 631, 636 (4th Cir.) (quoting Fed. R. Evid. 401), *cert. denied*, 116 S. Ct. 322 (1995).

I. Cross-Examination

1. Cross-Examination Limited to Relevant Matters. The trial court may limit the scope of cross-examination on relevancy grounds. "A defendant's Sixth Amendment right to cross-examination is limited to issues that are relevant to his trial, and the district court has broad discretion to determine which issues are relevant." *United States v. Powers*, 59 F.3d 1460, 1470 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996).

2. Trial Judge Has Broad Latitude to Control Cross-Examination. There is a "broad latitude afforded a trial judge in controlling cross-examination." *United States v. Morsley*, 64 F.3d 907, 918 n.10 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996).

3. Defendant May Not Immunize His Witness from Cross-Examination. "'The defendant's right to present witnesses in his own defense, however, does not carry with it the right to immunize the witness from reasonable and appropriate cross-examination.' *Lawson v. Murray*, 837 F.2d 653, 655 (4th Cir.), *cert. denied*, 488 U.S. 831 (1988). This court has always considered cross-examination to be 'an indispensable tool in the search for truth,' *id.* at 656, and the Fifth Amendment cannot be used selectively to provide a witness with immunity from cross-examination." *United States v. Heater*, 63 F.3d 311, 321 (4th Cir. 1995) (defendant sought to limit the government's cross-examination of his witness who was facing a perjury charge in a separate trial), *cert. denied*, 116 S. Ct. 796 (1996).

J. Prejudicial Generalizations Based on Nationality: "Jamaicans"

Defendants may be identified by their nationality — for instance, as Jamaicans — when the identification is relevant and has "more than marginal probative value." *United States v. Hoyte*, 51 F.3d 1239, 1244 (4th Cir.) (holding that defendants failed to show how reference to them as Jamaicans was prejudicial), *cert. denied*, 116 S. Ct. 346 (1995).

K. "Just Cause" to Refuse to Testify (28 U.S.C. § 1826(a))

Under this statute, a district court may hold in contempt and incarcerate a witness who refuses to testify, but the statute allows witnesses a "just cause" defense to contempt. The Supreme Court has held that illegal government surveillance of a witness is an example of such just cause. *In re Askin*, 47 F.3d 100, 102 (4th Cir.) (citing *Gelbard v. United States*, 408 U.S. 41 (1972)), *cert. denied*, 116 S. Ct. 382 (1995).

L. Testimony Regarding Voice Identification

A proper foundation must be laid before a witness may testify that he recognizes the voice of someone else. The witness may not come to his recognition through impermissibly suggestive means. *United States v. Oriakhi*, 57 F.3d 1290 (4th Cir.) (agent testified that he recognized the defendant's voice on audio tape because of his interactions with the defendant over a period of one year), *cert. denied*, 116 S. Ct. 400 (1995).

M. In-Court Identifications

1. "Suggestive" Photo Displays and Later In-Court Identifications. In *United States v. Burgos*, 55 F.3d 933 (4th Cir. 1995), the Fourth Circuit considered a concededly suggestive photo display wherein the only Caucasian was the defendant. Four witnesses who had been shown the display later identified the defendant in court. The court of appeals upheld the in-court identification because all four witnesses stated that they knew the defendant independently of the photo display. The court stated that the burden is on the government to show by clear and convincing evidence that the identification is based upon personal observations or familiarity, rather than upon any photo displays or lineups. Each case must be considered on its own facts and under the totality of the circumstances. "The extent to which the witnesses knew Burgos is a factual determination reviewed for clear error only; legal conclusions reached by the district court concerning the legitimacy of the in-court identification are reviewed *de novo*." *Id.* at 941.

In *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995), the Fourth Circuit found that the district court did not abuse its discretion in allowing in-court identifications after an earlier photo display that the defendant claimed had been unduly suggestive. The court noted that the witnesses were positive in their identifications and had seen the defendant closely in broad daylight. The court also noted that there was no inherent prejudice in allowing the witnesses to see the defendant before their testimonies on the

day of the trial. "Eyewitness identification at trial following an earlier pretrial photographic identification is permissible unless the photo line-up procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Id.* at 1168 (citations omitted).

2. Independent In-Court Identifications: Standard of Review. When the prosecution does not introduce evidence of out-of-court identifications, it must show by clear and convincing evidence under the totality of the circumstances that an in-court identification was based on the witness's independent knowledge or recollection of the defendant's appearance. *United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995) (upholding in-court identifications), *cert. denied*, 116 S. Ct. 749 (1996).

N. Tape Recordings and Transcripts

1. Trial Court Has Latitude over Foundation. "Upon review, we will not find error unless the foundation for admission [of a tape recording] is clearly insufficient to insure the accuracy of the recording." *United States v. Capers*, 61 F.3d 1100, 1106 (4th Cir. 1995) (holding that jury can resolve any issue over reliability of identification of parties on tape), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 5, 1995).

2. Transcripts Normally Permissible. The trial court has discretion over whether to allow the use of transcripts during the playing of tapes. The court must give a limiting instruction that the tapes are the evidence and the transcripts are only aids in understanding the tapes. Both sides have the right to prepare transcripts. *United States v. Capers*, 61 F.3d 1100 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 5, 1995).

O. When Admissible Evidence May Be Excluded (Rule 403)

1. When Excluded. "[O]therwise admissible evidence may be properly excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury." *United States v. Dorsey*, 45 F.3d 809, 815 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995). Because "in one sense all incriminating evidence is inherently prejudicial," the question is whether the evidence is *unduly* prejudicial. *United States v. Boyd*, 53 F.3d 631, 637 (4th Cir.) (evidence of drug use not unduly prejudicial when compared to drug trafficking evidence admitted against defendant), *cert. denied*, 116 S. Ct. 322 (1995).

2. When Prejudice Is Fair. "'Unfair prejudice' does not include within its purview the damage done to a defendant's case which arises from the

'legitimate probative force of the evidence.'" *United States v. Heater*, 63 F.3d 311, 321 (4th Cir. 1995) (citing Charles A. Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5215, at 275 (1978)), *cert. denied*, 116 S. Ct. 796 (1996).

3. Trial Court's Rule 403 Ruling Will Almost Always Be Upheld. "A court's decision to admit evidence will not be upset by a Rule 403 challenge except under the most extraordinary circumstances where that discretion is plainly abused." *United States v. Ricco*, 52 F.3d 58, 61 (4th Cir.) (citation omitted), *cert. denied*, 116 S. Ct. 254 (1995).

P. Evidence of Prior Bad Acts (Fed. R. Evid. 404(b))

1. A Broad, Inclusive Rule. "The purposes for which prior bad acts may be admitted under Rule 404(b) is illustrative rather than exclusionary. *United States v. Percy*, 765 F.2d 1199, 1203 (4th Cir. 1985). Consequently we have construed the exceptions to the inadmissibility of prior bad acts evidence broadly, and characterize Rule 404(b) 'as an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove *only* criminal disposition.' *Id.* (emphasis added). *United States v. Russell*, 971 F.2d 1098, 1106 (4th Cir. 1992) (holding that 'evidence of prior bad acts is admissible unless it is introduced for the sole purpose of proving criminal disposition'), *cert. denied*, 113 S. Ct. 1013 (1993)." *United States v. Powers*, 59 F.3d 1460, 1464 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996).

2. Four-Part Test for Admissibility. In *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996), the Fourth Circuit elaborated upon its four-part test for the admissibility of Rule 404(b) evidence. *See also United States v. Rawle*, 845 F.2d 1244 (4th Cir. 1988). Concerning *relevance*, the court said that "[t]he threshold for relevancy is relatively low . . . [the 404(b) evidence] 'must be sufficiently related to the charged offense.'" *Powers*, 59 F.3d at 1465 (quoting *Rawle*, 845 F.2d at 1247 n.3). The court also stated that when there is a relevancy issue of whether the 404(b) evidence is adequately related in time to the charged offense, the decision is within the district court's discretion. "We are especially reluctant to reverse the district court on this ground." *Id.* at 1466. Concerning *necessity*, the court said that 404(b) evidence can be necessary in various ways: when it is an essential part of the crime; is part of the context, setting, or environment of the crime; completes the story of the crime; or is intimately related to or explanatory of the crime. Concerning *reliability*, the court stated that the testimony of three 404(b) eyewitnesses

was sufficient to allow a jury to "reasonably conclude that the act[s] occurred and that the defendant was the actor." *Id.* at 1467 (quoting *Huddleston v. United States*, 485 U.S. 681, 689 (1988)). Concerning whether the 404(b) evidence was *"substantially" more probative than prejudicial*, the court found that the particular evidence in the case was "highly" probative and that the limiting instruction given was adequate. "As to prejudicial effect, we note that cautionary or limiting instructions generally obviate any such prejudice particularly if the danger of prejudice is slight in view of overwhelming evidence of guilt." *Id.* at 1468 (citation omitted).

3. Rule 404(b) Evidence in Significant Sexual Abuse Case. In *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996), the Fourth Circuit considered a *sexual* abuse conviction in which the defendant's prior acts of *physical* violence against the victim and her family were admitted as Rule 404(b) evidence. The Fourth Circuit noted that *Powers* was apparently the first federal case in which Rule 404(b) evidence had been admitted in such a context. Calling the case "a close question" that "pushes the boundaries of Rule 404(b)," *id.* at 1469, the Court found the evidence admissible under its four-part test for admissibility of 404(b) evidence. *See Four-Part Test for Admissibility*, *supra*, § 2; *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988). The evidence was (1) *relevant* because it explained why the victim delayed in reporting the sexual abuse; (2) *necessary* because it helped to explain the setting and context of the crime; (3) *reliable* because there were three eyewitnesses who testified to it; and (4) *substantially more probative than prejudicial* because it was "highly probative," *Powers*, 59 F.3d at 1467, and an adequate limiting instruction was given.

4. Evidence Upheld or Rejected.

Admission Upheld. In a prosecution of a pharmacist for illegally distributing controlled substances, the testimony of a customer that the pharmacist had given her numerous illegal prescriptions over a period of five years *before* the charged offense "was relevant to show the defendant's modus operandi." *United States v. Tanner*, 61 F.3d 231, 237 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 925 (1996).

Admission Upheld. In a case involving incestuous sexual abuse, prior acts of physical violence against the victim and other members of the family showed the setting and context of the sexual abuse and explained the delay of the victim in reporting the abuse. *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996).

Admission Upheld. In a drug conspiracy prosecution, evidence about a drug deal involving the defendant occurring *after* the conclusion of all the conduct alleged in the conspiracy was admissible to establish the identity of the defendant who had used several aliases and denied involvement in the crime. *United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996).

Admission Upheld. Tax returns offered by the government to rebut defendant's contention that his lifestyle was not that of a drug dealer were not impermissible character evidence, but rather constituted impeachment evidence. *United States v. Boyd*, 53 F.3d 631 (4th Cir.), *cert. denied*, 116 S. Ct. 322 (1995).

Admission Upheld. Evidence of defendant's marijuana and cocaine use was admissible to prove his motive for participating in a drug conspiracy and to prove the nature of his relationship with a co-conspirator. Because his drug use was less sensational than the drug trafficking charge that he was facing, the evidence was not more prejudicial than probative. *United States v. Boyd*, 53 F.3d 631 (4th Cir.), *cert. denied*, 116 S. Ct. 322 (1995).

5. Standard of Review on Appeal. Abuse of discretion is the standard of review on appeal, and a trial court's decision to admit or exclude Rule 404(b) evidence will not be overturned on appeal unless it was "arbitrary or irrational." *United States v. Tanner*, 61 F.3d 231, 237 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 925 (1996); *United States v. Powers*, 59 F.3d 1460, 1464 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996); *United States v. Boyd*, 53 F.3d 631 (4th Cir.), *cert. denied*, 116 S. Ct. 322 (1995).

Q. Victim's Other Sexual Conduct (Fed. R. Evid. 412)

In *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996), the Fourth Circuit upheld the exclusion, on relevancy grounds, of evidence of a sexual abuse victim's other sexual conduct because that conduct occurred more than a year after the rape of the victim by the defendant.

R. Marital Privilege: Two Types (Fed. R. Evid. 501)

"There are two types of marital privilege: the privilege against adverse spousal testimony and the privilege of protecting confidential marital communications. The adverse spousal privilege is vested in the witness-spouse, who may neither be compelled to testify nor foreclosed from testifying. . . . The 'marital communication privilege,' if applicable and properly raised, is with the defendant and prevents a spouse from testifying against the defen-

dant regarding confidential communications between the spouses." *Id.* at 514. Both types require a valid marriage. *United States v. Acker*, 52 F.3d 509, 515 (4th Cir. 1995) (privilege denied because cohabitation was not statutory or common-law marriage).

S. Summary-of-Testimony Charts Admissible Under Fed. R. Evid. 611(a)

In a drug conspiracy with many witnesses and extensive evidence, a trial court does not abuse its discretion in admitting into evidence a chart summarizing previous testimony as long as the chart aids the jury in ascertaining the truth and the defendant has a sufficient opportunity to cross-examine the chart and its preparer. In such a case, the trial court is exercising "reasonable control over the mode . . . of . . . presenting evidence," as allowed by Rule 611(a). *United States v. Johnson*, 54 F.3d 1150, 1158 (4th Cir.) (holding that agent's calculation of drug amounts was admissible; however, chart was not admissible in ordinary drug prosecution), *cert. denied*, 116 S. Ct. 266 (1995).

T. Expert Testimony (Fed. R. Evid. 702)

1. Standard for Admission into Evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court changed the standard for admission of expert testimony from the traditional *Frye* "general acceptance" standard to a Federal Rules of Evidence-based "relevant and reliable" standard. In *United States v. Dorsey*, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995), the Fourth Circuit construed the new standard to mean: (1) the expert testimony must be supported by appropriate validation; and (2) the evidence or testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. "In determining whether certain expert evidence properly satisfies the first 'scientific knowledge' prong of the two-part test, the Court held that trial courts may consider several factors: (1) whether the theory or technique used by the expert can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used; and (4) the degree of the method's or conclusion's acceptance within the relevant scientific community." *Daubert*, 113 S. Ct. at 2796-97. "In determining whether the evidence meets the second prong of the two-part test — that is, whether the evidence will be helpful to the trier of fact — the Supreme Court warned that throughout an admissibility determination, a judge must be mindful of other evidentiary rules, such as FRE 403, which permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confu-

sion of the issues, or misleading the jury.'" *Dorsey*, 45 F.3d at 813 (quoting *Daubert*, 113 S. Ct. at 2798).

2. Defendant's Surprise Expert Witness. In *United States v. Dorsey*, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995), the Fourth Circuit stated that the defendant's notification to the government *on the first day of trial* of its intent to present expert testimony was "a formidable reason in itself" to exclude the testimony. *Id.* at 816. The court observed that the defendant's late notice substantially prejudiced the government in its ability to rebut the testimony with expert testimony of its own. The court cited with approval *United States v. Curry*, 977 F.2d 1042, 1052 (7th Cir. 1992) (excluding evidence when defendant gave government four days' notice), *cert. denied*, 507 U.S. 947 (1993), and *United States v. Dowling*, 855 F.2d 114, 118 (3d Cir. 1988) (excluding evidence when defendant gave government five days' notice).

3. Anthropologists' Analysis of Bank Photographs for Mistaken Identity Not Scientific Knowledge. In *United States v. Dorsey*, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995), the defendant, relying on a defense of mistaken identity, had proposed to present two forensic anthropologists who would have testified that the man depicted in bank surveillance photographs was not the defendant. The Fourth Circuit ruled that the district court did not abuse its discretion in excluding the testimony on account of its questionable character as "scientific" knowledge, because the comparison of photographs can be adequately done by the jury, because its effect would be to usurp the jury's prerogative to evaluate the credibility of other witnesses, because the proposed testimony might confuse and mislead the jury under Fed. R. Evid. 403, and because the defendant gave tardy notice to the government of its intent to use such evidence.

4. Penile Plethysmograph Not Scientific Evidence. The penile plethysmograph is a test that is supposed to measure whether a man's sexual arousal is normal or abnormal. In *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996), the defendant offered the test as proof that he did not have the characteristics of a pedophile. The trial court exercised its discretion to exclude the test, and the Fourth Circuit upheld the exclusion, saying that the scientific validity of the test had not been proven.

5. Psychological Profile for Pedophilia Excluded. In *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996), the defendant, charged with incestuous sexual abuse, offered the expert testimony of a psychologist that he did not demonstrate the psychological profile of a fixated pedophile (someone who sexually prefers children). The

trial court exercised its discretion to exclude the testimony, and the Fourth Circuit upheld the exclusion on relevancy grounds. The circuit court pointed out that because only a percentage of child abusers were identifiable as fixated pedophiles, even if the defendant were shown not to be a fixated pedophile, the evidence did not necessarily prove anything. The defendant failed to show, the circuit concluded, a relevant causal link between fixated pedophilia and the crime charged — incest child abuse.

U. Prior Testimony May Not Be Summarized as "Expert Knowledge" (Fed. R. Evid. 703)

"Rule 703 of the Federal Rules of Evidence allows an expert witness to base his opinion upon earlier trial testimony. However, this Rule does not afford the expert unlimited license to testify or present a chart in a manner that simply summarizes the testimony of others without first relating that testimony to some 'specialized knowledge' on the expert's part as required under Rule 702 of the Federal Rules of Evidence." *United States v. Johnson*, 54 F.3d 1150, 1157 (4th Cir.) (holding chart admissible under Fed. R. Evid. 611(a)), *cert. denied*, 116 S. Ct. 266 (1995).

