

## STANDARDS OF APPELLATE REVIEW

### Abuse of Discretion defined:

Under the abuse of discretion standard, the appellate court must determine whether the district court's exercise of discretion, considering the law and the facts, was arbitrary or capricious. United States v. Mason, 52 F.3d 1286, 1289 (4th Cir. 1995). A district court by definition abuses its discretion when it makes an error of law. Koon v. United States, 518 U.S. 81, 100 (1996). Under this standard, a district court by definition abuses its discretion when it makes an error of law. United States v. Stitt, 250 F.3d 878, 896 (4<sup>th</sup> Cir. 2001).

### Anders Issues

The standard of review of an Anders submission is a de novo review of the entire record and all pertinent documents to determine whether the case is wholly frivolous. Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

### Apprendi Issues

If a defendant has made a timely and sufficient Apprendi sentencing objection in the trial court, and so preserved his objection, de novo is the proper standard of review. If preserved, the error will be reversed unless it was harmless beyond a reasonable doubt. The government bears the burden of proof that the error was harmless. But if a defendant has failed to make a timely and sufficient Apprendi sentencing objection and, therefore, failed to preserve his objection in the trial court, the appellate court can only correct the forfeited error if it constitutes plain error. The burden is on the defendant to demonstrate that the error was plain. United States v. Mackins, 315 F.3d 399, 405 (4<sup>th</sup> Cir. 2003).

### Clearly Erroneous Defined:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948).

### Defenses

District court's decision made prior to trial to refuse to allow a defendant to present an affirmative defense is reviewed for abuse of discretion. United States v. Osbourne, 935 F.2d 32, 38-39 (4th Cir. 1991).

Diplomatic Immunity - The determination of whether a person has diplomatic immunity is a mixed question of fact and law. Such questions are reviewed "under a hybrid standard, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining de novo the legal conclusions derived from those facts." Gilbaine Bldg. Co. v. Fed. Reserve Bank of Richmond, 80 F.3d 895, 905 (4<sup>th</sup> Cir. 1996). United States v. Al-Hamdi, No. 03-4452 (Jan. 23, 2004).

Double Jeopardy - District court's order denying defendant's double jeopardy claim reviewed de novo. United States v. Imngren, 98 F.3d 811, 813 (4th Cir. 1996).

Entrapment: Whether there is sufficient evidence to constitute a triable issue of entrapment is a question of law reviewable de novo. United States v. Singh, 54 F.3d 1182, 1189 (4th Cir.

1995); United States v. Phan, 121 F.3d 149, 154 (4th Cir. 1997). The district court's refusal to give an entrapment instruction is a legal issue reviewed de novo. United States v. Phan, 121 F.3d 149, 154 (4<sup>th</sup> Cir. 1997).

Pre-trial resolution of entrapment motions is seldom appropriate. However, a trial court's decision to resolve an entrapment motion prior to trial is reviewable de novo for abuse of discretion. United States v Osborne, 935 F.2d 32 (4th Cir. 1991).

Insanity - jury instruction: A district court's refusal to give a requested jury instruction on the affirmative defense of insanity under the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17, is reviewed de novo. United States v. Whitehead, 896 F.2d 432, 435 (9th Cir.), cert. denied, 498 U.S. 938 (1990); United States v. Denny-Shaffer, 2 F.3d 999, 1015-16 (10th Cir. 1993).

Justification: Whether the trial court erroneously refuses to instruct the jury on the defense of justification raises a question of law reviewed de novo. United States v. Perrin, 43 F.3d 869 (4th Cir.), cert. denied, 515 U.S. 1126 (1995).

Preserved Error - If a defendant has made a timely and sufficient objection of constitutional error in the trial court, and so preserved his objection, de novo is the proper standard of review. If preserved, the error will be reversed unless it was harmless beyond a reasonable doubt. The government bears the burden of proof that the error was harmless. United States v. Mackins, 315 F.3d 399, 405 (4<sup>th</sup> Cir. 2003).

#### Grand Jury

District court's denial of access to grand jury materials reviewed for abuse of discretion. In re Grand Jury Proceedings, GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1299 (4th Cir. 1986); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959).

District court's factual findings regarding the Government's purpose for calling post-indictment witnesses to appear before the grand jury are reviewed under the clearly erroneous standard. United States v. Brothers Construction Co., 219 F.3d 300, (4th Cir. 2000).

