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For The Criminal Practitioner Review Of Fourth Circuit Opinions In Criminal Cases Decided In Calendar Year 1992

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FOR THE CRIMINAL PRACTITIONER

REVIEW OF FOURTH CIRCUIT OPINIONS IN CRIMINAL CASES DECIDED IN CALENDAR YEAR 1992

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This review of significant Fourth Circuit criminal opinions is the second in a series[1] and covers calendar year 1992. Both published and unpublished opinions are reviewed; however, because unpublished opinions are not binding precedent, it is the published authority cited in unpublished slip opinions which is reviewed and discussed here. Only when recently published opinions are read in light of foundational propositions and principles repeatedly cited in unpublished opinions—which represent a majority of the Fourth Circuit's criminal cases—can it be predicted with any confidence how the Fourth Circuit will decide a particular issue.

I. PUBLISHED OPINIONS

A. DRUG CASES

1. Continuing Criminal Enterprise (CCE). In *United States v. McHan*, 966 F.2d 134 (4th Cir. 1992), the court upheld a CCE prosecution which relied upon a prior drug conspiracy conviction as one of the required predicate acts, citing *United States v. Felix*, 112 S. Ct. 1377 (1992); *Garrett v. United States*, 471 U.S. 773 (1985); and *United States v. Arnoldt*, 947 F.2d 1120 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992). The court found unpersuasive the defendant's argument that reliance upon the prior drug conspiracy conviction to which he had pled guilty constituted double jeopardy. For further discussion of CCE prosecutions, see *infra* paragraph II.A.

2. Drug Conspiracies/Sufficiency of Evidence. For further discussion of drug conspiracies, see *infra paragraph* II.A.2. In *United States v. Brooks*, 957 F.2d 1138 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992), the drug conspiracy conviction was affirmed. Among the key points made en route to affirmance were the following:

a. Slight Evidence. "Once it has been shown that a conspiracy exists, the evidence need only establish a slight connection between the defendant and the conspiracy to support conviction." *Brooks*, 957 F.2d at 1147 (citing *United States v. Seni*, 662 F.2d 277, 285 n.7 (4th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982)).

b. No Knowledge/Minor Role. A defendant need not have knowledge of his co-conspirators, or of the details of the conspiracy, and may be convicted despite having played only a minor role in the overall conspiracy. *Brooks*, 957 F.2d at 1147 (citations omitted). On this point, see also *Blumenthal v. United States*, 332 U.S. 539, 556-57 (1947) (co-conspirators need not know one another).

c. Quantity of Drugs. The quantity of drugs found by the district court to be involved in a drug conspiracy need only be supported

1. The first review, published in 49 WASH. & LEE L. REV. 727 (1992), covered the nine month period ending March 31, 1992. Forthcoming reviews will cover each calendar year, thus eliminating duplication of coverage in the future.

by a preponderance of the evidence, and will be affirmed on appeal unless found to be "clearly erroneous." *Brooks*, 957 F.2d at 1148 (citations omitted). For further discussion of the quantity of drugs, the standard of review on appeal, and related issues, see *infra* paragraph II.A.3.

d. Seller of Drugs. A seller of drugs in a drug conspiracy is not a "minor participant" as defined by Sentencing Guidelines Section 3B1.2(b). *Brooks*, 957 F.2d at 1149 (citations omitted).

e. Transactions with Government Agents. Drug defendants are responsible for sentencing purposes for quantities of drugs to be sold to, or purchased from, undercover Government agents. *Brooks*, 957 F.2d at 1151-52 (citations omitted).

f. Possession of Firearm by Co-Defendant. It is appropriate for a defendant to have his sentence enhanced per Sentencing Guidelines Section 2D1.1(b)(1) for the possession of a firearm *by a co-conspirator*. *Brooks*, 957 F.2d at 1148-49 (citations omitted) (emphasis added). *See generally United States v. Rusher*, 966 F.2d 868 (4th Cir.), *cert. denied*, 113 S. Ct. 351 (1992); *United States v. Morgan*, 942 F.2d 243 (4th Cir. 1991); *United States v. White*, 875 F.2d 427 (4th Cir. 1989).

3. More Than Bad Friends. In *United States v. Bell*, 954 F.2d 232 (4th Cir. 1992), the Fourth Circuit held that the evidence showed little more than "association between two persons, even if one has a fixed intent known to the other to commit an unlawful act." *Id.* at 236 (quoting *United States v. Giunta*, 925 F.2d 758, 764 (4th Cir. 1991)). In reversing Bell's conviction, the court concluded that his "most heinous crime [was] choosing the wrong friends. More than mere association with bad people who are committing crimes is required for a conspiracy conviction." *Id.* at 237.

4. Purity of Drugs/Mandatory Minimums. In *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992), the court held that in determining whether the five year mandatory minimum sentence applies, the amount of pure methamphetamine is found by multiplying the total quantity times its purity. Thus, per the provisions of 21 U.S.C. § 841(b)(1)(B)(viii), if the quotient is ten grams or more, the mandatory minimum does apply. *See also United States v. Stoner*, 927 F.2d 45 (1st Cir.), *cert. denied*, 112 S. Ct. 129 (1991).

5. Maintaining Place for Drug Manufacture or Distribution. In *United States v. Midgett*, 972 F.2d 64 (4th Cir. 1992), the court held that in a prosecution for maintaining a place for drug manufacture or distribution in violation of 21 U.S.C. § 856(a)(1), the drug quantity table, U.S.S.G. § 2D1.1(c), is *not* used to enhance a defendant's offense level.

6. Relevant Conduct. In *United States v. Williams*, 977 F.2d 866 (4th Cir. 1992), the court applied the "relevant conduct" provisions of U.S.S.G. § 1B1.3(a)(2) (defendant's possession and distribution of drugs not in count

of conviction included to determine base offense level if part of same course of conduct, or common scheme or plan) and held:

a. Standard on Appeal. Determination that additional drugs should be included as "relevant conduct" is factual in nature and is reviewed on appeal under a "clearly erroneous" standard. *See United States v. Hicks*, 948 F.2d 877, 881 (4th Cir. 1991); *United States v. Williams*, 880 F.2d 804, 806 (4th Cir. 1989); *United States v. White*, 875 F.2d 427, 431 (4th Cir. 1989).

b. Witness Credibility. "[T]he district court's findings as to relevant conduct [are reviewed] with due deference to the trial court's opportunity to assess [witness] credibility." *Williams*, 977 F.2d at 870.

c. Pretrial Disclosure of Government's Contentions. The Government is not required to give pretrial disclosure of the quantity of drugs it contends should be attributed to a particular defendant as "relevant conduct." The court cited *United States v. DeFusco*, 949 F.2d 114, 119 (4th Cir.), *cert. denied*, 112 S. Ct. 1703 (1991) (defendant need not be informed of Sentencing Guidelines range before Rule 11 proceedings); *and United States v. Henry*, 893 F.2d 46 (3d Cir. 1990); and *United States v. Strickland*, 725 F. Supp. 878 (E.D.N.C. 1989).

7. Possessing Marijuana Plants. A significant change in the law came in *United States v. Hash*, 956 F.2d 63 (4th Cir. 1992), which struck down Sentencing Guidelines Section 2D1.1(c)n (as applied to a defendant charged with *possessing less than fifty marijuana plants*). The court held that the Sentencing Guidelines were inconsistent with the applicable statute, 21 U.S.C. 841(b)(1)(D), thus joining the Eighth Circuit in requiring that the *actual weight* of the marijuana plants be used in sentencing, rather than the greater *projected weight* (once the marijuana plants grow to maturity). However, in *United States v. Underwood*, 970 F.2d 1336 (4th Cir. 1992), the court upheld the Sentencing Guidelines calculation (one plant equals one kilogram of marijuana) where a larger number of plants are involved, citing recent cases in six other circuits which have reached the same conclusion.

8. Acceptance of Responsibility/Continued Drug Use. In *United States v. Underwood*, 970 F.2d 1336 (4th Cir. 1992), the court upheld a finding of no "acceptance of responsibility" due to the defendant's continued use of marijuana after a plea agreement was entered. *See* U.S.S.G. § 3E1.1, cmt. n.1(a) (in determining whether defendant has accepted responsibility, consideration is to be given to whether defendant has terminated or withdrawn from criminal conduct and associations).

9. Drugs and Firearms Issues. For drugs and firearms issues in published opinions during calendar year 1992, see *infra* paragraphs I.C.2 (Use of Firearm During and in Relation to Drug Trafficking) and I.C.3 (Firearm

Enhancement/Sentencing Guidelines). For drugs and firearms issues arising in unpublished opinions during the review period, see *infra* paragraphs II.A.7 (Use of Firearm During and in Relation to Drug Trafficking) and II.A.8 (Firearm Enhancement/Sentencing Guidelines).

10. Enhancement for Prior Drug Conviction. In *United States v. Campbell*, 980 F.2d 245 (4th Cir. 1992), the court held that a probationary sentence subject to expunction under what is called a "deferral statute" is a prior drug conviction for purposes of sentence enhancement under 21 U.S.C. § 841. The court in *Campbell* also declined to hold that either a clerical error (citing the wrong subsection of the statute in the information which must be filed per 21 U.S.C. § 851(a)(1) (1988)), or the court's failure to engage in the colloquy required by 21 U.S.C. § 851(b), invalidated the enhanced sentence. *Id.* at 252.

B. Sentencing Guidelines Issues

1. Amount of Loss. For further discussion of amount of loss for Sentencing Guidelines purposes, see *infra* paragraph II.B.2.

a. Amount of Loss/Value of Collateral/Payments. In *United States v. Baum*, 974 F.2d 496 (4th Cir. 1992), the court held the amount of loss caused by a defendant's false representations in obtaining a loan is "the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan"—rejecting the Government's position that the full amount of the fraudulently obtained loan should be included. However, if the repayment is really "akin to restitution," it should be included in the relevant amount of loss for sentencing purposes. *United States v. Wilson*, 980 F.2d 259 (4th Cir. 1992) (amount paid by third party guarantor should be included in amount of loss, but payments *before* false statement should be excluded unless related to criminal conduct); *United States v. Rothberg*, 954 F.2d 217 (4th Cir. 1992) (settlement payment made after loss was discovered should be included in amount of loss for sentencing purposes); *see also United States v. Saunders*, 957 F.2d 1488, 1494 (8th Cir. 1992) (restitution paid by defendant's girlfriend included in amount of loss), *cert. denied*, 113 S. Ct. 256, *and cert. denied*, 113 S. Ct. 991 (1993).

b. Lost Profits. In *United States v. Bailey*, 975 F.2d 1028 (4th Cir. 1992), the court rejected the inclusion of profits lost by defrauded investors in computing the amount of loss, holding that only the lost principal is counted.

c. Unconvicted Offenses. Losses attributable to unconvicted offenses are counted as "relevant conduct" in computing the amount of loss so long as they are "part of the same course of conduct or

common scheme or plan as the offense of conviction. U.S.S.G. § 1B1.3(a)(2). *See United States v. Williams*, 880 F.2d 804, 806 (4th Cir. 1989); *United States v. Fox*, 889 F.2d 357, 363 (1st Cir. 1989).

2. Role in the Offense(Organizer/Leader/Manager/Supervisor). In *United States v. Kincaid*, 964 F.2d 325 (4th Cir. 1992), the court upheld a two-level increase in offense level under § 3B1.1(c), holding that direction of the activity of a single co-conspirator was sufficient to support the enhancement. Role in the offense enhancements are reviewed on appeal under a clearly erroneous standard. *See* United States v. Campbell, 935 F.2d 39, 46 (4th Cir.), *cert. denied*, 112 S. Ct. 348 (1991); *United States v. Sheffer*, 896 F.2d 842, 846 (4th Cir.), *cert. denied*, 111 S. Ct. 432 (1990); *United States v. White*, 875 F.2d 427, 431 (4th Cir. 1989). For further discussion of role in the offense enhancements, see *infra* paragraph II.B.4.

Similarly, in *United States v. Harriott*, 976 F.2d 198, 200 (4th Cir. 1992), the court reversed a finding by the district court that the defendant was not an organizer or leader where he drove a single "mule" carrying crack cocaine from New York to Virginia and generally directed her illegal activity.

3. Abuse of Position of Trust. *See United States v. Helton*, 953 F.2d 867, 869 (4th Cir. 1992) (abuse of trust enhancement *not* appropriate where defendant's duties are "functionally equivalent to that of 'an ordinary bank teller'"). For further discussion of this enhancement, see *infra* paragraph II.B.5.

4. Obstruction of Justice. In *United States v. Brooks*, 957 F.2d 1138, 1149 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992), the court reversed imposition of a two-level enhancement for "obstruction of justice" per § 3C1.1 based solely on statements to a third party by the defendant that he would kill a witness or his family if the witness "rolled over" on him. The court reasoned that such statements would only support an obstruction of justice enhancement if made in the presence of the threatened party or "in circumstances in which there is some likelihood that the co-defendant, witness, or juror will learn of the threat."

In *United States v. Ashers*, 968 F.2d 411 (4th Cir.), *cert. denied*, 113 S. Ct. 673 (1992), the court approved an obstruction of justice enhancement for a defendant who intentionally disguised his voice when giving a voice exemplar to a *defense* expert. *Ashers* also held that where two grounds are cited by a district court for an obstruction enhancement, one proper (disguising voice) and one improper (perjury, improper for the time being under *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), *cert. granted*, 112 S. Ct. 2272 (1992)), the obstruction enhancement can stand. *Ashers* also included a lengthy list of conduct that warrants an obstruction enhancement, namely: lying to a probation officer about the amount of attorney's fees paid; attempting to destroy evidence; giving a false name and age in bond proceedings; refusing to provide financial information to a probation officer; attempting to bribe a witness; refusing to provide

handwriting exemplars; attempting to postpone trial by misrepresenting a co-defendant's health and firing attorney; requesting a co-defendant to withhold information from law enforcement personnel; and failure to appear at sentencing.

In *United States v. Melton*, 970 F.2d 1328 (4th Cir. 1992), the court upheld an obstruction enhancement for an attempted escape from federal custody. The court in *Melton* also upheld a denial of a reduction for acceptance of responsibility, citing U.S.S.G. § 3E1.1, Application Note 4. (enhancement for obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct").

For further discussion of obstruction of justice, see *infra* paragraph II.B.6.

5. Acceptance of Responsibility. Another Sentencing Guidelines issue frequently litigated on appeal is whether a reduction for acceptance of responsibility (per § 3E1.1) should have been granted. Whether a particular defendant has accepted responsibility is primarily a factual question reviewable on appeal under a "clearly erroneous" standard. *United States v. Cusack*, 901 F.2d 29, 31 (4th Cir. 1990); *United States v. Daughtrey*, 874 F.2d 213, 217 (4th Cir. 1989). For further discussion of acceptance of responsibility, see *infra* paragraph II.B.7.

a. Unlikely if Obstruction of Justice. In *United States v. Melton*, 970 F.2d 1328, 1335-36 (4th Cir. 1992), the court upheld denial of a reduction for acceptance of responsibility to a defendant who had received an obstruction of justice enhancement for attempted escape, citing U.S.S.G. § 3E1.1, Application Note 4 (enhancement for obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct").

b. Requiring Cooperation. In *United States v. Frazier*, 971 F.2d 1076, 1087 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993), the court upheld conditioning the acceptance of responsibility reduction on a defendant's waiver of his Fifth Amendment privilege and full cooperation with the Government's ongoing investigation and prosecution. *Frazier* includes a lengthy discussion of the cases which have reversed any *penalty* for the exercise of Fifth Amendment rights, contrasting this well-established principle with the line of authority upholding lesser sentences pursuant to plea bargains for defendants who plead guilty and/or cooperate. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212, 218-24 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31 (1973); *North Carolina v. Alford*, 397 U.S. 790 (1970); *Brady v. United States*, 397 U.S. 742, 751 (1970); *United States v. Mourning*, 914 F.2d 699 (5th Cir. 1990); *United States v. Trujillo*, 906 F.2d 1456 (10th Cir.), *cert. denied*, 111 S. Ct. 396 (1990); *United States v. Henry*, 883 F.2d 1010 (11th Cir. 1989).

c. Incomplete Acceptance. In *United States v. Harriott*, 976 F.2d 198, 202 (4th Cir. 1992), the Fourth Circuit reversed the district

court's finding of acceptance of responsibility where the defendant did little more after a jury trial than "agreed that he had been convicted."

6. Career Offenders/Criminal History. In *United States v. Sanders*, 954 F.2d 227, 231-32 (4th Cir. 1992), the court held that prior convictions for two separate violent crimes (armed robbery and murder) made the defendant a career offender, rejecting the defendant's argument that the convictions should be merged because both had a single cause, that is, the defendant's drug addiction when the crimes were committed.

In *United States v. Jones*, 977 F.2d 105 (4th Cir. 1992), after reversing the district court's finding that the defendant *was* a career offender and remanding to consider the defendant's challenge of a prior conviction in *United States v. Jones*, 907 F.2d 456 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 683 (1991) (*Jones I*), the court reversed the district court's finding on remand that the defendant was *not* a career offender. (As humorist Dave Barry might say, "I am not kidding.") The court in *Jones II* set forth a rather elaborate process for questioning the constitutionality of prior convictions, pointing out as it had earlier in *United States v. Davenport*, 884 F.2d 121, 124 (4th Cir. 1989), that the burden is on a defendant to show the invalidity of a prior conviction.

In *United States v. Wilson*, 1992 U.S. App. LEXIS 30,784 (4th Cir. Nov. 23, 1992), the court held that a conviction for writing a check on a closed account counted as a conviction in determining Criminal History Category. The court distinguished writing a check on a closed or nonexistent account from writing a check for which there are insufficient funds, expressly excluded from criminal history considerations by U.S.S.G. § 4A1.2(c)(1). *See* U.S.S.G. § 4A1.2(c)(1), cmt. n.13 (checks passed using false name or on non-existent account do count in determining defendant's Criminal History Category).

For further discussion of career offender status, see *infra* paragraph II.B.8.

7. Downward Departures. For further discussion of downward departures, see *infra* paragraph II.B.9.

a. Due to Family Responsibilities. In *United States v. Bell*, 974 F.2d 537 (4th Cir. 1992), the court reversed a downward departure in a child pornography case because of the effect incarceration would have on the defendant's family (citing U.S.S.G. § 5H1.6 "[F]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines"). *See also United States v. Brand*, 907 F.2d 31, 33 (4th Cir.), *cert. denied*, 111 S. Ct. 585 (1990) (unextraordinary family circumstances do not justify downward departure); *United States v. Goff*, 907 F.2d 1441, 1446 (4th Cir. 1990); *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989), *cert. denied*, 496 U.S. 927 (1990). In a touch of irony apparently missed by the district court, Bell's conviction was for the sexual exploitation of children

in violation of 18 U.S.C. § 2251; the case initiated on a complaint by a seven-year old girl and the subject offense involved, *inter alia*, the surreptitious filming in the nude of the defendant's own daughter and her friends, then ages seven through thirteen.

b. Due to Disparate Sentences of Co-Conspirators/Co-Defendants. In *United States v. Ellis*, 975 F.2d 1061, 1066 (4th Cir. 1992), the court held that disparate sentences of co-conspirators caused by prosecutorial charging decisions and plea bargains are not a proper basis for a downward departure. The Fourth Circuit had held previously that disparate sentences of co-defendants were not a proper basis for an *upward* departure. *See United States v. McKenley*, 895 F.2d 184, 187-88 (4th Cir. 1990). In *Ellis*, the Fourth Circuit applied the same logic to downward departures, citing *United States v. Monroe*, 943 F.2d 1007, 1017 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1585 (1992); *United States v. Wogan*, 938 F.2d 1446, 1448-49 (1st Cir.), *cert. denied*, 112 S. Ct. 441 (1991); and *United States v. Joyner*, 924 F.2d 454, 460-61 (2d Cir. 1991). Likewise, in *United States v. Hall*, 977 F.2d 861, 864 (4th Cir. 1992), the court held that disparate *state* sentences of co-conspirators not prosecuted federally are not a proper basis for a downward departure.

c. Criminal History Category Overstates Seriousness of Criminal History. In *United States v. Hall*, 977 F.2d 861, 866 (4th Cir. 1992), the court held that while a Criminal History Category which overstates the seriousness of a defendant's criminal history may be a proper basis for a downward departure, citing U.S.S.G. § 4A1.3 and *United States v. Summers*, 893 F.2d 63, 67 (4th Cir. 1990), unless the district court misunderstands its own discretion its decision not to so depart is not appealable. *See United States v. Bayerle*, 898 F.2d 28, 30-31 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990).

8. Upward Departures. For further discussion of upward departures, see *infra* paragraph II.B.10.

a. For Related But Unconvicted Murder. In *United States v. Melton*, 970 F.2d 1328 (4th Cir. 1992), the court upheld an upward departure in a drug case for a related but unconvicted murder. The court held that the murder need only be proven by a preponderance of the evidence, citing *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990), and found the upward departure consistent with the test for upward departures set forth in *United States v. Hummer*, 916 F.2d 186, 192 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1608 (1991); also see *United States v. Rivalta*, 892 F.2d 223 (2d Cir. 1989), *cert. denied*, 112 S. Ct. 215 (1991).

b. For Old, Uncounted Convictions. In *United States v. Rusher*, 966 F.2d 868, 881-82 (4th Cir.), *cert. denied*, 113 S. Ct. 351 (1992), the court held that convictions too old to consider in computing a

defendant's criminal history category are a proper basis for an upward departure, whether or not the old convictions provide evidence of "similar misconduct"—an issue which had been specifically reserved for future consideration by the Supreme Court in *Williams v. United States*, 112 S. Ct. 1112 (1992). The Fourth Circuit joined the First and the Tenth Circuits in so holding. *See United States v. Aymelek*, 926 F.2d 64, 72-73 (1st Cir. 1991); *United States v. Russell*, 905 F.2d 1439, 1444 (10th Cir. 1990). *Rusher* includes a detailed description of what a district court must determine to justify an upward departure and an equally detailed articulation of the standard of appellate review of each step of the required process.

c. To Career Offenders. In *United States v. Cash*, No. 91-5869, 1992 WL 365342 (4th Cir. Dec. 14, 1992), the court upheld an upward departure to career offender status where the defendant's criminal history category underrepresented his past criminal conduct. In *Jones* the defendant would have been a career offender but for one of his prior convictions being found constitutionally invalid.

9. Aggravated Assault with Weapon. In *United States v. Williams*, 954 F.2d 204 (4th Cir. 1992), the court reversed and remanded for resentencing the district court's refusal to impose a four-level upward adjustment, per § 2A2.2(b)(2)(B), for use of a dangerous weapon in an aggravated assault. The district court based its refusal to enhance on the erroneous assumption that further increasing the offense level for aggravated assault (for the use of a gun) constituted impermissible "double counting." To the contrary, reasoned the Fourth Circuit, if the Sentencing Guidelines had not anticipated double counting in aggravated assaults with a gun, the further firearm enhancement would have been specifically excluded.

10. Offenses Committed While on Release. In *United States v. Kincaid*, 964 F.2d 325 (4th Cir. 1992), the court upheld an enhancement of the defendant's sentence pursuant to 18 U.S.C. § 3147 and U.S.S.G. § 2J1.7 for an offense committed while on pretrial release, rejecting the defendant's claim that the enhancement violated either due process or the guarantee against double jeopardy.

11. Fines. In *United States v. Salama*, 974 F.2d 520 (4th Cir. 1992), the court upheld findings that the defendant, an Egyptian citizen, had raised overseas funds to start a criminal (counterfeit) enterprise, and that funds or assets might be forthcoming from an unrelated foreign investment, as sufficient under 18 U.S.C. § 3572(a) to support a 25,000 dollar fine—even though the district court said just before imposing it, "I have doubts that any fine is collectable . . . ." *Salama*, 974 F.2d at 523.

In *United States v. Gresham*, 964 F.2d 1426 (4th Cir. 1992), the court upheld a fine of 80,200 dollars based, in part, on the defendant's equity in a home owned jointly with his wife, rejecting the defendant's argument that because the interest in a tenancy by the entirety was not severable it should

not be considered. The court also rejected defendant's argument that the fine violated 18 U.S.C. § 3572(d) in that it was not due on a date certain within five years. To the contrary, reasoned the court, since no installment payments were set up the fine is understood to be payable immediately by virtue of the express provisions of § 3572(d).

12. Restitution. In *United States v. Mullins*, 971 F.2d 1138 (4th Cir. 1992), the court held that "consequential damages" caused by the defendant's criminal conduct (here, attorney's and investigator's fees) cannot be ordered in restitution under the Victim Witness Protection Act, unlike the costs of repair of damaged real property which are recoverable. The court in *Mullins* remanded for the findings of fact required by 18 U.S.C. § 3664(a) and *United States v. Bruchey*, 810 F.2d 456, 458 (4th Cir. 1987).

In *United States v. Bailey*, 975 F.2d 1028 (4th Cir. 1992), the court held that an order of restitution is improper unless a defendant can possibly comply. As *Bailey* pointed out, this "does not preclude a sentencing judge from ordering an indigent defendant to pay restitution. Indigence is not necessarily a permanent condition. However, the court must make a factual determination that the defendant can feasibly comply with the order without undue hardship to himself or his dependents." *Id.* at 1032 (citations omitted).

For further discussion of restitution, see *infra* paragraph II.B.11.

13. Government's Right to Put on Evidence. In *United States v. Kincaid*, 964 F.2d 325 (4th Cir. 1992), the court held denial of the Government's motion for a continuance (to respond to a defendant's surprise, untimely objection to material facts in his presentence report) was an abuse of the district court's discretion, reversing and remanding for further proceedings. *See* FED. R. CRIM. P. 32(a)(1); U.S.S.G. § 6A1.3, cmt.

14. Supervised Release. In *United States v. Parriett*, 974 F.2d 523 (4th Cir. 1992), the court held that upon revoking a previously imposed period of supervised release, a district court has no authority to impose another term of supervised release. *See United States v. Cooper*, 962 F.2d 339 (4th Cir. 1992); *United States v. Holmes*, 954 F.2d 270 (5th Cir. 1992); *United States v. Behnezhad*, 907 F.2d 896 (9th Cir. 1990).

In *United States v. Copley*, 978 F.2d 829 (4th Cir. 1992), the Fourth Circuit held that transcription of the court's oral findings at the conclusion of an evidentiary hearing after which the defendant's supervised release was revoked was a sufficient "written statement" for due process purposes.

C. FIREARMS OFFENSES

1. Possession of Firearm by Felon.

a. Civil Rights Restored. In *United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992), the court reversed the defendant's conviction for being a felon in possession of a firearm, following *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991), in holding that a defendant whose civil rights have been restored under state law cannot sub-

sequently be prosecuted federally under 18 U.S.C. § 922(g). *See United States v. McLean*, 904 F.2d 216 (4th Cir.), *cert. denied*, 111 S. Ct. 203 (1990).

b. Not "Crime of Violence". In *United States v. Samuels*, 970 F.2d 1312 (4th Cir. 1992), the court again held that mere possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)—"absent aggravating circumstances charged in the indictment"—is not a "crime of violence" for career offender purposes. *Id.* at 1315; *see United States v. Johnson*, 953 F.2d 110, 113 (4th Cir. 1991).

c. Constructive Possession. In *United States v. Blue*, 957 F.2d 106 (4th Cir. 1992), the court reversed a felon in possession of a firearm conviction due to insufficient evidence of constructive possession. The facts essentially were that a police officer observed the defendant's shoulder dip as he approached the vehicle in which the defendant was a front seat passenger. When the vehicle was searched, the firearm was found under the defendant's seat. After carefully reviewing the law of constructive possession, the court reversed, explaining its holding thus: "[w]e emphasize that the facts of this case fall outside, but just barely, the realm of the quantum of evidence necessary to support a finding of constructive possession." *Id.* at 108.

