

FOURTH CIRCUIT DECISIONS ON
CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This outline documents the published decisions of the Fourth Circuit, beginning in January 2004, that address criminal law and procedure issues in direct appeals. Decisions that represent defense wins or otherwise contain defense-favorable findings are marked by an exclamation point (!). Decisions that, in the compiler's judgment, are significant because they contain particularly lengthy, thoughtful, or otherwise useful discussion are marked by an asterisk (*). Please report errors or omissions in this outline to fran_pratt@fd.org.

I. OFFENSES

15 U.S.C. § 1, Sherman Antitrust Act

United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502 (4th Cir. 2005) (Wilkinson, J.) (E.D. Va.) (holding that defendants engaged in bid rigging in violation of Sherman Act; bid-rigging scheme did not fall within exemption in Shipping Act (46 U.S.C. app. §§ 1701-1719) from antitrust liability for agreement or activity concerning foreign inland segment of through transportation; defendants were not exempted from antitrust liability based on tariff filing exemption; defendants did not qualify for immunity from antitrust prosecution under Act provision creating grace period allowing entity that previously operated under established statutory immunity to become compliant after such immunity was abrogated; and factual recitations in plea agreements and incorporated statement of facts established offense of conspiracy to defraud United States)

18 U.S.C. § 13, Assimilated Crimes Act

United States v. Thomas, 367 F.3d 194 (4th Cir. 2004) (Wilkins, C.J.) (E.D. Va.) (holding that subsection of Maryland DUI statute under which defendant was previously convicted was not "substantially similar" to Virginia DWI statute; thus defendant's prior Maryland convictions would not serve as predicates for Virginia fourth-offense DWI; finding that district court abused discretion in accepting guilty plea when factual basis was insufficient)

United States v. Smith, 395 F.3d 516 (4th Cir. 2005) (Luttig, J.) (E.D. Va.) (concluding that CIA access road not “public highway” for Virginia offense of driving on suspended license)

18 U.S.C. § 287, False Claims Against United States

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005) (King, J.) (E.D. Va.) (finding that, as matter of first impression, venue on charges of presenting false claims to the government was proper in district into which victimized government agency had passed subject claim after its initial presentation to that agency; further finding that jury was correctly instructed on venue)

18 U.S.C. § 371, Conspiracy

United States v. Ruhbayan, 406 F.3d 292 (4th Cir. 2005) (King, J.) (E.D. Va.) (where defendant was charged with witness tampering and subornation of perjury and conspiracy to commit those offenses, finding Wharton’s Rule (i.e., that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission)) was inapplicable because immediate consequences of witness tampering and subornation of perjury crimes fell on society at large and on criminal justice system itself, rather than only on defendants)

United States v. Gosselin World Wide Moving, N. V., 411 F.3d 502 (4th Cir. 2005) (Wilkinson, J.) (E.D. Va.) (holding in part that factual recitations in plea agreements and incorporated statement of facts established offense of conspiracy to defraud United States)

18 U.S.C. § 513, Counterfeit and Forged Securities

United States v. Pendergraph, 388 F.3d 109 (4th Cir. 2004) (Luttig, J.) (M.D.N.C.) (on plain error review in case involving forged securities, finding evidence sufficient where defendant had contested at trial only whether he knew that bonds were fraudulent, not whether bonds at issue fell within definition of “security”)

18 U.S.C. § 641, Theft of Government Property

United States v. Smith, 373 F.3d 561 (4th Cir. 2004) (per curiam) (Michael, J., dissenting) (E.D. Va.) (aggregation of individual misdemeanor offenses into one felony charge did not constitute impermissible joinder, nor does it violate statute of limitations)

U.S.C. § 871, Threats Against the President

United States v. Lockhart, 382 F.3d 447 (4th Cir. 2004) (Widener, J.) (E.D. Va.) (finding that present intent to restrict movement of President is not element of offense; concluding that threat at issue was “true threat” was not protected by First Amendment, not “political hyperbole” that would be protected)

18 U.S.C. § 922 (g), Possession of Firearm or Ammunition by Prohibited Person

United States v. Al-Hamdi, 356 F.3d 564 (4th Cir. 2004) (Williams, J.) (E.D. Va.) (affirming denial of motion to dismiss indictment charging non-immigrant alien’s possession of firearm over claim of diplomatic immunity as family member of diplomat)

! *United States v. Walters*, 359 F.3d 340 (4th Cir. 2004) (Duncan, J.) (E.D. Va.) (a juvenile adjudication in Virginia is not a conviction under that state’s law and thus could not serve as underlying conviction in felon-in-possession case)

United States v. Farrow, 364 F.3d 551 (4th Cir. 2004) (Duncan, J.) (M.D.N.C.) (affirming denial of motion to dismiss, brought on ground that defendant did not have qualifying felony conviction, where amendment of North Carolina’s Felony Firearms Act to replace five-year firearm disability following general restoration of civil rights with permanent ban did not make Act punitive so as to violate ex post facto clause)

United States v. Washington, 398 F.3d 306 (4th Cir. 2005) (King, J.) (D. Md.) (evidence was sufficient to convict defendant where police officer testified that he saw defendant with pistol and box that had defendant’s name on it and was found in house where officer saw defendant contained ammunition fitting pistol)

United States v. Goodine, 400 F.3d 202 (4th Cir. 2005) (King, J.) (M.D.N.C.) (where defendant’s trial resulted in acquittal on charge of possession of ammunition by convicted felon and hung jury on charge of possession of gun by convicted felon, rejecting contention that retrial on gun charge would be double jeopardy violation, and further rejecting collateral estoppel argument; distinguishing multiplicity theory in *United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998), because acquittal for bullet charge and mistrial for gun charge involved different facts)

! *United States v. Moyer*, ___ F.3d ___, 2005 WL 2174402 (4th Cir. 2005) (Gregory, J.) (D. Md.) (reversing conviction where government’s evidence at trial was insufficient to establish that defendant constructively possessed firearms where he was merely present in location from which guns had been stolen and there was no fingerprint or other physical evidence, or any testimony, to connect defendant to firearms)

United States v. Scott, ___ F.3d ___, 2005 WL 2277637 (4th Cir. 2005) (Michael, J.) (N.D. W. Va.) (where defendant argued that jury instructions were misleading because they did not adequately

explain that intent to possess is an element of the crime when government proceeds under a constructive possession theory, concluding that instructions were not misleading and affirming conviction)

18 U.S.C. § 922(j), Possession of Stolen Firearm

! *United States v. Moye*, ___ F.3d ___, 2005 WL 2174402 (4th Cir. 2005) (Gregory, J.) (D. Md.) (reversing conviction where government's evidence at trial was insufficient to establish that defendant constructively possessed firearms where he was merely present in location from which guns had been stolen and there was no fingerprint or other physical evidence, or testimony, to connect defendant to firearms)

18 U.S.C. § 922(o), Possession of Machinegun

United States v. Williams, 364 F.3d 556 (4th Cir. 2004) (Traxler, J.) (E.D.N.C.) (as matter of statutory interpretation, possession of receiver or frame alone violates § 922(o); definitional statute, 26 U.S.C. § 5845, is not unconstitutionally vague as applied to defendant)

18 U.S.C. § 924(c), Use of Firearm in Connection with Drug or Violent Offense

United States v. Groce, 398 F.3d 679 (4th Cir. 2005) (Luttig, J.) (W.D.N.C.) (where defendant pled to bank robbery, 18 U.S.C. § 2113(a), and went to trial on charge of using firearm in connection with crime of violence, 18 U.S.C. § 924(c), finding that as matter of law, firearm must actually be at hand in order to meet § 924(c)(4)'s definition of "brandish" for purpose of increasing sentence; affirming defendant's conviction because she was not misled or prejudiced by inclusion of brandishing citation)

18 U.S.C. § 1201, Kidnapping

* *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004) (Traxler, J.) (E.D. Va.) (discussing "holding" element of offense and sufficiency of evidence)

18 U.S.C. § 1341 et seq., Fraud

United States v. Pierce, 400 F.3d 176 (4th Cir. 2005) (Shedd, J.) (Gregory, J. dissenting) (W.D. Va.) (affirming conviction for mail fraud against sufficiency-of-evidence challenge where use of mail occurred after profits from fraudulent act were received, but served to lull victim into sense of security), *aff'd on panel reh'g*, 409 F.3d 228 (4th Cir. 2005)

18 U.S.C. § 1752, Temporary Residences of President

United States v. Bursey, 416 F.3d 301 (4th Cir. 2005) (King, J.) (D.S.C.) (holding that magistrate court did not err either in finding that defendant, a protestor of the war in Iraq, was in restricted area during Presidential visit or that defendant had requisite criminal intent)

18 U.S.C. § 2113, Bank Robbery

United States v. Turner, 389 F.3d 111 (4th Cir. 2004) (Wilkinson, J.) (W.D. Va.) (in case in which defendant forced teller to go to vault with him, finding that forced accompaniment during bank robbery or escape, § 2113(e), does not require that accompaniment extend beyond walls of bank, i.e., there is no property line or threshold requirement; finding that statutory maximum for forced accompaniment is life imprisonment)

18 U.S.C. § 2314, Transportation of Stolen Goods

United States v. Pendergraph, 388 F.3d 109 (4th Cir. 2004) (Luttig, J.) (M.D.N.C.) (on plain error review in case involving transporting forged securities, finding evidence sufficient where defendant had contested at trial only whether he knew that bonds were fraudulent, not whether bonds at issue fell within definition of “security”)

18 U.S.C. § 2320, Criminal Trademark Infringement

United States v. Farmer, 370 F.3d 435 (4th Cir. 2004) (Wilkinson, J.) (D.S.C.) (in case involving counterfeit clothing, affirming district court’s denial of motion to dismiss indictment for failure to allege violation)

! *United States v. Habegger*, 370 F.3d 441 (4th Cir. 2004) (Wilkins, C.J.) (M.D.N.C.) (in case involving trafficking in counterfeit clothing, in which defendant was acquitted on one count but convicted on second, finding that there was no evidence that defendant had “trafficked” in counterfeit socks because there was no evidence that he sent twelve pairs of counterfeit Eddie Bauer socks “as consideration for anything of value;” applying contract law)

18 U.S.C. § 2339A, Providing Material Support to Terrorists

* *United States v. Faris*, 388 F.3d 452 (4th Cir. 2004) (Wilkins, C.J.) (E.D. Va.) (finding district court did not abuse discretion in denying motion to withdraw plea where defendant so moved five months after entering plea on basis that summary of FBI 302s prepared after plea but based on statements given prior to plea contradicted statement of facts used to establish factual basis for plea; discussing and applying factors to be considered in evaluating motions to withdraw plea; on plain error review, rejecting defendant’s additional claims that he should have been allowed to withdraw plea based on government’s violation of plea agreement and government’s violation of *Brady* obligation)

18 U.S.C. § 2339B, Providing Material Support to Foreign Terrorist Organization

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (Gregory, J., dissenting) (W.D.N.C.) (on plain error review, finding that statute does not impermissibly restrict First

Amendment right of association, is not unconstitutionally overbroad, is not void for vagueness, and does not deprive defendant of his right to have a jury determine every element of the offense by preventing him from challenging the designation of an entity as a foreign terrorist organization)

21 U.S.C. § 841 et seq., Drug Offenses

United States v. Collins, 401 F.3d 212, 415 F.3d 304 (4th Cir. 2005) (Titus, D.J.) (E.D. Va.) (defendant's argument that § 841's penalty provisions are unconstitutional in light of *Apprendi* is foreclosed by circuit precedent that subsequent panel must follow; where jury instruction as to conspiracy charge omitted both "reasonably foreseeable" language and direction to jury that it could only find defendant responsible for acts of co-conspirators if those acts occurred during, and in furtherance of, conspiracy, finding instruction was in error, but error was harmless in light of evidence)

22 U.S.C. § 2778, Arms Export Control Act (AECA)

United States v. Hsu, 364 F.3d 192 (4th Cir. 2004) (Motz, J.) (D. Md.) (AECA and its implementing regulations are not unconstitutionally vague as applied to defendants)

II. JURISDICTION ISSUES

United States v. Juvenile Male, 388 F.3d 122 (4th Cir. 2004) (Niemeyer, J.) (D. Md.) (in addressing issue of first impression, finding that in case involving juveniles charged with Class B misdemeanors, government was not required to file certification pursuant to 18 U.S.C. § 5032 in order for magistrate judge to have jurisdiction under 18 U.S.C. § 3401(g))