#### Habeas Corpus Petitions

On habeas corpus petitions, district court's opinion concerning historical facts is reviewed for clear error; concerning questions of law, de novo. United States v. Cheek, 94 F.3d 136 (4th Cir. 1996).

#### Harmless Error:

Harmless error analysis is not appropriate when the district court lacked authority for its action. United States v. Jones, 238 F.3d 271, 273 (4th Cir. Jan. 2001).

Under harmless error review, the government bears the burden for proving that the error did not affect the defendant's substantial rights. United States v. General, 278 F.3d 389, 395 n.2 (4<sup>th</sup> Cir. 2002).

Under harmless error review, the government must prove that the error was harmless beyond

a reasonable doubt. United States v. Robinson, 460 F.3d 550, 558 (4<sup>th</sup> Cir. 2006).

Ineffective assistance of counsel:

Whether specific facts constitute ineffective assistance of counsel is decided *de novo*. United States v. Witherspoon, 231 F.3d 923 (4<sup>th</sup> Cir. 2000); Becton v. Barnett, 920 F.2d 1190, 1192 (4<sup>th</sup> Cir. 1990).

Issues not raised below:

Issues not raised below either before trial in a motion or during trial are reviewed for plain error. United States v. Maxwell, 285 F.3d 336, 339 (4<sup>th</sup> Cir. 2002), citing Fed. R. Crim. P. 52(b) and United States v. Olano, 507 U.S. 725, 732 (1993).

Legal Conclusions:

Legal conclusions are reviewed *de novo*. United States v. Johnson, 114 F.3d 435, 439 (4<sup>th</sup> Cir. 1997).

Plain error defined:

“ An error is plain when the law was clear at the time of the trial, but the action is clearly contrary to the law at the time of the appeal.” United States v. Richardson, 233 F.3d 223, 228 (4<sup>th</sup> Cir. 2000). Plain error involves (1) an error, (2) which is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity or public reputation of judicial proceedings. United States v. Brewer, 1 F.3d 1430, 1434-35 (4<sup>th</sup> Cir. 1993) (citing United States v. Olano, 113 S.Ct. 1770, 1777-79 (1993)).” The requirement that the error affect substantial rights “ typically means that the defendant is prejudiced by the error in that it affected the outcome of the proceedings.” United States v. Stewart, 256 F.3d 231, 252 (4<sup>th</sup> Cir. 2001). The burden is on the defendant to prove that the error was not harmless. Id.

Proportionality of Sentence

Proportionality review is not available for any sentence less than life imprisonment without the possibility of parole. United States v. Polk, 905 F.2d 54, 55 (4<sup>th</sup> Cir. 1990); United States v. Ming Hong, 242 F.3d 528 (4<sup>th</sup> Cir. 2001).

Prosecutorial Misconduct:

When faced with a claim of prosecutorial misconduct, appellate review of a district court’ s factual findings is for clear error and its legal conclusions is *de novo*. If no factual findings exist, review is plenary. United States v. McDonald, 61 F.3d 248, 253 (4<sup>th</sup> Cir. 1995); United States v. Ellis, 121 F.3d 908, 927 (4<sup>th</sup> Cir. 1997), cert. denied, 118 S. Ct. 738 (1998).

Prosecutorial Vindictiveness

A district court’ s decision that a defendant did not establish a presumption of vindictiveness or that he failed to show actual prosecutorial vindictiveness is reviewed for abuse of discretion. United States v. Najjar, No. 00-4296 (4<sup>th</sup> Cir. 2002) A district court’ s orders for discovery and establishing a presumption of vindictive prosecution is reviewed *de novo* because the appellate court is determining the legal adequacy of the evidence to support such orders. United States v. Wilson, 262 F.3d 305, 316 (4<sup>th</sup> Cir. 2001).

Sanctions

District court choice of sanctions for violation of sequestration order is reviewed for an abuse of discretion. United States v. Cropp, 127 F.3d 354, 363 (4<sup>th</sup> Cir. 1997); United States v.

Rhynes, 218 F.3d 310 (4th Cir. 2000).

#### Standard of Review

Determining the proper standard of appellate review is a question of law, which is considered *de novo*. Pierce v. Underwood, 487 U.S. 552, 557-558 (1988).

