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Annual Fourth Circuit Review: Table of Contents

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ANNUAL FOURTH CIRCUIT REVIEW

The Annual Fourth Circuit Review reviews opinions of the United States Court of Appeals for the Fourth Circuit in criminal and civil cases during 1994.

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For the Criminal Practitioner

Thomas R. Ascik*

Introductory Notes

1. This review is the fourth in a series in which all of the published criminal opinions of the United States Court of Appeals for the Fourth Circuit have been analyzed for points of law. The current author has continued the format of the author who originated the series, United States Magistrate Court Judge Carl Horn of Charlotte, North Carolina. This review covers the 1994 calendar year.

2. The author has analyzed all cases for points of law, each of which is set out separately. Almost every case is cited for more than one point of law.

3. An appeals court decides very few issues "of the first impression." Thus, most of the points of law cited herein are not necessarily "new." In addition, if the court uses existing foundational points of law to decide an issue, frequently those points have been included in this review. This structure allows the practitioner to cite the most recent case for a particular point of law.

4. The Table of Contents is lengthy and very detailed. It is effectively an outline of the whole review.

5. The style is one of extreme economy. The primary audience of these reviews has always been the busy criminal practitioner of some federal experience who needs a quick and ready reference.

6. New and occasional criminal practitioners, however, will find the review useful as well. A year of cases of a federal appeals court can serve as a passable review of much of federal criminal procedure and the most frequently prosecuted federal crimes.

7. As in the past, there are three full sections devoted exclusively to specific federal statutory crimes. Sections IV, V, and VI deal with drug, firearm, and all other federal crimes, respectively. The reader should note that 1994 holdings and statements of the Fourth Circuit about statutory

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construction are contained in the last subsection of Section III, Miscellaneous Pretrial Issues. That subsection also contains the law of appellate review of statutory construction.

8. The longest section, Section VIII, concerns sentencing and the many constructions of the United States Sentencing Guidelines. Appeal of Sentences is the last subsection in that section.

9. Concerning standards of review and other issues in the law of appeals, this review is broader than those of the past. In the last section, Section IX, Appeal and Other Post-Conviction Proceedings, more points of law are cited concerning harmless error, plain error, standards of review, and appellate jurisdiction, among other issues. In addition, in that section, 1994 cases are collected according to the standard of review, for example, "abuse of discretion," that governed their resolution. Finally, subsection V of Section IX cites 1994 convictions that the Fourth Circuit overturned on appeal.

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I. Search and Seizure

A. Search Warrants

1. *Probable Cause for Issuance of Search Warrant.* There is probable cause for a search warrant when "given all the circumstances set forth in the affidavit[,] . . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Legg*, 18 F.3d 240, 243 (4th Cir.) (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)), *cert. denied*, 114 S. Ct. 2761 (1994). A reviewing court should give "great deference" to a magistrate's determination of probable cause. *United States v. Clyburn*, 24 F.3d 613 (4th Cir.), *cert. denied*, 115 S. Ct. 274 (1994).

2. *"Oral" Statements of Probable Cause for State Search Warrants.* As a supplement to a written statement (affidavit) of probable cause for the issuance of a search warrant, the Fourth Amendment does not forbid an unrecorded, oral, sworn statement of probable cause by a state officer to a state magistrate. *United States v. Clyburn*, 24 F.3d 613 (4th Cir.), *cert. denied*, 115 S. Ct. 274 (1994).

3. *Challenging a Search Warrant: Right to a 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 shows that the false statement was necessary to the finding of probable cause. *United States v. Jeffus*, 22 F.3d 554 (4th Cir. 1994) (upholding district court's denial of *Franks* hearing).

4. *"Knock and Announce" (18 U.S.C. § 3109).* An agent need not knock and announce a search warrant if he reasonably believes that by doing so he will endanger himself or allow suspects to destroy evidence. *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995).

5. *State Search Warrants and the Leon "Good Faith" Exception to the Exclusionary Rule.* If state officers acting under state search warrant law and procedure reasonably relied on the validity of a search warrant issued by a state judge, the search will be upheld in federal court under the "good faith" exception to the exclusionary rule enunciated by the Supreme Court

in *United States v. Leon*, 468 U.S. 897 (1984). *United States v. Clutchette*, 24 F.3d 577, 581 (4th Cir. 1994) (basing its decision on *Leon* line of cases and refusing to "address the questions of the validity of telephone warrants under Maryland law and of the interplay between state law and the Exclusionary Rule").

6. *Validity of State Search Warrants in Federal Court*. "[T]he validity of a search warrant obtained by state officers is to be tested by the requirements of the Fourth Amendment of the U.S. Constitution, not by state law standards [nor by Rule 41 of the Federal Rules of Criminal Procedure, which applies only to federal officers], when the admissibility of evidence in federal court is at issue." *United States v. Clyburn*, 24 F.3d 613, 614 (4th Cir.), *cert. denied*, 115 S. Ct. 274 (1994).

B. *Exceptions to Warrant Requirement*

1. *Warrantless Seizure Under Plain View Doctrine*. An officer who is lawfully present at a place where he has a plain and lawful view of an object whose incriminating character is immediately apparent may seize the object without a warrant. *United States v. Williams*, 41 F.3d 192 (4th Cir. 1994), *cert. denied*, No. 94-8326 (U.S. Apr. 3, 1995); *United States v. Legg*, 18 F.3d 240 (4th Cir.), *cert. denied*, 114 S. Ct. 2761 (1994).

2. *Warrantless Search Following Warrantless Seizure*. "Courts have drawn a distinction between the plain view seizure of a container and the subsequent search of that container, because its seizure under the plain view doctrine does not compromise the interest in preserving the privacy of its contents, while its search does. As a consequence, to protect the privacy interest of the contents of a container, courts will allow a search of a container following its plain view seizure only where the contents of a seized container are a foregone conclusion." *United States v. Williams*, 41 F.3d 192, 197 (4th Cir. 1994) (internal quotations omitted) (upholding warrantless search following warrantless seizure because of characteristic packaging of drugs and place where packages were found), *cert. denied*, No. 94-8326 (U.S. Apr. 3, 1995).

3. *Threat to Safety of Officer as Exigent Circumstance*. Courts have long recognized that the possibility of a threat to the safety of law enforcement officers is one of the exigent circumstances that justifies a warrantless search or seizure. *United States v. Legg*, 18 F.3d 240 (4th Cir.), *cert. denied*, 114 S. Ct. 2761 (1994).

4. Leon "*Good Faith Exception*" Applied to Plain View Seizure. In *Leon v. United States*, 468 U.S. 897 (1984), the Supreme Court ruled that there can be exceptions to the exclusionary rule if officers acted in good faith. In *United States v. Legg*, 18 F.3d 240 (4th Cir.), cert. denied, 114 S. Ct. 2761 (1994), the Fourth Circuit concluded "that the rationale of *Leon* should apply to render an officer lawfully present for purposes of applying the plain view doctrine as long as the officer possesses a reasonable good faith belief in the validity of the warrant and the warrant was issued by a detached and neutral magistrate." *Legg*, 18 F.3d at 244 n.2 (finding officer lawfully present because of good-faith belief in validity of search warrant).

5. *Automobile Exception to Warrant Requirement*. "With or without warrant, the scope of the search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found. . . . [T]he justification to conduct a warrantless search under the automobile exception does not disappear merely because the car has been immobilized and impounded. . . . [T]he passage of time between the seizure and the search of [the defendant's] car is legally irrelevant." *United States v. Gastiburo*, 16 F.3d 582, 586-87 (4th Cir.), cert. denied, 115 S. Ct. 102 (1994).

6. *Unauthorized Rental Car Driver Has No Reasonable Expectation of Privacy*. In *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994), cert. denied, 115 S. Ct. 1115 (1995), the court ruled that, because the driver of a rental car from which drugs were seized in a warrantless search was not the driver listed on the rental agreement, he had no expectation of privacy in the contents, including his luggage, of the car.

C. *No Expectation of Privacy in a Jail Cell*

There is no reasonable expectation of privacy in jail cells, and jailers may search cells without search warrants. *United States v. Jeffus*, 22 F.3d 554 (4th Cir. 1994); see also *Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979).

D. *Seizure Under a Forfeiture Statute (21 U.S.C. § 881)*

Items in a car may be seized and later introduced into evidence if there is probable cause that the car is subject to forfeiture as a means of transporting drugs under 21 U.S.C. § 881. *United States v. Bizzell*, 19 F.3d 1524 (4th Cir. 1994).

E. Wiretapping (18 U.S.C. § 2518)

Even though wiretapping can be neither the initial step in an investigation nor employed when traditional investigative techniques would suffice, the burden on the government to show the inadequacy of normal investigative techniques is "not great." The government's application for a wiretap may be justified if, for example, an undercover infiltration would be too dangerous, or if normal investigative techniques have not been successful and a continuation of the same techniques would be fruitless or dangerous. *United States v. Smith*, 31 F.3d 1294 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1170 (1995).

F. Inevitable Discovery Doctrine

Under the inevitable discovery doctrine, seized evidence properly excluded as violative of the Fourth Amendment may still be admitted if its discovery would have been inevitable on other legal grounds. *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994); *see also Nix v. Williams*, 467 U.S. 431 (1984).

G. Terry Vehicular Stop v. Arrest

As long as there is reasonable suspicion, that is, a "particularized and objective basis for suspecting the particular person stopped of criminal activity," probable cause is not necessary for a "brief but complete restriction of liberty" during a vehicular stop. In addition, such a stop is not an arrest. *United States v. Harris*, 39 F.3d 1262, 1269 (4th Cir. 1994) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), and *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir.), *cert. denied*, 484 U.S. 965 (1987)); *see also Terry v. Ohio*, 392 U.S. 1 (1968).

H. Arrest

1. *Definition of Probable Cause to Arrest.* "Probable cause consists of 'facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.'" *United States v. Williams*, 41 F.3d 192, 199 (4th Cir. 1994) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)), *cert. denied*, No. 94-8326 (U.S. Apr. 3, 1995).

2. *When Warrantless Arrest Is Permissible.* "Police officers may arrest a suspect without a warrant as long as they act on the basis of probable cause." *United States v. Williams*, 41 F.3d 192, 198 (4th Cir. 1994), *cert. denied*, No. 94-8326 (U.S. Apr. 3, 1995).

II. Confessions and Other Statements

A. Exceptions to Miranda Requirements

1. *Public Safety Exception to Miranda.* In *New York v. Quarles*, 467 U.S. 649, 659 n.8 (1984), the Supreme Court established the public safety exception to the *Miranda* rule, under which a suspect may be questioned in violation of *Miranda* warnings if there is "an objectively reasonable need to protect the police or the public from any immediate danger associated with [a] weapon." In *Quarles*, the Supreme Court approved the exception in a situation in which the police questioned a suspect under arrest about a weapon *before* they administered the *Miranda* warnings.

In *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994), the Fourth Circuit held that the exception applied to a situation in which the FBI questioned the arrested defendant about any weapons *after* he had been read the *Miranda* warnings and had responded that he wanted a lawyer. In other words, the court of appeals held that there was a public safety exception to *Edwards v. Arizona*, 451 U.S. 477 (1981), the case in which the Supreme Court upheld the right to counsel after *Miranda* warnings.

In *Mobley*, the Fourth Circuit, describing the exception as "narrow," concluded that the exception did not apply to the facts of the case because the government had not shown that there was a sufficiently immediate need to justify it. However, the court then found the error harmless beyond a reasonable doubt.

2. *"Booking" Exception to Miranda.* A defendant in custody need not be "*mirandized*" before being asked questions concerning "biographical data necessary to complete booking or pretrial services." *United States v. D'Anjou*, 16 F.3d 604, 608 (4th Cir.) (quotation omitted) (mentioning possible exception in certain kinds of immigration cases when giving of one's name may be tantamount to confession), *cert. denied*, 114 S. Ct. 2754 (1994).

III. Miscellaneous Pretrial Issues

A. Right to Counsel

1. *When Right to Counsel Attaches.* The right to counsel attaches at the time of a defendant's initial appearance in court, that is, "as the process shifts from investigation to prosecution, and not before." *United States v. D'Anjou*, 16 F.3d 604, 608 (4th Cir.) (finding that defendant had no right to counsel at custodial interrogation occurring prior to his initial appearance), *cert. denied*, 114 S. Ct. 2754 (1994).

2. *Right to Counsel of One's Choice.* "A defendant's right to have a lawyer of his or her own choosing is an essential element of the Sixth Amendment right to assistance of counsel. . . . Nevertheless, the defendant's right to choose his or her lawyer is not absolute. . . . [I]t necessarily follows that a defendant does not have an absolute right to substitution of counsel. . . . In evaluating whether the trial court abused its discretion in denying a defendant's motion for substitution, we consider three factors: 'Timeliness of the motion; adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense.'" *United States v. Mullen*, 32 F.3d 891, 895 (4th Cir. 1994) (citations omitted) (quoting *United States v. Gallop*, 838 F.2d 105, 107-08 (4th Cir.), *cert. denied*, 487 U.S. 1211 (1988)).

3. *Substitution of Counsel.* In *United States v. Corporan-Cuevas*, 35 F.3d 953, 957 (4th Cir. 1994), the court ruled that the right to counsel is not absolute and that a district court, on account of its "interest in the orderly administration of justice," may deny a defendant's motion for substitution of counsel and a continuance.

4. *Continuance to Seek New Counsel.* "[A] district court need not grant a continuance for purposes of securing new counsel where the request for it plausibly can be viewed as simply a delaying tactic or as otherwise unreasonable." *United States v. Attar*, 38 F.3d 727, 735 (4th Cir. 1994) (treating last-minute actions and assertions of defendant as constructive discharge of counsel and holding that defendant was properly required to proceed *pro se*), *petition for cert. filed*, 63 U.S.L.W. 3644 (U.S. Feb. 21, 1995) (No. 94-1404).

B. *Investigative Powers of Grand Jury Are Broad*

The investigatory powers of a grand jury are very broad, and courts normally will not interfere with a grand jury investigation. "The grand jury is under no obligation at the investigative stage to prove its case to a court of law." *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 878 (4th Cir. 1994). However, a grand jury may not use its subpoena powers to undertake what amounts to civil or criminal discovery or in an arbitrary, malicious, or harassing manner. The test for the enforceability of a grand jury subpoena is "whether there is any 'reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation.'" *Id.* (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991)). If the "reasonable possibility" test is passed, then a subpoena will be enforced even if there is the additional possibility that the prosecution may use subpoenaed information for some purpose other than the gathering of evidence for the grand jury. *Id.* (overturning district court's quashing of subpoenas for attorney fee records in grand jury drug investigation).

C. *Attorney Fee Records May Be Subpoenaed*

The Fourth Circuit has held that subpoenas for attorney fee records violate neither the Sixth Amendment right to counsel nor the attorney-client relationship. *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876 (4th Cir. 1994) (upholding subpoena for records of attorney fees); *see also In re Grand Jury Matter*, 926 F.2d 348 (4th Cir. 1991); *United States v. (Under Seal)*, 774 F.2d 624 (4th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

D. *Venue*

"We have held that venue is proper, in a multi-district conspiracy, in any district in which a conspirator has committed an overt act. Moreover, when a conspiracy is formed in one district and overt acts are taken in furtherance of it in other districts, venue is proper against all of the defendants in any one of those districts." *United States v. Heaps*, 39 F.3d 479, 482 (4th Cir. 1994) (citations omitted); *see also Platt v. Minnesota Mining & Mfg.*, 376 U.S. 240 (1964) (listing ten factors that court may consider in deciding whether to transfer venue).

E. Statute of Limitations Favors Repose

"[A] criminal statute of limitations should be liberally applied in favor of repose." *United States v. Blizzard*, 27 F.3d 100, 102 (4th Cir. 1994).

F. Severance of Defendants

Severance of defendants in a drug conspiracy case is disfavored. *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994). Disparities in the strength of evidence among several defendants is "only very rarely a proper ground for severance." *Id.* at 608 (citing *United States v. Mitchell*, 733 F.2d 327, 331 (4th Cir.), *cert. denied*, 469 U.S. 1039 (1984)). A trial court may order a severance of defendants on its own motion. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

G. Double Jeopardy

1. *Major Case.* For a major decision involving double jeopardy after a mistrial, see *Mistrial*, *infra* section VII.Y.

2. *Protection Afforded by the Double Jeopardy Clause.* "[T]he Double Jeopardy Clause affords protection against a retrial following reversal based solely on evidentiary insufficiency, but not against a retrial following reversal based on trial error." *United States v. Akpi*, 26 F.3d 24, 26 (4th Cir. 1994).

3. *Double Jeopardy Does Not Bind the Legislature.* The principle of double jeopardy is binding on the executive and judicial branches, but not on the legislative branch. If Congress clearly decided that multiple punishments can be imposed for the same acts, that decision cannot be challenged by a claim of double jeopardy. *United States v. Johnson*, 32 F.3d 82 (4th Cir.), *cert. denied*, 115 S. Ct. 650 (1994).

H. Vindictive/Selective Prosecution

1. *Prosecutorial Vindictiveness.* The government may not attempt to punish a defendant by bringing new or increased charges immediately after he has vindicated some statutory or constitutional right. A presumption of prosecutorial vindictiveness "generally arises where the defendant is reindicted after she exercises her legal right to a trial de novo or following her successful post-conviction appeal." *United States v. Fiel*, 35 F.3d 997,

1007 (4th Cir. 1994) (citation omitted), *cert. denied*, 115 S. Ct. 1160 (1995). A mere reindictment after a mistrial is not prosecutorial vindictiveness, nor are new charges brought as a consequence of newly discovered evidence.

2. *Selective Prosecution*. The issue of selective prosecution concerns only a constitutional defect in the *initiation* of the proceedings. It has nothing to do with ultimate guilt or innocence. Possible bases for a claim of selective prosecution are race, religion, or the exercise of constitutional rights. In order to determine whether a hearing is warranted for a claim of selective prosecution, a district court must consider whether (1) the claim was frivolous, (2) it was supported by specific factual allegations, and (3) the government's response and explanation were adequate. An appeals court will use an abuse of discretion standard to review a district court's denial of a hearing on a claim for selective prosecution. *United States v. Marcum*, 16 F.3d 599 (4th Cir.), *cert. denied*, 115 S. Ct. 137 (1994).

I. *Guilty Pleas — Rule 11*

1. *Insubstantial Errors in Guilty Pleas (FRCrP 11(h))*. Under subsection (h) of Rule 11, procedural errors in guilty pleas are disregarded unless they affect "substantial rights." *United States v. Good*, 25 F.3d 218 (4th Cir. 1994).

