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This review of significant Fourth Circuit criminal opinions covers the
nine month period ended March 31, 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 Both published and unpublished
opinions are reviewed; however, because unpublished opinions are not
binding precedent, it is the published authority cited in unpublished slip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repeatedly cited in unpublished opinions—which represent a majority of the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. Drug Conspiracies/Sufficiency of Evidence. Several published opin-
ions during the review period involved claims of insufficiency of the
evidence to support drug conspiracy convictions. In United States v. Brooks,
957 F.2d 1138 (4th Cir. 1992), and United States v. Mabry, 953 F.2d 127
(4th Cir. 1991), cert. denied, 112 S. Ct. 1951 (1992), the conspiracy con-
victions were affirmed. Among the key points made en route to affirmanre
were the following:

a. Overt Acts. No overt act must be shown by a particular defen-
dant to sustain a drug conspiracy conviction. Mabry, 953 F.2d at
130 (citing United States v. Goldman, 750 F.2d 1221, 1226 (4th
Cir. 1984)).

b. Circumstantial Evidence. "Proof of a conspiracy may of course
be by circumstantial evidence; it need not and normally will not be
by direct evidence." Mabry, 953 F.2d at 130 (quoting United States
v. Giunta, 925 F.2d 758, 764 (4th Cir. 1991)).

c. 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 n.7
(4th Cir. 1981), cert. denied, 455 U.S. 950 (1982)).

d. No Knowledge/Minor Role. A defendant need not have knowl-
edge of his coconspirators, or of the details of the conspiracy, and

* Chief Assistant U.S. Attorney for the Western District of North Carolina.
may be convicted despite having played only a minor role in the overall conspiracy. *Brooks*, 957 F.2d at 1147 (citations omitted).

e. *Quantity of Drugs.* The quantity of drugs found by the district court to be involved in a drug conspiracy need only be supported 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). (See discussion and cases cited in paragraph II(A)(1), infra.)

f. *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).

g. *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).


i. 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); *United States v. Morgan*, 942 F.2d 243 (4th Cir. 1991); *United States v. White*, 875 F.2d 427, 433 (4th Cir. 1989).

2. *More Than Bad Friends.* The drug conspiracy conviction did *not* survive on appeal, however, in *United States v. Bell*, 954 F.2d 232 (4th Cir. 1992), in which 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." 954 F.2d at 237.

3. *Search and Seizure/Inevitable Discovery.* Two drug convictions were reversed during the review period for reasons related to improper search or seizure. In *United States v. Thomas*, 955 F.2d 207, 211 (4th Cir. 1992), the court held that an illegal, warrantless search of the defendant’s motel room earlier in the evening was not cured either by the defendant’s later “consent” to search (once in handcuffs and told by police officers of bank robbery evidence they had seen during the unlawful search), or by the “inevitable discovery” rule. The *Thomas* opinion includes a lengthy discussion of the inevitable discovery rule, first recognized in *Nix v. Williams*, 467 U.S. 431

4. Police-Citizen Encounters Versus "Seizure" of Person. In United States v. Wilson, 953 F.2d 116 (4th Cir. 1991), the court held that repeated requests to search a defendant followed by unequivocal refusals (here, in an airport drug interdiction context) can constitute a Fourth Amendment "seizure." The court distinguished "police-citizen encounters" in routine drug interdiction efforts held not to be seizures in Florida v. Bostick, 111 S. Ct. 2382 (1991) and United States v. Flowers, 912 F.2d 707, 712 (4th Cir. 1990), cert. denied, 111 S. Ct. 2895 (1991), emphasizing the familiar "free to leave" test first articulated in United States v. Mendenhall, 446 U.S. 544, 554 (1980). Because a seizure had occurred and the necessary "reasonable suspicion" had not been demonstrated, see United States v Gordon, 895 F.2d 932, 937 (4th Cir.) (discussing when court must make reasonable suspicion determination), cert. denied, 111 S. Ct. 131 (1990), the conviction in Wilson was reversed. However, en route to reversal the court pointed with approval to a number of factors supporting "reasonable suspicion" in routine drug interdiction, emphasizing (1) "drug profiles"; (2) special police training and expertise; (3) bulges in clothing; (4) false statements; and (5) use of a false name. See further discussion of this topic in paragraph II(C)(5), infra.

5. Bogus Drugs. In United States v. Fletcher, 945 F.2d 725 (4th Cir.), cert. denied, 112 S. Ct. 1230 (1991), the court upheld a conviction for attempted distribution of the narcotic drug PCP, even though what was actually distributed was not a narcotic drug, citing United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

6. Rule 404(b) Evidence. United States v. Mark, 943 F.2d 444 (4th Cir. 1991), has a detailed discussion of the use of Rule 404(b) evidence in drug cases.