#### Subpoenas

District court' sruling regarding the authorization of a party to undertake the investigation that prompted the use of a subpoena is reviewed for clear error. United States v. American Target Advertising, Inc., 257 F.3d 348 (4th Cir. 2001) .

#### Vagueness

“ [V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” United States v. Mazurie, 419 U.S. 544, 550 (1975).

#### Witness Credibility

Evaluation of witness credibility is reserved to the finder of fact and is generally not subject to review on appeal. United States v. Saunders, 886 F.2d 56, 60 (4<sup>th</sup> Cir. 1989).

## FEDERAL RULES OF CRIMINAL PROCEDURE

### Rule 8(b) - Joinder of defendants:

The granting of a severance under Rule 8(b), misjoinder, is committed to the discretion of the trial courts, whose decisions on such matters will not be disturbed absent a clear abuse of that discretion. United States v. Reavis, 48 F.3d 763, 766-67 (4th Cir. 1995), cert. denied, 515 U.S. 1151 (4th Cir. 1995). A defendant must show prejudice for the court's ruling denying a severance to constitute an abuse of discretion. United States v. Porter, 821 F.2d 968, 972 (4th Cir. 1987). Factual findings made in conjunction with a district court's ruling is reviewed for clear error. United States v. Smith, 44 F.3d 1259, 1269 (4th Cir. 1995). "[A]n error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" United States v. Lane, 474 U.S. 438, 449 (1986).

### Rule 11 - Pleas - breach of plea agreement:

Findings of fact as to what the parties said or did as part of a plea agreement are reviewed under the clearly erroneous standard, United States v. Conner, 930 F.2d 1073, 1076 (4th Cir.), cert. denied, 502 U.S. 958 (1991), United States v. Martin, 25 F.3d 211, 217 (4th Cir. 1994), while principles of contract interpretation applied to the facts are reviewed de novo. Martin, supra.

### Rule 11 - Pleas - colloquy:

Whether a defendant's guilty plea was made knowingly and voluntarily requires a de novo review of the Rule 11, Fed. R. Crim. P. colloquy, to determine compliance with the Rule. United States v. Good, 25 F.3d 218 (4th Cir. 1994); United States v. Ubakanma, 215 F.3d 421 (4th Cir. 2000).

### Rule 11 - Pleas - factual basis:

A district court's determination that a sufficient factual basis exists for acceptance of a guilty plea is reviewed for abuse of discretion. United States v. Morrow, 914 F.2d 608, 611 (4th Cir. 1990) (and cases cited therein). United States v. Moore, 931 F.2d 245, 248 (4th Cir. 1991); United States v. Mitchell, 104 F.3d 649, 652 (4th Cir. 1997).

Rule 11 - Forfeited Error - The plain error analysis is the proper standard for review of forfeited error in the Rule 11 context. United States v. Martinez, 277 F.3d 517, 525 (4th Cir. 2002).

### Rule 12(b) - Pre-trial Motions:

Denial of MOTION TO AMEND A PLEADING is reviewed for abuse of discretion. Sandcrest Outpatient Servs. v. Cumberland County Hosp. Sys., 853 F.2d 1139, 1140 (4th Cir. 1988).

A MOTION TO CONTINUE is normally committed to the discretion of the trial judge and is reviewed for abuse of discretion. United States v. Bailey, 112 F.3d 758, 770 (4th Cir. 1997); United States v. Mullen, 32 F.3d 891 (4th Cir. 1994); United States v. Colon, 975 F.2d 128, 131 (4th Cir. 1992); United States v. Bakker, 925 F.2d 728, 735 (4th Cir. 1991); United States v. LaRouche, 896 F.2d 815, 823-25 (4th Cir.), cert. denied, 496 U.S. 927 (1990). "A abuse of discretion" in the context of a denial of a motion for continuance is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." Morris v. Slappy, 461 U.S. 1, 11-12 (1983). Broad discretion must be granted because judges require a great deal of

latitude in scheduling trials. Id. at 11.

A district court's denial of a defendant's MOTION FOR SUBSTITUTION OF COUNSEL is reviewed under the abuse of discretion standard. United States v. Hanley, 974 F.2d 14, 16-17 (4th Cir. 1992); United States v. Corporan-Cuevas, 35 F.3d 953, 956 (4th Cir. 1994); United States v. Mullen, 32 F.3d 891, 895 (4th Cir. 1994) (identifying factors relevant to whether a district court abused its discretion by denying a defendant's motion to substitute counsel.); United States v. Attar, 38 F.3d 727, 735 (4th Cir. 1994), cert. denied, 514 U.S. 1107 (1995).