2. *Applicable Guideline Range Is Not at Issue at Rule 11 Hearings (FRCrP 11(c)(1))*. A district court is not required to tell a defendant the specific applicable guideline range at a Rule 11 hearing. The court must state the maximum penalties, and any minimum penalties, and must state that any applicable guidelines will apply and that departures are permitted in some instances. *United States v. Good*, 25 F.3d 218 (4th Cir. 1994).

J. *Courts Will Not Normally Enforce the Internal Policies of Government Agencies*

Courts will enforce only those agency regulations whose compliance is required by the Constitution or federal law. *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876 (4th Cir. 1994) (rejecting attempt to require enforcement of Justice Department internal guideline on grand jury subpoenas).

K. *Disclosure of Identities of Confidential Informants*

The burden is on the defendant to show why the disclosure of confidential informants should be compelled. *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.) (not requiring disclosure), *cert. denied*, 114 S. Ct. 2754 (1994). According to the Supreme Court in *Roviaro v. United States*, 353 U.S. 53, 62 (1957), the question of disclosure "depend[s] on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." According to the Fourth Circuit in *United States v. Blevins*, 960 F.2d 1252 (4th Cir. 1992), a relevant factor is the role of the confidential informant in the particular case.

L. *Pretrial Special Probation for Simple Possession of Drugs*

In *United States v. Barial*, 31 F.3d 216 (4th Cir. 1994), the Fourth Circuit ruled that the "special probation" of 18 U.S.C. § 3607 for defendants accused of simple possession of drugs was not confined solely to charges under 18 U.S.C. § 844 but included similar statutes (e.g., 36 C.F.R. § 2.35(b)(2)).

M. *Criminal Jurisdiction Under the Commerce Clause*

Although the federal government has territorial jurisdiction over federal lands, most federal criminal jurisdiction arises from Congress's power to regulate interstate and foreign commerce under the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3). With the increased growth of the corpus of federal criminal laws over the last fifteen years, Commerce Clause challenges to the power of Congress to create new federal crimes have arisen across the country. By its ruling in *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994) (2-1 decision), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994), the court severely restricted such challenges in this circuit. The Fourth Circuit stated that the Necessary and Proper Clause (U.S. CONST. art. I, § 8, cl. 18) "freed" the Commerce Clause "from the potential straitjacket of its literal terms." *Ramey*, 24 F.3d at 606. Congress may use the Commerce Clause to regulate activities that have "only a trivial or theoretical effect" on interstate commerce. *Id.* No "rational basis" is required for legislation under the Commerce Clause, and the court will not question the motive or purpose of Congress in legislating in this area. "As a practical matter, at least since the watershed decisions of 1937-1942 [e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942)], the political process, and not the

courts, has been the states' only real defense against commerce-based federal incursions." *Ramey*, 24 F.3d at 606. The Commerce Clause has a "nearly boundless background." *Id.* In *Ramey*, the court ruled that a residential trailer's use of electricity from an interstate power grid was a sufficient interstate nexus for prosecution of a case under the federal arson statute, 18 U.S.C. § 844(i). "The language of § 844(i) is intended to and does exercise Congress' power to its constitutional limit." *Ramey*, 24 F.3d at 606 (citing *Russell v. United States*, 471 U.S. 858, 859 (1985)).

N. Speedy Trial Act (18 U.S.C. § 3161)

1. *Defendant May Not Waive Speedy Trial.* "In general, a defendant cannot waive his right to a speedy trial under the Act. The reasoning behind this general rule rests on the notion that a defendant cannot waive the public's interest in a speedy trial." *United States v. Keith*, 42 F.3d 234, 238 (4th Cir. 1994) (citations omitted).

2. *Finding Required for "Ends of Justice" Continuance.* The Speedy Trial Act allows certain continuances for the "ends of justice," but the court must state specifically the reasons for such a continuance, refer to the proper section of the Act, and balance the reasons for the continuance against the defendant's and the public's right to a speedy trial. *United States v. Keith*, 42 F.3d 234 (4th Cir. 1994) (finding continuance improperly granted because district court failed to tie reason for continuance to "ends of justice" and because required balancing test not performed).

3. *Defendant May Not Normally Take Advantage of Agreed-To Continuance.* If the defendant agreed to a continuance, he may not later claim a violation of the Act as long as the record shows "a sufficient factual basis which would support an ends of justice finding under the Act." *United States v. Keith*, 42 F.3d 234, 240 (4th Cir. 1994).

4. *Thirty Days for Consideration of Motions (§ 3161(h)(1)(F), (J)).* In *United States v. Parker*, 30 F.3d 542 (4th Cir.), *cert. denied*, 115 S. Ct. 605 (1994), the court ruled that the thirty days that it took the district court to allow the defense counsel's motion to withdraw as counsel could be excluded from the speedy-trial clock as "reasonably attributable" to the consideration of the motion.

O. Construction of Statutes and Regulations

1. *Statutory Construction.* In passing new laws, the legislature is presumed to know the prior laws. It is not permissible to speculate that the legislature overlooked something or did something inadvertently. *United States v. Johnson*, 32 F.3d 82 (4th Cir.), *cert. denied*, 115 S. Ct. 650 (1994). Courts are required to attempt to reconcile seemingly competing laws that are "capable of coexistence" in order to give effect to each law. *United States v. Harris*, 27 F.3d 111 (4th Cir. 1994) (quoting the Supreme Court). Defining the elements of an offense is a legal issue which is reviewed *de novo* on appeal. *United States v. Smith*, 29 F.3d 914 (4th Cir.), *cert. denied*, 115 S. Ct. 454 (1994). "[A] statutory term is generally presumed to have its common-law meaning." *United States v. Chase*, 18 F.3d 1166, 1170 (4th Cir. 1994) (quoting *Evans v. United States*, 504 U.S. 255, __ (1992)). The adoption of rules of evidence and procedure is not a means of amending substantive law. *Id.* When a word is not defined in a statute, it is given its ordinary meaning. *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994). The plain language of a statute will control unless the legislative history clearly demonstrates that Congress intended some other meaning. *Id.*; *United States v. Neal*, 27 F.3d 90 (4th Cir. 1994) ("plain meaning"). Construing a statute is a legal issue, and the review in the appeals court is "plenary." *United States v. Murphy*, 35 F.3d 143 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 954 (1995). In construing a statute, words are given their common usage. *Id.* If the language of a statute is unambiguous, any party challenging that lack of ambiguity must show a "clearly expressed legislative intent to the contrary that would warrant a different construction." *United States v. Fiel*, 35 F.3d 997, 1005 (4th Cir. 1994) (quoting *NOW v. Scheidler*, 114 S. Ct. 798, 806 (1994)), *cert. denied*, 115 S. Ct. 1160 (1995). The words in a statute, not the words in the title of the statute, control the meaning of the statute. *Id.* The language of one statute cannot not normally serve as a definition of similar language in another statute. *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994). In statutory interpretation, all parts of a statute must be read together. *United States v. Penn*, 17 F.3d 70 (4th Cir. 1994).

2. *Conflicts Between Statutes, Repeal by Implication.* There is a "strong presumption" against repeal by implication. "[A] later act will not repeal an earlier one in the absence of a clear and manifest intention of Congress. A court may find the requisite degree of intent when (1) the two acts are in irreconcilable conflict, or (2) the later act covers the whole

subject of the earlier one and is clearly intended as a substitute. . . . Statutory provisions will not be considered to be in irreconcilable conflict unless there is a 'positive repugnancy' between them such that they cannot mutually coexist. . . . One statutory provision will repeal another only if necessary to make the [later enacted law] work." *United States v. Mitchell*, 39 F.3d 465, 472-73 (4th Cir. 1994) (last alteration in original) (citations and internal quotations omitted). When statutes are in irreconcilable conflict, the statute that is more specific to the facts at issue controls over the more general statute. When the goals of statutes are not in conflict, the statutes are probably not in conflict.

3. *Rule of Lenity*. Under the rule of lenity, a close call concerning the construction of a statute is resolved in favor of the defendant. But the rule of lenity "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of a statute.'" *United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994) (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991)); see also *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994); *United States v. Denard*, 24 F.3d 599 (4th Cir. 1994) (stating that rule of lenity applies when text and structure of statute as well as its history are ambiguous); *United States v. Penn*, 17 F.3d 70 (4th Cir. 1994).

4. *Legislative Regulations Are Substantive Law*. "For regulations to have the force and effect of law they must first be 'substantive' or 'legislative-type' rules, as opposed to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice. An inherent characteristic of a 'substantive rule' is that it is one affecting individual rights and obligations. Second, the regulation must have been promulgated pursuant to a congressional grant of quasi-legislative authority. Third, the regulation must have been promulgated in conformity with congressionally-imposed procedural requirements such as the notice and comment provisions of the Administrative Procedure Act." *United States v. Mitchell*, 39 F.3d 465, 470 (4th Cir. 1994) (citation and internal quotations omitted).

5. *Mens Rea: General Intent, Specific Intent*. When a statute does not specify a heightened mental element, such as specific intent, then general intent (and not strict liability) is presumed to be the mental element. "The difference between a specific intent and general intent crime involves the way in which the intent is proved — whether by probing the defendant's subjective state of mind or whether by objectively looking at the defendant's behavior in the totality of the circumstances." *United States v. Darby*, 37

F.3d 1059, 1065 (4th Cir. 1994) (quoting *United States v. DeAndino*, 958 F.2d 146, 149 (6th Cir.), *cert. denied*, 112 S. Ct. 2997 (1992)), *petition for cert. filed*, No. 94-7778 (U.S. Jan. 19, 1995). Diminished mental capacity and voluntary intoxication are defenses only to specific intent crimes.

IV. Drug Offenses

A. Quantity of Drugs

1. *Proof at Trial.* The quantity of drugs is a sentencing issue, not an essential element of a drug trafficking crime. The government need only show a measurable amount of the drug at issue, even if the government alleged a specific quantity in the indictment. *United States v. Kimberlin*, 18 F.3d 1156 (4th Cir.), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994).

2. *Proof at Sentencing.* The government must prove the quantity of drugs by a preponderance of the evidence. *United States v. Estrada*, 42 F.3d 228 (4th Cir. 1994). Determining the quantity of drugs at sentencing is frequently an issue of section 1B1.3 of the U.S. Sentencing Guidelines, Relevant Conduct. Under section 1B1.3, Commentary 2, "[w]ith respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." In *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994), the Fourth Circuit elaborated on the methods that the government may use to prove the quantity of drugs:

The prosecution bears the burden of proving the amount of drugs reasonably foreseeable to the defendant by a preponderance of the evidence. The government may meet this burden by: the defendant's acknowledgement that the amount alleged by the government is correct, a guilty plea to an indictment attributing an amount of drugs to the defendant, a stipulation of the parties, failure by the defendant to object to a pre-sentence report, or presenting sufficient evidence to establish the quantity of drugs attributable to the defendant.

Id. at 885 (citing *United States v. Gilliam*, 987 F.2d 1009, 1013 (4th Cir. 1993)).

3. *Resolution of Dispute Regarding Quantity of Drugs (U.S.S.G. § 6A1.3).* If the quantity of drugs is a fact in dispute, the sentencing court

must make an independent resolution of the dispute at sentencing. *United States v. Estrada*, 42 F.3d 228 (4th Cir. 1994) (finding that, because sentencing court failed to make sufficient factual finding concerning quantity of drugs, defendant was not subject to mandatory five-year minimum sentence even though he agreed to that sentence in his plea agreement); *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

4. *Aggregating Quantity of Drugs (U.S.S.G. § 2D1.1)*. The Drug Equivalency Table of section 2D1.1 provides a method of aggregating different drugs at different offense levels to come up with a single offense level. But this method of aggregating different drugs may not be used to impose any of the several mandatory minimum sentences of 21 U.S.C. § 841(b) because all such mandatory minimum sentences apply to single drugs only. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994); see also *United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993), cert. denied, 114 S. Ct. 1086 (1994).

5. *Approximating Quantity of Drugs (U.S.S.G. § 2D1.1)*. When there is no drug seizure or the amount of drugs seized does not reflect the true scale of the offense, the sentencing court may approximate the amount of drugs, and the amount approximated need not be based on any completed transaction or distribution. *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995); see also U.S.S.G. § 2D1.1 and Commentary. "[T]he Sentencing Guidelines permit estimated amounts based on satisfactory evidence, and such estimates inherently possess a degree of uncertainty." *United States v. D'Anjou*, 16 F.3d 604, 614 (4th Cir.), cert. denied, 114 S. Ct. 2754 (1994).

6. *Single Defendant Is Liable at Sentencing for the Reasonably Foreseeable Quantity of Drugs in the Whole Drug Conspiracy (U.S.S.G. § 1B1.3)*. "The drug quantity to be attributed to [the defendant] therefore is not limited to the amount he personally handled, but rather is that amount that was reasonably foreseeable to him and in furtherance of the conspiracy." *United States v. D'Anjou*, 16 F.3d 604, 614 (4th Cir.), cert. denied, 114 S. Ct. 2754 (1994).

B. *Drug Distribution (21 U.S.C. § 841)*

1. *Possession with Intent to Distribute*. If the government charges a defendant with possession of a specific kind and quantity of drug, then a conviction may not stand on evidence that a defendant distributed another

drug or the same drug at another time. But a conviction for possession with intent to distribute drugs may stand on only a small amount of drugs if the government produces other evidence. *United States v. Harris*, 31 F.3d 153 (4th Cir. 1994).

2. *Sharing Drugs with Another Is Illegal Distribution.* "Distribution under 21 U.S.C. § 841(a)(1) is not limited to the sale of controlled substances. . . . Sharing drugs with another constitutes 'distribution' under § 841(a)(1). . . . [A] defendant who purchases a drug and shares it with a friend has 'distributed' the drug even though the purchase was part of a joint venture to use drugs." *United States v. Washington*, 41 F.3d 917, 919-20 (4th Cir. 1994) (citations omitted).

3. *Prosecution of Physician as Drug Distributor.* In order to prove that a physician was illegally distributing drugs through bogus prescriptions, the government must show, in addition to the usual elements of drug distribution, that the physician acted "outside the course of professional medical practice." *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1138 (4th Cir. 1994) (reviewing and approving text of sample jury instruction). In *Tran Trong Cuong*, the Fourth Circuit overturned all of a physician's drug distribution convictions, some for insufficiency of the evidence and some for trial errors. The court overturned eighty counts, each based on a single drug prescription, for insufficiency of the evidence because the patients who received the prescriptions did not testify, because the government relied on a summary chart of only thirty-three patient files, and because of defects in the testimony of the government's physician expert.

4. *Expert Opinion on "Intent to Distribute" (FRE 704(b)).* Rule 704(b) prohibits expert testimony "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." In *United States v. Gastiaburo*, 16 F.3d 582 (4th Cir.), cert. denied, 115 S. Ct. 102 (1994), the Fourth Circuit considered the testimony of a government expert who stated that in his opinion the possession of a certain amount and packaging of crack cocaine meant that the defendant possessed the crack cocaine with the "intent to distribute." Because the defendant did not object to this testimony at trial, the court reviewed the testimony for plain error and found none.

5. *Death as a Result of Drug Distribution.* In *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994), petition for cert. filed, No. 94-7831 (U.S. Jan. 23, 1995), the court ruled that the statutory requirement in 21 U.S.C. § 841(b)(1)(C) of a mandatory minimum sentence of twenty years if

death or serious bodily injury "results" from drug distribution (under 21 U.S.C. § 841) was not an essential element of the crime that the government had to prove beyond a reasonable doubt. In addition, the court stated, the government need not prove that death was reasonably foreseeable, only that it occurred.

C. *Drug Conspiracy (21 U.S.C. § 846)* [See also *Conspiracy (18 U.S.C. § 371)*, *infra section VI.D.*]

1. *Miscellaneous*. Proof of a drug conspiracy is often accomplished by showing the street-level sales of various members of the conspiracy. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994); *see also United States v. Banks*, 10 F.3d 1044 (4th Cir. 1993) (stating that street dealers who compete with one another can still be part of same conspiracy), *cert. denied*, 114 S. Ct. 1850 and 114 S. Ct. 2681 (1994). Severance of defendants in drug conspiracy cases is disfavored. *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994). "The conspiracy doctrine makes conspirators liable for all reasonably foreseeable acts of their coconspirators done in furtherance of the conspiracy." *United States v. McManus*, 23 F.3d 878, 883 (4th Cir. 1994) (citation omitted). In a conspiracy case, a defendant may be liable for the mandatory firearm penalties of 18 U.S.C. § 924(c)(1) if his co-conspirator used a firearm in the conspiracy and that use was reasonably foreseeable to the defendant. *Id.* Conspiracies may be proved by circumstantial evidence such as the kind and length of the relationship of the defendant with other members of the conspiracy, the defendant's attitude and conduct, and the nature of the conspiracy. To be a conspirator, a defendant must be a member of the conspiracy and not a mere associate of the members. Only a "slight connection" between the defendant and the conspiracy need be shown. *United States v. Locklear*, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 278 and 115 S. Ct. 457 (1994).

2. *Drug Conspiracy (§ 846) v. Drug Enterprise (§ 848)*. "A defendant convicted under § 848 may not also be convicted for any predicate conspiracy charges proved as elements of the § 848 offense." *United States v. McManus*, 23 F.3d 878, 884 (4th Cir. 1994) (quoting *United States v. Butler*, 885 F.2d 195, 202 (4th Cir. 1989) (quoting *United States v. Porter*, 821 F.2d 968, 978 (4th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988))).

3. *Collecting Money Is Part of Drug Conspiracy*. Even if it can be argued that the collection of payment for drugs is not part of the act of

distributing drugs, that collection is certainly part of a *conspiracy* to distribute drugs. *United States v. Locklear*, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 278 and 115 S. Ct. 457 (1994).

D. Expert Testimony by Law Enforcement Agent Concerning Drugs and Drug Activities (FRE 702)

Law enforcement agents may testify as experts about the "tools of the trade" of drug traffickers and matters concerning drug organizations, including testifying about beepers, address books, quantities of drugs, whether the quantity and packaging of drugs indicates an "intent to distribute," and some characteristic behaviors of traffickers. *United States v. Gastiburo*, 16 F.3d 582 (4th Cir.), *cert. denied*, 115 S. Ct. 102 (1994).