7. "Drug Equivalent" of Seized Cash. In United States v. Hicks, 948 F.2d 877 (4th Cir. 1991), the court rejected the defendant's due process argument and held that the "drug equivalent" of cash seized from the defendant's home (in this case $295,000) could be added to the amount of drugs involved under the "relevant conduct" provisions of the Sentencing Guidelines, citing sections 1B1.3(a)(2), 2D1.1, and 2D1.4, and the commentary thereunder.

8. Intent to Distribute/Residue Only. In United States v. Jones, 945 F.2d 747 (4th Cir. 1991), the court reversed a section 924(c) conviction where only a residue of cocaine was found (along with various drug paraphernalia) at the time of a search of defendant's home.

9. Multiple section 924(c) Convictions/Sentencing. In United States v. Raynor, 939 F.2d 191 (4th Cir. 1991), the court held that convictions for two section 924(c) violations, occurring on different dates but charged in a single Bill of Indictment, should be treated as first and second offenses under the statute. The practical effect of that, of course, is to make the
punishment five years for the first offense and twenty consecutive years for the second.

10. 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 50 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).

11. Career Offenders/Misdemeanors as "Felonies." In United States v. Pinckney, 938 F.2d 519 (4th Cir. 1991), the court held again that state misdemeanor convictions (here possession of less than two ounces of marijuana and two grams of cocaine on two different occasions) qualify as prior "felonies" for the purpose of determining whether a defendant is a "career offender." However, the court remanded for resentencing to allow the court to decide whether it wished to depart downward in accordance with Sentencing Guidelines section 4A1.3. See also United States v. Raynor, 939 F.2d 191, 194-95 (4th Cir. 1991).

12. Cooperation Used Against Defendant. In United States v. Malvito, 946 F.2d 1066 (4th Cir. 1991), the court reversed and remanded for resentencing because the quantity of drugs revealed by the defendant himself while cooperating with the Government caused the district court to refuse to sentence at the low end of the Sentencing Guidelines range or to depart downward per the Government's motion. The Fourth Circuit noted that, "[i]n short, the district court could have denied Malvito the downward departure for almost any reason, but not for the reason it gave." 946 F.2d at 1068 (citing United States v. Bayerle, 898 F.2d 28, 30-31 (4th Cir.), cert. denied, 111 S. Ct. 65 (1990)).

B. Sentencing Guidelines Issues

1. Obstruction of Justice. In addition to the Sentencing Guidelines issues arising in drug cases, a substantial amount of the Fourth Circuit's caseload pertains to assorted guidelines issues. Perhaps the most significant opinion published during the review period was United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991), petition for reh'g denied by an equally divided court (Nov. 15, 1991, 6-6 decision). In Dunnigan the Fourth Circuit became the only federal circuit to disallow an obstruction of justice enhancement under Sentencing Guidelines section 3C1.1 for the defendant's perjury, calling such "an intolerable burden upon the defendant's right to testify in his own behalf." Id. at 185. See also United States v. Craigo, 956 F.2d 65, 68 (4th Cir. 1992); compare, however, those examples of conduct held to justify an obstruction of justice enhancement, as discussed in paragraph II(B)(2), infra.

In United States v. Brooks, 957 F.2d 1138, 1150 (4th Cir. 1992), discussed supra paragraph I(A)(i), the court reversed imposition of a two-level enhancement for "obstruction of justice" (per section 3C1.1) due to
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."

On the other hand, in United States v. Romulus, 949 F.2d 713 (4th Cir.), cert. denied, 112 S. Ct. 1690 (1992), the court upheld an obstruction of justice enhancement based upon the defendant having given a false name to the Magistrate, and in United States v. Hicks, 948 F.2d 877, 883 (4th Cir. 1991), held that each of the following conduct independently justify the two-level enhancement: (1) high speed flight from arrest; (2) throwing cocaine from the car during the chase; and (3) lying to a Probation Officer about the amount of attorney's fees paid.

2. Defendant's Wealth/Upward Departure in Fine. In United States v. Graham, 946 F.2d 19 (4th Cir. 1991), the court held that the defendant's wealth was not a sufficient factor to justify an upward departure in the amount of the defendant's fine. The court's opinion in Graham contains a rather lengthy discussion of upward departures generally, before also holding that the district court's refusal to downward depart is not reviewable on appeal, citing United States v. Bayerle, 898 F.2d 28 (4th Cir.), cert. denied, 111 S. Ct. 65 (1990). For the required findings to support a Sentencing Guidelines fine generally, see United States v. Harvey, 885 F.2d 181 (4th Cir. 1989).