Whether the district court erred in its fact-based denial of defendant's MOTION TO DISMISS INDICTMENT FOR GOVERNMENTAL MISCONDUCT is reviewable for clear error. United States v. McDonald, 61 F.3d 248 (4th Cir. 1995); United States v. Abbott Laboratories, 505 F.2d 565, 574 (4th Cir. 1974), cert. denied, 420 U.S. 990 (1975). If district court made no factual findings regarding the existence of prosecutorial misconduct prior to denying motion, review is de novo. McDonald, supra.

When reviewing the denial of a MOTION TO DISMISS AN INDICTMENT, the appellate court reviews the district court's factual findings for clear error and its legal conclusions de novo. United States v. Ward, 171 F.3d 188, 193 (4<sup>th</sup> Cir. 1999).

A claim that charges in an indictment are multiplicitous is reviewed de novo. United States v. Stewart, 256 F.3d 231, 247 (4<sup>th</sup> Cir.), cert. denied, 534 U.S. 1049 (2001).

A district court's decision concerning whether or not to strike alleged SURPLUSAGE from the indictment is reviewed for abuse of discretion. United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997).

Jurisdictional issues may be raised at any time during the criminal proceedings. United States v. Sutton, 961 F.2d 476, 478-79 (4th Cir.), cert. denied, 506 U.S. 858 (1992). Jurisdiction is a question of law reviewable de novo. United States v. Barton, 26 F.3d 490 (4th Cir. 1994). Whether a district court has jurisdiction over a criminal offense is a question of law which is reviewed de novo. United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000). Hukill v. Auto Care, Inc., 192 F.3d 437, 441 (4th Cir. 1999), cert. denied, 120 S.Ct. 1978 (2000).

On a post-verdict challenge to an indictment, "every intendment is then indulged in support of . . . sufficiency." The question is then "only whether the necessary facts appear in any form, or by a fair construction can be found within [its] terms." United States v. Vogt, 910 F.2d 1184, 1201 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991), quoting Finn V. United States, 256 F.2d 304, 307 (4th Cir. 1958).

United States v. Floresca, 38 F.3d 706, 714 (4<sup>th</sup> Cir. 1994) (en banc) "constructive amendments of a federal indictment are error *per se* and must be corrected on appeal even when not preserved by objection." See also United States v. Randall, 171 F.3d 195 (4<sup>th</sup> Cir. 1999). (But see S. Ct. case United States v. Cotton.)

Court's denial of motion by defendant to proceed *pre se* is reviewed for an abuse of discretion. Bassette v. Thompson, 915 F.2d 932, 941-42 (4<sup>th</sup> Cir. 1990).

#### Rule 12(f) - Failure to Raise Defenses/Objections:

A motion under Rule 12(f) "is addressed to the discretion of the district judge and is to be disturbed only for clear error." United States v. Wertz, 625 F.2d 1128, 1132 (4th Cir.), cert. denied,

449 U.S. 904 (1980); United States v. Chavez, 902 F.2d 259, 263 (4th Cir. 1990)(untimely suppression motion).

Rule 14 - Prejudicial Joinder:

The granting of severance under Rule 14 is committed to the discretion of the trial courts, whose decisions on such matters will not be disturbed absent a clear abuse of that discretion. United States v. Brooks, 957 F.2d 1138, 1145 (4th Cir.), cert. denied, 505 U.S. 1228 (1992); United States v. Rhodes, 32 F.3d 867, 872 (4th Cir. 1994)(severance of counts), cert. denied, 513 U.S. 1164 (1995).

Rule 15 - Amending Pleadings

Denial of motion to amend a pleading is reviewed for abuse of discretion. Sandcrest Outpatient Servs. v. Cumberland County Hosp. Sys., 853 F.2d 1139, 1140 (4th Cir. 1988).

Rule 16 - Discovery:

A district court's decision to deny a bill of particulars is subject to review for abuse of discretion. United States v. MacDougall, 790 F.2d 1135, 1153 (4th Cir. 1986).

