Selected Post-*Booker* and Guideline Application Decisions for the Fourth Circuit

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS — FOURTH CIRCUIT

This document contains annotations to Fourth Circuit judicial opinions that involve the federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate relevant authorities involving the federal sentencing guidelines. The document is not comprehensive and does not include all authorities needed to apply the guidelines correctly. Instead, it presents authorities that represent Fourth Circuit jurisprudence on selected guidelines and guideline issues. The document is not a substitute for reading and interpreting the actual *Guidelines Manual* or researching specific sentencing issues.

ISSUES RELATED TO *UNITED STATES V. BOOKER*, 543 U.S. 220 (2005)

I. Procedural Issues

A. Sentencing Procedure Generally

United States v. Carter, 564 F.3d 325 (4th Cir. 2009). The Fourth Circuit held that a sentence of probation for a defendant convicted of being a felon in possession of a firearm was not procedurally reasonable; the sentencing court did not explain its reasons for a sentence significantly below the advisory guidelines range, nor did it explain how the statutory sentencing factors applied to the defendant or the facts of his case. The panel stated that "regardless of whether the district court imposes an above, below, or within-Guidelines sentence, it must place on the record an 'individualized assessment' based on the particular facts of the case before it. This individualized assessment need not be elaborate or lengthy, but it must provide a rationale tailored to the particular case at hand and adequate to permit 'meaningful appellate review.'"

United States v. Green, 436 F.3d 449 (4th Cir. 2006). "[T]o sentence a defendant, district courts must (1) properly calculate the sentence range recommended by the [s]entencing [g]uidelines; (2) determine whether a sentence within that range and within statutory limits serves the factors set forth in § 3553(a) and, if not, select a sentence that does serve those factors; (3) implement mandatory statutory limitations; and (4) articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the [s]entencing [g]uideline range better serves the relevant sentencing purposes set forth in § 3553(a)."

United States v. Milam, 443 F.3d 382 (4th Cir. 2006). The court determined that "facts stated in a presentence report [PSR] may not, at sentencing, be deemed to be admissions by the defendant sufficient to bypass the Sixth Amendment right to a jury trial as articulated in . . . *Booker* . . . even though the defendant, who had been given the . . . [PSR] before sentencing, did not object to the facts."

United States v. Montes-Pineda, 445 F.3d 375 (4th Cir. 2006). The court rejected the government's argument that the court of appeals does not have jurisdiction to review a guidelines sentence; "[h]olding that a sentence within a properly calculated [g]uidelines range is automatically lawful would render superfluous the other § 3553(a) factors and so contravene the statute's mandatory language."

United States v. Perez-Pena, 453 F.3d 236 (4th Cir. 2006). "That the guidelines are non-binding in the wake of *Booker* does not mean that they are irrelevant to the imposition of a sentence. To the contrary, remaining provisions of the Sentencing Reform Act require the district court to consider the guideline range applicable to the defendant and pertinent policy statements of the Sentencing Commission."

United States v. Hughes, 401 F.3d 540 (4th Cir. 2005). Although the sentencing guidelines are no longer mandatory, *Booker* makes clear that a sentencing court must still "consult the guidelines and take them into account when sentencing." The district court should first determine the appropriate sentencing range under the guidelines, making all factual findings appropriate for that determination. The court should consider this sentencing range along with the other factors described in 18 U.S.C. § 3553(a), and then impose a sentence. If that sentence falls outside the guidelines range, the court should explain its reasons for the departure as required by 18 U.S.C. § 3553(c)(2). The sentence must be "within the statutorily prescribed range and . . . reasonable."

B. Uncharged or Acquitted Conduct

United States v. Lawing, 703 F.3d 229 (4th Cir. 2012). The Fourth Circuit noted that "[a] verdict of acquittal demonstrates only lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence," *United States v. Isom*, 886 F.2d 736, 738 (4th Cir. 1989). Thus, the sentencing court may consider conduct of which a defendant has been acquitted if the conduct has nonetheless been proved by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 157 (1997).

United States v. Grubbs, 585 F.3d 793 (4th Cir. 2009). The Fourth Circuit rejected the defendant's argument that his Sixth Amendment rights were violated and the sentence unreasonable under *Booker* when the district court relied on uncharged conduct to increase the sentence. The court considered the defendant's arguments foreclosed by *Watts* and Fourth Circuit precedent and held that *Booker* did not change the district court's ability to consider uncharged or acquitted conduct during sentencing, provided the government proves the conduct by a preponderance.

C. Prior Convictions

United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc). The issue was whether Simmons's prior North Carolina state conviction was punishable by imprisonment for more than one year. The Fourth Circuit held that, under the state sentencing scheme, prior state felony convictions cannot be predicate offenses for 18 U.S.C. § 851 enhancements unless the prior conviction actually exposed the defendant to a sentence of imprisonment greater than one year. This decision overruled *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005) (which required the court to look at the maximum aggravated sentence for a hypothetical defendant with the worst criminal history). Under North Carolina law, there are no statutory maximums, rather, there is a statutory sentencing grid which matches classes of offenses and criminal history to provide three possible sentencing ranges — a mitigated range, a presumptive range, and an aggravated range. Generally, the presumptive range governs unless the court makes written

findings that allow the court to depart to the mitigating or aggravating range. The court can only sentence within the aggravated range if the state has noticed the defendant of its intent to prove the aggravating factors and a jury has found beyond a reasonable doubt (or the defendant has pled to) the existence of those factors. This sentencing scheme, unlike the federal sentencing guidelines, prohibits a sentencing judge from imposing a maximum sentence higher than the one fixed by the statutory grid. Under prior precedent, the Fourth Circuit had looked at how the offense was treated rather than how much time a specific defendant was exposed to. The en banc court observed that the focus must be on the prior conviction itself. The "'mere possibility that [Simmons's] conduct, coupled with facts outside the record of conviction, could have authorized' a conviction of a crime punishable by more than one year's imprisonment cannot and does not demonstrate that Simmons was actually convicted of such a crime." Thus, the Fourth Circuit found that Simmons's prior state conviction was not punishable by more than one year's imprisonment. *See also Whiteside v. United States*, 775 F.3d 180 (4th Cir. 2014) (en banc) (holding that *Simmons* does not qualify as a new "fact" for purposes of 28 U.S.C. § 2255(f)(4); *Simmons* does not reset the one-year period for filing a section 2255 *habeas* petition).

United States v. Kellam, 568 F. 3d 125 (4th Cir. 2009). The court found that the government did not carry its burden of proving beyond a reasonable doubt the fact that the defendant was the person convicted in two previous drug felonies. The district court "did not explicitly find that [the defendant] was the defendant in the underlying Virginia and Maryland convictions." Further, the prosecution made no further efforts to establish that the defendant sustained the prior convictions, despite several discrepancies regarding the issue of identity. The court concluded, despite the fact that it is probable that the defendant was convicted of the underlying crimes, "to justify the life sentence enhancement [pursuant to section 841(b)(1)(A)], such proof should have been presented by the prosecution and found as proven by the sentencing court." The case was remanded for further proceedings, "authorizing the courts to permit the prosecution to properly support — if it can — the prior convictions alleged in the Information."

United States v. Cheek, 415 F.3d 349 (4th Cir. 2005). "It is thus clear that the Supreme Court continues to hold that the Sixth Amendment (as well as due process) does not demand that the mere fact of a prior conviction used as a basis for a sentencing enhancement be pleaded in an indictment and submitted to a jury for proof beyond a reasonable doubt. Even were we to agree with [the appellant's] prognostication that it is only a matter of time before the Supreme Court overrules *Almendarez-Torres*, we are not free to overrule or ignore the Supreme Court's precedents."

United States v. Thompson, 421 F.3d 278 (4th Cir. 2005). In *Shepard*, the Supreme Court prohibited courts from resolving a disputed fact about a prior conviction by using information that is not inherent in that prior conviction, but held that the "fact of a prior conviction" remains a valid enhancement even when not found by the jury. The court explained that the fact of a prior conviction cannot be severed from its essential components — *e.g.*, whether prior convictions occurred on different occasions — because "some facts are so inherent in a conviction that they need not be found by a jury." Furthermore, the court explained that the date on which a prior crime was committed is a fact inherent in the fact of a prior conviction and does not have to be admitted by the defendant or found by a jury.

D. Ex Post Facto

United States v. Stallard, 317 F. App'x 383 (4th Cir. 2009). Noting that there is a circuit split regarding whether, after *Booker*, the *Ex Post Facto* Clause no longer applies to the now advisory guidelines, the Fourth Circuit stated that it has not yet decided the issue.

II. Departures

United States v. Hampton, 441 F.3d 284 (4th Cir. 2006). The court determined that a sentence of probation for the defendant, who was convicted for being a felon-in-possession of a firearm, was unreasonable even though the defendant was the sole custodial parent of his two small children; the court of appeals observed that the defendant was assisted by his mother and was behind in child support for his two other children.

United States v. Bartram, 407 F.3d 307 (4th Cir. 2005). Imposing guideline upward adjustments and departures predicated on facts that were not charged in the indictment and found by a jury beyond a reasonable doubt did not violate the Sixth Amendment rights of a defendant who had pled guilty, where the district court's fact findings were based on the defendant's own admissions. Based on the district court's careful deliberation in sentencing the defendant, and because the district court sentenced him near the low end of the statutory guidelines, the Fourth Circuit determined that the sentence was reasonable.

III. Specific Section 3553(a) Factors

A. Unwarranted Disparities

United States v. Clark, 434 F.3d 684 (4th Cir. 2006). Although considering state sentencing practices is not *per se* unreasonable, deviating from the guidelines simply because a defendant would have received a different sentence in state court without considering the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct is unreasonable.

1. Fast-Track

United States v. Montes-Pineda, 445 F.3d 375 (4th Cir. 2006). The court declined to require a sentencing court to deviate downward from the guidelines based solely on the existence of fast-track programs in other districts because such a requirement would conflict with Congress's decision to limit the availability of sentence reductions to certain jurisdictions.

2. Co-Defendants

United States v. Khan, 461 F.3d 477 (4th Cir. 2006). The court reversed as unreasonable a below-guidelines sentence of 52 months, finding that the variance from the advisory guidelines range of 97 to 121 months was not justified by a co-defendant's lower sentence. The court held that "the district court impermissibly ignored the primary reason that [the two co-defendants]. . .

had different recommended Guidelines ranges in the first place: the fact that the Guidelines treat those who accept responsibility and those who obstruct justice differently."

IV. Forfeiture

United States v. Alamoudi, 452 F.3d 310 (4th Cir. 2006). "Because no statutory or other maximum limits the amount of forfeiture, a forfeiture order can never violate *Booker*. . . . [T]he Sixth Amendment applies neither to criminal forfeitures in general nor to a district court's order permitting the forfeiture of substitute assets in an appropriate case."

V. Restitution

United States v. Rattler, 139 F. App'x 534 (4th Cir. 2005). Because there is no statutory maximum for restitution, *Booker* does not apply to restitution.

VI. Reasonableness Review

A. General Principles

United States v. Susi, 674 F.3d 278 (4th Cir. 2012). The Fourth Circuit rejected the defendant's assertion that *Pepper v. United States*, 562 U.S. 476 (2011), requires the district court to conduct a de novo resentencing, including a recalculation of the sentencing guidelines range. The panel explained that "[n]othing in *Pepper* . . . requires the district court to reconsider every component of the sentencing decision during resentencing" and "a district court [is] well within its authority to decline to revisit every sentencing issue on remand, unless the mandate indicates otherwise or the interrelationship of sentencing components makes it advisable to do so."

United States v. Smith, 566 F.3d 410 (4th Cir. 2009). The court stated that "while an appellate court reviewing a sentence may presume that the sentence within a properly calculated Guidelines range is reasonable, . . . the sentencing court may not, in sentencing a defendant, rely on this presumption . . . rather the sentencing court must 'first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.'" Because the district court's statement in sentencing the defendant suggested that the court improperly presumed that a sentence within the Guidelines range would be reasonable, the Fourth Circuit vacated the defendant's sentence and remanded for resentencing.

United States v. Osborne, 514 F.3d 377 (4th Cir. 2008). "The Supreme Court has recently held that 'courts of appeals must review all sentences -- [including those] inside . . . the Guidelines range -- under a deferential abuse-of-discretion standard.' The first step in this review requires us to 'ensure that the district court committed no significant procedural error, such as . . . improperly calculating . . . the Guidelines range.' In assessing whether a sentencing court properly applied the Guidelines, 'we review the court's factual findings for clear error and its legal conclusions de novo.' 'On mixed questions of law and fact regarding the Sentencing Guidelines, we apply a due deference standard in reviewing the district court.'"

United States v. Pauley, 511 F.3d 468 (4th Cir. 2007). "In [*Gall v. United States*, 552 U.S. 38 (2007)], the Court instructed that the sentencing court should first calculate the applicable Guidelines range. . . After calculating the Guidelines range, the sentencing court must give both the government and the defendant 'an opportunity to argue for whatever sentence they deem appropriate.' . . . The sentencing court should then consider all of the [18 U.S.C. § 3553(a)] factors to determine whether they support the sentence requested by either party . . . In so doing, the sentencing court may not presume that the Guidelines range is reasonable. . . In the event the sentencing court decides to impose a variance sentence, *i.e.*, one outside of the recommended Guidelines range, the sentencing court 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.' As noted by the *Gall* Court, it is an 'uncontroversial' proposition that a 'major departure should be supported by a more significant justification than a minor one.'"

United States v. Green, 436 F.3d 449 (4th Cir. 2006). "[T]he overarching standard of review for unreasonableness will not depend on whether we agree with the particular sentence selected, but whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law." (internal citations omitted).

United States v. Johnson, 445 F.3d 339 (4th Cir. 2006). The court of appeals treats a within-guideline sentence as presumptively reasonable for three reasons. "The first reason that Guidelines sentences are presumptively reasonable under *Booker* is the legislative and administrative process by which they were created . . . The second reason that Guidelines sentences are presumptively reasonable is that the process described above has led to the incorporation into the Guidelines of the factors Congress identified in 18 U.S.C.A. § 3553(a) as most salient in sentencing determinations . . . This leads to the third reason why Guidelines sentences must be treated as presumptively reasonable, namely, that such sentences are based on individualized factfinding and this factfinding takes place in a process that invites defendants to raise objections and requires courts to resolve them."

United States v. Hughes, 401 F.3d 540 (4th Cir. 2005). "The determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it."

B. Standard of Review

United States v. Savillon-Matute, 636 F.3d 119 (4th Cir. 2011). When the Fourth Circuit reviews any sentence, "whether inside, just outside, or significantly outside the Guidelines range," it applies a "deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). The circuit court will first "ensure that the district court committed no significant procedural error." *Id*. at 51. "If, and only if, [it] find[s] the sentence procedurally reasonable can [it] 'consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.'" *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009) (*quoting Gall*, 552 U.S. at 51).

United States v. Lynn, 592 F.3d 572 (4th Cir. 2010). The Fourth Circuit subjects unpreserved sentencing objections only to plain-error review.

United States v. Grubbs, 585 F.3d 793 (4th Cir. 2009). Post-*Booker*, the Due Process Clause does not require district courts to apply a heightened standard of proof before using uncharged or acquitted conduct as a basis for determining a defendant's sentence.

United States v. Jeffers, 570 F.3d 557 (4th Cir. 2009). A sentencing court is required to make factual determinations by a preponderance of the evidence. The Fourth Circuit reviews a sentencing court's findings of fact for clear error, reversing only when the circuit court is "left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. Harvey*, 532 F.3d 326, 336 (4th Cir. 2008)).

United States v. Amaya-Portillo, 423 F.3d 427 (4th Cir. 2005). The court will review "the district court's imposition of the sentence enhancement *de novo* because it entails the interpretation of a statute."