3. Career Offenders. Several published opinions during the review period dealt with issues related to the "career offender" enhancement per section 4B1.1. 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. Wilson, 951 F.2d 586 (4th Cir. 1991), the court held that "pickpocketing" was a "violent crime" for career offender purposes as defined in section 4B1.2 and, by reference, in 18 U.S.C. § 16. In so holding, the court adopted a so-called "categorical approach" in determining whether a prior conviction constitutes a violent crime. Under the categorical approach the elements of the offense of conviction are the crucial factor rather than the facts of a particular case.

Applying this categorical approach to prior convictions just weeks later in United States v. Johnson, 953 F.2d 110 (4th Cir. 1991), the court held that possession of a firearm by a convicted felon was not a "crime of violence" for career offender purposes.

4. 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 section 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.

5. Counterfeit Enhancements. In United States v. Payne, 952 F.2d 827 (4th Cir. 1991), the court reversed a two-level enhancement for "more than minimal planning" under section 2F1.1(b)(1) in a counterfeit prosecution, holding that the reference to the fraud table in section 2F1.1 which governs counterfeit cases applies only to the table itself and not to the specific offense characteristics in section 2F1.1(a) and following. In fact, between the filing of the appeal in Payne and the date of decision, the Sentencing Guidelines were amended to so indicate.

C. Miscellaneous

1. Check Kiting. In United States v. Celesia, 945 F.2d 756 (4th Cir. 1991), the court held that "check kiting" constituted bank fraud in violation of Title 18, U.S. Code, section 1344. Requisite fraudulent intent may be determined, according to the court, by circumstantial evidence as well as from "inferences deduced from facts and situations." Id. at 759.

2. Possession of Firearm by Convicted Felon. In United States v. McBryde, 938 F.2d 533 (4th Cir. 1991), the court reversed a conviction for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) because the defendant's civil rights had been previously restored under North Carolina law, citing United States v. McLean, 904 F.2d 216, 218 (4th Cir.), cert. denied, 111 S. Ct. 203 (1990); and United States v. Cassidy, 899 F.2d 543, 549 (6th Cir. 1990). The court pointed out in McBryde that the federal law was amended in 1986 and thereafter, pursuant to 18 U.S.C. § 921(a)(20), federal law has deferred to the state in which a defendant was convicted to determine whether his civil right to possess firearms has been restored.

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 stopped, the firearm was found under the defendant's seat. After carefully reviewing the law of constructive possession, the court reversed, explaining its holding thus: "we 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. The Blue opinion also states what is not expressly provided in the Armed Career Criminal Act [18 U.S.C. § 924(e)], that is, that the unstated statutory maximum is life imprisonment. 957 F.2d at 107.

Arnoldt, 947 F.2d 1120 (4th Cir. 1991), cert. denied, 112 S. Ct. 1666 (1992), the court held that prosecution on RICO (racketeering) or CCE (Continuing Criminal Enterprise) charges following trial on related substantive drug offenses is not double jeopardy, even though the substantive drug offenses are charged as predicate acts in the subsequent RICO or CCE prosecution.

4. Voluntariness of Confession/Lost Evidence. In United States v. Sanders, 954 F.2d 227 (4th Cir. 1992), discussed supra paragraph I(B)(3), the court reversed 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.

5. Waiver of Counsel. In United States v. Muca, 945 F.2d 88 (4th Cir. 1991), cert. denied, 112 S. Ct. 983 (1992), the court held that the Miranda warnings were sufficient to support waiver of the Sixth Amendment right to counsel by a defendant who was questioned without being told and without being aware that he had already been indicted. The court rejected a view to the contrary in a Second Circuit line of cases, electing instead to follow Riddick v. Edmiston, 894 F.2d 586, 590-91 (3rd Cir. 1990) and Quadrini v. Clusen, 864 F.2d 577, 585-87 (7th Cir. 1989).

6. Attorney-Client Privilege. In Re Grand Jury Proceedings, 947 F.2d 1188 (4th Cir. 1991), held that the attorney-client privilege only extends to communications with an accountant (a) when the accountant is retained by the attorney; (b) when the accountant is present at a meeting with the client and the attorney; or (c) when the meeting between the client and the accountant was immediately prior to a meeting with the attorney and for the purpose of assisting the attorney in preparation of a defense. Otherwise, communications with an accountant—whether or not the information is relevant to a legal defense—are not protected by the attorney-client privilege.

7. Withdrawal of Plea. In United States v. Lambey, 949 F.2d 133 (4th Cir. 1991), 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. Judge Widener dissented, arguing that erroneous advice from counsel of this magnitude is a "fair and just reason" to allow withdrawal of a plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. Judges Niemeyer and Wilkins disagreed.