E. "Use" v. "Possession" of Drugs

Use "necessarily requires" possession. Presence of a drug in a person's body means that he has possessed it. The court ruled in the context of the mandatory penalties required for a drug-possession violation of supervised release under 18 U.S.C. § 3583(g), but apparently the ruling applies more generally to any offense which involves simple possession of drugs. If a sentencing court finds possession of a drug, it must then find that the possession was culpable (, not accidental). *United States v. Clark*, 30 F.3d 23 (4th Cir.), *cert. denied*, 115 S. Ct. 600 (1994).

F. Relevance of Attorney Fee Records in Drug Investigation

Neither the Sixth Amendment nor the attorney-client relationship prohibits a subpoena for attorney fee records as part of a drug investigation. Such records may be probative of "[t]he sudden acquisition of funds . . . unexplained expenditure of large sums . . . the sudden presence of large sums to pay attorney fees, despite the apparent absence of legitimate sources of income . . . information regarding other possible co-conspirators . . . the power structure of a drug cartel and . . . persons whose role might otherwise remain obscure." *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 878-79 (4th Cir. 1994) (upholding subpoena for records of attorney fees).

G. Disparate Impact of Crack on African-Americans

Consistent with other circuits, the Fourth Circuit has rejected an equal protection claim that the U.S. Sentencing Guidelines' crack cocaine guideline discriminates in its application because it has a disproportionate impact on

African-Americans. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994); *see also United States v. Bynum*, 3 F.3d 769 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1105 (1994).

H. *Statutory Definition of "Playground" Controls (21 U.S.C. § 860(d))*

In *United States v. Parker*, 30 F.3d 542 (4th Cir.), *cert. denied*, 115 S. Ct. 605 (1994), the court overturned a conviction for distributing crack cocaine within 1000 feet of a playground because the government had failed to prove the element of a "playground" as defined in the statute.

I. *Drug Distribution Is Lesser-Included Offense of Drug Distribution Near Schools and Playgrounds (21 U.S.C. §§ 841, 860)*

Drug distribution is a lesser-included offense of drug distribution within 1000 feet of a school or playground. In *United States v. Parker*, 30 F.3d 542 (4th Cir.), *cert. denied*, 115 S. Ct. 605 (1994), the court overturned a conviction for distribution near a playground for failure of proof of an essential element, but directed the district court to enter a conviction for the underlying and lesser-included drug distribution offense.

V. *Firearms Offenses*

A. *Firearm Charge Together with Carjacking Charge (18 U.S.C. §§ 924(c)(1), 2119)*

In *United States v. Johnson*, 32 F.3d 82 (4th Cir.), *cert. denied*, 115 S. Ct. 650 (1994), the Fourth Circuit ruled that a defendant may be convicted and sentenced for both carjacking, 18 U.S.C. § 2119 (including essential element of possessing firearm), and using or carrying a firearm in a crime of violence, 18 U.S.C. § 924(c)(1), even though the essential elements of the latter offense fully overlap with those of the former offense. The court held that Congress intended this result and that when congressional intent is clear, the principle of double jeopardy does not bind the legislature. *Id.* (agreeing with the Fifth and Sixth Circuits).

B. *Using or Carrying a Firearm in Drug Trafficking Crime or Crime of Violence (18 U.S.C. § 924(c)(1))*

1. *Elements and Criteria.* In order to prove that a defendant "used or carried" a firearm in a drug trafficking crime (or a crime of violence), "[i]t

is not necessary to show that [a defendant] affirmatively used a gun when completing a drug transaction . . . or even that [he] possessed a gun at the exact time of a drug exchange. . . . It is enough that a gun was [his] companion while he engaged in drug trafficking activities and that the firearm facilitated the success of those activities." *United States v. Kimberlin*, 18 F.3d 1156, 1158 (4th Cir.) (citing the Fifth and Seventh Circuits and *Smith v. United States*, 113 S. Ct. 2050, 2058-59 (1993)), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994). "The drug trafficking crime need not have been the defendant's sole purpose in the use or carrying of the weapon." *United States v. Sloley*, 19 F.3d 149, 152 n.2 (4th Cir.) (citations omitted), *cert. denied*, 114 S. Ct. 2757 (1994).

2. *Self-Defense Does Not Apply to § 924(c)(1)*. Section 924(c)(1) requires that a connection be shown between the use of a firearm and a drug or violent crime. Once this showing has been made, any evidence purporting to show that the firearm was possessed for self-defense is irrelevant. *United States v. Sloley*, 19 F.3d 149 (4th Cir.), *cert. denied*, 114 S. Ct. 2757 (1994).

3. *Multiple Convictions*. "A defendant who has 'used' or 'carried' a firearm on several separate occasions during the course of a single continuing offense . . . has committed several section 924(c)(1) offenses. . . . [S]ection 924(c)(1) prohibits each separate act of firearm use or carriage, not violent crimes and drug trafficking with firearms. Each separate act of firearm use or carriage, therefore, is separately, and consecutively, punishable." *United States v. Camps*, 32 F.3d 102, 107-08 (4th Cir. 1994) (disagreeing with six circuits), *cert. denied*, 115 S. Ct. 1118 (1995). Thus, five years is the statutorily required sentence for the first conviction, and twenty years is the statutorily required sentence for each subsequent conviction. *Id.*; *see also United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994) (holding that separate violations require separate sentences, five years and twenty years, under § 924(c)(1)); *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994) (holding that separate § 924(c)(1) charges connected to separate underlying drug charges will support separate § 924(c)(1) convictions).

4. *Bartering for a Firearm Is Using/Carrying a Firearm*. The Supreme Court has held that the exchange of a firearm for drugs constitutes a violation of § 924(c)(1). *Smith v. United States*, 113 S. Ct. 2050 (1993); *see also United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994).

5. *Using or Carrying Is a Jury Question.* "Determining whether an adequate connection has been made between a firearm and an underlying drug offense is a classic jury question." *United States v. Kimberlin*, 18 F.3d 1156, 1158 (4th Cir.), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994); *see also United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994).

6. *Using or Carrying by Co-Conspirator.* In a conspiracy case, a defendant may be liable for the mandatory firearm penalties of § 924(c)(1) if his co-conspirator used a firearm in the conspiracy and that use was reasonably foreseeable to the defendant. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

7. *Using or Carrying to Collect Drug Monies.* Carrying a firearm when collecting monies owed for drugs is using or carrying a firearm in a drug trafficking crime. *United States v. Locklear*, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 278 and 115 S. Ct. 457 (1994).

8. *Sentencing Enhancement Despite § 924(c)(1) Acquittal.* In *United States v. Hunter*, 19 F.3d 895 (4th Cir. 1994), the Fourth Circuit upheld a sentencing enhancement for possession of a firearm by the defendant even though he was acquitted of using or carrying a firearm under § 924(c)(1).

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

1. *No Conviction if 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). In North Carolina, state law provides an additional exception in that a prior felon may possess a firearm "within his own home or on his lawful place of business." N.C. GEN. STAT. § 14-415.1 (1993). In *United States v. Walker*, 39 F.3d 489 (4th Cir. 1994), the Fourth Circuit endorsed that additional exception as a prohibition of a federal charge of being a felon in possession. However, the court restricted the exception to regular firearms and ruled that it did not include weapons of "mass death and destruction" under N.C. GEN. STAT. § 14-288.8(c)(3) (1993), a category that includes short-barreled shotguns.

2. *Details of Predicate Conviction in Evidence.* In *United States v. Rhodes*, 32 F.3d 867 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1130 (1995), the Fourth Circuit found it unnecessary to decide the issue of whether it is

prejudicial error for the prosecution to introduce details of a prior felony conviction of the defendant. The court did hold that, when the defendant stipulates that he had a prior felony conviction, "evidence of the nature of the conviction is irrelevant and should be stricken." *Id.* at 871. But when the defendant refuses to stipulate, the court additionally held, the government must prove the conviction because it is an element of the offense of felon in possession. The issue of the details of the conviction, or, perhaps, *excessive* details of the conviction, remains open.

3. *Limiting Instruction Concerning Predicate Conviction.* When a defendant is charged with other offenses as well as felon in possession, and the government introduces evidence on the felon in possession charge of the defendant's prior predicate felony conviction, the better practice is for the district court to give an instruction limiting the evidence of the prior conviction to the felon in possession charge. But that instruction is not required, especially in a case in which the reason for joining the other charges in the same indictment and trial is strong. *United States v. Rhodes*, 32 F.3d 867 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1130 (1995).

4. *Procedure for Determining Predicate Conviction for Armed Career Criminal* (§ 924(e)(1)-(2)). Under the Armed Career Criminal Act, a defendant is subject to severely enhanced incarceration if he has three prior convictions for "serious drug offenses or violent felonies." Normally, the sentencing court need only scrutinize the statutory definition of the prior crime in order to decide if it qualifies as a serious drug offense or violent felony. In cases in which the statutory definition is unclear or in which the prior crime could have been committed in more than one way, the sentencing court must consult the indictment and jury instructions concerning the prior crime. *United States v. Cook*, 26 F.3d 507 (4th Cir.), *cert. denied*, 115 S. Ct. 373 (1994).

5. *Pickpocketing Can Be "Violent Felony."* In *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994), the court held that pickpocketing qualified as a predicate conviction under the words of the Armed Career Criminal Act, describing a "violent felony" as one that "presents a serious potential risk of physical injury to another." The court emphasized that the statute "covers any crime of various enumerated types, and also those crimes of whatever variety that involve conduct that presents a serious potential risk of physical injury to another." *Id.* at 696.

6. *Obstruction of Justice May Be "Violent Felony" if Committed with Violent Means.* In order to determine if obstruction of justice was committed

with violent means and thus decide if it qualifies as a "violent felony" and a predicate conviction under the Armed Career Criminal Act, the sentencing court should consult the indictment and jury instructions for the obstruction conviction. However, in most cases, the sentencing court need only inspect the statutory definition of the crime. *United States v. Cook*, 26 F.3d 507 (4th Cir.), *cert. denied*, 115 S. Ct. 373 (1994); *see also Taylor v. United States*, 495 U.S. 575, 598 (1990) (holding that "burglary" listed in Act as violent felony is modern, "generic" burglary, not strict common-law burglary). Concerning all possible predicate convictions, *Taylor* is to be interpreted "broadly." *United States v. Cook*, 26 F.3d 507 (4th Cir.), *cert. denied*, 115 S. Ct. 373 (1994).

D. Transfer of Firearm with Knowledge of Drug Crime (18 U.S.C. § 924(h))

Section 924(h) forbids the transfer of a firearm with knowledge that the firearm will be used in a drug trafficking crime or a crime of violence. In *United States v. Harrison*, 37 F.3d 133 (4th Cir. 1994), the Fourth Circuit held that the word "transfer" should be given its ordinary meaning, that is, "surrender physical possession of," rather than the more formal meaning of "selling" or finally "disposing of" under 26 U.S.C. § 5845(j) *et seq.*, the statutes that regulate the manufacture and sale of firearms. *United States v. Harrison*, 37 F.3d 133, 137 (4th Cir. 1994) (agreeing with Eighth Circuit's decision in *United States v. Callaway*, 938 F.2d 907 (8th Cir. 1991)).

VI. Miscellaneous Offenses

A. Re-Entry of Country by Illegal Alien (8 U.S.C. § 1326)

Subsection (b) of § 1326, which provides for an increased penalty if the previous deportation was for commission of an aggravated felony, is a sentencing enhancement provision, not a separate offense. *United States v. Crawford*, 18 F.3d 1173 (4th Cir.) (agreeing with Fifth Circuit, but disagreeing with Ninth Circuit), *cert. denied*, 115 S. Ct. 171 (1994).

B. Land Subject to Jurisdiction of Great Smoky Mountain National Park (16 U.S.C. § 403h-3)

A certain part of the land within the statutorily-defined boundaries of the North Carolina portion of the Great Smoky Mountain National Park (National Park Service) was in the custody of the adjacent Tennessee Valley

Authority. By agency agreement, the National Park Service was exercising the police power over the land. The defendant, found guilty of hunting within the boundaries of the park pursuant to 16 U.S.C. § 403h-3, a statute pertaining only to the Great Smoky Mountain National Park, argued that he was on TVA land and that § 403h-3 did not apply. The Fourth Circuit held that the statutory boundaries of the park together with the agency agreement were controlling and consistent with what Congress intended. The court rejected the appeal. *United States v. Stephenson*, 29 F.3d 162 (4th Cir. 1994).

C. *Assault on a Federal Officer (18 U.S.C. §§ 111, 1114)*

This statute prohibiting assault on federal law enforcement agents also prohibits assault on anyone, whether a federal employee or not, assisting federal agents in the performance of their duties. The statute protects "both federal officers and federal functions." *United States v. Murphy*, 35 F.3d 143, 147 (4th Cir. 1994) (quoting *United States v. Feola*, 420 U.S. 671, 679 (1975)), *cert. denied*, 115 S. Ct. 954 (1995).

D. *Conspiracy (18 U.S.C. § 371) [See also Drug Conspiracy (21 U.S.C. § 846), supra section IV.C.]*

1. *Elements and Criteria.* "To prove a conspiracy, the government must show an agreement to do something illegal, willful participation by the defendant, and an overt act in furtherance of the agreement." *United States v. Dozie*, 27 F.3d 95, 97 (4th Cir. 1994) (citation omitted). The government must show that the defendant willingly and knowingly joined the conspiracy, but need not show that the defendant knew all the details of the conspiracy. Only a "slight connection" between the defendant and the conspiracy need be shown. *United States v. Whittington*, 26 F.3d 456 (4th Cir. 1994). Venue is proper for all co-conspirators in any district where the conspiracy was formulated or in which overt acts were committed. *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994). In a conspiracy case, the government ordinarily must prove an overt act within the five-year statute of limitations period in order to avoid repose. *United States v. Matzkin*, 14 F.3d 1014 (4th Cir. 1994). A trial court must instruct on the statute of limitations when appropriate in a conspiracy case, but such a charge is not an essential element of conspiracy and is not necessary in every conspiracy case. *Id.* Proof of a conspiracy is usually by circumstantial evidence and inferences drawn from all the evidence. *United States v. Harris*, 39 F.3d 1262 (4th

Cir. 1994). But "circumstantial evidence that proves nothing more than association between two persons, even if one has a fixed intent known to the other to commit an unlawful act, is not sufficient to permit the inference of the requisite agreement between the two to act in concert or commit the act." *Dozie*, 27 F.3d at 98 (quoting *United States v. Giunta*, 925 F.2d 758, 766 (4th Cir. 1991)).

2. *Single v. Multiple Conspiracies*. The question of single versus multiple conspiracies is a question of fact for the jury to answer. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994). In a conspiracy case, a defendant is not prejudiced by a possible variance between the conspiracy with which he is charged and other related conspiracies proven at trial as long as the case involves a similar number of defendants and conspiracies. *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995). A jury instruction on multiple conspiracies is not required unless the evidence demonstrates that there were "separate conspiracies unrelated to the overall conspiracy charged in the indictment." *Id.* at 884 (quoting *United States v. Castaneda-Cantu*, 20 F.3d 1325, 1333 (5th Cir. 1994)). For there to be a "fatal" variance between pleading and proof, the government must have proven a different conspiracy than the one charged in the indictment. *United States v. Camps*, 32 F.3d 102 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1118 (1995). If the jury is properly instructed on single versus multiple conspiracies, then a reviewing court will not second-guess the jury's decision that a single conspiracy existed. *Id.*

3. *Clearly Erroneous Standard Governs Admission of Co-Conspirator's Statement (FRE 801(d)(2))*. A co-conspirator's statement may be admitted against a defendant if it is shown that a conspiracy existed and that the statement was in furtherance of the conspiracy. In *United States v. Shores*, 33 F.3d 438 (4th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3690 (U.S. Mar. 20, 1995) (No. 94-7025), the Fourth Circuit refused to hold that it was clearly erroneous for the trial court to admit statements made in jail after a co-conspirator had already been incarcerated for the instant conspiracy.

E. *Smuggling: Felony v. Misdemeanor (18 U.S.C. § 545)*

This statute prohibits the importation of non-invoiced merchandise or merchandise imported "contrary to law." The government may charge various legislative-type regulations (e.g., 19 C.F.R. § 148.11, 50 C.F.R. § 14.61) as the essential elements of an importation "contrary to law." *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994). But, even though

those regulations provide for misdemeanor penalties standing by themselves, the felony penalties of § 545 apply when the regulations are incorporated into a § 545 prosecution.

F. Taking of Public Property (18 U.S.C. § 641)

1. *Scope.* "Section 641 is not a theft statute nor is it a codification of the common law of larceny. It is much more inclusive because it covers unauthorized sale and conversion which the [Supreme] Court has defined as the 'misuse or abuse of property' or its use 'in an unauthorized manner.' The statute also covers both tangible and intangible property. . . . It is not necessary that the government have the sole interest in the property. . . ." *United States v. Matzkin*, 14 F.3d 1014, 1020 (4th Cir. 1994) (citations omitted) (holding that bid information concerning government contracts was government property).

2. *Continuing Offense.* The offense of concealing and retaining government property is a continuing offense as long as possession of the property continues. The statute of limitations does not begin to run until possession ends. *United States v. Blizzard*, 27 F.3d 100 (4th Cir. 1994).

G. Duress as a Defense to Escape (18 U.S.C. § 751(a))

Duress may be a defense to escape from custody (, the prisoner escaped in order to avoid the duress imposed by a prison guard), but only if the escapee makes a prompt, bona fide effort to return to custody once the immediate duress has been alleviated. *United States v. Sarno*, 24 F.3d 618, 621 (4th Cir. 1994) (citing *United States v. Bailey*, 444 U.S. 394, 413 (1980)).

H. Damaging by Fire or Explosives (18 U.S.C. § 844(i)) [See also Criminal Jurisdiction Under the Commerce Clause, supra section III.M.]

The statutory sentencing enhancement under § 844(h)(1) provides for five additional years' imprisonment for commission of a felony with *either* fire or explosives. *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994).

I. *Communicating a "True Threat" in Interstate Commerce (18 U.S.C. § 875(c))*

The government must prove that the defendant intended to transmit the interstate communication and that the communication contained a "true threat," but need not prove that the defendant intended the victim of the threat to subjectively take it as a threat. A "true threat" is determined "by the interpretation of a reasonable recipient familiar with the context of the communication." *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), *petition for cert. filed*, No. 94-7778 (U.S. Jan. 19, 1995).