C. Procedural Reasonableness

United States v. Savillon-Matute, 636 F.3d 119 (4th Cir. 2011). In appeals involving a *Shepard* issue, the Fourth Circuit may make an "assumed error harmlessness inquiry," which requires (1) "knowledge that the district court would have reached the same result even if it had decided the guidelines issue the other way," and (2) "a determination that the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor." *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006). The circuit court explained that "it would make no sense to set aside [a] reasonable sentence and send the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm." *Id*. at 1350; *see also United States v. Alvarado Perez*, 609 F.3d 609, 619 (4th Cir. 2010); *United States v. Hargrove*, 625 F.3d 170 (4th Cir. 2012). The Fourth Circuit observed that this approach originates from two bases: (1) that "procedural errors at sentencing . . . are routinely subject to harmlessness review," *Puckett v. United States*, 556 U.S. 129 (2009), and (2) that the circuit court commonly assumes, without deciding, an error exists when performing harmless error inquiry.

United States v. Engle, 592 F.3d 495 (4th Cir. 2010). After the defendant pled guilty to tax evasion, the district court sentenced him to four years' probation instead of a term of imprisonment within the guidelines' range of 24-30 months. The Fourth Circuit vacated the sentence, finding that the sentence was procedurally unreasonable because the district court minimized the offense conduct, failed to consider the Sentencing Commission's policy statements in Chapters One and Two concerning tax evasion offenses and the need for general deterrence for such offenses, and failed to explain why a term of imprisonment was not required.

United States v. Ibanga, 271 F. App'x 298 (4th Cir. 2008) (per curiam). The jury convicted the defendant of money laundering, but acquitted him of drug trafficking. At sentencing the government proved by a preponderance that the defendant trafficked methamphetamine. The judge sentenced the defendant based solely on the money laundering

verdict, "noting that sentencing based upon [the] acquitted conduct [of drug trafficking] 'makes the constitutional guarantee of a right to a jury trial quite hollow.'" The circuit court remanded the case because, "the court committed significant procedural error by categorically excluding acquitted conduct from the information that it could consider in the sentencing process."

D. Substantive Reasonableness

United States v. Engle, 592 F.3d 495 (4th Cir. 2010). The defendant pled guilty to tax evasion, having failed to pay $2 million in taxes, interest, and fines. The defendant was sentenced to four years' probation, instead of a term of imprisonment within the guidelines' range of 24-30 months, to allow him to work and pay restitution to the IRS. The panel vacated the sentence, concluding the term of probation was substantively unreasonable because of the court's improper focus on the defendant's financial ability to pay restitution. The circuit court expressed concern that rich tax evaders would avoid jail, while poor tax evaders would be imprisoned, a prospect seemingly based on the socio-economic status of the defendant and a factor impermissible under the guidelines and the Sentencing Reform Act.

United States v. Curry, 461 F.3d 452 (4th Cir. 2006). The court vacated a below-guidelines sentence, concluding that (1) the district court erred in sentencing the defendant "based on a conclusion that contravened the jury's verdict," and (2) although a defendant's restitution "may be worthy of some consideration," it was insufficient to justify a 70 percent variance from the guidelines.

E. Plain Error / Harmless Error

United States v. Williams, 316 F. App'x 208 (4th Cir. 2008). *Kimbrough* did not alter the rule that *Booker*-type errors are subject to harmless-error analysis.

United States v. Robinson, 460 F.3d 550 (4th Cir. 2006). The court will review *de novo* a preserved claim of constitutional *Booker* error for harmless error and must reverse unless the court finds the error harmless beyond a reasonable doubt. Appellant properly preserved his claim of statutory *Booker* error by raising a timely *Blakely* objection at sentencing.

United States v. Shatley, 448 F.3d 264 (4th Cir. 2006). The government showed harmless error because the district court announced an identical non-guideline alternative sentence.

United States v. Hughes, 401 F.3d 540 (4th Cir. 2005). When a defendant raises a *Booker* claim for the first time on appeal, the Fourth Circuit reviews for plain error. In order to determine for purposes of plain error review whether the defendant was prejudiced by the district court's Sixth Amendment error under the mandatory guidelines regime in effect at the time of sentencing, the question the court must decide is whether the defendant has established that the sentence imposed by the district court as a result of the Sixth Amendment violation "was longer than that to which he would otherwise be subject." Because the maximum sentence permitted by the jury verdict was 12 months and the district court imposed a sentence of 46 months, the error affected the defendant's substantial rights. The court remanded for re-sentencing. *See also United States v. Ebersole*, 411 F.3d 517, (4th Cir. 2005) (same); *United States v. Pierce*, 409

F.3d 228 (4th Cir. 2005) (same); *United States v. Johnson*, 400 F.3d 187 (4th Cir. 2005) (determining that because the defendant's sentence was based upon a crime for which he was not convicted and exceeded that which would be available absent the finding of the crime of sexual abuse, the court found plain error had occurred and remanded for re-sentencing).

F. Waiver of Right to Appeal Sentence

United States v. Nixon, 352 F. App'x 786 (4th Cir. 2009). A valid waiver provision in a plea agreement precludes review of a sentence by the Fourth Circuit. A defendant may waive the right to appeal when the waiver is knowing and intelligent. When the district court fully questions a defendant during the plea colloquy regarding the waiver of his right to appeal in accordance with Federal Rule of Criminal Procedure 11, the waiver is both valid and enforceable. *See also United States v. Blick*, 408 F.3d 162 (4th Cir. 2005).

United States v. Cohen, 459 F.3d 490 (4th Cir. 2006). The Fourth Circuit will not enforce a valid appeal waiver against a defendant if the government breached the plea agreement containing that waiver. *See also United States v. Dawson*, 587 F.3d 640 (4th Cir. 2009).

United States v. Johnson, 410 F.3d 137 (4th Cir. 2005). *Booker* did not render unknowing or involuntary the defendant's pre-*Booker* guilty plea in which he waived his right to appeal. The defendant's *Booker* challenge was within the scope of his pre-*Booker* appeal waiver.

VII. Revocation

United States v. Bennett, 698 F.3d 194 (4th Cir. 2012). The Fourth Circuit held that *Tapia v. United States*, 131 S. Ct. 2382 (2011), which interpreted 18 U.S.C. § 3582(a) to preclude federal courts from imposing or lengthening a prison term to promote a defendant's rehabilitation, applies to revocation sentencing. The Supreme Court in *Tapia* interpreted the term "imprisonment" as used in section 3582(a) broadly, the circuit court determined, and concluded that the Court's "capacious definition[] obviously encompass[es] incarceration in the revocation context."

United States v. Moulden, 478 F.3d 652 (4th Cir. 2007). The standard of review for probation revocation sentences is the same standard applied to supervised release revocation sentences - the court reverses only where the sentence imposed is "plainly unreasonable." The defendant argued that, because a probation revocation requires consideration of all of the section 3553(a) factors (as opposed to only some of them, as required for revoking supervised release pursuant to 18 U.S.C. § 3583(c)), the reasonableness standard should apply. Although other circuits may apply a different standard for the revocations at issue, all the circuits to address the issue have applied the *same* standard to both types of revocations.

United States v. Crudup, 461 F.3d 433 (4th Cir. 2006). A sentence imposed upon revocation of supervised release that falls within the range authorized by statute is reviewable only if it is plainly unreasonable. The reasonableness of a revocation sentence is reviewable for abuse of discretion. The policy statements in Chapter Seven, Part B, are advisory.

VIII. Retroactivity

United States v. Morris, 429 F.3d 65 (4th Cir. 2005). *Booker* does not apply retroactively to cases on collateral review because, although the rule announced in *Booker* is a new criminal procedural rule, it is not a watershed rule.

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Passaro, 577 F.3d 207 (4th Cir. 2009). Application Note 1 adopts a broad definition of "dangerous weapon" to include "an instrument capable of inflicting death or serious bodily injury," an object that closely resembles such an instrument, or an object used in a way by the defendant that creates the impression that the object is such an instrument.

United States v. Fenner, 147 F.3d 360 (4th Cir. 1998). The cross reference in §2K2.1 required the application of the homicide guideline where death resulted from the firearms offense for which the defendants were sentenced; even though the defendants had previously been acquitted of the homicide. The court of appeals rejected a due process challenge to the cross reference. The court reasoned that the cross reference does not create a new offense or increase the statutory maximum to which the defendants were exposed, but merely limits the discretion of the district court in selecting an appropriate sentence within the statutorily defined range.

§1B1.2 Applicable Guidelines

United States v. Locklear, 24 F.3d 641 (4th Cir. 1994). The district court erroneously applied §2D1.2 to increase the defendant's base offense level. The defendant was charged with conspiracy to possess with intent to distribute cocaine and marihuana. Section 1B1.2 instructs the court to determine first the proper guideline and then any applicable specific offense characteristics under that guideline. Section 2D1.1, the guideline applicable in the instant case, has its own specific offense characteristics which do not include a cross reference to §2D1.2.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Burns, 781 F.3d 688, 691 (4th Cir. 2015). The Fourth Circuit held that the "acts and omissions" referenced in §1B1.3(a)(1) necessarily incorporate *mens rea*; acting with a particular mental state is relevant conduct within the meaning of §1B1.3(a)(1). As a result, the circuit court affirmed the district court's denial of an acceptance of responsibility reduction where the defendant argued that the evidence did not support a cross reference to attempted murder and that the district court should have cross-reference aggravated assault instead.

United States v. Hodge, 354 F.3d 305 (4th Cir. 2004). The defendant appealed his conviction and sentence for possession of a firearm by a convicted felon, and possession of

cocaine with the intent to distribute. The district court found that various 1996 drug transactions committed by the defendant were relevant conduct to the 1999 offense. The panel affirmed, noting that the district court found that the 1996 transactions and the 1999 offense were not isolated occurrences, but rather, part of a continuous pattern of narcotics trafficking. The record supported the finding that the defendant had continued to deal drugs between 1996 and 1999.

United States v. Butner, 277 F.3d 481 (4th Cir. 2002). The district court erred when it did not include the full amount of the post-conversion deposits in the loss amount involved in a conspiracy to commit bankruptcy fraud. The appellate court held that the district court should have included the deposits as relevant conduct for sentencing purposes based on uncontroverted evidence that linked each post-conversion check to the conspiracy.

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). The district court erred in applying a 2-level enhancement for reckless endangerment because a codefendant, in an attempt to flee the police, drove down a one-way street and crashed the vehicle. The appellate court held that the relevant conduct standards are only to be applied in the absence of any specific provisions to the contrary in the underlying guideline. The court noted that a specific provision exists in Application Note 5 of §3C1.2 which states "under this section, the defendant is accountable for his own conduct and for conduct he aided or abetted, counseled, commanded, induced, procured, or willfully caused." Because the record was incomplete as to whether the defendant's own conduct met the standard set in Note 5, the application of §1B1.3 was inappropriate.

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002). The defendant pled guilty to aiding and abetting possession with intent to distribute methamphetamine and marijuana. A string of robberies, during which Pauley stole drugs, formed the basis of the drug-trafficking charge. The government contended that at one robbery, Pauley shot and killed two victims. The district court correctly applied the cross reference to murder under §2D1.1(d)(1), because the murders were part of the same course of conduct as the drug-trafficking crime, and constituted relevant conduct under §1B1.3(a)(2).

United States v. Dove, 247 F.3d 152 (4th Cir. 2001). The district court erred by including conduct that did not violate state law in its "relevant conduct" calculation under §1B1.3. The relevant conduct under the guidelines must be criminal, rather than merely malignant or immoral.

United States v. Kimberlin, 18 F.3d 1156 (4th Cir. 1994). Absent evidence of exceptional circumstances, it is fair to infer that a codefendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash.

United States v. Moore, 29 F.3d 175 (4th Cir. 1994). The abuse of trust enhancement must be based on an individualized determination of each defendant's culpability and cannot be based solely on the acts of co-conspirators.

§1B1.4 Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

United States v. Nichols, 438 F.3d 437 (4th Cir. 2006). A defendant's statement, even if obtained in violation of *Miranda*, may be used against him at sentencing, so long as the confession was not coerced or otherwise involuntary.

United States v. Barber, 119 F.3d 276 (4th Cir. 1997). Unless otherwise prohibited by law, the sentencing court may consider any information concerning the defendant's background, character, and conduct, including dismissed, uncharged, or acquitted conduct.

§1B1.8 Use of Certain Information

United States v. Lopez, 219 F.3d 343 (4th Cir. 2000). When the plea agreement expressly provides that any self-incriminating information would not be used in determining the applicable sentencing guideline range, the sentencing court cannot use the proffered statement as a basis for making a finding as to drug amount.

United States v. Washington, 146 F.3d 219 (4th Cir. 1998). The district court erred in relying on the defendant's statements to his probation officer, which were protected under the defendant's plea agreement, regarding the amount of cocaine distributed to deny him a reduction for minimal or minor participant.

§1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

United States v. Fennell, 592 F.3d 506 (4th Cir. 2010). The defendant was initially sentenced to 97 months for conspiracy and possession with intent to distribute crack cocaine, a 20 percent downward departure for substantial assistance from the bottom of the applicable guideline range of 121-151 months. Pursuant to Amendment 706, the defendant filed an 18 U.S.C. § 3582(c)(2) motion requesting an 80 month sentence, a sentence 20 percent below the amended guideline range of 100-125 months. Instead, the sentencing court reduced the sentence to 96 months, a 20 percent downward departure based on the applicable 120 month mandatory minimum, stating that it lacked the discretion to reduce the sentence any greater than 20 percent below the mandatory minimum. The Fourth Circuit reversed and remanded, stating that sentencing courts are authorized pursuant to section 3582(c)(2) to reduce a sentence based on a guideline range that has been subsequently lowered by the Sentencing Commission and section 3582(c)(2) provides sentencing courts exceptional authority to do so. If the original sentence is below the original guideline range, section 3582(c)(2) does not preclude a departure below the amended guideline range and a motion for substantial assistance permits the court to depart below a mandatory minimum in any instance, including a 3582(c) sentence modification. The circuit court added that sentencing courts are not bound to use one specific method in reducing a defendant's sentence and have the discretion to use a method other than the precise one used at the initial sentencing in calculating a sentence reduction.

United States v. Stewart, 595 F.3d 197 (4th Cir. 2010). The Fourth Circuit held that the "original term of imprisonment" in §1B1.10 refers to the sentence being served by the defendant when he or she moves for a reduction under 18 U.S.C. § 3582(c)(2). Such an "original term" includes a below-guidelines sentence the result of a Fed. R. Crim. Pro. R. 35 motion filed by the government and may be further reduced comparable to the previous reduction received. *See also United States v. Fennell*, 592 F.3d 506 (4th Cir. 2010), *supra*, arriving at the same determination for a sentence the result of a §5K1.1 motion filed by the government.

United States v. Dunphy, 551 F.3d 247 (4th Cir 2009). The defendant moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and was granted a reduction under USSG App. C, Amendment 706 (2-level reduction for crack cocaine) as it is listed at §1B1.10 as an amendment that may be applied retroactively. The resulting sentence was at the bottom of the amended guideline range. The district court denied the defendant's subsequent motion for a sentence reduction pursuant to section 3582(c)(2) for a sentence below the amended guideline range. The district court based its denial on section 3582(c)(2) and 28 U.S.C. § 994(u), which prohibit a court from granting a sentence reduction that is inconsistent with the applicable policy statements issued by the Sentencing Commission. Affirming the district court's denial, the circuit court held: "When a sentence is within the guidelines applicable at the time of the original sentencing, in an 18 U.S.C § 3582(c) resentencing hearing, a district judge is not authorized to reduce a defendant's sentence below the amended guideline range." The circuit court also rejected the defendant's *Booker* argument because "[e]ven before *Booker*, the guidelines were not mandatory in § 3582(c) proceedings."

United States v. Lindsey, 556 F.3d 238 (4th Cir. 2009). Defendants originally sentenced pursuant to the career offender provision, or to a downward departure motion based on substantial assistance, are not eligible for retroactive application of the crack amendment.