A trial court's decision as to an appropriate remedy for a discovery violation may only be reversed for abuse of discretion. United States v. Muse, 83 F.3d 672, 675 (4th Cir.), cert. denied, 117 S. Ct. 261 (1996), citing United States v. Ford, 986 F.2d 57, 59 (4th Cir. 1993); United States v. Hastings, 126 F.3d 310, 316 (4th Cir. 1997), cert. denied, 118 S. Ct. 1388 (1998).

A district court's decision not to order disclosure of an informant's identity is reviewable for abuse of discretion. United States v. Smith, 780 F.2d 1102, 1107-08 (4th Cir. 1985).

A district court's refusal to order the government to provide all requested pre-trial discovery materials is reviewed for abuse of discretion. See United States v. Fowler, 932 F.2d 306, 311 (4th Cir. 1991).

A district court's decision, after in camera inspection, denying the defendant access to Brady [373 U.S. 83 (1963)] material is reviewed for clear error. See United States v. Trevino, 89 F.3d 187, 193 (4th Cir. 1996).

Rule 18 - Venue:

The prosecution must establish venue by a preponderance of the evidence, and the trial court's decision is reviewed de novo. United States v. Newsom, 9 F.3d 337, 338 (4th Cir. 1993). If an objection to venue is not raised in the district court, the issue is waived on appeal. United States v. Stewart, 256 F.3d 231, 238 (4th Cir. 2001).

Rule 21(b) - Transfer:

A district court's decision concerning transfer of venue must be upheld unless the court's decision was a clear abuse of discretion and was prejudicial to the defendant. United States v. Espinoza, 641 F.2d 153, 162 (4th Cir.), cert. denied, 454 U.S. 841 (1981); United States v. Heaps, 39 F.3d 479, 482 (4th Cir. 1994). District court's ruling denying defendant's motion to transfer venue is reviewed de novo. United States v. Stewart, No. 98-4155 (4th Cir. July 6, 2001).

Rule 23(b) - Jury of Less than Twelve:

A district court's decision to excuse a juror for cause after the trial has begun is reviewed for abuse of discretion. United States v. Acker, 52 F.3d 509, 515 (4th Cir. 1995); United States v. Capers, 61 F.3d 1100, 1104 (4th Cir. 1995), cert. denied, 517 U.S. 1211 (1996).

Rule 24(a) - Trial Jurors: Examination.

The conduct of a jury voir dire examination is a matter within the broad discretion of the trial court and is reviewable for abuse of that discretion. United States v. Schnabel, 939 F.2d 197, 200-01 (4th Cir. 1991).

A district court's refusal to ask a requested voir dire question is reviewed for abuse of discretion. United States v. Barber, 80 F.3d 964, 967 (4th Cir.), cert. denied, 117 S. Ct. 198 (1996); United States v. Brooks, 957 F.2d 1138, 1144 (4<sup>th</sup> Cir.), cert. denied, 112 S. Ct. 3051 (1992).

A decision on whether to strike an entire jury panel is reviewed for a manifest abuse of discretion. United States v. Trujillo, 146 F.3d 838, 842 (11th Cir. 1998).

Rule 24(b) - Trial Jurors: Peremptory Challenges

Trial court's determination of whether prosecutor's exercise of peremptory strikes amounted to intentional discrimination on basis of race, in violation of Fourteenth Amendment's Equal Protection Clause as interpreted in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), should not be disturbed on appeal unless it is clearly erroneous. Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995); United States v. Blanding, 250 F.3d 858 (4th Cir. 2001).

Whether a defendant has made a prima facie showing of discrimination is a factual issue reviewed under the clearly erroneous standard. United States v. Woods, 812 F.2d 1483, 1487 (4th Cir. 1987).

Rule 24(c) - Alternate Jurors

A trial court's decision to replace a sitting juror with an alternate is reviewed for abuse of discretion. United States v. Nelson, 102 F.3d 1344, 1349 (4th Cir. 1996).

Rule 26.3 - Mistrial:

A trial court's decision to grant or deny a mistrial will not be overruled on appeal absent an abuse of discretion. United States v. Guay, 108 F.3d 545, 552 (4th Cir. 1997); United States v. Smith, 44 F.3d 1259, 1267 (4th Cir.), cert. denied, 115 S. Ct. 1970 (1995). Denials of motions for mistrial based upon juror misconduct are reviewed for abuse of discretion. United States v. Dorsey, 45 F.3d 809, 817 (4th Cir. 1995). Factual findings made in conjunction with a district court's ruling on a mistrial motion is reviewed for clear error. United States v. Smith, 44 F.3d 1259, 1269 (4<sup>th</sup> Cir. 1995).