V. Hearsay

1. Confrontation Clause v. Hearsay Exceptions. "When evidence is admitted under a firmly rooted hearsay exception, a court can 'infer [ ] without more' that it is sufficiently reliable to satisfy the Confrontation Clause. . . . But the Clause requires 'a showing of *particularized* guarantees of trustworthiness' before all other hearsay can be admitted. . . . This trustworthiness requirement — which serves as a surrogate for the declarant's in-court cross-examination — is satisfied if the court can conclude that cross-examination would be of 'marginal utility.'" *United States v. Shaw*, 69 F.3d 1249, 1253 (4th Cir. 1995) (citing *Idaho v. Wright*, 497 U.S. 805, 820 (1990)); *see also United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995) (holding that Confrontation Clause is satisfied when "cross-examination would add little to test the hearsay's reliability"), *cert. denied*, 116 S. Ct. 925 (1996).

2. Admission of Co-Conspirator's Statement (Fed. R. Evid. 801(d)(2)(E)). "Rule 801(d)(2)(E) allows the admission of hearsay if the district court finds by a preponderance of the evidence (1) that there was a conspiracy involving the declarant and the party against whom the statement is offered and (2) that the declarant's statement was made during the course of and in furtherance of a conspiracy." *United States v. Capers*, 61 F.3d

1100, 1105 (4th Cir. 1995) (allowing admission of statement of deceased co-conspirator), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995).

3. Impeachment Must Occur Before Prior Consistent Statement Admitted (Fed. R. Evid. 801(d)(1)(B)). In *United States v. Lowe*, 65 F.3d 1137 (4th Cir. 1995), the testifying defendant tried to introduce his prior consistent statement before his testimony had been impeached. The Fourth Circuit upheld the trial court's sustaining of the government's objection. In *United States v. Acker*, 52 F.3d 509 (4th Cir. 1995), a government witness testified to a prior consistent statement merely as a general corroboration of an earlier government witness. The government made no attempt to offer the statement as a rebuttal to a recent fabrication, as required by the rule. The Fourth Circuit was unable to find the error harmless beyond a reasonable doubt because the jury below had acquitted the defendant of two of the four bank robberies with which she had been charged. The court of appeals reversed the convictions on the other two robberies and ordered a new trial.

4. Test for Trustworthiness of Residual Exceptions to Hearsay Rule (Fed. R. Evid. 803(24), 804(b)(5)). "Trustworthiness must emanate from the circumstances of a hearsay statement, not from its consistency with other evidence offered in the case." *United States v. Shaw*, 69 F.3d 1249, 1253 n.5 (4th Cir. 1995) (finding trustworthiness).

5. Corroboration of Unavailable Witness's Statement Against Interest (Fed. R. Evid. 804(b)(3)). When a witness is unavailable, the admission ("a formidable burden") of his statement against interest may turn on whether corroborating circumstances clearly indicate that the statement is trustworthy. In *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir.), *petition for cert. filed*, 64 U.S.L.W. 3486 (U.S. Dec. 26, 1995) (No. 95-1076), the Fourth Circuit stated that "[t]he level of corroboration . . . must be sufficient that cross examination would add little to test the hearsay's reliability," and further elaborated on factors that may be considered in assessing reliability: "(1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question." *Id.* at 1102 (upholding district court's exclusion of statement offered by and purportedly exculpating defendant). "When assessing the corroborating circumstances of a statement, a court can make an assessment of the evi-

dence." *United States v. Lowe*, 65 F.3d 1137, 1146 (4th Cir. 1995) (upholding district court's exclusion of statement of defendant's witness).

6. Test for Residual Exception When Declarant Is Unavailable (Fed. R. Evid. 804(b)(5)). "To admit hearsay under the residual exception created by Federal Rule of Evidence 804(b)(5), the district court must find that (1) the declarant is unavailable; (2) the statement bears circumstantial guarantees of trustworthiness equivalent to those that warrant the admission of hearsay under the other exceptions enumerated in Rule 804; (3) the statement relates to a material fact; (4) the statement is more probative on the point for which it is offered than any other reasonably obtainable evidence; (5) the interests of justice are served by the statement's admission; and (6) the offering party has provided the opposing party reasonable notice before trial of its intention to use the statement." *United States v. Shaw*, 69 F.3d 1249 (4th Cir. 1995) (finding evidence admissible).

7. Distinguishing Between Hearsay and Nonhearsay Uses of Evidence. In *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995), the Fourth Circuit upheld the trial court's rulings allowing limited references to newspaper articles introduced by the defense in a securities and wire fraud prosecution. *Id.* at 969. The defense theory of admission was that the newspaper articles established information that was available to the public. *Id.* at 967. The trial court properly limited the use of the articles because the content of the articles was hearsay. *Id.* at 968.

W. Chain of Custody (Fed. R. Evid. 901(a))

1. Chain of Custody Is Only One Method of Authentication. "The authentication requirement of the Federal Rules of Evidence requires only that a party introducing evidence demonstrate that the evidence is in fact what its proponent claims. Fed. R. Evid. 901(a). The 'chain of custody' rule is simply a variation of this principle." *United States v. Turpin*, 65 F.3d 1207, 1213 (4th Cir. 1995) (finding that challenge to evidence went to its weight, not to its authenticity), *cert. denied*, 64 U.S.L.W. 3640 (U.S. Mar. 25, 1996) (No. 95-7260).

2. "Missing Link" Is Not Necessarily Fatal. The "'chain of custody' is not an iron-clad requirement, and the fact of a 'missing link' does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material respect." *United States v. Ricco*, 52 F.3d 58, 61-62 (4th Cir.) (finding authentication sufficient) (citing *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982)), *cert. denied*, 116 S. Ct. 254 (1995).

X. Note-Taking by Jurors

It is within the discretion of the court to allow jurors to take notes. They should be instructed that their notes are not evidence and that their notes should not take precedence over their independent recollection of the proceedings. *United States v. Wild*, 47 F.3d 669, 672 (4th Cir.), *cert. denied*, 116 S. Ct. 128 (1995).

Y. Jury Misconduct: Defendant Bears Initial Burden of Showing Improper Contact Between Juror and Parties

"In *Stockton*, we emphasized that the defendant bears the initial burden of demonstrating that an improper contact occurred. Only if such contact is established must the government demonstrate the absence of prejudice. A mere proffer without further support is not enough to create a question about improper jury tampering." *United States v. Heater*, 63 F.3d 311, 321-22 (4th Cir. 1995) (noting that court will not go on "fishing expedition"), *cert. denied*, 116 S. Ct. 796 (1996).

Z. Defenses

1. Ignorance of Law Is No Defense. Ignorance of the law generally is no defense to a criminal charge. *United States v. Forbes*, 64 F.3d 928, 932 n.4 (4th Cir. 1995).

2. Mistake of Law Is No Defense. Except for good-faith reliance on the advice of an *actual* expert or government official with *actual* authority, mistake of law is no defense to a criminal charge. *United States v. Sparks*, 67 F.3d 1145, 1152-53 n.4 (4th Cir. 1995) (finding no detrimental reliance on expert or official).

3. Legal Impossibility, Definition. "The defense of legal impossibility is available where the defendant's acts, even if fully carried out as intended, would not constitute a crime." *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir.) (holding that defense of legal impossibility was contradicted by facts), *cert. denied*, 116 S. Ct. 90 (1995).

4. Factual Impossibility Is No Defense In Attempt Crime. "Factual impossibility exists 'where the objective is proscribed by the criminal law but a factual circumstance unknown to the actor prevents him from bringing it about.' *United States v. Conway*, 507 F.2d 1047, 1050 (5th Cir. 1975). However, factual impossibility is traditionally not a defense to a charge of attempt, and we now join those circuits that have expressly held that it is not a defense to an attempt crime." *United States v. Hamrick*, 43 F.3d 877, 885

(4th Cir.) (finding possibly dysfunctional bomb no defense to attempted murder charge), *cert. denied*, 116 S. Ct. 90 (1995).

5. Government May Solicit But Not Entrap. "As we stated in *Daniel*, inducement involves elements of governmental overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party, whereas, on the other hand, solicitation simply is the provision of an opportunity to commit a criminal act." *United States v. Singh*, 54 F.3d 1182, 1189 (4th Cir. 1995) (citations and internal quotations omitted) (holding that defendant was not entrapped because he readily committed the criminal act).

6. Standard for Justification Defense. "The defendant must produce evidence which would allow the factfinder to conclude that he (1) was under unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) a direct causal relationship between the criminal action and the avoidance of the threatened harm." *United States v. Perrin*, 45 F.3d 869, 873-74 (4th Cir.) (citing *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989)) (holding that justification for possession of firearm by felon will be construed very narrowly), *cert. denied*, 115 S. Ct. 2287 (1995).

AA. Jury Instructions

1. No Definition of "Reasonable Doubt." In 1995, the Fourth Circuit again reiterated its long-standing rule that the district courts should not attempt to define "reasonable doubt." *United States v. Oriakhi*, 57 F.3d 1290, 1300 (4th Cir. 1995); *see also United States v. Reives*, 15 F.3d 42, 46 (4th Cir.) (holding that court was not obliged to give definition of reasonable doubt even when jury asks for one), *cert. denied*, 114 S. Ct. 2679 (1994).

2. No "Missing Witness" Instruction When Witness Is Available to Both Sides. In *United States v. Milton*, 52 F.3d 78 (4th Cir. 1995), the defendant appealed the trial court's denial of his request for a "missing witness" instruction. *Id.* at 81. Under such an instruction, if a party has failed to call a relevant witness, the jury may consider that the witness's testimony would have been unfavorable to the party that did not call the witness. The Fourth Circuit ruled that no instruction was required since the missing witness was equally available to both sides. *Id.*

3. Requested Jury Instructions Must Be Supported By Evidence. A party is entitled to a jury instruction only when there is evidence in the record to support the instruction. *Kornahrens v. Evatt*, 66 F.3d 1350, 1354 (4th Cir. 1995). In *Kornahrens*, the Fourth Circuit held that a defendant charged with murder had no right to an instruction about lesser degrees of homicide because the record did not support it. *Id.* at 1354-55.

4. Failure To Instruct Jury on Essential Element Is Constitutional Error, Almost Always Requiring Reversal. "Failure to instruct the jury that it must make an essential finding is therefore a constitutional error, and we must reverse the conviction unless the error is harmless beyond a reasonable doubt. . . . [F]ailing to instruct the jury on an essential element will rarely be harmless." *United States v. Forbes*, 64 F.3d 928, 934-35 (4th Cir. 1995) (finding rare example of harmless constitutional error); *see also United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995) (finding error not harmless); *United States v. Boyd*, 53 F.3d 247 (4th Cir. 1995) (concluding that deficient conspiracy instruction was not harmless).

5. Error in Reasonable Doubt Instruction Can Never Be Harmless. "[T]he harmless-error doctrine cannot save a constitutionally deficient reasonable doubt instruction." *Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2281 (1995).

6. Allen *Charge Must Be Balanced.* An *Allen* charge is a supplemental jury instruction requiring members of a deadlocked jury to give deference to each other's views. In *United States v. Burgos*, 55 F.3d 933, 935 (4th Cir. 1995), the Fourth Circuit explicitly stiffened its standard of review from previous cases. "It is critical that an *Allen* charge not coerce one side or the other into changing its position for the sake of unanimity. . . . [R]egardless of what other specifics are included in an *Allen* charge given to a deadlocked jury, a district court must incorporate a specific reminder both to jurors in the minority and those in the majority that they reconsider their positions in light of the other side's views. Such an instruction applies equally to each juror, regardless of whether that person is alone in dissent or is part of a substantial majority. Failure to provide a sufficiently balanced charge will result in reversal." *United States v. Burgos*, 55 F.3d 933, 941 (4th Cir. 1995) (overturning conviction because *Allen* charge acted as coercion on jurors in minority).

7. Conflicting Jury Instructions: When Retrial Is Required. When *final* jury instructions are conflicting and erroneous, a retrial may be required. When a final instruction conflicts with a prior limiting instruction, the final instruction controls, and retrial is probably not necessary. *United States v.*

Powers, 59 F.3d 1460, 1469 n.9 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996).

8. Supplemental Argument After Supplemental Instruction. If the trial court gives a supplemental jury instruction that presents a new theory of the case, it may be error for the court to deny the defendant another chance to argue. However, if the supplemental instruction only amplifies the initial instructions, then no additional argument is necessary. *United States v. Smith*, 44 F.3d 1259, 1271 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995).

9. Trial Judge Has Discretion Over Wording of Initial and Clarifying Jury Instructions and Over Whether To Issue Any Particular Jury Instruction. There is no right to a particular wording of a jury instruction. *United States v. Smith*, 44 F.3d 1259, 1270 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995); *United States v. Heater*, 63 F.3d 311, 326 (4th Cir. 1995) (holding that trial judge has discretion over wording of instruction on defendant's theory of defense), *cert. denied*, 116 S. Ct. 796 (1996). "[I]n responding to a jury's request for clarification on a charge, the district court's duty is simply to respond to the jury's apparent source of confusion fairly and accurately without creating prejudice. . . . The particular words chosen, like the decision whether to issue any clarification at all, are left to the sound discretion of the district court." *United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995); *see also United States v. Gray*, 47 F.3d 1359, 1369 (4th Cir. 1995) (holding that trial judge has discretion over whether facts warrant issuing of jury instruction on defendant's theory of case).

10. Test for Reversible Error When Trial Court Refuses Defendant's Requested Jury Instruction. "A district court's refusal to provide an instruction requested by a defendant constitutes reversible error only if the instruction: (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Lewis*, 53 F.3d 29, 32 (4th Cir. 1995) (citations omitted) (finding reversible error in deficient conspiracy instruction).

11. Standard of Review: Abuse of Discretion. An appeals court reviews a trial court's decision to give or reject a jury instruction and the contents of the instruction for abuse of discretion. The court "reviews jury instructions in their entirety and as part of the whole trial. . . . [W]e determine, on that basis, 'whether the court adequately instructed the jury on the elements of the offense and the accused's defenses.'" *United States v. Bostian*, 59 F.3d 474, 480 (4th Cir. 1995) (citation omitted) (quoting *United*

States v. Fowler, 932 F.2d 306, 317 (4th Cir. 1991)), *cert. denied*, 116 S. Ct. 929 (1996); *see also United States v. Pearce*, 65 F.3d 22 (4th Cir. 1995) (reviewing supplemental instructions under same standard); *United States v. Burgoss*, 55 F.3d 933 (4th Cir. 1995). But a constitutional challenge to a jury instruction is resolved according to whether there is a *reasonable likelihood* that the jury applied the instruction in an unconstitutional manner. *United States v. Lowe*, 65 F.3d 1137 (4th Cir. 1995) (considering instruction defining statutory terms); *Adams v. Aiken*, 41 F.3d 175 (4th Cir. 1994) (considering reasonable-doubt instruction), *cert. denied*, 115 S. Ct. 2281 (1995).

BB. Verdict by Fewer Than Twelve Jurors (Fed. R. Crim. P. 23(b))

Rule 23(b) provides that a verdict may be rendered by a jury of any number fewer than twelve if both parties agree, or by eleven, if "after the jury has retired," the trial court finds "just cause" to excuse the twelfth juror. *United States v. Acker*, 52 F.3d 509, 515 (4th Cir. 1995) (holding that trial court did not abuse discretion in excusing ill twelfth juror after deliberations had begun).

CC. Mistrial

1. Mistrial Disfavored But Left to Discretion of Trial Court. "The decision whether to declare a mistrial is left to the sound discretion of the trial judge. . . . In making such a determination, the district court should consider whether there are less drastic alternatives to declaring a mistrial." *United States v. Smith*, 44 F.3d 1259, 1268 (4th Cir.) (upholding denial of mistrial for 32-day interruption in trial and denial of mistrial for alleged government intimidation of defense witness), *cert. denied*, 115 S. Ct. 1970 (1995).

2. Defendant Must Show Actual Prejudice Caused by Interruption in Trial. In *United States v. Smith*, 44 F.3d 1259 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995), the defendant moved for a mistrial on account of a 32-day interruption in the trial caused by the judge's vacation and the illness of a codefendant. The Fourth Circuit ruled that the defendant had failed to show any actual prejudice to himself and that arguments about whether the interruption favored the defendant or the government were speculative, which ameliorated part of the problem of the interruption. The court of appeals did, however, caution that "the hiatus was a long one for a jury trial and can be tolerated only as a rare exception." *Id.* at 1268.

DD. Motion for New Trial

1. Based On Newly Discovered Evidence. A new trial on the basis of newly discovered evidence may be brought within two years after final judgment and may be granted if a defendant establishes *all* five of the following elements: (1) the evidence must be newly discovered since the trial; (2) the defendant must show due diligence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must probably produce an acquittal. In *United States v. Singh*, 54 F.3d 1182 (4th Cir. 1995), the Fourth Circuit found that because the newly discovered evidence did not show the probability of an acquittal, there was no abuse of discretion in the district court's denial of a new trial. *Id.* at 1190. The evidence for conviction was still overwhelming. *Id.*

2. Based on Newly Discovered "Information." A motion for a new trial brought on the basis of newly discovered information that is not admissible trial evidence but would, for instance, support a claim of ineffective assistance of counsel must be brought within seven days of the verdict. *United States v. Smith*, 62 F.3d 641, 650-51 (4th Cir. 1995).