8. Rule 11 Proceedings. United States v. DeFusco, 949 F.2d 114 (4th Cir. 1991), cert. denied, 112 S. Ct. 1703 (1992), contains a lengthy discussion of Rule 11 proceedings, holding, inter alia, that the low end of the applicable Sentencing Guidelines range is not a "mandatory minimum" about which
the defendant must be informed during the Rule 11 colloquy. *DeFusco* also
held: (1) that there is some flexibility in the degree to which the court must
go in explaining to the defendant “the nature of the charges against him”;
(2) that the Sentencing Guidelines range need not be known at the time the
Rule 11 inquiry is held and the plea is accepted; and (3) that promises to
the defendant, including the promise of leniency toward his co-defendant/
wife, do not render the plea “involuntary.”

1145-46 (4th Cir. 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. 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.

10. Disclosure of Confidential Informant. Two published decisions dur-
ing the review period addressed when the identity of a confidential informant
must be disclosed. *United States v. Blevins*, 960 F.2d 1252 (4th Cir. 1992);
and *United States v. Mabry*, 953 F.2d 127 (4th Cir. 1991), discussed *supra*.
Neither opinion required disclosure; however, both include lengthy discus-
sions of the pertinent cases and principles relative to when the duty to
disclose arises.

11. Right to Trial/Multiple Petty Offenses. In *United States v. Coppins*,
953 F.2d 86 (4th Cir. 1991), the court held that a defendant charged with
multiple petty offenses with a *cumulative* exposure in excess of six months
imprisonment has a Sixth Amendment right to a jury trial, citing *Baldwin
majority opinion written by Judge Phillips and joined by Senior United
States District Judge Merhige of the Eastern District of Virginia.

12. 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.
13. Polygraph Evidence. United States v. A&S Council Oil Co., 947 F.2d 1128 (4th Cir. 1991), has a lengthy discussion of the historical inadmissibility of polygraph (a.k.a. "lie detector") results at trial, including citations to a number of more recent decisions to the contrary in other circuits now allowing polygraph evidence. Although this panel stopped short of overruling its long line of cases in this area, there was apparent sympathy for those circuits which were moving in that direction. The unique factual twist in this case was that it was the defendant company which sought admission of polygraph results in cross examining a key Government witness, claiming its right to do so under the Confrontation Clause of the Sixth Amendment. Citing a number of cases from other circuits which had "loosened their traditional strictures against polygraph evidence in recent years," the court stopped short of following: "Any such drastic departure from our previous practice must be made by an en banc court." Id. at 1134. However, the court did, in fact, depart from previous practice, reversing and remanding for a new trial, and it did so on the basis of polygraph evidence—holding that the defendant should have been allowed to cross-examine a government expert (a psychiatrist who had testified that a Government witness in his opinion was able to distinguish fact from fancy) as to what extent the expert's awareness of the polygraph results influenced his expert opinion. It is likely that we will see additional cases defining the Fourth Circuit's evolving position on the admissibility of polygraph results in the near future.


15. Statement by Deceased Witness. In United States v. Ellis, 951 F.2d 580 (4th Cir. 1991), cert. denied, No. 91-1741, 1992 U.S. LEXIS 4612 (1992) (Apr. 10, 1992), the court upheld the admissibility of evidence of a statement made to government agents by a deceased witness pursuant to a plea agreement and in the presence of counsel. Shortly thereafter the witness/defendant committed suicide. The court examined the defendant's hearsay objections in light of the Supreme Court's decision in Idaho v. Wright, 110 S. Ct. 3139 (1990), and found that the statement bore the necessary "indicia of reliability" to justify admissibility. See also United States v. Workman, 860 F.2d 140 (4th Cir. 1988), cert. denied, 489 U.S. 1078 (1989).

16. Rule 404(b) Evidence. In United States v. Sanders, 951 F.2d 34 (4th Cir. 1991), the court reversed an assault with a dangerous weapon conviction because it found evidence of prior convictions for assault and possession of contraband, admitted under FED. R. EVID. 404(b), to be too prejudicial, but affirmed the defendant's assault conviction. The Sanders opinion discusses the wide range of admissible Rule 404(b) evidence and the harmless error doctrine as it applies to Rule 404(b) evidence, before finding the error reversible in regard to the assault conviction but harmless in regard to the contraband conviction. The absence of other evidence and
the length of jury deliberations in regard to the assault charge played a large part in the ultimate outcome.

17. Inaccurate Jury Instructions. In *United States v. Craigo*, 956 F.2d 65 (4th Cir. 1992), the court held that technically inaccurate jury instructions will result in reversal only if there is a "reasonable likelihood" that the erroneous instruction "prejudice[d] the jury's consideration of the dispositive issue." *Id.* at 68.