Rule 29 - Motion for Judgment of Acquittal:

The standard of review on direct appeal for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979) (emphasis in original).

The standard for appellate review of the sufficiency of the evidence is that the verdict of guilt "must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680 (1942); United States v. Gray, 137 F.3d 765, 772 (4th Cir.), cert. denied, 119 S. Ct. 157 (1998).

Review de novo district court's entry of a judgment of acquittal. United States v. Harris, 31 F.3d 153, 156 (4th Cir. 1994); United States v. Lipford, 203 F.3d 259 (4th Cir. 2000).

A district court's denial of a motion for a judgment of acquittal is reviewed de novo. United States v. Romer, 148 F.3d 359, 364 (4th Cir. 1998); United States v. Villarini, 238 F.3d 530 (4th Cir. 2001). A district court's grant of a motion for judgment of acquittal, viewing the evidence in the light most favorable to the government, is reviewed de novo. United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997).

#### Rule 29(b) - Reservation of Decision on Motion:

The standard for appellate review of the trial court's reserving ruling on the defendant's motion for judgment of acquittal at the close of the government's evidence is the harmless error standard. United States v. Chorman, 910 F.2d 102 at 110, n.12 (4th Cir. 1990); United States v. Reifsteck, 841 F.2d 701, 703-04 (6th Cir. 1988).

#### Rule 29(c) - Motion after Discharge of Jury:

The Court of Appeals reviews de novo the district court's decision to deny judgment of acquittal. United States v. Romer, 148 F.3d 359, 364 (4th Cir. 1998), cert. denied, 119 S. Ct. 1032 (1999).

#### Rule 29.1 - Closing Argument:

The scope and extent of argument are within the discretion of the trial judge, reviewable for abuse of discretion. United States v. Horton, 921 F.2d 540, 547 (4th Cir. 1990), cert. denied, 501 U.S. 1234 (1991).

When faced with a claim of prosecutorial misconduct, appellate review of a district court's factual findings is for clear error. If no factual findings exist, review is plenary. United States v. McDonald, 61 F.3d 248, 253 (4th Cir. 1995). United States v. Ellis, 121 F.3d 908, 927 (4th Cir. 1997), cert. denied, 118 S. Ct. 738 (1998).

The Fourth Circuit has a two-pronged test for determining whether a prosecutor's misconduct in closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). Specifically a defendant "must show [1] that the [prosecutor's] remarks were improper and [2] that they 'prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial.'" United States v. Adam, 70 F.3d 776, 780 (4th Cir. 1995) (quoting United States v. Mitchell, 1 F.3d 235, 240 (4th Cir. 1993); accord United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994); United States v. Brockington, 849 F.2d 872, 875 (4th Cir. 1988)).

#### Rule 30 - Jury Instructions

Claims that a jury instruction failed to state the law accurately is reviewed de novo. United

States v. Cherry, 330 F.3d 658, 665 (4<sup>th</sup> Cir. 2003).

The trial court has broad latitude in instructing the jury and the charge will not be disturbed absent abuse of discretion. United States v. Park, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975).

Allegations of a constitutionally defective jury instruction are reviewed de novo. United States v. Morrison, 991 F.2d 112, 115 (4th Cir. 1993); United States v. Stitt, 250 F.3d 878 (4th Cir. 2001).

The standard of review for a trial court's refusal to give a specific eyewitness identification jury instruction is abuse of discretion. United States v. Brooks, 928 F.2d 1403, 1408 (4th Cir. 1991); United States v. Patterson, 150 F.3d 382, 387-88 (4th Cir. 1998).

An ERRONEOUS JURY INSTRUCTION not noticed below is reviewed for plain error. Olanov v. United States, 507 U.S. 725, 732 (1993).

When confronted by a claim of ERRONEOUS JURY INSTRUCTION, appellate court does not conduct a search for technical error. Rather, inquiry is whether, taken as a whole, the instruction fairly states the controlling law. United States v. Snyder, 766 F.2d 167, 170 (4th Cir. 1985) (jury instructions are reviewed "as a whole" to determine whether they fairly summarize applicable law).