2. Use of Firearm During and in Relation to Drug Trafficking.

a. Short-Barreled Shotgun. In *United States v. Hall*, 972 F.2d 67 (4th Cir. 1992), the court held that possession of a short-barreled shotgun during and in relation to a drug trafficking crime carries a ten-year mandatory sentence, rejecting defendant's argument that the statutory definition of "short-barreled shotgun" in 18 U.S.C. § 921(a)(6) was too ambiguous to support the additional penalty. The court ruled that any shotgun with a barrel less than eighteen inches long *or* with an overall length of less than twenty-six inches falls within the prohibited statutory category to which the additional penalty applies.

b. Guns at Home of Co-Conspirator. In *United States v. Peay*, 972 F.2d 71 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3479 (U.S. Jan. 11, 1993), the court upheld admission into evidence (and § 924(c) conviction based upon) guns seized from the home of a co-conspirator. *See United States v. Crespo de Llano*, 838 F.2d 1006, 1018 (9th Cir. 1987); *United States v. Zarintash*, 736 F.2d 66, 72 (3d Cir. 1984); *United States v. Mourad*, 729 F.2d 195, 201 (2d Cir. 1984).

c. Failure to Allege Scienter. In *United States v. Sutton*, 961 F.2d 476 (4th Cir.), *cert. denied*, 113 S. Ct. 171 (1992), the court found sufficient an indictment which failed to allege that a § 924(c) violation was "knowingly" committed. In part because of the

standard of review when first argued on appeal set forth in *Finn v. United States*, 256 F.2d 304, 307 (4th Cir. 1958) ("[i]ndictments . . . are construed more liberally . . . and every indictment is then indulged in support of the sufficiency" when first challenged on appeal), the court held the failure to allege scienter insufficient to require reversal. This limited scienter which must ordinarily be proven (that is, a "knowing" violation) is distinguished from knowledge that possessing the firearm is against the law, which need not be proven. On this latter point, see *United States v. Santiesteban*, 825 F.2d 779, 782 (4th Cir. 1987) (stating that ignorance of law is not defense in prosecution under 18 U.S.C. § 922(g)); *United States v. Etheridge*, 932 F.2d 318, 320-21 (4th Cir.), *cert. denied*, 112 S. Ct. 323 (1991) (holding that no defense in § 922(g) prosecution that state judge had told defendant he could possess firearms for hunting purposes).

3. Firearm Enhancement/Sentencing Guidelines. In addition to prosecution under 18 U.S.C. § 924(c) for the use of firearms during or in relation to drug trafficking crimes, the Sentencing Guidelines provide for the enhancement of drug sentences where weapons are present "unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1, cmt. n.3. In *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992), the court upheld such an enhancement in spite of the fact that a co-defendant admitted owning the weapons. *See United States v. Brooks*, 957 F.2d 1138, 1148-49 (4th Cir. 1992); *United States v. Morgan*, 942 F.2d 243 (4th Cir. 1991); *United States v. White*, 875 F.2d 427, 433 (4th Cir. 1989).

4. Armed Career Criminals.

a. Offenses Consolidated for Sentencing. In *United States v. Samuels*, 970 F.2d 1312 (4th Cir. 1992), the court held that offenses consolidated for sentencing are nevertheless treated as separate convictions for Armed Career Criminal Act (18 U.S.C. § 924(e)) purposes. *See United States v. Mason*, 954 F.2d 219 (4th Cir.), *cert. denied*, 112 S. Ct. 1979 (1992); *United States v. Bolton*, 905 F.2d 319, 323 (10th Cir. 1990); *United States v. Schieman*, 894 F.2d 909, 912 (7th Cir. 1990); *United States v. Wallace*, 889 F.2d 580, 584 (5th Cir. 1989).

b. Breaking and Entering as "Crime of Violence". In *United States v. Bowden*, 975 F.2d 1080 (4th Cir. 1992), the court applied *Taylor v. United States*, 495 U.S. 575 (1990) ("[A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he has been convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime"), to the North Carolina statute prohibiting breaking *or* entering. The court in *Bowden* held that convictions under the

North Carolina statute (N.C. Gen. Stat. § 14-54) do qualify as generic burglary convictions under *Taylor* and therefore properly support an Armed Career Criminal enhancement. The First Circuit in *United States v. Anderson*, 921 F.2d 335, 340 (1st Cir. 1990) came to the same conclusion with respect to convictions under the North Carolina statute.

c. Maximum Penalty: Life. In *United States v. Blue*, 957 F.2d 106, 107 (4th Cir. 1992), the court implicitly acknowledged what is not expressly provided in 18 U.S.C. § 924(e), that the unstated statutory *maximum* penalty for a violation of the Armed Career Criminal Act is life imprisonment.

5. Title 26 Charges. In *United States v. Aiken*, 974 F.2d 446 (4th Cir. 1992), the court upheld a prosecution for possession of an unregistered short-barreled shotgun in violation of 26 U.S.C. § 5861(d), rejecting the defendant's argument that to so use a taxing statute was unconstitutional in that the Government would *not* have allowed him to register the short-barreled shotgun and pay a tax.

In *United States v. Daniels*, 973 F.2d 272 (4th Cir. 1992), the court reversed the defendant's conviction for transferring a firearm in violation of 26 U.S.C. §§ 5812(a) and 5861(e) due to the insufficiency of the charging language in the indictment. The Fourth Circuit found fatal the failure to charge that the sawed-off shotgun had been made "in violation of the provisions of this chapter," even though the specific section in the chapter which was violated was cited.

In *United States v. Council*, 973 F.2d 251, 254 (4th Cir. 1992), the court held that the Government need not prove scienter in a prosecution for possessing unregistered firearms and explosives in violation of 26 U.S.C. § 5861(d) and 5871, that is, the Government need not prove that the defendant knew the firearms and explosives were unregistered. The court cited *United States v. Freed*, 401 U.S. 601 (1971).

D. Search and Seizure

1. Pretextual Stops/Expectation of Privacy in Vehicle and Wife's Purse. In *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992), the court held that a traffic stop for seat belt and potential license tag violations followed by a consent to search and discovery of drugs was not "pretextual." The court in *Rusher* also held that only the owner (*i.e.*, none of the passengers) had a reasonable expectation of privacy in regard to items found in the vehicle, citing *United States v. Manbeck*, 744 F.2d 360, 374-75 (4th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985), and that a man does not have a reasonable expectation of privacy in his wife's purse.

2. Suppression Hearings: Extent of District Court's De Novo Review. In *United States v. George*, 971 F.2d 1113 (4th Cir. 1992), the court held that a defendant is entitled to full *de novo* review of the magistrate's findings and recommendation regarding any suppression motion, whether

or not issues or evidence presented to the district court were raised before the magistrate. *See, e.g.*, 28 U.S.C. § 636(b)(1) (1988); *Wimmer v. Cook*, 774 F.2d 68, 75 (4th Cir. 1985); *Camby v. Davis*, 718 F.2d 198, 199-200 (4th Cir. 1983). However, if objections are not filed seeking the required *de novo* review of the magistrate's findings, further appellate review is waived. *See United States v. Schronce*, 727 F.2d 91, 94 (4th Cir.), *cert. denied*, 467 U.S. 1208 (1984).

3. Expectation of Privacy in Vehicle Exterior and Interior/Inevitable Discovery/Vehicle Inventory Searches/Good Faith Exception. Once recognizing the defendant's right to *de novo* and appellate review, however, the Fourth Circuit proceeded in *United States v. George*, 971 F.2d 1113 (4th Cir. 1992), to reverse the district court's suppression of certain evidence, holding: (a) that there is no reasonable expectation of privacy in tires or other exterior parts of vehicles, citing *California v. Greenwood*, 486 U.S. 35, 39 (1988); *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979); and *Katz v. United States*, 389 U.S. 347, 360-61 (1967); (b) that there is no reasonable expectation of privacy in the interior of a vehicle visible from the exterior, citing *New York v. Class*, 475 U.S. 106, 114 (1986); and *Texas v. Brown*, 460 U.S. 730, 740 (1983) (plurality opinion); (c) that the "inevitable discovery" of hack saw blades in the tool box in the defendant's trunk may justify its admission into evidence—if the district court finds on remand that it would, in fact, have been found in a standard vehicle inventory search, citing in regard to "inevitable discovery," *Nix v. Williams*, 467 U.S. 431, 439 (1984); *United States v. Thomas*, 955 F.2d 207, 210-11 (4th Cir. 1992); and *United States v. Whitehorn*, 813 F.2d 646, 650 (4th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988), and citing in regard to inventory searches of vehicles and containers within them, *California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991); *Florida v. Wells*, 495 U.S. 1, 4-5 (1990); and *Colorado v. Bertine*, 479 U.S. 367, 374 (1987); and (d) that boots found in a separate search of defendant's residence pursuant to a defective search warrant should be admitted into evidence under the "good faith exception" of *United States v. Leon*, 468 U.S. 897 (1984). In regard to the good faith exception generally, see *Illinois v. Krull*, 480 U.S. 340, 355 (1987).

4. Motel Room of Known Drug Dealer/Deference to Magistrate's Finding of Probable Cause. In *United States v. Williams*, 974 F.2d 480 (4th Cir. 1992), the court held reliable information that a known drug dealer was renting a particular motel room sufficient to support a search warrant. Consequently, the Fourth Circuit reversed the district court's suppression of evidence seized pursuant to the search warrant, faulting the lower court for failure to give proper deference to the magistrate's finding of probable cause. On the deference due the magistrate's findings, see *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990); *United States v. Hodges*, 705 F.2d 106, 108 (4th Cir. 1983).

5. Warrantless Searches: Good Faith Exception/Exigent Circumstances/Emergency Doctrine. On the other hand, in *United States v. Moss*,

963 F.2d 673 (4th Cir. 1992), the court reversed the district court for *not* suppressing evidence discovered "in plain view" during an unlawful warrantless search. The court refused to apply the "good faith exception" to uphold a warrantless search based upon an officer's mistaken, but "good faith" belief that the search was justified. On this point, see also *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2800 (1990). The court in *Moss* also discussed and rejected the "exigent circumstances" and "emergency doctrine" exceptions to the general warrant requirement, as inapplicable to the facts of this case.

6. State or Federal Search. Rule 41(a) of the Federal Rules of Criminal Procedure requires that a federal search warrant be obtained from a federal magistrate or "a state court of record." This excludes most state magistrates who routinely authorize state search warrants. In *United States v. Williams*, 977 F.2d 866 (4th Cir. 1992), however, the court held that the involvement of a single federal agent in obtaining a state search warrant and the fact that the offense was ultimately prosecuted federally did not trigger the application of Rule 41(a), applying the test set forth in *United States v. Smith*, 914 F.2d 565, 569 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 999 (1991) (test is whether search warrant application is made "at the direction or urging of a federal officer"). *See also United States v. MacConnell*, 868 F.2d 281 (8th Cir. 1989); *United States v. Bookout*, 810 F.2d 965, 967 (10th Cir. 1987).

E. Miscellaneous

1. Enforcement of Subpoenas.

a. Subpoena of Corporate and Personal Business Documents/Fifth Amendment Privilege. In *United States v. Stone*, 976 F.2d 909 (4th Cir. 1992), the court upheld enforcement of subpoenas duces tecum to produce desk and pocket calendars, appointment books, planner schedules, daily meeting logs, miscellaneous records of a closely held corporation owned solely by one of the defendants, and records regarding a personally owned beach home. In regard to the business records, the court held the defendants had failed to meet their burden of establishing their "personal nature." *Id.* at 911. The court took no stock in the defendant's argument that because he was the sole owner of the corporation its affairs were really his personal business, stating: "[the company] is a one-man operation; however it is still a corporation . . . that has a separate legal existence from [the defendant]. . . . [The defendant] chose the corporate form and gained its attendant benefits, and we hold, in accord with the decisions of sister circuits, that he cannot now disregard the corporate form to shield his business records from production." *Id.* at 912 (citations omitted).

The court in *Stone* also enforced the subpoena of the beach house records, described as "statements of the rental agent, bills

for public utilities, the telephone company, and the power company," finding them "unprotected by the privilege against self-incrimination because their existence, possession, and authentication are a 'foregone conclusion' [and] their production 'adds little or nothing to the sum total of the Government's information.'" *Id.* at 911 (citations omitted).

b. Subpoena of the Press. In *In re Shain*, 978 F.2d 850 (4th Cir. 1992), the court upheld enforcement of subpoenas of four reporters to testify at the bribery (Hobbs Act) trial of a South Carolina legislator snared in Operation Lost Trust and affirmed a district court order holding the reporters in contempt for refusing to testify. Both Judge Niemeyer's majority opinion and Judge Wilkinson's concurring opinion are required reading for those encountering this issue in the future. On subpoenas of the press generally, see *Branzburg v. Hayes*, 408 U.S. 665 (1972); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (citations omitted); *United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977) (en banc); *Stickels v. General Rental Co.*, 750 F. Supp. 729, 731-32 (E.D. Va. 1990) (discussing cases).

2. Use Immunity. In *United States v. Harris*, 973 F.2d 333 (4th Cir. 1992), the court affirmed dismissal of most of the charges in the indictment, holding that the Government had not met its burden of showing a source or sources for the evidence independent of the defendant's immunized cooperation. *See, e.g., Kastigar v. United States*, 406 U.S. 441 (1972).

Likewise, in *United States v. Smith*, 976 F.2d 861 (4th Cir. 1992), the court reversed the defendant's conviction as a breach of an agreement not to prosecute the defendant "for any federal offense based on information now in the possession of the government." As the court noted in *Smith*, whether an immunity agreement has been breached is reviewed on appeal *de novo*. *Id.* at 863; *see also United States v. Blackburn*, 940 F.2d 107, 109 (4th Cir. 1991).

In *United States v. Fant*, 974 F.2d 559 (4th Cir. 1992), the court reversed and remanded an extortion conviction for resentencing without an enhancement for obstruction based upon the defendant's statements to his probation officer after being promised use immunity for any cooperation. Because the defendant failed to raise the issue on appeal, the court was required to find "plain error" to reverse per *United States v. Maxton*, 940 F.2d 103, 105 (4th Cir.), *cert. denied*, 112 S. Ct. 398 (1991), which it did.

But cf. United States v. Reckmeyer, 786 F.2d 1216, 1224 (4th Cir.) (promise by Government not to use information in further prosecutions did not prevent its use in that prosecution), *cert. denied*, 479 U.S. 850 (1986). And in *United States v. Seeright*, 978 F.2d 842 (4th Cir. 1992), the court upheld use of the defendant's statements made during a proffer meeting

after the defendant's material breach of the plea agreement—in spite of the fact that the defendant was not represented by counsel when he made the statements. *Accord United States v. Donahey*, 529 F.2d 831, 832 (5th Cir.), *cert. denied*, 429 U.S. 828 (1976).

3. Double Jeopardy. In *United States v. McHan*, 966 F.2d 134 (4th Cir. 1992), the court held that a 1984-86 conspiracy was separate and distinct from a 1988 conspiracy, and that the guarantee against double jeopardy did not prevent further using these two conspiracies as predicate offenses to prosecuting the defendant for conducting a continuing criminal enterprise (CCE). *See also United States v. Felix*, 112 S. Ct. 1377, *reh'g denied*, 113 S. Ct. 13 (1992); *Garrett v. United States*, 471 U.S. 773 (1985); *United States v. Arnoldt*, 947 F.2d 1120 (4th Cir. 1991) (RICO prosecution not barred by earlier convictions on some of predicate acts), *cert. denied*, 112 S. Ct. 1666 (1992).

In *United States v. Cullen*, 979 F.2d 992 (4th Cir. 1992), the court found no double jeopardy violation in following criminal prosecution with asset forfeiture proceedings against the defendant's property. *Accord United States v. McCaslin*, 959 F.2d 786, 788 (9th Cir.), *cert. denied*, 113 S. Ct. 382 (1992); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992); *see also United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989) (asset forfeiture not cruel and unusual punishment in violation of Eighth Amendment).

For a case with an unexpected double jeopardy twist, see *United States v. Council*, 973 F.2d 251 (4th Cir. 1992) (counts on which Rule 29 motion was granted really in nature of dismissal on legal grounds and therefore may be tried again, but counts mistried on Government's motion during jury deliberations may not).

For further discussion of double jeopardy, see *infra* paragraph II.D.3.

4. Sufficiency of Indictment. In *United States v. Daniels*, 973 F.2d 272 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1064 (1993), the court reversed the defendant's conviction for transferring a firearm in violation of 26 U.S.C. §§ 5812(a) and 5861(e) due to the insufficiency of the charging language in the indictment. The Fourth Circuit found fatal the failure to charge that the defendant transferred a sawed off shotgun "in violation of the provisions of this chapter," even though the specific section in the chapter that was violated was cited. For sufficiency of indictments generally, see *Russell v. United States*, 369 U.S. 749, 760-64 (1962); *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir.) (en banc), *cert. denied*, 488 U.S. 842 (1988) ("[A] statutory citation does not ensure that the grand jury has considered and found all essential elements of the offense charged"); and *United States v. Hooker*, 841 F.2d 1225, 1227 (4th Cir. 1988) (en banc).

On the other hand, in *United States v. Sutton*, 961 F.2d 476 (4th Cir. 1992), the court rejected the defendant's argument—raised for the first time on appeal—that failure to allege scienter in charging a violation of 18 U.S.C. § 924(c) was constitutionally insufficient. The court, acknowledging the less stringent standard in post-verdict challenges, held "that in alleging

that Sutton 'did carry and use' a firearm, the indictment sufficiently imparted knowledge of the essential facts of the crime," citing *United States v. Wilson*, 884 F.2d 174 (5th Cir. 1989); *United States v. Purvis*, 580 F.2d 853, 859 (5th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979). *See also Hamling v. United States*, 418 U.S. 87, 117 (1974); *Finn v. United States*, 256 F.2d 304, 306-07 (4th Cir. 1958).

For further discussion of sufficiency of an indictment, see *infra* paragraph II.D.44.

5. Venue. In *United States v. Gilliam*, 975 F.2d 1050, 1057 (4th Cir. 1992), the court held that "an offense committed in more than one district may be prosecuted in any district that such offense was begun, continued, or completed," citing 18 U.S.C. § 3237(a). The court also held that "a conspiracy may be prosecuted in any district in which the agreement was formed or in which an act in furtherance of the conspiracy was committed," citing *United States v. Lewis*, 676 F.2d 508, 511 (11th Cir.), *cert. denied*, 459 U.S. 976 (1982). *See also United States v. Barfield*, 969 F.2d 1554, 1557 (4th Cir. 1992); *Lord v. United States*, 412 F.2d 499, 500-01 (4th Cir. 1969).

Venue challenges cannot be raised for the first time on appeal; failure to raise venue objections in district court constitutes waiver. *United States v. Santiesteban*, 825 F.2d 779, 783 (4th Cir. 1987).

6. Competency Hearings. In *United States v. Barfield*, 969 F.2d 1554, 1556-57 (4th Cir. 1992), the court held that a defendant has a right to be present, and to be represented by counsel, at a competency hearing, which is "a critical stage" of criminal proceedings. However, if the defendant is, in fact, competent, his absence or nonrepresentation at the competency hearing is harmless error.

In *United States v. Cox*, 964 F.2d 1431 (4th Cir. 1992), the court upheld the continued confinement of the defendant (pursuant to 18 U.S.C. § 4246), finding no clear error in the requisite dual proof: (1) that the defendant is suffering from a mental condition or defect; and (2) that his release would create a substantial risk of harm to the person or property of another. The court in *Cox* also upheld the district court's order requiring the Government to pay for a second, independent psychiatric evaluation per the provisions of 18 U.S.C. § 4247(b), rejecting the Government's argument to the contrary on cross-appeal.

7. Voluntariness of Confession/Lost Evidence. In *United States v. Sanders*, 954 F.2d 227 (4th Cir. 1992), the court remanded an armed bank robbery conviction, concluding that the defendant's confession was not sufficiently purged of the taint of an earlier unlawful arrest and therefore not voluntary. However, the court rejected the defendant's argument that erasure of the bank surveillance videotape required dismissal of charges against the defendant, citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) for the proposition that, absent bad faith on the part of the Government, failure to preserve potentially useful evidence is not a denial of due process.

8. Motions to Withdraw Plea. In *United States v. Lambey*, 974 F.2d 1389 (4th Cir. 1992) (en banc), the court affirmed a 360-month sentence in a child pornography case which involved a conspiracy to kidnap, sexually molest, and murder a child on what is known as a "snuff film." The court upheld the district court's refusal to allow defendant's withdrawal of the plea when he learned that the Sentencing Guidelines range was not 78-108 months, as his attorney had advised him, but 360 months to life. Six of the thirteen judges on the Fourth Circuit dissented in four different opinions. Five of the six dissenters believed a "fair and just reason" had been shown; a sixth, Judge Murnaghan, concurred in denial of the motion to withdraw, but dissented as to the Sentencing Guidelines computation.

On a related point, it is clear in general that a court is not required to calculate and disclose the sentencing guideline range prior to accepting a defendant's plea. *See United States v. DeFusco*, 949 F.2d 114, 118 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1403 (1992); *see also United States v. McHan*, 920 F.2d 244 (4th Cir. 1990) (defendant not allowed to withdraw plea after learning that his conviction might be used as predicate offense in continuing criminal enterprise (CCE) charge).

For further discussion of motions to withdraw a plea, see *infra* paragraph II.D.12.

9. Waiver of Right to Counsel. In *United States v. Barfield*, 969 F.2d 1554, 1558 (4th Cir. 1992), the court held there was no obligation to ask a defendant who had waived his right to counsel and was representing himself whether he wanted assistance of standby counsel who had been appointed pursuant to *McKaskle v. Wiggins*, 465 U.S. 168 (1984). On the constitutional right of a defendant to waive counsel and proceed pro se, see *Faretta v. California*, 422 U.S. 806 (1975); *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985); *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981); *United States v. King*, 582 F.2d 888, 890 (4th Cir. 1978); *United States v. Sacco*, 571 F.2d 791, 793 (4th Cir.), *cert. denied*, 435 U.S. 999 (1978); *United States v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977). On when a defendent has shown sufficient "good cause" to justify appointment of substitute counsel, see *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir.), *cert. denied*, 487 U.S. 1211 (1988). For further discussion of waiver of counsel, see *infra* paragraph II.D.10.

10. Counsel's Motion to Withdraw. In *United States v. Hanley*, 974 F.2d 14 (4th Cir. 1992), the court affirmed denial of counsel's motion to withdraw filed one week before trial. In evaluating whether the district court has abused its discretion in refusing to allow counsel to withdraw, an appellate court considers: (1) the timeliness of the motion; (2) the adequacy of the district court's inquiry into the defendant's complaint; and (3) whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense. For further discussion of counsel's motion to withdraw, see *infra* paragraph II.D.11.

11. Government's Motion to Continue. In *United States v. Colon*, 975 F.2d 128 (4th Cir. 1992), the Fourth Circuit reversed the district court's

refusal to grant a brief continuance (of a suppression hearing) to allow the Government to locate a key witness, finding the requisite abuse of discretion and prejudice.

On the district court's wide discretion regarding motions to continue generally, see *United States v. Bakker*, 925 F.2d 728, 735 (4th Cir. 1991); *United States v. Gaither*, 527 F.2d 456, 457 (4th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976). However, the wide latitude allowed the court to control its own docket is not unlimited. *Bakker*, 925 F.2d at 735; *United States v. Clinger*, 681 F.2d 221, 223 (4th Cir.), *cert. denied*, 459 U.S. 912 (1982) (when continuance is sought for purpose of locating witness, moving party must show who witness is, nature and relevance of testimony, that witness can probably be located, and that due diligence has been exercised to locate witness).

12. Disclosure of Confidential Informant. *United States v. Blevins*, 960 F.2d 1252 (4th Cir. 1992) includes a lengthy discussion of the pertinent cases and principles relative to when the identity of a confidential informant must be disclosed. Disclosure was not required in *Blevins*. For further discussion of this subject, see *infra* paragraph II.D.9.

13. Joinder and Severance. In *United States v. Brooks*, 957 F.2d 1138, 1145-46 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992), discussed *supra*, the court held that defendants' pretrial motions for severance had been properly denied, pointing out that "[d]efendants who have been charged in the same conspiracy indictment should ordinarily be tried together." *Id.* at 1145; *see also United States v. Brugman*, 655 F.2d 540, 542 (4th Cir. 1981). The court emphasized that no right to severance arises because the evidence against one or more defendants is stronger than the evidence against other defendants, which it observed to be true of most conspiracies. Denial of a motion to sever will be reversed on appeal only for a "clear abuse of discretion." *Opper v. United States*, 348 U.S. 84, 95 (1954); *see also United States v. Haney*, 914 F.2d 602, 606 (4th Cir. 1990); *United States v. Chorman*, 910 F.2d 102, 114 (4th Cir. 1990); *United States v. Roberts*, 881 F.2d 95, 102 (4th Cir. 1989); *Person v. Miller*, 854 F.2d 656, 665 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989); *United States v. Hargrove*, 647 F.2d 411, 415 (4th Cir. 1981).

In *United States v. Rusher*, 966 F.2d 868 (4th Cir.), *cert. denied*, 113 S. Ct. 351 (1992), the court held the possibility that one defendant might testify that he was solely responsible for the criminal conduct insufficient to require severance. In such a case, the court held "[the defendant] must first show a 'reasonable probability . . . that the proffered testimony would, in fact materialize' and that the 'co-defendant would have waived his Fifth Amendment' right at a separate trial," citing *United States v. Parodi*, 703 F.2d 768, 779 (4th Cir. 1983) (quoting *United States v. Shuford*, 454 F.2d 772, 778 (4th Cir. 1971)). Moreover, the court ruled, "[s]everance is not required when the co-defendant would testify only if his case came first." *Rusher*, 966 F.2d at 878.

In *United States v. Samuels*, 970 F.2d 1312 (4th Cir. 1992), the court held that defendant's motion to sever the counts in the indictment (three counts of possession of firearm and one count of possession of ammunition by convicted felon) were properly denied. As the court in *Samuels* noted, "[t]he general rule is that counts charged in the same indictment will be joined at trial, *see* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 222, at 776 (1982), and [the defendant] has failed to carry his burden of establishing that the denial of severance deprived him of a fair trial or resulted in undue prejudice." *Samuels*, 970 F.2d at 1314 (citing *United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir. 1984)) and *United States v. Parodi*, 703 F.2d 768, 779-81 (4th Cir. 1983)).

For further discussion of joinder and severance, see *infra* paragraph II.D.4.

14. Defendant's Absence at Trial. In *United States v. Camacho*, 955 F.2d 950 (4th Cir. 1992), the court reversed the defendant's conviction because the district court proceeded with voir dire, opening statements, and examination of one of the Government's witnesses in the defendant's absence. The reason for the defendant's absence was not entirely clear, although there was a snow storm in process, the defendant lived some distance away, and he arrived about 50 minutes after the trial began. The court discussed at length and distinguished those cases in which a defendant is a fugitive, is voluntarily absent, or has otherwise waived his right to be present for trial, before concluding that proceeding without the defendant in this case was reversible error. For cases finding the defendant's absence at trial voluntary, see *Taylor v. United States*, 414 U.S. 17, 18-20 (1973); *United States v. Rogers*, 853 F.2d 249, 251-52 (4th Cir.), *cert. denied*, 488 U.S. 946 (1988); and *United States v. Peterson*, 524 F.2d 167, 184 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), *and cert. denied*, 424 U.S. 925 (1976).