United States v. Capers, 61 F.3d 1100 (4th Cir. 1995). "[C]ourts can give retroactive effect to a clarifying (as opposed to substantive) amendment regardless of whether it is listed in USSG §1B1.10."

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Lewis, 606 F.3d 193 (4th Cir. 2010). The Fourth Circuit joined the D.C. Circuit in holding that the retroactive application of severity-enhancing guidelines amendments contravenes the *Ex Post Facto* Clause. Because the guidelines represent the starting point for the sentencing process, an increased advisory guidelines range poses a significant risk that a defendant will be subject to increased punishment.

United States v. Lewis, 235 F.3d 215 (4th Cir. 2000). In calculating the defendant's sentence for conviction of four counts of filing false tax returns, the district court applied the *Guidelines Manual* in effect on the date of sentencing, pursuant to §1B1.11. The defendant appealed, arguing that because the application of the later Manual resulted in increased punishment for the first incident of tax evasion, the sentence violates the *Ex Post Facto* Clause. The appellate court concluded that §1B1.11(b)(3) does not violate the *Ex Post Facto* Clause. The defendant had ample warning when she committed the later acts of tax evasion that those

acts would cause her sentence for the earlier crime to be determined in accordance with the *Guidelines Manual* applicable to the later offenses. Therefore, the district court was correct in applying the revised edition of the *Guidelines Manual*.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.1 First Degree Murder

United States v. Carr, 303 F.3d 539 (4th Cir. 2002). The defendant was convicted of intentionally setting fire to an apartment building and causing the death of an occupant. At sentencing, the district court properly cross referenced the arson guideline to §2A1.1 (First Degree Murder). The defendant then sought a downward departure pursuant to §2A1.1, Application Note 1, which states that a downward departure may be warranted when the defendant did not knowingly or intentionally cause death. At sentencing the district court denied the motion for downward departure, finding that the defendant was recklessly indifferent as to whether people would be in the apartment building and equated reckless indifference with knowledge. Thus, the court denied the defendant's request for a downward departure. The court of appeals vacated the sentence and remanded for a clear finding as to whether the defendant knowingly caused the death of another.

§2A1.2 Second Degree Murder

United States v. Passaro, 577 F.3d 207 (4th Cir. 2009). The guidelines' definition of "dangerous weapon" at §§2A2.2, Application Note 1 and 1B1.1, Application Note 1, encompasses an extremely broad range of instrumentalities, including any item adapted to causing death or serious bodily injury. To properly apply the dangerous weapon enhancement, the district court must explicitly find by a preponderance of the evidence what, if any, instrumentality constituted the basis for the dangerous weapon enhancement.

§2A6.1 Threatening or Harassing Communications; Hoaxes; False Liens

United States v. Stokes, 347 F.3d 103 (4th Cir. 2003). The phrase "more than two threats," as used in §2A6.1(b)(2), refers to the number of threatening communications, not the number of victims threatened.

United States v. Worrell, 313 F.3d 867 (4th Cir. 2002). Pre-threat relevant conduct may be used as evidence of intent to carry out the threat if there is a substantial and direct connection with the offense.

United States v. Brock, 211 F.3d 88 (4th Cir. 2000). The defendant pled guilty to one count of violating 47 U.S.C. § 223(a)(1)(E) by making repeated interstate telephone calls for the purpose of harassing his former girlfriend. Under the terms of the plea agreement, the defendant admitted only to using "threatening words," and the parties agreed that the applicable guideline was §2A6.1(a)(2), which set the base offense level at six. The district court applied a 2-level

enhancement pursuant to §2A6.1(b)(2) for making "more than two threats." The Fourth Circuit reversed application of the enhancement. If §2A6.1(a)(2) applies, then the offense did not involve threats to injure a person, as would be required for an enhancement under §2A6.1(b)(2) to apply. Therefore, "because application of both provisions would require the district court to make contradictory factual findings," the enhancement for making more than two threats was improper.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Loss Issues (§2B1.1(b)(1) and comment. (n.3))

United States v. Wilkinson, 590 F.3d 259 (4th Cir. 2010). The district court determined the defendant's fraudulent conduct did not result in a pecuniary loss for the victim and sentenced him to probation. The government appealed arguing that the district court's loss finding was clearly erroneous. The Fourth Circuit remanded the sentence, stating that although a sentencing court may give weight to any relevant information before it, provided the information has sufficient indicia of reliability, the court failed to provide a sufficient explanation of its rationale in making its loss finding.

United States v. Pierce, 409 F.3d 228 (4th Cir. 2005). The evidence supported the district court's finding that $235,000 was the loss attributable to the defendant convicted of mail fraud in connection with a bingo operation. The estimated total loss was $265,598, based on the average monthly purchases of off-the-books bingo games. The government must prove the amount of loss attributed to a fraud by a preponderance of evidence, and the district court must make a reasonable estimate of the loss, given the available information.

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). There is no statutory reason why the value of certain goods for jurisdictional purposes should be the same as the value for sentencing purposes. The definition of loss for jurisdictional purposes requires a determination of the value of the goods. Loss for guidelines purposes means that value which most closely represents the loss to the victim, and not the monetary value of the property involved.

Means of Identification (§2B1.1(b)(11))

United States v. Giannone, 360 F. App'x 473 (4th Cir. 2010). The district court erred by imposing the 2-level enhancement at §2B1.1(b)(10) for trafficking in unauthorized access devices. Because the defendant was convicted of aggravated identity theft, he received a mandatory consecutive two-year sentence for the unauthorized transfer of the debit card account numbers pursuant to §2B1.6 (Aggravated Identity Theft). Application Note 2 of §2B1.6 states that no Chapter Two enhancement for transferring a means of identification should be applied for the underlying offense because §2B1.6 already accounts for this factor.

§2B3.1 Robbery

United States v. Dimache, 665 F.3d 603 (4th Cir. 2011). The Fourth Circuit affirmed imposition of the §2B3.1(b)(4)(B) 2-level enhancement for physical restraint where the defendant held two tellers on the floor at gunpoint and prevented them from leaving the bank. The court found the size of the area was not controlling; the enhancement depended on whether the victim's freedom of movement was restrained.

United States v. Osborne, 514 F.3d 377 (4th Cir. 2008). The defendant forced two employees of a drugstore he was robbing to accompany him from the back of the store to the front door. At sentencing, he received a 4-level enhancement pursuant to §2B3.1(b)(4)(A) because the employees were "abducted to facilitate commission of the offense or to facilitate escape." The court of appeals held that "an abduction enhancement may properly be applied even though the victim remained within the confines of a single building."

United States v. Reevey, 364 F.3d 151 (4th Cir. 2004). The defendant was charged with carjacking, kidnapping, and possessing a firearm in furtherance of a crime of violence. At sentencing, the district court imposed several sentence enhancements, including a 2-level enhancement for a threat of death pursuant to §2B3.1(b)(2)(F). The defendant argued that the 2-level sentencing enhancement for a threat of death, combined with the sentence for his 18 U.S.C. § 924(c) conviction, resulted in impermissible double counting under the guidelines. The Fourth Circuit stated that the relevant inquiry was whether the threat-of-death enhancement was applied "for possession, brandishing, use, or discharge of an explosive or firearm." Because both of the threats made by the defendant were to shoot the victim with the firearm and the defendant was convicted under section 924(c), the court concluded that the application of the enhancement fell within the scope of §2K2.4's double-counting prohibition.

United States v. Souther, 221 F.3d 626 (4th Cir. 2000). Where the defendant kept his hands in his coat pockets during the robberies after having handed the teller a note indicating that he had a gun, and it appeared that the defendant did have a dangerous weapon, the enhancement was proper even though the defendant did not in fact have a weapon and did not simulate the presence of a weapon with his hands beyond placing them in his pockets.

United States v. Wilson, 198 F.3d 467 (4th Cir. 1999). The appellate court upheld the district court's application of §2B3.1(b)(4)(B) for physical restraint enhancement during a carjacking. A gun was placed to the victim's head, and she was prevented from leaving her car, albeit briefly, until the defendants could get her money and control of the car. Thus, the victim was physically restrained to facilitate the commission of the carjacking.

§2B1.6 Aggravated Identity Theft

United States v. Giannone, 360 F. App'x 473 (4th Cir. 2010). If the defendant receives a two-year consecutive sentence under this provision, no Chapter Two enhancement for transferring a means of identification applies.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Service of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

United States v. Dodd, 770 F.3d 306 (4th Cir. 2014). In a case of first impression, the Fourth Circuit held that a private correctional officer acting under the authority of the Federal Bureau of Prisons holds a "sensitive position" for purposes of the enhancement at §2C1.1(b)(3).

United States v. Quinn, 359 F.3d 666 (4th Cir. 2004). The district court erred because it added the gross rather than the net values of the contracts to calculate the loss for a bribery payment. The court vacated the sentence and remanded for recalculation of loss.

United States v. Matzkin, 14 F.3d 1014 (4th Cir. 1994). The district court properly enhanced the defendant's sentence for influencing an official in a sensitive position pursuant to §2C1.1(b)(2)(B). The defendant was convicted of bribery of a Navy employee who, as supervisory engineer, used his position to acquire and transfer information relating to defense contract procurements. The defendant argued that because his Navy contact was only a GS-15 Navy engineer, he was merely a mid-level employee who lacked the power to award contracts on his own. The court of appeals disagreed, citing to the contact's position on the procurement review panel as evidence of his sensitive position. His position on this three person board provided him with the opportunity not only to obtain the information, but also to influence the Navy's final decision making, because it was unlikely that the Navy would grant a bid without the favorable opinion of the review board.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

Drug Quantity (§2D1.1(a)(5))[1]

United States v. Bell, 667 F.3d 431 (4th Cir. 2011). Calculation of drug quantity must exclude prescription medications lawfully obtained and consumed by the defendant. The district court erred when it failed to explain adequately its methodology for calculating drug quantity and its decision to hold the defendant and her daughter responsible for the entire drug quantity prescribed to the defendant.

[1] In 2014, the Commission amended the Drug Quantity Table in §2D1.1 and the precursor chemicals quantity tables in §2D1.11 to reduce by two the base offense levels assigned to all drug types, while ensuring the guidelines penalties remain consistent with existing mandatory minimum penalties. *See* USSG App. C, amend. 782 (eff. Nov. 1, 2014). The Commission made these revisions to the drug guideline available for retroactive application to previously sentenced defendants, subject to a special instruction requiring that any order granting sentence reductions based on Amendment 782 shall not take effect until November 1, 2015, or later. *See* USSG App. C, amend. 788 (eff. Nov. 1, 2014).

United States v. Fullilove, 388 F.3d 104 (4th Cir. 2004). In a case in which law enforcement officers removed 26 grams of cocaine base from a suspicious package prior to its delivery, inserted a transmitter and left .37 grams for delivery, the district court should have sentenced based on the pre-delivery weight rather than the delivery weight of .37 grams. The court's calculation resulted from an error in interpreting the guideline language; the defendant's culpability was not related to the quantity delivered but to the quantity planned for delivery.

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995). The district court did not commit clear error in converting all the cocaine powder found in the defendant's apartment into cocaine base for sentencing purposes, where credible evidence was presented to establish that the powder cocaine was to be manufactured into cocaine base for distribution.

Dangerous Weapon (§2D1.1(b)(1))

United States v. Manigan, 592 F.3d 621 (4th Cir. 2010). A sentencing court is entitled to consider several important factors when assessing whether a firearm is possessed in connection with relevant drug activity, including: 1) the type of firearm (*e.g.*, a handgun is a tool of the drug trade because it is easily concealed and yet deadly); 2) the proximity of the firearm to the illicit narcotics; and 3) the recognized connection between firearms and drug activities (*i.e.*, a court might reasonably infer that a handgun taken from the residence of a drug trafficker was possessed in connection with his or her drug activities).

United States v. McAllister, 272 F.3d 228 (4th Cir. 2001). The district court erred in applying the 2-level enhancement under §2D1.1(b)(1) for possession of a firearm during a drug felony because there was no reliable evidence to support its application. The only evidence supporting the enhancement was contained in a Drug Enforcement Administration (DEA) investigation report discussing an interview of a person who claimed that he saw the defendant with handguns "on many occasions." The report did not assert that the informant saw the defendant with a handgun during a narcotics transaction.

United States v. Christmas, 222 F.3d 141 (4th Cir. 2000). Two-level enhancement for possession of a dangerous weapon, pursuant to §2D1.1(b)(1), was proper and did not constitute double jeopardy even though the defendant previously had been convicted in state court for the same possession of the same firearm. Under the doctrine of dual sovereignty, federal prosecutions are not barred by a previous state prosecution for the same or similar conduct.

United States v. Goines, 357 F.3d 469 (4th Cir. 2004). The dangerous weapon enhancement does not apply when the defendant is convicted under 18 U.S.C. § 924(c).

United States v. Kimberlin, 18 F.3d 1156 (4th Cir. 1994). The 2-level enhancement applied to the defendants' base offense levels as a result of co-conspirator's possession of a firearm was proper because it was foreseeable that the firearm would be used in the drug offense.

Amendment of §2D1.1 Drug Quantity Table

United States v. Legree, 205 F.3d 724 (4th Cir. 2000). A motion under 18 U.S.C.

§ 3582(c) does not entitle the defendant to a full resentencing, and the district court need not hold a hearing when considering a § 3582(c) motion. *See also United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009) (holding that *Booker* has no effect on § 3582).

United States v. Fletcher, 74 F.3d 49 (4th Cir. 1996). The amendments to §2D1.1 and its inclusion in §1B1.10(c) for retroactive application required resentencing. The amended guideline provides that each marijuana plant is equivalent to 100 grams of dry marijuana, regardless of the number or sex of the plants involved. Under the amended provision, the defendant was responsible for the equivalent of 72.2 kilograms of dry marijuana (level 22, guideline range 41 to 51 months), rather than 722 kilograms (level 30, guideline range 97 to 121 months).

Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

United States v. Cox, 744 F.3d 305 (4th Cir. 2014). The Fourth Circuit agreed with the Seventh and Ninth Circuits that §2G2.2(c)(1)'s purpose requirement is satisfied any time one of the defendant's purposes was to produce a visual depiction of the sexually explicit conduct. In other words, the circuit court explained, producing the depiction need not be the defendant's sole, or primary, purpose. *See also United States v. Hughes*, 282 F.3d 1228 (9th Cir. 2002); *United States v. Veazey*, 491 F.3d 700 (7th Cir. 2007).

United States v. McManus, 734 F.3d 315 (4th Cir. 2013). In a case of first impression, the Fourth Circuit considered whether a defendant's use of a file sharing program constituted distribution of child pornography warranting the 5-level enhancement at §2G2.2(b)(3)(B). The court held that application of the enhancement must be supported by sufficient individualized evidence of the defendant's intent to distribute his pornographic materials in expectation of receipt of a thing of value. The panel rejected the government's proposed *per se* rule that the defendant's use of the file-sharing program Gigatribe was sufficient evidence to prove such intent.

United States v. Strieper, 666 F.3d 288 (4th Cir. 2012). The Fourth Circuit held that for purposes of §2G2.2(b)(5) (a 5-level enhancement applicable when the "defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor"), "the term 'minor' may include an unidentified individual, provided that evidence shows the individual would be under eighteen years of age." In this case, the defendant engaged in an online chat with a confidential source for Immigration and Customs Enforcement "about [his] large child pornography collection and his desire to kidnap, molest, and murder a young child." Although the defendant was arrested before he identified a specific child to abduct and assault, the district court determined that he would have carried out his plan. As a result, the Fourth Circuit found that the defendant's failure to identify a specific child did not diminish his danger to children or his first-

hand involvement in the exploitation of a minor, the type of conduct that §2G2.2(b)(5) is intended to address.