J. *"Exculpatory No" Doctrine as Defense to False Statement (18 U.S.C. § 1001)*

The "exculpatory no" doctrine is a judicially-created exception to a prosecution for false statement to a federal officer or agency. It allows a defendant to deny his guilt when faced with the questions of a federal officer conducting a criminal investigation. But it extends only to simple denials of guilt and does not include false exculpatory stories, other affirmative statements regarding guilt, or attempts to inculcate someone else. *United States v. Moore*, 27 F.3d 969 (4th Cir.) (citing and explaining Ninth Circuit's five requirements for asserting "exculpatory no" as defense and construing doctrine more narrowly than Ninth Circuit), *cert. denied*, 115 S. Ct. 459 (1994); *see also United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988) (adopting *Medina de Perez*); *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir. 1986) (listing criteria for "exculpatory no" doctrine).

K. *False Statement in Banking (18 U.S.C. § 1014)*

To prove this offense, the government must show only that a knowingly false statement was made to influence the action of a bank, not that the statement was made to a bank (or other federally insured or chartered financial institution) or to a bank employee. *United States v. Smith*, 29 F.3d 914 (4th Cir.), *cert. denied*, 115 S. Ct. 454 (1994).

L. *"Year and a Day" Rule Still Applies to Murder (18 U.S.C. §§ 1111, 3281)*

According to the "year and a day" rule concerning murder, death from murder must occur within a year and a day from the date that the fatal injuries occurred. In *United States v. Chase*, 18 F.3d 1166 (4th Cir. 1994), the Fourth Circuit held that neither the federal government's codification of

its criminal laws nor the enactment of the federal rules of evidence had repealed the rule and that the rule was a principle of substantive federal common law, not a rule of evidence.

M. Kidnapping: Victim Need Not Attempt Escape (18 U.S.C. § 1201(a)(1))

The crime of kidnapping is complete when someone is seized and detained without consent, even if the kidnapped person later passes up opportunities to escape. The prosecution must show that the defendant benefitted in some way from the kidnapping, but need not show that the defendant seized the victim for ransom or reward. The showing of a "willful" seizing of the victim is sufficient to show benefit to the defendant. *United States v. Childress*, 26 F.3d 498 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1115 (1995).

N. Fraud (18 U.S.C. §§ 1341, 1344)

1. *Victims of Fraud (§ 1341)*. If a membership organization has a separate legal identity, both the organization and its members can be victims of a fraud perpetrated against it. *United States v. Marcum*, 16 F.3d 599 (4th Cir.), *cert. denied*, 115 S. Ct. 137 (1994).

2. *Mail Fraud (§ 1341)*. "Mail fraud requires a showing of (1) knowing participation in a scheme to defraud and (2) a mailing in furtherance of the scheme." *United States v. Dozie*, 27 F.3d 95, 97 (4th Cir. 1994).

3. *Property Interests in Bank Fraud (§ 1344)*. Only property and money interests, and not intangible, general social interests such as an "interest in sound government," can be the subject of bank fraud. Nevertheless, a property interest is to be defined "fairly widely." If something can be "assigned, traded, bought, and otherwise disposed of," it is a property interest. *United States v. Mancuso*, 42 F.3d 836, 845 (4th Cir. 1994).

4. *Single v. Multiple Schemes in Bank Fraud (§ 1344)*. In *United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994), the Fourth Circuit agreed with most of the other circuits that "executing a scheme" to defraud a bank allows for "a separate charge for each separate diversion of funds from the financial institution in question," even if each diversion arguably was part of a larger scheme. The court pointed out that this kind of conclusion may depend on the facts of each case.

O. Obscenity (18 U.S.C. §§ 1460-1469)

The federal obscenity statute is constitutional under the standard of *Miller v. California*, 413 U.S. 15 (1973), and provides fair notice to any prospective defendants. A bookstore owner has no right to any kind of prior civil proceeding at which he would be informed by the government of which of his materials are or are not obscene. Such a proceeding might constitute an impermissible governmental censorship. In essence, purveyors of possibly obscene material must live with the fear of possible prosecution. *Eckstein v. Melson*, 18 F.3d 1181 (4th Cir. 1994).

P. Money Laundering (18 U.S.C. § 1956)

1. *Elements (§ 1956(a)(1))*. "In order to sustain a conviction under the statute, the Government must prove that: (1) the defendant conducted or attempted to conduct a financial transaction; (2) the property involved the proceeds of specified unlawful activity; (3) the defendant knew ["actual subjective knowledge"] that the property involved represented the proceeds of some form of unlawful activity; (4) the defendant engaged in the financial transaction with the intent to promote the carrying on of unspecified unlawful activity; or (5) while knowing that the transaction was designed in whole or in part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity." *United States v. Heaps*, 39 F.3d 479, 483-84 (4th Cir. 1994) (citation omitted).

2. *Elements (§ 1956(a)(1)(A)(i))*. Under this version of money laundering, the prosecution is "required to prove that the defendant engaged in a financial transaction with the intent to promote the carrying on of specified unlawful activity." *United States v. Heaps*, 39 F.3d 479, 484 (4th Cir. 1994) (overturning convictions on account of lack of proof that money was used to promote unlawful activity).

3. *Elements (§ 1956(a)(1)(B)(i))*. Under this version of money laundering, the prosecution is "required to prove that the transactions were designed, in whole or in part, to disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *United States v. Heaps*, 39 F.3d 479, 487 (4th Cir. 1994) (overturning convictions on account of lack of proof of intent to conceal what were concededly proceeds of illegal activity).

4. *Commingled Funds in Money Laundering (§ 1957)*. The fact that legally- and illegally-acquired funds have been commingled does not prevent the government from charging a § 1957 offense. "[I]t may be presumed . . .

as the language of section 1957 permits, that the transacted funds, at least up to the full amount originally derived from crime, were the proceeds of the criminal activity or derived from that activity." *United States v. Moore*, 27 F.3d 969, 977 (4th Cir.), *cert. denied*, 115 S. Ct. 459 (1994).

Q. Violent Crime in Aid of Racketeering (18 U.S.C. § 1959)

In order to establish this crime, the government must show that (1) there was a RICO enterprise, that is, an enterprise (whether organized for an economic purpose or not) with "continuity, unity, shared purpose and identifiable structure"; (2) the enterprise was engaged in racketeering, that is, activities or threats involving generally violent crimes or drugs (or any of the long list of crimes in 18 U.S.C. § 1961(1)); (3) the defendant had a position in the organization; (4) the defendant committed the criminal act charged; and (5) the defendant committed that act for financial gain or to maintain or increase his position in the organization, which, if the latter, can be demonstrated by showing that the defendant committed the act "because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *United States v. Fiel*, 35 F.3d 997, 1003, 1004 (4th Cir. 1994) (quoting *United States v. Griffin*, 660 F.2d 996, 1000 (4th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982), and *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 163 (1993)), *cert. denied*, 115 S. Ct. 1160 (1995).

R. "Structuring" a Financial Transaction (31 U.S.C. §§ 5322(a), 5324)

Structuring, akin to money laundering, involves an attempt to evade the reporting requirements regarding large financial transactions. In *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994), the Supreme Court held that the trial judge must instruct the jury that the defendant "knew the structuring in which he engaged was unlawful." See also *United States v. Rogers*, 18 F.3d 265, 267 (4th Cir. 1994) (noting ruling in *Ratzlaf*).

VII. Trial

A. Indictment

1. *Sufficiency and Purpose of an Indictment.* An indictment that tracks the statutory language is normally sufficient. The two *purposes* of an indictment are to inform the defendant of the charges against him and to

eliminate the danger, with adequately specific language, that the defendant will be placed in jeopardy a second time for the same offense. *United States v. Matzkin*, 14 F.3d 1014 (4th Cir. 1994). To be *sufficient*, an indictment must contain all the essential elements of the offense charged (mere reference to the applicable statute is not enough), fairly inform the defendant of the charge, and enable the defendant to plead double jeopardy if he should be charged with same offense again. *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994), *petition for cert. filed*, No. 94-7778 (U.S. Jan. 19, 1995).

2. *Date in Indictment.* As long as the indictment fairly apprises the defendant of the crime with which he is charged and as long as a particular date is not an essential element of the crime, exact accuracy of date is not required. *United States v. Kimberlin*, 18 F.3d 1156 (4th Cir.), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994).

3. *Variance Between Indictment and Evidence.* A variance occurs when the evidence at trial is materially different from the facts alleged in the indictment. *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995).

4. *Constructive Amendment of Indictment.* "A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994) (en banc, 7-5 decision). A constructive amendment of the indictment is error *per se*. *But see id.* (disagreeing sharply in dissenting opinion with this last point and arguing that plain versus harmless error analysis applies).

B. Jury Selection

1. *Batson Challenges.* In a defendant's *Batson* challenge to a peremptory jury strike, the burden is on the defendant "to show *both* that [the prosecutor's] reasons were merely pretextual *and* that race was the real reason for the strike." *United States v. McMillon*, 14 F.3d 948, 953 (4th Cir. 1994) (rejecting *Batson* challenge). In a typical *Batson* inquiry, the Supreme Court has said that the "decisive question" will be the credibility of counsel's race-neutral explanation. *Id.* (citing *Hernandez v. New York*, 500 U.S. 352, 363 (1991)); *see also Batson v. Kentucky*, 476 U.S. 79

(1986); *United States v. Joe*, 928 F.2d 99 (4th Cir.), *cert. denied*, 502 U.S. 816 (1991); *United States v. Lane*, 866 F.2d 103 (4th Cir. 1989).

2. *Trial Court's Removal of Part of Already-Selected Jury.* In *United States v. Hanno*, 21 F.3d 42 (4th Cir. 1994), the Fourth Circuit reviewed a situation in which the trial court had removed six members of a jury between the time that the jury had been selected and the time a few days later when the trial began. For four reasons, the court found plain error under Rule 52(b) of the Federal Rules of Criminal Procedure and *United States v. Olano*, 113 S. Ct. 1770 (1993). First, it was plain error for the court to dismember a selected jury because it needed jurors for another trial. Second and third, neither the defendant nor his attorney was present. Finally, the trial court did not record the proceedings in which the jurors were removed.

C. Opening Statement

Because an opening statement is based on a reasonable expectation of what counsel intends to prove, a subsequent failure of proof will not necessarily result in a mistrial. *United States v. Sloan*, 36 F.3d 386 (4th Cir. 1994).

D. Jencks Act

1. *Jencks Act Statements.* The Jencks Act, 18 U.S.C. § 3500 and Rule 26.2 of the Federal Rules of Criminal Procedure, requires the prosecution to turn over to the defense any statement of a witness, after the witness has testified, that is in possession of the government and that relates to the testimony of the witness. Included in this requirement are "interview notes" of an investigating agent, but only if the interviewee/witness has "formally and unambiguously approved them — either orally or in writing — as an accurate record of what he said during the interview." *United States v. Smith*, 31 F.3d 1294, 1301 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1170 (1995).

2. *Early Disclosure of Jencks Material.* A district court may not require the government to produce Jencks Act material concerning one of its witnesses until after the witness has testified. *United States v. Lewis*, 35 F.3d 148 (4th Cir. 1994).

E. Brady/Giglio Violations

Under the rulings of the Supreme Court in *Brady* and *Giglio*, the government is required to disclose exculpatory evidence, including material evidence affecting the credibility of its witnesses, to the defense. But the Fourth Circuit has ruled that disclosure is not required if the evidence is available to the defense from other sources or if the defense could have discovered the evidence through reasonable diligence. *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994).

F. Impermissible Evidence for the Prosecution

1. *Perjured Testimony in Favor of the Government*. "A conviction acquired through the knowing use of perjured testimony by the Government violates due process. This is true regardless of whether the Government solicited testimony it knew or should have known to be false or simply allowed such testimony to pass uncorrected. Even if the false testimony relates only to the credibility of a Government witness and other evidence has called that witness' credibility into question, a conviction must be reversed when 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994) (citations omitted) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

2. *Erroneous Admission of Character Evidence (FRE 404(a))*. If the defendant does not put his character or reputation at issue, character or reputation evidence is not admissible. A strong curative instruction may sometimes ameliorate the effect of an inadvertent admission of character or reputation evidence. If a defendant testifies, only his reputation for truth-telling, but not his general character, may be shown by the government. *United States v. Tran Trong Cuong*, 18 F.3d 1132 (4th Cir. 1994) (reversing multiple convictions because of erroneous, uncured admission of character evidence).

3. *Government's Impeaching of Its Own Witness in Order to Get Impermissible Hearsay Admitted into Evidence (FRE 607)*. Rule 607 allows either party to attack the credibility of its own witnesses. But the government may not impeach its own witness "to present testimony to the jury by indirection which would not otherwise be admissible." *United States v. Ince*, 21 F.3d 576, 580 (4th Cir. 1994) (quoting *United States v. Morlang*, 531 F.2d 183, 189 (4th Cir. 1975)). In *Ince*, the Fourth Circuit overturned the

defendant's conviction because the government, knowing to what its witness would testify, called another witness to impeach her testimony with a prior inconsistent statement. The substance of the impeaching witness' testimony was a confession by the defendant that was otherwise inadmissible hearsay.

4. *Guilt-Assuming Question to Character Witness.* In *United States v. Harrison*, 37 F.3d 133 (4th Cir. 1994), one of the defendant's character witnesses was asked the same question with respect to which the Fourth Circuit had reversed a conviction the previous year in *United States v. Mason*, 993 F.2d 406 (4th Cir. 1993), namely, the guilt-assuming question whether the character witness would change his opinion if he knew that the defendant had committed the offenses for which he was charged. This time, however, the court ruled that the trial court had properly sustained an objection to the question and that any error notwithstanding was harmless in light of the overwhelming evidence against the defendant.

G. FRE 404(b) Evidence

1. *In General.* Rule 404(b) is an "inclusionary rule," but "evidence of prior bad acts is not admissible if it is introduced for the sole purpose of proving criminal disposition." *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994) (citation omitted). The threshold issue is whether the "evidence is probative of a material issue other than character." *United States v. McMillon*, 14 F.3d 948, 954 (4th Cir. 1994) (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)). As long as the evidence impugns the character of the defendant, the "other crime, wrong, or act" need not be criminal. *Id.* The 404(b) evidence must tend to prove the *mens rea* in the *instant* case.

2. *Three-Part Test for Admissibility.* "Evidence is admissible under 404(b) if it is relevant to an issue other than character; necessary, which means that it is an essential part of the crimes on trial, or where it furnishes part of the context of the crime; and reliable. It also must pass the Rule 403 balancing test." *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994).

3. *Kinds of Evidence Covered.* Sometimes it can be unclear what is and what is not 404(b) evidence. In *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995), the Fourth Circuit endorsed rulings in other circuits to the effect that not all evidence falling out of the time period alleged in an indictment must be regarded as 404(b) evidence.

"There is no requirement that all the Government's evidence fall within the time period of the indictment, providing it is relevant to the charges. . . . [E]vidence of uncharged conduct is not considered 'other crimes' evidence if it arose out of the same . . . series of transactions as the charged offense, . . . or if it is necessary to complete the story of the crime (on) trial." *Id.* at 885 (latter two alterations in original) (internal quotations omitted).

Section 404(b) does not apply. When a defendant is charged with conspiracy, evidence of acts not otherwise charged that prove the defendant's involvement in the conspiracy are admissible without resorting to Rule 404(b). *United States v. Dozie*, 27 F.3d 95 (4th Cir. 1994).

4. Evidence Upheld or Rejected.

Admissibility Upheld. In light of the defense theory that a drug courier, a witness for the government, was a business associate of another kind, evidence of the defendant's prior drug-related activity showed preparation, knowledge of drug dealing, and the absence of mistake or accident concerning the instant charge of drug conspiracy. *United States v. Francisco*, 35 F.3d 116 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 950 (1995).

Admissibility Upheld. In a drug conspiracy case, background testimony of three co-conspirators against the defendant helped to explain how the illegal association of the co-conspirators began and developed. This evidence was "directly related" to the instant conspiracy. *United States v. McMillon*, 14 F.3d 948 (4th Cir. 1994).

Admissibility Upheld. In a drug conspiracy case, evidence of bankruptcy demonstrated unexplained wealth. This evidence was "directly related" to the instant conspiracy. *United States v. McMillon*, 14 F.3d 948 (4th Cir. 1994).

Admissibility Rejected. In a drug conspiracy case, testimony by a police officer about a prior unrelated occasion when the defendant admitted possession of cocaine should not have been admitted. The Fourth Circuit found that this evidence did not bear on a relevant issue in the case, that is, it did not help the jury determine the defendants "*mens rea* in the *instant* conspiracy." *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994) (finding nevertheless admission to be harmless error).

Admissibility Rejected. "While in the proper case evidence of drug use creating financial need can explain the motive to commit a bank robbery and thus would clearly meet the test of Rule 404(b), we are persuaded that in this instance the government's evidence did no more than show that Madden was a drug user, which, absent evidence of financial need, is simply not relevant

to a prosecution for bank robbery." *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994) (overturning conviction).

5. *Standard of Review on Appeal.* "Where error is founded on a violation of Rule 404(b), the test for harmlessness is whether we can 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. This inquiry is not whether, absent the improperly admitted evidence, sufficient evidence existed to convict. Rather than focusing particularly on the *quantum of evidence*, we are asked whether we can say that we believe it highly probable that the error did not affect the judgment." *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994) (citations omitted). "We review admission of 404(b) evidence by inquiring whether the district court acted in a way that was so 'arbitrary or irrational' that it can be said to have abused its discretion." *United States v. McMillon*, 14 F.3d 948, 954 (4th Cir. 1994) (citation and internal quotations omitted).

H. *Objections to Questioning of Witnesses by Presiding Judge (FRE 614(c))*

Rule 614 allows the presiding judge to interrogate witnesses. In addition, subsection (c) requires counsel to object immediately or at the first available time when the jury is not present in order to preserve the issue for appeal. Failure of counsel to object at the proper time precludes raising the issue on appeal with the limited exception when the judge's questions deny the injured party a fair and impartial trial. *United States v. Gastiaburo*, 16 F.3d 582 (4th Cir.), *cert. denied*, 115 S. Ct. 102 (1994).

I. *Expert Testimony*

1. *Expert's Testifying to Impermissible Hearsay (FRE 703).* In a case in which the defendant was a physician charged with illegal drug distribution for writing bogus prescriptions, the government's physician expert testified that he essentially agreed with another physician who was not called as a witness and whose opinion was not in the record. The Fourth Circuit ruled that the expert had impermissibly bolstered his testimony with inadmissible hearsay. The court found that the non-testifying physician's opinion, which was a forensic report instead of an everyday medical report, was not the kind usually and "reasonably relied upon by experts in the particular field," as stated in Rule 703. *United States v. Tran Trong Cuong*, 18 F.3d 1132 (4th Cir. 1994).