18. Juvenile Prosecution. In *United States v. Romulus*, 949 F.2d 713 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1690 (1992), the court remanded the conviction of a juvenile prosecuted as an adult for certain factual findings required by 18 U.S.C. § 5032. Assuming the district court decides on remand that "the interests of justice are served" by prosecution of the juvenile as an adult, the conviction stands.


20. Harmless Error/Fact of Non-Testifying Co-Defendant 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 non-testifying 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.

21. Lengthy Sentences. In *United States v. Pavlico*, 961 F.2d 440 (4th Cir. 1992), *petition for cert. filed* (June 9, 1992), the court affirmed a 40-year sentence for mail fraud and false statement violations imposed by the Honorable Robert D. Potter, District Judge for the Western District of North Carolina. 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 (4th Cir. 1991), 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. In regard to the latter point, see also *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).

concluded that to justify the Armed Career Criminal 15-year mandatory minimum, the statute required three separately sentenced, sequential convictions. The Fourth Circuit disagreed stating that all that is required is convictions for three qualifying felonies "committed on occasions different from one another." (citing the statute and numerous cases from other circuits).

23. Waiver of Appeal. And finally, in United States v. Davis, 954 F.2d 182 (4th Cir. 1992), the Fourth Circuit held again that knowing waiver of appellate rights is valid and will be enforced on appeal. See also United States v. Wessells, 936 F.2d 165 (4th Cir. 1992); 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 1299 (4th Cir. 1991), cert. denied, 112 S. Ct. 160 (1992) (Defendant's knowing waiver of appeal held, as a matter of basic fairness, to also preclude Government from appealing).

II. SELECTED PRINCIPLES CITED IN UNPUBLISHED OPINIONS

As stated on 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 since July 1, 1991, chosen with an eye toward practical usefulness.

A. Drug Cases

1. Quantity of Drugs. Because the quantity of drugs for which a particular defendant is responsible is the key factor in determining the sentencing range, it is not surprising that this is one of the most frequently litigated issues on appeal in drug cases. Key principles of law to keep in mind are:

   a. 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. 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, 110 S. Ct. 8 (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 (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).

b. Under the “relevant conduct” provisions of the Sentencing Guidelines section 1B1.3(a)(2), all quantities of drugs that were part of the same course of conduct or part of the same common scheme or plan are included. This may include uncharged drug transactions as well as those described in the Bill of Indictment. United States v. Cusack, 901 F.2d 29, 32-33 (4th Cir. 1990); United States v. Williams, 880 F.2d 804, 805-06, reh’g denied, No. 88-5213, 1989 U.S. App. LEXIS 13911 (4th Cir. 1989).

c. When the quantity of drugs seized does not reflect the scale of the offense, the district court may estimate the total quantity involved. See United States Sentencing Commission, Guidelines Manual, section 2D1.4, Comment n.2 (Nov. 1990).

d. 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).

e. In determining the quantity of drugs, the district court may consider “the drug equivalent of 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).

f. In a conspiracy, under the general rule established by the Supreme Court in Pinkerton v. United States, 328 U.S. 640 (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). 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. Id.

g. The district court’s findings regarding the quantity of drugs are factual in nature and will only be overturned on appeal if found to be “clearly erroneous.” United States v. Campbell, 935 F.2d 39, 46 (4th Cir.), cert. denied, 112 S. Ct. 348 (1991); United States v. Goff, 907 F.2d 1441, 1444 (4th Cir. 1990); United States v. Wilson, 896 F.2d 856, 858 (4th Cir. 1990); United States v. Vinson, 886 F.2d 740, 742 (4th Cir. 1989), cert. denied, 493 U.S. 1062 (1990); United States v. Powell, 886 F.2d 81 (4th Cir. 1989), cert. denied,
FOR THE CRIMINAL PRACTITIONER


2. 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).

3. 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. 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 (4th Cir. 1985); United States v. Wooten, 688 F.2d 941 (4th Cir. 1982).

4. Sufficiency of section 924(c) Evidence. The "use" of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c) 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), quoted in United States v. Paz, 927 F.2d 176, 179 (4th Cir. 1991). Moreover, even if the defendant is acquitted of the 924(c) charge, his base offense level may be increased by two levels under section 2D1.1(b) if the court determines by a preponderance of the evidence that a firearm was present during any of the subject drug trafficking. United States v. Johnson, 943 F.2d 383, 386 (4th Cir.), cert. denied, 102 S. Ct. 667 (1991); United States v. Morgan, 942 F.2d 243, 246 (4th Cir. 1991); United States v. White, 875 F.2d 427, 433 (4th Cir. 1989). Finally, the district court's determination in this regard will only be overturned on appeal if found to be "clearly erroneous." United States v. Apple, 915 F.2d 899, 914 (4th Cir. 1990).