3. Ineffective Assistance of Counsel May Be Grounds for Motion for New Trial. If raised within seven days of the verdict, a motion for a new trial may be based on a claim of ineffective assistance of counsel. But the trial court's decision on the motion is reviewed only for abuse of discretion. *United States v. Adam*, 70 F.3d 776, 779 (4th Cir. 1995).

EE. Limited Post-Trial Right to Contact Juror (28 U.S.C. § 1867(a))

In *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995), the defendant claimed that a doubt had arisen since his conviction about the English-language proficiency of one of the jurors. *Id.* at 1366. The Fourth Circuit upheld the trial court's ruling that the defendant had not brought up the claim within the required seven days and that there was no manifest injustice because all of the jurors had passed the statutory linguistic competency standard under 28 U.S.C. § 1865. *Gray*, 47 F.3d at 1367.

VIII. Sentencing

A. Cases Remanded for Resentencing

United States v. Harrison, 58 F.3d 115 (4th Cir. 1995) (remanded for failure to follow procedural rules for determining extent of upward departure based on inadequacy of criminal history).

United States v. Turner, 59 F.3d 481 (4th Cir. 1995) (remanded for incorrect calculation of weight of LSD at sentencing).

United States v. Smith, 47 F.3d 681 (4th Cir. 1995) (concluding that court may not force defendant to relinquish ERISA pension benefits for restitution).

United States v. Stewart, 49 F.3d 121 (4th Cir. 1995) (holding that pre-trial detention when new sentence not imposed is not "imprisonment on a sentence" under U.S.S.G. § 4A1.1(e)).

United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995) (remanded for inappropriate application of "economic loss" under U.S.S.G. § 2F1.1; no record of rationale for upward departure in fine).

United States v. Hill, 59 F.3d 500 (4th Cir. 1995) (remanded for incorrect calculation of "reasonable incremental punishment" under U.S.S.G § 5G1.3(c)).

United States v. Myers, 66 F.3d 1364 (4th Cir. 1995) (remanded for incorrect calculation of "reasonable incremental punishment," U.S.S.G. § 5G1.3(c), in sentence of one of two defendants).

United States v. Johnson, 48 F.3d 806 (4th Cir. 1995) (remanded for failure to calculate "reasonable incremental punishment" under U.S.S.G. § 5G1.3(c); holding that court may not delegate essential decisions about restitution to probation office).

United States v. Singh, 54 F.3d 1182 (4th Cir. 1995) (overturning vulnerable-victim enhancement).

United States v. Maddox, 48 F.3d 791 (4th Cir. 1995) (holding that district court erroneously awarded downward departure for substantial assistance without government's initiating motion; holding that district court erroneously awarded downward departure because defendant would be vulnerable in prison; holding that district court erroneously awarded downward departure sua sponte and without notice to government).

United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 116 S. Ct. 124 (1995) (finding that district court must force defendant to get his financial affairs in order so that district court can determine his ability to pay fine).

United States v. Smith, 62 F.3d 641 (4th Cir. 1995) (remanded for lack of specific findings concerning obstruction-of-justice enhancement for perjury).

United States v. Morsley, 64 F.3d 907 (4th Cir. 1995) (finding that quantity of drugs was miscounted), *cert. denied*, 116 S. Ct. 749 (1996).

United States v. Heater, 63 F.3d 311 (4th Cir. 1995) (finding that amendment of perjury guideline, U.S.S.G. § 2J1.2, caused *ex post facto* problem), *cert. denied*, 116 S. Ct. 796 (1996).

United States v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995) (finding that restitution order went beyond offense of conviction).

B. Appeals Dismissed

United States v. Hill, 70 F.3d 321 (4th Cir. 1995) (holding that court was without jurisdiction to hear appeal of extent of downward departure).

United States v. Speed, 53 F.3d 643 (4th Cir. 1995) (finding no jurisdiction to hear appeal of sentence within guideline range).

C. Plea Negotiations and Agreements

1. Plea Agreement Is Contract. Contract law governs the interpretation of plea agreements. Both sides are entitled to the benefit of their bargains, but neither side is entitled to more than it bargained for. *Ashe v. Styles*, 67 F.3d 46, 52 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1051 (1996).

2. The "Prisoners' Dilemma" and Government "Hardball." The government may place two codefendants into a dilemma by offering the same plea agreement to both but only accepting the plea agreement of the first to agree. "The combination of statutory mandatory minimum sentences and the exclusive power to move for downward departure based upon substantial assistance allow the government to play hardball during plea negotiations." *United States v. Maddox*, 48 F.3d 791, 796 (4th Cir. 1995).

3. Failure to Appear Is Breach of Plea Agreement. "By jumping bail and failing to appear, David violated the plea agreement and the government's obligation to move for a downward departure based on substantial assistance ended." *United States v. David*, 58 F.3d 113, 115 (4th Cir. 1995).

D. Sentencing Commission May Overturn Court Interpretations of Guidelines

"[T]he Sentencing Commission has the authority to review the work of the courts and revise the Guidelines by adopting an interpretation of a particular guideline in conflict with prior judicial constructions of that guideline." *United States v. Turner*, 59 F.3d 481, 488 (4th Cir. 1995).

E. Rule of Lenity Favors Defendant at Sentencing

"The rule of lenity requires the sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should

apply." *United States v. Fisher*, 58 F.3d 96, 99 (4th Cir.), *cert. denied*, 116 S. Ct. 329 (1995).

F. Hearsay Is Allowed at Sentencing (§ 6A1.3(a))

Section 6A1.3(a) specifically provides that the rules of evidence, including the rule against hearsay, do not apply at sentencing hearings. *United States v. Puckett*, 61 F.3d 1092, 1095 (4th Cir. 1995) ("The government can rely on hearsay testimony to meet its burden of proof.").

G. Uniform Sentencing Is Goal of Guidelines

"The purpose of enacting the Sentencing Guidelines was to ensure some measure of uniformity in federal sentencing . . . ." *United States v. Stewart*, 49 F.3d 121, 123 n.3. (4th Cir. 1995).

H. Sentences May Be Lowered if Guidelines Are Later Amended (18 U.S.C. § 3582(c)(2))

Under the Guidelines, a court has discretion to reduce an already-imposed sentence if the guideline on which the sentence was based is later amended. *United States v. Turner*, 59 F.3d 481, 483 (4th Cir. 1995).

I. Current Version of Guidelines Is Not Used When Ex Post Facto Clause Is Implicated

Although a defendant is normally sentenced under the version of the Guidelines in effect on the date of sentencing, this does not apply when the Guidelines have been amended to the defendant's disadvantage between commission of the crime and the date of sentencing. *United States v. Heater*, 63 F.3d 311, 332 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996).

J. Factual Findings at Sentencing

1. Findings Must Be Specific Enough for Review. If factual findings at sentencing are too "generalized," a reviewing court may not be able to determine if a guideline was correctly applied. *United States v. Singh*, 54 F.3d 1182, 1192 (4th Cir. 1995) (remanded for re-sentencing).

2. Sentencing Court May Adopt Findings in Pre-Sentence Report. "A district court may adopt the findings in a pre-sentence report in order to sustain a particular sentencing decision." *United States v. Singh*, 54 F.3d 1182, 1192 (4th Cir. 1995).

3. Sentencing Court May Adopt Government's Objections If Specific Facts Are Included in Objections. There may be a sufficient record for review of factual findings "when a district court adopts the government's objections to a presentence report and the government's objections clearly expound specific facts supporting the correct application of the Guidelines." *United States v. Singh*, 54 F.3d 1182, 1192 (4th Cir. 1995).

4. Standard of Review: Clear Error. United States v. Myers, 66 F.3d 1364, 1371 (4th Cir. 1995) (regarding acceptance of responsibility); *United States v. Turner*, 59 F.3d 481, 484 (4th Cir. 1995); *United States v. Re-Brook*, 58 F.3d 961, 969 (4th Cir.) (determining whether enhancement applied), *cert. denied*, 116 S. Ct. 431 (1995); *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995) (determining amount of loss under § 2F1.1.); *United States v. Singh*, 54 F.3d 1182, 1190 (4th Cir. 1995) (discussing facts to sustain vulnerable-victim enhancement).

K. Interpretation of Sentencing Guidelines

1. Binding Nature of Commentary in Guidelines. "[C]ommentary that interprets or explains a specific guideline is to be given the same force and effect as the Guidelines language itself unless the Commentary 'violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *United States v. Turner*, 59 F.3d 481, 485 (4th Cir. 1995) (quoting *Stinson v. United States*, 113 S. Ct. 1913, 1915 (1993)).

2. State Law Is Not Needed. "A federal court construing the federal Sentencing Guidelines need not turn to state law." *United States v. Stewart*, 49 F.3d 121, 123 n.3 (4th Cir. 1995) (holding that Maryland statutory definition of "imprisonment" was not binding on federal court).

3. Date of Sentencing Controls Guidelines Version Used (§ 1B1.11(a)). "Generally, subject to the limitations of the *ex post facto* clause, courts are to use 'the Guidelines Manual in effect on the date that the defendant is sentenced.' U.S.S.G. § 1B1.11(a), 18 U.S.C. § 3553(a)(4)." *United States v. Capers*, 61 F.3d 1100, 1109 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995).

4. When Guidelines Amendments Are Retroactive (§ 1B1.10). Section 1B1.10 lists certain amendments to the Guidelines that the Guidelines Commission has decided are to be given retroactive effect and therefore are the basis of sentencing reduction. But "courts can give retroactive effect to a clarifying (as opposed to substantive) amendment regardless of whether it is

listed in U.S.S.G. § 1B1.10. . . . [A]n amendment should be classified as substantive, not clarifying, when it cannot be reconciled with circuit precedent." *United States v. Capers*, 61 F.3d 1100, 1109-10 (4th Cir. 1995) (concluding that amendment is substantive and therefore is not retroactive), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995).

L. Double Counting

"Double counting" is permissible under the Guidelines except where expressly prohibited. Under double counting, the same conduct may serve as a sentencing enhancement under two separate provisions of the Guidelines. *United States v. Puckett*, 61 F.3d 1092, 1096-97 (4th Cir. 1995); *United States v. Curtis*, 934 F.2d 553, 536 (4th Cir. 1991) (holding that "the sentencing guidelines are explicit when double counting is forbidden").

M. Defendant May Not Protest Lesser Sentence of Codefendant

As long as all sentences are correctly calculated and sentenced within the guideline range, defendants may not protest the lesser sentences of codefendants. *United States v. Castner*, 50 F.3d 1267, 1280 (4th Cir. 1995).

N. Defendant's Knowledge of Presentence Report (Fed. R. Crim. P. 32(c)(3)(A))

Failure to inquire at sentencing whether the defendant has read the presentence report and discussed it with his attorney is plain error. *United States v. Lockhart*, 58 F.3d 86, 88-89 (4th Cir. 1995) (concluding that error did not affect substantial rights).

O. Mandatory Life Sentences Are Constitutional

In *United States v. Kratsas*, 45 F.3d 63 (4th Cir. 1995), the Fourth Circuit affirmed its 1994 decision in *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994), that a life sentence required by the federal drug statute was neither disproportionate to the offense nor unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

P. Sentence Less than Life Sentence Is Not Reviewable as Cruel and Unusual Punishment

Sentences other than life sentences are not reviewable under the Cruel and Unusual Punishments Clause of the Eighth Amendment. *United States*

v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995) (refusing to review 120-month sentence for drug trafficking).

Q. Almost No Limit to What Court May Consider at Sentencing (18 U.S.C. § 3661, § 1B1.4, Fed. R. Crim. P. 32(b)(4)(G))

According to § 1B1.4, a sentencing court may consider "without limitation, any information concerning the background, character and conduct of the defendant unless otherwise prohibited by law." *United States v. Gordon*, 61 F.3d 263, 268 (4th Cir. 1995) (holding that sentencing judge may consider additional crimes not accounted for in plea agreement, defendant's grand jury testimony, and personal knowledge of defendant from prior proceedings). But a sentence may not be based on "an unconstitutional classification" such as race. *United States v. Holmes*, 60 F.3d 1134, 1137 (4th Cir. 1995) (concluding that sentencing enhancement in fraud case was based on vulnerable-victim status rather than race).

R. Not Abuse of Discretion For Court to Refuse to Consider Tardy Objections to Presentence Report

In *United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996), the defendant failed to abide by a local rule requiring that written objections to the presentence report be filed within 15 days [now fixed at 14 days in Fed. R. Crim. P. 32(b)(6)(B)] after issuance of the report. The Fourth Circuit upheld the sentencing court's refusal to entertain tardy oral objections on the day of sentencing. *Id.* at 914.

S. Defendant Need Not Have Been Armed to Receive Enhancement for "Express Threat of Death" During Robbery (§ 2B3.1(b)(2)(F))

"[A] threat to shoot a firearm at a person during a robbery, created by any combination of statements, gestures, or actions that would put an ordinary victim in reasonable fear for his or her life, is an express threat of death under § 2B3.1(b)(2)(F), even though the person delivering the threat is not in possession of a firearm." *United States v. Murray*, 65 F.3d 1161, 1167 (4th Cir. 1995) (agreeing with Seventh, Eighth, Ninth, and Tenth Circuits, and upholding enhancement on one bank robber for showing but not pointing sawed-off shotgun and on another bank robber even though unarmed).

T. Decision-Making or Sensitive Position (U.S.S.G. § 2C1.7(b)(1)(B))

In *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995), the Fourth Circuit ruled that it was not clearly erroneous

for the district court to conclude that an attorney for the West Virginia Lottery Commission held a "sensitive position" because he was privy to confidential information and because of his influence and the nature of the advice his job called upon him to make. The defendant had argued that he was on part-time status and that his job was simply to give legal advice and perform such other duties as required. *Id.* at 970.

U. Loss (§ 2B1.1, 2F1.1)

1. Loss under § 2F1.1. "Loss under § 2F1.1(b)(1) is the actual, probable, or intended loss to the victims of the fraud." *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995).

2. Gain to Defendant or to Manufacturer Is Not Loss. "In appropriate circumstances, a defendant's gain may provide an estimate of the loss. . . . However, gain is only an alternative measure of some actual, probable, or intended loss; it is not a proxy for loss when there is none. . . Economic gain to the manufacturer . . . is not the appropriate measure of loss in [this] situation." *United States v. Chatterji*, 46 F.3d 1336, 1340-42 (4th Cir. 1995) (finding no loss in regulatory fraud concerning manufacture and sale of two new drugs).

3. Gain to Defendant Is Alternative Measure of Loss. When the amount of loss caused by the defendant's conduct cannot be determined with certainty, the amount of gain realized by the defendant "is an available, alternative measure of estimating that loss." *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995). Moreover, Application Note 8 of the Commentary to § 2F1.1 states that the "offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss." *Id.* at 781 (holding that loss was to taxpayers in medical-referral kickback scheme involving federal welfare funds). Also, in *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995), the Fourth Circuit ruled that "the illegal profit" and not just the "net monetary damage" in a complicated government procurement-fraud case was a permissible measure of actual loss under § 2F1.1. *Id.* at 1276.

4. Standard of Review. "While the question of the amount of loss is generally one of fact subject to review only for clear error, the application of a loss enhancement to undisputed facts is a question of law which we review de novo." *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995).

V. When Perjury Guideline (§ 2J1.2) Is Cross-Referenced to Accessory Guideline (§ 2X3.1)

In two previous cases, *United States v. Pierson*, 946 F.2d 1044 (4th Cir. 1991), and *United States v. Jamison*, 996 F.2d 698 (4th Cir. 1993), the Fourth Circuit had construed § 2J1.2 to require a cross-reference to § 2X1.3 only when the perjury was committed in an effort to assist another person to escape punishment. *Jamison*, 996 F.2d at 701-02; *Pierson*, 946 F.2d at 1049. Since those decisions, the Guidelines Commission amended § 2J1.2, and in *United States v. Heater*, 63 F.3d 311 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996), the Fourth Circuit recognized that "[t]he *Pierson-Jamison* distinction between those who commit perjury to protect themselves from prosecution and those who commit perjury for the sole purpose of assisting another is no longer relevant. Each perjurer will face an enhancement of his base offense level under section 2X3.1." *Id.* at 331.

W. When Victim Is "Vulnerable" (§ 3A1.1)

A sentence may be enhanced by two levels if the victim is found to be vulnerable. "[T]he district court must first look to the victim to determine whether this particular victim was more vulnerable to the offense than the world of possible victims. Then, the court must determine whether the defendant specifically targeted the victim because of that vulnerability." *United States v. Singh*, 54 F.3d 1182, 1192 (4th Cir. 1995) (overturning vulnerable-victim enhancement because evidence failed to show that victims were selected *because of* their vulnerability); *see United States v. Holmes*, 60 F.3d 1134, 1136-37 (4th Cir. 1995) (upholding enhancement because defendant selected victims with poor credit ratings as targets for fraud).

X. Role in Offense (§§ 3B1.1, 1.2)

1. Reduction Based on Comparison Both of Defendants and Elements of Offense. In deciding whether a defendant merits a reduction for being a minimal or minor participant in the offense, the sentencing court must "not only compare the defendant's culpability to that of other participants, but also 'measur[e] each participant's individual acts and relative culpability against the elements of the offense of conviction.' *Daughtrey*, 874 F.2d at 216." *United States v. Reavis*, 48 F.3d 763, 769 (4th Cir.) (allowing no reduction), *cert. denied*, 115 S. Ct. 2597 (1995).