2. *Expert Testimony by Law Enforcement Agent Concerning Drugs and Drug Activities (FRE 702)*. Law enforcement agents may testify as experts about the "tools of the trade" of drug traffickers and matters concerning drug organizations, including testimony about beepers, address books, quantities of drugs, and whether the quantity and packaging of drugs indicates an "intent to distribute," and also about some of the characteristic behaviors of drug traffickers. *United States v. Gastiburo*, 16 F.3d 582 (4th Cir.), *cert. denied*, 115 S. Ct. 102 (1994).

3. *Expert Opinion on "Intent to Distribute" (FRE 704(b))*. Rule 704(b) prohibits expert testimony "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." In *United States v. Gastiburo*, 16 F.3d 582 (4th Cir.), *cert. denied*, 115 S. Ct. 102 (1994), the Fourth Circuit considered the testimony of a government expert who stated that, in his opinion, the possession of a certain amount and packaging of crack cocaine meant that the defendant possessed the crack cocaine with the "intent to distribute." Because the defendant did not object at trial, the court reviewed the testimony for plain error and found none.

J. *Agent's Investigatory Interviews as Public Record Exceptions to the Hearsay Rule (FRE 803(8)(C))*

Rule 803(8)(C), providing one of the bases for the admission of a public record as a hearsay exception, allows the admission of "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." In *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994), the defendant sought the admission into evidence of twelve interview transcripts taken during a drug investigation. He hoped to show that the interviewees did not mention his name. The Fourth Circuit found that the public record exception was not intended to be used under such circumstances, that the contents (and absence of contents) of the interviews were not "factual findings," and that the contents were not trustworthy.

K. *Lay Opinion on Handwriting (FRE 901(b)(3))*

Expert opinion on handwriting is not required by the Federal Rules of Evidence. *United States v. Dozie*, 27 F.3d 95 (4th Cir. 1994).

L. Right to Cross-Examine

While cross-examination is an "important element of the right of confrontation" and is "essential to a fair trial,' . . . 'there is a duty to protect [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.'" *United States v. McMillon*, 14 F.3d 948, 956 (4th Cir. 1994) (citation omitted) (quoting *United States v. Cole*, 622 F.2d 98, 100 (4th Cir.), cert. denied, 449 U.S. 956 (1980), and *Alford v. United States*, 282 U.S. 687, 694 (1931)). In *McMillon*, the Fourth Circuit, stating that "testimony regarding [the witness'] sexual life is not probative of his character for truthfulness," upheld the district court's denial of the opportunity for the defendant to cross-examine a government witness about specific instances of sexual conduct. *Id.* at 956.

M. Bruton Statements

1. *Bruton Statements Must Incriminate.* Only statements incriminating the defendant need to be redacted from a non-testifying defendant's confession. As long as there is a limiting instruction, not every reference to the defendant must be eliminated. *United States v. Locklear*, 24 F.3d 641 (4th Cir.), cert. denied, 115 S. Ct. 278 and 115 S. Ct. 457 (1994); see also *Richardson v. Marsh*, 481 U.S. 200 (1987); *Bruton v. United States*, 391 U.S. 123 (1968).

2. *Bruton Statements May Be Otherwise Admissible Under FRE.* "[T]he *Bruton* rule does not apply if the nontestifying co-defendant's statement is admissible against the defendant under the co-conspirator exception to the hearsay rule set forth in Federal Rule of Evidence 801(d)(2)(E)." *United States v. Shores*, 33 F.3d 438, 442 (4th Cir. 1994) (citations omitted), cert. denied, 63 U.S.L.W. 3690 (U.S. Mar. 20, 1995) (No. 94-7025).

N. Defenses

1. *Diminished Mental Capacity, Voluntary Intoxication.* These defenses are defenses only to specific intent crimes because "such defenses directly negate the required intent element of those crimes." *United States v. Darby*, 37 F.3d 1059, 1064 (4th Cir. 1994), petition for cert. filed, No. 94-7778 (U.S. Jan. 19, 1995) (citing *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988)).

2. *Entrapment Is a Jury Question.* There are two elements to entrapment: government inducement of the crime and a lack of a predisposi-

tion of the defendant to commit the crime. Entrapment is a jury question, but when the evidence shows that the defendant promptly accepted the government's inducement, there is no reason for the trial court to instruct the jury on entrapment. *United States v. Harrison*, 37 F.3d 133 (4th Cir. 1994).

3. *Statute of Limitations Must Be Plead* (18 U.S.C. § 3282). The five-year statute of limitations is an affirmative defense that must be raised at trial, or it is waived. *United States v. Matzkin*, 14 F.3d 1014 (4th Cir. 1994).

4. *Affirmative Defense Is a Jury Matter, but Trial Court Should Scrutinize the Defense for Sufficiency*. Whether an affirmative defense has been established is a factual question for the jury to decide. However, if there is insufficient evidence as a matter of law to establish an element of the affirmative defense, the trial court may exclude all evidence about the defense. In addition, if some of the evidence, but still an insufficient amount of it, is admitted, the trial court need not instruct the jury concerning the defense. *United States v. Sarno*, 24 F.3d 618 (4th Cir. 1994) (upholding exclusion of duress defense); *see also United States v. Bailey*, 444 U.S. 394 (1980).

O. *Effect of Limiting Instruction*

"We generally follow the presumption that the jury obeyed the limiting instructions of the district court. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ('[J]uries are presumed to follow their instructions.');

United States v. Ince, 21 F.3d 576, 584 (4th Cir. 1994) ('[W]e recognize the presumption of cure by a court's instruction.')

"*United States v. Francisco*, 35 F.3d 116, 119 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 950 (1995).

P. *Jury Instructions*

1. *Right to Jury Instruction*. "Generally, a criminal defendant is entitled to an instruction as to any defense, provided that the instruction (1) has an evidentiary foundation, and (2) accurately states the law." *United States v. Sloley*, 19 F.3d 149, 153 (4th Cir.), *cert. denied*, 114 S. Ct. 2757 (1994).

2. *"Willful Blindness" in a "Knowingly" Jury Instruction*. "Willful blindness" may serve as the basis for proving that the defendant acted "knowingly." The blindness must be "willful," however; it is not sufficient to show merely "a careless disregard of the truth." *United States v.*

Whittington, 26 F.3d 456, 462 (4th Cir. 1994) (quotation omitted). Nor is it sufficient to show mere negligence. Willful blindness instructions are restricted "to cases not only where there is asserted lack of knowledge but also where there is evidence of deliberate ignorance." *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994) (citation omitted).

3. "Good Faith" in an "Intent" Jury Instruction. "If the district court gives adequate instruction on specific intent, a separate instruction on good faith is not necessary." *United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994) (citation and internal quotation omitted).

4. Definition of "Reasonable Doubt." The Fourth Circuit has long admonished the district courts not to attempt to define "reasonable doubt" in their instructions to juries. See, e.g., *United States v. Moss*, 756 F.2d 329 (4th Cir. 1985). In *United States v. Reives*, 15 F.3d 42 (4th Cir.), cert. denied, 114 S. Ct. 2679 (1994), the court upheld the refusal of a district court to attempt to define reasonable doubt when a deliberating jury specifically asked the court to do so.

Q. Violation of Witness Sequestration Order

If witnesses violate the trial court's sequestration order, the appeals court will determine whether the violation had a substantial influence on the jury verdict and whether or not the violation was harmless. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994) (involving situation in which violating witnesses did not discuss substance of their testimony); see also *United States v. Farnham*, 791 F.2d 331 (4th Cir. 1986) (finding that, under circumstances, prejudice had to be presumed from violation).

R. Collateral Estoppel

To determine whether an issue should be precluded by the doctrine of collateral estoppel, "the court must decide (1) whether the issue in question is identical to the previous issue, (2) whether it was actually determined in the prior adjudication, (3) whether it was necessarily decided in that proceeding, (4) whether the resulting judgment settling the issue was final and valid, and (5) whether the parties had a full and fair opportunity to litigate the issue in the prior proceeding. In order for the determination of an issue to be given preclusive effect, it must have been necessary to a judgment." *United States v. Fiel*, 35 F.3d 997, 1006 (4th Cir. 1994) (citations omitted), cert. denied, 115 S. Ct. 1160 (1995). In *Fiel*, the Fourth

Circuit granted one of three collateral estoppel claims of the defendants. The court ruled that the government could not introduce evidence of the participation of one of the defendants in a conspiracy of which the jury in a previous trial had found the defendant not guilty.

S. *Prosecutorial Misconduct*

A conviction can be reversed for prosecutorial misconduct if the prosecutor's remarks or conduct (1) were improper and (2) denied the defendant a fair trial by seriously affecting substantial rights. *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 950 (1995).

T. *Closing Argument*

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 950 (1995).

U. *Ex Post Facto Clause, When Effective (U.S. CONST. art. I, § 9, cl. 3)*

"As the Supreme Court recently explained, the *ex post facto* prohibition is violated only by an application of a statute 'which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed.'" *United States v. Moore*, 27 F.3d 969, 976 (4th Cir.) (quoting *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169 (1925))), *cert. denied*, 115 S. Ct. 459 (1994).

V. *Defendant's Presence at Consideration of a Question by a Deliberating Jury (FRCrP 43(a))*

When a deliberating jury sends out a question for the court to answer, the defendant, and not his counsel only, must be present when the answer is formulated and given. *United States v. Rhodes*, 32 F.3d 867 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1130 (1995); *see also Rogers v. United States*, 422 U.S. 35 (1975).

W. Conviction

1. *Alternative Bases for Conviction.* "When one of two independent grounds for conviction is unconstitutional or illegal, a general verdict cannot stand if the court instructed the jury that it could rely on either of the two grounds. The verdict will stand if one of the [independent] grounds is [deficient only because it is] merely unsupported by sufficient evidence." *United States v. Harris*, 27 F.3d 111, 113 (4th Cir. 1994) (citation and internal quotation omitted).

2. *No Guilt by "Association" or "Pattern": Each Count of an Indictment to be Considered Separately by Jury.* "The present case is a classic example of 'overkill' by the prosecution. It obtained an indictment containing 136 counts, of which 80 counts were supported only by copies of the prescriptions and by Dr. MacIntosh's testimony together with his summary of the office charts of 20 patients, who did not testify. Such tactics invite a jury to find guilt by association or as a result of a pattern. . . . A defendant is entitled to individual consideration of every count in an indictment by the jury and evidence sufficient to convict on each count beyond a reasonable doubt, if he is to be convicted." *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1142-43 (4th Cir. 1994) (overturning eighty counts of conviction on basis of this rule of law and finding by Fourth Circuit of insufficiency of evidence; defendant, physician, had been charged with drug distribution in writing of bogus drug prescriptions).

X. Newspaper Discovered in Jury Room

In *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994), a newspaper containing an article about the previous day's trial proceedings was discovered in the jury room. The presiding judge questioned the jury as a body whether any members had read the article. When no one responded, he proceeded with the trial. The Fourth Circuit approved this approach and found that the trial judge did not abuse his discretion by deciding not to examine each juror individually.

Y. Mistrial

The Fourth Circuit decided a major case involving both mistrial and double jeopardy after mistrial. The court found error in the ordering of a mistrial, and then decided that further prosecution was barred by the double jeopardy clause. In *United States v. Sloan*, 36 F.3d 386 (4th Cir. 1994), the district court *sua sponte* declared its intention to order a mistrial because the defendant had declared his intention to testify and then had not testified. The

district court stated that it had relied on the defendant's stated intentions in making evidentiary rulings and that the government was in a position of prejudice. The defendant objected, but the government, after thinking about it, acquiesced. In finding error in the ordering of a mistrial, the Fourth Circuit stated that the trial court should have explored other alternatives to a mistrial. The court enunciated these principles: "When a mistrial is declared over a criminal defendant's objection, retrial is permitted only when 'there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.' . . . [T]he double jeopardy clause protects a defendant's 'valued right to have his trial completed by a particular tribunal.' . . . [T]he Double Jeopardy Clause may preclude retrial when a mistrial was neither requested nor desired by the prosecution." *Id.* at 393, 395 (quoting *United States v. Perez*, 22 U.S. (9 Wheat) 579, 680 (1824), *Arizona v. Washington*, 434 U.S. 497, 503 (1978), and *United States v. Jorn*, 400 U.S. 470, 490 (1971)).

VIII. Sentencing

A. Plea Agreement Is a Contract

Contract law governs the interpretation of plea agreements. Both sides are entitled to the benefit of their bargains. Both sides must live up to their promises in a plea agreement, but a plea agreement does not bind either side to more than what was agreed to in the agreement. If the government breaches its plea agreement, the defendant is deprived of due process. The party asserting a breach of a plea agreement has the burden of proving the breach. The court reviews the interpretation of the plea agreement *de novo* under the principles of contract law and reviews the facts constituting an alleged breach under a clearly erroneous standard. *United States v. Peglera*, 33 F.3d 412 (4th Cir. 1994); *United States v. Martin*, 25 F.3d 211 (4th Cir. 1994); see also *Santobello v. New York*, 404 U.S. 257 (1971). In *Peglera*, the government refused to fulfill its promise to recommend the minimum of the guideline range at sentencing because it claimed that the defendant had lied in his testimony at the sentencing hearing concerning whether the drug at issue was cocaine or cocaine base (crack). The Fourth Circuit ordered specific performance of the government's promise because a specific provision in the plea agreement allowed the defendant to contest the identity of the drug. The court also ordered that resentencing occur before a different judge.

B. Presentence Report

1. *Defendant's Knowledge of Presentence Report.* Rule 32(a)(1)(A) of the Federal Rules of Criminal Procedure requires a sentencing court to determine that a defendant has read his presentence report and discussed it with his counsel. If the sentencing court does not directly ask the defendant about these Rule 32 requirements, a reviewing court may still conclude that they have been met if the record so indicates. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

2. *Rulings on Objections to Presentence Report (FRCrP 32).* Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure requires the district court to make findings regarding any objections to the presentence report. The district court may fulfill this obligation by adopting the findings in the presentence report if the court clarifies which objected-to issues were resolved by the adoption. In addition, as long as it is clear from the context that specific objections are included in the adoption, the court may adopt the presentence report *in toto*. *United States v. Walker*, 29 F.3d 908 (4th Cir. 1994).

C. Fines

1. *Factual Findings Required.* In imposing a fine, a district court must take into consideration the seven factors set out in 18 U.S.C. § 3572: (1) the defendant's ability to pay, (2) the burden on the defendant and his family, (3) pecuniary loss suffered by others, (4) whether restitution is to be awarded, (5) the need to deprive the defendant of illegally obtained gains, (6) whether the defendant can pass the fine on to others, and (7) if the defendant is an organization, the size of the organization and whether the organization has taken measures to correct its procedures and discipline its responsible employees. The Fourth Circuit had previously ruled that sentencing courts must make specific findings as to these factors when imposing fines. See, e.g., *United States v. Taylor*, 984 F.2d 618 (4th Cir. 1993); *United States v. Shulman*, 940 F.2d 91 (4th Cir. 1991). In *United States v. Walker*, 39 F.3d 489 (4th Cir. 1994), the defendant argued that, because his presentence report indicated that he had no ability to pay a fine and because the sentencing court had made no § 3572 findings, the \$9,700 fine imposed on him to be paid while incarcerated as part of the Inmate Financial Responsibility Program and afterwards should be overturned. The Fourth Circuit declined to do so and stated that the fine was already below the fine range established for the offense, that the sentencing court gave the

defendant a long time to pay the fine, and that sentencing courts are presumed to know more about the Inmate Financial Responsibility Program than appeals courts are.

2. *When Factual Findings Not Required.* In *United States v. Francisco*, 35 F.3d 116 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 950 (1995), the Fourth Circuit ruled that the entry of specific factual findings is not required when (1) the defendant fails to object to the fine, (2) the sentencing court finds that the defendant is unable to pay a fine greater than the one imposed, (3) the presentence report states that the defendant has no income, assets, or financial obligations and recommends that any fine imposed could be paid through the Inmate Financial Responsibility Program, and (4) there is some indication in the record that the sentencing court is sympathetic to the defendant's financial condition.

D. Restitution

1. *Interest as Restitution.* Interest may be awarded as restitution even though it may not be included as a loss in calculating the applicable guideline range. *United States v. Hoyle*, 33 F.3d 415 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 949 (1995).

2. *Considerations in Awarding Restitution.* In awarding restitution, the district court must balance the victims's right to be reimbursed with the defendant's resources, needs, and earning ability. *United States v. Hoyle*, 33 F.3d 415 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 949 (1995).

E. Right of Allocution (FRCrP 32(a)(1)(C))

The denial of the personal right of a defendant to make a statement or to present evidence in mitigation at sentencing will be closely scrutinized for prejudice to the defendant. *United States v. Cole*, 27 F.3d 996 (4th Cir. 1994) (requiring resentencing because of prejudice).

F. Revocation of Probation for Drug Possession (18 U.S.C. § 3565(a))

If a probationer is found to be in possession of drugs, he is required to serve, according to this statute, "not less than one-third of the original sentence." In *United States v. Penn*, 17 F.3d 70 (4th Cir. 1994), the Fourth Circuit, following the Supreme Court in *United States v. Granderson*, 114 S. Ct. 1259 (1994), construed the phrase "original sentence" to mean the original guideline range, not the original term of probation. The court held

that the minimum required sentence for a drug-possessing probation violator is one-third of the *maximum* of the originally applicable guideline range and that the maximum sentence is the maximum of the same original guideline range. In *United States v. Denard*, 24 F.3d 599 (4th Cir. 1994), the court held that the rule in *Penn* trumps the probation revocation tables in section 7b1.4 of Chapter Seven of the Guidelines. Those tables are policy statements that, unlike some other policy statements in the Guidelines, are not binding on the courts.

G. *Violations of Supervised Release (18 U.S.C. § 3583)*

1. *Drug Use While on Supervised Release (§ 3583(g))*. In *United States v. Clark*, 30 F.3d 23 (4th Cir.), *cert. denied*, 115 S. Ct. 600 (1994), the Fourth Circuit overturned the district court's refusal to apply the mandatory provisions of § 3583(g). That section requires a sentence of imprisonment for a drug-possession violation of supervised release of at least one-third of the original sentence of supervised release. The defendant had claimed that his use of drugs did not mean that he had possessed them, but the Fourth Circuit ruled that use "necessarily requires" possession. Presence of a drug in a person's body means that he has possessed it. In order to establish a violation of supervised release, a district court must find possession of a drug and then make a finding that the possession was culpable (e.g., not accidental).