15. *Batson Challenges*. In *United States v. Malindez*, 962 F.2d 332 (4th Cir.), *cert. denied*, 113 S. Ct. 215 (1992), the court held that the defendant must still establish a prima facie case of racial discrimination in the use of peremptory challenges of potential jurors *before* the Government is required to come forward with a nonracial justification for its challenges, as required by *Batson v. Kentucky*, 476 U.S. 79 (1986). The issue arose in the wake of *Powers v. Ohio*, 111 S. Ct. 1364 (1991), in which the Supreme Court held that a defendant may object to race-based peremptory challenges regardless of whether the defendant and the excluded juror(s) are of the same race, and the Fourth Circuit's own decision in *United States v. Joe*, 928 F.2d 99 (4th Cir.), *cert. denied*, 112 S. Ct. 71 (1991). The court in *Malindez* declined to define precisely what might constitute a prima facie case of discrimination, but it did cite with approval its own pre-*Powers* decision in *United States v. Grandison*, 885 F.2d 143 (4th Cir. 1989), *cert. denied*, 495 U.S. 934 (1990) (defendant failed to establish prima facie case where six of nine potential jurors struck by Government were black) and further stated in a footnote: "The fact that 50 percent (four out of eight)

of the Government's peremptory challenges were exercised against black veniremen, standing alone, is insufficient to establishing a *prima facie* case of purposeful discrimination." *Malindez*, 962 F.2d at 332, n.2.

In *United States v. Campbell*, 980 F.2d 245 (4th Cir. 1992), the court found no *Batson* violation in the Government's peremptory strike of the sole black in the jury venire, accepting the Government's racially neutral explanation that the juror had been a victim of crime and therefore might be dissatisfied with the police.

Note that in *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), the Supreme Court held that a *defendant* is likewise prohibited from exercising peremptory strikes in a discriminatory manner. How exactly this decision will play out in practical application remains to be seen.

16. Co-Conspirator Statements. *United States v. Blevins*, 960 F.2d 1252 (4th Cir. 1992), contains a lengthy discussion of the law of evidence governing statements made by co-conspirators during, and in furtherance of, a conspiracy per FED. R. EVID. 801(d)(2)(E).

17. Harmless Error/Fact of Nontestifying Co-Defendant's Guilty Plea. In *United States v. Blevins*, 960 F.2d 1252 (4th Cir. 1992), the court held that it was error to allow into evidence the fact that nontestifying co-defendants had pled guilty, albeit harmless error in this particular case. The *Blevins* opinion includes a lengthy discussion of the harmless error doctrine generally, citing many cases.

18. Authenticating Tape Recordings. In *United States v. Branch*, 970 F.2d 1368 (4th Cir. 1992), the Fourth Circuit approved a pretrial in camera hearing to consider authenticity of certain tape recordings to be later introduced at trial. The court emphasized that this does not relieve the Government of presenting sufficient authenticating evidence to the jury at trial but simply streamlines the process and assures no prejudicial evidence reaches the jury. In regard to laying a proper foundation for tape recordings generally, see *United States v. Long*, 651 F.2d 239 (4th Cir.), *cert. denied*, 454 U.S. 896 (1981); *United States v. West*, 574 F.2d 1131, 1137 (4th Cir. 1978); *United States v. Baller*, 519 F.2d 463, 464 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States v. Fuller*, 441 F.2d 755, 762 (4th Cir.), *cert. denied*, 404 U.S. 830 (1971).

19. Rule 403 (Probative Value Versus Prejudicial Effect). In *United States v. Analla*, 975 F.2d 119 (4th Cir. 1992), the court, in a robbery and murder trial, upheld the admission into evidence of two photographs of the robbery victim's face showing gunshot wounds inflicted by the defendant, and of one photograph of the murder victim lying in a pool of blood. The court rejected the defendant's argument that the photographs, though relevant, should be excluded because of their prejudicial effect under Rule 403. In *United States v. Melton*, 970 F.2d 1328 (4th Cir. 1992), the court approved evidence of a related but unconvicted murder, against a Rule 403 challenge by the defendant.

In regard to the standard of appellate review of a district court's Rule 403 analysis generally, see *United States v. Heyward*, 729 F.2d 297, 301 n.2 (4th Cir. 1984) (probative/prejudicial determination of district court "will not be overturned except under the most 'extraordinary' of circumstances," quoting *United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983)), *cert. denied*, 469 U.S. 1105 (1985); and *United States v. Whitfield*, 715 F.2d 145 (4th Cir. 1983) (admission of otherwise relevant evidence will not be disturbed on appeal absent clear abuse of discretion).

For further discussion of Rule 403, see *infra* paragraph II.D.27.

20. Rule 404(b) Evidence. In *United States v. Russell*, 971 F.2d 1098 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3479 (U.S. Jan. 11, 1993), the court upheld in a prosecution for murder of the defendant's wife admission of evidence of the defendant's extramarital affairs and generally abusive treatment of the deceased. *See also Virgin Islands v. Harris*, 938 F.2d 401, 420 (3d Cir. 1991) (in murder case, evidence of defendant's "history of violence" toward his wife was "highly probative in demonstrating his motive and intent as well as establishing that his wife's death was not accidental or suicidal"); *United States v. Stapleton*, 730 F. Supp. 1375, 1378 (W.D. Va. 1990) ("It is generally recognized that an adulterous relationship, particularly when it is clandestine, is evidence of possible strong motives for murdering the cuckolded husband").

In *United States v. Kenny*, 973 F.2d 339 (4th Cir. 1992), the court found it an abuse of discretion to admit certain Rule 404(b) evidence, but found further in this case that the error was harmless. The court had this to say about the harmless error doctrine in regard to Rule 404(b) evidence: "[A]ny error in admission or exclusion is subject to the harmless error test: 'whether it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial.' *United States v. Morison*, 844 F.2d 1057, 1078 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988) (quoting *United States v. Davis*, 657 F.2d 637, 640 (4th Cir. 1981))." *Kenny*, 973 F.2d at 344.

In *United States v. Hernandez*, 975 F.2d 1035 (4th Cir. 1992), the court reversed the defendant's conviction for conspiracy to distribute and to possess with intent to distribute cocaine, finding the district court abused its discretion in admitting the defendant's statements to a local drug dealer about her "recipe" for cooking crack cocaine, and about selling crack in New York about six months before the charged criminal conduct.

In *United States v. Sanders*, 964 F.2d 295 (4th Cir. 1992), the court found in a prosecution for assault and possession of a contraband weapon in federal prison, admission of the defendant's *prior* convictions for assault and possession of a contraband weapon to be reversible error as to the resulting assault conviction, but harmless as to the contraband weapon conviction. Judge Niemeyer dissented, stating that he had "little difficulty in concluding that in this case intent was made an issue and that therefore evidence of a prior assault, which is probative of intent, is admissible under Rule 404(b)." *Sanders*, 964 F.2d at 300 (citations omitted).

For further discussion of Rule 404(b), see *infra* paragraph II.D.28.

21. Structuring Monetary Transactions. In *United States v. Rogers*, 962 F.2d 342 (4th Cir. 1992), the court held that proof of a *willful* violation of 31 U.S.C. § 5324 (structuring monetary transactions to avoid reporting requirements) does *not* require proof that a defendant *knew* structuring was *illegal*. "We conclude that a criminal conviction for willfully violating [the structuring law] may be sustained as long as the prosecution proves that the defendant had knowledge of the currency reporting requirements and acted to avoid them. No other specific intent need be shown. The defendant, therefore, was not entitled to any jury instruction regarding knowledge of illegality." *Rogers*, 962 F.2d at 345.

22. Money Laundering. In *United States v. Peay*, 972 F.2d 71 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3979 (U.S. Jan. 11, 1993), the court held the "effect on interstate commerce" element of money laundering (in violation of 18 U.S.C. § 1956) was sufficiently established by proof of deposit of laundered funds in a bank insured by the Federal Deposit Insurance Corporation (FDIC). "We therefore hold that, in enacting § 1956, Congress intended to exercise the full legislative power conferred by the Commerce Clause. Only a *de minimis* effect on interstate commerce must be shown for the application of such a statute to pass constitutional muster." *Peary*, 972 F.2d at 74 (citing *United States v. Spagnola*, 546 F.2d 1117, 1119 (4th Cir. 1976)).

In *United States v. Gilliam*, 975 F.2d 1050, 1056 (4th Cir. 1992), the court rejected the defendant's argument that 18 U.S.C. § 1956 is unconstitutionally vague. The court applied the two part "void for vagueness" test established in *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), in upholding the money laundering statute against the defendant's constitutional challenge.

In *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992), the Fourth Circuit reversed the district court's judgment of acquittal, approving a money laundering conviction on a "willful blindness" theory. The court's opinion in *Campbell* is a virtual primer on the "knowledge" and "concealment" elements which must be proven in money laundering prosecutions under 18 U.S.C. §§ 1956 and 1957.

23. Hobbs Act (Bribery of Public Official). In *United States v. Taylor*, 966 F.2d 830 (4th Cir. 1992), the court reversed the defendant's conviction for certain violations of the Hobbs Act (18 U.S.C. § 1951), which proscribes payments to public officials in exchange for votes or other public actions. The defendant, a member of the South Carolina House of Representatives snared in an undercover FBI "sting" known as "Operation Lost Trust," persuaded the Fourth Circuit that the jury instructions failed to distinguish adequately between an illegal bribe and a campaign contribution followed by a vote in accordance with the expressed wishes of the donor. *See also McCormick v. United States*, 111 S. Ct. 1807 (1991) (distinguishing Hobbs Act violations from mere campaign contributions); *Zant v. Stephens*, 462

U.S. 862, 881 (1983) (jury instructions which allow for conviction on two or more independent grounds, any one of which is insufficient, constitutes reversible error). The *Taylor* opinion also addresses the degree of proof necessary to satisfy the "interstate commerce" element in a Hobbs Act prosecution, in this instance rejecting the defendant's claims of insufficiency. *Taylor*, 966 F.2d at 835-36.

24. Possession of False Identification Documents. In *United States v. Rohn*, 964 F.2d 310 (4th Cir. 1992), the court reversed a conviction for the possession, *with intent to use unlawfully*, five or more false identification documents in violation of 18 U.S.C. § 1028(a)(3). The Fourth Circuit found the district court's jury instructions inadequate in that they failed to describe the Government's burden to prove the unlawful nature of the use to which the defendant intended to put the fraudulent documents.

25. Witness Tampering. In *United States v. Kenny*, 973 F.2d 339 (4th Cir. 1992), the court approved prosecution for witness tampering under the general obstruction of justice statute (18 U.S.C. § 1503), which carries substantially higher penalties than the witness tampering statute (18 U.S.C. § 1512). The defendant in *Kenny* unsuccessfully argued that prosecution was restricted to the more narrowly tailored statute (18 U.S.C. § 1512). The court made the general observation that "[t]he existence of a more narrowly tailored statute does not necessarily prevent prosecution under a broader statute, so long as the defendant is not punished under both statutes for the same conduct," citing *United States v. Grenagle*, 588 F.2d 87 (4th Cir.), *cert. denied*, 440 U.S. 927 (1978). On prosecution of witness tampering under 18 U.S.C. § 1503 specifically, see also *United States v. Williams*, 874 F.2d 968 (5th Cir. 1989). *Accord United States v. Kulczyk*, 931 F.2d 542 (9th Cir. 1991); *United States v. Brown*, 948 F.2d 1076 (8th Cir. 1991); *United States v. Branch*, 850 F.2d 1080 (5th Cir. 1988); *United States v. Marrapese*, 826 F.2d 145 (1st Cir. 1987).

26. Attempts to Commit a Crime. In *United States v. Sutton*, 961 F.2d 476 (4th Cir.), *cert. denied*, 113 S. Ct. 171 (1992), the court held that producing cash to be used to purchase marijuana (here, $28,000), and an agreement to close the deal later the same day, was sufficient to sustain defendant's conviction for *attempt* to possess marijuana with intent to distribute. As the court held in *United States v. Pelton*, 835 F.2d 1067, 1074 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988), to support a conviction for attempt, "the evidence must show (a) culpable intent, and (b) a substantial step toward the commission of the crime that is strongly corroborative of that intent." "'[A] substantial step'" is "'more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.'" *United States v. Delvecchio*, 816 F.2d 859, 861 (2d Cir. 1987) (quoting *United States v. Martinez*, 775 F.2d 31, 35 (2d Cir. 1985)).

27. Lesser Included Offenses. In *United States v. Walkingeagle*, 974 F.2d 551 (4th Cir. 1992), the court held that uncharged lesser included

offenses could be sent to the jury, even after the district court granted the defendant's Rule 29 motion for judgment of acquittal on the 18 U.S.C. § 1153 violations (offenses committed within Indian Country) charged in the indictment. Judge Hamilton wrote a lengthy dissenting opinion.

28. Entrapment/Outrageous Government Conduct. In *United States v. Jones*, 976 F.2d 176, 179 (4th Cir. 1992), the court held if the issue of entrapment is submitted to the jury, "an appellate court may overturn [the jury's rejection of the entrapment defense] only if no rational trier of fact could have found predisposition beyond a reasonable doubt, viewing the evidence in the light most favorable to the prosecution," citing *United States v. Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987). The defendant in *Jones* contended that undercover government agents had induced him to sell them machine guns and other firearms for large amounts of money, leaving him with the impression that the guns were for the Contras in Nicaragua. In regard to the Government's burden in overcoming an entrapment defense, see *Jacobsen v. United States*, 112 S. Ct. 1535, 1540-41 (1992), and *United States v. Osborne*, 935 F.2d 32, 37-38 (4th Cir. 1991).

The *Jones* court also rejected the defendant's claim that the undercover operation constituted "outrageous" government conduct in violation of due process of law, citing *United States v. Hunt*, 749 F.2d 1078, 1087 (4th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) (undercover agents posing as criminals who persisted in persuading state judge to "help" them despite his initial hesitation not "outrageous" government conduct), *United States v. Russell*, 411 U.S. 423, 431-32 (1973) (contemplating possibility of "outrageous" government conduct in violation of due process guarantees, but not finding it on facts of case at bar). In rejecting the defendant's due process claim in *Jones*, the court noted again its rejection (in *Osborne*, 935 F.2d at 35-36) of "the proposition that the government may not conduct an undercover investigation without reasonable cause to suspect criminal wrongdoing." *Jones*, 976 F.2d at 182; *see also United States v. Steinhorn*, 739 F. Supp. 268, 272 (D. Md. 1990).

29. Reopening Case After Close of Evidence. In *United States v. Peay*, 972 F.2d 71, 73-74 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3479 (U.S. Jan. 11, 1993), the court reversed the district court for abusing its discretion in allowing the government to reopen its case after the close of evidence—then refusing to allow the defendant to call a witness to impeach the Government's belated witness. On reopening a case after the close of evidence generally, see *United States v. Paz*, 927 F.2d 176, 179 (4th Cir. 1991); *United States v. Thetford*, 676 F.2d 170, 182 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983); *United States v. Carter*, 569 F.2d 801, 803 (4th Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

30. Rule 29/Sufficiency of the Evidence. In *United States v. Sutton*, 961 F.2d 476, 478 (4th Cir.), *cert. denied*, 113 S. Ct. 171 (1992), the court affirmed denial of the defendant's Rule 29 motion for judgment of acquittal.

The Rule 29 standard is a familiar one: "whether, viewing the evidence in the light most favorable to the government, *any* rational trier of facts could have found the defendant guilty beyond a reasonable doubt." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982) (emphasis added). For further discussion of the sufficiency of the evidence standard, see *infra* paragraph II.D.36.

In *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3583 (U.S. Feb. 22, 1993), the court reversed the district court's granting of the defendant's post-verdict Rule 29 motion. However, because the error in *Campbell* was substantially a misstatement of the Government's burden of proof (in money laundering prosecution), the court stated the standard of review on appeal thus: "[b]ecause the question is a matter of law, we review the issue *de novo* and need accord no deference to the district court's determination that the evidence is insufficient." *Id.* at 856.

In *United States v. Russell*, 971 F.2d 1098 (4th Cir. 1992), the court found sufficient evidence to support a murder conviction although no body was ever found. The opinion includes a lengthy discussion of state and federal authority on this point. *Id.* at 1110-11.

31. Jury Instructions. In *United States v. Craigo*, 956 F.2d 65, 67-68 (4th Cir. 1992), the court held that technically inaccurate jury instructions will result in reversal only if there is a "reasonable likelihood" the jury misconstrued the instruction and the erroneous instruction "prejudice[d] the jury's consideration of the dispositive issue." The court cited *Boyde v. California*, 494 U.S. 370 (1990) and *United States v. Davis*, 739 F.2d 172, 175 (4th Cir. 1984).

In *United States v. Hanley*, 974 F.2d 14 (4th Cir. 1992), the court did not find reversible error in the court's apparently inadvertent error in instructing the jury: "On the other hand, if a reasonable doubt exists in your mind concerning the guilt of the defendant as to one or more of the counts, then it will be your duty to find the defendant *guilty* as to such count or counts" (emphasis added). The court cited *United States v. Young*, 470 U.S. 1, 17 n.14 (1985) in finding that the court's inadvertent misstatement "did not have an unfair prejudicial impact on the jury's deliberations, or in any way undermine the fairness of the trial or contribute to a miscarriage of justice." *Manley*, 974 F.2d at 18.

Two 1992 opinions discussed and approved giving the jury *Allen* charges: *United States v. Seeright*, 978 F.2d 842, 850 (4th Cir. 1992) and *United States v. Russell*, 971 F.2d 1098 (4th Cir. 1992). "The *Allen* charge, which takes its name from the Supreme Court's decision in *Allen v. United States*, 164 U.S. 492 (1896), essentially informs a deadlocked jury that a new trial would be expensive for both sides; that there is no reason to believe that another jury would do a better job; that it is important that a unanimous verdict be reached; and that jurors who are in the minority should consider, without surrendering their convictions, whether the majority's position might be correct." *Russell*, 971 F.2d at 1107 n.18. On the *Allen* charge generally,

see *United States v. West*, 877 F.2d 281, 291 (4th Cir.), *cert. denied*, 493 U.S. 869 (1989), 493 U.S. 959 (1989), *and cert. denied*, 493 U.S. 1070 (1990); *United States v. Martin*, 756 F.2d 323, 327 (4th Cir. 1985) (en banc); and *United States v. Sawyers*, 423 F.2d 1335, 1341-43 (4th Cir. 1970) ("the leading *Allen* charge case in the Fourth Circuit," according to *Russell*, 971 F.2d at 1107 n.18).

For further discussion of jury instructions, see *infra* paragraphs II.D.4.6 (Joinder and Severance of Defendants/Jury Instructions); II.D.17 (Voir Dire/Right to Impartial Jury); and II.D.39 (Jury Instructions).

32. Inconsistent Verdicts. In *United States v. Harriott*, 976 F.2d 198 (4th Cir. 1992), the court held again that an "inconsistent jury verdict" is ordinarily not a valid basis for acquittal, particularly where "the reason for the jury's not guilty verdict may have been lenity." *Id.* at 202. For further discussion of inconsistent verdicts, see *infra* paragraph II.D.40.

33. Rule 33 (Motion for New Trial). In *United States v. Campbell*, 977 F.2d 854 (4th Cir.), *cert. denied*, 113 S. Ct. 144 (1992), the court affirmed the lower court's conditional granting of defendant's Rule 33 motion for a new trial "should the entry of a judgment of acquittal be granted on appeal." *Id.* at 860. The court emphasized the district court's broader discretion in considering a Rule 33 motion, including an ability to evaluate the credibility of witnesses, "to draw inferences, unfavorable to the Government, from the evidence." *Id.* at 860.

For further discussion of Rule 33, see *infra* paragraph II.D.49.

34. Lengthy Sentences. In *United States v. Pavlico*, 961 F.2d 440 (4th Cir.), *cert. denied*, 113 S. Ct. 144 (1992), the court affirmed a 40-year sentence for mail fraud and false statement violations. The court rejected each of the defendant's objections to the sentence, to wit: (a) that it was an "illegal sentence" correctable under Rule 35(a); (b) that the enhancement of a pre-Sentencing Guidelines sentence for perjury should be disallowed, as the Fourth Circuit held in *United States v. Dunnigan*, 944 F.2d 178, 183-85 (4th Cir. 1991), *cert. granted*, 112 S. Ct. 2272 (1992), in regard to Sentencing Guidelines sentences; and (c) that the long sentence is so disproportionate to the offense as to constitute "cruel and unusual punishment" in violation of the Eighth Amendment. On the last point, see also *United States v. Analla*, 975 F.2d 119, 127 (4th Cir. 1992) (no Fifth Amendment equal protection violation in life sentence for murder in violation of 18 U.S.C. § 1111 due to lesser 20-year mandatory minimum for murder in violation of 21 U.S.C. § 848(e)); *United States v. Guglielmi*, 929 F.2d 1001, 1002, 1004 (4th Cir. 1991); *United States v. Polk*, 905 F.2d 54, 55 (4th Cir.), *cert. denied*, 111 S. Ct. 519 (1990); *United States v. Thomas*, 900 F.2d 37, 39 (4th Cir. 1990); and *United States v. Rhodes*, 779 F.2d 1019, 1028 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

For further discussion of length of sentences, see *infra* paragraph II.D.18.

35. Sentencing: Alien Status as Factor. In *United States v. Salama*, 974 F.2d 520 (4th Cir. 1992), the court upheld a finding that the defendant

was an "organizer or leader" of criminal activity based in part on the defendant's alien status. The court conceded that it considered the remarks about the defendant's alien status "inappropriate," but found it to be harmless error in that the subject enhancement was otherwise supported by the facts properly before the court. *Id.* at 522.

Likewise, in *United States v. Munoz*, 974 F.2d 493, 495-96 (4th Cir.), *cert. denied*, 61 U.S.L.W. 3435 (U.S. Dec. 14, 1992), the court found no "fatal impropriety" in the judge's comment on the defendant's alien status at sentencing: "It really is revolting to me to see you people come up here from South America, take advantage of our system, take advantage of the wealth, the work and good people of this country and bring in these drugs by the ton. You care nothing about this country." In affirming the conviction, the court explained that "the court may appropriately take judicial notice of the fact that South America, in general, and Colombia, in particular, are major sources of the cocaine sold and used in the United States," but that in any event "the connection between the group targeted for deterrence and the defendant must be the criminal conduct *and not* the defendant's national origin." *Id.* at 495-96 (emphasis added).

36. Notice of Appeal. In regard to time limitations for giving notice of appeal generally, see FED. R. APP. P. 4(b); *United States v. Raynor*, 939 F.2d 191, 197 (4th Cir. 1991); *United States v. Reyes*, 759 F.2d 351, 353 (4th Cir.), *cert. denied*, 474 U.S. 857 (1985); *United States v. Breit*, 754 F.2d 526 (4th Cir. 1985); and *United States v. Schuchardt*, 685 F.2d 901, 902 (4th Cir. 1982).

37. Waiver of Appeal. In *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992) and *United States v. Davis*, 954 F.2d 182, 185-86 (4th Cir. 1992), the Fourth Circuit upheld again the knowing and voluntary waiver of a defendant's right to appeal. *See also United States v. Wessells*, 936 F.2d 165 (4th Cir.1991); *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990); *United States v. Guevara*, 941 F.2d 1299 (4th Cir.), *reh'g denied*, 949 F.2d 706 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 160 (1992) (defendant's knowing waiver of appeal held, as matter of basic fairness, to also preclude Government from appealing).

38. Ineffective Assistance of Counsel/Conflict of Interest. Several 1992 cases were remanded for further proceedings to determine whether an attorney's alleged conflict of interest constituted a violation of the defendant's Sixth Amendment right to counsel. For further discussion of a conflict of interest as ineffective assistance of counsel, see *infra* paragraph II.D.52.c.

In *United States v. Gilliam*, 975 F.2d 1050 (4th Cir. 1992), the court remanded for a Rule 44(c) hearing to determine whether joint representation of father-son defendants denied the son (to whom a more favorable plea agreement was offered) effective representation of counsel.

In *United States v. Swartz*, 975 F.2d 1042, 1050 (4th Cir. 1992), the court vacated the defendant's sentencing and remanded for resentencing on the basis of a conflict (also due to joint representation), which first developed

during sentencing proceedings. Similarly, in *United States v. Magini*, 973 F.2d 261 (4th Cir. 1992), the court reversed a grant of summary judgment for the government in a 28 U.S.C. § 2255 (1988) proceeding and remanded for an evidentiary hearing on petitioner's claim that her attorney's preoccupation with selling certain of her assets to pay his legal fees impinged on her constitutional right to effective representation in the trial court. *Magini*, 973 F.2d at 264-65.

39. 28 U.S.C. § 2255 Petitions.

a. Ineffective Assistance of Counsel Claims. In *United States v. Hanley*, 974 F.2d 14, 16 n.2 (4th Cir. 1992), and *United States v. Underwood*, 970 F.2d 1336, 1340 (4th Cir. 1992), the court held again that ineffective assistance of counsel claims should ordinarily be raised in 28 U.S.C. § 2255 (1988) proceedings, not on direct appeal. For further discussion of this point, see *infra* paragraph II.D. 52.a.

In *Fields v. Attorney General of the State of Maryland*, 956 F.2d 1290 (4th Cir.), *cert. denied*, 113 S. Ct. 243 (1992), the court reiterated the familiar principles and standards which are to be applied when an ineffective assistance of counsel claim is asserted after an otherwise valid guilty plea. The court began by pointing out the array of rights and even prior constitutional violations waived by a knowing and voluntary plea of guilty, citing numerous cases. *Id.* at 1294-95.

Next, the court in *Fields* laid out the familiar principles and standards to be applied in evaluating a post guilty plea claim of ineffective assistance of counsel per the *Hill v. Lockhart*, 474 U.S. 52, 53-59 (1985), and *Strickland v. Washington*, 466 U.S. 668 (1984) lines of authority, to wit:

(1) "First, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.' 466 U.S. at 687-88. Second, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Id.* at 694. These two components are typically referred to as the 'performance' and 'prejudice' components. *Id.* at 698." *Fields*, 956 F.2d at 1297.

(2) "The defendant bears the burden of proving *Strickland* prejudice. *See Hutchins v. Garrison*, 724 F.2d 1425, 1430-31 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065 (1984). If the defendant cannot demonstrate the requisite prejudice, a reviewing court need not consider the performance prong. *Strickland*, 466 U.S. at 697." *Fields*, 956 F.2d at 1297.

(3) "In *Hooper v. Garraghty*, 845 F.2d 471 (4th Cir. 1988), we stated:

> When a defendant challenges a conviction entered after a guilty plea, [the] "prejudice" prong of the [*Strickland*] test

> is slightly modified. Such a defendant "must show that there is a reasonable probability that, but for counsel's errors, *he would not have pleaded guilty and would have insisted on going to trial.*

845 F.2d at 475 (quoting *Hill*, 474 U.S. at 59)." *Fields*, 956 F.2d at 1297 (emphasis added).

(4) Statements previously made by a defendant under oath affirming satisfaction with counsel will be binding on a defendant who later asserts ineffective assistance unless there is "clear and convincing evidence to the contrary." *Fields*, 956 F.2d at 1299 (*citing Blackledge v. Allison*, 431 U.S. 63, 74-75 (1977)).