2. Burden to Prove Reduction Is on Defendant. A defendant bears the burden of proving any reduction by a preponderance of the evidence. *United*

States v. Reavis, 48 F.3d 763, 769 (4th Cir.), *cert. denied*, 115 S. Ct. 2597 (1995).

Y. Abuse of Position of Trust (§ 3B1.3)

1. Physician May Hold Position of Trust. In *United States v. Adam*, 70 F.3d 776 (4th Cir. 1995), the Fourth Circuit upheld the trial court's enhancing of a physician's sentence for abuse of position of trust in a medical-referral kickback scheme involving federal welfare funds. The Fourth Circuit ruled that physicians, who "exercise enormous discretion" and normally receive "great deference," may be held accountable for abuse of their discretion and the deference they receive. *Id.* at 782.

2. Bank Teller May Hold Position of Trust. Although the commentary to §3B1.3 states that the "ordinary" bank teller is not in a position of trust, a bank teller who is actually in a position of trust will not escape an enhancement simply because she holds the title of bank teller. "The abuse of trust enhancement was not designed to turn on formalistic definitions of job type. . . . Rather, several factors must be considered by courts to determine whether a defendant held a position of trust. . . . Overall, the question of whether a defendant held a position of trust must be approached from the perspective of the victim." *United States v. Gordon*, 61 F.3d 263, 269 (4th Cir. 1995) (teller had "special access" and committed "external violation of trust" by aiding and abetting bank robbery).

Z. Obstructing or Impeding Justice (§ 3C1.1)

1. Threatening as Obstruction. The sentence of a defendant may be enhanced two levels under § 3C1.1 if the sentencing court finds that he obstructed justice during "the investigation, prosecution, or sentencing" of the case. *United States v. Puckett*, 61 F.3d 1092, 1095 (4th Cir. 1995) (discussing threats against grand jury witness).

2. Perjury as Obstruction. If the enhancement is for perjury, the sentencing court must make a finding on all the essential elements of perjury. *United States v. Murray*, 65 F.3d 1161, 1165 (4th Cir. 1995); *United States v. Gordon*, 61 F.3d 263, 270 (4th Cir. 1995). "The definition of perjury under the Sentencing Guidelines is the same as that which obtains under the substantive federal criminal law. It contains three elements: (1) false testimony (2) concerning a material matter (3) given with the willful intent to deceive. . . ." *United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995) (enhancement overturned because no specific findings concerning elements of perjury).

AA. Acceptance of Responsibility (§ 3E1.1)

1. Defendant Has Burden of Proof. "It is the defendant's burden to show, by a preponderance of the evidence, that his sentence should be reduced for acceptance of responsibility." *United States v. Myers*, 66 F.3d 1364, 1371 (4th Cir. 1995); *see United States v. Castner*, 50 F.3d 1267, 1279 (4th Cir. 1995) (holding that defendant must accept "personal responsibility" for criminal conduct).

2. Defendant Who Goes to Trial Will Rarely Get Acceptance of Responsibility. Section 3E1.1, comment. (n.2), specifically provides that acceptance of responsibility is not intended for those defendants who proceed to trial. It is the "rare" defendant who will get acceptance after trial. *United States v. Castner*, 50 F.3d 1267, 1279 (4th Cir. 1995) (finding no acceptance).

3. Relevant Factors. "The commentary to Sentencing Guideline § 3E1.1 lists a non-exhaustive set of factors that the district court may use in deciding on acceptance of responsibility . . . . Conduct indicating acceptance of responsibility 'may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.' *Id.* comment. (n.3). Further, in determining acceptance of responsibility, the district court may look beyond the factors that constitute part of the conviction, even if those factors would not be sufficiently relevant to increase the defendant's sentence." *United States v. Myers*, 66 F.3d 1364, 1372 (4th Cir. 1995) (denying acceptance despite factors in favor of acceptance where defendants attempted to conceal crimes, partially denied crimes, left victim for dead in woods, and later used victim's credit cards).

4. Standard of Review: Clear Error, Great Deference. "We review the district judge's factual determination regarding whether to apply § 3E1.1 under the clearly erroneous standard. . . . 'The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.' U.S.S.G. § 3E1.1 comment. (n.5.)" *United States v. Myers*, 66 F.3d 1364, 1372 (4th Cir. 1995) (upholding denial); *see also United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995) (upholding denial of acceptance where defendant intentionally misled law enforcement officers).

BB. When PreTrial Detention Is Not "Imprisonment on a Sentence" (§ 4A1.1(e))

In *United States v. Stewart*, 49 F.3d 121 (4th Cir. 1995), the district court had enhanced the defendant's sentence two levels for commission of an offense within two years of release from prison because during the two-year period he had spent 24 days in custody before a prior parole violation hearing. The Fourth Circuit reversed and found that the 24-day period was not an "imprisonment on a sentence" because the defendant's parole was eventually not revoked and he was not reincarcerated.

CC. When Prior Sentences Are "Related" (§ 4A1.2(a)(2))

If prior sentences are "related" (*i.e.* consolidated for sentencing), they will be treated under § 4A1.2(a)(2) as one sentence for purposes of calculating criminal history. But prior sentences are related only if there was a *factual relationship* between them or if they were *formally consolidated* (*i.e.* by court order) for sentencing. *United States v. Allen*, 50 F.3d 294 (4th Cir.) (holding that non-factually related offenses sentenced at same sentencing hearing without formal order of consolidation were not "related" for Guideline purposes), *cert. denied*, 115 S. Ct. 2630 (1995).

DD. Career Offender (§ 4B1.1)

1. Guidelines Commission Did Not Exceed Authority When It Classified Certain Offenses Under Career Criminal Guideline (§ 4B1.2). In *United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996), the Fourth Circuit noted that it and most of the other federal circuits had already rejected the argument "that the United States Sentencing Commission exceeded the authority granted to it by Congress when it authorized enhanced 'career offender' sentences for defendants with prior drug conspiracy convictions or whose instant offense is a drug conspiracy conviction." *Id.* at 915 (citing *United States v. Kennedy*, 32 F.3d 876, 888-90 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995)).

2. Extortion Is Crime of Violence (§ 4B1.2, cmt. n.2). For purposes of determining prior predicate convictions under the career-offender guideline, Application Note 2 of § 4B1.2 clearly provides that extortion is a crime of violence. *United States v. Al-Talib*, 55 F.3d 923, 932 (4th Cir. 1995).

3. Attempt Is Prior Predicate Conviction (§ 4B1.2, cmt. n.1). Application Note 1 of § 4B1.2 clearly provides that a conviction for attempt to commit a crime of violence or controlled substance offense qualifies as a

prior predicate conviction for determining career-offender status. *United States v. Al-Talib*, 55 F.3d 923, 932 (4th Cir. 1995).

4. Using Telephone for Drug Distribution Is Prior Predicate Conviction (§ 4B1.2, cmt. n.1). Application Note 1 of § 4B1.2 provides that convictions for attempting, aiding and abetting, or conspiring to commit a drug offense qualify as prior predicate convictions for purposes of career-offender status. In *United States v. Walton*, 56 F.3d 551 (4th Cir. 1995), the Fourth Circuit ruled that a prior conviction under 21 U.S.C. § 843(b) for using the telephone for facilitating drug distribution was "equivalent to aiding and abetting that distribution" and was therefore a prior predicate conviction. *Id.* at 556.

EE. Restitution (§ 5E)

1. Ability to Pay Must Be Specifically Addressed (18 U.S.C. § 3664(a)). In imposing restitution, the sentencing court must make explicit factual findings concerning the defendant's ability to pay and the burden of restitution on the defendant's dependents. Furthermore, the court must relate these findings to the specific type and amount of restitution ordered. The sentencing court may satisfy this obligation by adopting the presentence report as long as the report contains adequate factual findings to allow appellate review. The defendant bears the burden of proving his inability to pay restitution. *United States v. Castner*, 50 F.3d 1267, 1277 (4th Cir. 1995) (quoting *United States v. Plumley*, 993 F.2d 1140, 1143 (4th Cir. 1993)).

2. Restitution May Be Imposed on Defendant with Negative Income Based on Earning Ability. The sentencing court may impose restitution on an indigent defendant based on his past business success and his above-average earning capacity. *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995).

3. Court May Not Force Payments of ERISA Pension Benefits. In *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995), the Fourth Circuit ruled that because Congress provided that ERISA benefits "may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), a court may not force a beneficiary (the defendant) to pay his ERISA benefits as restitution, regardless of the restitution provisions of the Victim Witness Protection Act (18 U.S.C. §§ 3663-3664). However, the amount of benefits that the beneficiary receives may be used to calculate the beneficiary's assets and ability to pay restitution.

4. Court May Not Delegate Essential Decisions About Restitution to Probation Office. "[M]aking decisions about the amount of restitution, the amount of installments, and their timing is a judicial function and therefore is non-delegable." *United States v. Johnson*, 48 F.3d 806, 809 (4th Cir. 1995).

5. When Restitution May Be Ordered (18 U.S.C. § 3663). A defendant may be ordered to pay restitution not only to the most obvious "victim," but also in a case involving a scheme, conspiracy, or pattern of criminal activity to "any person directly harmed by the defendant's criminal conduct." § 3663(a)(2). In addition, restitution may be ordered to the extent agreed upon in a plea agreement but with the caveat that the loss to be repaid must have been a result of the defendant's criminal conduct. *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (holding restitution order improper). Absent a specific provision in a plea agreement, restitution may not be ordered for losses that are a result of counts dismissed or acquitted. *Hughey v. United States*, 495 U.S. 411 (1990).

FF. Fines (§ 5E)

1. Ability to Pay Must Be Specifically Addressed (18 U.S.C. § 3572(a)). In ordering a fine, the sentencing court must make explicit factual findings concerning the defendant's ability to pay and the burden of a fine on his dependents. The sentencing court may satisfy this obligation by adopting the presentence report if the report contains adequate factual findings to allow appellate review. *United States v. Castner*, 50 F.3d 1267, 1277 (4th Cir. 1995).

2. Upward Departure from Fine Range. Section 5E1.2 of the Guidelines provides a method of calculating a fine range according to final offense level. If a court is going to depart upwards from the fine range, it must make findings in the record, including the normal upward-departure finding (§ 5K2.0) of the factor not adequately considered by the Sentencing Commission in determining the range. *United States v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995).

3. Defendant May Not Evade His Burden of Proving Inability to Pay Fine (§ 5E1.2(a)). Under § 5E1.2(a), a fine is to be imposed in all cases except where "the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." Because "[t]he defendant bears the burden of demonstrating his present and prospective inability to pay," he must get his financial affairs in order by the time of sentencing so that the district court can make a determination of ability to pay. *United States v.*

Hairston, 46 F.3d 361, 376 (4th Cir.), *cert. denied*, 116 S. Ct. 124 (1995). "The defendant cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition." *Id.* at 377; *see also United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995) (holding that defendant must show present and future inability to pay).

GG. Reasonable Incremental Punishment to Undischarged Term of Imprisonment (§ 5G1.3(c))

1. Enforced as Guideline. Section 5G1.3(c) is to be followed as if it were a guideline, but according to its own terms it allows a sentencing judge a measure of discretion. *United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995); *United States v. Hill*, 59 F.3d 500 (4th Cir. 1995); *United States v. Stewart*, 59 F.3d 496 (4th Cir. 1995).

2. Definition of "Reasonable Incremental Punishment." Sometimes a defendant is sentenced at a time when he is already serving a term of imprisonment. If the sentence that he is already serving was for a crime committed before his instant crime or has not been taken into consideration in the instant sentencing calculation, then he is liable only for an incremental penalty. "A reasonable incremental penalty is a sentence for the instant offense that, together with the undischarged term of imprisonment [*i.e.*, the sentence that a defendant is already serving], approximates the sentence that would have been imposed if the instant offense and the offense underlying the undischarged term of imprisonment were before the court simultaneously for sentencing pursuant to U.S.S.G. § 5G1.2, U.S.S.G § 5G1.3(c), comment. (n.3)." *United States v. Hill*, 59 F.3d 500, 502 (4th Cir. 1995).

3. How to Calculate Reasonable Incremental Punishment. "[A] district court should apply § 5G1.3(c) by first determining the guideline range for the instant offense (the instant offense guideline range) and the appropriate guideline range if the sentence were being imposed at the same time in federal court for the instant offense and the offense for which the undischarged term of imprisonment is being served (the combined guideline range)." *United States v. Wiley-Dunaway*, 40 F.3d 67, 71 (4th Cir. 1994). "Then, considering the time served and the time remaining [*i.e.*, the predicted time that the defendant will actually serve] on the undischarged sentence, the court should impose a term of imprisonment within the instant offense guideline range that results in a total punishment that is within the combined guideline range. . . . In order to reach a total punishment that is within the combined guideline range, the district court may order the sentence imposed to be served consecutively or concurrently, in whole or in

part, to the undischarged sentence. If no sentence can be imposed from within the instant offense guideline range that will result in a total punishment that is within the combined guideline range, the commentary to § 5G1.3 authorizes the district court, in its discretion, to depart from the instant offense guideline range in order to accomplish this result." *United States v. Hill*, 59 F.3d 500, 503 (4th Cir. 1995); *see also United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995) (finding that court incorrectly calculated sentence of one of two defendants); *United States v. Johnson*, 48 F.3d 806 (4th Cir. 1995) (remanded because of failure to apply § 5G1.3).

4. "Reasonable Alternate Method" of Calculation. In *United States v. Stewart*, 59 F.3d 496 (4th Cir. 1995), the Fourth Circuit endorsed a "reasonable alternate method" to the § 5G1.3(c) procedures because the district court found for "a reason sufficiently articulated in the record" that those procedures were "unduly complicated in this case." The Circuit noted that the result was approximately the same as the § 5G1.3(c) procedures. *Id.* at 498-99; *see also United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995).

5. No Need to Predict Effect of Federal Sentence on State Parole Board. In sentencing under § 5G1.3(c), the federal court must predict the release date of the defendant from his state sentence. In *United States v. Stewart*, the Fourth Circuit addressed the situation where the state parole board alters the defendant's predicted release date based on the sentence the federal court imposes. In *Stewart*, the court stated that the federal court need not consider such a speculative effect of its sentencing because it enmeshed the court in "the type of fine tuning that is unnecessary, and largely impossible, where indeterminate undischarged state sentences are involved in a federal sentencing proceeding." *Id.* at 499.

HH. Departures (§§ 5H, 5K, 18 U.S.C. § 3553(b))

1. No Departures Without Notice. "[A] district court should depart [upwards or downwards] from the Sentencing Guidelines only after both the government and the defendant have received proper notice in order to develop a full record." *United States v. Maddox*, 48 F.3d 791, 799 (4th Cir. 1995) (agreeing with Second and Seventh Circuits and remanding departure because no notice).

II. Downward Departures

1. No Appeal of Court's Refusal to Depart Downwards. Unless a district court mistakenly believes that it lacks the authority to depart downwards, a refusal by the district court to depart downwards may not be

appealed. *United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995); *United States v. Dorsey*, 61 F.3d 260 (4th Cir. 1995) (citing *United States v. Bayerle*, 898 F.2d 28 (4th Cir.), *cert. denied*, 498 U.S. 819 (1990)), *cert. denied*, 116 S. Ct. 732 (1996).

2. No Appeal of Extent of Downward Departure. "[W]e join ten other courts of appeals that have denied review of challenges to the sufficiency of downward departures. The fundamental flaw of such claims is that they contest the district court's exercise of its sentencing discretion, for which no right of appeal exists." *United States v. Hill*, 70 F.3d 321, 324 (4th Cir. 1995).

3. No Right to Continue Sentencing in Order to Have Opportunity to Render Substantial Assistance (§ 5K1.1, Fed. R. Crim. P. 35). In *United States v. Speed*, 53 F.3d 643 (4th Cir. 1995), the Fourth Circuit ruled that a defendant had no right to a continuance of his sentencing to give the government an opportunity to allow him to render substantial assistance. The court found that the defendant could give substantial assistance after his sentencing via Fed. R. Crim. P. 35.

4. No Appeal of Court's Denial of Government's Motion for Downward Departure for Substantial Assistance. The district court is not required to accept a government motion on behalf of the defendant for a downward departure for substantial assistance pursuant to Fed. R. Crim. P. 35(b). A district court's refusal to grant such a motion is final and unreviewable. *United States v. Pridgen*, 64 F.3d 147 (4th Cir. 1995).

5. "Substantial Assistance to the Judicial System" Is Not Basis for Downward Departure. Defendant's "substantial assistance to the judicial system" through his efforts to convince codefendants to plead guilty was not a basis for a downward departure. Substantial assistance to the judicial system is not a mitigating circumstance the Sentencing Commission failed to adequately consider. *United States v. Dorsey*, 61 F.3d 260 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 732 (1996).

6. Equitable Estoppel Is Not Basis for Downward Departure. In *United States v. Agubata*, 60 F.3d 1081 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 929 (1996), the Fourth Circuit ruled that an immigration form incorrectly stating the maximum penalty for illegal re-entry into the country could not be used as a basis for a downward departure because "a calculated decision to commit a felony cannot be termed reasonable reliance." *Id.* at 1084.

7. Downward Departure for Substantial Assistance Only at Motion of Government (§ 5K1.1). "A district court may depart from the guidelines

based on a defendant's substantial assistance only upon motion of the government." *United States v. David*, 58 F.3d 113, 114 (4th Cir. 1995); *see also United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995).