United States v. Shank, 395 F.3d 466 (4th Cir. 2005) (Motz, J.) (D. Md.) (Fed. R. Crim. P. 35(a)'s seven-day time limit establishes jurisdictional limitation district court effectively denies motion to correct sentence by failing to act on motion to correct sentence within that period)

United States v. Robinson, 404 F.3d 850 (4th Cir. 2005) (Williams, J.) (E.D.N.C.) (concluding that district court did not abuse its discretion when transferring case from juvenile to adult status given defendant's age, social environment, intellectual maturity, and nature and severity of alleged crimes)

* *United States v. T.M.*, 413 F.3d 420 (4th Cir. 2005) (Shedd, J.) (Widener, J., dissenting) (S.D. W. Va.) (in Hobbs Act robbery case, concluding that government complied with certification requirements of 18 U.S.C. § 5032 and reversing district court's determination that it did not have jurisdiction over juvenile case)

III. FOURTH AMENDMENT ISSUES

Automobile Exception (see also Searches Incident to Arrest, *infra*)

United States v. Johnson, 410 F.3d 137 (4th Cir. 2005) (Motz, J.) (D. Md.) (upholding search of automobile glove box; although declining to permit police to search driver's car for his registration and identification absent a warrant *and* probable cause any time that driver did not readily provide registration and identification information at scene of accident, finding in this case that officer was simply reacting to effect of accident and performing community-caretaking function when he opened defendant's glove compartment and that officer's conduct was not pretextual)

United States v. Collins, 412 F.3d 515 (4th Cir. 2005) (Moon, D.J.) (S.D. W. Va.) (finding that police officer who observed defendant, who was in passenger seat of vehicle parked in front of empty lot in area known for drug trafficking, throw plastic bag onto floor of vehicle had probable cause to believe vehicle contained evidence of a crime and exigent circumstances existed, such that automobile exception justified search of vehicle in order to obtain bag from floorboard)

Border Searches

United States v. Ickes, 393 F.3d 501 (4th Cir. 2005) (Wilkinson, J.) (E.D. Va.) (affirming denial of motion to suppress evidence obtained from computer seized from defendant at Michigan-Canada checkpoint; concluding that warrantless search of defendant's van was permissible both because Congress and Supreme Court have made clear that extensive searches at border are permitted, even if same search elsewhere would not be; refusing to undermine well-settled law by restrictively reading statutory language in 19 U.S.C. § 1581(a) or by carving out First Amendment exception to border search doctrine)

Community Caretaking Exception

United States v. Johnson, 410 F.3d 137 (4th Cir. 2005) (Motz, J.) (D. Md.) (upholding search of automobile glove box where officer was simply reacting to effect of automobile accident and performing community-caretaking function when he opened defendant's glove compartment to look for vehicle registration and driver's identification; finding that officer's reasons for opening glove box were not pretextual)

Consent to Search

United States v. Jones, 356 F.3d 529 (4th Cir. 2004) (Traxler, J.) (S.D. W. Va.) (affirming district court's ruling that defendant consented to search of duffel bag, that consent was voluntary, and that it extended to locked box inside bag; rejecting argument that locked container is different from closed container and does not fall within scope of general consent)

United States v. Smith, 395 F.3d 516 (4th Cir. 2005) (Luttig, J.) (E.D. Va.) (affirming denial of motion to suppress with regard to cocaine possession and false statement to police where defendant voluntarily initiated encounter with CIA officers when approaching entrance to CIA headquarters in middle of night to ask for directions)

United States v. Meikle, 407 F.3d 670 (4th Cir. 2005) (Widener, J.) (D.S.C.) (affirming denial of motion to suppress where defendant had been told he was free to go and officer subsequently requested permission to search his vehicle, concluding that the encounter was consensual and consent to search the vehicle was freely given)

“Knock and Announce”

* *United States v. Hatfield*, 365 F.3d 332 (4th Cir. 2004) (Widener, J.) (S.D. W. Va.) (on appeal by government, finding that where defendant yelled “come on in” in response to knock on door, officers’ unannounced entry did not violate knock and announce rule because entry was not forcible; defendant’s consent to entry was voluntarily given and amounted to invitation to enter; discussing *United States v. Cephas*, 254 F.3d 488 (4th Cir. 2001))

Probable Cause (see also Search Warrants, *infra*)

United States v. Singh, 363 F.3d 347 (4th Cir. 2004) (King, J.) (M.D.N.C.) (on appeal by government, finding that officers had probable cause to conduct warrantless search of tractor-trailer rig where confidential informant told officers that defendants were smuggling drugs, officers corroborated identifying information, defendants were nervous, anxious, and agitated, and gave suspicious answers to questions, and drug dog alerted at rear doors of rig)

United States v. Humphries, 372 F.3d 653 (4th Cir. 2004) (Niemeyer, J.) (Gregory, J., concurring in judgment only) (E.D. Va.) (on appeal by government, finding as matter of law that officers had probable cause to arrest defendant without warrant where officers, patrolling in area known for drug trafficking, observed defendant pat his waist, smelled strong odor of marijuana upon exiting their vehicle, smelled same strong odor when within 5-10 feet of defendant, and defendant refused to stop when directed to do so; noting that if district court based ruling on its belief that probable cause means “more likely than not,” it erred; Gregory, J., would have reversed because district court had found reasonable suspicion existed for officers to stop defendant and could have conducted pat-down that would have revealed gun)

* *United States v. Dickey-Bey*, 393 F.3d 449 (4th Cir. 2004) (Niemeyer, J.) (D. Md.) (on appeal by government, finding police had probable cause to arrest defendant without warrant on basis that defendant knowingly possessed cocaine when defendant matched description of person who customarily retrieved mail from Mail Boxes Etc box, defendant backed into parking space in MBE lot when all other customers had parked front-first, and defendant looked around parking lot before entering MBE store to pick up mail; declining to address whether district court’s ruling as to search of car incident to arrest (*see*

Thornton v. United States, 541 U.S. 615 (2004) was proper when police had independent probable cause to search car) (NB: this opinion appears to conflict with *United States v. Perkins*, below under Reasonable Suspicion, as to whether probable cause to arrest can be based on future criminal activity)

! *United States v. Brown*, 401 F.3d 588 (4th Cir. 2005) (Wilkins, C.J.) (E.D. Va.) (affirming suppression of firearm and statements made after arrest where officers did not have probable cause to arrest defendant for public intoxication when defendant did not exhibit any physical impairments caused by alcohol consumption)

United States v. Collins, 412 F.3d 515 (4th Cir. 2005) (Moon, D.J.) (S.D. W. Va.) (finding that police officer had probable cause to believe a felony was being committed when he seized defendant by ordering him out of vehicle and handcuffing him; officers with combined 27 years of police experience and seven years' experience in narcotics were patrolling area known for drug trafficking when they noticed vehicle occupied by two men parked in front of empty lot, officers believed man in driver's seat of vehicle was offering to sell them drugs when he motioned them over and asked what they needed, and officer saw defendant, who was in passenger seat, throw plastic bag onto floor of vehicle)

Reasonable Suspicion

* *United States v. Mayo*, 361 F.3d 802 (4th Cir. 2004) (Niemeyer, J.) (E.D. Va.) (on appeal by government, finding that police had reasonable suspicion to conduct *Terry* stop and frisk where officers observed defendant, who was standing in middle of street in high-crime area, react to their presence by turning around and walking to nearby apartment complex; put hand in jacket, which officers interpreted as consistent with trying to maintain control of weapon; froze when he saw officers for second time; and, when stopped by officers, exhibited physical symptoms of unusual nervousness; distinguishing *United States v. Burton*, 228 F.3d 524 (4th Cir. 2000))

United States v. Singh, 363 F.3d 347 (4th Cir. 2004) (King, J.) (M.D.N.C.) (on appeal by government, finding that district court erred in characterizing highway stop as ordinary or routine traffic stop when reason for investigation of tractor-trailer rig was based on informant's tip that district court disregarded in analysis, not on speeding violation; highway patrol officers had reasonable suspicion to believe rig contained drugs based on informant's tip that they verified)

* *United States v. Perkins*, 363 F.3d 317 (4th Cir. 2004) (Wilkinson, J.) (Michael, J., dissenting) (S.D. W. Va.) (in felon-in-possession case, finding that officer had reasonable suspicion to stop car where officer knew neighborhood to be high-crime area in which he had previously conducted several drug investigations; anonymous caller, whom officer reasonably believed to be previously reliable tipster who lived in neighborhood, had reported observing two men who had arrived in red car with light-colored stripe pointing rifles in front of duplex where officer had made drug arrests; officer saw car matching caller's description when they arrived at scene, and recognized passenger as known drug purchaser; majority

opinion contains lengthy discussion of anonymous tips and of difference between reasonable suspicion and probable cause vis-a-vis future criminal activity)

United States v. Foreman, 369 F.3d 776 (4th Cir. 2004) (Hamilton, J.) (Gregory, J., dissenting) (E.D. Va.) (on appeal by government in case involving traffic stop early on summer day on highway used as drug trafficking corridor, finding officers had reasonable suspicion to search; rejecting district court's analysis that it could not consider facts arising before lawful stop ended when considering existence of reasonable suspicion during second detention) (NB: in footnotes 1 and 2, majority comments on way in which defendant presented statement of facts in brief, and in footnote 5 comments on lack of inclusion in joint appendix of videotape that district court considered)

* *United States v. Holmes*, 376 F.3d 270 (4th Cir. 2004) (Luttig, J.) (D.S.C.) (affirming district court's denial of suppression motion where officers had reasonable suspicion under *Michigan v. Long*, 463 U.S. 1032 (1983), to conduct protective search of interior of defendant's SUV, when defendant and companion were handcuffed and secured in police cruiser, based on belief that men were dangerous and based on *possibility* that men would have later access to weapons)

* *United States v. Smith*, 396 F.3d 579 (4th Cir. 2005) (Wilkins, J.) (M.D.N.C.) (applying *Illinois v. Wardlow*, 528 U.S. 119 (2000), to evasive conduct by drivers; affirming denial of suppression motion where officer had reasonable suspicion to stop vehicle after driver tried to evade police checkpoint)

! *United States v. Brown*, 401 F.3d 588 (4th Cir. 2005) (Wilkins, C.J.) (E.D. Va.) (affirming suppression of firearm where officers did not have reasonable suspicion based on uncorroborated anonymous tip to justify seizing defendant)

Searches Incident to Arrest (see also Automobile Exception, *supra*)

United States v. Bush, 404 F.3d 263 (4th Cir. 2005) (Williams, J.) (D. Md.) (affirming denial of motion to suppress evidence recovered as result of search of defendant's car incident to arrest of passenger who was about to re-enter car when arrested; applying *Thornton v. United States*, 541 U.S. 615 (2004))

Search Warrants (see also Probable Cause, *supra*)

United States v. Hodge, 354 F.3d 305 (4th Cir. 2004) (Wilkins, J.) (E.D. Va.) (search warrant affidavit based primarily on informant hearsay and officer's confirmation of facts identifying defendant was sufficient to establish probable cause; comparing affidavit to that at issue in *United States v. Porter*, 738 F.2d 622 (4th Cir. 1984) (en banc)).