If there is a FAILURE TO REQUEST the jury instruction, review its omission for plain error. United States v. Rogers, 18 F.3d 265, 268 (4th Cir. 1994); United States v. Brown, 202 F.3d 961, 698 n.13 (4th Cir. 2000).

" [A] claim of instructional error MAY ALTERNATIVELY BE PRESERVED by an objection in a directed verdict motion made pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure, before the jury retires." United States v. Ebersole, 411 F.3d 517 (4<sup>th</sup> Cir. 2005).

If there is a FAILURE TO OBJECT to court's instruction at trial, the issue is reviewed on appeal for plain error. United States v. Chavis, 880 F.2d 788, 794 (4th Cir. 1989). The plain error standard requires the defendant to show that the error resulted in a miscarriage of justice. United States v. Young, 470 U.S. 1, 15-16, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

The appellate court reviews a trial court's REFUSAL TO GIVE A REQUESTED JURY INSTRUCTION in view of the record and instructions as a whole and in the context of the trial, reversing only for prejudicial error. United States v. Fleschner, 98 F.3d 155, 158 (4th Cir. 1996), cert. denied, 521 U.S. 1106 (1997).

The decision to give a jury instruction and its content are reviewed for abuse of discretion. United States v. Abbas, 74 F.3d 506, 513 (4th Cir.), cert. denied, 506 U.S. 1229 (1996); United States v. Bostian, 59 F.3d 474, 480 (4th Cir. 1995), cert. denied, 516 U.S. 1121 (1996); United States v. Burgos, 55 F.3d 933, 935 (4th Cir. 1995); United States v. Russell, 971 F.2d 1098, 1107 (4th Cir. 1992), cert. denied, 506 U.S. 1066 (1993); United States v. Hassouneh, 199 F.3d 175 (4th Cir. 2000).

The district court's decision to give an Allen charge and the content of that charge are reviewed for an abuse of discretion. United States v. Burgos, 55 F.3d 933, 935 (4th Cir. 1995).

This Court will review de novo the district court's instructions on the statutory elements of an

offense as a question of law. United States v. Aramony, 88 F.3d 1369, 1383 (4th Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); United States v. Ellis, 121 F.3d 908, 923 (4th Cir. 1997) United States v. Horton, 321 F.3d 476 (4<sup>th</sup> Cir. 2003).

Harmless error analysis may be applied to a jury charge on the essential elements of the offense, even though defendant objected. Pope v. Illinois, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987). Neder v. United States, 119 S.Ct. 1827 (1999).

In determining harmlessness of instruction containing unconstitutional, burden-shifting presumption, reviewing court must determine, first, what evidence jury actually considered apart from presumption, and second, not merely whether that evidence would support jury's verdict but whether that evidence was so overwhelming as to leave it beyond reasonable doubt that verdict would have been same without improper presumption. Yates v. Evatt, 500 U.S. 391, 404-05, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991).

The standard of review for giving a SUPPLEMENTAL INSTRUCTION is whether the district court abused its discretion. United States v. Barsanti, 943 F.2d 428, 438 (4th Cir. 1991), cert. denied, 503 U.S. 936 (1992). United States v. Helem, 186 F.3d 449, 454 (4th Cir. 1999); United States v. Brown, 202 F.3d 691 (4th Cir. 2000).

The formulation of issues, the use of special verdicts, and the form of the submitted interrogatories rest with the sound discretion of the district court. Tights, Inc. v. Acme-McCrary Crop., 541 F.2d 1047, 1060 (4th Cir.), cert. denied, 429 U.S. 980 (1976).

#### Rule 32

A district court's application of Rule 32 is reviewed under the clearly erroneous standard. United States v. Souther, 221 F.3d 626 (4th Cir. 2000).

#### Rule 32(a)(1) - Presentence Investigation and Report:

Whether a defendant was deprived of the opportunity to comment upon the presentence report is reviewable for abuse of discretion. United States v. Jones, 913 F.2d 174, 178 (4th Cir. 1990), cert. denied, 498 U.S. 1052 (1991).

#### Rule 32(e) - Plea Withdrawal:

Decision whether a plea may be withdrawn rests with the discretion of the trial judge. The decision of the district court will not be disturbed absent an abuse of discretion. United States v. Wilson, 81 F.3d 1300, 1305 (4th Cir. 1996); United States v. Ptino, 887 F.2d 42, 46 (4th Cir. 1989); United States v. Haley, 784 F.2d 1218, 1219 (4th Cir. 1986); United States v. Brown, 617 F.2d 54, 55 (4th Cir. 1980). Denial of motion to vacate guilty plea reviewed for abuse of discretion.