United States v. Spence, 661.F.3d 194 (4th Cir. 2011). On appeal, the Fourth Circuit affirmed use of the modified categorical approach to determine whether a prior South Carolina conviction for assault and battery of a high and aggravated nature (ABHAN) qualified as a predicate offense that resulted in the statutory enhancement under 18 U.S.C. § 2252A(b)(2). Under § 2252A(b)(2), a conviction for possession of child pornography carries a ten-year mandatory minimum if the defendant has a prior conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor." Because the defendant's prior ABHAN conviction did not necessarily relate to offensive sexual conduct, the court used the modified categorical approach to consider the nature of the prior offense conduct. The Fourth joined the Sixth, Eighth, and Ninth Circuits in finding that the categorical and modified categorical approach should be applied in the context of the statutory sexual abuse enhancement.

United States v. Layton, 564 F.3d 330 (4th Cir. 2009). In a matter of first impression, the Fourth Circuit joined the Seventh, Eighth, and Eleventh Circuits in holding that use of a peer-to-peer file-sharing program constitutes 'distribution' for the purposes of §2G2.2(b)(3)(F). "When knowingly using a file-sharing program that allows others to access child pornography files, a defendant commits an act 'related to the transfer of material involving the sexual exploitation of a minor.' U.S.S.G. §2G2.2 cmt. n.1."

United States v. Dotson, 324 F.3d 256 (4th Cir. 2003). The defendant pled guilty to attempting to receive a child pornography videotape. The defendant answered an advertisement on the computer and placed an order for a child pornography videotape. The district court did not err in applying a 2-level increase under §2G2.2(b)(5)[2] for the use of a computer in connection with the offense because those who seek out and respond to notice and advertisement of such materials are as culpable as those who initially send out the notice and advertisement. The court affirmed the district court's application of the enhancement.

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage by Use of Explosives

United States v. Davis, 202 F.3d 212 (4th Cir. 2000). Shooting a gun constituted a "use of explosives" under §2K1.4.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

Number of Firearms involved in the Offense (§2K2.1(b)(1))

United States v. Pineda, 770 F.3d 313 (4th Cir. 2014). The Fourth Circuit rejected defendant's argument that the 2-level enhancement at §2K2.1(b)(1)(A) for committing an

[2] Redesignated as §2G2.2(b)(6). *See* USSG App. C, amend. 664 (effective Nov. 1, 2004).

offense that involved three or more firearms cannot be applied in conjunction with his sentence for violating 18 U.S.C. § 924(c)(1)(A) as it created impermissible double counting, insofar as the firearm that was the basis for his section 924(c) conviction cannot also be counted when determining the number of weapons involved for purposes of the § 2K2.1(b)(1) enhancement. Instead, the Fourth Circuit held that §2K2.1(b)(1)'s enhancement based on the number of firearms involved in the offense does not qualify as an enhancement "for possession, brandishing, use, or discharge" of a firearm as prohibited by section 924(c)(1)(A). *See* §2K2.4, comment. (n.4).

Lawful Sporting Purposes or Collection (§2K2.1(b)(2))

United States v. Solomon, 274 F.3d 825 (4th Cir. 2001). The defendant purchased a 9mm pistol and falsely answered "no" to whether he had ever been convicted of a misdemeanor. At sentencing, he received an 8-level reduction for possessing a firearm for lawful sporting purposes under §2K2.1(b)(2). The court erred when it applied the lawful sporting purposes reduction because there was no evidence of the purpose for which the weapon had been used. Section 2K2.1(b)(2) permits a reduction only if a firearm is possessed "solely for lawful sporting purposes or collection."

Possession in Connection with another Offense (§2K2.1(b)(6))

United States v. Blount, 337 F.3d 404 (4th Cir. 2003). The question on appeal was whether a §2K2.1(b)(5)[3] enhancement should apply when a defendant acquired a firearm during a theft or burglary, but did not use the firearm or show any willingness to do so. The Fourth Circuit held that the burglary did qualify as "another felony offense" but that a §2K2.1(b)(5) enhancement was nonetheless improper because the record did not demonstrate a sufficient nexus between the burglary and the defendant's possession of a firearm. The court noted that its past opinions treated "in connection with" as synonymous with "in relation to." In other words, a weapon is used or possessed "in connection with" another offense if the weapon facilitated or has a tendency to facilitate the [other] offense. *Id.* at 829. The firearm must have some purpose or effect with respect to the crime; its presence or involvement could not be the result of accident or coincidence.[4]

United States v. Schaal, 340 F.3d 196 (4th Cir. 2003). The defendant argued that the district court impermissibly double counted by applying both the §2K2.1(b)(4) enhancement for stolen firearms and the §2K2.1(b)(5) enhancement for use of a firearm in connection with another felony offense. The defendant argued that the §2K2.1(b)(5) enhancement already took into account the fact that the weapons were stolen, and therefore application of the §2K2.1(b)(4)

[3] Redesignated as §2K2.1(b)(6)((B). *See* USSG App. C, amend. 691 (effective Nov. 1, 2006).

[4] In 2006, the Commission amended §2K2.1(b)(5) to resolve a circuit split concerning the application of the enhancement for the use of a firearm in connection with a burglary and drug offense. In the case of a burglary offense, the enhancement applies to a defendant who takes a firearm in the course of a burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In the case of a drug trafficking offense, the enhancement applies where the firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. *See* Amendment 691, USSG App. C. However, *ex post facto* concerns bar application of the enhancement in cases occurring before the amendment.

enhancement constituted double counting. The Fourth Circuit concluded that the guidelines do not prohibit the application of both enhancements under the instant circumstances, noting that the Commission had addressed the issue of double counting with regard to §2K2.1(b)(4) without forbidding simultaneous application of the §2K2.1(b)(4) and (b)(5) enhancements. In addition, the court found that the two enhancements were conceptually separate, in that either could apply in the absence of the other. Consequently, the court concluded that the district court did not engage in impermissible double counting in applying the two enhancements together.

Other Issues

United States v. Levenite, 277 F.3d 454 (4th Cir. 2002). The district court did not err by including detonators as weapons for a 6-level enhancement under §2K2.1(b)(1)(C). The court held that since §2K2.1 includes destructive devices as defined by 26 U.S.C. § 5845, a detonator could potentially be a destructive device subject to proof from the government that the defendant intended to use it as a weapon. The government produced evidence that the defendant had no legitimate reason for possession of the detonators and that the detonators were designed to set off explosives like dynamite. Finally, the government showed that the detonators were seized from the defendant's house along with various other firearms. The appellate court held that although the evidence presented by the government was circumstantial, it was sufficient to support a finding that the defendant intended to use the detonators as weapons.

United States v. Fenner, 147 F.3d 360 (4th Cir. 1998). The cross reference in §2K2.1 required the application of the homicide guideline where death resulted from the firearms offense for which the defendants were sentenced; even though the defendants had previously been acquitted of the homicide. The court of appeals found that §2K2.1's cross reference to the homicide guideline does not violate due process. *See also* §1B1.1. *See also United States v. Horton*, 693 F.3d 463 (4th Cir. 2012) (vacating application of the homicide cross reference because the murder did not fall within the scope of the defendant's relevant conduct).

United States v. Peterson, 629 F.3d 432 (4th Cir. 2011). Post-*Begay*, North Carolina's crime of involuntary manslaughter is not a crime of violence as defined in §4B1.2(a).

United States v. Payton, 28 F.3d 17 (4th Cir. 1994). The defendant argued that his prior South Carolina conviction for involuntary manslaughter was not a "crime of violence" because it was not a specific intent crime and because the catchall phrase of §4B1.2 applies only to crimes against property. The panel relied on §4B1.2, Application Note 2, which specifically includes manslaughter within the definition of a "crime of violence."

§2K2.4 Use of Firearms, Armor-Piercing Ammunition, or Explosives During or in Relation to Certain Crimes

United States v. Hamrick, 43 F.3d 877 (4th Cir. 1995) (en banc). The district court did not err in finding that the improvised dysfunctional incendiary letter bomb used by the defendant in his attempt to assassinate a United States Attorney was a "destructive device" under 18 U.S.C. § 924(c)(1). The defendant argued that the terms "firearm" and "destructive device" were interchangeable, and the district court should have imposed the five-year sentence prescribed for

use of a "firearm" instead of the 30-year sentence prescribed for use of a "destructive device." The panel ruled that while "firearm" is defined to include "destructive device," the terms are not interchangeable. Rather, "destructive device" is a subset of "firearm," and the statute is clear that use of a destructive device shall be punished by 30 years' imprisonment.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Valdovinos, 760 F.3d 322 (4th Cir. 2014). The Fourth Circuit rejected defendant's argument that his prior North Carolina drug trafficking conviction did not qualify as a felony for the purposes of the 12-level enhancement at §2B1.1(b)(1)(B) because he was sentenced pursuant to a plea agreement that capped his prison term at 12 months. In Valdovinos's case, North Carolina's Structured Sentencing Act authorized a maximum sentence of 16 months' imprisonment for his prior conviction. However, the sentence ultimately imposed pursuant to his plea deal was 10 to 12 months' imprisonment. Affirming the district court's application of the enhancement, the Fourth Circuit stated that North Carolina's legislatively mandated sentencing scheme, not a recommended sentence hashed out in plea negotiations, determines whether an offender's prior North Carolina conviction was punishable by more than a year in prison.

United States v. Henriquez, 757 F.3d 144 (4th Cir. 2014). The Fourth Circuit held a conviction of first degree burglary under Maryland law (Md. Code Ann., Crim. Law § 6-202(a)) is not a crime of violence for purposes of §2L1.2(b)(1)(A)(ii). Because Maryland's statute does not define "dwelling," the circuit court opined that the statue encompasses conduct such as burglary of a boat or motor vehicle. Such conduct is beyond the Supreme Court's determination that burglary is a crime of violence only if committed in a building or enclosed space, but not in a boat or motor vehicle. *See Shepard v. United States*, 544 U.S. 13, 15-16 (2005).

United States v. Medina, 718 F.3d 364 (4th Cir. 2013). The Fourth Circuit held that a guilty plea resulting in a diversionary disposition is a conviction under federal law. In 2004, the defendant pled guilty to violations of Maryland law and the state judge issued a "probation before judgment" diversionary disposition without entering judgment in the case. In 2011, Medina was federally indicted in Maryland for unlawful reentry after removal, in violation of 8 U.S.C. § 1326. At sentencing, the district court applied the enhancement at §2L1.2(b)(1)(D) because Medina "previously was deported, or unlawfully remained in the United States, after a conviction for" a felony. Medina argued that his 2004 probation-before-judgment disposition did not trigger the enhancement at §2L1.2(b)(1)(D) because the term "conviction" as defined in §2L1.2 did not include diversionary dispositions such as probation-before-judgment. The Fourth Circuit rejected the defendant's argument, stating that in the general definitions section for the immigration laws, Congress specifically defined a conviction to include a diversionary disposition -- that is, a situation in which "adjudication of guilt has been withheld" -- if (1) "a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendre* or has admitted sufficient facts to warrant a finding of guilt" and (2) "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." *See* 8 U.S.C. § 1101(a)(48).

United States v. Maroquin-Bran, 587 F.3d 214 (4th Cir. 2009). The Fourth Circuit vacated a 16-level enhancement pursuant to §2L1.2(b)(1)(A) because the district court did not determine whether the defendant's prior state conviction was a qualifying drug trafficking offense. The district court must compare the statutory definition of the prior offense to the guidelines' definition. When a statute prohibits both qualifying and non-qualifying offenses, the court may examine the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge.

United States v. Chacon, 533 F.3d 250 (4th Cir. 2008). In a matter of first impression, the Fourth Circuit held that "a sex offense perpetrated in the absence of consent -- and which does not have as an element the use, attempted use, or threatened use of physical force -- constitutes a 'crime of violence' under the Guidelines."[5]

United States v. Amaya-Portillo, 423 F.3d 427 (4th Cir. 2005). A felony under the Controlled Substance Act means any federal or state offense classified by applicable federal or state law as a felony. Since the defendant's Maryland conviction for cocaine possession is not classified as a felony by either federal or Maryland law, the offense is not a felony under 21 U.S.C. § 802(13), nor an aggravated felony under §2L1.2 of the guidelines.

Bejarano-Urrutia v. Gonzales, 413 F.3d 444 (4th Cir. 2005). In determining whether a crime fits the definition of crime of violence, for purposes of the Immigration and Naturalization Act provision authorizing removal of aliens convicted of an aggravated felony, the court must look to the intrinsic nature of the crime, not to the facts of each individual commission of the offense. The alien's conviction for involuntary manslaughter, under Virginia law, was not a "crime of violence," and thus was not an "aggravated felony" warranting removal. Although a violation of Virginia's involuntary manslaughter statute involved a substantial risk that the perpetrator's actions would cause physical harm, since it required reckless disregard for human life, it did not intrinsically involve a substantial risk that force would be involved.

United States v. Campbell, 94 F.3d 125 (4th Cir. 1996). The district court correctly determined that the defendant's manslaughter conviction was a crime of violence included in the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(f) and, therefore, properly applied a 16-level enhancement to the defendant's sentence. The defendant argued that the district court improperly applied the statute because his underlying "aggravated felony" conviction preceded the amendment date that extended the definition of an "aggravated felony" to include crimes of violence. The appellate court held that the intent of the amendment was to allow predicate offenses to be used as enhancement penalties for those aliens who had been deported after being convicted of an aggravated felony. The court noted that, in considering a sentence under §2L1.2(b)(2), all prior felonies were relevant in the determination of a sentence.

[5] This decision arrived at the result intended by the Commission with the amendment to §2L1.2 that became effective November 1, 2008. *See* USSG App. C, Amendment 722.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001). The district court correctly applied §2S1.1 in quantifying the loss attributable to the fraud scheme of defendants convicted of mail fraud under 18 U.S.C. § 1341, conspiracy to commit money laundering under 18 U.S.C. § 1956(h), six counts of money laundering under Section 1956(a)(1)(A)(i), and three counts of making false declarations in a bankruptcy case under 18 U.S.C. § 152(3). The district court's determination of the loss attributable to their fraud scheme was correct despite the defendants' contention that certain amounts of money paid by three non-testifying investors and funds obtained in good faith should not have been included. There was no error in the district court's determination under §2S1.1, because the amount of money involved in this type of crime is an indicator of the magnitude of the commercial enterprise.

United States v. Barton, 32 F.3d 61 (4th Cir. 1994). The defendant pled guilty to attempted money laundering. The district court properly rejected the defendant's argument that §2S1.1(b)(2)'s definition of "value of the funds" should be determined by the amount of money actually used in the government sting. Rather, the "value of the funds" is the amount of money the defendant agreed to launder. To hold otherwise would allow the government to affect a sentencing variable simply by adjusting the amount of flash money used, and it would ignore the amount the defendant agreed and intended to launder.

§2S1.3 Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

United States v. Abdi, 342 F.3d 313 (4th Cir. 2003). The district court did not err when it concluded that the defendants were not entitled to the sentencing reduction offered by the safe harbor provision of §2S1.3(b)(3). The defendants pled guilty to conspiracy to structure financial transactions to evade reporting requirements in violation of 31 U.S.C. § 5324. The defendants failed to demonstrate that the proceeds that they structured were from lawful activities and that the monies they transmitted were to be used for a lawful purpose. Accordingly, the defendants were unable to meet their burden of satisfying the conditions for the safe harbor provision.

Part T Offenses Involving Taxation

§2T3.1 Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

United States v. Hassanzadeh, 271 F.3d 574 (4th Cir. 2001). The district court did not err in sentencing a defendant for aiding and abetting the making of a false statement and illegally importing carpets of Iranian origin. The defendant challenged the method used to calculate the loss amount. The Fourth Circuit held that the calculation used by the court applies to "items for

which entry is prohibited, limited, or restricted," and "harmful" under §2T3.1. Noting the Sentencing Commission's emphasis that the evaded duty "may not adequately reflect the harm to society or protected industries," the Fourth Circuit concluded that contribution of financial support to terrorism constitutes greater harm to society than harms usually associated with the illegal importation of goods. Thus, the goods in question clearly fit the definition of posing a significant "harm to society" and received the correct calculation.