United States v. Farmer, 370 F.3d 435 (4th Cir. 2004) (Wilkinson, J.) (D.S.C.) (in case involving counterfeit clothing, affirming district court's ruling that warrant was not stale, despite fact that information in it was nine months old, where nature of criminal activity was protracted and continuous, thus

making recency of information in warrant less crucial, and where nature of object of search, business records, were not likely to have been moved or destroyed)

United States v. DeQuasie, 373 F.3d 509 (4th Cir. 2004) (Shedd, J.) (S.D. W. Va.) (on appeal by government, finding that evidence seized on basis of second warrant that resulted from execution of first warrant was erroneously suppressed where first warrant was not so lacking in indicia of probable cause as to make reliance on it entirely unreasonable under *Leon* good-faith exception; explaining why district court's reliance on *United States v. Wilhelm*, 80 F.3d 116 (4th Cir. 1996) was misplaced)

United States v. Perez, 393 F.3d 457 (4th Cir. 2004) (Traxler, J.) (S.D. W. Va.) (on appeal by government, reversing district court's finding that affidavit was bare-boned where magistrate had reviewed signed statement of informant to affiant that was expressly referenced in affidavit, and finding that affiant's reliance on warrant was objectively reasonable and in good faith under *Leon*; as in *DeQuasie, supra*, explaining why district court's reliance on *United States v. Wilhelm*, 80 F.3d 116 (4th Cir. 1996) was misplaced; also discussing whether information in statement was stale)

United States v. Servance, 394 F.3d 222 (4th Cir. 2005) (King, J.) (Md.) (affirming denial of motion to suppress where search warrant was supported by probable cause showing nexus between drugs found in defendant's car and his home and judge issuing warrant was neutral and impartial)

United States v. Stevenson, 396 F.3d 538 (4th Cir. 2005) (Niemeyer, J.) (N.D. W. Va.) (affirming denial of motion to suppress evidence discovered during warrantless search of apartment where defendant no longer had reasonable expectation of privacy in apartment after abandoning it and giving his personal belongings to his girlfriend)

United States v. Grossman, 400 F.3d 212 (4th Cir. 2005) (Wilkinson, J.) (D. Md.) (affirming denial of suppression motion where fact that defendant lived at none of searched residences full-time did not preclude the fact that there was probable cause to issue three search warrants for them; rejecting defendant's argument that because he did not live at residences, mere fact that he as a suspected drug dealer had access to them could not establish probable cause absent some specific evidence that drugs were located therein; declining to require specific evidence of existence of drugs in residence where other facts sufficiently establish probable cause for search)

IV. FIFTH AMENDMENT ISSUES

Double Jeopardy

United States v. Goodine, 400 F.3d 202 (4th Cir. 2005) (King, J.) (M.D.N.C.) (where defendant's trial resulted in acquittal on charge of possession of ammunition by convicted felon and hung jury on charge of possession of gun by convicted felon, rejecting contention that retrial on gun charge would

be double jeopardy violation, and further rejecting collateral estoppel argument; distinguishing multiplicity theory in *United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998), because acquittal for bullet charge and mistrial for gun charge involved different facts)

Due Process

United States v. Kennedy, 372 F.3d 686 (4th Cir. 2004) (Wilkinson, J.) (Michael, J., dissenting) (W.D. Va.) (in case in which defendant, whose drug conviction was still on direct appeal, was forced to testify twice before grand jury without having been warned that he could remain silent (AUSA told him he had no right not to testify as to drug charges of which he had been convicted) and without counsel, and was subsequently charged with perjury based on grand jury testimony, finding that statements need not be suppressed; while there was clear Fifth Amendment violation and arguably a Sixth Amendment violation, suppression of statements was not appropriate remedy because remedy for violation of rights is not to perjure oneself and expect immunity from prosecution; further rejecting argument that conviction should be vacated because false statements were induced by prosecutorial misconduct so unfair that due process was violated)

! * *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005) (Williams, J.) (W.D. Va.) (vacating district court's order granting government's motion to forcibly medicate defendant to make him competent to stand trial on charges of assaulting federal employee and threatening to murder federal judge where district court erroneously concluded that government had demonstrated that involuntary medication would "significantly further" its prosecutorial interest and was "medically appropriate;" remanding for further proceedings to allow parties to supplement record)

United States v. Collins, 401 F.3d 212, 415 F.3d 304 (4th Cir. 2005) (Titus, D.J.) (E.D. Va.) (finding failure to disclose identity of non-testifying government informants until shortly before trial was not a *Brady* violation where defendant failed to show that earlier disclosure would have led to a different result (i.e., provided exculpatory evidence); noting that proper vehicle for claim was not motion to dismiss indictment but rather motion for continuance)

Indictment (see also Other Pre-Trial Issues, Indictment, *infra*)

United States v. Barnette, 390 F.3d 775 (4th Cir. 2004) (Niemeyer, J.) (Widener, J., concurring in result) (W.D.N.C.) (in capital case, indictment sufficiently alleged aggravating factors so as to comply with *Ring v. Arizona*, 536 U.S. 584 (2002); even if not, any error was harmless where government also filed formal notice of intent to seek death)

Self-Incrimination

United States v. Kennedy, 372 F.3d 686 (4th Cir. 2004) (Wilkinson, J.) (Michael, J., dissenting) (W.D. Va.) (in case in which defendant, whose drug conviction was still on direct appeal, was forced to

testify twice before grand jury without having been warned that he could remain silent (AUSA told him he had no right not to testify as to drug charges of which he had been convicted) and without counsel, and was subsequently charged with perjury based on grand jury testimony, finding that statements need not be suppressed; while there was clear Fifth Amendment violation and arguably a Sixth Amendment violation, suppression of statements was not appropriate remedy because remedy for violation of rights is not to perjure oneself and expect immunity from prosecution; further rejecting argument that conviction should be vacated because false statements were induced by prosecutorial misconduct so unfair that due process was violated)

* *United States v. Johnson*, 400 F.3d 187 (4th Cir. 2005) (Motz, J.) (D. Md.) (concluding that district court erred by not suppressing statements made by defendant after asserting his right to counsel and right to silence, but determining that failure to suppress was harmless error because defendant was convicted without the use of these statements)

United States v. Robinson, 404 F.3d 850 (4th Cir. 2005) (Williams, J.) (E.D.N.C.) (concluding that defendant was competent to waive *Miranda* rights despite his young age and low IQ when he had previously been *Mirandized* and was “street smart;” rejecting defendant’s argument that low IQ made him *per se* incapable of waiving rights)

United States v. Mashburn, 406 F.3d 303 (4th Cir. 2005) (Wilkins, J.) (M.D.N.C.) (concluding statements made to law enforcement agents after the defendant’s arrest in drug trafficking investigation but before being given *Miranda* warnings did not render involuntary the statements he made after receiving and waiving his *Miranda* rights; discussing *Missouri v. Seibert*, 542 U.S. 600 (2004))

V. SIXTH AMENDMENT ISSUES

Compulsory Process

* *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (en banc) (Wilkins, C.J.), *aff’g* 365 F.3d 292 (4th Cir. 2004) (E.D. Va.) (on appeal by government, where foreign national is being held in custody of United States, even if held abroad, district court can issue writ of habeas corpus *ad testificandum* directed to custodian, rather than subpoena, to obtain witness’s presence; defendant’s interest in compulsory process outweighed government’s interests in national security and foreign relations where defendant had sufficiently established that enemy combatant witnesses could provide testimony favorable to defense; where government refused to comply with district court order, remanding case so that parties can craft “adequate substitutions” for witness depositions)

United States v. Washington, 398 F.3d 306 (4th Cir. 2005) (King, J.) (D. Md.) (concluding that prosecutorial misconduct that would have permitted district court to grant a witness immunity so that

defendant could call witness in his defense was not shown where defendant wished to call the witness so that he could offer perjured testimony)

United States v. Rivera, 412 F.3d 562 (4th Cir. 2005) (Duncan, J.) (E.D. Va.) (in context of Fed. R. Evid. 804(b)(6) (forfeiture-by-wrongdoing hearsay exception) challenge, applying *Moussaoui*, *supra*, to case in which government claimed that allowing defendant to question detectives involved in investigation of murder with which defendant was charged would compromise investigation; rejecting government's position that defendant has *no* right to discover information regarding the alleged wrongdoing that caused the witness to be unavailable, but ruling against defendant because, as he acknowledged, he had no reason to believe that detectives have information material to his defense)

Confrontation

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (restrictions on defense questioning of government witness during *Daubert* hearing as to classified matters relating to witness's employment with FBI did not violate Classified Information Procedures Act ("CIPA") or defendant's Sixth Amendment right to confrontation)

Counsel (see also Other Pre-Trial Issues, Counsel, *infra*)

United States v. Kennedy, 372 F.3d 686 (4th Cir. 2004) (Wilkinson, J.) (Michael, J., dissenting) (W.D. Va.) (in case in which defendant, whose drug conviction was still on direct appeal, was forced to testify twice before grand jury without having been warned that he could remain silent (AUSA told him he had no right not to testify as to drug charges of which he had been convicted) and without counsel, and was subsequently charged with perjury based on grand jury testimony, finding that statements need not be suppressed; while there was clear Fifth Amendment violation and arguably a Sixth Amendment violation, suppression of statements was not appropriate remedy because remedy for violation of rights is not to perjure oneself and expect immunity from prosecution; further rejecting argument that conviction should be vacated because false statements were induced by prosecutorial misconduct so unfair that due process was violated)

United States v. Pollard, 389 F.3d 101 (4th Cir. 2004) (Wilkins, C.J.) (Titus, D.J., dissenting) (E.D. Va.) (right to counsel is not implicated in guilty plea to misdemeanor for which probation is imposed, even when probation is subsequently revoked and defendant is sentenced to imprisonment; rejecting argument that *Alabama v. Shelton*, 535 U.S. 654 (2002), should govern)

United States v. Bush, 404 F.3d 263 (4th Cir. 2005) (Williams, J.) (D. Md.) (concluding there was no error in denying defendant right to self-representation when defendant was trying to stall and manipulate proceedings)

United States v. Owen, 407 F.3d 222 (4th Cir. 2005) (Luttig, J.) (Gregory, J. concurring in part, dissenting in part) (W.D.N.C.) (when defendant who is advised of his right to counsel has failed to show that he cannot afford counsel, he impliedly waives his right to counsel by not procuring counsel from his own resources in a timely fashion)

United States v. Taylor, 414 F.3d 528 (4th Cir. 2005) (Hamilton, J.) (E.D. Va.) (holding that a criminal defendant does not have a federal constitutional right to effective assistance of counsel with regard to a post-conviction, post-direct appeal motion for reduction of sentence made by the government pursuant to Fed. R. Crim. P. 35(b))

Juries

United States v. Ealy, 363 F.3d 292 (4th Cir. 2004) (Motz, J.) (W.D. Va.) (fact that death penalty cannot be constitutionally imposed for particular offense does not make trial by death-qualified jury violative of fair-cross-section or impartiality requirements of Sixth Amendment)

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.), (holding that *Blakely v. Washington*, 124 S. Ct. 2531 (2004), does not apply to federal sentencing guidelines), *overruled in part by United States v. Booker*, 125 S. Ct. 738 (2005)

Speedy Trial (see also Other Pre-Trial Issues, Speedy Trial Act, *infra*)

United States v. Woolfolk, 399 F.3d 590 (4th Cir. 2005) (Williams, J.) (W.D. Va.) (discussing what defendant must show to establish Sixth Amendment violation)

VI. OTHER PRE-TRIAL ISSUES

Competence

! * *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005) (Williams, J.) (W.D. Va.) (vacating district court's order granting government's motion to forcibly medicate defendant to make him competent to stand trial on charges of assaulting federal employee and threatening to murder federal judge where district court erroneously concluded that government had demonstrated that involuntary medication would "significantly further" its prosecutorial interest and was "medically appropriate;" remanding for further proceedings to allow parties to supplement record)

United States v. Robinson, 404 F.3d 850 (4th Cir. 2005) (Williams, J.) (E.D.N.C.) (affirming district court's conclusion that defendant was competent to stand trial, based on clinical psychologist's report, where defendant did not introduce any evidence addressing his incompetency)

Continuances

United States v. Reevey, 364 F.3d 151 (4th Cir. 2004) (King, J.) (D. Md.) (district court did not abuse discretion in denying motions for substitution of counsel and for continuance to obtain new motion where motions were made orally at beginning of trial and therefore were untimely)

Counsel (see also Sixth Amendment Issues, Counsel, *supra*)

United States v. Reevey, 364 F.3d 151 (4th Cir. 2004) (King, J.) (D. Md.) (district court did not abuse discretion in denying motion for substitution of counsel where court was informed that counsel had spent extensive amount of time discussing case with defendant and they were prepared for trial, court had observed counsel and defendant working together in selection of jury, and court concluded that there was not a lack of communication so substantial as to prevent adequate defense)

Defendant's Statements

United States v. Kennedy, 372 F.3d 686 (4th Cir. 2004) (Wilkinson, J.) (Michael, J., dissenting) (W.D. Va.) (in case in which defendant, whose drug conviction was still on direct appeal, was forced to testify twice before grand jury without having been warned that he could remain silent (AUSA told him he had no right not to testify as to drug charges of which he had been convicted) and without counsel, and was subsequently charged with perjury based on grand jury testimony, finding that statements need not be suppressed; while there was clear Fifth Amendment violation and arguably a Sixth Amendment violation, suppression of statements was not appropriate remedy because remedy for violation of rights is not to perjure oneself and expect immunity from prosecution; further rejecting argument that conviction should be vacated because false statements were induced by prosecutorial misconduct so unfair that due process was violated)

Discovery (see also Fifth Amendment Issues, Due Process, *supra*)

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (upholding challenge to admission of expert testimony against claim that government failed to comply with discovery order; district court did not abuse discretion in allowing expert to testify)

United States v. Faris, 388 F.3d 452 (4th Cir. 2004) (Wilkins, C.J.) (E.D. Va.) (on plain error review, rejecting defendant's claim that he should have been allowed to withdraw plea based on government's failure to turn over FBI 302s before he entered plea)