B. Sentencing Guidelines Issues

2. Obstruction of Justice. The following are examples of conduct which justify a two-level enhancement for obstruction of justice: (a) throwing drugs out of a car during a police chase, United States v. Galvan-Garcia, 872 F.2d 638 (5th Cir.), cert. denied, 493 U.S. 857 (1989); (b) hiding a stolen credit card in a police car, United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 861 (1989); and (c) hiding stolen mail under a car when being approached by authorities, United States v. Cain, 881 F.2d 980 (11th Cir. 1989).

3. Downward Departures. In spite of oft repeated and clear law that the district court’s refusal to downward depart from the applicable Sentencing Guidelines range is not appealable, this issue continues to be frequently raised on appeal. For those who may yet have lingering doubts about the status of the law on this issue, see United States v. Metinger, 901 F.2d 27 (4th Cir.), cert. denied, 111 S. Ct. 519 (1990) and United States v. Bayerle, 898 F.2d 28, 29 (4th Cir.), cert. denied, 111 S. Ct. 65 (1990). The only exception to this well established rule arises when the district court erroneously believes it lacks the discretion to downward depart. United States v. Wilson, 896 F.2d 856, 859 (4th Cir. 1990). Nor will sentences within the applicable range be reviewed on appeal because they are “too high” or because they are “unfair” relative to the sentences of co-defendants. See United States v. Porter, 909 F.2d 789, 794 (4th Cir. 1990) (denying appellate review where sentence set within guideline range); United States v. Foutz, 865 F.2d 617, 621 (4th Cir. 1989) (stating that “[a] sentencing court simply ‘is not obligated to consider the sentences of co-defendants.’”) (quoting United States v. Lauga, 762 F.2d 1288, 1291 (5th Cir.), cert. denied, 474 U.S. 860 (1985)).

None of the following justifies a downward departure: (a) a good employment record, Sentencing Guidelines section 5H1.5; (b) family responsibility, Sentencing Guidelines section 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 Sentencing Guidelines section 5K2.12); (d) significant charitable contributions, United States v. McHan, 920 F.2d 244, 247 (4th Cir. 1990); or (e) to allow the defendant to make restitution to victims, United States v. Bolden, 889 F.2d 1336 (4th Cir. 1989).

4. Role in Offense. Another frequently appealed Sentencing Guidelines issue is whether a particular defendant should have received an enhancement per section 3B1.1 for his or her role in the offense (e.g., as a leader, organizer, manager, or supervisor). Although role in the offense findings are appealable, since the determination is factual in nature and the district court will be overturned only if “clearly erroneous,” such issues are seldom successfully raised on appeal. See United States v. Fells, 920 F.2d 1179 (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 (4th Cir.), cert. denied, 111 S. Ct. 112 (1990) (upholding district court’s enhancement for leadership role played by defendant).
5. Abuse of Position of Trust. Two appeals during the review period challenged the enhancement received per section 3B1.3 for abusing a position of trust, one involving a union official and the other a store detective. As in issues pertaining to role in the offense and acceptance of responsibility, the determination whether a defendant has abused a position of trust 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 (4th Cir. 1992); United States v. Chester, 919 F.2d 896 (4th Cir. 1990); United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989).

6. Criminal History/Career Offender. Convictions for offenses committed after the subject offense are counted in a defendant’s criminal history. Sentencing Guidelines section 4A1.2; United States v. Hoy, 932 F.2d 1343 (9th Cir. 1991); United States v. Walker, 912 F.2d 1365 (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 (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. Sentencing Guidelines section 4B1.2(3). United States v. Bassil, 932 F.2d 342 (4th Cir. 1991).

7. 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 (4th Cir. 1991), cert. denied, 112 S. Ct. 2294 (1992); United States v. Raynor, 939 F.2d 191 (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.

8. Government Failure to Make section 5K1.1 Motion. Where the Government agrees in a Plea Agreement to move for a downward departure if the defendant provides “substantial assistance,” 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 (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.


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. United States v. Blackwood, 913 F.2d 139, 142 (4th Cir. 1990).


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.), 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.), cert. denied, 111 S. Ct. 259 (1990); United States v. Fannin, 817 F.2d 1388, 1389 (4th 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).

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, 1369 (4th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); see United States v. Favole, 785 F.2d 1141, 1144 (4th Cir. 1986) (finding warrant for "address books, diaries," etc., 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); United States v.
5. Police-Citizen Encounters Versus “Seizure” of Person. A number of appeals during the review period raised issues related to so-called “police-citizen encounters.”

The Fourth Circuit continued to emphasize in these cases 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). Also of interest are the foundational Supreme Court decisions being applied in these more recent Fourth Circuit cases. INS v. Delgado, 466 U.S. 210, 215 (1984); United States v. Mendenhall, 446 U.S. 544, 553 (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, 112 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).