Part X Other Offenses

§2X3.1 Accessory After the Fact

United States v. Godwin, 253 F.3d 784 (4th Cir. 2001). The defendant was convicted of harboring a fugitive in violation of 18 U.S.C. § 922(g). The guideline is the accessory-after-the-fact guideline, §2X3.1, which sets the base level at "6 levels lower than the offense level for the underlying offense." The "underlying offense" is "the offense as to which the defendant is convicted of being an accessory," §2X3.1, comment (n.1). The fugitive was convicted of possession of a firearm by a prohibited person, which carries a base offense level of 14 under §2K2.1(a)(6). Instead of using offense level of 14, the court used the base level of 24, the level that the fugitive was *actually* sentenced to and which reflected enhancements for criminal history. The Fourth Circuit held that there is no support for this interpretation in the language of §2X3.1, because that guideline refers to the level of the "underlying offense" and not the level actually applied to the "principal offender." The court noted, however, that the base level could be higher than 14 if the principal had received enhancements for the firearms charge pursuant to §2K2.1 which "involve the actual conduct of the [principal] in the context of the charged offense," as opposed to "enhancements based on the criminal history" of the principal.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Dowell, 771 F.3d 162 (4th Cir. 2014). In a case of first impression, the Fourth Circuit held that the district court erred when it applied the upward adjustment for a "vulnerable victim" at §3A1.1(b)(1) based upon the victim's age-related cognitive development and psychological vulnerability, factors already incorporated into an upward adjustment for the young age of the victim pursuant to §§2G2.1(b)(1) and 2G2.2(b)(2). This result may be in conflict with the outcomes in *United States v. Wright*, 373 F.3d 935 (9th Cir. 2004) and *United States v. Jenkins*, 712 F.3d 209 (5th Cir. 2013).

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). The district court erred in applying the vulnerable victim 2-level enhancement pursuant to §3A1.1. Although it was indisputable that the victims were elderly, and many of them likely suffered from both mental and physical ailments, there were no factual findings showing that the vulnerability of the Emerald Health's residents facilitated the defendant's offenses. And, there were no findings supporting the idea that these residents were targeted because of their unusual vulnerability. *See also United States v. Etoty*, 679 F.3d 292 (4th Cir. 2002) (reviewing the district court's findings

that the victim was vulnerable and deciding that the defendant was aware of the victim's vulnerability).

United States v. Hill, 322 F.3d 301 (4th Cir. 2003). Under §3A1.1, a defendant should receive a 2-level enhancement if he knew or should have known that a victim of the offense was a vulnerable victim. In the instant case, the victim was in his mid-sixties, had suffered a stroke, and lived like a hermit. The court held that there was more than enough evidence to support the district court's finding that the vulnerable victim enhancement applied.

§3A1.2 Official Victim

United States v. Hampton, 628 F.3d 654 (4th Cir. 2010). The Fourth Circuit held that battery of a law enforcement officer satisfies the assault requirement at §3A1.2(c)(1). After concluding that the common meaning of the word "assault" is synonymous with "attack" and that at common law "assault" and "battery" are synonymous, the panel found that the defendant's struggle with a policeman that caused the officer a serious bodily injury merited the adjustment.

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001). The district court correctly applied adjustments for assault on an officer and reckless endangerment during flight under §§3A1.2(b) and 3C1.2, respectively. Defendants pled guilty to armed bank robbery and carrying a firearm in relation to a crime of violence, 18 U.S.C. § 924(c). After robbing a bank, the defendants engaged police in a high-speed multiple car chase during which an accomplice fired shots at officers and both vehicles crashed. The Fourth Circuit found that the adjustments made under §§3A1.2 and 3C1.2 were not erroneous because each was based on separate conduct. The court also held that the district court did not err in finding that the unarmed codefendant could reasonably foresee that one of his armed codefendants could fire a weapon that would create a risk of serious bodily injury and that the defendant aided and abetted conduct that created a substantial risk of death or serious bodily injury to the children in the getaway cars and the public during the high-speed flight that followed the robbery.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Slade, 631 F.3d 185 (4th Cir. 2011). The district court erred when it imposed §3B1.1's 3-level enhancement for aggravating role. The evidence of buying and selling drugs with a number of co-conspirators was not sufficient; there was no indication that the defendant actively exercised authority over the other participants.

United States v. Cameron, 573 F.3d 179 (4th Cir. 2009). The district court erred when it applied §3B1.1 because the government failed to show that the defendant actually exercised authority over other participants or actively directed their activities. The evidence indicated only that the defendant supplied counterfeit currency to the operation and the supplying of contraband to other participants in a conspiracy and involvement in illegal transactions, without more, cannot sustain the application of the leadership enhancement. *See also United States v. Sayles*,

296 F.3d 219, 224 (4th Cir. 2002) (discussing the seven-factor test at §3B1.1, Application Note 4, used to determine the defendant's leadership and organizational role in the offense).

United States v. Rashwan, 328 F.3d 160 (4th Cir. 2003). In order to increase a sentence under §3B1.1, a sentencing court should consider whether the defendant exercised decision making authority for the venture, whether he recruited others to participate in the crime, whether he took part in planning or organizing the offense, and the degree of control and authority that he exercised over others. Leadership over only one other participant is sufficient to support the adjustment as long as there was some control exercised.

United States v. Nicolaou, 180 F.3d 565 (4th Cir. 1999). The district court did not err in applying a leadership enhancement after the related offenses were grouped. The defendants were convicted of conducting an illegal gambling business, money laundering, and income tax charges. The defendant's gambling offenses were relevant conduct under the guidelines because they occurred during the commission of, and in preparation for "the money laundering." Without the gambling operation, there would have been no ill-gotten gains to launder.

United States v. Turner, 198 F.3d 425 (4th Cir. 1999). Because the offense of intentionally killing and causing the intentional killing of an individual while engaging in a continuing criminal enterprise did not include a supervisory role as an element of the offense, a 2-level adjustment pursuant to §3B1.1(c) for the defendant's role in the offense was not impermissible double counting.

§3B1.2 Mitigating Role

United States v. Pratt, 239 F.3d 640 (4th Cir. 2001). Whether the defendant is a minor participant in the conspiracy is measured not only by comparing his role to that of his codefendants, but also by determining whether his "conduct is material or essential to committing the offense."

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Weiss, 754 F.3d 207 (4th Cir. 2014). The Fourth Circuit held that the district court did not err when it applied §3B1.3 where the defendant falsely claimed to be a certified public accountant (CPA) when soliciting clients for his payroll processing company. The circuit court found that a trust relationship exists as a client company can reasonably believe that it has hired a licensed accounting professional to ensure the proper processing of its payroll liabilities and responsibilities.

United States v. Brack, 651 F.3d 388 (4th Cir. 2011). The court did not err when it imposed the abuse-of-trust enhancement. By posing as a bail bondsman, the defendant represented herself to the victim as holding a position of public or private trust.

United States v. Ebersole, 411 F.3d 517 (4th Cir. 2005). The facts set forth in the presentence report did not support the imposition of the §3B1.3 enhancement. Representatives

of the victimized federal agencies, in awarding contracts to the defendant's company, relied on the defendant's assertions that he was certified by state and federal regulating agencies as a bomb-sniffing canine team handler. The presentence report describes an arms-length commercial relationship where trust is created by the defendant's personality or the victim's credulity. These facts cannot justify the abuse of trust enhancement.

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). Under §3B1.3, an adjustment in the base offense level is authorized if the defendant abuses a position of public or private trust in a manner that significantly facilitates the commission or concealment of the offense. Whether an individual occupied a position of trust should be addressed from the perspective of the victim, in this case Medicaid. Medicaid entrusted the defendant with thousands of dollars in prospective payments that were to be used for the benefit of the Medicaid beneficiaries. The abuse of that authority contributed significantly to the commission and concealment of the fraud scheme. The court affirmed the district court's application of the "abuse of position of trust" adjustment.

United States v. Caplinger, 339 F.3d 226 (4th Cir. 2003). The district court erred in applying a 2-level enhancement under §3B1.3 on the ground that the defendant abused a position of trust when he misrepresented himself as a prominent physician in an effort to attract investors. Application of the §3B1.3 enhancement required more than a mere showing that the victim had confidence in the defendant. The fact that the defendant posed as a physician did not by itself mean that he occupied a position of trust because the defendant did not assume a doctor-patient relationship with any of the victims. Rather, the victims were investors who invested money in the company. The court found that although the defendant's assumed status as an accomplished physician was used to persuade the investors to invest in the defendant's venture, the facts did not support the conclusion that the defendant, by posing as a physician, occupied a position of trust with the victims as that term was used in §3B1.3 of the guidelines. Accordingly, the district court erred in applying a 2-level enhancement under §3B1.3.

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001). Adjustment for an abuse of trust was permitted because the sentencing court found ample evidence to support the adjustment. The evidence included the defendant's solicitation of investors through her work as an accountant and as a tax preparer, as well as testimony from witnesses who stated that they gave money to the defendant because they trusted her.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The district court erred in applying a §3B1.3 special skill enhancement. The defendant operated a tax preparation business out of his convenience store. He was not an accountant and had no special training in the area of tax preparation. The district court applied a §3B1.3 special skills enhancement, relying on the fact that the defendant used some special skills, and that he availed himself of services of co-conspirators who had special skills. The appellate court reversed, concluding that the defendant did not have special skills, and that his co-conspirators' skills were not relevant to the enhancement. "Role in the offense" adjustments, such as the special skill enhancement, are based on a defendant's status, not based on a co-conspirator's action. The district court also erred by concluding that tax preparation as practiced by the defendant was a special skill. A special skill usually requires substantial education, training or licensing, and the record reflected that the defendant did not have any formal training in the areas of tax preparation.

United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999). The Fourth Circuit has rejected a mechanistic approach to abuse of trust that excludes defendants from consideration based on their job titles. Instead, several factors should be examined in determining whether a defendant abused a position of trust. Those factors include: 1) whether the defendant has either special duties or special access to information not available to other employees; 2) the extent of discretion the defendant possesses; 3) whether the defendant's acts indicate that he is "more culpable than the others" who are in positions similar to his and engage in criminal acts; and 4) viewing the entire question of abuse of trust from the victim's perspective. The district court did not err in determining that the defendant held a position of trust because the defendant had special access to information as a real estate agent. The agency's clients not only gave the agency confidential information, but also keys to their homes. In addition, the defendant's position made his criminal activities harder to detect. Finally, although the banks may have ultimately borne the financial burden, the clients were victimized as well because their identities and credit histories were used to facilitate the crime.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The district court did not err in its application of a 2-level enhancement for an abuse of trust. The defendant, a group leader in the Sales and Audit Department at Woodward and Lothrop, used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately $40,000. The defendant was one of two group leaders who possessed a computer authorization code that others did not, and she used that code to conceal the fraudulent transactions.

United States v. Moore, 29 F.3d 175 (4th Cir. 1994). The abuse of trust enhancement must be based on each defendant's culpability, and not solely on the acts of co-conspirators.

§3B1.4 Using a Minor to Commit a Crime

United States v. Murphy, 254 F.3d 511 (4th Cir. 2001). The plain language of the congressional directive to "promulgate guidelines or amend existing guidelines to provide that a defendant 21 years of age or older who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense," did not expressly prohibit a younger defendant from receiving such an enhancement. *See also United States v. Gomez-Jimenez*, 750 F.3d 370, 379-81 (4th Cir. 2014) (discussing the adjustment and affirming its application).

Part C Obstruction and Related Adjustments

§3C1.1 Obstruction or Impeding the Administration of Justice

United States v. Perez, 661 F.3d 189 (4th Cir. 2011). The district court erred when it applied the 2-level obstruction of justice enhancement because the court did not establish whether the false testimony was willfully given.

United States v. Sun, 278 F.3d 302 (4th Cir. 2002). The district court did not err when it enhanced the sentence of a defendant because he willfully made materially false statements when he testified at trial. The district court found that the defendant made several materially false

statements concerning his reliance on the advice of counsel, on the advice of a State Department official, and in his denial of his intent when he committed the illegal act. Because the defendant lied about these material issues and matters at the heart of the case, the court found sufficient willful intent to deceive and rejected the defendant's challenge to the 2-level increase.

United States v. Godwin, 272 F.3d 659 (4th Cir. 2001). The district court correctly enhanced the defendants' sentences for obstruction of justice under §3C1.1. Section 3C1.1 permits an increase in the defendant's offense level by two levels if the defendant commits perjury by giving "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The defendant pled guilty to drug trafficking and was released on bond pending sentencing. He then failed to appear at his sentencing hearing because he feared the length of his upcoming sentence, and he failed to appear at meetings and avoided apprehension by police for more than six months. The district court did not enhance his sentence because it accepted his explanation. The Fourth Circuit held that his flight served as a willful obstruction of justice and remanded the case for resentencing.

United States v. Stewart, 256 F.3d 231 (4th Cir. 2001). The district court did not err by finding that the defendant obstructed justice where the defendant engaged in continuous misconduct throughout the trial, making gun-like hand gestures and shouting outside the jury room in an attempt to intimidate the jurors.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The defendant was convicted of conspiracy to defraud the United States and filing fraudulent tax return claims in connection with a rapid refund enterprise. The defendant appealed only his sentence specifically with respect to an enhancement for obstruction of justice and an enhancement for use of a special skill. After the trial, but before sentencing, the probation officer charged with preparing the presentence report interviewed the defendant. According to the probation officer, the defendant denied knowingly listing false information on the tax returns, recording only the information provided to him by his clients, the validity of which he did not investigate. As a result, the defendant denied engaging in any criminal activities. Noting a "denial of guilt" exception to the obstruction of justice enhancement, the appellate court nevertheless affirmed its application finding the defendant's statements to the probation officer "went beyond merely denying his guilt and implicated his taxpayer clients in the scheme to defraud the IRS," and were material inasmuch as the statements could have affected the sentence ultimately imposed.

§3C1.2 Reckless Endangerment During Flight

United States v. Shell, 2015 WL 3644036 (4th Cir. June 12, 2015). The Fourth Circuit held that the § 3C1.2 enhancement does not apply where the defendant was unaware that he or she was being pursued by a law enforcement officer.

United States v. Carter, 601 F.3d 252 (4th Cir. 2010). The Fourth Circuit held that "§3C1.2 is appropriate when a defendant, during flight from the police, enters the residence of

another person without that other person's permission, and regardless of whether that other person is present within the residence at the time of entry."

United States v. Chong, 285 F.3d 343 (4th Cir. 2002). Where a co-defendant drove recklessly to avoid arrest, the court of appeals remanded for determination of whether the defendant's own conduct constituted reckless endangerment, or whether he aided and abetted, or otherwise promoted his co-defendant's actions.

United States v. Harrison, 272 F.3d 220 (4th Cir. 2001). Adjustments under both §§3A1.2 and 3C1.2 are permissible because each adjustment is based upon separate conduct.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Bolden, 325 F.3d 471 (4th Cir. 2003). Fraud and money laundering offenses should only be grouped when they are closely related. The defendants' money laundering activities were essential to achieving the improper extraction of monies from Medicaid, and the money laundering and fraud activities were part of a continuous, common scheme. The district court had properly grouped the fraud and money laundering offenses.

United States v. Pitts, 176 F.3d 239 (4th Cir. 1999). The appellate court affirmed the district court's decision not to group the defendant's attempted espionage and conspiracy to commit espionage convictions for sentencing purposes. The district court found that the conduct was not a single course of conduct with a single objective as contemplated by §3D1.2. If the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual–albeit identical–goal, then the district court should not group the offenses.