Grand Jury

In re Grand Jury Proceedings # 5 Empanelled January 28, 2004, 401 F.3d 247 (4th Cir. 2005) (Gregory, J.) (D.S.C.) (where attorney moved to quash subpoena seeking documents and testimony)

from him involving his representation of two individuals and their corporation, finding district court abused discretion in concluding that crime-fraud exception to attorney-client privilege applied because, although district court conducted *in camera* hearing, it never examined for itself the documents that attorney claimed were privileged)

In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005) (Wilson, D.J.) (E.D. Va.) (where former employees of corporation (AOL) that was subject of Securities and Exchange Commission (SEC) investigation moved to quash grand jury subpoena seeking documents related to corporation's internal investigation, holding that employees could not assert attorney-client privilege, and that common interest agreement between corporation and one employee could not serve as basis for that employee's assertion of joint defense privilege)

Indictments (see also Fifth Amendment Issues, Indictments, *supra*)

* *United States v. Quinn*, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (in reviewing only for plain error, finding that indictment charging defendants with soliciting bribes under 18 U.S.C. § 201 contained enough allegations to withstand challenge to its sufficiency)

United States v. Holbrook, 368 F.3d 415 (4th Cir. 2004) (Wilkins, C.J.) (W.D. Va.) (where defendant entered plea on third day of trial to 18 U.S.C. § 922(g)(9) charge in exchange for dismissal of § 922(a)(6) charge, but moved to withdraw her plea several months later, district court did not err in refusing to dismiss undischarged charge on double jeopardy ground because first trial ended at defendant's request, which was not result of government misconduct)

United States v. Farmer, 370 F.3d 435 (4th Cir. 2004) (Wilkinson, J.) (D.S.C.) (in case involving counterfeit clothing, affirming district court's denial of motion to dismiss indictment for failure to allege violation of federal criminal trademark infringement statute, 18 U.S.C. § 2320)

United States v. Collins, 372 F.3d 629 (4th Cir. 2004) (Motz, J.) (E.D.N.C.) (in case involving sophisticated interstate burglary and money-laundering conspiracies, where defect in venue, if any, was plain on face of indictment, defendants waived venue claim by waiting to object until close of evidence at trial),

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005) (King, J.) (E.D. Va.) (applying *Collins, supra*, in case involving wire fraud to find that defendant waived objection to venue in district, on grounds that he did not intend or foresee that his fraud scheme would cause transmittals into and out of that district, where indictment specified that wire communications in furtherance of fraud scheme were transmitted to and from district but defendant waited until post-trial proceeding to raise objection)

Joinder and Severance

United States v. Jones, 356 F.3d 529 (4th Cir. 2004) (Traxler, J.) (S.D. W. Va.) (district court did not abuse discretion in declining to sever drug conspiracy charge from substantive charges, particularly where defendant was acquitted of conspiracy charge)

United States v. Smith, 373 F.3d 561 (4th Cir. 2004) (per curiam) (Michael, J., dissenting) (E.D. Va.) (in theft of government property case, 18 U.S.C. § 641, aggregation of individual misdemeanor offenses into one felony charge to fall within statute of limitations did not constitute unconstitutional duplicity)

United States v. Rivera, 412 F.3d 562 (4th Cir. 2005) (Duncan, J.) (E.D. Va.) (in case involving grisly gang murder, affirming district court's denial of one defendant's motion for severance where evidence against main defendant that would not have come in at separate trial against defendant seeking severance was not substantially more inflammatory than other evidence properly admitted against him (including evidence that victim begged for his life before his throat was cut and defendant ordered the murder), and where third defendant charged whose motion for severance was also denied was acquitted in joint trial)

Notice of Intent to Seek Death Penalty

United States v. Breeden, 366 F.3d 369 (4th Cir. 2004) (Wilkins, C.J.) (W.D. Va.) (district court did not err in using date of filing of death notice and scheduled trial date as of time of filing of notice as operative dates for determining amount of time remaining before trial, in accordance with *United States v. Ferebe*, 332 F.3d 722 (4th Cir. 2003))

Speedy Trial Act (see also Sixth Amendment Issues, Speedy Trial, *supra*)

* *United States v. Woolfolk*, 399 F.3d 590 (4th Cir. 2005) (Williams, J.) (W.D. Va.) (in issue of first impression, concluding that thirty-day period for charging a defendant, 18 U.S.C. § 3161(b), begins to run as to a defendant held in state custody as of date government knew or should have known that the defendant was being held by the state solely on basis of federal detainer)

* *United States v. Bush*, 404 F.3d 263 (4th Cir. 2005) (Williams, J.) (D. Md.) (finding that no Speedy Trial Act violation occurred where defendant was offered a hearing on his motion to sever but his counsel declined it; discussing application of 18 U.S.C. § 3161(h)(1)(F) and (J))

Statute of Limitations

United States v. Ealy, 363 F.3d 292 (4th Cir. 2004) (Motz, J.) (W.D. Va.) (fact that death penalty cannot be constitutionally imposed for particular offense does not make offense "not capital" for purpose of statute of limitations, *see* 18 U.S.C. §§ 3281, 3282, where enabling authorizes death as punishment)

United States v. Smith, 373 F.3d 561 (4th Cir. 2004) (per curiam) (Michael, J., dissenting) (E.D. Va.) (in theft of government property case, 18 U.S.C. § 641, aggregation of individual misdemeanor offenses into one felony charge to fall within statute of limitations did not constitute unconstitutional duplicity)

Venue

* *United States v. Ebersole*, 411 F.3d 517 (4th Cir. 2005) (King, J.) (E.D. Va.) (finding that wire fraud, 18 U.S.C. § 1343, was a “continuing offense” for purpose of venue statute, 18 U.S.C. § 3237, and therefore properly tried in any district where a payment-related wire communication was transmitted or received; further finding that, as matter of first impression, venue on charges of presenting false claims to the government, 18 U.S.C. § 287, was proper in district into which victimized government agency had passed subject claim after its initial presentation to that agency)

VII. TRIAL ISSUES¹

Jury Selection

United States v. Ealy, 363 F.3d 292 (4th Cir. 2004) (Motz, J.) (W.D. Va.) (fact that death penalty cannot be constitutionally imposed for particular offense does not make trial by death-qualified jury violative of fair-cross-section or impartiality requirements of Sixth Amendment)

United States v. Hsu, 364 F.3d 192 (4th Cir. 2004) (Motz, J.) (D. Md.) (district court did not abuse discretion in denying defendants’ request to inquire into occupations of jurors and their spouses where a number of jurors did not provide that information on written questionnaire)

United States v. Collins, 372 F.3d 629 (4th Cir. 2004) (Motz, J.) (E.D.N.C.) (in case involving eight-day long trial as to sophisticated interstate burglary and money-laundering conspiracies, district court did not err in giving willful blindness instruction; nor did court err in giving any instruction on reasonable doubt when defendants had requested one and court gave what they had requested)

United States v. Turner, 389 F.3d 111 (4th Cir. 2004) (Wilkinson, J.) (W.D. Va.) (in bank robbery case, refusing to create *per se* rule that depositors of victim bank must be struck for cause; district court did not abuse discretion in refusing to dismiss for cause jurors who had accounts at other branches where defendant did not establish actual bias and did not use peremptory to strike those jurors)

United States v. Barnette, 390 F.3d 775 (4th Cir. 2004) (Widener, J.) (W.D.N.C.) (in capital resentencing trial, finding that district court did not abuse discretion in removing prospective juror in

¹ Subsections are arranged by stage of trial.

violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968); district court did not abuse discretion in refusing to remove prospective juror in light of *Morgan v. Henderson*, 504 U.S. 719 (1992); and district court did not err in denying defendant's *Batson* challenges to use of government's peremptories to strike jurors on basis of race)

Evidence

Rules of Evidence

United States v. Reevey, 364 F.3d 151 (4th Cir. 2004) (King, J.) (D. Md.) (district court did not abuse discretion in excluding as misleading, confusing, and irrelevant (*see* Rules 402 and 403) to kidnapping and carjacking charges evidence that defendant's gun was inoperable at time of his arrest)

United States v. Hodge, 354 F.3d 305 (4th Cir. 2004) (Wilkins, J.) (E.D. Va.) (admission in drug case of evidence of prior bad acts pursuant to Rule 404(b), specifically drug transactions from three years ago in another state, was relevant and necessary and its probativity was not substantially outweighed by danger of unfair prejudice, particularly where jury was given limiting instruction)

United States v. Blount, 364 F.3d 173 (4th Cir. 2004) (Niemeyer, J.) (E.D. Va.) (in case arising out of defendant's conduct in courtroom during sentencing of his mother, finding that district court did not abuse discretion in admitting pursuant to Rule 404(b) evidence of (1) testimony of deputy clerk regarding incident in clerk's office prior to trial, and (2) evidence of defendant's mother's plea agreement, which had given defendant immunity for underlying tax fraud case, to show intent and motive)

United States v. Scruggs, 356 F.3d 539 (4th Cir. 2004) (Motz, J.) (E.D. Va.) (defendant's breach of plea agreement by failing to provide information to government investigators permitted government to use statements made by defendant because defendant had waived protection of Rule 410)

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (district court did not abuse discretion in permitting government expert to testify about Hizballah where court conducted *Daubert* hearing pursuant to Rule 702; district court did not abuse discretion under Rule 403 in allowing government to play for jury Hizballah videotapes found in defendant's apartment)

United States v. Savage, 390 F.3d 823 (4th Cir. 2004) (King, J.) (M.D.N.C.) (in fraud, stolen property, and money-laundering case, district court did not abuse discretion in admitting, under Rule 403, evidence as to answering machine messages, a sexual incident between defendant and his wife, and events relating to defendant's two prior arrests)

United States v. White, 405 F.3d 208 (4th Cir. 2005) (Wilkins, J.) (D. Md.) (concluding district court did not abuse its discretion when admitting testimony of rebuttal witness that she regularly purchased drugs from defendant under Rules 404(b) and 608(b) because it showed defendant had requisite

knowledge and intent to commit charged offense; nor did court abuse its discretion under Rule 403 when admitting evidence to show that defendant had constructive possession of dresser and items within it)

United States v. Gray, 405 F.3d 227 (4th Cir. 2005) (Shedd, J.) (D. Md.) (district court properly admitted evidence of defendant's involvement in murder of her first husband under Rule 404(b) where it helped show intent to commit murder and defraud; court also properly admitted statements under Rule 804(b)(6) when defendant conspired to kill witness even if she did not intend to make witness unavailable for this particular trial)

United States v. Ruhbayan, 406 F.3d 292 (4th Cir. 2005) (King, J.) (E.D. Va.) (rejecting defendant's evidentiary challenges to convictions arising from obstruction of justice scheme in his earlier federal criminal trial where crime fraud exception invalidated attorney-client and work product privilege and defendant's prior bad acts were relevant to establish his giving of false testimony at his first trial)

United States v. Iskander, 407 F.3d 232 (4th Cir. 2005) (Gregory, J.) (D. Md.) (finding no reversible error in rulings excluding defense evidence in tax evasion case where defendant failed to provide prosecution with timely notice of expert witness, sought to introduce evidence not relevant to charges against him; further, any error created by government's introduction of report establishing defendant's accounting experience was harmless because evidence was cumulative)

United States v. Rivera, 412 F.3d 562 (4th Cir. 2005) (Duncan, J.) (E.D. Va.) (in arguing for admissibility of evidence under Rule 804(b)(6) (forfeiture by wrong-doing), government need prove that defendant engaged or acquiesced in wrongdoing that led to witness's unavailability only by preponderance of evidence; holding that plain language of Rule 804(b)(6) allows admissibility of hearsay against defendant by virtue of his having acquiesced in acts taken to procure declarant's unavailability and that therefore, district court did not err in concluding that defendant need only have acquiesced in declarant's death to trigger rule's applicability; also finding that district court properly overruled defendant's objection pursuant to Rule 403 that dead declarant's statement that defendant compared killing murder victim to "cutting up chicken")

United States v. Hedgpeth, 418 F.3d 411 (4th Cir. 2005) (King, J.) (E.D. Va.) (in trial for conspiracy involving bribery and extortion scheme connected to city council voting, finding that even if witness's testimony that he thought defendant was involved in taking kick-backs was improperly admitted (because it was only marginally relevant or probative but was prejudicial), any error was harmless where district court gave cautionary jury instruction and government put on other evidence from which jury could determine defendant's *mens rea*; also finding that district court did not abuse discretion in refusing to admit defendant's written statement to FBI, offered to counteract government's impeachment of her credibility on cross-examination of her, where defense counsel was permitted to elicit same information on redirect examination as was in excluded statement; discussing Rule 801(d)(1)(B) and rule of completeness)