2. *Maximum Supervised Release Felony Jurisdiction Is Five Years (§ 3583(b)(1))*. The court may not supervise the post-incarceration release of a Class A or B felony offender for longer than five years. *United States v. Good*, 25 F.3d 218 (4th Cir. 1994).

3. *Violation of Supervised Release May Be Prosecuted After Term of Release Expires (§ 3583(e)(3); FRCrP 32.1(2))*. "[D]istrict courts retain jurisdiction for a reasonable time after the period of supervised release expires in order to hold hearings on petitions relating to violations of the conditions of supervised release that were filed during the pendency of the term of supervised release." *United States v. Barton*, 26 F.3d 490, 492 (4th Cir. 1994).

H. *Life Sentences*

1. *Life Sentence Without Parole Is Not Disproportionate to the Offense of Drug Dealing*. A sentence must be proportionate to the crime of conviction. But an extensive proportionality analysis is required only for

capital and life-without-parole sentences. Because the U.S. Sentencing Guidelines increase sentences based on both the instant crime and criminal history, proportionality analysis is made more difficult. The Supreme Court requires a reviewing court to consider the gravity of the offense and the sentence and to compare the instant sentence with sentences for the same crime in other jurisdictions. In *United States v. D'Anjou*, 16 F.3d 604, 613 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994), the Fourth Circuit found that illegal drugs are "a pervasive, destructive force in American society" and that both state and federal courts have concluded that life sentences without parole are not disproportionate to the major crime of drug dealing. See also *Solem v. Helm*, 463 U.S. 277 (1983); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

2. *Life Sentence Without Parole Is Not Cruel and Unusual Punishment.*

A sentence of life without parole is not cruel and unusual punishment under the Eighth Amendment. *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994).

I. *Presence of Counsel Not Required to Put into Effect a Non-Discretionary Mandate of an Appeals Court*

When the appeals court issued a very specific mandate that left no discretion in the district court on remand, it was not error for the defendant not to be represented by counsel at the hearing on remand. *United States v. Nolley*, 27 F.3d 80 (4th Cir.), *cert. denied*, 115 S. Ct. 585 (1994).

J. *"Sentencing Entrapment"*

In *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994), the defendants advanced the argument that investigators had prolonged an undercover drug investigation in order to increase the quantity of drugs that the defendants would be liable for at sentencing, thereby "entrapping" the defendants into longer sentences. The Fourth Circuit rejected that argument, as well as the related concept of what it called "sentencing manipulation." "We decline to impose a rule that would require the government to come forward with a purpose or motivation, other than its responsibility to enforce the criminal laws of this country, as a justification for an extended investigation or for any particular step undertaken as part of an investigation." *Id.* at 1155.

K. *Consistency Is a Goal of the Guidelines*

Consistent sentences, rather than "subjective, individualized judicial assessments of the gravity of criminal conduct," is a goal of the Guidelines. *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994) (quotation omitted).

L. *Binding Nature of Policy Statements, Commentary, and Application Notes*

When a policy statement prohibits a district court from taking a specific action, that statement is binding on the courts. *United States v. Denard*, 24 F.3d 599 (4th Cir. 1994) (citing *Williams v. United States*, 503 U.S. 193 (1992)) (stating nevertheless that policy statements in Chapter 7 of Guidelines are not binding). "[T]he Supreme Court [has] ruled that Guidelines commentary that is interpretive or explanatory controls, so long as it is not clearly inconsistent with the Guidelines or unconstitutional." *United States v. Payton*, 28 F.3d 17, 19 (4th Cir.) (citing *Stinson v. United States*, 113 S. Ct. 1913 (1993)), *cert. denied*, 115 S. Ct. 452 (1994). "[T]he Sentencing Commission's policy statements and commentary are generally entitled to treatment as authoritative guides with controlling weight, unless inconsistent with a statute or the Sentencing Guidelines themselves. . . ." *United States v. Wiley-Dunaway*, 40 F.3d 67, 71 (4th Cir. 1994).

M. *Double and Triple Counting*

"Double" and "triple" counting are permissible under the Guidelines except where the Guidelines expressly prohibit them. Under double counting, the same conduct may serve as a sentencing enhancement twice, for example, at the section of the Guidelines where the total offense level is calculated (Chapter Two) and under criminal history (Chapter Four). *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994) (stating that enhancements in same specific guideline may overlap), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994); *United States v. Crawford*, 18 F.3d 1173 (4th Cir.), *cert. denied*, 115 S. Ct. 171 (1994). In a double or triple counting case, a downward departure may be an appropriate remedy when the "defendant's criminal history category significantly over-represents the seriousness of [the] defendant's criminal history or the likelihood that the defendant will commit further crimes." *Crawford*, 18 F.3d at 1180-81 (quoting U.S.S.G. § 4A1.3).

N. Relevant Conduct (U.S.S.G. § 1B1.3)

1. Sentence Can Be Enhanced for Conduct of Others (§ 1B1.3(a)(1)(B)). The use of a firearm by a co-conspirator in a drug trafficking crime can be a "reasonably foreseeable act" that can be attributed to a defendant under relevant conduct. *United States v. Kimberlin*, 18 F.3d 1156 (4th Cir.), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994).

2. Sentence Can Be Enhanced for Uncharged Conduct (§ 3B1.3(a)(1)(B)). A district court can take into consideration at sentencing not only conduct of the defendant of which he was not convicted, but also conduct of the defendant for which the defendant has not even been charged. *United States v. Kimberlin*, 18 F.3d 1156 (4th Cir.), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994).

3. Sentence Can Be Enhanced for Acquitted Conduct (§ 1B1.3(a)(2)). Even if a defendant is acquitted of some charges, the conduct underlying those charges can be the basis for an enhancement of the defendant's sentence for convicted charges. *United States v. Hunter*, 19 F.3d 895 (4th Cir. 1994); *see also United States v. Nelson*, 6 F.3d 1049 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 2142 (1994). Under relevant conduct, a defendant may be held responsible for losses associated with ten fraudulent real estate loans even though he was convicted of only two of them. *United States v. Smith*, 29 F.3d 914 (4th Cir.), *cert. denied*, 115 S. Ct. 454 (1994).

O. Intent to Carry Out Threat (§ 2A6.1(b)(1))

The Guideline for mailing, phoning, or otherwise communicating threats, provides an enhancement of six levels if an intent to carry out the threats can be demonstrated. If there is evidence of such intent, then the enhancement is appropriate regardless of whether the acts evidencing intent occur before, during, or after the actual threats. *United States v. Gary*, 18 F.3d 1123 (4th Cir.) (upholding enhancement and agreeing with Seventh Circuit, but disagreeing with Second Circuit), *cert. denied*, 115 S. Ct. 134 (1994).

P. Defendant as Holder of "Sensitive Position" (§ 2C1.1(b)(2)(B))

Defendant, a GS-15 Navy Engineer, was in a sensitive position concerning a specific government contract, and therefore his sentence was appropriately increased by eight levels. *United States v. Matzkin*, 14 F.3d 1014 (4th Cir. 1994).

Q. Quantity of Drugs

See Drug Offenses, *supra* section IV.A.

R. Firearm Enhancement Despite Firearm Acquittal (§ 2D1.1(b)(1))

See Firearm Offenses, *supra* section V.B.8.

S. Firearm Possessed in Drug Crime (§ 2D1.1(b)(1))

Under this guideline subsection, a drug sentence may be enhanced if a weapon was "present, unless it is clearly improbable that the weapon was connected with the offense." In *United States v. Hunter*, 19 F.3d 895 (4th Cir. 1994), the Fourth Circuit upheld an enhancement for a drug dealer who was picked up by his designated driver after the completion of a drug deal. A handgun was found under the front seat of the vehicle the driver was operating. See also *United States v. White*, 875 F.2d 427 (4th Cir. 1989).

T. Guideline for Underage Persons Is Not an Enhancement to the Basic Drug Guideline (§§ 2D1.1, 2D1.2)

Section 2D1.2 is the proper guideline only for violations of 21 U.S.C. §§ 859 (distribution to underage persons), 860 (distribution at schools and colleges), and 861 (use of underage persons in distributing). It cannot be used to enhance violations of 21 U.S.C. §§ 841 (drug distribution) and 846 (drug conspiracy) on the basis that those offenses involved underage persons. *United States v. Locklear*, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 278 and 115 S. Ct. 457 (1994).

U. Loss

1. Meaning and Review of Loss. The definition or meaning of "loss" is reviewed *de novo*, but the amount of loss is reviewed for clear error. *United States v. Dozie*, 27 F.3d 95 (4th Cir. 1994). The district court's determination of the amount of loss is reviewed for clear error. *United States v. Hoyle*, 33 F.3d 415 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 949 (1995); *United States v. Dozie*, 27 F.3d 95 (4th Cir. 1994).

2. Estimate of Amount of Loss (§ 2F1.1). The amount of loss may be estimated. *United States v. Walker*, 29 F.3d 908 (4th Cir. 1994).

3. "Actual" v. "Intended" Loss as a Result of Fraud (§ 2F1.1). "[A]s a general rule, intended loss can be used as the baseline where the circum-

stances of the case warrant such an approach. . . . Fraudulent losses come about through an ever-expanding variety of means, and each case is examined on its own facts. . . . The Sentencing Guidelines provide very little guidance on this issue for transactions involving complex financing arrangements, such as assignments of rights and security interests." *United States v. Mancuso*, 42 F.3d 836, 849-50 (4th Cir. 1994).

4. *"Intended" v. "Probable" Loss as a Result of Fraud (§ 2F1.1)*. The commentary to section 2F1.1 permits the use of "probable loss" instead of "intended loss." "While the term 'intended loss' is a subjective measure, 'probable loss' connotes an objectively-measured harm." *United States v. Dozie*, 27 F.3d 95, 99 (4th Cir. 1994) (finding that, in insurance fraud scheme, loss was correctly calculated as amount of insurance settlement, not as amount of possibly inflated insurance claims). The estimate of loss must be reasonable and reflect economic reality. "The fraud guideline . . . has never endorsed sentencing on the worst-case scenario potential loss." *Id.* at 99 (quoting *United States v. Kopp*, 951 F.2d 521, 529 (3d Cir. 1991)).

5. *Loss in a "Completed Fraud" v. "Incomplete Fraud" (§§ 2F1.1, 2X1.1)*. In a case in which part of a fraud is complete and part is incomplete (*i.e.*, part of the loss from fraud is "actual" and part is "intended"), the determinative guideline may be section 2X1.1 (Attempt, Solicitation, and Conspiracy), which provides that "the offense level is calculated by taking the higher level of (1) the actual completed fraud or (2) the intended fraud minus 3 levels." *United States v. Mancuso*, 42 F.3d 836, 850 (4th Cir. 1994).

6. *Interest as Loss (§§ 2B1.2, 2F1.1)*. Interest that could have been earned had funds not been stolen is not computed as loss for sentencing purposes. *United States v. Hoyle*, 33 F.3d 415 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 949 (1995).

V. Arson Guideline (§ 2K1.4)

Some of the specific enhancements in the arson guideline may overlap, and the enhancement that results in the highest offense level should be given effect. *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994).

W. Transfer of Firearm with Knowledge That It Would Be Used in "Another" Felony Offense (§ 2K2.1(b)(5))

In *United States v. Cutler*, 36 F.3d 406 (4th Cir. 1994), the court read section 2K2.1(b)(5) in a plain manner and stated that the statute meant what it said. The defendant must have knowledge of "another" felony offense, not a "specific" felony offense, as the defendant had argued.

X. Escape from Non-Secure Custody (§ 2P1.1(b)(3))

In order for the defendant to receive a four-level reduction under this provision, "first, the escape must be from a non-secure facility and, second, that non-secure facility must be similar to a community corrections center, community treatment center or half-way house." *United States v. Sarno*, 24 F.3d 618, 623 (4th Cir. 1994) (denying appeal because escape was from secure facility).

Y. Money Laundering

1. Laundered Funds That Are Proceeds of a Drug Transaction (§ 2S1.1(b)(1)). A defendant's sentence will not be enhanced if he only "believed" that certain funds were proceeds of drug transactions. He must "know" that they were. *United States v. Barton*, 32 F.3d 61 (4th Cir. 1994).

2. "Flash Money" v. Total Amount of Laundered Funds in Drug Transaction (§ 2S1.1(b)(2)). In determining the "value of the funds" involved in the laundering of funds that are the proceeds of a drug transaction, the sentencing court is not restricted to the value of the "flash money" that agents exhibited during an undercover sting operation. *United States v. Barton*, 32 F.3d 61 (4th Cir. 1994).

Z. Sentencing Assimilated Crimes: "Like Punishment" (§ 2X5.1; 18 U.S.C. §§ 13(a), 3551(a))

In sentencing a state offense that has been assimilated into federal law by 18 U.S.C. § 13, the "like punishment" requirement of § 13 is fulfilled when the federal court sentences the defendant according to the most analogous federal guideline but within the maximum and any minimum limits of the state statute. *United States v. Harris*, 27 F.3d 111 (4th Cir. 1994). Not every aspect of state sentencing law, for example, state parole procedure, is assimilated into federal law in order to effectuate "like" sentences.

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

A defendant's sentence may be enhanced by two levels if he *selects* an *already vulnerable* victim. The enhancement is not to be applied when the instant offense causes severe emotional trauma to an otherwise normal victim. *United States v. Gary*, 18 F.3d 1123 (4th Cir.) (overturning enhancement), *cert. denied*, 115 S. Ct. 134 (1994).

BB. Proof of Aggravating Role (§ 3B1.1)

Under section 3B1.1 and the accompanying Application Notes, there are several factors that a sentencing court may consider in determining whether a defendant played a leadership role in the offense. Control of others and recruitment of others are important factors. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994).

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

1. *Elements.* To increase the sentencing level by two levels for abuse of a position of trust, the government must show that (1) there was a trust relationship between the defendant and the victim and (2) that trust relationship significantly contributed to facilitating the crime. "[O]rdinary commercial relationships do not constitute a trust relationship sufficient to invoke the § 3B1.3 enhancement." *United States v. Moore*, 29 F.3d 175, 180 (4th Cir. 1994).

2. *An Individualized Determination.* Whether the sentencing level should be increased by two levels for abuse of a position of trust is specific to each defendant. A co-conspirator/*Pinkerton* analysis does not apply. The abuse of a position of trust by a co-conspirator will not be automatically attributed to every defendant in a conspiracy. *United States v. Moore*, 29 F.3d 175 (4th Cir. 1994). "[T]he abuse of trust enhancement is premised on the defendant's *status* of having a relationship of trust with the victim." *Id.* at 178.

DD. Obstruction of Justice (§ 3C1.1)

A conscious purpose to destroy material evidence and threats against the court and witnesses are examples of appropriate reasons for the application of this provision. *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994).

EE. Sentencing "While Under Any Criminal Justice Sentence" (§ 4A1.1(d))

A term of unsupervised probation is a criminal justice sentence, and two additional points may be added to a criminal history score if the instant crime was committed while under such a sentence. *United States v. Kimberlin*, 18 F.3d 1156 (4th Cir.), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994).

FF. Career Offender (§ 4B1.1)

1. Elements. In order to be sentenced as a career offender, a defendant must have been convicted of two prior felony convictions of crimes of violence or drug offenses *before* the commission of the instant offense. *United States v. Williams*, 29 F.3d 172 (4th Cir. 1994).

2. Drug Conspiracy May Be Instant Offense. In *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995), the Fourth Circuit, differing with the D.C. and Fifth Circuits, ruled that the Sentencing Commission did not exceed its authority in including drug conspiracies as controlled substance instant offenses for purposes of career offender status. The court also ruled that the actual starting date of a conspiracy, and not the date alleged in the indictment, should be used as the date that tolls the fifteen-year period for calculating career offender status.

3. Simple Possession Is Not a Predicate Conviction for Career Offender Status. For sentencing as a career offender, a prior "controlled substance offense" is a felony manufacturing or distributing (or importing/exporting) offense. Thus, simple possession of a controlled substance may not be used as a predicate offense for the purposes of qualifying a defendant as a career criminal. *United States v. Neal*, 27 F.3d 90 (4th Cir. 1994).

4. Involuntary Manslaughter Is a Crime of Violence (§ 4B1.2). Involuntary manslaughter, even though not a specific intent crime, is a "crime of violence" under the career offender guideline and its application notes and therefore may be used as a predicate crime to support a sentence as a career offender. *United States v. Payton*, 28 F.3d 17 (4th Cir.), *cert. denied*, 115 S. Ct. 452 (1994).

5. State Convictions as Predicate Offenses. Prior state as well as federal convictions qualify as predicate convictions for purposes of sentencing a defendant as a career criminal. *United States v. Brown*, 23 F.3d 839 (4th Cir. 1994).

6. *Review of Interpretations of State Law.* An appeals court reviews *de novo* any needed interpretations of state law by a district court for the purpose of sentencing a defendant as a career offender. *United States v. Neal*, 27 F.3d 90 (4th Cir. 1994).

7. *Downward Departure from Career Offender Range.* "A downward departure from a career offender sentence, although possible, is reserved for the truly unusual case." *United States v. Brown*, 23 F.3d 839, 841 (4th Cir. 1994) (internal quotation omitted).

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

If a defendant is already serving a term of imprisonment for another offense when he is sentenced and that prior sentence was not for a crime committed while imprisoned (§ 5G1.3(a)) nor for a crime the facts of which are being taken into account at the present sentencing (§ 5G1.3(b)), then the sentencing court must treat the instant crime and the prior crime as if they were being disposed of together in federal court. The court may sentence the instant crime to run concurrently or consecutively with the prior crime according to the circumstances, but must seek to "achieve a reasonable incremental punishment [to the prior crime] for the instant offense." *United States v. Wiley-Dunaway*, 40 F.3d 67, 68 (4th Cir. 1994) (quoting U.S.S.G. § 5G1.3(c)).

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

1. *Generally.* "The district court must impose the Guidelines sentence unless it determines that 'there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *United States v. Harris*, 39 F.3d 1262, 1271 (4th Cir. 1994) (quoting 18 U.S.C. § 3553(b)). The court will review *de novo* a district court ruling concerning whether a circumstance or factor was adequately taken into consideration. "Only rarely will we conclude that a factor was not adequately taken into consideration by the Commission." *United States v. Jones*, 18 F.3d 1145, 1149 (4th Cir. 1994); *see also United States v. Bell*, 974 F.2d 537, 538 (4th Cir. 1992).