8. No General Duty on Government to Move to Depart Downwards (§ 5K1.1). "The government has the power, but not the duty, to make such a motion when a defendant has rendered substantial assistance." *United States v. David*, 58 F.3d 113, 114 (4th Cir. 1995); *see also United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995).

9. Two Rare Grounds for Challenging Government's Refusal to Move for Downward Departure (§ 5K1.1). The government's refusal to make a motion to depart downwards may be challenged only on the basis of an unconstitutional motive or a lack of a rational relationship to a legitimate governmental objective. *United States v. Lockhart*, 58 F.3d 86 (4th Cir. 1995) (citing *Wade v. United States*, 504 U.S. 181, 185-86 (1992)) (holding that plea agreement explicitly reserved to government right both to request substantial assistance and to decide whether to move for downward departure); *United States v. Maddox*, 48 F.3d 791, 797 (4th Cir. 1995) (holding that government's strategy of offering same plea agreement to two defendants, whomever accepted first, was "rationally related to the legitimate ends of securing two convictions, expediting plea negotiations, and avoiding the expense of at least one trial.").

10. Bargained-For Duty on Government to Move to Depart Downwards (§ 5K1.1). "[O]nce the government induces a defendant to plead guilty in exchange for a promise of a 5K1.1 motion, the government's discretion is subject to the terms of the plea agreement." *United States v. David*, 58 F.3d 113, 114 (4th Cir. 1995).

11. Government Need Not Make Motion if Defendant Has Breached Plea Agreement (§ 5K1.1). Appearing for sentencing is "an implicit term" of a plea agreement, and the government need not make a motion on behalf of a defendant who does not show up for his sentencing. *United States v. David*, 58 F.3d 113, 115 (4th Cir. 1995).

12. Downward Departure for "Extraordinary Vulnerability to Victimization in Prison." The list of possible grounds for departure in § 5K2 of the Guidelines is not exclusive. In *United States v. Lara*, 905 F.2d 599, 603 (2d Cir. 1990), the Second Circuit recognized a new departure ground, namely, that a defendant could be awarded a downward departure because he was found to be extraordinarily vulnerable to being victimized while in prison. In *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995), the Fourth Circuit

recognized the *Lara* departure but reversed as clearly erroneous the district court's awarding of it. The Fourth Circuit stated that "this ground for departure should be construed very narrowly." *Id.* at 798. The court of appeals found that defendant Maddox would not be as vulnerable in prison as the defendant in *Lara* and concluded that "[w]e . . . cannot condone departing from the applicable Sentencing Guidelines range for a crime of violence involving a gun merely because the defendant appears to be meek, cautious, and easily led." *Id.*

13. Mental and Emotional Conditions Are Not Ordinarily Basis For Downward Departure (§ 5H1.3). Section 5H1.3 provides that mental and emotional conditions of the defendant are not ordinarily relevant (*but see* § 5K2.13) in determining whether a sentence should be outside the applicable guideline range. In *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995), the Fourth Circuit reversed the district court and found that the borderline intelligence and dependent personality disorder of the defendant were not mental and emotional conditions justifying a downward departure. The circuit court credited testimony at sentencing that these two conditions were common in the prison inmate population.

14. Family Responsibilities and Ties Are Not Ordinarily Basis for Downward Departure (§ 5H1.6). Section 5H1.6 provides that the family and community ties and responsibilities of the defendant are not ordinarily a basis for a downward departure. "This Circuit has construed downward departures based on family ties very narrowly." *United States v. Maddox*, 48 F.3d 791, 799 (4th Cir. 1995) (remanded for further findings); *see also United States v. Brand*, 907 F.2d 31, 33 (4th Cir. 1990) (district court overturned for not imprisoning mother who was sole custodian of two children).

15. Court Need Not Hold Evidentiary Hearing on Motion for Downward Departure. Whether to conduct an evidentiary hearing on a motion for a downward departure is within the discretion of the sentencing court. *United States v. Pridgen*, 64 F.3d 147 (4th Cir. 1995).

JJ. Upward Departures

1. Strict Procedures Promulgated for Departure Based on Inadequacy of Criminal History (§ 4A1.3). In *United States v. Harrison*, 58 F.3d 115 (4th Cir. 1995), the Fourth Circuit tightened the requirements of its past decisions for upward departures based on inadequacy of criminal history (§ 4A1.3). The Circuit laid down the flat rule that when departing upwards, a district court "must either make level-by-level findings to justify its depar-

ture or, assuming supplementation of the record, conclude that [a defendant] qualifies as a *de facto* career offender under the principles set for in *Cash*." *Id.* at 119. Under the level-by-level method, a district court can "move to successively higher categories only upon finding that the prior category does not provide a sentence that adequately reflects the seriousness of the defendant's criminal conduct." *Id.* at 118. After the last category, Category VI, the court can invent (with proper findings) higher categories to meet the needs of the case. *United States v. Cash*, 983 F.2d 558, 561 (4th Cir. 1992); *see also United States v. Rusher*, 966 F.2d 868, 884 (4th Cir. 1992). Under the *de facto* career-criminal method, "the district court may sentence a defendant as a *de facto* career offender (§ 4B1.1) when he has committed two crimes that would qualify as predicate crimes for career offender status, but for some reason cannot be counted." *Harrison*, 58 F.3d at 118.

2. District Court May Use Analogy to Another Guideline. In *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995), the Fourth Circuit reviewed a decision by the district court to depart upwards six levels because of the greater danger in a bank robbery of the use of a sawed-off shotgun than of the use of a handgun. The district court was sentencing under the robbery guideline, § 2B3.1, but noted that one of the firearm guidelines, § 2K2.1, made this distinction. The Fourth Circuit upheld this analogizing to another guideline as principled and reasonable.

3. Refusal to Depart Upwards Is Not Appealable. If a district court decides not to enter an upward departure, that decision is not appealable. *United States v. Harrison*, 58 F.3d 115 (4th Cir. 1995).

4. Sentencing Court Must Rule on Record Whether Sentencing Guidelines Already Take Factors into Consideration (§ 5K2.0). To depart upwards, under § 5K2.0 a sentencing court must not only state that the Sentencing Commission did not adequately take certain factors into consideration when it formulated the guidelines, but also must make a finding on the record. *United States v. Hill*, 59 F.3d 500 (4th Cir. 1995) (holding that upward departure could not be justified because sentencing court did not go through proper analysis); *United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995) (holding that district court failed to give proper consideration but error was harmless).

5. When Error Is Harmless. "If we are convinced that, on the whole, the district court's reliance on an impermissible ground [for an upward departure] did not affect its determination of the sentence (*i.e.*, the sentence was not a *result* of the district court's error), the case need not be remanded for resentencing." *United States v. Myers*, 66 F.3d 1364, 1375 (4th Cir.

1995) (emphasis added) (holding that district court's failure to make findings whether factor was adequately taken into consideration was harmless error because record contained factual basis for departure and because other grounds for upward departure were adequate).

6. Standard of Review: "Multi-Part Test of Reasonableness." "We review the district court's upward departure under a 'multi-part test of reasonableness.' *United States v. Hummer*, 916 F.2d 186, 192 (4th Cir. 1990), *cert. denied*, 499 U.S. 970 (1991). We examine first, *de novo*, whether the district court's reasons for departing identify factors not adequately taken into consideration in the Guidelines. We then analyze the factual basis for those factors under a clearly erroneous standard. Finally, we determine whether the identified factors warrant a departure from the defendant's guideline range, and whether the departure imposed is reasonable, reviewing the district court under an abuse of discretion standard." *United States v. Myers*, 66 F.3d 1364, 1374 (4th Cir. 1995) (citations omitted).

KK. Violations of Probation or Supervised Release (Chapter 7)

1. Consecutive Sentences upon Revocation (§§ 7B1.3, 5G1.3). Under § 7B1.3, sentences imposed upon the revocation of probation or supervised release are to run consecutively to any sentence a defendant is already serving. Similarly, when a defendant is already serving a sentence for revocation of probation or supervised release, any new and additional sentence should run consecutively to that revocation sentence. *United States v. Puckett*, 61 F.3d 1092 (4th Cir. 1995).

2. Chapter Seven Policy Statements Not Binding for Revocations of Supervised Release. In *United States v. Davis*, 53 F.3d 638 (4th Cir. 1995), the Fourth Circuit, agreeing with all the other circuits, ruled that the policy statements of Chapter Seven are not binding concerning revocation of supervised release. The previous year, the court, in *United States v. Denard*, 24 F.3d 599 (4th Cir. 1994), made a similar ruling concerning revocation of probation. In *Davis*, the defendant's supervised release was revoked for drug possession. The district court did not sentence the defendant to the minimum required by policy statement § 7B1.4(b)(2), but instead sentenced him to the maximum allowed by 18 U.S.C. § 3583(e)(3) for the class of supervised-release violation.

LL. Appeal of Sentences

1. Four Bases for Appeal of Sentence (18 U.S.C. § 3742(a)). A sentence may be appealed if it was imposed: (1) in violation of law; (2) as a result of an incorrect application of the Guidelines; (3) for an offense for which there was no sentencing guideline and is plainly unreasonable; or (4) if it was greater that the sentence indicated in the applicable guideline range. *United States v. Hill*, 70 F.3d 321 (4th Cir. 1995).

2. Only Limited Appeals Under Guidelines (18 U.S.C. § 3742(a)). "Consistent with Congress' intent, we interpret our jurisdiction under § 3742(a) narrowly." *United States v. Hill*, 70 F.3d 321, 323-24 (4th Cir. 1995) (dismissing appeal for lack of jurisdiction to challenge sufficiency of downward departure). Section 3742 "reflects Congress' measured judgment to allow only limited appellate review of sentences imposed under the guidelines." *United States v. Porter*, 909 F.2d 789, 794 (4th Cir. 1990).

3. No Appeal of Sentence Within Guideline Range. A sentence anywhere within the final guideline range may not be appealed. *United States v. Hill*, 70 F.3d 321 (4th Cir. 1995) (denying appeal of sentence at maximum of range).

4. De Novo

Legal interpretation of a guideline. United States v. Myers, 66 F.3d 1364 (4th Cir. 1995) (acceptance of responsibility); *United States v. Singh*, 54 F.3d 1182 (4th Cir. 1995) (vulnerable victim); *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995) (§ 2B3.1(b)(2)(F), "express threat of death").

Proper application of a guideline. United States v. Adam, 70 F.3d 776 (4th Cir. 1995) (loss under § 2F1.1); *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995) (applying guideline terminology to particular facts); *United States v. Puckett*, 61 F.3d 1092 (4th Cir. 1995) (considering whether district court applied correct guideline); *United States v. Hill*, 59 F.3d 500 (4th Cir. 1995) (considering application of § 5G1.3, undischarged term of imprisonment); *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995) (holding that amount of loss is factual determination reviewed for clear error); *United States v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995) (applying loss enhancement, § 2F1.1, to undisputed facts).

Legal interpretation of an amendment to the Guidelines. United States v. Turner, 59 F.3d 481 (4th Cir. 1995).

Legal basis for a downward departure. United States v. Dorsey, 61 F.3d 260 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 732 (1996).

Consecutive or concurrent sentences under § 5G1.3. United States v. Myers, 66 F.3d 1364 (4th Cir. 1995).

Whether the Sentencing Commission adequately considered a particular factor as a potential basis for a departure. United States v. Maddox, 48 F.3d 791 (4th Cir. 1995).

5. Abuse of Discretion

Reasonableness of extent of upward departure. United States v. Murray, 65 F.3d 1161 (4th Cir. 1995).

District court's decision to order consecutive or concurrent sentence. United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995).

Whether to hold evidentiary hearing on motion for downward departure. United States v. Pridgen, 64 F.3d 147 (4th Cir. 1995).

6. Clear error

Factual findings at sentencing. United States v. Adam, 70 F.3d 776 (4th Cir. 1995) (discussing physician as abuser of position of trust); *United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995) (discussing acceptance of responsibility); *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995) (discussing whether defendant obstructed justice by committing perjury); *United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995) (examining role in offense); *United States v. Tanner*, 61 F.3d 231 (4th Cir. 1995) (discussing quantity of drugs), *cert. denied*, 116 S. Ct. 925 (1996); *United States v. Gordon*, 61 F.3d 263 (4th Cir. 1995) (discussing abuse of position of trust — enhancement that requires "a sophisticated factual determination"); *United States v. Puckett*, 61 F.3d 1092 (4th Cir. 1995) (discussing finding of obstruction of justice based on determination of credibility of witnesses); *United States v. Turner*, 59 F.3d 481 (4th Cir. 1995) (discussing quantity of drugs); *United States v. ReBrook*, 58 F.3d 961 (4th Cir.) (discussing whether enhancement applied), *cert. denied*, 116 S. Ct. 431 (1995); *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995) (discussing acceptance of responsibility and amount of loss under § 2F1.1); *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995) (discussing acceptance of responsibility and factual finding that defendant qualifies for downward departure); *United States v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995) (discussing amount of loss under § 2F1.1).

7. Due Deference

Section 3742(e)(2) of Title 18 requires the appeals court to apply "the due deference standard of review" to the district court's application of the guidelines to the facts. *United States v. Murray*, 65 F.3d 1161, 1167 (4th

Cir. 1995) (holding that under that standard, the "legal interpretation of guidelines terminology and the application of that terminology to a particular set of facts" are reviewed *de novo*) (citing *United States v. Toler*, 901 F.2d 399, 402 (4th Cir. 1990)). "On mixed questions of law and fact regarding the Guidelines, we apply a due deference standard in reviewing the district court." *United States v. Myers*, 66 F.3d 1364, 1371 (4th Cir. 1995) (citing *United States v. Daughtrey*, 874 F.2d 213, 217 (4th Cir. 1989)).

8. Unreviewable

The decision of the district court not to depart from the sentencing guidelines is unreviewable. *United States v. Harrison*, 58 F.3d 115 (4th Cir. 1995).

IX. APPEAL AND OTHER POST-CONVICTION PROCEEDINGS

A. Convictions Overturned

United States v. Bryan, 58 F.3d 933 (4th Cir. 1995) (disagreeing with Second, Seventh, and Ninth Circuits concerning misappropriation theory of securities fraud and overturning securities fraud conviction of director of West Virginia state lottery because no deception in misappropriating nonpublic information relating to video lottery contracts).

United States v. ReBrook, 58 F.3d 961 (4th Cir.) (overturning securities fraud conviction of West Virginia lottery official because no deception, only "taking advantage" of nonpublic information for private gain), *cert. denied*, 116 S. Ct. 431 (1995).

United States v. Burgos, 55 F.3d 933 (4th Cir. 1995) (overturning conviction due to failure to give balanced *Allen* charge).

Ostrander v. Green, 46 F.3d 347 (4th Cir. 1995) (overturning guilty plea based on ineffective assistance of counsel).

United States v. Hairston, 46 F.3d 361 (4th Cir.) (affirming multiple convictions but overturning three extortion convictions because they duplicated other convictions), *cert. denied*, 116 S. Ct. 124 (1995).

United States v. Reavis, 48 F.3d 763 (4th Cir.) (finding that defendant may not be convicted of drug conspiracy and drug enterprise under same facts), *cert. denied*, 115 S. Ct. 2597 (1995).

United States v. Johnson, 54 F.3d 1150 (4th Cir.) (same), *cert. denied*, 116 S. Ct. 266 (1995).

United States v. Heater, 63 F.3d 311 (4th Cir. 1995) (same), *cert. denied*, 116 S. Ct. 796 (1996).

United States v. Johnson, 71 F.3d 139 (4th Cir. 1995) (reversing for failure to instruct jury on essential element).

United States v. Gray, 47 F.3d 1359 (4th Cir. 1995) (reversing money structuring counts of conviction because of Supreme Court decision construing the charged statute).

United States v. Tomlinson, 67 F.3d 508 (4th Cir. 1995) (finding that, in felon-in-possession prosecution, government must prove that defendant knew that firearm was short-barreled shotgun).

United States v. Acker, 52 F.3d 509 (4th Cir. 1995) (finding erroneous admission of prior consistent statement not harmless beyond reasonable doubt).

United States v. Lewis, 53 F.3d 29 (4th Cir. 1995) (reversing because trial court refused to include defendant's requested complete conspiracy jury instruction).

B. Other Cases Reversed and Remanded (See also cases remanded for resentencing (§ VIIIA))

United States v. Smith, 55 F.3d 157 (4th Cir. 1995) (stating that district court may not deny government's motion to dismiss indictment).

United States v. Williams, 47 F.3d 658 (4th Cir. 1995) (stating that in context of plea negotiations, prosecutor may threaten uncooperative defendant with greater charges).

United States v. Tootle, 65 F.3d 381 (4th Cir. 1995) (finding speedy-trial seventy-day rule applies only when plea of not guilty has been entered), *cert. denied*, 64 U.S.L.W. 3657 (U.S. Apr. 1, 1996) (No. 95-7756).

United States v. Hamrick, 43 F.3d 877 (4th Cir.) (en banc) (reversing three-judge panel by holding that dysfunctional bomb is dangerous weapon or destructive device under three federal statutes), *cert. denied*, 116 S. Ct. 90 (1995).

United States v. Mason, 52 F.3d 1286 (4th Cir. 1995) (finding that district court erred in not holding mental-competency hearing).

United States v. Goins, 51 F.3d 400 (4th Cir. 1995) (finding that district court failed to inform defendant of mandatory minimum sentence at guilty plea).