United States v. Walker, 112 F.3d 163 (4th Cir. 1997). The district court correctly calculated the defendant's sentence for mail fraud and money laundering. The court grouped the counts pursuant to §3D1.2(d) and applied the higher base offense level for money laundering under §3D1.3(b). The defendant challenged the 4-level increase because the fraudulent scheme involved between $600,000 and $1,000,000, arguing that the court should have considered only $5,051.01 in fictitious payments identified in the indictment. However, the allegations in the mail fraud counts, which the defendant conceded involved $850,913.59, were incorporated into the money laundering counts. The Fourth Circuit found that the guidelines permitted the court to use the amount of money the defendant obtained through mail fraud as the basis for calculating his specific offense characteristic under the money laundering guideline.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Divens, 650 F.3d 343 (4th Cir. 2011). After the defendant timely informed the government of his intent to plead guilty, the government refused to move for the additional 1-level reduction under §3E1.1(b) at sentencing because the defendant had refused to sign a plea agreement waiving his appellate rights. Although the Fourth Circuit agreed that the

government retained discretion to refuse to move for the additional 1-level reduction, the court found that the government's discretion was limited under the commentary to §3E1.1. The court found that, if the defendant accepted responsibility in a timely manner such that the government did not have to prepare for trial, the government must move for the additional level. Upon remand, if the government cannot provide a valid reason for refusing to move for the additional reduction, the district court should order the government to file the motion.

United States v. Pauley, 289 F.3d 254 (4th Cir. 2002). The district court did not err in its refusal to reduce the defendant's base offense level for acceptance of responsibility because the defendant clearly did not accept responsibility. The defendant filed an appeal denying the amount of drugs ascribed to him by the court under a relevant conduct analysis and denied his culpability in the murders listed as relevant conduct by the court. Such denials do not constitute acceptance of responsibility.

United States v. Hudson, 272 F.3d 260 (4th Cir. 2001). The Fourth Circuit reversed the district court's decision to grant the defendant a reduction in his sentence under §3E1.1 for acceptance of responsibility. The defendant pled guilty to drug trafficking but had engaged in conduct that constituted obstruction of justice. The conduct precluded the reduction.

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). The defendant was convicted of conspiring to transport stolen property and aiding and abetting. The defendant argued that it was clear error for the district court to refuse to consider his polygraph evidence at sentencing. The polygraph evidence, however, only indicated the defendant's continued denial of responsibility because it served as evidence that he did not realize that the property was stolen, *i.e.*, that he did not commit the crime for which he was charged. Consequently, the district court did not commit any error in denying the decrease for acceptance of responsibility.

United States v. Dickerson, 114 F.3d 464 (4th Cir. 1997). The district court erred in giving the defendant credit for acceptance of responsibility. The district court based its decision to grant the adjustment on two grounds: the defendant saved both the court and the government time by having a bench trial; and the defendant never indicated at trial that he did not accept the fact that he lied. The Fourth Circuit reversed, reasoning that the guidelines make no distinction between a bench and a jury trial, but rather between a defendant who puts the government to its burden of proof at trial and a defendant who does not. The court found that the defendant went to trial to attempt to prove that his lies to the grand jury were not material. Because materiality is an essential element of any perjury offense, the defendant challenged his factual guilt. For these reasons, the defendant was not entitled to an acceptance of responsibility reduction.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Martinez-Melgar, 591 F.3d 733 (4th Cir. 2010). A district court may properly rely on circumstantial evidence, such as a computerized printout from a state's offender

information system, to make factual findings for purposes of §4A1.1. Absent any indication that the state records are inaccurate, a sentencing judge may reasonably conclude that the records are accurate for purposes of guidelines calculations.

United States v. Collins, 415 F.3d 304 (4th Cir. 2005). The defendant challenged his criminal history category on appeal, alleging that the government failed to show that there was no constitutional defect regarding a prior conviction. The Fourth Circuit held that for purposes of determining defendant's criminal history category under sentencing guidelines, the presumption of regularity that attaches to final judgments puts the burden on the defendant to raise an inference of the invalidity of his prior convictions, rather than on the government to show that there was no constitutional defect regarding prior convictions.

United States v. Dixon, 230 F.3d 109 (4th Cir. 2000). Suspended time on a defendant's prior state convictions should not count as time served under the sentencing guidelines. Suspended sentences are counted by the time not suspended, rather than the time imposed.

United States v. Stewart, 49 F.3d 121 (4th Cir. 1995). The district court erred by enhancing the defendant's criminal history pursuant to §4A1.1(e) based upon his 24-day incarceration pending a state parole revocation hearing that resulted in neither revocation nor re-incarceration. Although the defendant was found guilty of the parole violations, the Parole Commission did not revoke parole or re-impose a sentence, and he was released. The district court added two points to the defendant's criminal history pursuant to §4A1.1(e) because it considered this detention to constitute "imprisonment on a sentence." The circuit court, however, construed §4A1.1(e) to apply to the defendant only if his pre-revocation detention amounted to an extension or continuation of the original nine-year sentence for his 1983 conviction. There was no basis for holding that the detention amounted to an extension of an original "imprisonment on a sentence" within the meaning of the guidelines, since the defendant's parole was not revoked and the defendant was not re-incarcerated. The circuit court further held that §4A1.1(e) "does not contemplate the assessment of criminal history points on the basis of detentions of the defendants who are awaiting parole revocation hearings when those revocation hearings do not result in re-incarceration or revocation of parole."

§4A1.2 Definitions and Instructions for Computing Criminal History

Prior Sentence (§4A1.2(a)(2))

United States v. King, 673 F.3d 274 (4th Cir. 2012). The Fourth Circuit rejected the defendant's contention that *Alford* pleas do not qualify as a "prior sentence" imposed on an "adjudication of guilt" within the meaning of §4A1.2(a)(1). The defendant maintained that because *Alford* pleas are not included as an example of an "adjudication of guilt" at §4A1.2(a) (*e.g.*, guilty plea, trial, or plea of nolo contendere), it is not within the definition of "prior sentence." In an *Alford* plea, the panel explained, a defendant maintains his innocence, but pleads guilty. While the defendant does not confirm the factual basis underlying the *Alford* plea, the court may accept such plea only where the record contains strong evidence of actual guilt and where they are conducted in compliance with the requirements of Fed. R. Crim. P. 11. Mindful of these requirements, the Fourth Circuit held that *Alford* pleas are an "adjudication of guilt"

within the meaning of §4A1.2(a)(1) because (1) a strong factual basis for guilt is an essential part of an *Alford* plea and (2) such pleas are considered in other respects as a plea of guilty.

See United States v. Green, 436 F.3d 449 (4th Cir. 2006); §4B1.1.

United States v. Collins, 412 F.3d 515 (4th Cir. 2005). The 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, for purposes of application of sentencing guidelines' career-offender enhancement. Although the 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 the two prior offenses.

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999). Although the defendant's two prior felony convictions were consolidated for sentencing, because there was an intervening arrest, the sentences were not related. Consequently, the two prior felony convictions properly were considered as separate for purposes of qualifying the defendant as a career offender under §4B1.1(3).

Offenses Committed Prior to Age Eighteen (§4A1.2(d))

United States v. Mason, 284 F.3d 555 (4th Cir. 2002). The district court erred when it used a juvenile sentence to determine the defendant's career offender status. Because the defendant received a juvenile sentence for the robbery offense, and it occurred more than five years prior to the instant offense, the court improperly included it in determining the defendant's criminal history category and his career offender status.

§4A1.3 Departures Based on Inadequacy of Criminal History (Policy Statement)

United States v. Green, 436 F.3d 449 (4th Cir. 2006). The district court erred as a matter of law in its application of §4A1.3(b) by concluding that the defendant's two prior drug convictions over-represented the defendant's criminal history and the likelihood that he would commit other crimes.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Davis, 720 F.3d 215 (4th Cir. 2013). The Fourth Circuit held that a consolidated sentence under North Carolina law is a single sentence for purposes of the career offender enhancement. As permitted under North Carolina law, the defendant received one consolidated sentence for multiple violations of state law. At sentencing, the district court counted this consolidated sentence as at least "two prior felony convictions" and sentenced Davis as a career offender. Because the defendant had only one prior qualifying sentence, not two, the Fourth Circuit vacated the sentence and remanded the matter for resentencing without the career offender enhancement.

United States v. Jenkins, 631 F.3d 680 (4th Cir. 2011). Post *Begay* and *Chambers*, the state offense of resisting arrest is a predicate crime of violence for career offender purposes.

United States v. Green, 436 F.3d 449 (4th Cir. 2006). The district court erred by counting the defendant's two prior drug convictions (which had occurred only two weeks apart and were sentenced on the same day) as one conviction pursuant to §4B1.1. The two convictions involved two separate arrests, they were not factually related, the two cases were never consolidated, and the court imposed two separate sentences; the convictions were not related for the purposes of the guideline.

United States v. Lawrence, 349 F.3d 724 (4th Cir. 2003). The district court classified the defendant as a *de facto* career offender. The Fourth Circuit found that there were three possibilities a district court could follow when it found that the highest criminal history category was inadequate or that the defendant would be considered a career offender, but for the defendant's successful challenge to a predicate offense. First, a district court could exercise its discretion not to depart. Second, a district court could determine the extent of a departure by extrapolating from the existing sentencing table and considering the appropriateness of successively higher categories level by level. Finally, a sentencing court could, as the district court did in the instant case, directly depart to a sentencing range based on *de facto* career offender status, once the district court determined that a departure under §4A1.3 was warranted and that the defendant's prior criminal conduct was of sufficient seriousness to conclude that he should be treated as a career offender. Furthermore, a district court could sentence a defendant as a *de facto* career offender when he had committed two crimes that would qualify as predicate crimes for career offender status, but for some reason could not be counted.

United States v. Stockton, 349 F.3d 755 (4th Cir. 2003). A sentencing court may depart downward where a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that a defendant would commit further crimes. The court noted that the same analysis applied when considering the classification as a career offender as over-representing the seriousness of his actual criminal history or his likelihood of recidivism. In this case, the defendant's criminal history reflected recidivism in controlled substance offenses; under such circumstances, a departure based on over-representation was almost never appropriate.

United States v. Mason, 284 F.3d 555 (4th Cir. 2002). A juvenile conviction cannot be counted as a predicate offense under career offender provision.

United States v. Romary, 246 F.3d 339 (4th Cir. 2001). The district court erred in its determination of the defendant's career offender status. The defendant had two prior felony convictions that met the definition of "crime of violence" for purposes of §4B1.1. One conviction from 1987 was challenged as not meeting the requirements of §4B1.1. The original sentence for the 1987 conviction was a ten-year suspended imprisonment with five years of probation. The district court determined that this conviction could not be used in computing criminal history. The Fourth Circuit held that the district court erred by not considering that the sentence for the 1987 conviction was reactivated upon revocation of probation in 1992, when the defendant was incarcerated. Thus, the original suspended sentence became a "sentence of

imprisonment." Because the re-imposition of the sentence dates back to the original conviction (1987), it still fell within the 15-year period required by §4A1.2(e)(1).

United States v. Johnson, 114 F.3d 435 (4th Cir. 1997). The defendant argued his prior conviction for assault on a female, which at the time of the defendant's conviction carried a maximum penalty of two years, could not be used in the career offender analysis because that offense carried only a 150-day maximum on the date of his federal sentencing. As a case of first impression for the federal courts, the Fourth Circuit held that the date of the conviction pursuant to §4B1.2(3) of the guidelines provides that the conviction is sustained on the date the guilt of the defendant is established. At the time, the defendant sustained his conviction for assault on a female in 1986, the offense was punishable by a statutory maximum of two years. Thus, the assault conviction was properly considered a prior felony conviction for guideline purposes.

United States v. Bacon, 94 F.3d 158 (4th Cir. 1996). The district court relied upon the defendant's allegation that newly discovered evidence proved his innocence of a prior state offense and refused to enhance the defendant's sentence as required under §4B1.1. The circuit court held that the district court was required to count the previous state offense as a predicate offense because the defendant did not allege that he was deprived of counsel or of any other constitutional right. Once a conviction is found to meet the requirements of a predicate offense under §4A1.2, Application Note 6, it must be considered unless it has been reversed, vacated, or invalidated in a prior case. A defendant may not collaterally attack his prior conviction unless federal or constitutional law provides a basis for such an attack. The court vacated and remanded the sentence for recalculation characterizing the defendant as a career offender.

United States v. Neal, 27 F.3d 90 (4th Cir. 1994). The appellate court reversed the district court's sentencing calculation that included a New York state drug possession conviction for purposes of applying the career offender guideline. Section 4B1.1 requires the defendant to have at least two prior felony convictions for a crime of violence or a controlled substance offense. The court joined the Ninth, Fifth, Tenth and Eleventh Circuits in recognizing that simple possession of drugs is not a "controlled substance offense." The New York statute under which the defendant was convicted only required an intent to distribute for one section of the statute; the other sections pertain to simple possession. Because it was unclear which section of the statute applied to the defendant's convictions, it was improper for the court to count the conviction for purposes of applying the career offender guideline.

§4B1.2 Definitions of Terms Used in Section 4B1.1

Crime of Violence (§4B1.2(a))

United States v. Shell, 2015 WL 3644036 (4th Cir. June 12, 2015). The Fourth Circuit held that a conviction under subsection (a)(2) of North Carolina second-degree rape statute, N.C. Gen. Stat. § 14-27.3, is not a crime of violence under §4B1.2(a)(1).

United States v. Donnell, 661 F.3d 890 (4th Cir. 2011). The district court erred when it relied on an unincorporated statement of probable cause to find that the defendant's prior state

assault conviction was a crime of violence. Reliance on the unincorporated document was not permitted under *Taylor* and *Shepard.*

United States v. Peterson, 629 F.3d 432 (4th Cir. 2011). The circuit court held that under the categorical approach, a conviction under North Carolina's involuntary manslaughter statute does not satisfy the generic definition of "manslaughter" at §4B1.2(a) and cannot be relied upon to enhance sentences under §4B1.1(a).

United States v. Clay, 627 F.3d 959 (4th Cir. 2010). In a matter of first impression, the Fourth Circuit joined the Third, Sixth, Seventh, Tenth, and Eleventh Circuits by holding that the "generic crime of walk-away escape from an unsecured facility does not qualify as a crime of violence under §4B1.2(a)'s Otherwise Clause."

United States v. Jarmon, 596 F.3d 228 (4th Cir. 2010). The Fourth Circuit held that "larceny from the person resembles the enumerated offense of burglary both in kind and in degree of risk, and so constitutes a 'crime of violence' under the 'otherwise' clause of §4B1.2."

United States v. Hood, 628 F.3d 669 (4th Cir. 2010). Post-*Begay*, possession of a sawed-off shotgun is a crime of violence because the commentary accompanying §4B1.2, cmt. n.1 specifically defines such possession as a crime of violence.

United States v. Martin, 215 F.3d 470 (4th Cir. 2000). Bank larceny is not a crime of violence, even in the abstract, and therefore, the defendant was not eligible to be sentenced as a career offender.

§4B1.4 Armed Career Criminal[6]

United States v. Grant, 753 F.3d 480 (4th Cir. 2014). The Fourth Circuit agreed with the Seventh and Ninth Circuits that general court-martial convictions decided by a military court sitting in a foreign country may be used to determine whether the defendant is an armed career offender. *See also United States v. Martinez*, 122 F.3d 421 (7th Cir. 1997); *United States v. McDonald*, 992 F.2d 967 (9th Cir. 1993).

United States v. Vann, 660 F.3d 771 (4th Cir. 2011) (per curiam). Under the modified categorical approach, the court reversed the district's court finding that the defendant's two prior North Carolina indecent liberties convictions were predicate crimes of violence because the state indictment charged the conduct in the conjunctive.