Once a person is lawfully stopped, if the officer reasonably fears the individual may be armed, a frisk for weapons is appropriate. United States v. Hensley, 469 U.S. 221 (1985); Terry v. Ohio, 392 U.S. 1 (1968).

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. Gordon, 895 F.2d 932, 937 (4th Cir.), cert. denied, 111 S. Ct. 131 (1990); United States v. Wilson, 895 F.2d 168, 170 (4th Cir. 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).

6. Investigative Stop/“Reasonable Suspicion.” Another recurring issue during the review period 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). United States v. Cortez, 449 U.S. 411, 417-18 (1981); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); United States v. Crittendon, 883 F.2d 326 (4th Cir. 1989); United States v. Moore, 817 F.2d 1105 (4th Cir.), cert. denied, 484 U.S. 965 (1987). The court continued to point out that the basis for the requisite “reasonable suspicion” is more than an “inchoate and unparticularized suspicion or ‘hunch,’” Sokolow, 490 U.S. at 7 (quoting Terry, 392 U.S. at 27), but less than probable cause. The existence of “reasonable suspicion” is evaluated under a “totality of the circumstances” test, and may 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, 327-28 (1990).


8. Consent to Search. Another recurring appellate issue, in general and during the review period, is whether a defendant's alleged "consent to search" was knowing and voluntary. The question of voluntariness 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 whether or not the defendant is English-speaking, the Government is not 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).

On appeal the district court's findings are deemed to be factual in nature and therefore are not overturned unless "clearly erroneous." United States v. Gordon, 895 F.2d at 938; United States v. Wilson, 895 F.2d 168, 172 (4th Cir. 1990).

9. Searches Incident to Arrest. Searches incident to arrest are a well-established exception to the warrant requirement, United States v. Robinson, 414 U.S. 218 (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).

10. 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 de novo on appeal. 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 reason-
ably well-trained officer . . . [would] have known that the search was illegal despite the magistrate’s authorization.” *Leon*, 468 at 922 n.23.


**D. Miscellaneous**


2. *Conspiracy*. 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. West*, 877 F.2d 281, 289 (4th Cir.), cert. denied, 493 U.S. 869 (1989).

3. *Federal Firearms Violations*. As usual, a number of appeals during the review period involved federal firearms violations, primarily violations of 18 U.S.C. §§ 922(g), possession of a firearm by a convicted felon, section 924(c), use of a firearm during and in relation to a drug trafficking or violent crime, and section 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.

a. *Possession of Firearm by Convicted Felon*. In regard to 18 U.S.C. § 922(g), the Fourth Circuit continues to reverse convictions pursuant to its holding in *United States v. McLean*, 904 F.2d 216 (4th Cir.), cert. denied, 111 S. Ct. 203 (1990). In that case, the court held that “a person whose civil rights have been restored
after serving a sentence (may lawfully possess a firearm again) unless the state affirmatively restricts the former felon." Id. at 217. Thus, the Fourth Circuit will reverse unless the Government has proven a particular defendant has not had his civil rights restored under state law.

b. Scienter. On the other hand, the argument that a particular convicted felon did not know he was prohibited from possessing a firearm has been of no avail. Scienter is not required for convictions under 18 U.S.C. § 922(g). Ignorance of the law is simply not a defense under this statute. United States v. Santiesteban, 825 F.2d 779, 782 (4th Cir. 1987); United States v. Etheridge, 932 F.2d 318, 320-21 (4th Cir.), cert. denied, 112 S. Ct. 323 (1991) (no defense in section 922(g) prosecution that state judge had told defendant he could possess firearms for hunting purposes).

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


d. 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 proceeded 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).

e. The provisions of 18 U.S.C. § 3501(a) 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).

f. To be admissible, the confessions of non-testifying 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).

g. In applying the limited “public safety exception” to *Miranda v. Arizona*, 384 U.S. 436 (1966) carved out by the Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984), the court approved 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.

h. If there is a *Miranda* violation, a further inquiry must be made into whether the error is reversible or 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, 361 (4th Cir. 1980).

5. **Withdrawal of Plea.** Motions to withdraw guilty pleas after the Rule 11 proceedings generally fall on deaf appellate ears. See *United States v. Lambey*, 949 F.2d 133 (4th Cir. 1991) (affirming trial court’s denial of defendant’s request to withdraw his guilty plea based on misunderstanding of applicable Sentencing Guideline range); *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991) (affirming rejection of defendant’s attempt to withdraw guilty plea because defendant did not carry burden of showing plea was not knowing or voluntary); *United States v. Pitino*, 887 F.2d 42, 46 (4th Cir. 1989) (denying withdrawal of guilty plea because defendant failed to show pleas was not knowing or voluntary); *United States v. DeFreitas*, 865 F.2d 80 (4th Cir. 1989) (denying motion to withdraw guilty plea due to 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 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. CR. P. 32(d).