Correll v. Thompson, 63 F.3d 1279 (4th Cir.) (overturning federal court's grant of writ of habeas corpus from state conviction because error, if any, was harmless), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995).

Gray v. Thompson, 58 F.3d 59 (4th Cir.) (overturning federal district court's grant of writ of habeas corpus from state conviction because new federal constitutional rights are not promulgated on collateral review), *stay*

granted; 116 S. Ct. 687 (1995), *cert. granted in part*, 116 S. Ct. 690 (1996).

Barnes v. Thompskon, 58 F.3d 971 (4th Cir.) (overturning federal district court's grant of writ of habeas corpus from state conviction because defendant defaulted at state level by failing to raise claim in timely manner), *cert. denied*, 116 S. Ct. 453 (1995).

Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995) (ordering district court to inspect materials to see if defendant's *Brady* rights were violated to decide if writ of habeas corpus should issue).

Gilliam v. Foster, 61 F.3d 1070 (4th Cir. 1995) (en banc) (8-5 decision); *Gilliam v. Foster*, 63 F.3d 287 (4th Cir. 1995) (en banc) (7-5 decision) (enjoining state criminal trial on double jeopardy grounds because prior state court judge erroneously granted mistrial over defendant's objections).

C. *No Constitutional Right to Appeal*

"Because the right to appeal is not protected by the Constitution, any right to appeal must be found in an applicable statute." *United States v. Pridgen*, 64 F.3d 147, 148 (4th Cir. 1995) (citing *Abney v. United States*, 431 U.S. 651, 656 (1977)).

D. *Appeals Court Reluctant to Decide Constitutional Issues*

The Fourth Circuit will not decide constitutional issues needlessly. The court of appeals prefers to render decisions based on statutory or general law. *Ashe v. Styles*, 67 F.3d 46, 51 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1051 (1996).

E. *Panel Bound by Fourth Circuit Precedent*

A three-judge panel of the circuit is bound by circuit precedent and may not overrule precedent. *United States v. Singh*, 54 F.3d 1182 (4th Cir. 1995).

F. *District Court May Be Affirmed on Any Basis Supported by Record*

An appeals court need not agree with the reasoning of a district court. The reviewing court may affirm the result below on any ground that is supported by the record. *United States v. Dorsey*, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995).

G. Appeals Court Need Not Consider Argument Raised for First Time in Reply Brief

Because the purpose of a reply brief is rebuttal, an appeals court need not consider an issue raised for the first time in a reply brief. *United States v. Smith*, 44 F.3d 1259 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995).

H. Appeals Court May Consider Constitutional Issue Sua Sponte

Although it is not required to do so, an appeals court may notice and rule upon a constitutional issue sua sponte where "injustice might otherwise result." *United States v. Heater*, 63 F.3d 311, 331 n.5 (4th Cir. 1995) (citations and quotations omitted), *cert. denied*, 116 S. Ct. 796 (1996).

I. Waiver of Appeals

1. Specific Question About Waiver of Appeal Is Not Mandatory. As long as the waiver is "knowing and intelligent," the right to appeal may be waived. While the standard test for a knowing and intelligent waiver is a specific question to the defendant at his Rule 11 guilty plea, the court's "failure to do so, standing alone, does not invalidate the waiver." *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995) (citing *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992)) (upholding waiver despite no specific question).

2. Waiver of Appeal Will Not Overcome Improper Order of Restitution. There are some limitations on waivers of appeal. For instance, a defendant who waives his appeal rights may not be sentenced on the basis of an impermissible category such as race nor beyond the maximum penalty provided by statute. In *United States v. Broughton-Jones*, 71 F.3d 1143 (4th Cir. 1995), the Fourth Circuit held that even though the defendant had waived her right to appeal, she could still appeal the restitution part of her sentence because it ordered restitution for conduct that went beyond her offense of conviction. *Id.* at 1146.

J. Standards of Review

1. Appeal of Sentences. See Appeal of Sentences, supra Part VIII.LL.

2. Constitutional Error. See also When Constitutional Error Is Harmless, infra Part J.4.c.; *Habeas Corpus — Standard for Review of Constitutional Error, infra* Part M.2. "The Supreme Court has created two categories of constitutional violations that may occur during the course of a criminal trial — trial errors which are subject to harmless error analysis and

structural defects which are *per se* cause for reversal. Trial error has been described as error which occurred during the presentation of the case to the jury." *United States v. Hairston*, 46 F.3d 361, 373 (4th Cir.), *cert. denied*, 116 S. Ct. 124 (1995) (citations omitted). Examples of structural defects are denial of the right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)) and lack of impartiality of the judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)).

3. Plain Error (Fed. R. Crim. P. 52(b))

a. Standard of Review. When there is no objection below, an issue can succeed in the appeals court only when the error is plain. In addition, the plain error must affect substantial rights, that is, be prejudicial to the defendant and affect the outcome below; and be of a type that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lockhart*, 58 F.3d 86, 88 (4th Cir. 1995) (finding error in failure to follow required procedure at sentencing plain but not prejudicial to defendant because, *inter alia*, defendant given minimum sentence anyway) (quoting *United States v. Olano*, 113 S. Ct. 1770, 1779 (1993)); *see also United States v. Castner*, 50 F.3d 1267, 1272-74 (4th Cir. 1995) (finding no plain error in trial judge's refusal to recuse himself or in questioning of witnesses).

b. Issues Reviewed Under Plain Error Analysis.

District court's failure to inquire of defendant at sentencing whether defendant had read and discussed the presentence report with his attorney was plain error but was not prejudicial. *United States v. Lockhart*, 58 F.3d 86 (4th Cir. 1995).

No plain error to refuse to allow individual questioning of counsel at voir dire. *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995).

No plain error in legal standard for acceptance of responsibility. *United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995).

No plain error for admission of Rule 404(b) evidence when defendant failed to object to wording of limiting instruction. *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996).

No plain error in denial of suppression of fruits of vehicular search. *United States v. Perrin*, 45 F.3d 869 (4th Cir.), *cert. denied*, 115 S. Ct. 2287 (1995).

No plain error in sustaining objection to prior consistent statement. *United States v. Lowe*, 65 F.3d 1137 (4th Cir. 1995).

No plain error in prosecutor's remarks in closing argument. *United States v. Adam*, 70 F.3d 776 (4th Cir. 1995).

No plain error in ordering of restitution and fines. *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995).

4. Harmless Error (Fed. R. Crim. P. 52(a))

a. Standard on Review. "[I]n order to find a district court's error harmless, we need only be able to say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *United States v. Heater*, 63 F.3d 311, 325 (4th Cir. 1995) (citations omitted), *cert. denied*, 116 S. Ct. 796 (1996).

b. Issues Reviewed Under Harmless Error Analysis. Erroneous evidentiary rulings are not to be disturbed unless the error affected the defendant's "substantial rights." (Fed. R. Crim. P. 52(a)). *United States v. Heater*, 63 F.3d 311 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996).

Erroneous Admission of Prior Consistent Statement. Erroneous admission of prior consistent statement was not harmless beyond a reasonable doubt because the jury below had acquitted the defendant of two of the four bank robberies with which she was charged. *United States v. Acker*, 52 F.3d 509 (4th Cir. 1995) (reversing two convictions and ordering new trial).

Habeas Corpus from State Proceedings. "[B]efore a federal habeas court may grant relief as a result of the error, it must conclude that an error infecting state criminal proceedings is not harmless . . . ." *Correll v. Thompson*, 63 F.3d 1279, 1291 (4th Cir.) (finding error in state proceedings harmless), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995).

c. When Constitutional Error Is Harmless. A constitutional error may be harmless if the reviewing court can conclude "beyond a reasonable doubt that the jury *actually* made" a finding that cures the constitutional error. *United States v. Forbes*, 64 F.3d 928, 935 (4th Cir. 1995) (finding failure to instruct jury on essential element of crime cured because missing essential element was also essential element of another, related crime of which the jury also found defendant guilty); *see also United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995) (finding failure to instruct jury on essential element not to be harmless); *United States v. Hairston*, 46 F.3d 361 (4th Cir.) (finding misstatement of elements of offense to be harmless error), *cert. denied*, 116 S. Ct. 124 (1995).

5. Construction of Statutes and Regulations

a. Basic Canon of Construction. "We interpret a statute according to its plain language and in light of its object and policy. Our inquiry is complete if the terms of [the] statute are unambiguous on their face, or in

light of ordinary rules of statutory construction." *United States v. Turpin*, 65 F.3d 1207, 1210 (4th Cir. 1995) (citations omitted), *cert. denied*, 64 U.S.L.W. 3640 (U.S. Mar. 25, 1996) (No. 95-7260).

b. Statutes Are Presumed Constitutional. A "'heavy presumption of constitutionality' attaches to the 'carefully considered decision[s] of a coequal and representative branch of our Government.'" *In re Askin*, 47 F.3d 100, 105 (4th Cir. 1995) (quoting *Department of Labor v. Triplett*, 494 U.S. 715, 721 (1990)), *cert. denied*, 116 S. Ct. 382 (1995).

c. Standards for Some Specific Constitutional Challenges.

Commerce Clause. "To discover whether a statute is within Congress' authority to legislate under the Commerce Clause, the question we must ask is merely whether Congress could reasonably find that the class of regulated activities affects interstate commerce." *United States v. Presley*, 52 F.3d 64, 67 (4th Cir.) (requiring only "minimal nexus"), *cert. denied*, 116 S. Ct. 237 (1995).

Equal Protection Clause. "When a statute makes an irrational classification, unrelated to a valid government purpose, it may violate the Equal Protection Clause of the Constitution." *United States v. Presley*, 52 F.3d 64, 68 (4th Cir.), *cert. denied*, 116 S. Ct. 237 (1995).

Due Process Clause. When a provision of a statute is "so vague that it grants undue discretion to law enforcement officials . . . it may be void for vagueness under the Due Process Clause." *United States v. Presley*, 52 F.3d 64, 68 (4th Cir.) (citation omitted), *cert. denied*, 116 S. Ct. 237 (1995).

d. Presumption That Congress Knows Law Includes Presumption That It Knows Court Interpretations. "It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute." *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (stating that presumption used as partial basis for court to find that Congress did not intend sentencing amendment to change substantive firearm law), *cert. denied*, 116 S. Ct. 797 (1996).

e. Presumption That Congress Is Clear When It Intends to Change Law. It is presumed that Congress will make its actions and intentions clear when and if it changes a statute. "Absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (citations and quotations omitted), *cert denied*, 116 S. Ct. 797 (1996).

f. Plain Language Controls over Legislative History. The Fourth Circuit has always held that the first principle of statutory construction is the "plain language" of the statute. In *United States v. Williams*, 67 F.3d 527

(4th Cir. 1995), the court upheld this principle even against "a cogent, imaginative argument" based on legislative history. *Id.* at 528.

g. Mens Rea Is Essential Element of Criminal Law. Mens rea is such an essential element of criminal law that the courts will read it into a statute, even when Congress has not been clear about the precise mens rea or scienter required. "The [Supreme] Court has taken particular care . . . to avoid construing a statute to dispense with *mens rea* where doing so would criminalize a broad range of apparently innocent conduct." *United States v. Forbes*, 64 F.3d 928, 932 (4th Cir. 1995) (citations omitted).

h. "Willfully" versus "Knowingly." "'[W]illfully,' especially in a statute in which Congress simultaneously uses 'knowingly,' connotes a more deliberate criminal purpose, sometimes to the point of requiring a specific intent to violate the law." *United States v. Forbes*, 64 F.3d 928, 933 (4th Cir. 1995) (footnote omitted) (citing *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994)).

i. Other Rules of Statutory Construction. The law in effect at the time of the commission of an offense controls. If Congress later changes the law, the change cannot be applied retroactively. *In re Askin*, 47 F.3d 100 (4th Cir.), *cert. denied*, 116 S. Ct. 382 (1995). Close calls in statutory construction are resolved in favor of the defendant ("the rule of lenity"). *United States v. Fisher*, 58 F.3d 96 (4th Cir.), *cert. denied*, 116 S. Ct. 329 (1995). "When interpreting a statute, rules of statutory construction require that we give meaning to all statutory provisions and seek an interpretation that permits us to read them with consistency." *Id.* at 99 (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)). The purpose of the courts is to give effect to the legislative will. If statutory language is clear and within constitutional authority, the "sole function" of the courts is to enforce it according to its own terms. *United States v. Tootle*, 65 F.3d 381 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3657 (U.S. Apr. 1, 1996) (No. 95-7756).

j. Reviewed De Novo. The construction of statutes is reviewed *de novo* on appeal. *United States v. Letterlough*, 63 F.3d 332 (4th Cir.), *cert. denied*, 116 S. Ct. 406 (1995).

k. When Regulations Have Effect of Law. When Congress authorizes an executive agency to issue regulations that include punishments for violations, those regulations have "the force and effect of law." *United States v. Fox*, 60 F.3d 181, 184 (4th Cir. 1995).

l. Construction of Regulations Is Reviewed De Novo. An appeals court reviews the construction of regulations *de novo*. *United States v. Boynton*, 63 F.3d 337, 342 (4th Cir. 1995).

m. When Courts Should Avoid Literal Construction. For both statutes and regulations, constructions, even if arguably literal, which produce absurd results contrary to the legislature's or agency's purpose are to be avoided. *United States v. Boynton*, 63 F.3d 337, 344 (4th Cir. 1995).

6. Reasonableness

Whether the invasion of privacy in a wiretap (18 U.S.C. § 2510 et seq.) has been minimized. *United States v. Oriakhi*, 57 F.3d 1290 (4th Cir.), *cert. denied*, 116 S. Ct. 400 (1995).

7. De Novo

Review of the constitutionality of a mandatory life sentence. *United States v. Kratsas*, 45 F.3d 63 (4th Cir. 1995).

Constitutionality of a statute. *United States v. Presley*, 52 F.3d 64 (4th Cir.), *cert. denied*, 116 S. Ct. 237 (1995).

Regarding prosecution for felon in possession, review of state law to determine whether a defendant's civil rights have been restored. *United States v. Morrell*, 61 F.3d 279 (4th Cir. 1995).

Whether officers had "reasonable suspicion" for a *Terry* stop. *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995); *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995).

Legal conclusions concerning legitimacy of in-court identifications. *United States v. Burgos*, 55 F.3d 933 (4th Cir. 1995).

Ineffective assistance of counsel. *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995) (mixed question of law and fact).

Construction of statutes. *United States v. Letterlough*, 63 F.3d 332 (4th Cir.), *cert. denied*, 116 S. Ct. 406 (1995).

Construction of regulations. *United States v. Boynton*, 63 F.3d 337 (4th Cir. 1995).

Decision not to give an entrapment instruction. *United States v. Singh*, 54 F.3d 1182 (4th Cir. 1995).

Decision not to give a justification instruction. *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995).

Legal determinations at suppression hearing. *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995); *United States v. McDonald*, 61 F.3d 248 (4th Cir. 1995).

Adequacy of guilty plea. *United States v. Goins*, 51 F.3d 400 (4th Cir. 1995) (guilty plea overturned).

Voluntariness of confession. *Correll v. Thompson*, 63 F.3d 1279 (4th Cir.), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995).

Denial of petition for writ of habeas corpus. *Ashe v. Styles*, 67 F.3d 46 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1051 (1996).

8. Abuse of Discretion

a. Wrong Legal Principle May Be Abuse of Discretion. "One of the ways in which a district court may abuse its discretion is in applying erroneous legal principles to the case." *United States v. Mason*, 52 F.3d 1286, 1290 (4th Cir. 1995) (citing *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)).

b. Issues Reviewed Under Abuse of Discretion.

Admission and exclusion of evidence. "A district court is given broad discretion in its evidentiary rulings, which are entitled to substantial deference." *United States v. Murray*, 65 F.3d 1161, 1170 (4th Cir. 1995). "[E]ven if the grounds that the district court gave for admitting the evidence are improper, generally this Court will reverse only if there are no grounds upon which the district court could have properly admitted the evidence." *United States v. Johnson*, 54 F.3d 1150, 1156 (4th Cir.) (upholding admission of evidence under different rule of evidence than one relied on by district court), *cert. denied*, 116 S. Ct. 266 (1995); *see also United States v. Shaw*, 69 F.3d 1249 (4th Cir. 1995) (discussing residual hearsay exception); *United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995) (excluding expert testimony); *United States v. Turpin*, 65 F.3d 1207 (4th Cir. 1995) (discussing authentication of evidence), *cert. denied*, 64 U.S.L.W. 3640 (Mar. 25, 1996) (No. 95-7260); *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995) (admitting eyewitness testimony); *United States v. Capers*, 61 F.3d 1100 (4th Cir. 1995) (considering admission of tape recordings and use of transcripts), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995); *United States v. Bumpass*, 60 F.3d 1099 (4th Cir.) (considering hearsay statement against interest), *cert. denied*, 116 S. Ct. 925 (1996); *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (excluding expert testimony on relevancy grounds), *cert. denied*, 116 S. Ct. 784 (1996); *United States v. Bostian*, 59 F.3d 474 (4th Cir. 1995) (concerning evidence of lack of intent), *cert. denied*, 116 S. Ct. 929 (1996); *United States v. ReBrook*, 58 F.3d 961 (4th Cir.) (distinguishing between hearsay and nonhearsay uses of evidence), *cert. denied*, 116 S. Ct. 431 (1995); *United States v. Boyd*, 53 F.3d 631 (4th Cir.) (applying evidence under Fed. R. Evid. 404(b)), *cert. denied*, 116 S. Ct. 322 (1995); *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995) (considering district court's refusal to caution jury regarding inferences to be drawn from admitted evidence); *United States v. Dorsey*, 45 F.3d 809 (4th Cir.) (discussing expert testimony), *cert. denied*, 115 S. Ct. 2631 (1995).