2. *Standard of Review of Departures from Guideline Range.* Departures from the applicable guideline range are reviewed under a multi-part test

of reasonableness. First, the appeals court examines *de novo* whether the district court correctly identified a factor not adequately taken into consideration by the Sentencing Commission. Second, if the court decides that the district court identified such a factor, the court examines, under a clearly erroneous standard, whether there were adequate facts to support the departure. *United States v. Harrison*, 37 F.3d 133 (4th Cir. 1994); *United States v. Weddle*, 30 F.3d 532 (4th Cir. 1994). Third, the appeals court will use an abuse of discretion standard to decide whether the identified factor was of sufficient importance to warrant a departure and, fourth, whether the extent of the departure was reasonable. *United States v. Brown*, 23 F.3d 839 (4th Cir. 1994); *United States v. Gary*, 18 F.3d 1123 (4th Cir.), *cert. denied*, 115 S. Ct. 134 (1994); *see also United States v. Palinkas*, 938 F.2d 456 (4th Cir. 1991), *vacated*, 112 S. Ct. 1464, *reinstated*, 977 F.2d 905 (1992); *United States v. Hummer*, 916 F.2d 186 (4th Cir. 1990), *cert. denied*, 499 U.S. 970 (1991).

3. *Departure Based on Age* (§ 5H1.1). A departure in sentencing may not be based on age because the Sentencing Commission adequately took age into consideration in promulgating the Guidelines. *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994).

4. *Departure Based on Physical Condition* (§ 5H1.4). A departure in sentencing may not be based on physical condition because the Sentencing Commission adequately took physical condition into consideration in promulgating the Guidelines. *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994).

II. Upward Departures

1. *Extent of Upward Departure*. In *United States v. Gary*, 18 F.3d 1123 (4th Cir.), *cert. denied*, 115 S. Ct. 134 (1994), the Fourth Circuit reviewed the sentence of a defendant convicted of twelve counts of mailing threatening communications. From a final adjusted range of 70-87 months, the district court had departed upward to a sentence of 250 months. Reviewing five other cases in which the upward departure was of comparable magnitude, the Fourth Circuit found that there was precedent for such an upward departure. But in remanding for resentencing, the court also found that the district court had not articulated "substantial reasons" or a "principled justification" for its upward departure determination. Although the upward departure was justified under the first three parts of the four-part *Hummer/Palinkas* test (basis for departure, adequate factfinding, importance

of basis for departure, reasonableness of the extent of departure), the final extent of the departure was an abuse of discretion. The court suggested the following as possible methods of determining the extent of an upward departure: reference to the guideline table itself for level-by-level increases, reference to similar crimes, reference to similar aggravating circumstances, and reference to policy choices incorporated in the Guidelines. *See also United States v. Palinkas*, 938 F.2d 456 (4th Cir. 1991), *vacated*, 112 S. Ct. 1464, *reinstated*, 977 F.2d 905 (1992); *United States v. Hummer*, 916 F.2d 186 (4th Cir. 1990), *cert. denied*, 499 U.S. 970 (1991).

2. *Upward Departure for Extreme Psychological Injury* (§ 5K2.3). "If there is any place in sentencing guidelines where a factfinder is to be given considerable deference, it is here where the district court is called upon to assess the psychological impact upon victims." *United States v. Gary*, 18 F.3d 1123, 1129 (4th Cir.) (quoting *United States v. Astorri*, 923 F.2d 1052, 1058 (3d Cir.), *cert. denied*, 112 S. Ct. 444 (1991)) (upholding factual finding regarding psychological injury together with factual finding regarding extreme conduct), *cert. denied*, 115 S. Ct. 134 (1994).

3. *Upward Departure for Extreme Conduct* (§ 5K2.8). "In determining extreme conduct, not only completed conduct may be considered. Where the defendant's intended plan expressly involves extreme conduct, the departure is warranted." *United States v. Gary*, 18 F.3d 1123, 1130 (4th Cir.) (citation omitted) (upholding factual finding regarding extreme conduct together with factual finding regarding psychological injury), *cert. denied*, 115 S. Ct. 134 (1994).

JJ. Downward Departures

1. *Criminal History Category I Cannot Be Inadequate*. "[A] departure below the lower limit of the guideline range for Criminal History Category I on the basis of adequacy of criminal history cannot be appropriate." U.S.S.G. § 4A1.3. Thus, we are of the opinion that the Commission has adequately considered and rejected departures below Criminal History Category I based on lack of criminal history." *United States v. Harris*, 39 F.3d 1262, 1271 (4th Cir. 1994).

2. *Violence Has Adequately Been Considered by the Sentencing Commission* (§§ 5K2.0-2.6). Even though several sections of the Guidelines authorize an *upward* departure for the use of violence, the fact that there is no violence in a particular offense is not a basis for a *downward* departure.

The Sentencing Commission adequately considered violence in drafting the Sentencing Guidelines. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994).

3. *Drug Abuse Not Basis for Downward Departure* (§ 5H1.4). The Fourth Circuit, following the Guidelines, has held that drug abuse may not be the basis for a downward departure "under even extraordinary circumstances." *United States v. Kennedy*, 32 F.3d 876, 887 n.2 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995).

4. *Quantity of Drugs Not Basis for Downward Departure*. The quantity of drugs has been adequately taken into consideration in the formulation of the Guidelines by the Sentencing Commission and, therefore, may not be used as the basis for a downward departure. *United States v. Brown*, 23 F.3d 839 (4th Cir. 1994).

5. *Disparity Among Co-Conspirators' Sentences Not Basis for Downward Departure*. A disparity among co-conspirators' sentences is not grounds for review. A district court may not depart downward based on the disparity of sentences among co-defendants. *United States v. Mastronardi*, No. 93-5825, 1994 WL 385098 (4th Cir. July 25, 1994).

6. *No Appeal of Extent of Downward Departure*. Unless a district court mistakenly believes that it lacks the authority to depart downwards, a refusal by the district court to depart downward may not be appealed. *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994); *see also United States v. Underwood*, 970 F.2d 1336 (4th Cir. 1992); *United States v. Bayerle*, 898 F.2d 28 (4th Cir.), *cert. denied*, 498 U.S. 819 (1990). If the district court does depart downward, the extent of the downward departure may not be appealed. *United States v. Mastronardi*, No. 93-5825, 1994 WL 385098 (4th Cir. July 25, 1994) (agreeing with ten other circuits).

7. *Appeal of Refusal to Depart Downward More Than Once*. In *United States v. Baxter*, 19 F.3d 155 (4th Cir. 1994), the court extended its holding in *United States v. Bayerle*, 898 F.2d 28 (4th Cir.), *cert. denied*, 498 U.S. 819 (1990), that a district court's refusal to depart downward was not appealable to include the situation in which a district court departs downward on one ground but refuses to depart downward on other grounds.

8. *Downward Departure May Not Offset Criminal History* (§ 4A1.3). If a defendant receives additional criminal history points for committing the instant offense while under another sentence (§ 4A1.1), the district court

may not compensate for that increase by finding under section 4A1.3 that the defendant's criminal history category "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." *United States v. Weddle*, 30 F.3d 532, 536 (4th Cir. 1994) (quoting U.S.S.G. § 4A1.3).

9. *Downward Departure for Diminished Capacity* (§ 5K2.13). Section 5K2.13 of the Guidelines allows a downward departure for those defendants suffering from diminished capacity, but only if the instant offense is a "non-violent" one. In *United States v. Weddle*, 30 F.3d 532 (4th Cir. 1994), the Fourth Circuit, disagreeing with five circuits and agreeing with the D.C. Circuit, ruled that, even if the instant offense is definitionally a violent one, the district court may still make a finding that the defendant or his actions were in fact not dangerous. Therefore, a defendant found guilty of a violent offense may be eligible for a downward departure if he can show diminished capacity.

10. *Downward Departure for Substantial Assistance* (§ 5K1.1). Under section 5K1.1, a downward departure for substantial assistance in the investigation or prosecution of other persons may be granted only upon a "motion of the government." This requirement closes off most attempts by defendants to make their own motions for reduction of sentences based on substantial assistance. However, under the holding of the Fourth Circuit in *United States v. Connor*, 930 F.2d 1073 (4th Cir.), *cert. denied*, 502 U.S. 958 (1991), if the government explicitly promises to make a motion for substantial assistance if a defendant provides substantial assistance, a district court can entertain a defendant's claim that the government has breached that promise. The only other avenue available is a showing that the government has failed to make a motion for substantial assistance because of an unconstitutional motive, for example, race. But the burden is on the defendant to make a "substantial threshold showing" before the court will entertain such a motion. *United States v. Wallace*, 22 F.3d 84 (4th Cir.), *cert. denied*, 115 S. Ct. 281 (1994).

11. *Two Bases for Downward Departures for Substantial Assistance* (§ 5K1.1; *FRCrP* 35). If a defendant renders substantial assistance to the government before his sentencing, the government must make a section 5K1.1 motion for a downward departure at sentencing. If the defendant's substantial assistance occurs after sentencing, the government must use Rule 35 as the basis for its motion for a downward departure. For presentencing substantial assistance, the government may not defer a

section 5K1.1 motion at the sentencing hearing and plan to make a later Rule 35 motion. Such a deferment would deprive a defendant of due process and would cause the sentence to be in "violation of law." *United States v. Martin*, 25 F.3d 211, 216 (4th Cir. 1994).

KK. Tentative Findings (§ 6A1.3)

Concerning "disputed sentencing factors," section 6A1.3 requires the sentencing court to issue "tentative findings" and to allow the parties to object before the imposition of a sentence. In *United States v. Francisco*, 35 F.3d 116 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 950 (1995), the Fourth Circuit ruled that the failure to make tentative findings was not reversible error when all disputed issues were aired in an amendment to the presentence report before the date of sentencing, both sides were able to argue their positions, and the sentencing court properly addressed and ruled on each issue.

LL. Appeal of Sentences [See also Downward Departure from Career Offender Range, supra section VIII.FF.7.; Departures Generally and Standard of Review of Departures from Guideline Range, supra section VIII.HH.1. & 2.; No Appeal of Extent of Downward Departure and Appeal of Refusal to Depart Downward More Than Once, supra sections VIII.JJ.6. & 7.]

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, or (4) if it was greater than the sentence indicated in the applicable guideline range. *United States v. Mastronardi*, No. 93-5825, 1994 WL 385098 (4th Cir. July 25, 1994); *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994).

2. *No Appeal of Sentence Within Guideline Range.* A sentence within the guideline range may not be appealed. *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994).

3. *Standard of Review of Guideline Sentence: Due Deference.* 18 U.S.C. § 3742(e) requires a circuit court to give *due deference* to the district court's application of the Guidelines to the facts. For matters like the finding of facts and judging the credibility of witnesses, the deference that is due is the *clearly erroneous* standard. For matters like the interpretation of a

guideline term, the selection of the correct guideline or guideline subsection, or the application of the grouping principles, the deference that is due "moves closer to *de novo* review." *United States v. Gary*, 18 F.3d 1123, 1127 (4th Cir.) (quoting *United States v. Daughtrey*, 874 F.2d 213, 217 (4th Cir. 1989)), *cert. denied*, 115 S. Ct. 134 (1994).

4. *Plain Meaning of Guidelines*. "[T]he Sentencing Guidelines should be applied as written." *United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994).

5. *Clearly Erroneous*.

Aggravating role under section 3B1.1. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994).

Finding under 21 U.S.C. § 841(b)(1)(C) that death resulted from the use of drugs. *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994), *petition for cert. filed*, No. 94-7831 (U.S. Jan. 23, 1995).

Findings of fact at sentencing (18 U.S.C. § 3742(e)); *United States v. Cutler*, 36 F.3d 406 (4th Cir. 1994); *United States v. Barton*, 32 F.3d 61 (4th Cir. 1994).

Application of the Guidelines to the facts of a particular case. *United States v. Cutler*, 36 F.3d 406 (4th Cir. 1994); *United States v. Williams*, 29 F.3d 172 (4th Cir. 1994); *United States v. Sarno*, 24 F.3d 618 (4th Cir. 1994); *United States v. Gary*, 18 F.3d 1123 (4th Cir.), *cert. denied*, 115 S. Ct. 134 (1994); *United States v. Marcum*, 16 F.3d 599 (4th Cir.), *cert. denied*, 115 S. Ct. 137 (1994).

Calculation of criminal history score. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

Rulings on sentencing under Rule 32 of the Federal Rules of Criminal Procedure. *Id.*

Whether the court applied the correct victim-related adjustment to the facts. *United States v. Sloley*, 19 F.3d 149 (4th Cir.), *cert. denied*, 114 S. Ct. 2757 (1994).

6. *De Novo*.

Whether the sentencing court had the authority to order a downward departure in a particular case. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994).

Legal interpretation of a guideline term. *United States v. Barton*, 32 F.3d 61 (4th Cir. 1994).

Proper application of the Guidelines. *United States v. Locklear*, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 278 and 115 S. Ct. 457 (1994).

Interpretation of a particular sentencing guideline. *United States v. Sarno*, 24 F.3d 618 (4th Cir. 1994).

A claim of "double counting" under the Guidelines. *United States v. Sloley*, 19 F.3d 149 (4th Cir.), *cert. denied*, 114 S. Ct. 2757 (1994).

Concerning departures, whether a factor has already been adequately considered by the Guidelines Commission. *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994).

7. Mixture of Law and Fact. The Fourth Circuit has ruled that appellate review of the calculation of the amount of loss for sentencing purposes is governed by a mixed standard of law and fact. *United States v. Walker*, 29 F.3d 908 (4th Cir. 1994). The court has also said that that review is governed by a "clear error" standard. *United States v. Smith*, 29 F.3d 914 (4th Cir.), *cert. denied*, 115 S. Ct. 454 (1994).

IX. Appeal and Other Post-Conviction Proceedings

A. Limited Grounds When Waiver of Appeal Not Possible

If the defendant in a plea agreement makes a "knowing and intelligent" decision to waive his rights to appeal, then the appeals court will enforce that waiver. *See, e.g., United States v. Marin*, 961 F.2d 493 (4th Cir. 1992); *United States v. Wessells*, 936 F.2d 165 (4th Cir. 1991); *United States v. Clark*, 865 F.2d 1433 (4th Cir. 1989). However, in waiving appeal, a defendant does not waive his right to appeal a sentence imposed in excess of the statutory maximum on constitutionally impermissible grounds (such as race) or in violation of his Sixth Amendment right to counsel. *United States v. Attar*, 38 F.3d 727 (4th Cir. 1994) (accepting for review waived appeal, but finding right to counsel not to have been violated), *petition for cert. filed*, 63 U.S.L.W. 3644 (U.S. Feb. 21, 1995) (No. 94-1404).

B. Double Jeopardy and Appeal of Judgment of Acquittal (18 U.S.C. § 3731)

"An acquittal represents a judgment by a jury or a court that the evidence is insufficient to convict." *United States v. Mackins*, 32 F.3d 134, 137 (4th Cir. 1994) (citation omitted). After an acquittal, the double jeopardy clause bars retrial. But, if the entering of a judgment of acquittal by the trial court is based on a factor other than the sufficiency of the evidence, "the judgment constitutes a dismissal of the indictment, not an acquittal, and the government may appeal from that order under 18 U.S.C.

§ 3731." *Id.* at 138. In *Mackins*, the jury acquitted the defendant on two of three counts. The trial court then entered a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure on the remaining count because, the trial court found, the government would not be able to prove the remaining count on retrial. The Fourth Circuit concluded that the reasoning of the trial court was erroneous. The trial judge should have limited itself to assessing the sufficiency of the evidence already introduced and should not have speculated about admissible evidence in a future trial.

C. *Appeal of Guilty Plea*

"A guilty plea is a solemn judicial admission of the truth of the charge, and the right to later contest that plea is usually foreclosed." *United States v. Hoyle*, 33 F.3d 415, 419 (4th Cir. 1994) (citation omitted), *cert. denied*, 115 S. Ct. 949 (1995). A guilty plea normally admits everything contained in the charges as set out in the bill of indictment.

D. *Timeliness of Appeal of Incarcerated Appellant*

The appeal of an incarcerated defendant, even one represented by counsel, is deemed filed from the date that he gives his appeal to prison officials. *United States v. Moore*, 24 F.3d 624 (4th Cir. 1994) (applying holding of *Houston v. Lack*, 487 U.S. 266 (1988), to criminal cases).

E. *Appeal from Magistrate's Verdict*

In *United States v. Baxter*, 19 F.3d 155, 156 (4th Cir. 1994), the court pointed out that a judgment of conviction in magistrate's court may be appealed only to a district court, not to an appeals court. *See also* 18 U.S.C. § 3402; FED. R. CRIM. P. 58(g)(2).

F. *Appeal from "Final Decisions"*

In *United States v. Baxter*, 19 F.3d 155 (4th Cir. 1994), the court on its own motion turned back an appeal for lack of appellate jurisdiction. The court ruled that a decision by a district court to reverse and remand for further proceedings a verdict of the magistrate's court was not appealable to the appeals court because it was not a "final decision" within 18 U.S.C. § 1291. A decision is not final until sentencing, the court stated.

G. *Fugitives May Not Appeal*

A fugitive from justice may not avail himself of the resources of the court and may not appeal his conviction while he remains a fugitive. *United States v. Corporan-Cuevas*, 35 F.3d 953 (4th Cir. 1994).

H. *Interlocutory Appeal*

In *United States v. Sloan*, 36 F.3d 386 (4th Cir. 1994), the Fourth Circuit granted an interlocutory appeal in a case involving a double jeopardy challenge to a retrial after a mistrial.

I. *Appeals Court May Not Make Finding of Perjury*

In *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994), the Fourth Circuit was convinced from the record that a government witness had perjured herself, but the court remanded to the district court to determine whether perjury had occurred and whether the government knew or should have known about it. The court noted that the Supreme Court had ruled that an appeals court may not make a finding of perjury in the first instance. See also *Demarco v. United States*, 415 U.S. 449, 449-50 (1974) (per curiam).

J. *Stipulations May Not Be Retracted and Appealed*

If a defendant enters into a stipulation for purposes of sentencing, he may not attempt to retract that stipulation upon appeal. *United States v. Williams*, 29 F.3d 172 (4th Cir. 1994).

K. *Remand for Fact-Finding*

Sometimes the appeals court must remand to the district court for fact-finding before it can make a legal ruling. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

L. *When Retrial Is Permitted*

If the appeals court makes a finding of insufficient evidence to sustain a count of conviction, the defendant may not be retried on that count. If the appeals court overturns a conviction because of a trial or procedural error, the defendant may be retried. *United States v. Tran Trong Cuong*, 18 F.3d 1132 (4th Cir. 1994).

M. *Error Per Se*

A constructive amendment of an indictment is error *per se*. *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc).