(5) The fact that a plea bargain is "favorable" to a defendant and that accepting it was "a reasonable and prudent decision" is itself evidence of "[t]he voluntary and intelligent" nature of the plea. *Fields*, 956 F.2d at 1299.

b. Right to Evidentiary Hearing. "Section 2255 provides for an evidentiary hearing '[u]nless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief. . . .' 28 U.S.C. § 2255." *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992). The court in *Magini* reversed the granting of summary judgment against a petitioner alleging that her attorney had a conflict of interest, and remanded for an evidentiary hearing on disputed facts. For further discussion of this point, see *infra* paragraph II.D.53.b.

c. Second and Subsequent § 2255 Proceedings: Abuse of the Writ Doctrine. In *United States v. MacDonald*, 966 F.2d 854 (4th Cir.), *cert. denied*, 113 S. Ct. 606 (1992), the court applied the "abuse of the writ" doctrine to a second habeas petition filed by Captain Jeffrey MacDonald challenging his 1979 conviction for the murders of his wife and two daughters. MacDonald's allegations of newly discovered evidence—lab notes describing synthetic hairs and wool fibers allegedly supporting MacDonald's defense—were held insufficient to meet "the stringent requirements of *McCleskey v. Zant*, 111 S. Ct. 1454 (1991), necessary to overcome dismissal of a second or subsequent collateral claim for abuse of the writ." *MacDonald*, 966 F.2d at 856. For further discussion of the abuse of the writ doctrine, see *infra* paragraph II.D.53.c..

d. No Right to Counsel. In *United States v. MacDonald*, 966 F.2d 854 (4th Cir.), *cert. denied*, 113 S. Ct. 606 (1992), the court held (a) that there is no right to an attorney in a 28 U.S.C. § 2255 (1988) proceeding, citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), and (b) therefore, an attorney error made in a prior Section 2255 proceeding "cannot serve as cause to review subsequent petitions." *MacDonald*, 966 F.2d at 859 n.9.

e. Cross References. For further discussion of 28 U.S.C. § 2255 (1988) proceedings, see *infra* paragraphs II.D.52 (Ineffective Assistance of Counsel), and II.D.53 (Other 28 U.S.C. § 2255 Proceedings).

II. Selected Principles Cited in Unpublished Opinions

As stated in every unpublished Fourth Circuit slip opinion, which includes the overwhelming majority of opinions rendered, "Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6."

However, many principles of law are cited in unpublished opinions, citing prior published opinions which collectively indicate what precedents the Fourth Circuit considers significant on a whole array of issues.

The following are selected propositions and principles of law cited in the court's unpublished opinions in calendar year 1992, chosen with an eye toward practical usefulness.

A. Drug Cases

1. Continuing Criminal Enterprise (CCE). To sustain a conviction for engaging in a continuing criminal enterprise, the government must prove five elements: "(1) defendant committed a felony violation of the federal drug laws; (2) such violation was part of a continuing series of violations of the drug laws; (3) the series of violations were undertaken by defendant in concert with five or more persons; (4) defendant served as an organizer or supervisor, or in another management capacity with respect to these other persons; and (5) defendant derived substantial income or resources from the continuing series of violations." *United States v. Ricks*, 882 F.2d 885, 890-91 (4th Cir. 1989), *cert. denied*, 493 U.S. 1047 (1990).

In proving the "organizer or supervisor" element, the government is not required to prove that the five individuals were supervised at the same time, nor must the five individuals be under the direct or immediate control of the defendant. The defendant need only occupy a position of management. *Id.* at 891. "Thus, a defendant may not insulate himself from . . . liability by carefully pyramiding authority so as to maintain fewer than five direct subordinates." *Id.* A mere buyer-seller relationship, however, is not sufficient to prove a violation under section 848. *United States v. Butler*, 885 F.2d 195, 201 (4th Cir. 1989).

Although the statute does not prescribe the minimum amount of money required to constitute substantial income, this element is met where "tens of thousands" of dollars from a drug business move in and out of a defendant's possession. *See United States v. Webster*, 639 F.2d 174, 182 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981), *and opinion modified in part*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982).

Finally, where a defendant is convicted of engaging in a continuing criminal enterprise and of a lesser included drug conspiracy, the conspiracy conviction should be set aside and sentencing should only be on the CCE

conviction. *United States v. West*, 877 F.2d 281, 292 (4th Cir.), *cert. denied*, 493 U.S. 859, *and cert. denied*, 493 U.S. 959 (1989), *and cert. denied*, 493 U.S. 1070 (1990); *United States v. Porter*, 821 F.2d 968, 978 (4th Cir. 1987), *cert. denied*, 485 U.S. 934, *and cert. denied*, 485 U.S. 934, *and reh'g denied*, 485 U.S. 1042 (1988).

For further discussion of CCE prosecutions, see *supra* paragraph I.A.1.

2. Drug Conspiracies. In order to establish a drug conspiracy in violation of 21 U.S.C. § 846 (1988), the government must prove: (1) an agreement between two or more persons to engage in conduct that violates a federal drug law, and (2) "the defendant's wilful joinder in that agreement. *United States v. Clark*, 928 F.2d 639, 641-42 (4th Cir. 1991); *see also United States v. Collazo*, 732 F.2d 1200, 1205 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985); *United States v. Watkins*, 662 F.2d 1090, 1097 (4th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). A conspiracy need not be proven by direct evidence; rather, conspiracies are often proven circumstantially, based upon the relationship between the alleged conspirators and the nature of their conduct. *United States v. Brown*, 856 F.2d 710, 711-12 (4th Cir. 1988).

Nor must a particular co-conspirator be shown to have complete knowledge of the conspiracy; knowledge of its "essential object" is sufficient. *United States v. Goldman*, 750 F.2d 1221, 1227 (4th Cir. 1984); *see also United States v. Mabry*, 953 F.2d 127, 130 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1951 (1992); *Brown*, 856 F.2d at 711; *United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988); *Collazo*, 732 F.2d at 1205.

The Fourth Circuit has on numerous occasions approved evidence of firearms in drug conspiracy cases, whether or not there are separate firearms counts charged. *See, e.g., United States v. Ricks*, 882 F.2d 885, 892 (4th Cir. 1989), *cert. denied*, 493 U.S. 1047 (1990); *Collazo*, 732 F.2d at 1206. *Accord United States v. Blackman*, 897 F.2d 309, 317 (8th Cir.), *aff'd on reh'g*, 904 F.2d 1250 (1990); *United States v. Green*, 887 F.2d 25, 27 (1st Cir. 1989); *United States v. Payne*, 805 F.2d 1062, 1065 (D.C. Cir. 1986).

For further discussion of drug conspiracies, see *supra* paragraph I.A.2.

3. Quantity of Drugs. Perhaps the most frequently raised issue on appeal in drug cases is the quantity of drugs for which a particular defendant should be held accountable for sentencing purposes. The pertinent factors and principles:

a. Preponderance Standard/General Considerations. The quantity of drugs used to compute the base offense level must only be proven by a preponderance of the evidence, not beyond a reasonable doubt. *United States v. Brooks*, 957 F.2d 1138, 1148 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992); *United States v. Mark*, 943 F.2d 444, 450 (4th Cir. 1991); *United States v. Engleman*, 916 F.2d 182, 184 (4th Cir. 1990); *United States v. Goff*, 907 F.2d 1441, 1444 (4th Cir. 1990); *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990); *United States v. Vinson*, 886 F.2d 740, 741-42 (4th Cir. 1989), *cert. denied*, 493 U.S. 1062

(1990). This quantity includes up to the total amount of drugs distributed in a conspiracy, if the defendant could reasonably foresee the distribution of future amounts. *United States v. Willard*, 909 F.2d 780, 781 (4th Cir. 1990), or "knew or reasonably should have known what the past quantities were." *United States v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d Cir.), *cert. denied*, 112 S. Ct. 347 (1991). *See also* U.S.S.G. § 2D1.4, Application Note 1 ("[D]rug conspirators should be punished in a manner commensurate with the scale of the conspiracy, rather than their personal participation in the conspiracy"); *United States v. Campbell*, 935 F.2d 39, 46 (4th Cir.), *cert. denied*, 112 S. Ct. 348 (1991).

b. Clearly Erroneous Standard on Appeal. The district court's findings as to the quantity of drugs for sentencing purposes will be affirmed on appeal unless clearly erroneous. *Brooks*, 957 F.2d at 1148; *Campbell*, 935 F.2d at 46; *Goff*, 907 F.2d at 1444; *United States v. Wilson*, 896 F.2d 856, 858 (4th Cir. 1990); *Vinson*, 886 F.2d at 742; *Mark*, 943 F.2d at 450; *United States v. Williams*, 880 F.2d 804, 806 (4th Cir. 1989).

c. Types and Quantities of Drugs Not in Count(s) of Conviction. Types and quantities of drugs not specified in the count(s) of conviction are to be considered in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan. U.S.S.G. § 1B1.3(a)(1); *United States v. Cusack*, 901 F.2d 29, 32-33 (4th Cir. 1990); *United States v. Williams*, 880 F.2d at 805-06.

d. Court May Estimate Quantity. When the quantity of drugs is uncertain, the court must "approximate the quantity." U.S.S.G. § 2D1.4, Application Note 2 (providing, for example, that court may consider street prices, financial or other records, similar transactions by defendant, and other specified factors); *United States v. Johnson*, 943 F.2d 383, 387-88 (4th Cir.), *cert. denied*, 112 S. Ct. 667 (1991).

e. Quantity of Drugs for Which Defendant was Acquitted. Because of the difference in standard of proof (preponderance versus reasonable doubt), acquitted conduct may be considered for purposes of sentencing, if supported by the appropriate findings. *United States v. Romulus*, 949 F.2d 713, 716-17 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1690 (1992); *United States v. Morgan*, 942 F.2d 243, 246 (4th Cir. 1991); *Powell*, 886 F.2d at 85; *United States v. Isom*, 886 F.2d 736, 738 (4th Cir. 1989).

f. Hearsay. The amount of drugs for sentencing purposes is a factual question which the district court may resolve by considering any relevant and reliable evidence before it, including hearsay. *United States v. Bowman*, 926 F.2d 380, 381 (4th Cir. 1991); *United States v. Wilson*, 896 F.2d 856 (4th Cir. 1990); U.S.S.G. § 6A1.3(a).

g. Court Not Bound by Stipulations in Plea Agreements. In determining the quantity of drugs for sentencing purposes, the district

court is not bound by stipulations in plea agreements. U.S.S.G. § 6B1.4, Policy Statement; *see also United States v. Easterling*, 921 F.2d 1073, 1079 (10th Cir.), *cert. denied*, 111 S. Ct. 2066 (1990).

h. Findings in Presentence Reports. Where the quantity of drugs noted in the Presentence Report is challenged, the defendant has an affirmative duty to show that the information is inaccurate or unreliable. *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990).

i. Drug Equivalent of Cash Seized. In determining the quantity of drugs, the district court may consider "the drug equivalent of the cash seized," if it concludes that the cash came from the sale of drugs. *United States v. Hicks*, 948 F.2d 877, 882 (4th Cir. 1991).

4. Possession. Possession of drugs may be sole or joint, actual or constructive. Constructive possession exists when the person "exercises, or has the power to exercise, dominion and control" over the drugs. *United States v. Zandi*, 769 F.2d 229, 234 (4th Cir. 1985); *United States v. Laughman*, 618 F.2d 1067, 1077 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980). For a recent case discussing and finding constructive possession of a gun, see *United States v. Jones*, 945 F.2d 747, 749-50 (4th Cir. 1991).

5. Intent to Distribute. The intent to distribute drugs may be inferred from a number of factors, including but not limited to the quantity, the packaging, how and where the drugs are hidden, and the amount of cash seized. *United States v. Bell*, 954 F.2d 232, 235 (4th Cir. 1992); *United States v. Fisher*, 912 F.2d 728, 730 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2019 (1991); *United States v. Roberts*, 881 F.2d 95, 99 (4th Cir. 1989); *United States v. Grubbs*, 773 F.2d 599, 603-04 (4th Cir. 1985); *United States v. Wooten*, 688 F.2d 941, 946 (4th Cir. 1982); *United States v. Welebir*, 498 F.2d 346, 350-51 (4th Cir. 1974).

6. Proof of Cocaine. Expert testimony is not necessary to establish the identity of the substance involved in an alleged narcotics transaction as long as there is sufficient direct and circumstantial evidence. *See, e.g., United States v. Schrock*, 855 F.2d 327, 334 (6th Cir. 1988); *United States v. Dolan*, 544 F.2d 1219, 1221 (4th Cir. 1976).

7. Use of Firearm During and in Relation to Drug Trafficking. The "use" of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c) (1988) is committed even if the firearm is only constructively possessed "for protection and to facilitate the likelihood of success," whether or not it is ever actually held, brandished, or otherwise used. *United States v. Brockington*, 849 F.2d 872, 876 (4th Cir. 1988); *see also United States v. Paz*, 927 F.2d 176, 179 (4th Cir. 1991). Other issues raised in section 924(c) prosecutions:

a. Multiple Firearms. Multiple firearms involved in a single offense will not support multiple 924(c) convictions. *United States v. Casey*, 776 F. Supp. 272, 276 (E.D. Va. 1991) (collecting cases).

b. Enhanced (20-Year) Sentence for Second or Subsequent Conviction: The 20-year enhancement provisions of § 924(c)(1) apply even if the second firearm offense is charged in the same indictment as the first. *United States v. Raynor*, 939 F.2d 191, 193-94 (4th Cir. 1991) (joining majority of circuits in expressly rejecting argument that enhancement only applies to conviction for offense committed after first § 924(c) conviction).

c. Gun/Expert Testimony Unnecessary. Neither the firearm itself nor expert testimony about the firearm is necessary to sustain a conviction under 18 U.S.C. § 924(c). Rather, lay testimony regarding the use of what they believed to be a firearm is sufficient. *United States v. Jones*, 907 F.2d 456, 460 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 683 (1991).

8. Firearm Enhancement/Sentencing Guidelines. U.S.S.G. § 2D1.1(b)(1) provides for a two-level enhancement "[i]f a dangerous weapon was possessed during commission of the offense [unless] it is clearly improbable that the weapon was connected with the offense." The district court's determination is by a preponderance of the evidence and will be affirmed unless found to be clearly erroneous. *United States v. Apple*, 915 F.2d 899, 914 (4th Cir. 1990). Moreover, even if a defendant is acquitted of a related 924(c) charge, the two level enhancement is properly applied if a weapon was present during any of the subject drug trafficking. *United States v. Romulus*, 949 F.2d 713, 716-17 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1690 (1992); *United States v. Johnson*, 943 F.2d 383, 386 (4th Cir.), *cert. denied*, 112 S. Ct. 667 (1991); *United States v. White*, 875 F.2d 427, 433 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 748-49 (5th Cir. 1989). Likewise, the fact that the prosecutor decides not to charge an 18 U.S.C. § 924(c) violation does not prevent a U.S.S.G. § 2D1.1(b)(1) enhancement. *United States v. Bowman*, 926 F.2d 380, 381-82 (4th Cir. 1991). Possession or use of a firearm by a *co-defendant* has also been held to be sufficient basis for the firearms enhancement. *See United States v. Johnson*, 943 F.2d 383, 386 (4th Cir.), *cert. denied*, 112 S. Ct. 667 (1991).

9. Severe Penalties for Crack Cocaine. The more severe penalties assigned to crack cocaine in the Sentencing Guidelines (one gram of crack cocaine treated as 100 Grams of powder cocaine, U.S.S.G. § 2D1.1(c)) is "rational" and otherwise constitutional. *United States v. Thomas*, 900 F.2d 37, 39-40 (4th Cir. 1990); *see also United States v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991); *United States v. Johnson*, 944 F.2d 396, 404 n.7 (8th Cir.), *cert. denied*, 112 S. Ct. 646 (1991); *United States v. Pickett*, 941 F.2d 411, 418 (6th Cir. 1991); *United States v. Buckner*, 894 F.2d 975, 979-80 (8th Cir. 1990).

10. Expert Testimony on Packaging/Distribution. Because the distribution of drugs is outside the sphere of experience of many jurors, expert testimony regarding the packaging, dosages, and other aspects of the drug trade do not invade the jury's factfinding role, and therefore is permissible.

United States v. Safari, 849 F.2d 891, 895 (4th Cir.), *cert. denied*, 488 U.S. 945 (1988); *see also United States v. Foster*, 939 F.2d 445, 451-52 (7th Cir. 1991).

B. Sentencing Guidelines Issues

1. Straddle Conspiracies. A conspiracy which began prior to but continued beyond the effective date of the Sentencing Guidelines (November 1, 1987), a so-called "straddle conspiracy," is fully subject to the Sentencing Guidelines. *United States v. Barsanti*, 943 F.2d 428, 437 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1992); *United States v. Bakker*, 925 F.2d 728, 739 (4th Cir. 1991); *United States v. Meitinger*, 901 F.2d 27, 28 (4th Cir.), *cert. denied*, 111 S. Ct. 519 (1990); *United States v. Sheffer*, 896 F.2d 842, 845 (4th Cir.), *cert. denied*, 111 S. Ct. 432 (1990).

2. Amount of Loss. The determination of the amount of loss is essentially a factual question, requiring affirmance on appeal unless the district court's conclusions are clearly erroneous. *See United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989). The Sentencing Guidelines allow values to be "inferred from any reasonably reliable information available" and do not require the loss to be determined with precision. U.S.S.G. § 2B1.1, cmt. n.3. The Government meets its burden of proof if the value can be so inferred by a preponderance of the evidence. *United States v. Harris*, 882 F.2d 902, 907 (4th Cir. 1989) (preponderance proper standard of proof in resolving factual disputes regarding sentencing).

On occasions when the probable or intended loss is greater than the actual loss, the greater amount is used to determine the defendant's sentence. U.S.S.G. § 2F1.1, cmt. n.7. This is particularly apt to be true in the case of an uncompleted conspiracy. *See, e.g.*, U.S.S.G. § 2X1.1; *United States v. Depew*, 932 F.2d 324, 330 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991) (intended criminal conduct carries same weight as actual conduct); *United States v. Medeiros*, 897 F.2d 13, 18 (1st Cir. 1990) (fact that additional acts were necessary to complete conspiracy did not render contemplated outcome "speculative" within meaning of commentary to U.S.S.G. § 2X1.1).

For further discussion of amount of loss for Sentencing Guidelines purposes, see *supra* paragraph I.B.1.

3. Perjury. U.S.S.G. § 2J1.3(b)(2) states, "If the perjury or subordination of perjury resulted in substantial interference with the administration of justice, increase by three levels." There is a "substantial interference," for example, when the conduct results in "unnecessary expenditure of substantial governmental . . . resources." *United States v. Dudley*, 941 F.2d 260, 265 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 908 (1992) (citing U.S.S.G. § 2J1.3(b)(2), cmt. n.1).

4. Role in the Offense (Leader/Organizer/Manager/Supervisor). One frequently appealed Sentencing Guidelines issue is whether a particular defendant should receive an enhancement per section 3B1.1 for his or her role in the offense (that is, as a leader, organizer, manager, or supervisor).

Although role in the offense findings are appealable, because the determination is factual in nature and the district court will be overturned only if "clearly erroneous," role in the offense issues are seldom successfully raised on appeal. *See, e.g., United States v. Paz*, 927 F.2d 176, 180 (4th Cir. 1991); *United States v. Fells*, 920 F.2d 1179, 1185 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2831 (1991) (upholding district court's enhancement for unidentified participants); *United States v. Sheffer*, 896 F.2d 842, 846 (4th Cir.), *cert. denied*, 111 S. Ct. 432 (1990). For further discussion of role in the offense enhancements, see *supra* paragraph I.B.2.

5. Abuse of Position of Trust. As in issues pertaining to role in the offense the determination whether a defendant has abused a position of trust per U.S.S.G. § 3B1.3 are deemed to be factual in nature and will be overturned on appeal only if "clearly erroneous." *United States v. Helton*, 953 F.2d 867, 870 (4th Cir. 1992); *United States v. Chester*, 919 F.2d 896, 900 (4th Cir. 1990).

This enhancement has been given for defendants holding a wide range of positions: a United States Marshal, *United States v. Pascucci*, 943 F.2d 1032 (9th Cir. 1991); a prison case manager, *United States v. Brown*, 941 F.2d 1300 (5th Cir.), *cert. denied*, 112 S. Ct. 648 (1991); a comptroller and administrative manager of a company, *United States v. Harotunian*, 920 F.2d 1040 (1st Cir. 1990); an airline junior station agent, *United States v. Castagnet*, 936 F.2d 57 (2d Cir. 1991); a Customs Service informant, *United States v. Young*, 932 F.2d 1035 (2d Cir. 1991); a mail handler, *United States v. Lange*, 918 F.2d 707 (8th Cir. 1990); a savings and loan branch manager, *United States v. McMillen*, 917 F.2d 773 (3d Cir. 1990); a truck driver, *United States v. Hill*, 915 F.2d 502 (9th Cir. 1990); a baby sitter, *United States v. Zamarripa*, 905 F.2d 337 (10th Cir. 1990); a bank janitor, *United States v. Drabeck*, 905 F.2d 1304 (9th Cir. 1990), on rehearing, redesignated as a memorandum opinion, 944 F.2d 910 (9th Cir. 1991); a police officer, *United States v. Foreman*, 905 F.2d 1335 (9th Cir. 1990); a security guard, *United States v. Parker*, 903 F.2d 91 (2d Cir.), *cert. denied*, 111 S. Ct. 196 (1990); and a bank loan clerk, *United States v. Ehrlich*, 902 F.2d 327 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991).

Under the test set out in *United States v. Hill*, 915 F.2d 502 (9th Cir. 1990), and used by the Second Circuit in *United States v. Castagnet*, 936 F.2d 57 (2d Cir. 1991), a position of trust is one which gives the defendant the freedom to commit a difficult-to-detect wrong, with two indicia: (1) the criminal act will not be discovered as a matter of routine (such as the daily audit of a bank teller's till), and (2) the defendant's activities are not readily observed, so that he is in a position to commit a crime and leave the area before the crime is discovered. *Hill*, 915 F.2d at 506. Whether the defendant was in a position of trust must be viewed from the perspective of the victim. *Castagnet*, 936 F.2d at 62; *Hill*, 925 F.2d at 506 n.3.

For further discussion of the abuse of a position of trust enhancement, see *supra* paragraph I.B.3.

6. Obstruction of Justice. Another Sentencing Guidelines issue commanding much appellate ink is whether particular conduct warrants an

"obstruction of justice" enhancement per U.S.S.G. § 3C1.1. The following are examples of conduct the courts have held to justify this enhancement: (a) providing false information to the Magistrate at a bond hearing, *United States v. Romulus*, 949 F.2d 713, 717 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1690 (1992); (b) use of an alias at the time of arrest or interview by law enforcement, *United States v. Saintil*, 910 F.2d 1231, 1232-33 (4th Cir. 1990); *United States v. Rogers*, 917 F.2d 165 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1318 (1991); *United States v. Irabor*, 894 F.2d 554, 556 (2d Cir. 1990); *United States v. Brett*, 872 F.2d 1365, 1372-75 (8th Cir.), *cert. denied*, 110 S. Ct. 322 (1989); (c) providing misleading or false information or even refusing to testify about a co-defendant's involvement in the offense, *United States v. Williams*, 922 F.2d 737, 739 (11th Cir. 1991) (refusal to testify at co-defendant's trial held obstruction of justice); *United States v. Dyer*, 910 F.2d 530, 533 (8th Cir. 1990) (defendant who admitted her own criminal conduct but denied co-defendant's involvement obstructed justice); (d) throwing evidence (drugs) out of a car during a police chase, *United States v. Galvan-Garcia*, 872 F.2d 638, 641 (5th Cir.), *cert. denied*, 493 U.S. 857 (1989); (e) hiding a stolen credit card in a police car, *United States v. Roberson*, 872 F.2d 597, 609 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989); and (f) hiding stolen mail under a car when being approached by authorities, *United States v. Cain*, 881 F.2d 980, 982 (11th Cir. 1989).

However, per the sharply divided *en banc* decision in *United States v. Dunnigan*, 944 F.2d 178, 182-85 (4th Cir.), *modified*, 950 F.2d 149 (4th Cir. 1989), *cert. granted*, 112 S. Ct. 2272 (1992), it remains for the time being the law of the Fourth Circuit that testifying falsely in one's own defense, that is, committing perjury, is *not* a proper basis for an obstruction of justice enhancement.

For further discussion of obstruction of justice, see *supra* paragraph I.B.4.

7. Acceptance of Responsibility. To receive a two-level reduction for acceptance of responsibility per U.S.S.G. § 3E1.1 a defendant must accept responsibility for *all* his criminal activity. *United States v. Gordon*, 895 F.2d 932, 936 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990). The district court's determination whether a defendant has accepted responsibility is deemed factual in nature and therefore will be affirmed on appeal unless clearly erroneous. *United States v. Greenwood*, 928 F.2d 645, 646 (4th Cir. 1991); *United States v. Cusack*, 901 F.2d 29, 31 (4th Cir. 1990); *United States v. Harris*, 882 F.2d 902, 905 (4th Cir. 1989); *United States v. White*, 875 F.2d 427, 431 (4th Cir. 1989). Several related points:

a. Defendant Has Burden. The defendant has the burden of showing he is entitled to a reduction for acceptance of responsibility. *Harris*, 882 F.2d at 907.

b. Timeliness of Acceptance/Acceptance After Trial. Timeliness of a defendant's acceptance of responsibility is pertinent in determining whether a reduction is appropriate. *United States v. Martinez*, 901 F.2d 374, 377-78 (4th Cir. 1990). Therefore, when a defendant

chooses to go to trial, the reduction is warranted only "in rare situations." U.S.S.G. § 3E1.1, cmt. n.2.

c. Continued Criminal Conduct. A defendant's continued criminal conduct after arrest will usually make reduction for acceptance of responsibility inappropriate. *See, e.g., United States v. O'Neil*, 936 F.2d 599, 600-01 (1st Cir. 1991); *United States v. Lassiter*, 929 F.2d 267, 270 (6th Cir. 1991); *United States v. Scroggins*, 880 F.2d 1204, 1215-16 (11th Cir. 1989).

For further discussion of acceptance of responsibility, see *supra* paragraph I.B.5.

8. Criminal History/Career Offender. Convictions for offenses committed after the subject offense are counted in a defendant's criminal history. U.S.S.G. § 4A1.2; *United States v. Hoy*, 932 F.2d 1343, 1345 (9th Cir. 1991); *United States v. Walker*, 912 F.2d 1365, 1366 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1004 (1991); *United States v. Altman*, 901 F.2d 1161, 1165-66 (2d Cir. 1990); *United States v. Smith*, 900 F.2d 1442, 1446-47 (10th Cir. 1990). However, to count toward career offender status, the instant offense must have been committed after conviction for the two prior predicate offenses. U.S.S.G. § 4B1.2(3); *United States v. Bassil*, 932 F.2d 342, 346 (4th Cir. 1991). For further discussion of criminal history and career offender status see *supra* paragraphs I.B.6 (Career Offenders), I.B.7.c (Downward Departures/Criminal History Category Overstates Seriousness of Criminal History), and I.B.8 (Upward Departures), and *infra* paragraph II.B.10 (Upward Departures).

a. Related Cases as Single Conviction. Determination whether convictions for two or more crimes are so related that they should be counted as a single conviction—a momentous determination when career offender status hangs in the balance—are reviewed de novo, assuming there are no disputed facts. *United States v. Rivers*, 929 F.2d 136 (4th Cir.), *cert. denied*, 112 S. Ct. 431 (1991). However, the mere fact of separate convictions makes it difficult to prove otherwise: shared motivation for the crimes is not enough, *United States v. Sanders*, 954 F.2d 227, 231-32 (4th Cir. 1992); nor is a similar modus operandi, *United States v. Davis*, 922 F.2d 1385, 1389-90 (9th Cir. 1991); nor is the fact that concurrent sentences were imposed for otherwise separate crimes, *United States v. Hines*, 943 F.2d 348, 355 (4th Cir.), *cert. denied*, 112 S. Ct. 613 (1991).

b. Court's Discretion to Downward Depart. The court does have authority to depart downward if career offender status overstates the seriousness of the defendant's criminal history. *United States v. Pinckney*, 938 F.2d 519, 520-22 (4th Cir. 1991); *United States v. Adkins*, 937 F.2d 947, 951-52 (4th Cir. 1991). However, such departures are only envisioned in the "atypical" or "truly unusual" case. *Adkins*, 937 F.2d at 952.

c. Burglary as Violent Crime. For career offender purposes, conviction for unlawful entry into a dwelling is considered to be the "violent crime" of "burglary" described in section 4B1.1, whether the state crime is referred to as burglary, housebreaking, breaking and entering, or by some other label. *United States v. Wilson*, 951 F.2d 586, 587 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 2294 (1992); *United States v. Raynor*, 939 F.2d 191, 195-96 (4th Cir. 1991); *United States v. Cruz*, 882 F.2d 922, 923 (5th Cir. 1989); *United States v. Davis*, 881 F.2d 973, 976 (11th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990); *United States v. Pinto*, 875 F.2d 143, 144 (7th Cir. 1989). Closely related is whether a conviction for unlawful entry of a dwelling constitutes "burglary" under 18 U.S.C. § 924(e), 15-year mandatory minimum, per the Armed Career Criminal Act, for possession of a firearm after three convictions for serious drug offenses and/or crimes of violence. As the Supreme Court held in *Taylor v. United States*, 495 U.S. 575 (1990), the label does not matter; only if the subject statute prohibits something in addition to unlawful entry of a dwelling is there further inquiry into the particular facts, and then only to determine whether it was, in fact, unlawful entry of a dwelling which was charged and convicted.