United States v. Alston, 611 F.3d 219 (4th Cir. 2010). In a matter of first impression, the Fourth Circuit held that "under *Shepard* [*v. United States*, 544 U.S. 13 (2005)], the prosecutor's proffer of the factual basis for an *Alford* plea may not later be used by a sentencing court to identify the resulting conviction as an [Armed Career Criminal Act] predicate." The panel

[6] In June 2015, the Supreme Court held, in *Johnson v. United States*, that the "residual clause" of the ACCA is unconstitutionally vague. The Court's opinion in *Johnson* did not consider the guideline's definition of crime of violence, including the residual clause in the career offender guideline. As such, *Johnson* has not resulted in a change in guideline application at the time of this update.

explained that because the defendant pleads guilty without admitting the facts proffered by the prosecutor, an *Alford* plea does not necessarily rest on the facts needed to establish that an offense is of the type that qualifies as a violent felony.

United States v. Thompson, 421 F.3d 278 (4th Cir. 2005). The defendant's prior North Carolina convictions for breaking or entering buildings constituted violent felonies within meaning of the Armed Career Criminal Act (ACCA).

United States v. Brandon, 247 F.3d 186 (4th Cir. 2001). The district court erred in its determination that the defendant was a career criminal under 18 U.S.C. § 924(e)(1) and in applying the corresponding enhancement to his sentence. For purposes of the Armed Career Criminal statute, a prior state conviction is a serious drug felony if the underlying crime involves possession with intent to manufacture or distribute a controlled substance, even if that intent is not a formal element of the crime. In the instant case, the intent to manufacture or distribute was neither charged nor was it inherent in the generic conduct underlying the defendant's prior conviction for drug possession. Accordingly, the conviction did not qualify as a serious drug felony, and the defendant did not qualify as an armed career criminal.

United States v. O'Neal, 180 F.3d 115 (4th Cir. 1999). The district court relied on a 1977 North Carolina felony larceny conviction when sentencing the defendant as an armed career criminal under 18 U.S.C. § 924(e) and §4B1.4. The defendant argued that the conviction should not count because the government did not include the conviction in the notice it filed with the district court of its intent to seek an enhanced sentence. The appellate court concluded that the presentence report gave the defendant adequate notice that the 1977 conviction was a possible predicate conviction.

United States v. Letterlough, 63 F.3d 332 (4th Cir. 1995). The defendant argued that two of his prior convictions were not "committed on occasions different from one other." The two prior felony convictions consisted of two undercover drug sales made on the same date to a single undercover police officer. The appellate court ruled that each of the defendant's drug sales was a complete and final transaction, and therefore, an independent offense.

United States v. Cook, 26 F.3d 507 (4th Cir. 1994). The district court erred in concluding that "obstruction of justice" cannot serve as a predicate offense under the Armed Career Criminal Act when the applicable state law broadly defines it to include violent and nonviolent means. The court held that *Taylor* is not restricted to burglary offenses and may be applied to all predicate convictions.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.4[7] Recommended Conditions of Probation and Supervised Release (Policy Statement)

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996). The district court did not abuse its discretion in ordering the defendant to abstain from alcohol as a condition of supervised release. Because the defendant had prior convictions for alcohol related offenses and tested positive for drugs on various occasions, the condition of supervised release was acceptable.

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Ivester, 75 F.3d 182 (4th Cir. 1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of §5C1.2. The district court found that the defendant failed to provide the government with any truthful information concerning his crime. Although noting that a defendant cannot be denied section 3553(f) relief merely because the information provided to the government is not useful, the circuit court determined that granting a section 3553(f) relief to defendants who are merely willing to be completely truthful would obviate the statutory requirement that defendants "provide" information. Therefore, defendants seeking to avail themselves of downward departures under §5C1.2 bear the burden of affirmatively acting to ensure that the government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.

Part D Supervised Release

§5D1.1 Term of Supervised Release

United States v. Collins, 773 F.3d 25 (4th Cir. 2014). The Fourth Circuit held that, when the recommended guidelines range is below the statutory minimum term of supervised release, the guidelines should be read to recommend a "single point" at the statutory minimum, rather than a range. *See also United States v. Gibbs*, 578 F.3 694 (7th Cir. 2009).

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Alalade, 204 F.3d 536 (4th Cir. 2000). The defendant challenged the restitution amount ordered by the district court, arguing that it should be offset by the amount seized by the government. The appellate court examined the Mandatory Victims Restoration Act

[7] Deleted and replaced with a new guideline as §5B1.3 (Conditions of Probation). *See* USSG App. C, amend. 596 (effective Nov. 1, 1997).

of 1996 (MVRA) and held that the district court lacked discretion under the MVRA to offset the restitution amount by the value of the items seized by the government.

United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000). The appellate court ordered the district court to recalculate the amount of loss and restitution. The district court failed to make a finding that keyed the defendant's financial situation to the restitution schedule ordered or that the order is feasible. The MVRA clearly requires a sentencing court to consider the factors listed in 18 U.S.C. § 3664(f)(2), and the court "must make a factual finding keying the statutory factors to the type and manner of restitution ordered." The appellate court also held that the district court did not illegally delegate its judicial authority by allowing the probation officer to adjust the restitution payment schedule after considering the defendant's economic status. A district court may not delegate to the probation officer the final authority to establish the amount of the defendant's partial payment of restitution. The district court retained both the right to review the probation officer's findings and to exercise ultimate authority regarding the payment of restitution.

United States v. Ubakanma, 215 F.3d 421 (4th Cir. 2000). Pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663, a court may order restitution only to victims of an offense for losses traceable to the offense of conviction. The court must also consider various other factors, including the amount of loss sustained by the victim.

§5E1.2 Fines for Individual Defendants

United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001). The defendant was convicted of one count of failing to properly maintain and operate a treatment system and with 12 counts of discharging untreated waste water in violation of 33 U.S.C. § 1319(c)(1)(A). Relying on §5E1.2, the district court held that the maximum fine was $25,000 per violation and therefore no more than $300,000. Holding that the maximum schedule in §5E1.2 is not applicable if the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000, or (B) a fine for each day of violation, the Fourth Circuit reversed. The guidelines do not provide any maximum fine when the statute of conviction authorizes a fine per day of violation.

United States v. Hairston, 46 F.3d 361 (4th Cir. 1995). The district court must determine whether the defendant has proved his present and prospective inability to pay a fine. "The defendant cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition."

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995). The district court did not abuse its discretion in imposing a $300,000 fine when the defendant refused to complete a personal financial statement for the presentence report and provided no evidence to show an inability to pay.

§5E1.4 Forfeiture

United States v. Herder, 594 F.3d 352 (4th Cir. 2010). The Fourth Circuit reviews a trial court's findings of fact regarding the forfeitability of property for clear error. The district court

may order the forfeiture of 1) proceeds obtained as a result of the offense of conviction or 2) property used or intended to be used to commit or to facilitate the commission of the offense of conviction, *see* subsection (a) at 21 U.S.C. § 853 (Criminal Forfeitures), with the burden on the government to establish by a preponderance of the evidence that the property is subject to forfeiture. The requisite nexus between property and crime is reviewed under the "substantial connection" standard from case law interpreting the civil forfeiture language in 21 U.S.C. § 881. A substantial connection may be established by showing that use of the property made "the prohibited conduct less difficult or more or less free from obstruction or hindrance." *See United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990).

United States v. Najjar, 300 F.3d 466 (4th Cir. 2002). RICO forfeitures do not violate *Apprendi* in that they do not increase penalties beyond the statutory maximum. Forfeitures are part of the punishment and sentencing determination and need not be submitted to jury.

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. Mosley, 200 F.3d 218 (4th Cir. 1999). When using the 1995 or later editions of the sentencing guidelines dealing with the imposition of a sentence on a defendant who is subject to an undischarged term of imprisonment, the district court is not required to calculate a hypothetical combined guideline range. Instead, a sentencing court need only consider the relevant factors that §5G1.3(c) directs the court to consider.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court erred in relying upon Application Note 5 of §5G1.3 to impose the statutory maximum term for solicitation on the defendant. The court of appeals held that the district court erroneously interpreted Note 5 to allow the imposition of the statutory maximum. Nothing in Note 5 allows the district court to depart from the applicable guideline range.

United States v. Johnson, 48 F.3d 806 (4th Cir. 1995). The defendant's sentence was vacated and remanded to the district court to apply §5G1.3, where it was not clear from the record or the sentencing order whether the 46-month sentence was imposed to run concurrently or consecutively to the defendant's undischarged state sentence.

United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995). The district court did not err by ordering that the defendant's sentence for the instant offense run consecutively to his parole revocation sentence. Although the district court did not specifically state that it was applying either §5G1.3(c) or §7B1.3, its reasoning indicated that it considered the appropriate factors under the relevant guidelines. The district court listed several factors that formed the basis of its decision to have the present sentence run consecutively, including the frequency of the defendant's drug convictions, the severity of his PCP offense, and the court's desire not to minimize the punishments for two different, unrelated drug offenses.

Part H Specific Offender Characteristics

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

United States v. Carr, 271 F.3d 172 (4th Cir. 2001). The Fourth Circuit dismissed a defendant's appeal after the district court refused to grant him a downward departure based on his physical impairment, AIDS. The court found that the district court's refusal to depart was not subject to appellate review because the district court ruled that the impairment was not so extraordinary as to warrant departure under §5H1.4.

§5H1.6 Family Ties and Responsibilities (Policy Statement)

United States v. Wilson, 114 F.3d 429 (4th Cir. 1997). The district court abused its discretion in departing downward from the applicable guideline range because of the defendant's extraordinary family responsibilities. The circuit court found that the defendant's deprived background was a motivating force behind the decision of the district court to depart. The district court, recognizing that §5H1.12 prohibited a departure based on disadvantaged upbringing, attempted to justify the departure under §5H1.6, based on family ties and the defendant's ability to take care of his own children. The circuit court found that the defendant's family circumstances were not so extraordinary as to justify the departure. The circuit court found that the district court improperly departed, vacated the sentence, and remanded for resentencing.

Part K Departures

Standard of Appellate Review—Departures and Refusals to Depart

United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989). The level of review for determining reasonableness of departures depends on whether the issue is (1) correctness of the factual findings underlying the decision to depart; (2) relevance of a factor used to justify a departure; (3) the adequacy of the Commission's consideration of the factor in formulating the guidelines; or (4) the reasonableness of the extent of the departure. The more fact-driven the determination, the more deference given.

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Barnette, 427 F.3d 259 (4th Cir. 2005). While §5K1.1 rewards the defendant for substantial assistance prior to sentencing, Rule 35(b) rewards defendants who provide substantial assistance post-sentencing. The circuit court did not take the district court's statement that the defendant might have a chance to further reduce his sentence in the future as evidence that the district court did not fully exercise its §5K1.1 authority.

United States v. Johnson, 393 F.3d 466 (4th Cir. 2004). A district court, on motion from the government for a downward departure pursuant to 18 U.S.C. § 3553(e), can impose a sentence below the guideline range even if the defendant is subject to a statutory minimum

sentence that exceeds the guideline range. Section 3553(e) places no limit on the court's authority to impose a sentence below the statutory minimum or at the low-end of the guideline range as long as the extent of the departure was reasonable under 18 U.S.C. § 3742(e).

United States v. Butler, 272 F.3d 683 (4th Cir. 2001). The defendant claimed that under 18 U.S.C. § 3553(e) and §5K1.1, due to his substantial assistance, he was entitled to a downward departure. While the defendant provided the government with substantial assistance in the investigation and prosecution of a bank robbery, he had also threatened the life of a codefendant, causing the government's refusal to file a downward departure motion for him. The Fourth Circuit stated that under 18 U.S.C. § 3553(e) and §5K1.1, district courts are permitted to "impose a sentence below the statutory minimum 'to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense,'" but the granting of such a sentence is a power, not a duty provided by the government. The refusal to file in this case was rationally related to a government interest; a defendant is not rendering substantial assistance if he is threatening the life of another government witness before his sentencing hearing.

United States v. LeRose, 219 F.3d 335 (4th Cir. 2000). Absent a determination of an unconstitutional or irrational motive on the part of the government, it was error for a district court to grant a reduction for substantial assistance without a government motion. The burden is on the defendant to make a substantial threshold showing that the government's refusal resulted from improper or suspect motives. The district court impermissibly shifted the burden to the government without first determining whether the defendant had met his threshold burden.

United States v. Pearce, 191 F.3d 488 (4th Cir. 1999). Although the district court's discretion to depart under §5K1.1 is broad, it is limited in two ways: (1) the factors it considers must relate to "the nature, extent and significance of the defendant's assistance"; (2) the extent of any departure must be "reasonable." The district court erroneously held that once the government files a §5K1.1 motion, the court has "total discretion." The Fourth Circuit reversed and remanded for resentencing. With respect to one defendant, the circuit court determined that the district court considered irrelevant factors; failed to give substantial weight to the government's evaluation; failed to give its reasons for departing; and departed to an unreasonable extent. With respect to the other defendant, the district court's 20-level departure was "unreasonable in extent" given his level of cooperation.

United States v. Pillow, 191 F.3d 403 (4th Cir. 1999). The starting point for calculating a downward departure under §5K1.1 and 18 U.S.C. § 3553(e) was the statutory minimum sentence–not what the guidelines would be absent the statutory minimum sentence.

United States v. Hill, 70 F.3d 321 (4th Cir. 1995). The defendant appealed the extent of the downward departure based on his substantial assistance to the government. He asserted that the district court's decision to reduce his base offense level by only two levels was based on its erroneous consideration of a prison term imposed on him by the district court in Texas. The appellate court concluded that the sentence did not result from an incorrect application of the guidelines, and the appeal was an artful attempt to gain review of the district court's exercise of discretion. As such, the appeal was dismissed.

United States v. Wallace, 22 F.3d 84 (4th Cir. 1994). The circuit court did not err in refusing the defendant's request to depart downward under §5K1.1 based on the defendant's "substantial assistance" in order to enforce his plea agreement with the government. A court may not grant such a departure without a government motion unless 1) the government obligated itself in the plea agreement or 2) the refusal to make the motion was based on an unconstitutional motive. Neither factor was present in this case.

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Pitts, 176 F.3d 239 (4th Cir. 1999). The defendant was an FBI agent who sold confidential information to Russia. The district court applied the 2-level abuse of trust enhancement pursuant to §3B1.3, and then departed upward one level for extraordinary abuse of trust. The appellate court held that an upward departure based upon an extraordinary abuse of trust is warranted if the combination of the level of trust violated by the defendant and the level of harm created solely by the violation of that trust falls outside the heartland of cases that qualify for the enhancement. Here, the level of trust placed in the defendant was unmatched. He was a supervisory special agent of the FBI and a foreign counterintelligence operative whose job was to thwart the espionage activities of the very foreign intelligence service with whom he conspired. In violating that "awesome responsibility and trust," the defendant violated a level of trust to which most men are never exposed.

United States v. Fenner, 147 F.3d 360 (4th Cir. 1998). The district court properly concluded it could not base a downward departure on the increase in sentencing range that resulted from application of a cross reference. The guidelines take into account that the application of the cross reference will result in an enhanced guideline range.

United States v. Bailey, 112 F.3d 758 (4th Cir. 1997). The district court properly departed upward from the standard guideline sentence for kidnapping. The district court justified the upward departure using four aggravating factors, including §§5K2.2 (physical injury), 5K2.8 (extreme conduct), 5K2.5 (property damage), and 5K2.4 (abduction or unlawful restraint). The defendant objected to the consideration of §5K2.2 as a ground for departure because the kidnapping guideline at §2A4.1(b)(2) provides for a 4-level increase if the victim sustained permanent or life-threatening bodily injury. The circuit court states that the extent of the upward departure should ordinarily depend on the extent of the injury, the degree to which it may prove to be permanent, and the extent to which the injury was intended. When the victim suffers a major permanent disability, and when such an injury was intentionally inflicted, a substantial departure may be appropriate. Similarly, the defendant objected to the use of §5K2.4 because the crimes of kidnapping and domestic violence contain the elements of abduction and unlawful restraint. The circuit court held that because of the egregious nature of the restraint in this case, being held captive in the trunk of a car for an extended period of time, a departure based on §§5K2.2 and 5K2.4 was reasonable. Additionally, the defendant argued that a departure under §5K2.5 was erroneous because the 4-level adjustment for a permanent or life-threatening bodily injury mentioned in §2A4.1(b)(2) obviated the use of §5K2.5 because in every case involving serious injury, there will always be significant medical expenses. The circuit court rejected this argument and held that the district court correctly referred to §5K2.5 due to the massive future medical expenses involved. Finally, the defendant argued that the use of §5K2.8 was

unwarranted because the facts underlying the finding of extreme conduct were erroneous. The circuit court rejected this argument, holding that even in the light most favorable to the defendant, the defendant's conduct was intentionally brutish, cruel, and extreme.