Other Evidentiary Issues

United States v. Scruggs, 356 F.3d 539 (4th Cir. 2004) (Motz, J.) (E.D. Va.) (defendant's breach of plea agreement by failing to provide information to government investigators permitted government to use statements made by defendant because defendant had waived protection of Fifth Amendment)

United States v. Jones, 356 F.3d 529 (4th Cir. 2004) (Traxler, J.) (S.D. W. Va.) (chain of custody of drugs was sufficiently established)

* *United States v. Quinn*, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (government did not violate *Doyle v. Ohio*, 426 U.S. 610 (1976), by eliciting testimony from witness about defendant's refusal to answer questions during investigatory interview when defendant had been advised at outset of interview that his participation was voluntary, he could leave or terminate interview at any time, and he was not in custody but was not told that selective silence would not be used against him; distinguishing from *Miranda* warnings)

United States v. Brandon, 363 F.3d 341 (4th Cir. 2004) (Wilkinson, J.) (M.D.N.C.) (on plain error review, finding that admission into evidence of transcripts of recordings without prior review by district court was not error in light of *United States v. Collazo*, 732 F.2d 1200 (4th Cir. 1984), and therefore was not plain error, much less error that affected defendant's substantial rights)

United States v. Collins, 372 F.3d 629 (4th Cir. 2004) (Motz, J.) (E.D.N.C.) (in case involving eight-day long trial as to sophisticated interstate burglary and money-laundering conspiracies, district court did not err in denying defense motion for mistrial based on government witness's brief remark that defendant refused to sign law enforcement consent forms where court immediately granted motion to strike testimony, and promptly gave curative instruction)

* *United States v. Janati*, 374 F.3d 263 (4th Cir. 2004) (Niemeyer, J.) (E.D. Va.) (on appeal by government in multi-year-long healthcare fraud conspiracy case, reversing district court's ruling that government was limited to proof of the 61 overt acts alleged in indictment because "[i]t is well-established that when seeking to prove conspiracy, the government is permitted to present evidence of acts committed in furtherance of the conspiracy [in this case, over 1,000 other instances of billing fraud] even though they are not all specifically described in the indictment;" at end of opinion, addressing "appropriate balance between the district court's right to manage trials and the government's right to prove its case")

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (upholding admission at trial of evidence obtained pursuant to FISA wiretap against challenges that (1) the wiretap authorization was not based on probable cause, (2) the official certification was clearly erroneous, and (3) that government failed to ensure that invasion of defendant's privacy was no greater than necessary)

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (restrictions on defense questioning of government witness during *Daubert* hearing as to classified matters relating to witness's employment with FBI did not violate Classified Information Procedures Act ("CIPA") or defendant's Sixth Amendment right to confrontation)

* *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004) (Traxler, J.) (E.D. Va.) (on appeal by government in capital case, finding that district court did not abuse discretion in granting new trial where unadmitted, but crucial and highly prejudicial, evidence, went back to jury room that affected deliberation)

United States v. Pendergraph, 388 F.3d 109 (4th Cir. 2004) (Luttig, J.) (M.D.N.C.) (district court did not abuse discretion in excluding government's stipulation that e-mail sent by defendant was not understood by recipient to request illegal action where government introduced e-mail for another purpose)

United States v. Johnson, 410 F.3d 137 (4th Cir. 2005) (Mozt, J.) (D. Md.) (holding that even if blood test performed at the Armed Forces Institute of Pathology to test defendant's impairment was performed by military personnel in violation of the Posse Comitatus Act, suppression of test results was not an appropriate remedy)

Sufficiency of Evidence

United States v. Scruggs, 356 F.3d 539 (4th Cir. 2004) (Mozt, J.) (E.D. Va.) (evidence was sufficient to establish that defendant knowingly participated in Hobbs Act conspiracy)

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (evidence was sufficient to support convictions for solicitation of bribes under 18 U.S.C. § 201)

United States v. Ealy, 363 F.3d 292 (4th Cir. 2004) (Mozt, J.) (W.D. Va.) (where defendant is convicted of offense on alternative theories, and government has produced sufficient evidence to sustain conviction on one theory, whether evidence is sufficient to support alternate theory is irrelevant and reviewing court need not consider issue)

! *United States v. Habegger*, 370 F.3d 441 (4th Cir. 2004) (Wilkins, C.J.) (M.D.N.C.) (in case involving trafficking in counterfeit clothing, in which defendant was acquitted on one count but convicted on second, finding that there was no evidence that defendant had "trafficked" in counterfeit socks because there was no evidence that he sent twelve pairs of counterfeit Eddie Bauer socks "as consideration for anything of value;" applying contract law)

United States v. Collins, 372 F.3d 629 (4th Cir. 2004) (Mozt, J.) (E.D.N.C.) (in case involving sophisticated interstate burglary and money-laundering conspiracies, finding evidence sufficient to support convictions of both defendants on all charges)

United States v. Kennedy, 372 F.3d 686 (4th Cir. 2004) (Wilkinson, J.) (W.D. Va.) (finding sufficient evidence of materiality of statement in perjury prosecution)

United States v. Tucker, 376 F.3d 236 (4th Cir. 2004) (Beam, J., sitting by designation) (S.D. W. Va.) (finding evidence sufficient in conspiracy to make destructive device, in violation of 18 U.S.C. § 371 and 26 U.S.C. § 5861(f) where defendant had planned to acquire bomb parts for her cousin, who was in jail after being convicted of using pipebomb to kill pregnant woman; rejecting argument that because defendant could not be convicted of possessing destructive device, she could not be convicted of conspiring to make one)

United States v. Davis, 380 F.3d 183 (4th Cir. 2004) (Luttig, J.) (E.D. Va.) (in witness-tampering case, 18 U.S.C. § 1512, finding evidence sufficient to establish that defendant “corruptly persuaded” his ex-girlfriend to perjure herself at defendant’s previous trial on drug and gun charges)

United States v. Lockhart, 382 F.3d 447 (4th Cir. 2004) (Widener, J.) (E.D. Va.) (in case involving making of threats against President, 18 U.S.C. § 871, evidence in bench trial was sufficient as to defendant’s intent)

* *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004) (Traxler, J.) (E.D. Va.) (on appeal by government, in kidnapping case, 18 U.S.C. § 1201, finding evidence of “holding” of victim to be sufficient notwithstanding completely circumstantial nature of government’s case; reversing district court’s grant of motion for acquittal)

United States v. Pendergraph, 388 F.3d 109 (4th Cir. 2004) (Luttig, J.) (M.D.N.C.) (on plain error review in case involving forged securities, 18 U.S.C. § 513 and 2314, finding evidence sufficient where defendant had contested at trial only whether he knew that bonds were fraudulent, not whether bonds at issue fell within definition of “security”)

United States v. Washington, 398 F.3d 306 (4th Cir. 2005) (King, J.) (D. Md.) (evidence was sufficient to convict defendant where police officer testified that he saw defendant with pistol and box that had defendant’s name on it and was found in house where officer saw defendant contained ammunition fitting pistol)

United States v. Pierce, 400 F.3d 176 (4th Cir. 2005) (Shedd, J.) (Gregory, J. dissenting) (W.D. Va.) (affirming conviction for mail fraud, 18 U.S.C. § 1341, where use of mail occurred after profits from fraudulent act were received, but served to lull victim into sense of security), *aff’d on panel reh’g*, 409 F.3d 228 (4th Cir. 2005)

United States v. Gray, 405 F.3d 227 (4th Cir. 2005) (Shedd, J.) (D. Md.) (evidence was sufficient to support jury finding defendant intended to procure insurance premiums through fraud and insurance companies had actual interest in the fraudulently procured premiums; district court did not abuse

discretion in permitting government to reopen its case for limited purpose of establishing that certain pleadings were mailed to courthouse, and properly considered that evidence in ruling on Rule 29(b) motion)

United States v. Iskander, 407 F.3d 232 (4th Cir. 2005) (Gregory, J.) (D. Md.) (concluding that evidence was sufficient to support jury verdict's of willful tax evasion)

United States v. Collins, 412 F.3d 515 (4th Cir. 2005) (Moon, D.J.) (S.D. W. Va.) (finding that evidence was sufficient to support defendant's conviction for possession of cocaine base with the intent to distribute where two experienced narcotics officers encountered defendant and another man in parked vehicle in high drug-trafficking area, other man in vehicle motioned officers over and asked them what they needed, which officer interpreted as offer to sell drugs, and defendant threw plastic bag containing cocaine base onto floor of vehicle)

! *United States v. Moyer*, ___ F.3d ___, 2005 WL 2174402 (4th Cir. 2005) (Gregory, J.) (D. Md.) (reversing conviction where government's evidence at trial was insufficient to establish that defendant constructively possessed firearms where he was merely present in location from which guns had been stolen and there was no fingerprint or other physical evidence, or any testimony, to connect defendant to firearms)

Closing Argument

United States v. Ollivierre, 378 F.3d 412 (4th Cir. 2004) (King, J.) (D.S.C.) (district court did not abuse discretion in denying motion for new trial based on prosecutor's improper and prejudicial closing argument as to statements to which defense objected during argument; finding no plain error as to other statements where defendant did not establish that he was prejudiced)

United States v. Savage, 390 F.3d 823 (4th Cir. 2004) (King, J.) (M.D.N.C.) (on plain error review, finding no misconduct or other error by prosecutor in closing argument)

* *United States v. Collins*, 401 F.3d 212, 415 F.3d 304 (4th Cir. 2005) (Titus, D.J.) (E.D. Va.) (in trial involving cooperating witnesses testifying pursuant to plea agreements where prosecutor stated that government always seeks to determine whether cooperating witnesses are telling the truth, "find[ing] the prosecutor's argument in this case, at a stage when there is a heightened concern about impermissible vouching, either crossed the line [of improper vouching for witness], or, at best, was a close call," but then concluding that any error "did not 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process'")

Jury Instructions

United States v. Hsu, 364 F.3d 192 (4th Cir. 2004) (Motz, J.) (D. Md.) (discussing at length what defense must show to warrant instruction on entrapment; defendant must show both lack of

predisposition and government inducement, the latter of which must include solicitation plus some overreaching or improper conduct)

United States v. Kennedy, 372 F.3d 686 (4th Cir. 2004) (Wilkinson, J.) (W.D. Va.) (district court did not abuse discretion in refusing to give entrapment instruction in case in which defendant, whose drug conviction was still on direct appeal, was forced to testify twice before grand jury without having been warned that he could remain silent and without counsel, and was subsequently charged with perjury based on testimony at second appearance)

United States v. Savage, 390 F.3d 823 (4th Cir. 2004) (King, J.) (M.D.N.C.) (on plain error review, finding that jury instructions on money-laundering counts did not constructively amend charges)

United States v. Collins, 401 F.3d 212, 415 F.3d 304 (4th Cir. 2005) (Titus, D.J.) (E.D. Va.) (in 21 U.S.C. § 846 drug conspiracy case, where jury instruction as to conspiracy charge omitted both “reasonably foreseeable” language and direction to jury that it could only find defendant responsible for acts of co-conspirators if those acts occurred during, and in furtherance of, conspiracy, finding instruction was in error, but error was harmless in light of evidence)

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005) (King, J.) (E.D. Va.) (finding that jury was correctly instructed on venue in false claim case, 18 U.S.C. § 287, that venue on charge may be proper in district into which victimized government agency had passed subject claim after its initial presentation to that agency (either by the defendant or an intermediary))

! *United States v. Moyer*, ___ F.3d ___, 2005 WL 2174402 (4th Cir. 2005) (Gregory, J.) (D. Md.) (in case involving felon-in-possession and stolen firearms charges, 18 U.S.C. § 922(g), (j), concluding that aiding and abetting instruction was improperly given as to felon-in-possession charge where there was no evidence that other person was convicted felon, and instruction was also improperly given as to stolen firearms charge where government’s closing argument was that defendant was *not* a look-out for the men stealing guns from a store; district court also erroneously gave instruction regarding flight from scene as evidence of guilt)

United States v. Scott, ___ F.3d ___, 2005 WL 2277637 (4th Cir. 2005) (Michael, J.) (N.D. W. Va.) (in felon-in-possession case, 18 U.S.C. § 922(g), where defendant argued that jury instructions were misleading because they did not adequately explain that intent to possess is an element of the crime when government proceeds under a constructive possession theory, concluding that instructions were not misleading and affirming conviction)