9. Downward Departures.

a. Refusal Ordinarily Not Appealable. Unless the district court wrongly believes it lacks authority to depart, the district court's decision not to depart downward is not appealable. *United States v. Meitinger*, 901 F.2d 27, 28 (4th Cir.), *cert. denied*, 111 S. Ct. 519 (1990); *United States v. Bayerle*, 898 F.2d 28, 30-31 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990); *United States v. Wilson*, 896 F.2d 856 (4th Cir. 1990). Nor is the extent of a downward departure, should the court elect to depart at all, a subject for appellate review. *United States v. Sharp*, 931 F.2d 1310, 1311 (8th Cir. 1991); *United States v. Pomerleau*, 923 F.2d 5, 6 (1st Cir. 1991); *United States v. Weaver*, 920 F.2d 1570, 1577 (11th Cir. 1991); *United States v. Vizcarra-Angulo*, 904 F.2d 22, 23 (9th Cir. 1990).

b. Diminished Mental Capacity. U.S.S.G. § 5K2.13, p.s., provides that the sentencing court may downwardly depart if a defendant has committed "a *non-violent* offense while suffering from significantly reduced mental capacity." (emphasis added). Courts have generally agreed that the negative implication of this language is that a court may not depart on the basis of reduced capacity if defendant has committed a violent offense. *See United States v. Poff*, 926 F.2d 588, 591 (7th Cir. 1991) (en banc); *United States v. Russell*, 917 F.2d 512, 517 (11th Cir. 1990).

c. Miscellaneous Non-Grounds. None of the following justifies a downward departure: (a) a good employment record, U.S.S.G. § 5H1.5; (b) family responsibility, U.S.S.G. § 5H1.6; (c) personal

financial difficulty, "under even extraordinary circumstances," *United States v. Deigert*, 916 F.2d 916, 919 n.2 (4th Cir. 1990) (citing U.S.S.G. § 5K2.12); (d) significant charitable contributions, *United States v. McHan*, 920 F.2d 244, 247-48 (4th Cir. 1990); or (e) to allow the defendant to make restitution to victims, *United States v. Bolden*, 889 F.2d 1336, 1340 (4th Cir. 1989).

d. Government's Refusal to Make "Substantial Assistance" Motion. Where the Government agrees in a plea agreement to move for a downward departure if the defendant provides "substantial assistance" per U.S.S.G. § 5K1.1, and at sentencing the Government refuses to so move, the defendant must be given an opportunity to prove, by a preponderance of the evidence, that the Government has breached the plea agreement. *United States v. Conner*, 930 F.2d 1073, 1076-77 (4th Cir.), *cert. denied*, 112 S. Ct. 420 (1991); *cf. United States v. Raynor*, 939 F.2d 191, 195 (1991) in which the court refused to extend this right to cases in which no such provision appears in the plea agreement (except insofar as there is "substantial showing" of Government's "unconstitutional motive" per *Wade v. United States*, 112 S. Ct. 1840 (1992)).

For further discussion of downward departures, see *supra* paragraph I.B.7.

10. Upward Departures. As the court stated in *United States v. Hummer*, 916 F.2d 186, 192 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1608 (1991), upward departures are reviewed on appeal in this way:

> We review departures from the applicable Sentencing Guidelines range under a multi-part test of "reasonableness" derived from our reading of 18 U.S.C.A. § 3742 in conjunction with 18 U.S.C.A. § 3553(b). *United States v. Summers*, 893 F.2d 63 (4th Cir. 1990). Under this test, we first examine de novo the specific reasons cited by the district court in support of its sentence outside the Guidelines range to ascertain whether those reasons encompass factors "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C.A. § 3553(b). If the sentencing court identified one or more factors potentially warranting departure, we apply a clearly erroneous standard and review the factual support in the record for those identified circumstances. Upon ascertaining that there is an adequate factual basis for the factors, we apply an abuse of discretion standard to determine if, on balance, the cited departure factors are of sufficient importance in the case such that a sentence outside the Guidelines range "should result." *Id.* Similarly, we apply an abuse of discretion standard to determine if the extent of departure was reasonable.

See also United States v. Palinkas, 938 F.2d 456, 461 (4th Cir. 1991); *United States v. Chester*, 919 F.2d 896, 900 (4th Cir. 1990); *United States v. Summers*, 893 F.2d 63, 67 (4th Cir. 1990).

Under U.S.S.G. § 4A1.3, the district court is authorized to depart upward when the criminal history category does not adequately reflect the defendant's criminal history or where it is determined that the defendant is likely to commit more crimes. *See, e.g., United States v. Wilson*, 913 F.2d 136, 138-39 (4th Cir. 1990); *United States v. McKenley*, 895 F.2d 184, 185-86 (4th Cir. 1990).

For further discussion of upward departures, see *supra* paragraph I.B.8.

11. Restitution. In determining restitution, the trial court must make "explicit fact findings" regarding "the amount of the loss sustained by the victim as a result of the offense, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3664(a) (Supp. III 1991); *United States v. Bruchey*, 810 F.2d 456, 458-59 (4th Cir. 1987). Failure to make the required findings of fact may cause the appellate court to vacate and remand for resentencing. *See, e.g., United States v. Sharp*, 927 F.2d 170, 174 (4th Cir.), *cert. denied*, 112 S. Ct. 139 (1991).

Restitution by installment payments must be completed by the end of probation, or within five years after the end of a term of imprisonment. 18 U.S.C. § 3663(f)(2) (1988); *Bruchey*, 810 F.2d at 460.

Finally, unless there is a specific agreement with the defendant to the contrary, the Victim and Witness Protection Act authorizes "restitution only for the loss [resulting from] the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990) (footnote omitted). In other words, absent an agreement, the court is not authorized to order restitution for amounts charged in other counts or for "related conduct."

For further discussion of restitution, see *supra* paragraph I.B.12.

12. Factual Findings by District Court.

a. Facts in Presentence Report. "Without an affirmative showing the information is inaccurate, the court is 'free to adopt the findings of the [presentence report] without more specific inquiry or explanation.'" *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (quoting *United States v. Mueller*, 902 F.2d 336, 346 (5th Cir. 1990)); *see United States v. Hicks*, 948 F.2d 877, 881 (4th Cir. 1991) (stating that appellate court should apply "clearly erroneous" standard to factual determinations by district court).

b. Stipulation in Plea Agreement. Where there is a discrepancy between the presentence report and a stipulation in a plea agreement "[t]he court is not bound by the stipulation but may with the aid of the presentence report, determine the facts relevant to sentencing." U.S.S.G. § 6B1.4, Policy Statement; *see United States v. Easterling*, 921 F.2d 1073, 1079 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2066 (1991).

c. Acquitted Conduct. Acquitted conduct may be considered at sentencing if it is proved by a preponderance of the evidence. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 376 n.1 (1989);

United States v. Romulus, 949 F.2d 713, 716-17 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1690 (1992); *United States v. Morgan*, 942 F.2d 243, 246 (4th Cir. 1991); *United States v. Averi*, 922 F.2d 765 (11th Cir. 1991); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 181 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 127 (1991); *United States v. Isom*, 886 F.2d 736, 738 (4th Cir. 1989). Also, see the cases supporting a firearm enhancement under U.S.S.G. § 2D1.1(b) after acquittal on an 18 U.S.C. § 924(c) charge, discussed *supra* in paragraph II.A.8.

d. Scope of Information/Hearsay. In finding facts relative to sentencing, the court is entitled to consider any information it considers to be sufficiently reliable, including reliable hearsay. 18 U.S.C. § 3661 (1988); *United States v. Bowman*, 926 F.2d 380, 381 (4th Cir. 1991); *United States v. Wilson*, 896 F.2d 856 (4th Cir. 1990); U.S.S.G. § 6A1.2, Commentary, § 6A1.3(a).

e. Waiver. Failure to object to factual inaccuracies in a presentence report at sentencing constitutes waiver of the issue on appeal. *United States v. Saucedo*, 950 F.2d 1508, 1518 (10th Cir. 1991); *United States v. Heilprin*, 910 F.2d 471, 474 (7th Cir. 1990). For further discussion of waiver of appellate review by failure to object, see *infra* paragraphs II.D.13 & 47.

f. Standard of Review on Appeal. In general, factual findings are reviewed on appeal—if they are reviewed at all—under the "clearly erroneous" standard. *United States v. Goff*, 907 F.2d 1441, 1444 (4th Cir. 1990); *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991).

13. Appeal of Sentencing Errors Generally. Sentencing errors cannot be raised for the first time on appeal. *Wren v. United States*, 540 F.2d 643, 644 n.1 (4th Cir. 1975). The adoption of the Sentencing Guidelines has not changed the basic requirement that one must preserve issues for review by presenting them to the district court. *See United States v. Taylor*, 868 F.2d 125, 127 (5th Cir. 1989). When no objection is made at the sentencing hearing, such a failure results in waiver unless the district court committed "plain error." *United States v. Davis*, 954 F.2d 182, 186-87 (4th Cir. 1992); *United States v. Rivers*, 929 F.2d 136, 139-40 (4th Cir.), *cert. denied*, 110 S. Ct. 431 (1991); *United States v. Tibesar*, 894 F.2d 317, 319 (8th Cir.), *cert. denied*, 111 S. Ct. 79 (1990); FED. R. CRIM. P. 52(b).

The plain error rule authorizes this Court to correct only "particularly egregious errors" that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Young*, 470 U.S. 1, 15 (1985). The plain error exception should be used "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* Moreover, "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 2032 (1991).

For further discussion of the effect of failure to object on appellate review, see *supra* paragraph II.D.12.e and *infra* paragraph II.D.47.

14. Sentences Within Guidelines Range/Overlapping Ranges. It is entirely within the district court's discretion to fix the sentence at any point within the Guidelines range, *United States v. Roberts*, 881 F.2d 95, 106-07 (4th Cir. 1989), and its decision is not appealable as long as the range is correctly calculated. *United States v. Porter*, 909 F.2d 789, 794 (4th Cir. 1990); *see also Williams v. United States*, 112 S. Ct. 1112, 1121 (1992) (selection of sentence from within Guidelines range is decision left solely to sentencing court).

Similarly, where there is a dispute over which of two overlapping Guidelines ranges is applicable, the district court makes it clear that a certain sentence will be imparted irrespective of which range is applicable, and then sentences at a point falling in both ranges, such a sentence is not reviewable on appeal. *United States v. Smith*, 914 F.2d 565, 569 n.3 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 999 (1991); *United States v. White*, 875 F.2d 427, 432-33 (4th Cir. 1989); *United States v. Bermingham*, 855 F.2d 925, 931 (2d Cir. 1988).

15. Disparity of Co-Defendant's Sentence. A defendant may not challenge his sentence merely because a co-defendant received a lighter sentence. *United States v. Kant*, 946 F.2d 267, 270 n.3 (4th Cir. 1991); *United States v. Porter*, 909 F.2d 789, 794 n.5 (4th Cir. 1990); *United States v. Goff*, 907 F.2d 1441, 1447 (4th Cir. 1990); *United States v. Foutz*, 865 F.2d 617, 621 (4th Cir. 1989).

16. Sentencing Credit for Pretrial Detention or Release. Claims for credit on a sentence for either pretrial detention or release must be first presented to the Attorney General of the United States after a defendant has begun to serve his sentence. *United States v. Wilson*, 112 S. Ct. 1351 (1992); 18 U.S.C. § 3585(b) (1988). Therefore, a district court is not authorized to award credit for time served in official detention, or on some kind of restricted release, at sentencing. *Wilson*, 112 S. Ct. at 1353-56.

17. State Mandatory Minimums Under Assimilated Crimes Act. Sentences for violations of state statutes assimilated under 18 U.S.C. § 13 (1988) must fall within the minimum and maximum terms established by state law. *United States v. Young*, 916 F.2d 147, 150-51 (4th Cir. 1990); *see United States v. Garcia*, 893 F.2d 250, 251-52 (10th Cir. 1989), *cert. denied*, 444 U.S. 1070 (1991) (holding that federal court must apply state mandatory minimum sentence under Guidelines).

18. Other Challenges to Length of Sentence. In addition to disputes over Sentencing Guidelines issues and ranges, defendants occasionally contest the length of their sentences on other grounds.

a. More Lengthy Sentence After Trial. The Supreme Court has consistently rejected Fifth and Sixth Amendment challenges to more lengthy sentences given after trial than to co-defendants or others

who plead guilty. *See, e.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 218-26 (1978); *United States v. Frazier*, 971 F.2d 1076, 1083-84 (4th Cir. 1992) (discussing cases), *cert. denied*, 61 U.S.L.W. 3480 (U.S. Jan. 11, 1993) (No. 92-6157).

b. Ex Post Facto Defense. 18 U.S.C. § 3553(a)(4) requires the court to apply the Guideline that is in effect on the date the defendant is sentenced, giving a defendant the benefit of any favorable amendment between commission of the offense and the date of sentencing. However, the Ex Post Facto Clause precludes application of an amended guideline which is unfavorable to the defendant. *See Miller v. Florida*, 482 U.S. 423 (1987) (applying Clause to state guideline sentencing scheme); *United States v. Morrow*, 925 F.2d 779, 782-83 (4th Cir. 1991).

The exception to this general rule are so-called "straddle conspiracies," discussed *supra* in paragraph II.B.1. The courts have consistently held that applying the Sentencing Guidelines to straddle conspiracies or similar ongoing criminal conduct violates neither the Due Process Clause nor the Ex Post Facto Clause. *See United States v. Meitinger*, 901 F.2d 27, 28 (4th Cir.) ("In this case, the conspiracy continued after the effective date of the Guidelines, and thus the Guidelines are applicable in this case"), *cert. denied*, 111 S. Ct. 519 (1990); *United States v. Sheffer*, 896 F.2d 842, 845 (4th Cir.) ("We agree with our sister circuits that the application of the Guidelines to an ongoing conspiracy does not in any way violate the [E]x [P]ost [F]acto clause"), *cert. denied*, 111 S. Ct. 432 (1990).

c. Eighth Amendment Defenses. "Proportionality review" under the Eighth Amendment's guarantee against "cruel and unusual punishment" is limited to sentences of death or life without parole. *United States v. Polk*, 905 F.2d 54 (4th Cir.), *cert. denied*, 111 S. Ct. 519 (1990); *United States v. Thomas*, 900 F.2d 37, 39 (4th Cir. 1990). Further, even when a life sentence is imposed, it will be affirmed on appeal unless "grossly disproportionate" to the crime committed. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1981).

For further discussion of length of sentences, see *supra* paragraph I.E.34.

19. Intended Versus Actual Offense Conduct. Under the Sentencing Guidelines, intended offense conduct carries the same weight as actual conduct. *United States v. Depew*, 932 F.2d 324, 330 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991); *United States v. Medeiros*, 897 F.2d 13 (1st Cir. 1990) (fact that additional acts were necessary to complete conspiracy did not render intended outcome "speculative" within meaning of commentary to U.S.S.G. § 2X1.1).

20. Resentencing in Defendant's Absence. Under FED. R. CRIM. P. 43, a defendant is only required to be present where the sentence is increased,

or where the entire sentence is vacated and the case remanded for resentencing. *United States v. Jackson*, 923 F.2d 1494, 1497 (11th Cir. 1991); *Rust v. United States*, 725 F.2d 1153, 1154 (8th Cir. 1984); *see also Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (presence not required at key stages of trial where presence would be useless).

C. Search and Seizure

1. Probable Cause. In appellate review of a Magistrate's probable cause determination, "great deference" is to be shown to the Magistrate's assessment of the facts presented to him in support of a search warrant. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990); *United States v. McCall*, 740 F.2d 1331 (4th Cir. 1984). "[T]he task of a reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984). However, to the extent the facts are undisputed and the challenge to the search warrant is on a purely legal basis, appellate review is de novo. *United States v. Miller*, 925 F.2d 695, 698 (4th Cir.), *cert. denied*, 112 S. Ct. 111 (1991).

Probable cause to arrest exists if the totality of the circumstances would cause a reasonable person to believe a crime has been committed, *Illinois v. Gates*, 462 U.S. 213 (1983); *Beck v. Ohio*, 379 U.S. 89 (1964), taking into account information received from informants. *United States v. Porter*, 738 F.2d 622, 625-26 (4th Cir.) (en banc), *cert. denied*, 469 U.S. 983 (1984); *United States v. Shepherd*, 714 F.2d 316, 317 (4th Cir. 1983), *cert. denied*, 466 U.S. 938 (1984); *United States v. Laughman*, 618 F.2d 1067, 1072 (4th Cir.), *cert. denied*, 447 U.S. 925 (1980). For a case discussing probable cause to arrest in the context of an investigative stop by a drug interdiction unit, see *United States v. Aguiar*, 825 F.2d 39, 41 (4th Cir.) (officer's observation of bulge and white plastic on suspect's ankle combined with other "drug profile characteristics" constitutes probable cause to arrest), *cert. denied*, 484 U.S. 987 (1987).

2. Affidavit in Support of Search Warrant. The reliability of an informant's information used in an affidavit in support of a search warrant may be inferred from the factual circumstances, even if the affidavit is otherwise devoid of any stated reasons why the informant is believed to be reliable. *United States v. Miller*, 925 F.2d 695 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 111 (1991). Likewise, the fact-based conclusion of experienced law enforcement personnel that evidence is likely to be found at a particular location may be relied upon in making the probable cause determination. *United States v. Jenkins*, 901 F.2d 1075 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 259 (1990); *United States v. Fannin*, 817 F.2d 1379 (9th Cir. 1987); *United States v. Reyes*, 798 F.2d 380, 382 (10th Cir. 1986); *United States v. Foster*, 711 F.2d 871, 878 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *see United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988)

(finding probable cause where officer told of pistol by informants), *cert. denied*, 488 U.S. 1031 (1989).

It is well settled that an affidavit in support of a search warrant may be based in whole or in part on hearsay information so long as it has sufficient indicia of reliability. *See, e.g.*, *United States v. Ventresca*, 380 U.S. 102, 103 (1965); *United States v. Chavez*, 902 F.2d 259, 265 (1990); FED. R. CRIM. P. 41(c)(1). The fact that an informant is admitting to a crime or providing information in hopes of leniency for past crimes are "indicia of reliability" of the information provided. *United States v. Harris*, 403 U.S. 573, 583 (1971); *United States v. Miller*, 925 F.2d 695, 699 (4th Cir.), *cert. denied*, 112 S. Ct. 111 (1991). Moreover, tips from different informants (multiple hearsay sources) may properly be used to establish probable cause. *United States v. Landis*, 726 F.2d 540, 543 (9th Cir.) ("Interlocking tips from different confidential informants enhance the credibility of each"), *cert. denied*, 467 U.S. 1230 (1984).

3. Description of Items to be Seized. A generic description of items to be seized pursuant to a search warrant (*e.g.*, "ledgers, papers, books, records") is sufficient to meet the Fourth Amendment's particularity requirement. *United States v. Peagler*, 847 F.2d 756, 757 (11th Cir. 1988); *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *see also United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986) (finding search warrant for "address books, diaries," and other items sufficiently specific).

4. Anticipatory Search Warrants. Anticipatory search warrants are permissible when contraband "is on a sure course to its destination." *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988); *see United States v. Dornhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989).

5. Franks Hearing. In order to be entitled to a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), commonly referred to as a Franks hearing, a defendant must make a "dual showing . . . which incorporates both a subjective and an objective threshold component." First, the defendant "must make 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.'" *Franks*, 438 U.S. at 155-56. Secondly, the offending information must be essential to the probable cause determination; if the offending information is excluded and probable cause still remains, no *Franks* hearing is required. *Id.*; *see United States v. Chavez*, 902 F.2d 259, 265 (4th Cir. 1990) (must show that agent affirmatively tried to mislead Magistrate to warrant *Franks* hearing; ambiguity or lack of clarity is insufficient).

6. Police-Citizen Encounters Versus "Seizure" of Person. The Fourth Circuit continues to emphasize in so-called "police-citizen encounters" that whether an individual has been "seized" is determined by whether a reasonable person would have believed that he or she was "free to leave."

United States v. Gordon, 895 F.2d 932, 937 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990); *United States v. Alpert*, 816 F.2d 958, 960 (4th Cir. 1987); *see also INS v. Delgado*, 466 U.S. 210, 215 (1984); *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980). The Fourth Amendment is definitely not violated, the Court repeatedly points out, when the police simply approach a person in a public place and ask that person to answer some questions. *Florida v. Bostick*, 111 S. Ct. 2382 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983); *United States v. Flowers*, 912 F.2d 707, 711-12 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991); *United States v. Gray*, 883 F.2d 320, 322-23 (4th Cir. 1989); *cf. United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (reversing conviction resulting from police-citizen encounter which developed into unlawful seizure).

The district court's determination whether a seizure occurred is factual in nature and will be overturned on appeal only if "clearly erroneous." *United States v. Wilson*, 895 F.2d 168, 172 (4th Cir. 1990); *United States v. Gordon*, 895 F.2d 932, 937-38 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990); *United States v. Clark*, 891 F.2d 501 (4th Cir. 1989); *United States v. Porter*, 738 F.2d 622, 625 (4th Cir.), *cert. denied*, 469 U.S. 983 (1984).

7. Investigative Stop/"Reasonable Suspicion." Another recurring issue on appeal was what constitutes "reasonable suspicion" to justify a so-called "investigative stop" or brief "investigative detention" per *United States v. Sokolow*, 490 U.S. 1, 7 (1989) and *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The Court continues to point out that the requisite "reasonable suspicion" is more than an "inchoate and unparticularized suspicion or 'hunch,'" but less than probable cause, *Sokolow*, 490 U.S. at 7; *United States v. Gooding*, 695 F.2d 78 (7th Cir. 1982). The existence of "reasonable suspicion" is determined under a "totality of the circumstances" test, and may even be based upon anonymous informant tips if there has been independent corroboration of the veracity of the information provided. *Alabama v. White*, 496 U.S. 325, 329-30 (1990); *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *United States v. Crittendon*, 883 F.2d 326, 328 (4th Cir. 1989).

Because the intrusion created by an investigatory stop and frisk is minimal, the reasonable suspicion standard is not onerous. *See, e.g., United States v. Moore*, 817 F.2d 1105, 1107 (4th Cir.) (officer's nighttime observation of man walking away from otherwise deserted area where burglar alarm had just gone off constitutes reasonable suspicion to stop man), *cert. denied*, 484 U.S. 965 (1987); *United States v. Turner*, 933 F.2d 240, 242-44 (4th Cir. 1991) (officer with experience in narcotics investigations had reasonable suspicion to stop and determine whether she was "cooking" illegal drugs after observing her carry cup of water out of convenience store, walk to car, and lean over front seat as if to hide something).

Moreover, if reasonable suspicion to stop a suspect exists, the officer is entitled to conduct a frisk and limited search for weapons to protect himself. *United States v. Hensley*, 469 U.S. 221 (1985); *Terry v. Ohio*, 392 U.S. 1, 29 (1968) (search should be "confined in scope to an intrusion reasonably designed to discover knives, clubs, or other hidden instruments

for the assault of the police officer"); *United States v. Brockington*, 849 F.2d 872, 876 (4th Cir. 1988) (recognizing that guns are common tool of drug trade); *United States v. Moore*, 817 F.2d 1105, 1107-08 (4th Cir.), *cert. denied*, 484 U.S. 965 (1987).

The standard of review of an investigative stop on appeal is twofold. Underlying factual determinations are reviewed under a "clearly erroneous" standard. *United States v. McCraw*, 920 F.2d 224, 227 (4th Cir. 1990); *United States v. Porter*, 738 F.2d 622, 625 (4th Cir.) (en banc), *cert. denied*, 469 U.S. 983 (1984). The determination of whether the particular facts constitute "reasonable suspicion" is reviewed de novo.

8. Protective Sweep Searches. Protective sweep searches of buildings incident to the arrest of persons in or immediately outside a dwelling or building are permissible to protect the safety of the arresting police officers. *Maryland v. Buie*, 494 U.S. 325 (1990); *United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 80 (1990); *United States v. Bernard*, 757 F.2d 1439 (4th Cir. 1985); *United States v. Baker*, 577 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978).

9. Consent to Search. Another recurring appellate issue is whether a defendant's alleged "consent to search" was knowing and voluntary. The question of voluntariness likewise turns on the "totality of the circumstances," which the Government must prove by a preponderance of the evidence. *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Matlock*, 415 U.S. 164, 177 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). Whether a defendant had the requisite understanding of the English language to knowingly consent to a search is a question of fact, but in no event is the Government required to show that a defendant knew he had the right to refuse consent. *United States v. Gordon*, 895 F.2d 932, 938 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990).

Agents are not required to disclose their true identity to obtain valid consent. Nor are agents required to disclose their true purpose for wishing to enter the premises. *See Lewis v. United States*, 385 U.S. 206, 208-10 (1966). "A government agent may obtain an invitation onto property by misrepresenting his identity, and if invited, does not need probable cause nor warrant to enter so long as he does not exceed the scope of his invitation." *United States v. Scherer*, 673 F.2d 176, 182 (7th Cir.), *cert. denied*, 457 U.S. 1120 (1982).

A third party otherwise put in charge of certain property or premises may validly consent to its search. *Stoner v. California*, 376 U.S. 483 (1964). Moreover, even if a third party giving consent did not, in fact, have authority to do so, the search will be upheld if the officer reasonably believed the third party had authority to consent. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990).

On appeal, the district court's findings are deemed to be factual in nature and therefore will be affirmed unless "clearly erroneous." *United States v. Gordon*, 895 F.2d 932, 938 (4th Cir.), *cert. denied*, 111 S. Ct. 131

(1990); *United States v. Wilson*, 895 F.2d 168, 172 (4th Cir. 1990); *United States v. Poole*, 718 F.2d 671, 674 (4th Cir. 1983).

10. Searches Incident to Arrest. Searches incident to arrest are another well-established exception to the warrant requirement. *United States v. Robinson*, 414 U.S. 218, 222 (1973). Where officers have probable cause to arrest (independent of whatever is found in the search), a search immediately *before* arrest also qualifies as a "search incident to arrest." *United States v. Miller*, 925 F.2d 695, 698-99 (4th Cir.), *cert. denied*, 112 S. Ct. 111 (1991).