6. **Rule 11 Proceedings.** The precise manner in which Rule 11 proceedings are conducted is left to the sound discretion of the district court.

7. Motions to Continue. Whether to grant a motion to continue is left to the broad discretion of the district court. 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, that is, 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. Poschwitz, 829 F.2d 1477, 1483 (4th Cir. 1987), cert. denied, 484 U.S. 1064 (1988) (holding district court did not abuse its discretion in denying continuance requested to secure defense witness); United States v. Sellers, 658 F.2d 230, 231 (4th Cir. 1981) (upholding district court’s denial of continuance where indictments amended seven days before trial).

8. 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. 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 1247 (4th Cir. 1988); United States v. Greenwood, 796 F.2d 49, 53 (4th Cir. 1986).

b. The district court is given an exceedingly wide berth in determining which 404(b) evidence should be allowed, and which should not. 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. 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. 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 is desirable and may aid the appellate court, such an explicit finding is neither required nor necessary. Rawle, 845 F.2d at 1247. Moreover, any prejudice can be substantially dissipated by a limiting jury instruction. United States v. Hadaway, 681 F.2d 214, 219 (4th Cir 1982); Rawle, 845 F.2d at 1248; Masters, 622 F.2d at 87.

e. Post-indictment conduct may also be admissible under Rule 404(b), if it otherwise meets the requirements set forth above. United States v. Ramey, 791 F.2d 317, 323 (4th Cir. 1986); 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.

9. In-court Identification of Defendant. Whether in-court identification of a defendant should be permitted by a witness whose identification has been allegedly “tainted” by viewing a single photo of the defendant in the meantime is governed by the “independent basis” test of United States v. Wade, 388 U.S. 218 (1967). If no objection is made to the in-court identification at trial, there is a “plain error” standard of review on appeal. Fed. R. Crim. P. 52(b); United States v. Young, 470 U.S. 1, 14-15 (1985). Moreover, even if the in-court identification is deemed inadmissible, its identification may be found harmless beyond a reasonable doubt where there is otherwise overwhelming evidence of the defendant’s guilt. Wade, 388 U.S. at 242.

10. Rule 29 Motions. The defendant’s Rule 29 motion for acquittal must be denied if, viewing the evidence in the light most favorable to the government, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. In making this calculation, circumstantial as well as direct evidence is considered, and the government is given the benefit of all reasonable inferences from the evidence presented. Glasser v. United States, 315 U.S. 60 (1942); 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. MacCloskey, 682 F.2d 468, 473 (4th Cir. 1982); United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982); United States v. Steed, 674 F.2d 284, 286 (4th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982).

11. Credibility of Witnesses for Jury. The credibility of witnesses is strictly a matter for the jury. United States v. Saunders, 886 F.2d 56, 60
12. Informing Jury Re 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).

13. Inconsistent Jury Verdicts. Jury verdicts need not be consistent to be upheld. Thus, the conviction of a coconspirator and the acquittal of the only other coconspirator by the same jury need not be set aside. United States v. Thomas, 900 F.2d 37 (4th Cir. 1990) (holding invalid common law “rule of consistency” in light of United States v. Powell, 469 U.S. 57 (1984) and Standefer v. United States, 447 U.S. 10 (1980)).

14. Notice of Appeal. Notice of appeal in a criminal case must be filed within ten days of judgment. Fed. R. App. P. 4(b). Upon a showing of “excusable neglect,” this time may be extended for an additional thirty days. Id. The time limits in Rule 4(b) are mandatory and jurisdictional—which is to say they are about as etched in stone as anything in federal law. United States v. Raynor, 939 F.2d 191 (4th Cir. 1991) (citing United States v. Schuchardt, 685 F.2d 901, 902 (4th Cir. 1982)).

15. Findings 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)).

16. Lengthy Sentences. In two cases which involved (a) a mandatory 30-year sentence required by 18 U.S.C. § 924(c)(1) for a first-time offender and (b) a 264-month sentence for a defendant convicted of possessing with intent to distribute one ounce of “crack” cocaine (but found under the “related conduct” rules to be involved in a conspiracy which distributed more than 50 kilograms of cocaine), the court restated its long-time position that “proportionality review” under the Eighth Amendment’s “cruel and unusual punishment” clause 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).

17. Restitution/Findings of Fact. 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.
Failure to make the required findings of fact may cause the appellate court to vacate and remand for resentencing.

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

18. 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).