Verdict

United States v. Collins, 412 F.3d 515 (4th Cir. 2005) (Moon, D.J.) (S.D. W. Va.) (finding that jury's acquittal of co-defendant who was defendant's only alleged co-conspirator did not entitle defendant to reversal of his conviction for conspiracy to distribute cocaine base on ground of inconsistent verdicts)

Misconduct by Party or Judge (see also Closing Argument, *supra*)

* *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004) (Traxler, J.) (E.D. Va.) (on appeal by government in capital case, reversing district court's finding that AUSA engaged in intentional misconduct by sending back to the jury inadmissible, but crucial and highly prejudicial, evidence)

United States v. Pendergraph, 388 F.3d 109 (4th Cir. 2004) (Luttig, J.) (M.D.N.C.) (on plain error review, finding that judge interrupted defendant in his testimony no more than he interrupted government's chief witness, thus defendant was not prejudiced before jury)

Motion for New Trial

* *United States v. Lentz*, 383 F.3d 191 (4th Cir. 2004) (Traxler, J.) (E.D. Va.) (on appeal by government in capital case, finding that district court did not abuse discretion in granting new trial where unadmitted, but crucial and highly prejudicial, evidence, went back to jury room that affected deliberation)

VIII. PLEA ISSUES

Plea Agreements

United States v. Scruggs, 356 F.3d 539 (4th Cir. 2004) (Motz, J.) (E.D. Va.) (defendant's breach of plea agreement by failing to provide information to government investigators permitted government to use statements made by defendant pursuant to agreement against him at trial)

United States v. Wood, 378 F.3d 342 (4th Cir. 2004) (Duncan, J.) (W.D. Va.) (finding that although terms of plea agreement limited defendant's ability to contest drug weight attributable to him at sentencing, where district court at time of plea repeatedly assured defendant that he would be able to challenge drug weight without objection by government (thus modifying plea agreement) but then at sentencing prevented defendant from challenging drug quantity, defendant was not precluded from appealing where waiver of appeal was conditioned upon defendant receiving "a full and fair sentencing")

United States v. Faris, 388 F.3d 452 (4th Cir. 2004) (Wilkins, C.J.) (E.D. Va.) (on plain error review, rejecting defendant's claim that he should have been allowed to withdraw plea based on

government's violation of plea agreement where government had not agreed to keep plea proceedings sealed)

Conditional Pleas

United States v. Bundy, 392 F.3d 641 (4th Cir. 2004) (Shedd, J.) (W.D. Va.) (defendant in conditional plea cannot reserve for appellate review any issue that is not case-dispositive; issue is case-dispositive if either (1) ruling in defendant's favor would require dismissal of charges or suppression of material evidence, or (2) ruling in government's favor would require affirming conviction)

Acceptance of Pleas

United States v. Thomas, 367 F.3d 194 (4th Cir. 2004) (Wilkins, C.J.) (E.D. Va.) (finding that district court abused discretion in accepting guilty plea when factual basis was insufficient to establish violation of Virginia fourth-offense DWI because subsection of Maryland DUI statute under which defendant was previously convicted was not "substantially similar" to Virginia DWI statute; thus, defendant's prior Maryland convictions would not serve as predicates for Virginia fourth-offense DWI)

Withdrawal of Pleas

United States v. Holbrook, 368 F.3d 415 (4th Cir. 2004) (Wilkins, C.J.) (King, J., dissenting) (W.D. Va.) (where defendant entered plea on third day of trial to 18 U.S.C. § 922(g)(9) charge in exchange for dismissal of § 922(a)(6) charge, but moved to withdraw her plea several months later, district court did not err in refusing to permit her to withdraw plea but also allowing government to refuse to dismiss second count and take that count to a second trial; discussing at length remedy provisions of plea agreement; King, in dissent, roundly criticizing majority's approach to interpretation of plea agreement); see *United States v. Holbrook*, 376 F.3d 259 (4th Cir. 2004) (King, J., dissenting from denial of rehearing en banc)

* *United States v. Faris*, 388 F.3d 452 (4th Cir. 2004) (Wilkins, C.J.) (E.D. Va.) (in case involving provision of material support to terrorists, 18 U.S.C. § 2339A, finding district court did not abuse discretion in denying motion to withdraw plea where defendant so moved five months after entering plea on basis that summary of FBI 302s prepared after plea but based on statements given prior to plea contradicted statement of facts used to establish factual basis for plea; discussing and applying factors to be considered in evaluating motions to withdraw plea; on plain error review, rejecting defendant's additional claims that he should have been allowed to withdraw plea based on government's violation of plea agreement and government's violation of *Brady* obligation)

IX. SENTENCING ISSUES

Sentencing Procedure

United States v. Houchins, 364 F.3d 182 (4th Cir. 2004) (King, J.) (S.D. W. Va.) (finding that because defendant cannot establish that he has suffered injury, he did not have standing to challenge reporting requirement of Feeny Amendment)

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.), (holding that *Blakely v. Washington*, 124 S. Ct. 2531 (2004), does not apply to federal sentencing guidelines), *overruled in part by United States v. Booker*, 125 S. Ct. 738 (2005)

United States v. Barnette, 390 F.3d 775 (4th Cir. 2004) (Widener, J.) (W.D.N.C.) (considering and rejecting numerous challenges to defendant's capital resentencing trial)

United States v. Robinson, 390 F.3d 833 (4th Cir. 2004) (King, J.) (D. Md.) (on plain error review, in applying *United States v. Cotton*, 535 U.S. 625 (2002), to defendants' case, finding that while defendants met first, second, and third prong of *Olano* analysis, court would not notice error where evidence that drug quantity exceeded 50 grams of crack was overwhelming)

United States v. Shank, 395 F.3d 466 (4th Cir. 2005) (Motz, J.) (D. Md.) (Fed. R. Crim. P. 35(a)'s seven-day time limit establishes jurisdictional limitation district court effectively denies motion to correct sentence by failing to act on motion to correct sentence within that period)

! * *United States v. Hughes*, 396 F.3d 374 (4th Cir.), *amended on panel reh'g by* 401 F.3d 540 (4th Cir. 2005) (Wilkins, C.J.) (Md) (in first opinion from circuit interpreting and applying *United States v. Booker*, 125 S. Ct. 738 (2005), finding plain error in violation of defendant's Sixth Amendment right to jury trial when district court enhanced his sentence on basis of facts neither admitted by him nor found by a jury beyond a reasonable doubt); applied in *United States v. Washington*, 398 F.3d 306 (4th Cir. 2005) (King, J.) (D. Md.); *United States v. Johnson*, 400 F.3d 187 (4th Cir. 2005) (Motz, J.) (D. Md.); *United States v. Collins*, 401 F.3d 212, 415 F.3d 304 (4th Cir. 2005) (Titus, D.J.) (E.D. Va.); *United States v. Gray*, 405 F.3d 227 (4th Cir. 2005) (Shedd, J.) (D. Md.); *United States v. Ruhbayan*, 406 F.3d 292 (4th Cir. 2005) (King, J.) (E.D. Va.); *United States v. Iskander*, 407 F.3d 232 (4th Cir. 2005) (Gregory, J.) (D. Md.); *United States v. Pierce*, 409 F.3d 228 (4th Cir. 2005); *United States v. Ebersole*, 411 F.3d 517 (4th Cir. 2005) (King, J.) (E.D. Va.); *United States v. Evans*, 416 F.3d 298 (4th Cir. 2005) (Shedd, J.) (M.D.N.C.) (finding no error)

United States v. Washington, 404 F.3d 834 (4th Cir. 2005) (King, J.) (Luttig, J., dissenting) (S.D. W. Va.) (determining that sentencing court's application of base offense level under U.S.S.G. § 2K1.2 for prior convictions that are crimes of violence through use of extra-indictment facts "about a

prior conviction” was plain error and violated defendant’s Sixth Amendment rights per *Booker* and *Shepard v. United States*, 125 S. Ct. 1254 (2005))

* *United States v. White*, 405 F.3d 208 (4th Cir. 2005) (Wilkins, J.) (Duncan, J., dissenting) (D. Md.) (concluding per *Booker* that where there was no Sixth Amendment error, district court nonetheless plainly erred in applying Guidelines in mandatory fashion, but affirming sentence because error did not affect defendant’s substantive rights); applied in *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005) (Wilkins, C.J.) (M.D.N.C.); *United States v. Collins*, 412 F.3d 515 (4th Cir. 2005) (Moon, D.J.) (S.D. W. Va.)

United States v. Robinson, 404 F.3d 850 (4th Cir. 2005) (Williams, J.) (E.D.N.C.) (on cross-appeal of sentence by government, remanding for resentencing because downward departure by court was below applicable statutory mandatory minimum sentence; even after *Booker*, district court has no discretion to go below sentence mandated by Congress)

United States v. Pierce, 400 F.3d 176 (4th Cir. 2005) (Shedd, J.) (W.D. Va.) (rejecting defendant’s Equal Protection argument where defendant challenged disparity between his sentence and those of coconspirators because coconspirators were not similarly situated where they pled guilty and stipulated to loss amount but defendant went to trial and loss attributed to him was based on trial evidence), *aff’d on panel reh’g*, 409 F.3d 228 (4th Cir. 2005)

United States v. Bartram, 407 F.3d 307 (4th Cir. 2005) (Widener, J.) (Niemeyer, J. concurring in part and in judgment) (Gregory, J. concurring in judgment only) (S.D. W. Va.) (affirming *pre-Booker* sentence as reasonable, sentence reviewed by Niemeyer for plain error)

United States v. Hedgpeth, 418 F.3d 411 (4th Cir. 2005) (King, J.) (E.D. Va.) (finding that defendant was not entitled to continuance of sentencing hearing based on psychiatrist report delivered to her lawyer late in day preceding sentencing hearing, which could have supported a downward departure from the Sentencing Guidelines based upon diminished capacity where sentencing hearing had been scheduled for three months, such that defendant had ample opportunity to investigate and present diminished capacity arguments, psychiatric report did not demonstrate that further investigation would have revealed basis for departure, and at sentencing hearing, court admitted psychiatric testimony about defendant’s depression medication and how it adversely affected her mental state, which was contained in report)

Sentencing Statutes

18 U.S.C. § 924(e), Armed Career Criminal Act (ACCA)

! * *United States v. Pressley*, 359 F.3d 347 (4th Cir. 2004) (Mozt, J. (D.S.C.) (all three prior convictions must be sustained before defendant commits instant offense in order for defendant to be sentenced under § 924(e) (i.e., a conviction sustained after conduct giving rise to § 922(g)(1) charge does

not qualify as “previous conviction”); finding that escape conviction under South Carolina law that was categorized by state as misdemeanor even though punishable by up to two years in prison does not qualify as “violent felony;” declining to address whether “breach of peace” conviction qualifies as “violent felony” because it did not count as “previous conviction”)

United States v. Cheek, 415 F.3d 349 (4th Cir. 2005) (Niemeyer, J.) (D.S.C.) (finding that enhancement of defendant’s sentence on basis of three previous convictions did not violate his Sixth Amendment rights under *Booker* when the prior convictions were not alleged in the indictment or admitted by the defendant during his plea colloquy, where defendant did not challenge existence of prior convictions or their qualification as predicate offenses)

United States v. Thompson, 421 F.3d 278 (4th Cir. 2005) (Wilkinson, J.) (Wilkins, C.J., dissenting) (M.D.N.C.) (finding that defendant’s prior North Carolina convictions for breaking or entering buildings constituted violent felonies within meaning of ACCA as a matter of law, and that application of ACCA based on at least three convictions committed on different occasions did not require jury fact finding to comply with Sixth Amendment)

18 U.S.C. § 3553(e), Substantial Assistance (see also U.S.S.G. § 5K1.1, *infra*)

United States v. Johnson, 393 F.3d 466 (4th Cir. 2004) (Hamilton, J.) (D.S.C.) (where statutory mandatory minimum is higher than guideline range (such that guideline is mandatory minimum, *see* U.S.S.G. § 5G1.1(b)), starting point for substantial assistance departure is mandatory minimum; once government moves for departure pursuant to § 3553(e), there is no lower limit to departure as long as it is reasonable; explaining earlier decision in *United States v. Pillow*, 191 F.3d 403 (4th Cir, 1999))

18 U.S.C. § 3553(f), Safety Valve (see also U.S.S.G. § 5C1.2, *infra*)

United States v. Wood, 378 F.3d 342 (4th Cir. 2004) (Duncan, J.) (W.D. Va.) (in issue of first impression in Fourth Circuit, joining other circuits that have ruled that “the government” as used in safety valve provision relating to truthful provision of all information concerning offense or relevant conduct does not include probation officer; therefore, fact that defendant meets with probation officer during presentence investigation does not qualify him for safety valve consideration)