Warrantless arrests—and searches incident thereto—are permitted where there is probable cause to believe a felony is being or has been committed, based upon "the totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. McGraw*, 920 F.2d 224, 227 (4th Cir. 1990).

A valid arrest warrant carries with it the authority to enter the home of the person to be arrested, assuming there is reason to believe the person may be inside. *Payton v. New York*, 445 U.S. 573, 602-03 (1980). Once validly inside the house, other principles relative to search and seizure may apply, including particularly searches incident to arrest and the plain view doctrine.

11. Good Faith Exception. A finding by the district court that otherwise improperly seized evidence is admissible under the good faith exception per *United States v. Leon*, 468 U.S. 897 (1984), is reviewed on appeal de novo. *United States v. Anderson*, 851 F.2d 727 (4th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989); *United States v. Hove*, 848 F.2d 137, 139 (9th Cir. 1988); *United States v. Edwards*, 798 F.2d 686 (4th Cir. 1986). Both at the district court and appellate levels the inquiry is whether good faith reliance on an otherwise invalid search warrant is objectively reasonable, that is, whether "a reasonably well-trained officer . . . [would] have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 at 922 n.23.

12. Abandoned Property/Denial of Ownership. Those who are found to have abandoned property have no standing to challenge its seizure. *Abel v. United States*, 362 U.S. 217, 241 (1960); *United States v. Flowers*, 912 F.2d 707, 711 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991); *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976). Consequently, if a suspect denies ownership of certain property, he loses standing he may have otherwise had to contest its seizure. *See Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

13. Vehicle Searches. Vehicles and any containers found in vehicles may be searched without a warrant when the search is incident to a lawful arrest. *California v. Acevedo*, 111 S. Ct. 1982 (1991); *United States v. Ross*, 456 U.S. 798, 825 (1982); *New York v. Belton*, 453 U.S. 454, 460 (1981); *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980); *United States v. Taylor*, 857 F.2d 210, 214 (4th Cir. 1988); *United States v. Bellina*, 665 F.2d 1335,

1342 (4th Cir. 1981). Vehicles which are in the lawful custody of law enforcement may also be searched for inventory purposes without a warrant. *South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Brown*, 787 F.2d 929 (4th Cir. 1986), *cert. denied*, 479 U.S. 837 (1986); *see also United States v. Chavis*, 880 F.2d 788 (4th Cir. 1989) (passage of time between arrest and vehicle search does not invalidate finding of probable cause for conducting warrantless search).

A third party in sole possession of a vehicle belonging to another has authority to consent to its search. *United States v. Dunkley*, 911 F.2d 522, 526 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 765 (1991).

14. Standing to Challenge/Expectation of Privacy. To challenge the legality of a search under the Fourth Amendment a defendant must have "a reasonable expectation of privacy" in the place to be searched. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). A reasonable expectation of privacy is not created by the subjective expectation of the defendant alone; the court must look at the defendant's interest and control in the area searched, the measures taken by the defendant to ensure privacy, and society's willingness to recognize defendant's expectation as reasonable. *United States v. Horowitz*, 806 F.2d 1222, 1225 (4th Cir. 1986); *see also California v. Greenwood*, 486 U.S. 35 (1988) (no reasonable expectation of privacy in garbage left on street curb); *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Brown*, 743 F.2d 1505, 1507 (11th Cir. 1984).

Similarly, the Fourth Circuit has held that "Fourth Amendment rights are . . . personal rights," which co-defendants "lack standing to assert vicariously." *United States v. Taylor*, 857 F.2d 210, 214 (4th Cir. 1988) (noting that adult defendants had no standing to challenge constitutionality of search of juvenile on whom drugs for which adults were prosecuted were found); *see also Brown v. United States*, 411 U.S. 223, 230 (1973).

D. Miscellaneous

1. Venue. Challenges to the venue cannot be raised for the first time on appeal. Failure to raise venue objections in the district court constitutes waiver. *United States v. Santiesteban*, 825 F.2d 779 (4th Cir. 1987).

2. Use Immunity. Promise by the Government not to use information provided by a defendant in *further* prosecutions does not prevent the Government from using the information in that prosecution. *United States v. Reckmeyer*, 786 F.2d 1216, 1224 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986).

3. Double Jeopardy.

a. State and Federal Prosecutions. Prosecution in both federal and state court for exactly the same criminal conduct is not double jeopardy. *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Iaquinta*, 674 F.2d 260, 264 (4th Cir. 1982); *United States v. Musgrove*, 581 F.2d 406 (4th Cir. 1978).

b. Multiple Punishments. The Double Jeopardy Clause prohibits multiple punishments for the same offense. *Grady v. Corbin*, 495 U.S. 508 (1990); *Blockburger v. United States*, 284 U.S. 299, 302 (1932); *United States v. Clark*, 928 F.2d 639, 642 (4th Cir. 1991); *see Dowling v. United States*, 493 U.S. 342 (1990); *Serfass v. United States*, 420 U.S. 377, 388 (1975) (finding that jeopardy attaches in jury trial when jury is empaneled and sworn, and in bench trial when court begins to hear evidence).

However, neither the Double Jeopardy clause nor the Sentencing Guidelines prohibit a court from considering prior criminal conduct as the basis for an enhancement to the sentence for a subsequent offense. *United States v. Williams*, 954 F.2d 204 (4th Cir. 1992). Similarly, cumulative punishments for separate offenses are not barred by the Double Jeopardy clause, *Garrett v. United States*, 471 U.S. 773, 778 (1985), and so-called "double counting" of criminal convictions through various Sentencing Guidelines enhancements is permissible unless expressly prohibited. *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991); U.S.S.G. § 4A1.1, cmt.; *see also United States v. Shavers*, 820 F.2d 1375, 1377 (4th Cir. 1987) (convictions for armed bank robbery and use of firearm during commission of violent crime, that is, bank robbery, is not double jeopardy); and the related discussion in *supra* paragraph IA.1 (Continuing Criminal Enterprise).

For further discussion of double jeopardy, see *supra* paragraph I.E.3.

4. Joinder and Severance of Defendants.

a. Generally. Generally, persons indicted together should be tried together, unless joint trial would result in a miscarriage of justice. *Richardson v. Marsh*, 481 U.S. 200, 210 (1987); *United States v. Chorman*, 910 F.2d 102, 114 (4th Cir. 1990); *United States v. Pryba*, 900 F.2d 748, 758 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990); *United States v. Odom*, 888 F.2d 1014, 1017 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 44 (1990); *United States v. Brugman*, 655 F.2d 540, 542 (4th Cir. 1981). "The grant or denial of a motion for severance under Rule 14 lies within the sound discretion of the trial court and its action on such a motion will be overturned only when there has been a clear abuse of such discretion . . . [because] the denial of a severance deprive[d] the movant a fair trial and result[ed] in a miscarriage of justice." *United States v. Santoni*, 585 F.2d 667, 674 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (citations omitted).

b. Jury Instructions. Rather than the more radical remedy of severance of defendants, the courts have long emphasized the adequacy of limiting instructions to the jury. *See, e.g., Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991); *Richardson v. Marsh*, 481 U.S. 200,

206-11 (1987); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) ("Absent . . . extraordinary situations . . . we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions"); *Opper v. United States*, 348 U.S. 84, 95 (1954) ("To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions"); *Lutwak v. United States*, 344 U.S. 604, 618-19 (1953); *Ball v. United States*, 163 U.S. 662, 672 (1896); *United States v. Jones*, 907 F.2d 456, 460 (4th Cir. 1990) ("The jury is generally presumed to be able to follow an instruction to disregard evidence, absent some strong indication that the evidence is so powerful that a jury could not ignore it and that the defendant would be harmed as a result"), *cert. denied*, 111 S. Ct. 683 (1991); *United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987) ("No prejudice exists if the jury could make individual guilt determinations by following the court's cautionary instructions, appraising the independent evidence against each defendant"), *cert. denied*, 485 U.S. 934 (1988). For further discussion of jury instructions, see *supra* paragraph I.E.31 (Jury Instructions); and *infra* paragraphs II.D. 17 (Voir Dire/Right to Impartial Jury) and II.D.39 (Jury Instructions).

c. Nontestifying Co-Defendant's Confession. Severance is not required when a nontestifying codefendant's confession is admitted in a joint trial with a proper limiting instruction, provided that the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence. *Marsh*, 481 U.S. at 211. The Fourth Circuit has extended the holding in *Marsh* to allow the admission of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun. *United States v. Vogt*, 910 F.2d 1184, 1191-92 (4th Cir. 1990) (Phillips, J.), *cert. denied*, 111 S. Ct. 955 (1991). *See also* the discussion of this subject in *supra* paragraph I.E.16 (Co-Conspirator Statements), and *infra* paragraph II.D.20 (Prior Statements of Witnesses).

d. Rule 404(b) Evidence Against Co-Defendant. Severance is not required when Rule 404(b) evidence is admitted against a codefendant, as long as an appropriate limiting instruction is given to the jury. *See, e.g., United States v. Manner*, 887 F.2d 317, 324-25 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); *United States v. Porter*, 764 F.2d 1, 14-15 (1st Cir. 1985); *United States v. Rosenwasser*, 550 F.2d 806, 808-09 (2d Cir.), *cert. denied*, 434 U.S. 825 (1977); *United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir. 1986); *United States v. Ocanas*, 628 F.2d 353, 359 (5th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); *United States v. White*, 788 F.2d 390, 394 (6th Cir. 1986); *United States v. Tuchow*, 768

F.2d 855, 865 n.10 (7th Cir. 1985); *United States v. Robinson*, 774 F.2d 261, 266-67 (8th Cir. 1985); *United States v. Escalante*, 637 F.2d 1197, 1201-02 (9th Cir.), *cert. denied*, 449 U.S. 856 (1980); *United States v. McClure*, 734 F.2d 484, 492 (10th Cir. 1984); *United States v. Silien*, 825 F.2d 320, 323 (11th Cir. 1987).

For further discussion of joinder and severance, see *supra* paragraph I.E.13.

5. Bill of Particulars. A district court's denial of the defendant's motion for a bill of particulars is reviewed on appeal under an abuse of discretion standard. *United States v. MacDougall*, 790 F.2d 1135, 1153 (4th Cir. 1986). In order to show abuse of discretion, a defendant must prove that he suffered unfair surprise. *United States v. Jackson*, 757 F.2d 1486 (4th Cir.), *cert. denied*, 474 U.S. 994 (1985). Moreover, if the Government has an "open file policy," this is taken into account in determining whether the degree of detail known by the defendant is constitutionally adequate. *United States v. Duncan*, 598 F.2d 839, 849 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979). In any event, providing a defendant with additional discovery is not a proper basis for ordering a bill of particulars. *See, e.g.*, *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 405 (4th Cir. 1985) ("A bill of particulars is not to be used to provide detailed disclosure of the government's evidence in advance of trial").

6. Miranda Issues/Confessions Generally.

a. Voluntariness of Confession. Issues related to the voluntariness of confessions continue to arise with some frequency. The governing principles of law:

(1) *Generally.* Involuntary confessions are subject to "harmless error" analysis. *Arizona v. Fulminante*, 111 S. Ct. 1246, 1253-54 (1991).

(2) *Standard on Appeal.* An appellate court independently reviews the question of a confession's voluntariness, but defers to the district court's pertinent findings of fact unless "clearly erroneous." *Beckwith v. United States*, 425 U.S. 341, 348 (1976); *United States v. Pelton*, 835 F.2d 1067, 1072 (4th Cir. 1987), *cert denied*, 486 U.S. 1010 (1988). Further, when a finding of voluntariness is based on the credibility of witnesses even greater deference to the district court's determination is required. *United States v. Locklear*, 829 F.2d 1314, 1317 (4th Cir. 1987).

(3) *Totality of Circumstances Test.* The appellate court must determine, under the totality of the circumstances, whether law enforcement agents have overborne the defendant's will or left his "capacity for self-determination critically impaired." *Pelton*, 835 F.2d at 1071 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)); *United States v. Wertz*, 625 F.2d

1128, 1134 (4th Cir.), *cert. denied*, 449 U.S. 904 (1980); *see also Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (coercive police activity necessary predicate to finding confession involuntary); 18 U.S.C. § 3501(b) (1988) (providing considerations for trial judge in determining voluntariness of confession).

The totality of the circumstances include the defendant's individual characteristics and background, the setting in which the confession occurred, and the details of any interrogation which preceded it. *Pelton*, 835 F.2d at 1071. A voluntary confession need not be entirely free of intimidation. *Id.* at 1072. Nor must inculpatory statements be suppressed merely because a defendant subjectively now believes a confession was "involuntary." *United States v. Shears*, 762 F.2d 397, 403 (4th Cir. 1985).

(4) *Voluntary Appearance.* A suspect's voluntary appearance at a police station (or, by clear implication, at an agent's office) is evidence of voluntariness of any subsequent statement. *United States v. Fazio*, 914 F.2d 950, 956 (7th Cir. 1990).

(5) *Evidentiary Hearing.* The provisions of 18 U.S.C. § 3501(a) (1988) do not require a district court to conduct an evidentiary hearing and rule on the voluntariness of a confession unless a defendant objects to its introduction or otherwise moves the court for a determination of voluntariness. *United States v. Wilson*, 895 F.2d 168, 173 (4th Cir. 1990).

(6) *Jury Instruction.* The district court should instruct the jury specifically on the law governing the use of a confession, whether or not the defendant requests the court to do so, *United States v. Sauls*, 520 F.2d 568, 570 (4th Cir.), *cert. denied*, 423 U.S. 1021 (1975); *United States v. Inman*, 352 F.2d 954, 956 (4th Cir. 1965). However, although "it is plain error to fail to give such specific instruction, reversal will not follow if the failure may be deemed non-prejudicial and harmless," *Sauls*, 520 F.2d at 570.

b. Miranda Warnings

(1) *When Required. Miranda* warnings are required when express questioning of a person *either in custody or its functional equivalent* takes place. *Berkemer v. McCarty*, 468 U.S. 420 (1984) (*Miranda* applies only to *custodial* interrogation); *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the taking of basic personal information such as identity does not constitute interrogation. *United States v. Taylor*, 799 F.2d 126 (4th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987). Nor do casual conversation or statements of agents about evidence which are not designed to elicit an incriminating response constitute

interrogation. *United States v. Payne*, 954 F.2d 199 (4th Cir.), *cert. denied*, 112 S. Ct. 1680 (1992).

(2) Nontestifying Co-defendant's Confession. To be admissible, the confessions of nontestifying co-defendants must be redacted and otherwise comply with the requirements of *Bruton v. United States*, 391 U.S. 123 (1968) and *Richardson v. Marsh*, 481 U.S. 200 (1987), discussed further in *supra* paragraphs I.E.16 (Co-conspirator Statements) and II.D.4.c (Joinder and Severance of Defendants/Non-Testifying Co-Defendant's Confession), and *infra* paragraph II.D.20 (Prior Statements of Witnesses).

(3) Public Safety Exception. Per the limited "public safety exception" to *Miranda v. Arizona*, 384 U.S. 436 (1966), carved out by the Supreme Court in *New Orleans v. Quarles*, 467 U.S. 649 (1984), pre-*Miranda* questioning at the scene of an arrest regarding weapons, drug use, or other matters specifically connected to the safety of officers or nearby members of the public is permissible.

(4) Harmless Error. If there is a *Miranda* violation, a further inquiry must be made into whether the error is harmless beyond a reasonable doubt. *United States v. Ramirez*, 710 F.2d 535, 542-43 (9th Cir. 1983); *Williams v. Zahradnick*, 632 F.2d 353, 360-61 (4th Cir. 1980).

7. Brady Issues. Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), a defendant has a right to receive on request any exculpatory information in the Government's possession, which right has been subsequently held to include "impeachment evidence." *United States v. Bagley*, 473 U.S. 667, 676 (1985). To show a *Brady* violation a defendant must demonstrate (1) that the evidence was favorable to the defense, (2) that the evidence was material, and (3) that the prosecution suppressed the evidence. *See United States v. Warhop*, 732 F.2d 775, 778 (10th Cir. 1984) (citing *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972)).

Care must be taken not to allow defendants to use *Brady* requests as a pretext for broader discovery. "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 424 U.S. 545, 559 (1977); *see United States v. Polowichak*, 783 F.2d 410, 414 (4th Cir. 1986).

As to the showing that *Brady* materials are sufficiently favorable to the defense, see *United States v. Crowell*, 586 F.2d 1020, 1029 (4th Cir. 1978) (mere speculation by counsel is not adequate to establish that material was exculpatory under *Brady*), *cert. denied*, 440 U.S. 959 (1979). As to whether the evidence is sufficiently material, the nondisclosure "amounts to a constitutional violation . . . and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678 (citing *United*

States v. Agurs, 427 U.S. 97, 112 (1976)). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see* Jean v. Rice, 945 F.2d 82, 87 (4th Cir. 1991).

Finally, a *Brady* violation is not shown "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked." *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990).

8. Jencks Act Materials. In *Jencks v. United States*, 353 U.S. 657 (1957), the Supreme Court held that a criminal defendant had a due process right to inspect, for impeachment purposes, statements which had been made to government agents by government witnesses. Such statements were to be turned over to the defense at the time of cross-examination if their contents related to the subject matter of the witness' direct testimony and if a demand had been made for specific statements of the witness. *Id.* at 667-72. The Jencks Act, 18 U.S.C. § 3500, was enacted to codify the *Jencks* decision.

In spite of the practice of many U.S. Attorney's offices to turn over *Jencks* material in advance of trial, per the plain language of the statute, the defendant has no right to pretrial discovery. *See, e.g.*, *United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984), *cert. denied*, 471 U.S. 1067 (1985); *United States v. Anderson*, 481 F.2d 685, 693-94 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974). The legislative history of the Act is in accord. H.R. CONF. REP. No. 1271, 85th Cong., 1st Sess. 3 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1869, 1869-70; S. REP. No. 981, 85th Cong., 1st Sess. 1-5 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1861, 1861-64.

A district court's factual findings regarding Jencks Act material are reviewed on appeal under the clearly erroneous standard. *United States v. Escamilla*, 467 F.2d 341 (4th Cir. 1972). A district court's denial of a defendant's motion to exclude testimony for a *Jencks* violation is reviewed under the abuse of discretion standard. *Imperial Colliery Co. v. Oxy USA Inc.*, 912 F.2d 696, 705 (4th Cir. 1990). In the absence of bad faith or prejudice, the failure to disclose Jencks Act material will not result in reversal. This is particularly true where the prior statements are not produced because they have been lost or misplaced in the interim. *See Arizona v. Youngblood*, 488 U.S. 51 (1988) (unless defendant can show bad faith on behalf of government, failure to preserve evidence does not result in denial of due process).

9. Disclosure of Confidential Informant. A confidential informant's identity may be guarded from disclosure without impinging on a defendant's Fifth or Sixth Amendment rights. *McCrary v. Illinois*, 386 U.S. 300 (1967). Disclosure is required only when his testimony is highly relevant to the defense or essential to the fair determination of a cause. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). Ex parte consideration of evidence or testimony concerning a confidential informant is a widely-used procedure which allows the court to balance two conflicting needs that arise in cases

such as this: the need to protect the identity of informants and the testimonial privilege traditionally afforded them, and the need to guard against police perjury. *See, e.g., United States v. Moore*, 522 F.2d 1068, 1072-73 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976); *United States v. Fisher*, 440 F.2d 654, 656 (4th Cir. 1971) (identity of informant used only to obtain search warrant need not be disclosed).

For further discussion of the Government's duty to disclose a confidential informant's identity, see *supra* paragraph I.E. 13.

10. Waiver of Right to Counsel. A criminal defendant has a Sixth Amendment right of self-representation, but his decision must be intelligent and knowing. *Faretta v. California*, 422 U.S. 806 (1975); *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985). A waiver of the right to counsel, though not explicit, can be found from the circumstances. *See United States v. Davis*, 958 F.2d 47 (4th Cir.), *cert. denied*, 113 S. Ct. 223 (1992). Refusal to proceed with competent counsel without good cause is sufficient to show a voluntary waiver of counsel. *United States v. Gallop*, 838 F.2d 105, 109 (4th Cir.), *cert. denied*, 487 U.S. 1211 (1988). A court's failure to inquire whether the defendant's waiver was knowing and intelligent is not reversible error where the court finds the defendant is rejecting competent counsel for purposes of delay. *Id.* at 110-11. For further discussion of waiver of counsel, see *supra* paragraph I.E. 9.

11. Counsel's Motion to Withdraw. A district court is free to allow or deny an attorney's motion to withdraw as counsel unless there is a showing of an actual conflict adversely affecting representation. *See Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980); *United States v. Hanley*, 974 F.2d 14 (4th Cir. 1992); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. (1991); *United States v. Gallop*, 838 F.2d 105 (4th Cir.), *cert. denied*, 487 U.S. 1211 (1988). For further discussion of counsel's motion to withdraw, see *supra* paragraph I.E.10.

12. Motion to Withdraw Guilty Plea. Denial of a motion to withdraw a guilty plea after Rule 11 proceedings have generally been upheld on appeal. *See United States v. Lambey*, 974 F.2d 1389 (4th Cir. 1992) (en banc) (affirming trial court's denial of defendant's request to withdraw his guilty plea based on substantial misunderstanding of applicable Sentencing Guidelines range); *United States v. Moore*, 931 F.2d 245, 248 (4th Cir.) (affirming rejection of defendant's attempt to withdraw guilty plea because defendant did not carry burden of showing plea was not knowing or voluntary), *cert. denied*, 112 S. Ct. 171 (1991); *United States v. Pitino*, 887 F.2d 42, 46 (4th Cir. 1989) (denying withdrawal of guilty plea because defendant failed to show plea was not knowing or voluntary); *United States v. DeFreitas*, 865 F.2d 80 (4th Cir. 1989) (denying motion to withdraw guilty plea due to claimed ineffective assistance of counsel at time plea entered); *United States v. Haley*, 784 F.2d 1218 (4th Cir. 1986) (denying motion to change guilty plea because defendant failed to show any fair and just reason why guilty plea was invalid). Reviewing under an "abuse of

discretion" standard, *Pitino*, 887 F.2d at 46, the Fourth Circuit has emphasized the following factors to be considered in determining whether a "fair and just reason" exists to warrant post Rule 11 withdrawal of a guilty plea: (1) whether the defendant provided credible evidence that his plea was not knowing or voluntary; (2) whether the defendant credibly asserted his legal innocence; (3) whether there was a delay between entering the plea and moving for withdrawal; (4) whether the defendant had close assistance of counsel; (5) whether withdrawal will prejudice the government; and (6) whether withdrawal will inconvenience the court and waste judicial resources. *Moore*, 931 F.2d at 248; FED. R. CRIM. P. 32(d).

For further discussion of motions to withdraw a guilty plea, see *supra* paragraph I.E.8.

13. Government Breach of Plea Agreement. The Supreme Court has held that a defendant is entitled to enforcement of the promises and provisions in his plea agreement, which create a kind of constitutionally based right of contract. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *see also United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (broken Government promise which induced guilty plea implicates due process because it impairs voluntariness and intelligence of plea, and also undermines "honor of the government [and] public confidence in the fair administration of justice").

14. Motions to Continue. Whether to grant a motion to continue is within the broad discretion of the district court. *United States v. Bakker*, 925 F.2d 728, 735 (4th Cir. 1991); *United States v. Kosko*, 870 F.2d 162 (4th Cir.), *cert. denied*, 491 U.S. 909 (1989); *United States v. Wilson*, 721 F.2d 967, 972 (4th Cir. 1983). Thus, the district court's denial of a continuance will only be reversed for abuse of discretion, when the denial is "so arbitrary and so fundamentally unfair as to invoke the Constitution." *Shirley v. North Carolina*, 528 F.2d 819, 822 (4th Cir. 1975) (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)); *see also United States v. LaRouche*, 896 F.2d 815, 823 (4th Cir.) (defendant must show abuse of discretion and actual prejudice), *cert. denied*, 496 U.S. 927 (1990); *United States v. Poschwatta*, 829 F.2d 1477, 1483 (4th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) (district court did not abuse its discretion in denying continuance requested to secure defense witness); *United States v. Bourne*, 743 F.2d 1026, 1031 (4th Cir. 1984) (holding ex parte hearing on motion to continue not abuse of discretion); *United States v. Sellers*, 658 F.2d 230, 231 (4th Cir. 1981) (upholding district court's denial of continuance where indictments were amended seven days before trial); *Miller v. State of North Carolina*, 583 F.2d 701, 706 (4th Cir. 1978) ("Due process is not violated unless the error constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice'" (citations omitted)).

15. Speedy Trial. The Speedy Trial Act of 1974 provides for a maximum of seventy days between indictment and trial subject to specific delays which toll the time period. 18 U.S.C. § 3161(c), (h) (1988). The Act applies

from the time a defendant is arrested under federal law. *United States v. Iaquinta*, 674 F.2d 260, 264 (4th Cir. 1982). Neither a federal detainer nor transport to federal court trigger application of the Act, unless there has also been a federal arrest. *United States v. Lee*, 818 F.2d 302, 305 (4th Cir. 1987). The Act requires both a federal complaint and a federal arrest and/or federal summons. *Id.* All time between the filing of a pre-trial motion and the conclusion of hearing and briefing on the motion is excluded. 18 U.S.C. § 3161(h)(1)(F) (1988); *Henderson v. United States*, 476 U.S. 321 (1986); *United States v. Shear*, 825 F.2d 783 (4th Cir. 1987), *cert. denied*, 489 U.S. 1087 (1989); *United States v. Velasquez*, 802 F.2d 104, 105 (4th Cir. 1986); *see also United States v. Blackmon*, 874 F.2d 378 (6th Cir.), *cert. denied*, 493 U.S. 859, *and cert. denied*, 493 U.S. 862 (1989); *United States v. Thompson*, 866 F.2d 268 (8th Cir.), *cert. denied*, 493 U.S. 828 (1989).

In computing the time within which trial must commence, the statute excludes, *inter alia*, periods of time during which the defendant is undergoing psychiatric examinations to determine competency to stand trial (§ 3161(h)(1)(A)); is involved in a trial on other charges (§ 3161(h)(1)(D)); has pretrial motions pending (§ 3161(h)(1)(F); is being moved from one correctional facility to another (§ 3161(h)(1)(H); or has a trial continued by order of the judge (§ 3161(h)(8)(A)).

Section 3161(h)(8)(A) allows the district court to exclude time from the Speedy Trial calculus only if "the ends of justice served by [the exclusion] outweigh the best interest of the public and the defendant in a speedy trial." Section 3161(h)(8)(B) contains a nonexhaustive list of factors that the district court shall consider in excluding time on the basis that it serves the "ends of justice." The district court is required to consider all of these factors, but need not make explicit findings on all four factors. *See United States v. Leiva*, 959 F.2d 637, 640 (7th Cir. 1992); *United States v. Cianciola*, 920 F.2d 1295, 1300 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2830 (1991); *United States v. Quinteros*, 769 F.2d 968, 974 (4th Cir. 1985).

The enumerated factors that the district court must consider in determining whether the ends of justice served by the exclusion of time outweigh the best interests of the public and the defendant in a speedy trial are:

> (i) whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) whether the case is so unusual or complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> (iii) whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified by § 3161(b), or

> because the facts upon which the grand jury must base its determination are unusual or complex.
>
> (iv) whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably delay the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

No exclusion under this section can be granted because of the lack of diligent preparation on the part of the government. 18 U.S.C. § 3161(h)(8)(C) (1988). However, the defendant must establish prejudice from the decision to grant the exclusion to warrant relief on appeal. *Leiva*, 959 F.2d at 640; *Cianciola*, 920 F.2d at 1298.