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). The district court granted a downward departure to the defendant based on three justifications: comparatively lenient treatment of similarly culpable codefendants; unwarranted racial disparity in sentencing stemming from the fact that most of the codefendants are white and the defendant is black; and a shorter sentence more accurately reflects the defendant's relative culpability. The government appealed the departure, and the Fourth Circuit reversed. The circuit court stated that disparate sentences among codefendants are not a permissible ground for departure and that race can never be a basis for a departure. As for a departure based on "relative culpability," the circuit court dismissed this argument stating that such a departure would circumvent the district court's factual determinations.

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996). The district court abused its discretion in granting a downward departure based on the defendant's "extraordinary restitution." The defendant, through the generosity of friends, repaid the bank she had embezzled $250,000 from to settle her civil liability. The district court determined that her efforts merited a 5-level departure for "extraordinary restitution." The circuit court concluded that because the guidelines already take restitution into consideration in the context of a sentence reduction for acceptance of responsibility, restitution is a discouraged factor that can support a departure only if the restitution in a particular case demonstrates an extraordinary acceptance of responsibility. Here, the court found that the defendant's restitution was not extraordinary.

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996). The defendant was convicted of submitting fraudulent claims to Medicaid and Medicare. Under the plea agreement, the defendant was required to pay restitution of $545,000. However, in a consent judgment in a civil forfeiture action, the defendant agreed to forfeit over $600,000 which was credited against the restitution in the plea agreement. The district court departed downward under §5K2.0 because the defendant had paid a sum "beyond" complete restitution. The circuit court reversed, holding that exposure to civil forfeiture is not a basis for a downward departure. Forfeiture was considered by the Sentencing Commission and was intended to be in addition to, and not in lieu, of imprisonment. Additionally, civil forfeiture actions do not suggest any reduced culpability or contrition on the part of a defendant that might warrant a sentence reduction. The circuit court concluded that the district court's departure was an error of law and therefore, an abuse of discretion.

§5K2.1 Death (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The district court abused its discretion by departing upward four levels in determining the defendant's sentence for two counts of reckless involuntary manslaughter and an additional uncharged death. The circuit court held that the additional uncharged death of a participant in the aggressive driving could provide a basis for upward departure, even though that victim had been "an active participant in the activity that resulted in his death." The sentencing court erred, however, by failing to make

additional findings of fact to support the extent of the departure. The guidelines provide that the extent of an upward departure for death "should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury." The sentencing court failed to consider these factors and did not make any findings as to the defendant's state of mind.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court did not err in departing upward based on the murder of the victim in a kidnaping case. The court of appeals held that unless §2A4.1 of the 1990 *Guidelines Manual* takes into account the death of the kidnaping victim as occurred in the instant case, the court could upwardly depart on that basis. After examining the guideline, the Fourth Circuit concluded that the guideline does not take into account the scenario where the victim was kidnaped for the purpose of sexual assault, and only later did the defendant form the intent to murder her. Therefore, an upward departure to life imprisonment based on the victim's death was not an abuse of discretion.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The defendant was convicted of two counts of involuntary manslaughter for the deaths of two commuters who died when he lost control of his car while he was engaging in aggressive driving. The circuit court held that the sentencing court abused its discretion in departing upward three levels for the extreme psychological injury to the family members of the victims who were killed. Although a departure for psychological injury to a victim is not limited to the direct victim of the offense of conviction but can also apply to indirect victims, an indirect victim is a victim because of his relationship to the offense, not because of his relationship to the direct victim. Here, the court held that there was no evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims. *See also United States v. Perez*, 609 F.3d 609 (4th Cir. 2010) (holding that the psychological injury caused by the defendant's carrying a loaded firearm into a U.S. probation Officer's office met the requirements under §5K2.3).

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002). The appellate court held that the decision to depart from a particular guideline must be made based on a five-step analysis: (1) a determination of the circumstances and consequences of the offense, (2) whether any of those circumstances are atypical enough to remove them from the "heartland" of the offense, (3) whether the factor is a forbidden, encouraged, discouraged, or unmentioned basis for departure, (4) assuming it is an encouraged factor, whether the guideline has already accounted for the factor, and (5) whether a departure based on these factors is in fact warranted. The defendant was convicted of conspiracy to harbor an illegal alien and of harboring an illegal alien. The unlawful alien in question was brought to the United States by the defendant, and was completely dependent on the defendant as she did not speak the language, did not have control over her own passport or visa, and was illiterate. The defendant and his wife kept her in virtually slave-like conditions, did not pay her, forced her to work as many as 15 or more hours a day, and the defendant's wife regularly abused her. The defendant held the victim for more than 15 years

in essentially forced servitude. The appellate court agreed with the district court that this rose to the level of extreme conduct. The appellate court held that there was no abuse of discretion in the district court's finding that the duration of the offense prolonged the victim's pain and humiliation and warranted an upward departure.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Bowe, 257 F.3d 336 (4th Cir. 2001). The district court granted a §5K2.13 departure for diminished capacity. The appellate court concluded that the defendant did not satisfy the criteria set forth in §5K2.13, which states that if the offense involved actual violence or a serious threat of violence, then the court may not depart below the applicable guideline range. Because the offense involved violence and serious threats of violence, the district court erred in granting the departure.

§5K2.14 Public Welfare (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The circuit court remanded the case to allow the sentencing court to determine whether the danger created by the defendant's reckless conduct while driving was outside the "heartland" of the typical reckless driving involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. On remand, the sentencing court must determine whether the defendant's reckless driving was "present to an exceptional degree" or was in some other way different from the ordinary case where the factor is present.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996). The district court did not violate the Double Jeopardy Clause when it imposed a 24-month sentence for the revocation of the defendant's supervised release and a consecutive 240-month sentence for the bank robbery upon which the revocation was based. When a defendant violates the terms of his supervised release, the sentence imposed for the violation is an authorized part of the original sentence. Thus, the imposition of a sentence upon revocation of supervised release is not a punishment for the conduct prompting the revocation, but a modification of the original sentence for which supervised release was authorized. The Fourth Circuit joined the Ninth Circuit in holding that the sentencing of a defendant for criminal behavior that previously served as the basis for revocation of supervised release does not violate the Double Jeopardy Clause.

United States v. Clark, 30 F.3d 23 (4th Cir. 1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The government presented positive evidence that the defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C.

§ 3583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to §7B1.4, reasoning that 18 U.S.C. § 3583(g) was "too harsh in the circumstances and that it limited the court's sentencing discretion too much. The Fourth Circuit held that the application of 18 U.S.C. § 3583(g) was required; once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under section 3583 necessarily follows.

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Denard, 24 F.3d 599 (4th Cir. 1994). Title 18 U.S.C. § 3565(a) provides that when a probationer is found in possession of a controlled substance, the court shall revoke the sentence of probation and sentence the defendant to no less than one-third of the original sentence. The original sentence means the defendant's original guideline imprisonment range. Therefore, the sentence must be at a minimum one-third of the maximum sentence in his original guideline range and at a maximum the top of the guideline range.

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C2.5 Culpability Score

United States v. Bros. Constr. Co., 219 F.3d 300 (4th Cir. 2000). The defendant corporations were convicted of conspiracy to defraud the United States, two counts of wire fraud, and one count of making a false statement. The defendant corporation appealed, among other issues, the district court's imposition of a 3-level sentencing enhancement for obstruction of justice, pursuant to §8C2.5(e). The district court found that an agent of the defendant corporation had made a false statement in a letter to investigators and gave perjurious grand jury testimony regarding the organization's compliance with a state program fostering the development of disadvantaged business enterprises. The defendant corporation argued that the enhancement constituted impermissible double counting insofar as the letter constituted the act for which the defendant corporation was convicted of conspiracy to defraud and making a false statement. The appellate court held that because the district court identified the grand jury testimony as another separate, independent basis for applying the obstruction of justice enhancement, the enhancement was not erroneous. Further, the district court's finding that the grand jury testimony was false as to a material fact and was willfully given to obstruct justice was not clearly erroneous.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Weon, 722 F.3d 583 (4th Cir. 2013). The Fourth Circuit held that absent a successful withdrawal from a plea agreement or other very exceptional circumstances, a defendant remains bound by the factual stipulations in his plea agreement once the plea has been accepted by the district court.

United States v. Lewis, 633 F.3d 262 (4th Cir. 2011). The district court erred when it failed to offer the defendant the opportunity to withdraw his plea under [Fed. R. Crim. P.] Rule 11(c)(5) after the court implicitly rejected the plea agreement by imposing a consecutive sentence. The concurrent sentence provision in the plea agreement was set forth in mandatory terms. The panel vacated the judgment and remanded the case.

United States v. Battle, 499 F.3d 315 (4th Cir. 2007). In a case of first impression, the Fourth Circuit "consider[ed] what it means to 'accept' a guilty plea under [Fed. R. Crim. P.] 11(d)." "Under Rule 11, a defendant may withdraw a guilty plea (or plea of nolo contendere) before the court accepts the plea for any reason or no reason. Fed. R. Crim. P. 11(d)(1). But if the court has accepted the defendant's plea, the plea may only be withdrawn if the court rejects a plea agreement under Rule 11(c)(5) or if 'the defendant can show a fair and just reason for requesting the withdrawal.' Fed. R. Crim. P. 11(d)(2)." The defendant moved to withdraw his guilty plea, arguing that the sentencing judge's use of the phrase "provisionally accepted" at the conclusion of the plea colloquy meant that the guilty plea had not been accepted by the court and that he was free to withdraw his guilty plea "for any or no reason." The 4th Circuit rejected this argument, holding that, "[o]nce the district court has satisfied Rule 11's colloquy requirement, there is a presumption that the court has accepted the defendant's guilty plea. *See United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992) (*en banc*)."

United States v. Osborne, 345 F.3d 281 (4th Cir. 2003). The district court was not required, absent a defendant's request, to review *de novo* the Rule 11 proceedings conducted by a magistrate judge where the defendant clearly consented to entering a plea before a magistrate judge and raised no objection to the Rule 11 proceeding.

United States v. Cannady, 283 F.3d 641 (4th Cir. 2002). The defendant pled guilty to conspiracy to distribute and possession with intent to distribute cocaine and heroin. Included in the plea agreement was a waiver of the defendant's right to initiate proceedings under 28 U.S.C. § 2255. The government informed the defendant that the waiver provision was required by the judge for all plea agreements, and the defendant agreed. At the plea proceeding the judge told the defendant that if he did not agree to the waiver there would be no agreement. Rule 11(e)(1) provides that the attorneys for the defendant and the government may participate in plea negotiations but the judge may not. The appellate court held that since the parties had negotiated and signed a plea agreement before the judge became involved, his comments did not meet the definition of participation under Rule 11(e)(1). Furthermore, the appellate court held that there was nothing coercive about the judge's comments during the plea proceeding–rather the judge was encouraging the defendant to make a decision whether to plead guilty or go to trial; the choice was the defendant's.

United States v. General, 278 F.3d 389 (4th Cir. 2002). The district court did not commit reversible error by not reciting the mandatory minimum during the plea hearing. Although Rule 11 requires the district court to inform the defendant of any statutory mandatory minimums before accepting a guilty plea, the failure to do so did not violate the defendant's substantial rights in this case because the plea agreement provided all the information the defendant would have gotten from the court.

United States v. Martinez, 277 F.3d 517 (4th Cir. 2002). The district court committed plain error under Rule 11 by advising the defendant of incorrect potential penalties during his plea hearing and by failing to advise the defendant that he could not withdraw his plea after sentencing. The court held that the defendant failed to demonstrate that either error affected his substantial rights. The defendant must show that, absent the errors made by the court, he would not have agreed to the plea agreement. Because the defendant was facing multiple charges, many of which were dropped through the plea agreement, it is unlikely that he would have changed his mind about the agreement based on a different potential sentence for only one of the remaining charges.

United States v. Carr, 271 F.3d 172 (4th Cir. 2001). Before accepting a guilty plea, the court must satisfy itself that all elements of the charged offense were committed. Where the record lacked a sufficient factual basis to support a federal arson charge due to a lack of evidence of use of the property in interstate commerce, the court vacated the judgment of conviction.

United States v. Thorne, 153 F.3d 130 (4th Cir. 1998). The district court's failure to inform the defendant at his Rule 11 hearing that his sentence would include a term of supervised release and to describe to him the nature of supervised release before accepting his guilty plea was error. The court of appeals held that the court's oversight was not harmless error because the maximum term the defendant understood he could receive was less than his actual sentence. In the event he violated release, he would be subject to a further five years of incarceration, resulting in an even greater disparity. The court of appeals ordered that the defendant be permitted to withdraw his plea.

United States v. Goins, 51 F.3d 400 (4th Cir. 1995). The trial court committed plain error when it failed to inform the defendant during the Rule 11 hearing that a guilty plea would result in a mandatory minimum sentence. The error affected the defendant's substantial rights because the defendant had not been aware of the mandatory minimum sentence until the presentence report was prepared, nearly three months after the plea had been accepted. The circuit court held that the Rule 11 violation cannot be considered harmless if the defendant had no knowledge of the mandatory minimum at the time of the plea.

Rule 35

United States v. Clawson, 650 F.3d 530 (4th Cir. 2011). The district court exceeded its authority under Fed. R. Crim. P. 35(b) when it based the reduction in the sentence solely on the defendant's access to medication in custody rather than on the value of defendant's assistance to the government. Although his guideline range was 324 to 405 months, the statutory maximum was 240 months. At sentencing, the district court relied on the defendant's background, mental health issues, and the nature of the offense to support a downward variance and the court imposed a 96-month sentence for distribution of child pornography. At the Rule 35 hearing, the district court was displeased with BOP's inability to supply the defendant with needed medication for ADHD and thus reduced the sentence from 96 months to one day in custody, three years of home confinement with electronic monitoring followed by a 15-year term of supervised release. The Fourth Circuit reversed and held that, "when deciding whether to grant a

Rule 35(b) motion, a district court may not consider any factor other than the defendant's substantial assistance to the government."

OTHER STATUTORY CONSIDERATIONS

Fair Sentencing Act

United States v. Mouzone, 687 F.3d 207 (4th Cir. 2012). The Fourth Circuit, in accord with *Dorsey v. United States*, 132 S. Ct. 2321 (2012), held that the Fair Sentencing Act of 2010 (FSA) applies retroactively only to offenders whose crimes preceded August 3, 2010, the date the FSA became effective, but who are sentenced after that date.

Mandatory Minimums

United States v. Farrior, 535 F.3d 210 (4th Cir. 2008). A statutorily required sentence is *per se* reasonable. *See also United States v. Robinson*, 404 F.3d 850 (4th Cir. 2005) (stating that *Booker* did nothing to alter the rule that judges cannot depart below a statutorily provided minimum sentence).

United States v. Pierce, 75 F.3d 173 (4th Cir. 1996). The Assimilated Crime Act (ACA) provides that a person who commits a state crime on a federal enclave shall be subject to a "like punishment," which requires only that the punishment be similar, not identical. Because the state statute authorized parole, and supervised release was similar to parole, imposition of a term of supervised release did not violate the ACA's requirement that the defendant be subject to "like punishment." Although the total sentence exceeded the maximum term of imprisonment authorized by the state statute, the court upheld the sentence because supervised release is not part of the incarceration portion of a sentence. Therefore, supervised release under the ACA may exceed the maximum term of incarceration provided for by state law.