18 U.S.C. § 3591 et seq., Federal Death Penalty Act (FDPA)

United States v. Barnette, 390 F.3d 775 (4th Cir. 2004) (Widener, J.) (W.D.N.C.) (FDPA is not unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002), because nothing prevents grand jury from charging aggravating factors)

18 U.S.C. § 3663 et seq., Mandatory Victims Restitution Act (MVRA)

* *United States v. Johnson*, 400 F.3d 187 (4th Cir. 2005) (Motz, J.) (D. Md.) (postponement of restitution hearing beyond ninety-day time period set by 18 U.S.C. § 3664(d)(5) constituted harmless error absent prejudice; determining that Congress intended defendants to pay full restitution to victim's service provider even if service provider did not charge victim full cost of treatment)

Sentencing Guidelines

U.S.S.G. § 1B1.3, Relevant Conduct

United States v. Hodge, 354 F.3d 305 (4th Cir. 2004) (Wilkins, J.) (E.D. Va.) (inclusion of drug transactions from three years in another state as relevant conduct was not clearly erroneous)

United States v. Jones, 356 F.3d 529 (4th Cir. 2004) (Traxler, J.) (S.D. W. Va.) (inclusion of 1.5 kilos of crack was not clearly erroneous when based on district court's credibility determinations as to trial witnesses and evidence that defendant possessed drug trade tools, even though defendant was acquitted of conspiracy)

U.S.S.G. § 1B1.10, Retroactive Application of Amendments

! * *United States v. Goines*, 357 F.3d 469 (4th Cir. 2004) (Wilkins, C.J.) (Luttig, J., dissenting) (W.D. Va.) (where defendant was convicted of both 18 U.S.C. § 922(g) and § 924(c), holding that defendant may rely on clarifying amendment to support motion under 18 U.S.C. § 3582(c)(2) where amendment is designated for retroactive application by Sentencing Commission and would result in application of sentencing range lower than range applied at original sentencing)

U.S.S.G. § 2B1.1, Fraud (formerly § 2F1.1)

! *United States v. Pendergraph*, 388 F.3d 109 (4th Cir. 2004) (Luttig, J.) (M.D.N.C.) (reversing loss calculation in fraudulent contract procurement case where district court based loss on amount risked by victim but guideline limits amount to actual or intended loss; however, affirming on plain error review enhancement of sentence based on § 2F1.1(b)(8)(B))

United States v. Savage, 390 F.3d 823 (4th Cir. 2004) (King, J.) (M.D.N.C.) (finding district court did not clearly err in applying enhancement for violating injunction, 2F1.1(b)(4)(C), where defendant transferred assets to storage and to associates when he was enjoined from “disposing of, encumbering and depleting any interest in any assets”)

United States v. Pierce, 400 F.3d 176 (4th Cir. 2005) (Shedd, J.) (W.D. Va.) (loss amount determined against defendant who went to trial is not affected by government's plea agreements with other

defendants that capped loss at lower levels; agreeing with 5th and 9th Circuits that civil doctrine of nonmutual collateral estoppel has no application in criminal sentencing; finding that evidence at trial supported district court's finding of loss amount)

U.S.S.G. § 2B3.1, Robbery

! *United States v. Reevey*, 364 F.3d 151 (4th Cir. 2004) (King, J.) (D. Md.) (vacating sentence because district court improperly applied enhancement for threat of death where defendant had conviction under 18 U.S.C. § 924(c) based on same conduct)

U.S.S.G. § 2C1.1, Gratuities (a/k/a bribes)

* ! *United States v. Quinn*, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (remanding for recalculation of loss amount; declining to accept government's new calculations; rejecting defendant's other arguments as to loss determination)

U.S.S.G. § 2D1.1 et seq., Drug Offenses

* *United States v. Kiulin*, 360 F.3d 456 (4th Cir. 2004) (Luttig, J.) (E.D.N.C.) (declining to require district courts to err on side of caution in determining drug quantities; declining to join other circuits)

* *United States v. Houchins*, 364 F.3d 182 (4th Cir. 2004) (King, J.) (S.D. W. Va.) (in methamphetamine manufacturing conspiracy case, finding that 3-level enhancement for creating substantial risk of harm to human life or environment was properly applied; discussing factors that guideline requires district court to consider)

United States v. Fullilove, 388 F.3d 104 (4th Cir. 2004) (Wilkins, C.J.) (D.S.C.) (on appeal by government, finding as matter of Guideline interpretation (and agreeing with four other circuits) that entire amount of crack cocaine in mailed package was attributable to defendant, not simply the .37 grams remaining after rest of crack was removed by law enforcement officers from package prior to controlled delivery)

U.S.S.G. § 2J1.2, Obstruction of Justice

! *United States v. Blount*, 364 F.3d 173 (4th Cir. 2004) (Niemeyer, J.) (E.D. Va.) (in case arising out of defendant's conduct in courtroom during sentencing of his mother, while agreeing with defendant that 8-level enhancement for causing injury requires intent to cause injury, disagreeing that injury that actually results must be the injury that defendant intended; affirming application of enhancement)

U.S.S.G. § 2K2.1 et seq., Firearms Offenses

United States v. Holbrook, 368 F.3d 415 (4th Cir. 2004) (Wilkins, C.J.) (W.D. Va.) (finding no error in applying cross-reference to U.S.S.G. § 2A1.2, second-degree murder guideline (rather than § 2A1.3, voluntary manslaughter), where district court did not err in finding that defendant acted with malice in shooting estranged husband to death)

! * *United States v. Washington*, 404 F.3d 834 (4th Cir. 2005) (King, J.) (Luttig, J., dissenting) (S.D. W. Va.) (determining that sentencing court's application of base offense level for prior convictions that are crimes of violence through use of extra-indictment facts "about a prior conviction" was plain error and violated defendant's Sixth Amendment rights per *Booker* and *Shepard v. United States*, 125 S. Ct. 1254 (2005))

U.S.S.G. § 2K2.4, Use of Firearm

! * *United States v. Goines*, 357 F.3d 469 (4th Cir. 2004) (Wilkins, C.J.) (Luttig, J., dissenting) (W.D. Va.) (where defendant was convicted of both 18 U.S.C. § 922(g) and § 924(c), holding that defendant may rely on clarifying amendment (599) to support motion under 18 U.S.C. § 3582(c)(2) where amendment is designated for retroactive application by Sentencing Commission and would result in application of sentencing range lower than range applied at original sentencing)

! *United States v. Reevey*, 364 F.3d 151 (4th Cir. 2004) (King, J.) (D. Md.) (vacating sentence because district court improperly applied enhancement for threat of death under U.S.S.G. § 2B3.1 where defendant had conviction under 18 U.S.C. § 924(c) based on same conduct)

U.S.S.G. § 2L1.2, Illegal Reentry After Deportation

! *United States v. Amayo-Portillo*, ___ F.3d ___, 2005 WL 2130198 (4th Cir. 2005) (Cacheris, D.J.) (Shedd, J., dissenting) (D. Md.) (in issue of first impression, finding that defendant's Maryland conviction for cocaine possession, which carried a maximum sentence of four years' imprisonment but was characterized as misdemeanor under state law, did not constitute felony conviction under federal Controlled Substances Act, and thus was not conviction for "aggravated felony" subjecting defendant to eight-level increase in base offense level)

U.S.S.G. § 2S1.1, Money-laundering

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (district court did not clearly err in applying "sophisticated laundering" enhancement)

U.S.S.G. § 2X3.1, Accessory After the Fact

* *United States v. Cross*, 371 F.3d 176 (4th Cir. 2004) (Traxler, J.) (E.D. Va.) (on appeal by government, finding that requirement that defendant “knew or reasonably should have known” applies only to specific offense characteristics for underlying offense, not to that offense’s base offense level, i.e., there is no reasonable knowledge requirement as to base offense level; distinguishing *United States v. Godwin*, 253 F.3d 784 (4th Cir. 2001))

U.S.S.G. § 3A1.4, Terrorism

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (on plain error review, upholding application of enhancement against challenges that standard of proof higher than preponderance of evidence should be used and that application constitutes doublecounting)

U.S.S.G. § 3B1.1, Aggravating Role

United States v. Jones, 356 F.3d 529 (4th Cir. 2004) (Traxler, J.) (S.D. W. Va.) (finding application of enhancement not clearly erroneous when based on trial evidence, even though defendant was acquitted of drug conspiracy charge)

! *United States v. Ruhbayan*, 406 F.3d 292 (4th Cir. 2005) (King, J.) (E.D. Va.) (reversing application of enhancement for “otherwise extensive” criminal activity where jurors in defendant’s first trial were the *objects* of his criminal scheme to obstruct justice by suborning perjury, such that jurors could not have been involved in commission of offenses)

U.S.S.G. § 3B1.2, Mitigating Role

United States v. Kiulin, 360 F.3d 456 (4th Cir. 2004) (Luttig, J.) (E.D.N.C.) (district did not err in concluding that defendant was more than mere courier where evidence showed that defendant agreed to transport substantial amount of ecstasy from Canadian border to southern Florida, he rented car, recruited accomplice to help with transport, and bragged that he often engaged in such trips and was well-paid for them)

U.S.S.G. § 3B1.3, Abuse of Position of Trust

! *United States v. Ebersole*, 411 F.3d 517 (4th Cir. 2005) (King, J.) (E.D. Va.) (finding that enhancement was not warranted for defendant convicted of wire fraud and presenting false claims to the government, in connection with defendant’s contracts with government to provide bomb-sniffing canines, based upon government’s reliance on defendant’s assertions that he was certified by state and federal regulating agencies as a bomb-sniffing canine team handler because an arms-length commercial relationship did not create trust or fiduciary relationship)

U.S.S.G. § 3C1.1, Obstruction of Justice

United States v. Jones, 356 F.3d 529 (4th Cir. 2004) (Traxler, J.) (S.D. W. Va.) (finding no clear error in application of enhancement based on defendant's testimony at his suppression hearing)

* *United States v. Quinn*, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (rejecting defendants' contention that their false testimony was not "material;" also rejecting argument that enhancement should not be applied because resulting sentence was higher than if they had been convicted on separate perjury count because offense level would have been the same) (NB: while court describes latter argument as "without merit," it seems to leave open possibility of finding merit under different facts)

United States v. Kiulin, 360 F.3d 456 (4th Cir. 2004) (Luttig, J.) (E.D.N.C.) (district court did not clearly err in concluding that defendant entered into agreement to lie in attempt to exonerate accomplice where existence of agreement established in recorded conversation between accomplice and third person, and defendant had described accomplice's role during interrogation immediately following arrest)

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc) (Wilkins, C.J.) (W.D.N.C.) (application of enhancement was not clearly erroneous where defendant introduced receipt for donation made by defendant to Hizballah but defendant testified that he had never donated money to Hizballah)

U.S.S.G. § 3D1.1, Grouping

United States v. Collins, 372 F.3d 629 (4th Cir. 2004) (Motz, J.) (E.D.N.C.) (on cross-appeal by government in case involving sophisticated interstate burglary and money-laundering conspiracies, finding district court erred in refusing to aggregate dollar amounts once it decided to group offenses under § 3D1.2(d) of 1998 Guidelines)

U.S.S.G. § 3E1.1, Acceptance of Responsibility

! *United States v. Kise*, 369 F.3d 766 (4th Cir. 2004) (Gregory, J.) (Luttig, J., concurring in judgment only) (D.S.C.) (in child exploitation case in which probation officer recommended, without objection from government, that defendant receive reduction for acceptance of responsibility but district court (Shedd, J., now on court of appeals) rejected recommendation because defendant said during sentencing that he believed that child could consent to sex, finding district court clearly erred in denying reduction because to hold otherwise would be to create *per se* rule that punishes defendants who acknowledge disorder and seek treatment)

U.S.S.G. §§ 4A1.1, 4A1.2, Criminal History Calculations

! * *United States v. Tigney*, 367 F.3d 200 (4th Cir. 2004) (Motz, J.) (N.D. W. Va.) (holding that West Virginia misdemeanor offense of failure to appear is “similar” within meaning of § 4A1.2(c)(1) to “contempt of court”)

* *United States v. Martin*, 378 F.3d 353 (4th Cir. 2004) (Motz, J.) (M.D.N.C.) (holding that 60-day sentence for North Carolina misdemeanor imposed in state district court that is completely stayed pending trial *de novo* in superior court can be assigned only one criminal history point; however, error in assigning extra point was harmless)