Restricting scope of cross-examination. *United States v. Smith*, 44 F.3d 1259 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995).

Denial of motion to dismiss an indictment. *United States v. Smith*, 55 F.3d 157 (4th Cir. 1995) (reversing district court's refusal to grant government's motion to dismiss an indictment).

Denial of motion for mistrial. *United States v. Morsley*, 64 F.3d 907 (4th Cir. 1995) (denying motion based on prosecutorial misconduct), *cert. denied*, 116 S. Ct. 749 (1996); *United States v. Hoyte*, 51 F.3d 1239 (4th Cir.), *cert. denied*, 116 S. Ct. 346 (1995); *United States v. Smith*, 44 F.3d 1259 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995).

Denial of motion to continue. *United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995); *United States v. Hoyte*, 51 F.3d 1239, 1245 (4th Cir.) (stating that "To prevail, the defendants must show the denial prejudiced their case."), *cert. denied*, 116 S. Ct. 346 (1995); *United States v. Speed*, 53 F.3d 643 (4th Cir. 1995) (denying motion to continue sentencing).

Denial of motion for new trial. *United States v. Adam*, 70 F.3d 776 (4th Cir. 1995); *United States v. Singh*, 54 F.3d 1182 (4th Cir. 1995).

Contents of jury instructions and decisions to give or not give jury instructions. *United States v. Bostian*, 59 F.3d 474 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 929 (1996); *United States v. Burgos*, 55 F.3d 933 (4th Cir. 1995); *United States v. Lewis*, 53 F.3d 29 (4th Cir. 1995) (setting out three-part test for reversal for failure to give defendant's requested instruction); *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995).

Denial of motion for recusal of judge. *United States v. Gordon*, 61 F.3d 263 (4th Cir. 1995).

Denial of severance. *United States v. Acker*, 52 F.3d 509 (4th Cir. 1995) (discussing severance of counts); *United States v. Reavis*, 48 F.3d 763 (4th Cir.) (discussing severance of defendants), *cert. denied*, 115 S. Ct. 2597 (1995).

Trial court's refusal to dismiss juror. *United States v. Capers*, 61 F.3d 1100 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995).

Denial of disclosure of government's confidential informant. *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995).

Whether to allow jurors to take notes. *United States v. Wild*, 53 F.3d 328 (4th Cir. 1995).

Whether "reasonable cause" for a mental-competency hearing exists under 18 U.S.C. § 4241. *United States v. Mason*, 52 F.3d 1286 (4th Cir. 1995).

9. Clearly Erroneous

Whether suspect was sufficiently seized to require *Miranda* warnings. *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995).

Extent of personal knowledge of defendant by witness identifying him in court. *United States v. Burgos*, 55 F.3d 933 (4th Cir. 1995).

Factual findings and credibility determinations at suppression hearings. *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995); *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995); *United States v. McDonald*, 61 F.3d 248 (4th Cir. 1995).

Prosecutorial misconduct. *United States v. McDonald*, 61 F.3d 248, 253 (4th Cir. 1995).

Finding of conspiracy by preponderance of evidence as precondition to admission of co-conspirator's hearsay statement. *United States v. Capers*, 61 F.3d 1100 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995).

Factual findings concerning a *Terry* stop. *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995).

Factual finding concerning whether government intimidated witness. *United States v. Smith*, 44 F.3d 1259 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995).

Trial court's decision about competency of juror. *United States v. Gray*, 47 F.3d 1359 (4th Cir. 1995).

Trial court's decision about whether statements are subject to Jencks Act. *United States v. Boyd*, 53 F.3d 631 (4th Cir.), *cert. denied*, 116 S. Ct. 322 (1995).

10. Sufficiency of the Evidence

"Challenges to the sufficiency of evidence must overcome a heavy burden. We consider the evidence in the light most favorable to the government, making all inferences and credibility determinations in its favor." *United States v. Hoyte*, 51 F.3d 1239, 1245 (4th Cir.) (holding evidence of murder in drug crime sufficient), *cert. denied*, 116 S. Ct. 346 (1995). "The standard of review in evaluating the sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *United States v. Giunta*, 925 F.2d 758, 764 (4th Cir. 1991). The standard requires us "to construe the evidence in the light most favorable to the government, assuming its credibility, drawing all favorable inferences from it, and taking into account all the evidence, however adduced." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also United States v. Pearce*, 65 F.3d 22, 24 (4th Cir.

1995) (finding evidence of possession of document-making implements sufficient). "The jury, not the reviewing court, weighs the credibility of the evidence and resolves any conflicts in the evidence presented, and if the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe." *United States v. Murphy*, 35 F.3d 143, 148 (4th Cir. 1995) (finding evidence of assault on person assisting federal agents sufficient). "In evaluating the sufficiency of the evidence to support a conviction, we do not review the credibility of the witnesses." *United States v. Reavis*, 48 F.3d 763, 771 (4th Cir.) (affirming murder and maiming counts), *cert. denied*, 115 S. Ct. 2597 (1995). "Credibility determinations are within the sole province of the jury and are not susceptible to judicial review." *United States v. Lowe*, 65 F.3d 1137, 1142 (4th Cir. 1995) (finding sufficient evidence of willful damage to motor vehicles used in interstate commerce). "The verdict must stand if there is substantive evidence to support it." *United States v. Capers*, 61 F.3d 1100, 1107 (4th Cir. 1995) (finding drug conspiracy evidence sufficient), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995); *see United States v. Singh*, 54 F.3d 1182 (4th Cir. 1995) (finding sufficient evidence for conviction of physician for illegally distributing drugs); *United States v. Johnson*, 54 F.3d 1150 (4th Cir.) (finding evidence of single drug conspiracy sufficient), *cert. denied*, 116 S. Ct. 266 (1995); *United States v. Smith*, 44 F.3d 1259 (4th Cir.) (finding evidence sufficient for wire fraud and money laundering convictions), *cert. denied*, 115 S. Ct. 1970 (1995).

11. Great Deference

Magistrate judge's finding of probable cause for search warrant. *Simmons v. Poe*, 47 F.3d 1370 (4th Cir. 1995).

K. Ineffective Assistance of Counsel

1. Elements of Ineffective Assistance of Counsel. To state a valid claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness *and* (2) that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Adam*, 70 F.3d 776 (4th Cir. 1995) (finding no ineffective assistance); *United States v. Foster*, 68 F.3d 86 (4th Cir. 1995) (same). Ineffective assistance is that which falls outside of the "range of competence demanded of attorneys in criminal cases." That range is "wide," and there is "a strong presumption" that counsel's performance falls within it. *Bell v. Evatt*, 72 F.3d 421, 427 (4th Cir. 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (finding no ineffective

assistance); *see also Correll v. Thompson*, 63 F.3d 1279 (4th Cir.) (holding that petitioner failed to demonstrate prejudice), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995).

2. Failure to File Requested Appeal. "[F]ailure to file a *requested* appeal is *per se* ineffective assistance of counsel, irrespective of the possibility of success on the merits." *United States v. Foster*, 68 F.3d 86, 88 (4th Cir. 1995) (finding no ineffective assistance).

3. Failure to Know Law. "[T]here is a difference between a bad prediction within an accurate description of the law and gross misinformation about the law itself. . . . [W]e must demand that [attorneys] at least apprise themselves of the applicable law and provide their clients with a reasonably accurate description of it." *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995) (finding ineffective assistance because attorney predicted work release to client in Virginia state guilty-plea case where work release was precluded).

4. Failure to Anticipate New Rule of Law. "[T]he case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law." *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (finding no ineffective assistance).

5. Failure to Raise Mental Defense. When defense counsel has made a decision to pursue a reasonable trial strategy, ineffective assistance of counsel cannot later be raised against him for not pursuing a possible mental defense. *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995) (finding that pursuit of defense leading to voluntary manslaughter conviction was acceptable strategy); *Barnes v. Thompson*, 58 F.3d 971 (4th Cir.) (holding that there is no requirement to obtain psychological examination of defendant nor to present mental defense that would have undercut defense strategy at sentencing in capital murder case), *cert. denied*, 116 S. Ct. 435 (1995).

6. Plea Proceedings Can Cure Misstatement of Counsel. In *United States v. Foster*, 68 F.3d 86 (4th Cir. 1995), the defendant complained that he received a higher sentence than his counsel had predicted. The Fourth Circuit pointed out that at his Rule 11 formal plea the district court informed him of the maximum possible penalty. "Therefore, if the trial court properly informed Foster of the potential sentence he faced, he could not be prejudiced by a misinformation his counsel allegedly provided him." *Id.* at 88.

7. "Tactical Retreat" Is Not Ineffective Assistance. In *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995), defense counsel, in the face of overwhelming evidence that the defendant was guilty of murder and kidnapping, devised a

trial strategy of admission of the kidnapping and admission-but-mentally-ill of the murder. The Fourth Circuit found this to be a reasonable "tactical retreat" under the circumstances.

8. Standard of Review. Ineffective assistance of counsel is a mixed question of law and fact. Therefore, appellate review is *de novo*. *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995).

L. The "New Rule" Doctrine of Collateral Review (e.g., *habeas corpus*)

1. Definition. New rulings in constitutional law, usually by the Supreme Court, affect collateral review (*e.g.*, habeas corpus) of criminal cases in this manner: If a new ruling occurs after the criminal conviction becomes final, then it may not be applied in reviewing the case. *Ostrander v. Green*, 46 F.3d 347 (4th Cir. 1995) (discussing new-rule doctrine); *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994) (discussing at length new-rule doctrine); *see also Teague v. Lane*, 489 U.S. 288, 301 (1989) (stating that there is new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). However, the Supreme Court in *Teague* established two exceptions for when a new rule may be applied retroactively: (1) when it is necessary to afford constitutional protection to certain "primary, private individual conduct" and (2) when "it requires the observance of those procedures that are . . . implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311 (citations omitted); *see also Love v. Johnson*, 57 F.3d 1305, 1315 (4th Cir. 1995) (discussing new-rule doctrine); *Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir. 1994) (holding that constitutionally correct reasonable-doubt jury instruction is implicit in the concept of ordered liberty), *cert. denied*, 115 S. Ct. 2281 (1995).

2. New Rule Applies to All Cases Not Yet Final. New rules apply retroactively to all cases not yet final. A case on appeal is not yet final. *United States v. Gray*, 47 F.3d 1359, 1363 (4th Cir. 1995) (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)).

M. Habeas Corpus

1. Pretrial Habeas Corpus (28 U.S.C. § 2241). A defendant in custody seeking to complain about a delay in arraignment or trial can apply for a writ of habeas corpus under 28 U.S.C. § 2241. "Pretrial petitions for habeas corpus 'are properly brought under 28 U.S.C.A. § 2241, which applies to person in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against him.'" *United States v. Tootle*, 65 F.3d 381, 383 (4th Cir. 1995) (quoting *Dicker-*

son v. Louisiana, 816 F.2d 220, 224 (5th Cir. 1987), *cert. denied*, 484 U.S. 456 (1987)), *cert. denied*, 64 U.S.L.W. 3657 (U.S. Apr. 1, 1996) (No. 95-7756).

2. Habeas Corpus — Standard for Review of Constitutional Error. The "standard for constitutional trial errors reviewed in federal habeas corpus cases requir[es] reversal only if an error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Cooper v. Taylor*, 70 F.3d 1454, 1462 (4th Cir. 1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 1710, 1712 (1993)). Four factors are determinative of the effect of the error: (1) whether the case was tried by a court; (2) whether the evidence was a confession; (3) how much the prosecution relied on the evidence; and (4) the closeness of the case. *Id.* at 1463 (overturning state conviction because of confession taken in violation of right to counsel); *see also Ashe v. Styles*, 67 F.3d 46, 51 (4th Cir. 1995) (discussing court's hesitation to adjudicate constitutional issues unnecessarily), *cert. denied*, 116 S. Ct. 1051 (1996).

N. Habeas Corpus from State Conviction (28 U.S.C. § 2254)

1. Jurisdiction for Federal Relief and "Cause and Prejudice" Rule on Default. "Because we review prior state-court judgments with the writ of habeas corpus, basic principles of federalism permit us to review only those state-court decisions that implicate federal constitutional rights. Therefore, if a state court rules against a defendant on federal issues and the defendant has exhausted all avenues of state-court relief, a federal court can hear the defendant's federal claims by way of the Great Writ. Conversely, if a defendant defaults by not following proper state appellate procedure, causing the state courts to rule against him solely on state-law procedural grounds, we have no power to review his defaulted issues because they are based solely on state procedural grounds rather than federal constitutional grounds. As the Supreme Court explained in *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), if a state prisoner defaulted on his federal claims in state court pursuant to an independent and adequate state procedural rule, he is precluded from asserting such claims in his federal habeas petition unless he shows cause for and resulting prejudice from the default. . . . [W]e can review it only upon a showing of cause for the procedural default and actual prejudice from the asserted constitutional error." *Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995) (denying relief).

2. Facts Must Be Developed at State Level. "When the state has given a petitioner a full and fair hearing on a claim and he has failed to develop the material facts supporting it, he is not entitled to develop further facts in a

federal habeas evidentiary hearing unless he demonstrates either cause for the failure and prejudice resulting therefrom or a fundamental miscarriage of justice." *Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir.) (overturning grant of federal habeas relief), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995).

3. "Raise It or Waive It" at State Level. "[T]he crux of federal habeas corpus review is to provide criminal defendants with a mechanism to review state court interpretations of federal constitutional protections, while providing deference to the state-court proceedings. Because our role is limited to reviewing state-court judgments, federal review is inappropriate if a prisoner failed to raise his claim and have it reviewed by a state court." *Kornahrens v. Evatt*, 66 F.3d 1350, 1362 (4th Cir. 1995) (finding no automatic review of the record for legal error, even in murder case).

4. State Remedies Must Be Exhausted. All available state remedies must be exhausted before bringing a federal habeas corpus petition. "To do so the habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claim. . . . The ground relied upon must be presented face-up and squarely. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick." *Townes v. Murray*, 68 F.3d 840, 846 (4th Cir. 1995) (citations and internal quotation marks omitted).

5. State Basis as Alternative Basis for Decision. If the state court below based its ruling alternatively on a state procedural and a federal substantive holding, "a federal court must accord respect to the state law [procedural] ground for decision, even if it is convinced the treatment of federal law was incorrect." *Kornahrens v. Evatt*, 66 F.3d 1350, 1358 (4th Cir. 1995) (citing *Ashe v. Styles*, 39 F.3d 80, 86 (4th Cir. 1995)) (denying habeas). "[I]f a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, he is barred from raising those claims on federal collateral review unless he can show cause for the default and prejudice resulting therefrom." *Barnes v. Thompson*, 58 F.3d 971, 974 (4th Cir.), *cert. denied*, 116 S. Ct. 435 (1995).

6. Harmless-Error Test Applies. "[B]efore a federal habeas court may grant relief as a result of the error, it must conclude that an error infecting state criminal proceedings is not harmless . . . ." *Correll v. Thompson*, 63 F.3d 1279, 1291 (4th Cir.) (finding error in state proceedings harmless), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995).

7. State Factual Findings "Presumed To Be Correct." Subject to the eight exceptions listed in 28 U.S.C. § 2254(d), the factual findings of the court at the state level are "presumed to be correct" in federal habeas proceedings. *Sargent v. Waters*, 71 F.3d 158 (4th Cir. 1995) (holding that voluntariness of guilty plea is finding of fact); *Correll v. Thompson*, 63 F.3d 1279, 1288-90 (4th Cir.), *cert. and stay of execution denied sub nom. Correll v. Jabe*, 116 S. Ct. 688 (1995). The presumption of correctness applies to findings of fact by state appellate courts as well as state trial courts. *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995) (en banc) (7-5 decision).

8. Federal Court Reluctance to Resolve Undecided Point of State Law. "[W]e are reluctant to decide needlessly an important matter of state law that has not been addressed conclusively by the state's courts." *Ashe v. Styles*, 67 F.3d 46, 51 (4th Cir. 1995) (denying habeas relief), *cert. denied*, 116 S. Ct. 1051 (1996).

9. New Constitutional Rights Not Applied in Habeas Corpus. "[F]ederal courts generally may not create or apply new constitutional rights on collateral review." *Gray v. Thompson*, 58 F.3d 59, 64 (4th Cir.) (overturning district court's issuing of writ of habeas corpus; holding that there is no constitutional right to appointment of private investigator; holding that there is no constitutional right to advance notice of evidence concerning other bad acts), *stay granted*, 116 S. Ct. 687 (1995), *cert. granted in part*, 116 S. Ct. 690 (1996).

10. No Constitutional Right to Counsel. There is no federal constitutional right to counsel at state post-conviction hearings or at federal habeas corpus hearings. Therefore, because federal habeas proceedings are concerned only with constitutional violations, there can be no such thing as ineffective assistance of counsel at such proceedings. *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995) (holding that if petitioner's attorney at federal proceeding failed to raise claim, claim is defaulted).