Review of the district court's decision to exclude time under § 3161(h)(8)(A) is under an abuse of discretion standard. *Leiva*, 959 F.2d at 640; *United States v. Blandina*, 895 F.2d 293, 296 (7th Cir. 1989). Moreover, unless the Speedy Trial violation is raised in the district court, it may not be raised for the first time on appeal, *United States v. Davis*, 954 F.2d 182 (4th Cir. 1992), and a valid guilty plea also waives Speedy Trial violations, *Tollett v. Henderson*, 411 U.S. 258 (1973) (valid guilty plea waives all nonjurisdictional defects); *United States v. Bohn*, 956 F.2d 208 (9th Cir. 1992) (guilty plea waives Speedy Trial claim); *accord United States v. Lebowitz*, 877 F.2d 207 (2d Cir. 1989).

16. Delay Until Indictment/Due Process Limits. Although the statute of limitations may not have run, whether a pre-accusation delay violates the Due Process clause is determined on a case-by-case basis. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir.), *cert. denied*, 111 S. Ct. 590 (1990); *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977). Reversible error will be found only when the delay violates "fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which defy 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790 (citations omitted), and the defendant has suffered actual prejudice. The burden of proving such prejudice is on the defendant. *United States v. Automated Medical Lab, Inc.*, 770 F.2d 399, 403 (4th Cir. 1985).

17. Voir Dire/Right to Impartial Jury. The burden is on a defendant to show that he was prejudiced by the conduct of voir dire. *United States v. Griley*, 814 F.2d 967 (4th Cir. 1987), and failure to make appropriate objections during the voir dire process constitutes waiver. *United States v. LaRouche*, 896 F.2d 815, 829 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990); *King v. Jones*, 824 F.2d 324, 326 (4th Cir. 1987). Where the issue is whether specific questions should have been asked, the district court's determination is reviewed on appeal for abuse of discretion. *United States v. Brooks*, 957 F.2d 1138, 1144 (4th Cir.), *cert. denied*, 112 S. Ct. 3051 (1992); *United*

States v. Muldoon, 931 F.2d 282, 286 (4th Cir. 1991); *United States v. Grandison*, 783 F.2d 1152 (4th Cir.), *cert. denied*, 479 U.S. 845 (1986). Particularly "wide discretion [is] granted to the trial court in conducting voir dire in the area of pretrial publicity." *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1906 (1991); *see also United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991).

On a related point, the Supreme Court has recently affirmed that "peremptory challenges are not constitutionally protected fundamental rights," but rather are "means to the constitutional end of an impartial jury and a fair trial." *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992); *see also United States v. Rucker*, 557 F.2d 1046, 1048 n.4 (4th Cir. 1977) ("The right of peremptory challenge . . . is conferred by Congress and the Federal Rules of Criminal Procedure, and is not required by the Constitution"). This is directly related to voir dire in that "[t]he essential function of voir dire is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel." *United States v. Brown*, 799 F.2d 134, 135 (4th Cir. 1986) (internal quotations omitted); *see also Morgan v. Illinois*, 112 S. Ct. 2222, 2230 (1992) ("part of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors").

Because any rights regarding voir dire are subsumed under the larger right to an impartial jury, voir dire issues should be considered in light of relevant jury instructions. In general, a juror is presumed impartial and jury instructions are presumed to be sufficient to allow a juror to lay aside any impressions, opinions, or preconceptions and render an impartial verdict based on the evidence. *Irvin v. Dowd*, 366 U.S. 717 (1961); *Poynter v. Ratcliff*, 874 F.2d 219 (4th Cir. 1989).

In regard to refusal to ask specific voir dire questions followed by jury instructions on the same points, see *United States v. Evans*, 917 F.2d 800, 807 (4th Cir. 1990) (finding failure to ask requested voire dire question resulting in new trial); *United States v. Robinson*, 804 F.2d 280, 281 (4th Cir. 1986); *United States v. Carter*, 772 F.2d 66, 67 (4th Cir. 1985); *United States v. Ledee*, 549 F.2d 990, 992 (5th Cir.) (not error "to refuse to allow inquiries of jurors as to whether they can accept certain propositions of law"), *cert. denied*, 434 U.S. 902 (1977); *United States v. Cosby*, 529 F.2d 143, 149 (8th Cir.), *cert. denied*, 426 U.S. 935 (1976); *United States v. Clarke*, 468 F.2d 890, 891 (5th Cir. 1972); *United States v. Cowles*, 503 F.2d 67, 68 (2d Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); and *United States v. Goodwin*, 470 F.2d 893, 898 (5th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973).

For further discussion of jury instructions, see *supra* paragraphs I.E.31 (Jury Instructions) and II.D.4.b (Joinder and Severance of Defendants/Jury Instructions), and *infra* paragraph II.D.39 (Jury Instructions).

18. Suggestive Pretrial Identification Procedures. Convictions based on eyewitness identification at trial, following pretrial identification by photograph, will be set aside only if the pretrial photographic identification

procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). "The exclusion of evidence from the jury is, however, a drastic sanction, one that is limited to identification testimony which is manifestly suspect." *Harker v. Maryland*, 800 F.2d 437, 443 (4th Cir. 1986). Evidence that is not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification is for the jury to weigh because "evidence with some element of untrustworthiness is customary grist for the jury mill." *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977); *see also Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (setting out five factors to be considered in determining whether pretrial identification procedures are impermissibly suggestive); *Stovall v. Denno*, 388 U.S. 293 (1967); *United States v. Wade*, 388 U.S. 218, 242 (1967) (allowance of in-court identification without "independent basis" of suggestive pretrial viewing of single photo may be harmless beyond reasonable doubt where there is otherwise overwhelming evidence of guilt).

19. Fifth Amendment/Nontestimonial Evidence. It is well-settled that the Fifth Amendment "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 761 (1966) (footnote omitted). The privilege does not attach to "evidence of acts noncommunicative in nature." *Id.* at 761 n.5. As the Supreme Court has stated:

> the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.

Holt v. United States, 218 U.S. 245, 252-53 (1910); *see United States v. Maceo*, 873 F.2d 1 (1st Cir.), *cert. denied*, 493 U.S. 840 (1989) (upholding marshal's examination of criminal defendant's teeth and gums while in defendant's cell to validate detective's description of subject in custody).

For cases upholding a variety of orders requiring nontestimonial cooperation, see *Gilbert v. California*, 388 U.S. 263 (1967) (no Fifth Amendment violation in court's order requiring handwriting exemplars); *United States v. Wade*, 388 U.S. 218 (1967) (no error in ordering defendant to appear in line-up and speak); *Schmerber v. California*, 384 U.S. 757 (1966) (upholding court's order of blood sample); *Holt v. United States*, 218 U.S. 245 (1910) (no error in ordering defendant to put on certain piece of clothing); *United States v. Valenzuela*, 722 F.2d 1431, 1433 (9th Cir. 1983) (no error in requiring defendant to shave his facial hair); *United States v. Lamb*, 575 F.2d 1310 (10th Cir.) (no error in ordering defendant to shave), *cert. denied*, 439 U.S. 854 (1978); *United States v. Roberts*, 481 F.2d 892 (5th Cir. 1973) (no error in ordering defendant to put on stocking mask);

United States v. Hammond, 419 F.2d 166 (4th Cir. 1969) (no error in ordering defendant to wear false goatee), *cert. denied*, 397 U.S. 1068 (1970); and *United States v. Holland*, 378 F. Supp. 144, 154-55 (E.D. Pa.) (no error in ordering dental examination of defendant), *aff'd*, 506 F.2d 1050 (3d Cir. 1974), *cert. denied*, 420 U.S. 994 (1975).

20. Prior Statements of Witnesses.

a. Prior Statements of Nontestifying Witness. In determining whether a prior statement of a nontestifying witness should be admitted, the Supreme Court has established a two-part test for ascertaining whether the requirements of the Confrontation Clause have been satisfied. First, the prosecution must either produce the declarant at trial or show that the declarant is unavailable. *But see White v. Illinois*, 112 S. Ct. 736, 741 (1992). *See also United States v. Ellis*, 951 F.2d 580 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3030 (1992). Second, the statement is admissible "only if it bears adequate 'indicia of reliability.'" *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *accord Idaho v. Wright*, 497 U.S. 805 (1990); *Anderson v. United States*, 417 U.S. 211 (1974); *United States v. McCall*, 740 F.2d 1331, 1341 (4th Cir. 1984); *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

Although the best practice is to caution the jury that the testimony has not been subject to cross examination, if there is otherwise overwhelming evidence of guilt the failure to do so may be harmless error. *United States v. Stockton*, 788 F.2d 210 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986); *United States v. Murphy*, 696 F.2d 282 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

b. Prior Statements of Testifying Witness. Rule 803(24) of the Federal Rules of Evidence provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (24) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the

> statement and the particulars of it, including the name and address of the declarant.

For cases interpreting Rule 803(24), see *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985); *United States v. Williams*, 573 F.2d 284 (5th Cir. 1978); *see also California v. Green*, 399 U.S. 149, 158 (1970); *United States v. Murphy*, 696 F.2d 282, 294 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *United States v. Walker*, 696 F.2d 277, 280 (4th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983).

21. Promises in Plea Agreement to be Truthful. On the "propriety of eliciting a plea bargain promise of truthfulness where . . . the defense has not indicated that it intends to use the plea bargain to attack the witness's credibility," in *United States v. Henderson* the court found "no error in permitting the government to elicit details of a plea agreement regardless of the defense's intentions concerning its use for impeachment purposes." 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984). The court explained:

> [T]here is no evidence that the government derived any improper advantage from [the witness'] testimony concerning his promise to be truthful. The prosecutor's questions [did] not imply that the government had special knowledge of the [co-defendant's] veracity. The trial judge instructed the jury on the caution necessary in evaluating testimony given pursuant to a plea bargain. Henderson makes no claim that the prosecutor made improper use of the plea bargain promise of truthfulness in closing argument. The promise was not "disproportionately emphasized or repeated."

Id. at 138 (citation omitted).

22. Reference to Polygraph. Evidence that a witness has agreed to take a polygraph (a.k.a. a lie detector) test is improper bolstering and should be kept from the jury. *United States v. Herrera*, 832 F.2d 833, 835 (4th Cir. 1987); *United States v. Porter*, 821 F.2d 968, 974 (4th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). However, the error may be deemed harmless, particularly where there is substantial other evidence and/or a cautionary instruction is given or offered. *Porter*, 821 F.2d at 974; *United States v. Tedder*, 801 F.2d 1437, 1444-45 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987); *United States v. Smith*, 565 F.2d 292, 294-95 (4th Cir.1977).

23. Evidence of Threats. Evidence of threats by a defendant to a potential Government witness is admissible on the issue of guilt. *United States v. Billups*, 692 F.2d 320, 329-30 (4th Cir. 1982), *cert. denied*, 464 U.S. 820 (1983).

24. Lost Evidence. In the absence of bad faith or an impaired ability to put on a meaningful defense, the inadvertent loss of evidence is not reversible error. *United States v. Sanders*, 954 F.2d 227 (4th Cir. 1992) (inadvertent erasure of bank videotape not denial of due process); *accord*

Arizona v. Youngblood, 488 U.S. 51, 58 (1988); *United States v. Solomon*, 686 F.2d 863, 872 (11th Cir. 1982).

25. Chain of Custody. The court is perhaps less willing than it once was to exclude evidence on technical chain of custody grounds. Rather, the question is a more substantive one: whether the Government has sufficiently established that the evidence is, in fact, what it purports to be. *See, e.g.*, *United States v. Howard-Arias*, 679 F.2d 363, 365-66 (4th Cir.), *cert. denied*, 459 U.S. 874 (1982).

26. Clergy-Communicant Privilege. The clergy-communicant, or priest-penitent, privilege only covers communications designed to elicit spiritual advice or consolation. Other communications with a priest, pastor, or spiritual advisor are not covered by the privilege. *Trammell v. United States*, 445 U.S. 40, 51 (1980); *In re Grand Jury Investigation*, 918 F.2d 374, 384 (3d Cir. 1990); *United States v. Dube*, 820 F.2d 886, 889 (7th Cir. 1987).

27. Rule 403. Although Rule 403 is considered most often in conjunction with potential Rule 404(b) evidence, Rule 403 by its own terms requires exclusion of any evidence if its probative value is substantially outweighed by its prejudicial effect. Appraisal of the probative and prejudicial value of evidence is entrusted to the sound discretion of the district court and its appraisal, absent extraordinary circumstances, will not be disturbed on appeal. *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990). Such an abuse of discretion will only be found when the trial court acted "arbitrarily" or "irrationally" in admitting evidence. *Garraghty v. Jordan*, 830 F.2d 1295, 1298 (4th Cir. 1987); *United States v. Greenwood*, 796 F.2d 49, 53 (4th Cir. 1986); *United States v. Masters*, 622 F.2d 83, 88 (4th Cir. 1980). *See also Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1134 (4th Cir. 1988); *United States v. King*, 768 F.2d 586, 588 (4th Cir. 1985) (Rule 404(b) evidence regarding convictions for distributing different illegal drugs from one with which defendant was then charged not unduly prejudicial per Rule 403). Finally, in considering Rule 403 challenges, due consideration should be given to the curative power of any relevant jury instructions. *United States v. Hadaway*, 681 F.2d 214, 219 (4th Cir. 1982); *Masters*, 622 F.2d at 87.

For further discussion of Rule 403, see *supra* paragraph I.E.19 and *infra* paragraph II.D.28.d.

28. Rule 404(b) Evidence. Rule 404(b) evidence continues to occasion a great deal of appellate ink. The principles of law to which the court repeatedly returns are familiar ones:

a. Generally. Rule 404(b) permits evidence of a defendant's prior crimes, wrongs, or other "bad acts" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but only if such evidence is (1) relevant to an issue other than character; (2) necessary; and (3) reliable. FED. R. EVID. 404(B); *United States v. Mark*, 943 F.2d 444, 447 (4th Cir. 1991);

United States v. Rawle, 845 F.2d 1244, 1247 (4th Cir. 1988); *United States v. Greenwood*, 796 F.2d 49, 53 (4th Cir. 1986).

b. Standard of Review on Appeal. The district court's admission of Rule 404(b) evidence is reviewed for abuse of discretion. *Mark*, 943 F.2d at 447; *United States v. Fells*, 920 F.2d 1179, 1181 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2831 (1991); *United States v. Ramsey*, 791 F.2d 317, 323 (4th Cir. 1986). Indeed, the district court's discretion will not be disturbed unless its exercise was "arbitrary or irrational." *United States v. Haney*, 914 F.2d 602, 607 (4th Cir. 1990); *Rawle*, 845 F.2d at 1247; *Greenwood*, 796 F.2d at 53; *United States v. Masters*, 622 F.2d 83, 85-86 (4th Cir. 1980).

c. Almost Infinite Reasons. Rule 404(b) is a rule of inclusion rather than exclusion. Thus, the reasons which justify 404(b) evidence are not limited to those listed in the Rule, but as one opinion put it, are almost "infinite" in number. *United States v. Watford*, 894 F.2d 665, 671 (4th Cir. 1990); *Masters*, 622 F.2d at 86.

d. Rule 403 Prejudice. Even if evidence is admissible under Rule 404(b), however, it may be excluded per Rule 403 if "the risk that the jury will be excited to irrational behavior is disproportionate to the probative value of the evidence." *United States v. Tedder*, 801 F.2d 1437, 1444 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987); *see United States v. Percy*, 765 F.2d 1199, 1204 (4th Cir. 1985) (upholding admission of evidence where its probative value outweighed potential to invoke irrational or emotional behavior by jurors). However, while a specific finding of probative value outweighing prejudice to the defendant may aid the appellate court, such an explicit finding is neither required nor necessary. *Rawle*, 845 F.2d at 1247. For further discussion of Rule 403, see *supra* paragraphs I.E.19 and II.D.27.

e. Post-Indictment Conduct. Post-indictment conduct may also be admissible under Rule 404(b), if it otherwise meets the requirements set forth above. *Ramey*, 791 F.2d at 323; *United States v. Hines*, 717 F.2d 1481, 1489 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Hadaway*, 681 F.2d at 217-18.

f. Acquitted Conduct. Defendant's prior acquittal does not preclude admission as Rule 404(b) evidence in a subsequent trial if it otherwise meets the requirements for admissibility. *Dowling v. United States*, 493 U.S. 342, 348 (1990).

g. Importance of Limiting Instructions. Any undue prejudice to the defendant caused by the admission of Rule 404(b) evidence can be substantially limited by an appropriate jury instruction. *Hadaway*, 681 F.2d at 219; *Rawle*, 845 F.2d at 1248; *Masters*, 622 F.2d at 87.

For further discussion of Rule 404(b), see *supra* paragraph I.E.20.

29. Cross-Examination. A trial court may impose reasonable limits on cross-examination to preclude repetitive and unduly harassing interrogation. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974); *United States v. Bodden*, 736 F.2d 142, 145 (4th Cir. 1984); *United States v. Atkinson*, 512 F.2d 1235, 1238 (4th Cir. 1975). Whether and how to limit cross-examination is within the trial court's discretion. *United States v. Crockett*, 813 F.2d 1310, 1312 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about . . . confusion of the issues . . . or interrogation that is repetitive or only marginally relevant").

30. Expert Testimony. A trial judge has broad discretion to exclude expert testimony under FED. R. EVID. 702 if it is determined that a proposed expert will not significantly assist the trier of fact. *See El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483, 487 (4th Cir. 1986). The trial court's admission or rejection of expert testimony is reviewed on appeal for abuse of discretion. *See Persinger v. Norfolk, & Western Ry. Co.*, 920 F.2d 1185, 1187 (4th Cir. 1990).

31. Harmless Error. Assuming admission of certain evidence or some other aspect of proceedings in the trial court was error, the appellate court must determine whether the error was harmless or reversible. Whether a particular error is found to be harmless turns on "the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." *United States v. Nyman*, 649 F.2d 208, 212 (4th Cir. 1980) (quoting *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C. Cir. 1969)). "[T]he appropriate test of harmlessness . . . is whether [it can be said] '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." *Nyman*, 649 F.2d at 211-12 (4th Cir. 1980) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Only if "it [is] highly probable that the error did not affect the judgment" should an error be found harmless. *Nyman*, 649 F.2d at 212 (internal quotation omitted); *see United States v. Vogt*, 910 F.2d 1184, 1193 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 955 (1991); *United States v. Urbanik*, 801 F.2d 692, 698 (4th Cir. 1986); *United States v. Johnson*, 610 F.2d 194, 196 (4th Cir. 1979), *cert. denied*, 446 U.S. 911 (1980); *United States v. Curry*, 512 F.2d 1299 (4th Cir.), *cert. denied*, 423 U.S. 832 (1975).

32. Misprision of a Felony. To establish the crime of misprision of a felony, the government must prove: (1) a felony was committed; (2) the defendant knew that the felony had been committed; (3) the defendant failed to notify authorities; and (4) the defendant took an affirmative step to conceal the crime. 18 U.S.C. § 4 (1988); *United States v. Baez*, 732 F.2d 780, 782 (10th Cir. 1984); *United States v. Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1984); *United States v. Stuard*, 566 F.2d 1, 2 (6th Cir. 1977); *Neal v. United States*, 102 F.2d 643, 646 (8th Cir. 1939). Circuits that have

spoken to the issue have generally agreed that something more than silence or failure to report a known crime must be shown to prove the requisite concealment. *See, e.g.*, *United States v. Warters*, 885 F.2d 1266, 1275 (5th Cir. 1989); *United States v. Jennings*, 603 F.2d 650 (7th Cir. 1979); *United States v. King*, 402 F.2d 694 (9th Cir. 1968); *Lancey v. United States*, 356 F.2d 407 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966); *Bratton v. United States*, 73 F.2d 795, 797-98 (10th Cir. 1934). However, the extent to which a defendant must go beyond silence to "conceal" is not great. *See United States v. Pittman*, 527 F.2d 444 (4th Cir. 1975) (defendant's lying to investigator regarding her husband's involvement in bank robbery is sufficient to show "concealment"), *cert. denied*, 424 U.S. 923 (1976); *Lancey*, 356 F.2d at 410-11 (harboring fugitive or hiding evidence can constitute "concealment"); *Bratton*, 73 F.2d at 797-98 (10th Cir. 1934) (dicta) (suppression of evidence or harboring criminal would be concealment); *see also United States v. Gravitt*, 590 F.2d 123 (5th Cir. 1979) (transporting robbers to retrieve loot is sufficient proof of concealment).

33. Mailing Threats. In a prosecution for mailing threats under 18 U.S.C. § 876, "intent [to threaten] can be gleaned from the very nature of the words used in the communication; extrinsic evidence to prove an intent to threaten should only be necessary when the threatening nature of the communication is ambiguous." *United States v. Maxton*, 940 F.2d 103, 106 (4th Cir.), *cert. denied*, 112 S. Ct. 398 (1991). However, there is no requirement that the government prove a defendant actually intended to carry out his threats. *United States v. Chatman*, 584 F.2d 1358, 1360-61 (4th Cir. 1978).

34. Attempt to Commit Crime. The elements of an attempt are (1) an intent to commit a crime and (2) an overt act, or "substantial step," toward its commission which corroborates the intent. *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988).

35. Conspiracies.

a. Single Versus Multiple Conspiracies. Whether the Government has proven a single conspiracy, versus multiple conspiracies—a fact which may have momentous consequences for a defendant—is a jury question. *United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988); *United States v. Urbanik*, 801 F.2d 692, 695 (4th Cir. 1986); *United States v. Burman*, 584 F.2d 1354, 1356 (4th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979). Whether there is one conspiracy or more depends on the overlap of main actors, methods, and goals, and whether there is one overall agreement. *See United States v. Barsanti*, 943 F.2d 428 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1992); *Leavis*, 853 F.2d at 218; *United States v. Ragins*, 840 F.2d 1184, 1189-92 (4th Cir. 1988); *United States v. Crockett*, 813 F.2d 1310, 1316-17 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987). On appeal the evidence must be reviewed in the light most favorable to the Government. *Barsanti*, 943 F.2d at 439; *Urbanik*, 801 F.2d at 695.

b. Presumed to Continue Until Withdrawal. Once a defendant is shown to be involved in a conspiracy he is presumed to continue in the conspiracy until he takes "affirmative action" to withdraw, that is, until he acts "to defeat or disavow the purposes of the conspiracy." *United States v. Sheffer*, 896 F.2d 842, 844 (4th Cir.), *cert. denied*, 111 S. Ct. 432 (1990); *Leavis*, 853 F.2d at 218; *United States v. West*, 877 F.2d 281, 289 (4th Cir.), *cert. denied*, 493 U.S. 869 (1989).

The burden of proving withdrawal from the conspiracy is on the defendant. *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986). Finally, whether and when a defendant withdrew from a particular conspiracy are factual findings which will be affirmed on appeal unless clearly erroneous. *Barsanti*, 943 F.2d at 437; *United States v. Grubb*, 527 F.2d 1107, 1109 (4th Cir. 1975).

c. Statements of Co-Conspirators. Before admitting evidence as a co-conspirator's statement, the trial court must first conclude: (1) that there was a conspiracy involving the declarant and the party against whom admission of the evidence is sought; and (2) that the statements at issue were made in furtherance and in the course of that conspiracy. *See United States v. Blevins*, 960 F.2d 1252, 1255 (4th Cir. 1992) (citing *Bourjaily v. United States*, 483 U.S. 171, 175 (1987)). These threshold requirements must be established by a preponderance of the evidence including circumstantial evidence. *Bourjaily*, 483 U.S. at 175; *Leavis*, 853 F.2d at 219-20; *United States v. Massuet*, 851 F.2d 111, 114 (4th Cir. 1988); *United States v. Jones*, 542 F.2d 186, 203 (4th Cir. 1976). Any findings of fact with respect to these questions are subject to a clearly erroneous standard of review, and a district court's decision to admit evidence under Rule 801(d) (2) (E) may only be overturned on appeal if it constituted an abuse of discretion." *Bourjaily*, 483 U.S. at 181; *Blevins*, 960 F.2d at 1255 (citations omitted).

d. Pinkerton Liability. In a conspiracy, under the general rule established by the Supreme Court in *Pinkerton v. United States*, 328 U.S. 640, 645 (1946), "a conspirator may be convicted of substantive offenses committed by co-conspirators in the course of and in furtherance of the conspiracy. . . ." *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990); *see United States v. Cummings*, 937 F.2d 941, 944 (4th Cir.), *cert. denied*, 112 S. Ct. 395 (1991). In order for the Pinkerton Rule imposing liability for the substantive crimes of other co-conspirators to apply, it must be proven beyond a reasonable doubt that: (1) the substantive offense was committed by one of the members of the conspiracy, (2) while the one committing the crime was a member of the conspiracy, (3) in furtherance of the conspiracy, and (4) that the substantive crime was a reasonably foreseeable part of the conspiracy. *Chorman*, 910 F.2d at 111.

36. Sufficiency of the Evidence/Credibility of Witnesses.

a. Sufficiency of the Evidence. The sufficiency of the evidence is likely to be challenged, both at the Rule 29 stage and after a verdict of guilty is returned. In either event, the test for whether a verdict is supported by sufficient evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). *See also Glasser v. United States*, 315 U.S. 60, 80 (1942). For recent examples of the long line of Fourth Circuit cases applying this familiar test, see *United States v. Fisher*, 912 F.2d 728, 730 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2019 (1991); *United States v. Vogt*, 910 F.2d 1184, 1193 (4th Cir. 1990); *United States v. Jackson*, 863 F.2d 1168, 1173 (4th Cir. 1989) (circumstantial evidence need not exclude every hypothesis of innocence); *United States v. MacDougall*, 790 F.2d 1135, 1151 (4th Cir. 1986); *United States v. Stockton*, 788 F.2d 210, 218 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986); *United States v. Jones*, 735 F.2d 785, 790 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984); *United States v. Parodi*, 703 F.2d 768, 790 (4th Cir. 1983); *United States v. MacCloskey*, 682 F.2d 468, 473 (4th Cir. 1982); *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982) (appellate court "must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences"); *United States v. Dominguez*, 604 F.2d 304, 310 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). Indeed, even the uncorroborated testimony of a single witness may be sufficient. *United States v. Arrington*, 719 F.2d 701, 705 (4th Cir. 1983), *cert. denied*, 465 U.S. 1028 (1984); *see United States v. Manbeck*, 744 F.2d 360, 392 (4th Cir. 1984) (". . . uncorroborated testimony of an accomplice may be sufficient to sustain a conviction"), *cert. denied*, 469 U.S. 1217 (1985).

b. Credibility of Witnesses for Jury. In determining the sufficiency of evidence, the credibility of witnesses is strictly a matter for the jury. *United States v. Saunders*, 886 F.2d 56, 60 (4th Cir. 1989); *United States v. Cecil*, 836 F.2d 1431, 1441 (4th Cir.), *cert. denied*, 487 U.S. 1205 (1988); *Pigford v. United States*, 518 F.2d 831, 836 (4th Cir. 1975); *United States v. Fisher*, 484 F.2d 868, 869-70 (4th Cir. 1973), *cert. denied*, 415 U.S. 924 (1974); *United States v. Shipp*, 409 F.2d 33, 36 (4th Cir.), *cert. denied*, 396 U.S. 864 (1969).

37. Informing Jury Regarding Penalties. A defendant is not entitled to have the jury told about the severity of sentence he faces if convicted; in fact, the jury is not to be instructed as to penalties. *United States v. Meredith*, 824 F.2d 1418, 1429 (4th Cir.), *cert. denied*, 484 U.S. 969 (1987); *United States v. Goodface*, 835 F.2d 1233, 1237 (8th Cir. 1987); *United States v. Greer*, 620 F.2d 1383, 1384 (10th Cir. 1980); *United States v. Davidson*, 367 F.2d 60, 63 (6th Cir. 1966).