United States v. Collins, 412 F.3d 515 (4th Cir. 2005) (Moon, D.J.) (S.D. W. Va.) (finding that defendant’s prior convictions for possession of crack cocaine with intent to deliver and malicious wounding were properly treated as two separate offenses, rather than as related offenses to be treated as one offense, because although prior offenses occurred in same area and during same general time frame and were consolidated for plea and sentencing and resulted in concurrent sentences, an intervening arrest separated offenses)

U.S.S.G. §§ 4B1.1, 4B1.2, Career Offender

* *United States v. Smith*, 359 F.3d 662 (4th Cir. 2004) (Wilkins, C.J.) (E.D. Va.) (Virginia conviction for larceny from the person qualifies as “crime of violence” because it “involves a serious potential risk of physical injury to another”)

United States v. Brandon, 363 F.3d 341 (4th Cir. 2004) (Wilkinson, J.) (M.D.N.C.) (on appeal by government, finding that district court erred in not sentencing defendant as career offender where single state judgment incorporated findings of guilt as to several offenses unrelated to one another)

* *United States v. Hondo*, 366 F.3d 363 (4th Cir. 2004) (Widener, J.) (Motz, J., dissenting) (D.S.C.) (affirming district court’s finding, made against recommendation of probation officer, that defendant had waived counsel as to 1984 conviction and thus could be sentenced as career offender on instant drug conviction; in dissent, Motz arguing that even if state court judge implicitly found waiver to be voluntary, it never found waiver to be knowing and intelligent; discussing *Faretta v. California*, 422 U.S. 806 (1975))

United States v. Harp, 406 F.3d 242 (4th Cir. 2005) (Wilkins, C.J.) (M.D.N.C.) (examining career offender statute and concluding that defendant’s conviction for controlled substance offense can be used to increase sentence when any defendant, not just the individual defendant, could receive a sentence of more than one year and concluding that *Booker* does not impact this determination)

U.S.S.G. § 5C1.2, Safety Valve (see also 18 U.S.C. § 3553(f), *supra*)

United States v. Wood, 378 F.3d 342 (4th Cir. 2004) (Duncan, J.) (W.D. Va.) (in issue of first impression in Fourth Circuit, joining other circuits that have ruled that “the government” as used in safety valve provision relating to truthful provision of all information concerning offense or relevant conduct does not include probation officer; therefore, fact that defendant meets with probation officer during presentence investigation does not qualify him for safety valve consideration)

U.S.S.G. § 5G1.3, Concurrent or Consecutive Sentences

* *United States v. Rouse*, 362 F.3d 256 (4th Cir. 2004) (Wilkins, C.J.) (W.D. Va.) (on plain error review, finding that district court erred in not running federal sentence concurrently with state sentence for conduct that was included as relevant conduct, but error was not plain because neither Supreme Court nor Fourth Circuit had spoken on issue; finding that amendment 660 was substantive despite language in amendment that it was clarifying; noting that fact that defendant was sentenced as career offender did not change fact that prior conduct was used as relevant conduct)

U.S.S.G. § 5K1.1, Substantial Assistance (see also 18 U.S.C. § 3553(e), *supra*)

United States v. Johnson, 393 F.3d 466 (4th Cir. 2004) (Hamilton, J.) (D.S.C.) (where statutory mandatory minimum is higher than guideline range (such that guideline is mandatory minimum, *see* U.S.S.G. § 5G1.1(b)), starting point for substantial assistance departure is mandatory minimum; once government moves for departure pursuant to § 3553(e), there is no lower limit to departure as long as it is reasonable; explaining earlier decision in *United States v. Pillow*, 191 F.3d 403 (4th Cir. 1999))

U.S.S.G. § 5K2.0 et seq., Departures

United States v. May, 359 F.3d 683 (4th Cir. 2004) (King, J.) (W.D.N.C.) (in case involving burning of cross in front of home of interracial couple, reversing district court’s downward departures based on victim conduct, aberrant behavior, and acceptance of responsibility)

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (where defendants argued for downward departure based on disparity of sentences compared to co-defendant created by government manipulation of Guidelines, refusing to review claim where district court recognized its authority to depart and declined to exercise it because it found no prosecutorial misconduct)

United States v. Riggs, 370 F.3d 382 (4th Cir. 2004) (Shedd, J.) (Duncan, J., dissenting) (D. Md.) (in felon-in-possession case in which defendant suffered from paranoid schizophrenia, reviewing *de novo* grant of downward departure based on U.S.S.G. § 5K2.13, diminished capacity, and reversing because offense involved serious risk of violence and because, at time of sentencing, there remained need

to protect public because defendant could decide to stop his medications), *on reh'g after remand from S. Ct.*, 410 F.3d 136 (4th Cir. 2005) (concluding that *Booker* did not alter analysis of previous ruling)

United States v. Davis, 380 F.3d 183 (4th Cir. 2004) (Luttig, J.) (Michael, J., dissenting) (E.D. Va.) (in appeal of six-level upward departure based on “criminal purpose,” U.S.S.G. § 5K2.9, finding that identified basis was permissible and that degree of departure in obstruction of justice case was reasonable where defendant had suborned perjury that resulted in his acquittal on most serious charges (including § 924(c) charge) in previous trial; Michael, J., dissenting on ground that district court did not adequately justify extent of departure) (NB: this decision may give insight into how Fourth Circuit will handle post-*Booker* arguments that a sentence is unreasonably high)

X. REVOCATION ISSUES

United States v. Farrell, 393 F.3d 498 (4th Cir. 2005) (Conrad, D.J.) (E.D. Va.) (in case in which district court did not directly question defendant during revocation proceedings, finding that, based on totality of circumstances, defendant knowingly and voluntarily admitted to supervised release violations)

XI. APPELLATE ISSUES

Anders Briefs

United States v. Kise, 369 F.3d 766 (4th Cir. 2004) (Gregory, J.) (D.S.C.) (in appeal in which counsel filed *Anders* brief, directing counsel to consider first issue identified, granting argument, and finding for defendant on the issue)

Appellate Procedure

* *United States v. Hatfield*, 365 F.3d 332 (4th Cir. 2004) (Widener, J.) (S.D. W. Va.) (finding that where equities favored government, court would exercise discretion to hear government’s appeal where government did not file certification required under 18 U.S.C. § 3731 until January 16, 2004, one week before oral argument, even where defendant had moved to dismiss appeal on July 15, 2003, based on failure to file certification)

United States v. DeQuasie, 373 F.3d 509 (4th Cir. 2004) (Shedd, J.) (Motz, J., dissenting) (S.D. W. Va.) (where government never filed certification required by 18 U.S.C. § 3731 until panel ordered supplemental briefing on issue after argument in light of pending *Hatfield* decision, nonetheless finding that equities weighed in favor of hearing appeal where U.S. Attorney’s Office acknowledged error “and, more importantly, now appears to appreciate the importance of the certification requirement,” and where issues addressed by district court in published opinion were important; noting that court has assumed in past that

certification must be filed in same 30-day period as notice of appeal; further noting that the better practice is for the government to include certification in both the appellate record and in joint appendix; Motz, J., in strong dissent, would dismiss appeal because of government's inexcusable failure and lack of novelty of substantive issue) (NB: see listing under Fourth Amendment Issues, Search Warrants)

Interlocutory Appeals

United States v. Breeden, 366 F.3d 369 (4th Cir. 2004) (Wilkins, C.J.) (W.D. Va.) (in capital case, court of appeals had jurisdiction under *United States v. Ferebe*, 332 F.3d 722 (4th Cir. 2003), to hear defendant's appeal of denial of motion to preclude filing of death notice where district court waited to rule on motion until after government actually filed notice, thus effectively transforming motion into one to strike notice)

Judicial Notice of Matters Not in Record

United States v. Foreman, 369 F.3d 776 (4th Cir. 2004) (Hamilton, J.) (E.D. Va.) (at page 786 and n.9, referring to matters as to which court may take judicial notice)

Mandate Rule

United States v. Robinson, 390 F.3d 833 (4th Cir. 2004) (King, J.) (D. Md.) (following remand of case for resentencing, district court did not violate "mandate rule" by continuing resentencing where mandate did not specify time for resentencing and where Supreme Court had under consideration case addressing issue identical to one in defendants' case; district court did not violate mandate by applying at resentencing new Supreme Court case that altered controlling principles)

Reviewability of Issues

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (district court's refusal to downwardly depart based on disparity of sentence given to co-defendant who pled guilty is not reviewable)

United States v. Bundy, 392 F.3d 641 (4th Cir. 2004) (Shedd, J.) (W.D. Va.) (in conditional plea reserving issues for appellate review, court will not review issue that is not case-dispositive; issue is case-dispositive if either (1) ruling in defendant's favor would require dismissal of charges or suppression of material evidence, or (2) ruling in government's favor would require affirming conviction)

Standards of Review

United States v. Rouse, 362 F.3d 256 (4th Cir. 2004) (Wilkins, C.J.) (W.D. Va.) (in plain error case, discussing what is required for error to be “plain”); *see also United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005); *United States v. White*, 405 F.3d 208 (4th Cir. 2005)

United States v. Lockhart, 382 F.3d 447 (4th Cir. 2004) (Widener, J.) (E.D. Va.) (describing standard of review for sufficiency of evidence claim in bench trial)

United States v. Bursey, 416 F.3d 301 (4th Cir. 2005) (King, J.) (D.S.C.) (stating that appellate review conducted by district court after bench trial before magistrate judge is not trial *de novo*, but rather, district court is to apply same standards of review applied by court of appeals in assessing district court conviction, as per Fed. R. Crim. P. 58(g)(2)(D); similarly, court of appeals’s review of magistrate court’s trial record is governed by same standards as was district court’s appellate review)

Sufficiency of Issue Preservation

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004) (Shedd, J.) (D. Md.) (plain error applied to review of sufficiency of indictment where defendant did not object; request for bill of particulars is not sufficient to preserve issue)

United States v. Rouse, 362 F.3d 256 (4th Cir. 2004) (Wilkins, C.J.) (W.D. Va.) (plain error applied to review of concurrent sentence issue where, even though counsel asked whether federal sentence would run concurrently or consecutively to undischarged term of imprisonment, counsel did not cite relevant Guideline provision or argue that sentence should run concurrently)

United States v. Foreman, 369 F.3d 776 (4th Cir. 2004) (Hamilton, J.) (E.D. Va.) (in footnote 8, finding government could rely on presence of air freshener in arguing existence of reasonable suspicion on appeal, even though government did not raise that fact in district court until motion for reconsideration of grant of suppression motion, where district court addressed argument when denying reconsideration)

United States v. Collins, 372 F.3d 629 (4th Cir. 2004) (Motz, J.) (E.D.N.C.) (where defect in venue, if any, is plain on face of indictment, defendants must raise claim of improper venue prior to trial; waiting to object until close of evidence at trial waives claim); applied in *United States v. Ebersole*, 411 F.3d 517 (4th Cir. 2005) (King, J.) (E.D. Va.)

United States v. DeQuasie, 373 F.3d 509 (4th Cir. 2004) (Shedd, J.) (S.D. W. Va.) (on appeal by government, declining to consider government’s alternative basis for reversal of grant of suppression motion where government did not raise it until questioned by court at oral argument)

United States v. Ollivierre, 378 F.3d 412 (4th Cir. 2004) (King, J.) (D.S.C.) (applying plain error review to denial of motion for new trial based on improper closing argument by prosecutor where defendant did not object at time of argument but raised objection for first time in motion for new trial)

Waivers of Appeal

United States v. Wood, 378 F.3d 342 (4th Cir. 2004) (Duncan, J.) (W.D. Va.) (where waiver of appeal was conditioned upon defendant receiving “full and fair sentencing,” but district court prevented defendant from contesting drug quantity at sentencing after assuring him at plea colloquy that he would be able to challenge quantity without objection by government (thus modifying term of plea agreement to contrary), waiver of appeal provision did not bar appeal)

United States v. LeMaster, 403 F.3d 216 (4th Cir. 2005) (Williams, J.) (W.D. Va.) (holding that defendant may waive right to collaterally attack conviction and sentence as long as waiver is knowing and voluntary, just as he may waive right to appeal; finding no reason to distinguish between the two; suggesting without deciding that exceptions for appeal waivers would also apply to post-conviction rights waivers)

United States v. Blick, 408 F.3d 162 (4th Cir. 2005) (Shedd, J.) (E.D. Va.) (appeal waiver entered into as part of plea agreement signed prior to *Blakely v. Washington*, 124 S. Ct. 2531 (June 24, 2004), is valid and enforceable as to claims made pursuant to *Blakely* and *United States v. Booker*, 125 S. Ct. 738 (2005)); *see also United States v. Johnson*, 410 F.3d 137 (4th Cir. 2005) (Motz, J.) (D. Md.)