11. Standard of Review. "We review *de novo* a district court's decision to deny a petition for a writ of habeas corpus. . . . [O]n federal habeas review, 'a state court's factual findings are "presumed to be correct," whereas its findings on questions of law and mixed questions of fact and law receive independent federal consideration.'" *Ashe v. Styles*, 67 F.3d 46, 50 (4th Cir. 1995) (citing *Turner v. Williams*, 35 F.3d 872, 886 n.14 (4th Cir. 1994)), *cert. denied*, 116 S. Ct. 1051 (1996).

TABLE OF FOURTH CIRCUIT CASES

Adams v. Aiken, 41 F.3d 175 (4th Cir. 1994),
cert. denied, 115 S. Ct. 2281 (1995) 536, 538, 576
Ashe v. Styles, 39 F.3d 80 (4th Cir. 1995) 578
Ashe v. Styles, 67 F.3d 46 (4th Cir. 1995),
cert. denied, 116 S. Ct. 1051 (1996) 541, 564, 571, 577, 579
Barnes v. Thompson, 58 F.3d 971 (4th Cir.),
cert. denied, 116 S. Ct. 435 (1995) 500, 564, 575, 578
Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) 574, 575
Brown v. Waddell, 50 F.3d 285 (4th Cir. 1995) 489
Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 484
Cooper v. Taylor, 70 F.3d 1454 (4th Cir. 1995) 577
Correll v. Thompson, 63 F.3d 1279 (4th Cir.), *cert.*
and stay of execution denied sub nom.
Correll v. Jabe, 116 S. Ct. 688 (1995) 490, 563, 567, 570, 575, 578, 579
Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995) 579
Gilliam v. Foster, 61 F.3d 1070, 1081 (4th Cir. 1995)
(en banc) 493, 494, 564
Gilliam v. Foster, 63 F.3d 287 (4th Cir. 1995) (en banc) 494, 564
Gray v. Thompson, 58 F.3d 59 (4th Cir.),
stay granted, 116 S. Ct. 687 (1995),
cert. granted in part, 116 S. Ct. 690 (1996) 563, 579
Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) 579
In re Askin, 47 F.3d 100 (4th Cir.),
cert. denied, 116 S. Ct. 382 (1995) 491, 524, 568, 569
James v. Jacobson, 6 F.3d 233 (4th Cir. 1993) 571
Kornahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) . . 536, 575, 577, 578
Lawson v. Murray, 837 F.2d 653 (4th Cir.),
cert. denied, 488 U.S. 831 (1988) 523
Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995) 564, 576
Nilson Van & Storage Co. v. Marsh,
755 F.2d 362 (4th Cir.), *cert. denied*, 474 U.S. 818 (1985) . . . 513
Ostrander v. Green, 46 F.3d 347 (4th Cir. 1995) . . . 562, 570, 575, 576
Sargent v. Waters, 71 F.3d 158 (4th Cir. 1995) 579
Simmons v. Poe, 47 F.3d 1370 (4th Cir. 1995) 483, 484, 574
Townes v. Murray, 68 F.3d 840 (4th Cir. 1995) 578
Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) 576, 579
United States v. Acker, 52 F.3d 509, 514 (4th Cir. 1995) 493, 529, 532, 538, 563, 567, 572

United States v. Adam, 70 F.3d 776 (4th Cir. 1995) 521, 539, 546, 548, 560, 561, 566, 572, 574
United States v. Agubata, 60 F.3d 1081, 1083-84 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 929 (1996) 500, 555
United States v. Allen, 50 F.3d 294 (4th Cir.), *cert. denied*, 115 S. Ct. 2630 (1995) 550
United States v. Al-Talib, 55 F.3d 923 (4th Cir. 1995) . . . 486, 488, 489, 491, 492, 501, 504, 515, 550, 551
United States v. Baker, 45 F.3d 837 (4th Cir.), *cert. denied*, 116 S. Ct. 114 (1995) 517
United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) 520
United States v. Banks, 10 F.3d 1044 (4th Cir. 1993) 505, 520
United States v. Bayerle, 898 F.2d 28 (4th Cir.), *cert. denied*, 498 U.S. 819 (1990) 555
United States v. Blue, 957 F.2d 106 (4th Cir. 1993) 509
United States v. Bonnette, 663 F.2d 495 (4th Cir. 1981), *cert. denied*, 455 U.S. 951 (1982) 514
United States v. Bostian, 59 F.3d 474 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 929 (1996) 518, 521, 537, 571, 572
United States v. Boyd, 53 F.3d 247 (4th Cir. 1995) 536
United States v. Boyd, 53 F.3d 631 (4th Cir.), *cert. denied*, 116 S. Ct. 322 (1995) 520, 523, 525, 528, 571, 573
United States v. Boynton, 63 F.3d 337 (4th Cir. 1995) . . . 512, 569, 570
United States v Brand, 907 F.2d 31, 33 (4th Cir. 1990) 557
United States v. Brooks, 957 F.2d 1138 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992) 504
United States v. Broughton-Jones, 71 F.3d 1143 (4th Cir. 1995) 541, 552, 565
United States v. Bryan, 58 F.3d 933 (4th Cir. 1995) 492, 512, 514, 516, 562
United States v. Bumpass, 60 F.3d 1099 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 925 (1996) 531, 532, 571
United States v. Burgos, 55 F.3d 933 (4th Cir. 1995) 524, 536, 538, 562, 570, 572, 573

United States v. Capers, 61 F.3d 1100 (4th Cir. 1995), *petition for cert. filed*, No. 95-7022 (U.S. Dec. 4, 1995) 500, 505, 520, 525, 531, 543, 544, 571, 572, 573, 574
United States v. Cash, 983 F.2d 558 (4th Cir. 1992) 558
United States v. Castner, 50 F.3d 1267 (4th Cir. 1995) . . 522, 544, 546, 549, 551, 552, 560, 561, 566, 567
United States v. Chandler, 36 F.3d 358 (4th Cir. 1994) 508
United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995) . . 540, 543, 546, 552, 560, 561
United States v. Crittendon, 883 F.2d 326 (4th Cir. 1989) 535
United States v. Curtis, 934 F.2d 553 (4th Cir. 1991) 544
United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989) 562
United States v. David, 58 F.3d 113 (4th Cir. 1995) 541, 556
United States v. Davis, 53 F.3d 638 (4th Cir. 1995) 559
United States v. Davis, 954 F.2d 182 (4th Cir. 1992) 565
United States v. Denard, 24 F.3d 599 (4th Cir. 1994) 559
United States v. Dorsey, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995) 525, 529, 530, 564, 571
United States v. Dorsey, 61 F.3d 260 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 732 (1996) 555, 560
United States v. D'Anjou, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994) 544
United States v. Estrada, 42 F.3d 228 (4th Cir. 1994) 502
United States v. Fisher, 58 F.3d 96 (4th Cir.), *cert. denied*, 116 S. Ct. 329 (1995) 503, 542, 569
United States v. Forbes, 64 F.3d 928 (4th Cir. 1995) 510, 534, 536, 567, 569
United States v. Foster, 68 F.3d 86 (4th Cir. 1995) 507, 574, 575
United States v. Fowler, 932 F.2d 306 (4th Cir. 1991) 537
United States v. Fox, 60 F.3d 181 (4th Cir. 1995) 513, 569
United States v. Garcia, 65 F.3d 17 (4th Cir. 1995) 499
United States v. Giunta, 925 F.2d 758 (4th Cir. 1991) 504, 573
United States v. Goins, 51 F.3d 400 (4th Cir. 1995) 496, 563, 570
United States v. Good, 25 F.3d 218 (4th Cir. 1994) 496
United States v. Gordon, 61 F.3d 263 (4th Cir. 1995) . . . 522, 545, 548, 561, 572

United States v. Gray, 47 F.3d 1359 (4th Cir. 1995) 499, 505, 518, 537, 539, 563, 571, 572, 573, 576
United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 116 S. Ct. 124 (1995) 516, 517, 540, 552, 562, 566, 567
United States v. Hairston, 71 F.3d 115 (4th Cir. 1995) 510
United States v. Ham, 58 F.3d 78 (4th Cir.), *cert. denied*, 116 S. Ct. 513 (1995) 493, 494
United States v. Hamrick, 43 F.3d 877 (4th Cir.) (en banc), *cert denied*, 116 S. Ct. 90 (1995) 508, 511, 517, 534, 563
United States v. Hanley, 974 F.2d 14, 17 (4th Cir. 1992) 499
United States v. Harrison, 58 F.3d 115 (4th Cir. 1995) 539, 557, 558, 562
United States v. Hayes, 775 F.2d 1279 (4th Cir. 1995) 504
United States v. Heater, 63 F.3d 311 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996) 502, 504, 506, 507, 516, 517, 519, 523, 526, 534, 537, 540, 542, 547, 562, 565, 567
United States v. Hill, 59 F.3d 500 (4th Cir. 1995) 540, 553, 554, 558, 560
United States v. Hill, 70 F.3d 321 (4th Cir. 1995) 541, 555, 560
United States v. Holmes, 60 F.3d 1134 (4th Cir. 1995) 545, 547
United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982) 533
United States v. Hoyte, 51 F.3d 1239 (4th Cir.), *cert. denied*, 116 S. Ct. 346 (1995) . . 498, 500, 506, 523, 572, 573
United States v. Hummer, 916 F.2d 186, 192 (4th Cir. 1990), *cert. denied*, 499 U.S. 970 (1991) 559
United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995) 486, 502, 503, 553, 555, 561
United States v. Jamison, 996 F.2d 698 (4th Cir. 1993) 547
United States v. Johnson, 324 F.2d 264 (4th Cir. 1963) 513
United States v. Johnson, 48 F.3d 806 (4th Cir. 1995) . . . 540, 552, 554
United States v. Johnson, 54 F.3d 1150 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995) 500, 501, 503, 504, 505, 506, 507, 520, 522, 529, 531, 562, 571, 574
United States v. Johnson, 55 F.3d 976 (4th Cir. 1995) 493, 509
United States v. Johnson, 71 F.3d 139 (4th Cir. 1995) . . . 511, 517, 536, 562, 567

United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995) 550
United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995) 544, 570
United States v. Lambey, 974 F.2d 1389 (4th Cir. 1992) (en banc), *cert. denied*, 115 S. Ct. 672 (1994) 497
United States v. Langley, 62 F.3d 602 (4th Cir. 1995) (en banc), *cert denied*, 116 S. Ct. 797 (1996) 508, 568
United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995) . . . 485, 486, 487, 489, 501, 570, 573
United States v. Letterlough, 63 F.3d 332 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 406 (1995) 510, 569, 570
United States v. Lewis, 53 F.3d 29 (4th Cir. 1995) . . 504, 537, 563, 572
United States v. Lockhart, 58 F.3d 86 (4th Cir. 1995) . . . 544, 556, 566
United States v. Locklear, 829 F.2d 1314 (4th Cir. 1987) 487
United States v. Lowe, 65 F.3d 1137 (4th Cir. 1995) 532, 533, 538, 566, 574
United States v. Maddox, 48 F.3d 791 (4th Cir. 1995) . . . 540, 541, 554, 556, 557, 561
United States v. Mason, 52 F.3d 1286 (4th Cir. 1995) . . . 495, 496, 563, 571, 572
United States v. McDonald, 61 F.3d 248 (4th Cir. 1995) . 484, 485, 486, 487, 488, 491, 501, 570, 573
United States v. Milton, 52 F.3d 78, 80 (4th Cir.), *cert. denied*, 116 S. Ct. 222 (1995) 485, 509, 535
United States v. Mitchell, 985 F.2d 1275 (4th Cir. 1993) 518
United States v. Moore, 931 F.2d 245 (4th Cir.), *cert. denied*, 112 S. Ct. 171 (1991) 496
United States v. Morrell, 61 F.3d 279 (4th Cir. 1995) 509, 570
United States v. Morsley, 64 F.3d 907 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996) 495, 499, 501, 504, 505, 521, 523, 525, 528, 540, 545, 550, 572
United States v. Murphy, 35 F.3d 143 (4th Cir. 1995) 574
United States v. Murray, 65 F.3d 1161 (4th Cir. 1995) . . 487, 524, 545, 548, 549, 558, 560, 561, 571, 573
United States v. Myers, 66 F.3d 1364 (4th Cir. 1995) . . . 501, 540, 543, 549, 553, 554, 558, 559, 560, 561, 562, 566, 571, 572

United States v. Oriakhi, 57 F.3d 1290 (4th Cir.),
cert. denied 116 S. Ct. 400 (1995) 484, 488, 490, 524, 535, 570
United States v. Paz, 927 F.2d 176 (4th Cir. 1991) 502
United States v. Pearce, 65 F.3d 22 (4th Cir. 1995) 514, 538, 573
United States v. Percy, 765 F.2d 1199 (4th Cir. 1985) 526
United States v. Perrin, 45 F.3d 869 (4th Cir.),
cert. denied 115 S. Ct. 2287 (1995) 484, 485, 535, 566, 570, 573
United States v. Pierson, 53 F.3d 62 (4th Cir. 1995) 503
United States v. Pierson, 946 F.2d 1044 (4th Cir. 1991) 547
United States v. Plumley, 993 F.2d 1140 (4th Cir. 1993) 551
United States v. Porter, 909 F.2d 789 (4th Cir. 1990) 560
United States v. Powers, 59 F.3d 1460 (4th Cir. 1995),
cert. denied, 116 S. Ct. 784 (1996) 522, 523, 526, 527, 528, 530, 536, 566, 571
United States v. Presley, 52 F.3d 64 (4th Cir.),
cert. denied, 116 S. Ct. 237 (1995) 499, 508, 510, 568, 570
United States v. Pridgen, 64 F.3d 147 (4th Cir. 1995) . . . 555, 557, 561, 564
United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995) . . 496, 497, 542, 544, 548, 559, 560, 561
United States v. Pupo, 841 F.2d 1235 (4th Cir.),
cert. denied, 488 U.S. 842 (1988) 504
United States v. Rawle, 845 F.2d 1244 (4th Cir. 1988) 526, 527
United States v. Reavis, 48 F.3d 763 (4th Cir.),
cert. denied, 115 S. Ct. 2597 (1995) 492, 493, 498, 506, 547, 562, 572, 574
United States v. ReBrook, 58 F.3d 961 (4th Cir.),
cert. denied, 116 S. Ct. 431 (1995) 512, 515, 519, 533, 543, 545, 561, 562, 566, 571
United States v. Reives, 15 F.3d 42 (4th Cir.),
cert. denied, 114 S. Ct. 2679 (1994) 535
United States v. Ricco, 52 F.3d 58 (4th Cir.),
cert. denied, 116 S. Ct. 254 (1995) 487, 502, 526, 533
United States v. Rusher, 966 F.2d 868 (4th Cir. 1992) 558
United States v. Russell, 971 F.2d 1098 (4th Cir. 1992),
cert. denied, 113 S. Ct. 1013 (1993) 526
United States v. Shaw, 69 F.3d 1249 (4th Cir. 1995) 531, 532, 533, 571

United States v. Singh, 54 F.3d 1182 (4th Cir. 1995) 503, 535, 539, 540, 542, 543, 547, 560, 564, 570, 572, 574
United States v. Smith, 44 F.3d 1259 (4th Cir.), *cert. denied*, 115 S. Ct. 1970 (1995) 492, 516, 519, 537, 538, 565, 572, 573, 574
United States v. Smith, 47 F.3d 681 (4th Cir. 1995) 540, 551
United States v. Smith, 55 F.3d 157 (4th Cir. 1995) 499, 563, 572
United States v. Smith, 62 F.3d 641 (4th Cir. 1995) . 537, 539, 540, 548
United States v. Sparks, 67 F.3d 1145 (4th Cir. 1995) . . . 496, 497, 513, 514, 518, 534
United States v. Speed, 53 F.3d 643 (4th Cir. 1995) 541, 555, 572
United States v. Stewart, 49 F.3d 121 (4th Cir. 1995) . . . 540, 542, 543, 550
United States v. Stewart, 59 F.3d 496 (4th Cir. 1995) 553, 554
United States v. Sturgis, 48 F.3d 784 (4th Cir.), *cert. denied*, 116 S. Ct. 107 (1995) 513
United States v. Tanner, 61 F.3d 231 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 925 (1996) 503, 507, 521, 527, 528, 561
United States v. Thomas, 52 F.3d 82 (4th Cir. 1995) 509
United States v. Thomas, 55 F.3d 144 (4th Cir.), *cert. denied*, 116 S. Ct. 266 (1995) 498, 521
United States v. Toler, 901 F.2d 399 (4th Cir. 1990) 562
United States v. Tomlinson, 67 F.3d 508 (4th Cir. 1995) 509, 563
United States v. Tootle, 65 F.3d 381 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3657 (U.S. Apr. 1, 1996) (No. 95-7756) 498, 563, 569, 576
United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994) . . 503
United States v. Turner, 59 F.3d 481 (4th Cir. 1995) 502, 540, 541, 542, 543, 560, 561
United States v. Turpin, 65 F.3d 1207 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3640 (U.S. Mar. 25, 1996) (No. 95-7260) 515, 533, 568, 571
United States v. Walton, 56 F.3d 551 (4th Cir. 1995) . . . 486, 522, 551
United States v. Wild, 47 F.3d 669 (4th Cir.), *cert. denied*, 116 S. Ct. 128 (1995) 507, 534
United States v. Wild, 53 F.3d 328 (4th Cir. 1995) 572
United States v. Williams, 47 F.3d 658 (4th Cir. 1995) . . 494, 495, 563
United States v. Williams, 67 F.3d 527 (4th Cir. 1995) 510, 568