38. Jury Conduct.

a. Jury Notes. The decision to allow the jury to take notes for use during deliberations is within the discretion of the trial court, and absent an abuse of discretion, will not be disturbed on appeal. *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986); *United States v. Oppon*, 863 F.2d 141, 148 (1st Cir. 1988). Where jurors are permitted to take notes, they should be instructed that their notes are not evidence and should not take precedence over the juror's independent recollection of the evidence. However, the failure to so instruct may be harmless error, particularly where no such instruction was requested by the defendant. *Polowichak*, 785 F.2d at 413.

b. Independent Investigation/Prejudicial Evidence Generally/Less Than Twelve Jurors. In *United States v. Seeright*, 978 F.2d 842, 849-50 (4th Cir. 1992), the court upheld dismissing a juror who had conducted "an independent investigation" of certain evidence and proceeding with the case with eleven jurors. The court cited *United States v. Barnes*, 747 F.2d 246, 250 (4th Cir. 1984) (district court must evaluate whether there is "reasonable possibility that the jury's verdict was influenced by the material that improperly came before it") (quoting *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980)); and *United States v. Fisher*, 912 F.2d 728, 733 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2019 (1991) ("quite clearly the occasional use of a jury of slightly less than 12 . . . is constitutional," in a case involving dismissal of a juror for cause after jury deliberations began) (quoting Advisory Committee to the Federal Rules). *See also* FED. R. CRIM. P. 23(b).

39. Jury Instructions.

a. Taken as a Whole. When considering a challenge to jury instructions, the inquiry on appeal is limited to "whether, taken as a whole, the instruction fairly states the controlling law." *United States v. Cobb*, 905 F.2d 784, 788-89 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 758 (1991); *see also Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (particular jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge").

b. Jury Presumed to be Able to Follow. "The jury is generally presumed to be able to follow an instruction to disregard evidence, absent some strong indication that the evidence is so powerful that a jury could not ignore it and that the defendant would be harmed as a result." *United States v. Jones*, 907 F.2d 456, 460 (4th Cir. 1990), *cert. denied*, 112 L. Ed. 675 (1991); *see also Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991) (discussing "sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given").

c. Standard of Review on Appeal. Both the decision whether to give and the contents of any jury instruction are reviewed on appeal for abuse of discretion. *United States v. Lozano*, 839 F.2d 1020, 1024 (4th Cir. 1988); *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 208-09 (4th Cir. 1986). However, if the defendant fails to object, he must show plain error to warrant reversal. FED. R. CRIM. P. 52(b); *United States v. Love*, 767 F.2d 1052, 1060 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); *United States v. Venneri*, 736 F.2d 995, 996-97 (4th Cir.), *cert. denied*, 469 U.S. 1035 (1984). As the Supreme Court has stated, "[i]t is the rare case in which an improper jury instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1976).

d. Cross References. For further discussion of jury instructions, see *infra* paragraph I.E. 31 (Jury Instructions) and *supra* paragraphs II.D.4.b (Joinder and Severance of Defendants/Jury Instructions) and II.D.17 (Voir Dire).

40. Inconsistent Verdicts. Inconsistent verdicts do not invalidate a co-defendant's conviction. *See United States v. Powell*, 469 U.S. 57, 65 (1984); *United States v. Harriott*, 976 F.2d 198, 202 (4th Cir. 1992); *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir. 1990) (acquittal of sole co-conspirator does not require reversal of defendant's conviction); *United States v. Arrington*, 719 F.2d 701, 705 (4th Cir. 1983), *cert. denied*, 465 U.S. 1028 (1984); *United States v. Harris*, 701 F.2d 1095, 1103 (4th Cir.), *cert. denied*, 463 U.S. 1214 (1983).

41. Notice of Appeal. Rule 4(b) of the Federal Rules of Appellate Procedure requires a notice of appeal to be filed within ten days of judgment. The district court may extend the time for filing a notice of appeal for thirty days upon a showing of excusable neglect with or without a motion being filed. The district court may not otherwise extend the time for filing a notice of appeal. *See United States v. Reyes*, 759 F.2d 351, 353-54 (4th Cir.), *cert. denied*, 474 U.S. 857 (1985); *United States v. Schuchardt*, 685 F.2d 901, 902 (4th Cir. 1982).

A letter or other document filed by an incarcerated prisoner can be a valid notice of appeal under Fed. R. App. P. 3 if it (1) notifies the court that an appeal is being taken and (2) notifies the party-opposite. *Smith v. Barry*, 112 S. Ct. 678, 682 (1992); *Coppedge v. United States*, 369 U.S. 438, 443 n.5 (1962). Under *Houston v. Lack*, 487 U.S. 266, 270 (1988), the notice of appeal is considered filed when it is given to prison officials for mailing.

42. Guilty Pleas/Rule 11 Proceedings. A defendant who pleads guilty may not challenge deprivations of his constitutional rights that occurred prior to the plea, but rather may only challenge the voluntary and counselled nature of the plea itself. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (guilty plea forecloses any challenge to nonjurisdictional errors, except in

limited situations); *United States v. Broce*, 488 U.S. 563, 569 (1989); *United States v. Bohn*, 956 F.2d 208 (9th Cir. 1992) (guilty plea waives Speedy Trial claim); *accord Lebowitz v. United States*, 877 F.2d 207 (2d Cir. 1989); *Johnson v. Puckett*, 930 F.2d 445 (5th Cir. 1991) (guilty plea waives attack on constitutionality of prior convictions supporting defendant's enhanced sentence as habitual offender), *cert. denied*, 112 S. Ct. 252 (1992); *Mack v. United States*, 853 F.2d 585 (8th Cir. 1988); *Hayle v. United States*, 815 F.2d 879 (2d Cir. 1987).

Where a defendant is represented by counsel during the Rule 11 proceeding, the voluntariness of the plea turns on whether the defendant received constitutionally adequate "effective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). On this subject, see paragraph II.D.52, *infra*. Statements made by the defendant regarding the voluntariness of a plea and assistance of counsel constitute strong evidence of voluntariness and are "a formidable barrier" to its subsequent attack. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *Fields v. Attorney General*, 956 F.2d 1290, 1297 (4th Cir.), *cert. denied* 113 S. Ct. 243 (1992); *United States v. DeFusco*, 949 F.2d 114 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1703 (1992); *United States v. Reckmeyer*, 786 F.2d 1216, 1221 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986) (precise manner in which Rule 11 proceedings are conducted is left to sound discretion of district court); *Via v. Superintendent, Powhatan Correctional Center*, 643 F.2d 167, 171 (4th Cir. 1981).

43. Threat to Indict. The Government's threat to indict a defendant on additional or more serious charges if he does not plead guilty is not a proper basis for challenging a guilty plea. The courts have long recognized that it is the avoidance or dismissal of such charges that fuels the plea bargain process and makes it work. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363-64 (1978).

44. Sufficiency of Indictment. Appellate claims regarding the vagueness or sufficiency of the indictment are seldom successful, particularly when made for the first time on appeal. In such a rare case, reversal would depend upon a finding of "plain error." FED. R. CRIM. P. 12(b)(2); *United States v. Hallock*, 941 F.2d 36, 39 n.2 (1st Cir. 1991); *cf. United States v. Fogel*, 901 F.2d 23, 25 (4th Cir.), *cert. denied*, 111 S. Ct. 343 (1990) ("Because the appellant's objection to this indictment was made after the jury rendered its verdict, any review for alleged defect is to be reviewed, if at all, under a liberal standard and 'every intendment is . . . indulged in support of the sufficiency.'" (citation omitted)); *Finn v. United States*, 256 F.2d 304, 307 (4th Cir. 1958) ("[i]ndictments . . . are construed more liberally . . . and every indictment is then indulged in support of the sufficiency" when first challenged on appeal).

"The indictment must charge all the essential elements of a criminal offense and sufficiently apprise the defendant of what he must be prepared to meet so he will not be misled while preparing his defense, and it must protect the defendant against later prosecution for the same offense." *United States v. Hayes*, 775 F.2d 1279, 1282 (4th Cir. 1985); *see Fogel*, 901 F.2d

at 25 ("An indictment that tracks the statutory language is ordinarily valid").

Similarly, claims that there was a variance between the charge in a Bill of Indictment and the Government's proof have a difficult burden to bear. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." As the Supreme Court observed in *Berger v. United States*, 295 U.S. 78 (1935):

> The true inquiry . . . is not whether there has been a variance of proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

Id. at 82 (citations omitted). On prejudicial variance generally, see *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991); *United States v. Odom*, 736 F.2d 104, 118 (4th Cir. 1984); and *United States v. DeBrouse*, 652 F.2d 383, 389 (4th Cir. 1981).

For further discussion of sufficiency of an indictment, see *supra* paragraph I.E.4.

45. Improper Prosecutorial Comment or Conduct. In *United States v. Harrison*, the Fourth Circuit identified the following four factors as central to determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. 716 F.2d 1050, 1052 (4th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

Although a prosecutor may not comment, either directly or indirectly, on a defendant's failure to testify, *Griffin v. California*, 380 U.S. 609 (1965), comment on the failure of the *defense* is acceptable. *United States v. Borchardt*, 809 F.2d 1115, 1119 (5th Cir. 1987).

> The test for determining whether an indirect remark constitutes improper comment on a defendant's failure to testify is: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to *be a comment* on the failure of the accused to testify."

United States v. Whitehead, 618 F.2d 523, 527 (4th Cir. 1980) (quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974).

In order to demonstrate prosecutorial misconduct based upon presentation of false testimony, a defendant must show that the prosecutor knew the testimony was false. *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987).

Assuming a prosecutor's comments or conduct is found to be improper, the question arises whether the error has rendered the trial so fundamentally unfair as to deny the defendant due process and therefore constitutes reversible error. *Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Thus, for example, the court in *Harrison* found the prosecutorial comments at issue to be improper but harmless error. *See United States v. Pupo*, 841 F.2d 1235 (4th Cir.), *cert. denied*, 488 U.S. 842 (1988). In deciding whether improper prosecutorial comments constitute harmless or reversible error, "absent other indications of prejudice or evidence of intentional prosecutorial misconduct," an instruction by the court will normally cure any unfairness to a defendant. *United States v. Moore*, 710 F.2d 157, 159 (4th Cir.), *cert. denied*, 464 U.S. 862 (1983); *see also United States v. Lorick*, 753 F.2d 1295, 1298 (4th Cir.) (jury instruction to ignore prosecutor's indirect comment on defendant's failure to testify cured any conceivable improper impression created by comment), *cert. denied*, 471 U.S. 1107 (1985).

46. Judicial Bias/Recusal. Under 28 U.S.C. § 455(a) a judge should recuse himself or herself if a reasonable person with knowledge of all the facts of the case, might question the judge's impartiality. *Liljeberg v. Health Services Acquisitions Corp.*, 486 U.S. 847, 860 (1988); *United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989). Denial of a recusal motion is reviewed on appeal for abuse of discretion. *Mitchell*, 886 F.2d at 671; *United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984). However, if raised for the first time on appeal, a claim of judicial bias is reviewed under the stricter plain error standard of FED. R. CRIM. P. 52(b). *See United States v. Schreiber*, 599 F.2d 534, 535-36 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979).

The subjective mindset of the judge is irrelevant to a determination of impartiality under section 455(a). In addition, "'[t]he alleged bias must derive from an extra-judicial source. It must result in an opinion on the merits on a basis other than that learned by the judge from his participation in the matter.'" *Mitchell*, 886 F.2d at 671 (quoting *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987)); *accord Shaw v. Martin*, 733 F.2d 304, 308-09 (4th Cir.), *cert. denied*, 469 U.S. 873 (1984); *United States v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984); *cf. United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (refusing to disqualify judge under 28 U.S.C. § 144 (1988) for evidence-based bias).[2] If the judge's perceived bias is based solely

2. The Supreme Court has recognized that the Circuits are split on this issue. *Waller v. United States*, 112 S. Ct. 2321 (1992) (White, J., dissenting from denial of certiorari). The Fourth, Fifth, Sixth, Ninth and Eleventh Circuits adhere to the view that the source of the

on evidence from the case before him or her, such will not serve to disqualify the judge.

A defendant's assertion of judicial bias frequently stems from questions interjected to witnesses by the presiding judge. However, it is well established that a federal judge has the authority to comment on evidence, question witnesses, and even call witnesses. *See* FED. R. EVID. 614(b); *United States v. Seeright*, 978 F.2d 842 (4th Cir. 1992); *United States v. Norris*, 749 F.2d 1116, 1123 (4th Cir. 1984), *cert. denied*, 471 U. S. 1065 (1985); *Crandell v. United States*, 703 F.2d 74, 78 (4th Cir. 1983). Indeed, as the Fourth Circuit explained in *United States v. Parodi*, 703 F.2d 768, 775 (4th Cir. 1983), quoting *Simon v. United States*, 123 F.2d 80, 83 (4th Cir. 1941)), "[the trial court] should not hesitate to ask questions for the purpose of developing the facts. . . . [H]e has no more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury." *See also United States v. Hickman*, 592 F.2d 931, 933 (6th Cir. 1979) (trial court must "see that the issues are not obscured and that the testimony is not misunderstood" and "has the right to interrogate witnesses for this purpose"); *United States v. Cassiagnol*, 420 F.2d 868, 879 (4th Cir. 1970) (same), *cert. denied*, 397 U.S. 1044 (1970). As the *Parodi* court noted:

> In order to determine whether the district judge so abused his proper prerogatives in this regard that a fair trial was denied [the defendant], it is necessary to look not merely at the challenged questions in isolation but also at the demeanor and conduct of the trial judge throughout the trial, to search the record for evidence of partiality or bias that might indicate a belief on the judge's part that [the defendant was] "guilty" or suggest that [the judge] had usurped the function of prosecutor.

Parodi, 703 F.2d at 776.

47. Waiver of Appeal by Failure to Object/Evidence Not in Record. Failure to object to testimony or other evidence at the time it is offered at trial will in all likelihood preclude consideration of the objection on appeal. *United States v. Maxton*, 940 F.2d 103, 105 (4th Cir.), *cert. denied*, 112 S. Ct. 398 (1991); *United States v. Parodi*, 703 F.2d 768, 783 (4th Cir. 1983); *United States v. Anderson*, 481 F.2d 685, 694-95 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974); *see also United States v. Terry*, 729 F.2d 1063, 1069 (6th

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alleged bias must be extrajudicial. In contrast, the First Circuit has consistently held that a judge may be disqualified pursuant to § 455(a) for alleged bias originating from evidence in the judicial proceeding. *Compare Mitchell*, 886 F.2d at 671 (stating that bias must be extra-judicial); *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986) (same), *cert. denied*, 480 U.S. 946 (1987); *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990) (same); *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988) (same), *cert. denied*, 488 U.S. 1040 (1989) and *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (same) *with United States v. Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990) (holding that judge may be disqualified for case-based bias).

Cir. 1984); *United States v. Edgewood Health Care Ctr., Inc.*, 608 F.2d 13, 14 (1st Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); *DiPaola v. Riddle*, 581 F.2d 1111, 1113 (4th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

Likewise, a defendant's failure to object at sentencing waives the issue on appeal in the absence of plain error. *United States v. Tibesar*, 894 F.2d 317, 319 (8th Cir.), *cert. denied*, 111 S. Ct. 79 (1990); *United States v. Daiagi*, 892 F.2d 31, 34 (4th Cir. 1989); *Wren v. United States*, 540 F.2d 643, 644 n.1 (4th Cir. 1975); FED. R. CRIM. P. 52(b).

Similarly, a defendant is precluded from raising a claim on direct appeal relating to evidence that is not a part of the record below. *United States v. Russell*, 971 F.2d 1098, 1112 (4th Cir. 1992) (post card purporting to be from murder victim which defendant did not receive until after sentencing not part of record on appeal, and therefore would have to be raised through Rule 33 motion or 28 U.S.C. § 2255 (1988) petition), *cert. denied*, 61 U.S.L.W. 3479 (U.S. Jan. 11, 1993); *United States v. Wilson*, 901 F.2d 378 (4th Cir. 1990); *United States v. Sanchez-Lopez*, 879 F.2d 541, 548 (9th Cir. 1989); *Virgin Islands v. Harrigan*, 791 F.2d 34, 36 (3d Cir. 1986).

For further discussion of waiver of appellate review by failure to object, see *supra* paragraphs II.D.12.e., II.D.13, and II.D. 39.c.

48. Rule 32 Violations. Findings under Rule 32(c) (3) (D) need not be made with minute specificity. *See United States v. Perrera*, 842 F.2d 73 (4th Cir.), *cert. denied*, 488 U.S. 837 (1988). Although the rule requires that a written record of such finding be appended to any copy of the presentence report made available to the Bureau of Prisons or Parole Commission, *United States v. Miller*, 871 F.2d 488 (4th Cir. 1989), ordinarily, a written transcript of the sentencing hearing complies with Rule 32(c)(3)(D). *See United States v. Hill*, 766 F.2d 856, 858 (4th Cir.), *cert. denied*, 474 U.S. 923 (1985). To prevail in a Rule 32 claim, a defendant has the burden to show that the disputed information was "*materially* inaccurate and that the judge *relied* on the information." *United States v. Tooker*, 747 F.2d 975, 978 (5th Cir. 1984), *cert. denied*, 471 U.S. 1021 (1985). Finally, Rule 32 claims not raised on direct appeal will be deemed waived unless the error is so egregious as to be deemed a violation of due process. *United States v. Emanuel*, 869 F.2d 795, 796 (4th Cir. 1989); *see United States v. Roberson*, 896 F.2d 388, 391 (9th Cir.), *amended on reh'g*, 917 F.2d 1158 (9th Cir. 1990).

For further discussion of factual findings by the district court generally, see *supra* paragraph II.D.12.

49. Rule 33 (Motion For New Trial). The standard for considering a Rule 33 motion depends upon how soon following trial the motion is made. If made within seven days, an "interest of justice" standard applies. *United States v. Mitchell*, 602 F.2d 636, 639 (4th Cir. 1979); *see* 3 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 557, at 316 (2d ed. 1982). If a motion for new trial based on newly discovered evidence is made after that time (but before two years elapse), the five-part test set forth in *United States v. Chavis*, 880 F.2d 788, 793 (4th Cir. 1989) is applied:

1. Is the evidence, in fact, newly discovered?
2. Are facts alleged from which the court may infer due diligence on the part of the movant?
3. Is the evidence relied upon not merely cumulative or impeaching?
4. Is the evidence material to the issues involved?
5. Would the evidence probably result in acquittal at a new trial?

Under Rule 33 of the Federal Rules of Criminal Procedure, a district court, despite the pendency of an appeal, has jurisdiction to entertain a motion for a new trial. The court may either deny the motion or certify to the court of appeals its intention to grant the motion, so that the Court of Appeals could, if it wished, entertain a motion to remand the case. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).

Denial of a Rule 33 motion for new trial will be affirmed on appeal absent an abuse of discretion by the trial judge. *Sloan v. Colebank*, 304 F.2d 668 (4th Cir. 1962). In general, motions for a new trial are not favored and should be sparingly granted. 3 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 557 (2d ed. 1982).

For further discussion of Rule 33, see *supra* paragraph I.E.33.

50. Petition for Certiorari. If a defendant wishes to petition the Supreme Court for certiorari, a court-appointed lawyer must represent him in filing the petition. *Wilkins v. United States*, 441 U.S. 468, 469 (1979); *Proffitt v. United States*, 549 F.2d 910, 912 (4th Cir. 1976), *cert. denied*, 429 U.S. 1076 (1977). Also, see the Fourth Circuit's Internal Operating Procedure ("I.O.P.") 46.3 and Plan in Implementation of the Criminal Justice Act of 1964 ("Plan") which require court-appointed counsel to inform clients in writing of the right to petition for certiorari and to file a petition if so requested. Plan, Part V, § 2. The remedy for a breach of this duty is re-entry of the judgment on appeal to permit the defendant, with the assistance of counsel, to file a timely petition for certiorari. *Wilkins*, 441 U.S. at 470.

51. Rule 35 Motions. The district court's disposition of a Rule 35 motion will not be disturbed on appeal except for a clear abuse of discretion. *United States v. Stumpf*, 476 F.2d 945, 946 (4th Cir. 1973); *cf. United States v. Guglielmi*, 929 F.2d 1001, 1002-07 (4th Cir. 1991) (district court's resolute refusal to reduce 25-year sentence for obscenity offenses held failure "to exercise its discretion discernably or meaningfully").

A defendant has ten days to appeal final disposition of a Rule 35 motion, although an untimely attempt to appeal raising an issue which could be raised under 28 U.S.C. § 2255 (1988) will be deemed to be a petition for relief under that statute. *Hill v. United States*, 368 U.S. 424, 430 (1962); *United States v. Santora*, 711 F.2d 41, 42 (5th Cir. 1983). However, unless the issue is one cognizable under 28 U.S.C. § 2255 (1988), the court loses authority to reconsider or modify its decision at the end of the ten day appeal period. *United States v. Breit*, 754 F.2d 526, 630 (4th Cir. 1985).

52. Ineffective Assistance of Counsel.

a. In 28 U.S.C. § 2255 Proceedings/Not on Direct Appeal. Claims of ineffective assistance of counsel should be raised in a 28 U.S.C. § 2255 petition rather than on direct appeal unless the record conclusively shows ineffective assistance. *United States v. Hanley*, 974 F.2d 14, 16 n.2 (4th Cir. 1992); *United States v. Underwood*, 970 F.2d 1336, 1340 (4th Cir. 1992); *United States v. Grandison*, 783 F.2d 1152, 1156-57 (4th Cir.), *cert. denied*, 479 U.S. 845 (1986); *United States v. Percy*, 765 F.2d 1199, 1205 (4th Cir. 1985); *United States v. Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005, *and* 457 U.S. 1136, *and* 459 U.S. 843 (1982); *United States v. Fisher*, 477 F.2d 300, 302 (4th Cir. 1973).

b. Standard on Appeal. The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), adopted a two-pronged test for determining in retrospect whether assistance of counsel has been constitutionally adequate. The first prong relates to professional competence. Here, the defendant must show that counsel's representation was deficient to the extent that representation fell below an objective standard of reasonableness. *Id.* at 687-91. In this regard, the Supreme Court made it clear in *Strickland* that there is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *Id.* at 689; *see Fields v. Attorney Gen. of Md.*, 956 F.2d 1290, 1297-99 (4th Cir.), *cert. denied*, 113 S. Ct. 243 (1992); *Roach v. Martin*, 757 F.2d 1463, 1476 (4th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985); *Hutchins v. Garrison*, 724 F.2d 1425, 1430-31 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065 (1984); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

The second prong of the *Strickland v. Washington* test is that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The two prongs of the *Strickland* test are sometimes referred to as the "performance" and "prejudice" components. *Fields*, 956 F.2d at 1297.

It is important to note that "[t]he defendant bears the burden of proving *Strickland* prejudice," *Fields*, 956 F.2d at 1297 (citing *Hutchins*, 724 F.2d at 1430-31), and that absent the defendant meeting this burden "a reviewing court need not consider the performance prong." *Fields*, 956 F.2d at 1297 (citing *Strickland*, 466 U.S. at 697). Moreover, in regard to the degree of prejudice a defendant must show, as this Court stated in *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir.) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)), *cert. denied*, 488 U.S. 843 (1988):

When a defendant challenges a conviction entered after a guilty plea, [the] "prejudice" prong of the [Strickland] test is slightly modified. Such a defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

Accord Craker v. McCotter, 805 F.2d 538, 542 (5th Cir. 1986) (allegation that effective counsel would have negotiated better plea bargain insufficient to establish prejudice under *Hill*), *cited with approval* in *Fields*, 956 F.2d at 1297.

c. Conflict of Interest. The appellate courts appear to give somewhat closer scrutiny to claims of ineffective assistance of counsel based upon alleged conflicts of interest, than they do to more generalized questioning of an attorney's handling of a particular case. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991); *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990); *United States v. Akinseye*, 802 F.2d 740 (4th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987); *United States v. Arias*, 678 F.2d 1202 (4th Cir.), *cert. denied*, 459 U.S. 910 (1982); *United States v. Ramsey*, 661 F.2d 1013 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982). For further discussion of conflicts of interest as ineffective assistance of counsel, see *supra* paragraph I.E.38.

d. Failure to Perfect Appeal. Failure to file notice and otherwise perfect an appeal may be a prima facie case of ineffective assistance of counsel. *See Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985) (attorney's failure to perfect appeal after trial deprived petitioner of constitutionally guaranteed effective assistance of counsel); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990); *Estes v. United States*, 883 F.2d 645, 648-49 (8th Cir. 1989); *Doyle v. United States*, 721 F.2d 1195, 1198 (9th Cir. 1983). *But cf. Barrientos v. United States*, 668 F.2d 838, 842-43 (5th Cir. 1982).

e. Cross References. For further discussion of ineffective assistance of counsel, see *supra* paragraphs I.E. 38 and 39.

53. Other 28 U.S.C. § 2255 Proceedings.

a. Challenges to Computation of Sentence. Challenges to the computation of a sentence must be brought in the district of confinement, *United States v. Miller*, 871 F.2d 488, 490 (4th Cir. 1989), and then only after an initial determination has been made by the Attorney General. *United States v. Wilson*, 112 S. Ct. 1351 (1992).

b. Evidentiary Hearings. No evidentiary hearing is necessary on a 28 U.S.C. § 2255 (1988) petition if there are no genuine disputes as to material facts, including any petition regarding which the record conclusively shows that a petitioner is entitled to no relief. *Aleman v. United States*, 878 F.2d 1009, 1012 (7th Cir. 1989).

However, when there are genuine disputes as to material facts, an evidentiary hearing should be held. *United States v. Young*, 644 F.2d 1008, 1013 (4th Cir. 1981); *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979). Also, see the discussion of this point in *supra* paragraph I.E.39.b.

c. Successive § 2255 Petitions as "Abuse of the Writ." The abuse of the writ doctrine "in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." *McCleskey v. Zant*, 111 S. Ct. 1454, 1468 (1991); *see also Sanders v. United States*, 373 U.S. 1, 15-17 (1963); *United States v. MacDonald*, 966 F.2d 854, 856-59 (4th Cir.), *cert. denied*, 113 S. Ct. 606 (1992); *United States v. Oliver*, 865 F.2d 600, 604-05 (4th Cir.), *cert. denied*, 493 U.S. 830 (1989); *Miller v. Bordenkircher*, 764 F.2d 245, 250 (4th Cir. 1985). Moreover, whether a petitioner appeared pro se or was represented by counsel in the earlier habeas proceeding is generally immaterial to a court's determination of a Rule 9(b) dismissal. *See Miller*, 764 F.2d at 251 (Congress did not intend to exclude nonlawyers and poorly educated from operation of Section 2254's similar Rule 9(b)). For further discussion of the abuse of the writ doctrine, see *supra* paragraph I.E.39.c. and for further discussion of right to counsel in 28 U.S.C. § 2255 proceedings generally, see *supra* paragraph I.E.39.d.

d. Cross Reference. For further discussion of 28 U.S.C. § 2255 proceedings generally, see *supra* paragraph I.E.39.

54. Probation Revocation. Probation may be revoked when the court determines that a condition of probation has been violated which warrants revocation. *Black v. Romano*, 471 U.S. 606, 611 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973). Whether to revoke probation is within the sound discretion of the court, which need only be "reasonably satisfied" that a term or condition has been violated. *Burns v. United States*, 287 U.S. 216, 222 (1932); *United States v. Cates*, 402 F.2d 473, 474 (4th Cir. 1968); *United States v. Williams*, 378 F.2d 665, 666 (4th Cir. 1967).