N. *Harmless Error (FRCrP 52(a))*

1. *Elements of Harmlessness of Non-Constitutional Error Analysis.*

"[I]n the realm of nonconstitutional error, the appropriate test of harmlessness . . . is whether we can 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. Williams*, 41 F.3d 192, 199-200 (4th Cir. 1994) (alteration in original) (quoting *United States v. Sanders*, 964 F.2d 295, 299 (4th Cir. 1992)) (finding erroneous admission of hearsay harmless in face of overwhelming evidence of guilt), *cert. denied*, No. 94-8326 (U.S. Apr. 3, 1995). "In assessing whether it is 'highly probable' that the error did not 'affect' or 'substantially sway' a judgment of conviction, we must consider three factors: (1) the centrality of the issue affected by the error; (2) the steps taken to mitigate the effects of the error; and (3) ['the single most important factor'] the closeness of the case." *United States v. Ince*, 21 F.3d 576, 583 (4th Cir. 1994) (overturning conviction because of erroneous admission of confession).

2. *Inadmissible Evidence: Harmless Beyond a Reasonable Doubt.*

When the appeals court finds that evidence was erroneously admitted at trial, the court must then decide whether in the context of all the evidence, the error was harmless beyond a reasonable doubt. If the court makes such a finding, then the conviction can stand. *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994).

3. *Issues Reviewed Under Harmless Error Analysis.*

Erroneous admission of hearsay. *United States v. Williams*, 41 F.3d 192 (4th Cir. 1994), *cert. denied*, No. 94-8326 (U.S. Apr. 3, 1995).

Violation of a witness sequestration order. *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994).

Erroneous admission of Rule 404(b) evidence. *United States v. Madden*, 38 F.3d 747 (4th Cir. 1994).

Admission or exclusion of evidence. *United States v. Francisco*, 35 F.3d 116 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 950 (1995); *United States v. Whittington*, 26 F.3d 456 (4th Cir. 1994).

Representation by counsel at a hearing in which the district court had no discretion but to effectuate precise remand of appeals court. *United States v. Nolley*, 27 F.3d 80 (4th Cir.), *cert. denied*, 115 S. Ct. 585 (1994).

Erroneous jury instruction. *United States v. Whittington*, 26 F.3d 456 (4th Cir. 1994).

Error in a guilty plea under Rule 11 of the Federal Rules of Criminal Procedure. *United States v. Good*, 25 F.3d 218 (4th Cir. 1994).

Possible *Bruton* error in case in which *Bruton* evidence was cumulative and in which evidence of guilt was overwhelming. *United States v. Locklear*, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 278 and 115 S. Ct. 457 (1994).

Erroneous admission of the defendant's confession. *United States v. Ince*, 21 F.3d 576 (4th Cir. 1994).

O. Plain Error (FRCrP 52(b))

1. Standard of Review. A reviewing court may recognize plain error even if no objections were raised below, but if no objections were raised below, the error must be plain in order to win on appeal. In *United States v. Olano*, 113 S. Ct. 1770 (1993), the Supreme Court construed plain error as requiring four elements: (1) there must be error; (2) the error must be plain under current law; (3) the error must affect substantial rights, that is, be prejudicial to the defendant and affect the outcome of the district court proceedings; and (4) the error must seriously affect "the fairness, integrity or public reputation of judicial proceedings." *United States v. Childress*, 26 F.3d 498, 502 (4th Cir. 1994) (quoting *Olano*, 113 S. Ct. at 1777-79), *cert. denied*, 115 S. Ct. 1130 (1995); *see also United States v. Hanno*, 21 F.3d 42 (4th Cir. 1994); *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994). If a legal right was forfeited, for example, because of the violation of a legal rule, it is not necessary for an appeal that a timely objection was not made at the trial level. But the forfeiture must still be "plain." *United States v. Matzkin*, 14 F.3d 1014 (4th Cir. 1994) (finding failure to instruct on statute of limitations not to be plain error). The failure to instruct on an essential element of a crime is plain error. *United States v. Rogers*, 18 F.3d 265 (4th Cir. 1994).

2. Burden Is on Defendant to Show Prejudice. In *United States v. Rhodes*, 32 F.3d 867 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1130 (1995), the Fourth Circuit pointed out that the Supreme Court in *Olano* held that the

burden is on the defendant to prove that any error was prejudicial to his substantial rights, that is, that it affected the outcome of the proceedings.

3. *Issues Reviewed Under Plain Error Analysis.*

Denial of right of allocution at sentencing. *United States v. Payton*, 28 F.3d 17 (4th Cir.), *cert. denied*, 115 S. Ct. 452 (1994).

Order of severance not objected to at trial. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

Decision of trial judge not objected to at trial concerning possible tainting of the jury by a newspaper discovered in the jury room. *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994).

Failure to instruct on the statute of limitations found not to be plain error. *United States v. Matzkin*, 14 F.3d 1014 (4th Cir. 1994).

P. *Invited Error Doctrine*

A defendant on appeal cannot ordinarily complain of an error of the trial court that he himself invited the trial court to commit. *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994).

Q. *Construction of Statutes and Regulations*

See Miscellaneous Pretrial Issues, *supra* section III.O.

R. *Appeal of Sentences*

See Sentencing, *supra* section VIII.LL.

S. *Standards of Review*

1. *Abuse of Discretion.*

District court's decision to offer a particular jury charge. *United States v. Mancuso*, 42 F.3d 836 (4th Cir. 1994) (finding, because court gave satisfactory intent instructions, no abuse of discretion to reject defendants' version); *United States v. Whittington*, 26 F.3d 456 (4th Cir. 1994).

Imposition of a fine as sentence. *United States v. Walker*, 39 F.3d 489 (4th Cir. 1994).

Whether to transfer a case to a different venue. *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994).

District court's order requiring defendant to proceed *pro se* after his acts and assertions operated as a constructive discharge of counsel. *United*

States v. Attar, 38 F.3d 727 (4th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3644 (U.S. Feb. 21, 1995) (No. 94-1404).

District court's order declaring a mistrial, but a seemingly stricter review than other abuse of discretion situations, for "reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *United States v. Sloan*, 36 F.3d 386, 400 (4th Cir. 1994) (alteration in original) (quoting *Arizona v. Washington*, 434 U.S. 497, 514 (1978)).

Finding regarding prosecutorial vindictiveness. *United States v. Fiel*, 35 F.3d 997 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1160 (1995).

District court's ruling denying a motion to substitute counsel and for a continuance. *United States v. Corporan-Cuevas*, 35 F.3d 953 (4th Cir. 1994).

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Sentence of restitution. *United States v. Hoyle*, 33 F.3d 415 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 949 (1995).

Right to substitution of counsel. *United States v. Mullen*, 32 F.3d 891 (4th Cir. 1994).

Order severing defendants. *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995).

Refusal to sever counts of an indictment. *United States v. Rhodes*, 32 F.3d 867 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1130 (1995).

Denial of motion to continue. *United States v. Moore*, 27 F.3d 969 (4th Cir.) (adding nevertheless that court will look to see if trial court had sufficient evidence to support exercise of its discretion), *cert. denied*, 115 S. Ct. 459 (1994).

Denial of motion to sever. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

Decision of the trial judge concerning possible tainting of the jury by a newspaper discovered in the jury room. *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994).

Denial of motion to compel disclosure of identities of confidential informants. *Id.*

Denial of a hearing on a claim of selective prosecution. *United States v. Marcum*, 16 F.3d 599 (4th Cir.), *cert. denied*, 115 S. Ct. 137 (1994).

Exclusion of certain topics from cross-examination. *United States v. McMillon*, 14 F.3d 948 (4th Cir. 1994).

2. *Clearly Erroneous.*

Review of trial court's decision concerning whether interview notes had been "adopted or approved" by a witness under the Jencks Act, 18 U.S.C. § 3500(b). *United States v. Smith*, 31 F.3d 1294 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1170 (1995).

Review of what the parties said or did that is asserted to be a violation of a plea agreement. *United States v. Martin*, 25 F.3d 211 (4th Cir. 1994).

Determination of the quantity of drugs involved. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994); *United States v. Kimberlin*, 18 F.3d 1156 (4th Cir.), *cert. denied*, 114 S. Ct. 1857 and 114 S. Ct. 2178 and 115 S. Ct. 131 (1994).

Factual finding at sentencing. *United States v. D'Anjou*, 16 F.3d 604 (4th Cir.), *cert. denied*, 114 S. Ct. 2754 (1994).

3. *Wiretap: "Considerable Deference."* In reviewing the legality of a wiretap under 18 U.S.C. § 2518, the Fourth Circuit refused to enunciate a definite standard of review. The court upheld the ruling of the trial judge on the issue and cited cases in other circuits that allow the trial judge "considerable deference" in making such a ruling. *United States v. Smith*, 31 F.3d 1294 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1170 (1995).

4. *De Novo.*

Whether an indictment sufficiently charges an offense but only if the defendant made a timely objection in the trial court. *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994), *petition for cert. filed*, No. 94-7778 (U.S. Jan. 19, 1995).

Issues of collateral estoppel. *United States v. Fiel*, 35 F.3d 997 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1160 (1995).

Jury instructions concerning the essential elements of an offense. *Id.*

Sentencing court's interpretation of state law. *United States v. Neal*, 27 F.3d 90 (4th Cir. 1994).

Questions of jurisdiction. *United States v. Barton*, 26 F.3d 490 (4th Cir. 1994).

Whether an investigatory stop is based on reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968). *United States v. Barton*, 26 F.3d 490 (4th Cir. 1994).

Adequacy of a guilty plea under Rule 11 of the Federal Rules of Criminal Procedure. *United States v. Good*, 25 F.3d 218 (4th Cir. 1994).

Interpretation of the terms of a plea agreement according to the principles of contract law. *United States v. Martin*, 25 F.3d 211 (4th Cir. 1994).

Legal conclusions of the district court in the application of the Speedy Trial Act. *United States v. Sarno*, 24 F.3d 618 (4th Cir. 1994).

Trial court's conclusions of law. *United States v. McManus*, 23 F.3d 878 (4th Cir. 1994).

Validity of a claimed "automobile exception" to the requirement of a warrant (because it is a mixed question of law and fact). *United States v. Gastiaburo*, 16 F.3d 582 (4th Cir.), *cert. denied*, 115 S. Ct. 102 (1994).

5. *Sufficiency of the Evidence.* The sufficiency of the evidence is reviewed *de novo* on appeal. *United States v. Dozie*, 27 F.3d 95 (4th Cir. 1994). "With respect to sufficiency of the evidence, we must sustain the conviction if *any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt. If there is substantial evidence to support the verdict, after viewing all of the evidence and the inferences therefrom in the light most favorable to the Government, then we must affirm. 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. 1994) (citations and internal quotations omitted), *cert. denied*, 115 S. Ct. 954 (1995). Evidence may be direct or circumstantial. *United States v. Smith*, 29 F.3d 914 (4th Cir.), *cert. denied*, 115 S. Ct. 454 (1994). "[C]ircumstantial evidence need not exclude every reasonable hypothesis of innocence. . . . We must not reweigh the evidence." *Evans-Smith v. Taylor*, 19 F.3d 899, 909, n.28 (4th Cir.) (citation omitted), *cert. denied*, 115 S. Ct. 298 (1994). However, appellate review of the sufficiency of the evidence gives "added assurance that guilt should never be found except on a rationally supportable state of near certitude." *Id.* at 906 (quotation omitted). In addition, "[f]avoring the prosecution with all inferences does not mean that we must ignore evidence that is in the record, but which they ignore." *Id.* at 909-10 n.29 (vacating, by writ of *habeas corpus*, state court conviction because evidence was insufficient); *United States v. Ramey*, 24

F.3d 602, 608 (4th Cir. 1994) (holding that appellate court will not review credibility of witnesses nor ignore "reasonable inculpatory inferences"), *petition for cert. filed*, No. 94-5755 (U.S. Aug. 15, 1994); *see also United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994) (explaining single versus multiple conspiracies).

6. *Motion for Judgment of Acquittal*. The court reviews a motion for judgment of acquittal in the light most favorable to the government and considers whether *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Harris*, 31 F.3d 153 (4th Cir. 1994). In *Harris*, the Fourth Circuit reversed a judgment of acquittal of the district court and reinstated the conviction. *See also United States v. Childress*, 26 F.3d 498 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1130 (1995); *United States v. Locklear*, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 278 and 115 S. Ct. 457 (1994); *United States v. Sloley*, 19 F.3d 149, 152 (4th Cir.), *cert. denied*, 114 S. Ct. 2757 (1994).

7. *Brady/Giglio Violations*. An appeals court will review the totality of the circumstances to determine whether there was "a reasonable probability that, had the [*Brady* or *Giglio*] evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Kelly*, 35 F.3d 929, 936 (4th Cir. 1994) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

8. *FRE 404(b)*. "Where error is founded on a violation of Rule 404(b), the test for harmlessness is whether we can 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. This inquiry is not whether, absent the improperly admitted evidence, sufficient evidence existed to convict. Rather than focusing particularly on the *quantum of evidence*, we are asked whether we can say that we believe it highly probable that the error did not affect the judgment." *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994) (citation and internal quotations omitted).

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

1. *The Writ Generally*. The writ of *habeas corpus* is "an extraordinary remedy." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993). "A determination in federal collateral review that a state court conviction by jury verdict was not supported by constitutionally sufficient evidence is one to be

made with special caution and anxiety." *West v. Wright*, 931 F.2d 262, 270 (4th Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2482 (1992). Nevertheless, the writ remains "a bulwark against convictions that violate fundamental fairness." *Evans-Smith v. Taylor*, 19 F.3d 899, 905 (4th Cir.) (quoting *Brecht*, 113 S. Ct. at 1719), *cert. denied*, 115 S. Ct. 298 (1994).

2. *Exhaustion of State Remedies* (§ 2254(b)-(c)). A state prisoner must exhaust available remedies in state court before bringing a federal habeas corpus writ. "Exhaustion" means that an issue was specifically and forthrightly presented and thoroughly argued. Mere "notice" of an issue in a state court proceeding is not enough. The petitioner has the burden of proving that state remedies have been exhausted. *Mallory v. Smith*, 27 F.3d 991 (4th Cir.), *cert. denied*, 115 S. Ct. 644 (1994). The issues that must be presented to a state's highest court before they can be included in a federal habeas corpus petition are a challenge to jury instructions and verdict forms, a challenge to the adequacy of a state's appellate review procedure of the death penalty, a claim of ineffective assistance of counsel, and any federal constitutional claim. *Id.*; *Spencer v. Murray*, 18 F.3d 237 (4th Cir. 1994).

3. *Failure to State a Cognizable Federal Habeas Corpus Claim*. A review of the admissibility of evidence under state law is not a matter for a federal habeas corpus claim. *Spencer v. Murray*, 18 F.3d 237 (4th Cir. 1994).

U. *Habeas Corpus from Federal Conviction* (28 U.S.C. § 2255)

1. *Ineffective Assistance of Counsel Should Not Be Brought on Direct Appeal*. Unless the record conclusively shows that counsel was ineffective, claims of ineffective assistance of counsel should not be brought on direct appeal. Because the attorney accused of ineffectiveness has not had an opportunity to submit an affidavit at the time of direct appeal, the record is usually inadequately developed. Instead, such claims should be brought later during collateral review pursuant to 28 U.S.C. § 2255. *United States v. Hoyle*, 33 F.3d 415 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 949 (1995); *United States v. Marcum*, 16 F.3d 599 (4th Cir.), *cert. denied*, 115 S. Ct. 137 (1994); *United States v. Gastiaburo*, 16 F.3d 582 (4th Cir.), *cert. denied*, 115 S. Ct. 102 (1994); *United States v. Matzkin*, 14 F.3d 1014 (4th Cir. 1994).

2. *Fraday Rule and "Actual Innocence" Exception Concerning § 2255 Motions*. "In order to proceed on a § 2255 motion 'based on trial errors to

which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains.'" *United States v. Maybeck*, 23 F.3d 888, 891 (4th Cir. 1994) (quoting *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). The *Frady* cause and prejudice rule applies to collateral attacks to unappealed guilty pleas. *Id.* (agreeing with Third Circuit). But, if the defendant can show "actual innocence," neither cause nor prejudice need be shown in order to secure relief. *Id.* at 890 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)); *id.* at 892 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

V. *Convictions Overturned by the Fourth Circuit*

United States v. Heaps, 39 F.3d 479 (4th Cir. 1994) (five convictions overturned for failing to prove essential elements of money laundering; three drug convictions allowed to stand).

United States v. Madden, 38 F.3d 747 (4th Cir. 1994) (prejudicial admission into evidence of use of drugs by defendant in bank robbery case).

United States v. Floresca, 38 F.3d 706 (4th Cir. 1994) (error in jury instruction caused constructive amendment of indictment).

United States v. Parker, 30 F.3d 542 (4th Cir.) (conviction for drug distribution near playground overturned, but district court directed to enter judgment for lesser-included offense of drug distribution), *cert. denied*, 115 S. Ct. 605 (1994).

United States v. Harris, 27 F.3d 111 (4th Cir. 1994) (deliberating jury allowed to see evidence that was not in record, and trial court gave insufficient curative instruction).

United States v. Dozie, 27 F.3d 95 (4th Cir. 1994) (mere association between two persons inadequate to prove conspiracy).

United States v. Whittington, 26 F.3d 456 (4th Cir. 1994) (no evidence in record to sustain one of several convictions).

United States v. Ince, 21 F.3d 576 (4th Cir. 1994) (erroneous admission of defendant's confession that was otherwise inadmissible hearsay).

Evans-Smith v. Taylor, 19 F.3d 899 (4th Cir.) (in *habeas corpus* collateral review of state court conviction, evidence found insufficient), *cert. denied*, 115 S. Ct. 298 (1994).

United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994) (defendant charged with 136 counts of writing false drug prescriptions; 80 counts overturned for insufficiency of evidence; 56 counts overturned for erroneous admission of character evidence).

W. Appeal May Be Affirmed on Any Legal Basis Found in the Record

An appeals court may affirm a ruling of a district court "on any legal ground for which there is a sufficient evidentiary foundation," regardless of the ground cited by a district court as the basis for its ruling. *United States v. Parker*, 30 F.3d 542, 547 n.3 (4th Cir.), *cert. denied*, 115 S. Ct. 605 (1994); *see also United States v. Hammad*, 902 F.2d 1062, 1064 (2d Cir.) (citation omitted) ("any basis for which there is a record sufficient to permit conclusions of law"), *cert. denied*, 498 U.S. 871 (1990).

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