#### Rule 33 - New Trial:

Decision whether to grant a new trial is in the discretion of the lower court and will be upset on appeal only if defendant can show abuse of discretion. United States v. Campbell, 977 F.2d 854, 860 (4th Cir. 1992), cert. denied, 507 U.S. 938 (1993); United States v. Arrington, 757 F.2d 1484 (4th Cir. 1985); United States v. Bales, 813 F.2d 1289 (4th Cir. 1987); United States v. Castner, 50 F.3d 1267, 1272 (4th Cir. 1995); United States v. Williams, 415 F.2d 232 (4th Cir. 1969) - sets out test (newly discovered evidence). United States v. Russell, 221 F.3d 615 (4th Cir. 2000); United States v. Fulcher, 250 F.3d 244 (4th Cir. 2001)

Rule 35 - Correction or Reduction of Sentence:

A district court' s refusal to depart under Rule 35 is not appealable. United States v. Pridgen, 64 F.3d 147 (4th Cir. 1995).

Rule 36 - A district court' s authority to amend a judgment is reviewed de novo. United States v. Layman, 116 F.3d 105, 108 (4th Cir. 1997).

Rule 41 - (unsealing of search warrant affidavit):

A district court' s decision to unseal a search warrant affidavit is reviewable for abuse of discretion. In re: The Application and Affidavit for Search Warrant (The Washington Post Co.) v. Hughes, 923 F.2d 324, 328 (4th Cir.), cert. denied, 500 U.S. 944 (1991).

Rule 48(a) - Dismissal

District court' s refusal to grant prosecutor' s motion for dismissal under Rule 48(a) is reviewed for abuse of discretion. United States v. Smith, 55 F.3d 157, 158 (4th Cir. 1995). United States v. Goodson, 204 F.3d 508 (4th Cir. 2000).

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 10(c) - The Record on Appeal

Review de novo the district court' s compliance with Fed. R. App. P. 10(c). United States v. Brown, 202 F.3d 691 (4th Cir. 2000).

## FEDERAL RULES OF EVIDENCE

General:

District court' s decision to admit or exclude evidence is reviewed for abuse of discretion. United States v. Bostian, 59 F.3d 474, 480 (4th Cir. 1995); United States v. Hassouneh, 199 F.3d 175 (4th Cir. 2000); United States v. Lancaster, 96 F.3d 734, 744 (4th Cir. 1996) (en banc). Where the defendant did not object at trial, the admission of evidence is reviewed for plain error. United States v. Olano, 507 U.S. 725, 732-35 (1993).

A district court' s evidentiary rulings are entitled to substantial deference and will not be reversed absent a clear abuse of discretion. United States v. Moore, 27 F.3d 969, 974 (4th Cir. 1994).

The evidence in an evidentiary hearing will be viewed in the light most favorable to the prevailing party below and the district court' s factual findings will be reversed only if they are clearly erroneous. United States v. Jones, 356 F.3d 529, 533 (4<sup>th</sup> Cir. 2004). " A finding is ' clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Lentz, 383 F.3d 191, 201 (4<sup>th</sup> Cir. 2004) (internal quotation omitted).

Attorney-client privilege - Whether evidence was admitted in violation of the defendant' s attorney-client privilege is a mixed question of fact and law subject to de novo review. In re Grand Jury Proceedings, 33 F.3d 342, 353 (4th Cir. 1994).

Charts - The admission of a chart will not be overturned on appeal unless the decision is arbitrary or irrational. United States v. Loayza, 107 F.3d 257, 264 (4<sup>th</sup> Cir. 1997).

Indictment - The submission of indictment to the jury is reviewed for abuse of discretion. United States v. Polowichak, 783 F.2d 410, 413 (4<sup>th</sup> Cir. 1986).

Marital Privilege - A trial court' s resolution of the marital privilege issue is reviewed for abuse of discretion. United States v. Hassan El, 5 F.3d 726, 731 (4<sup>th</sup> Cir. 1993);

### Rule 103 - Rulings on Evidence:

Failure to object to testimony at trial subjects admission of evidence to plain error standard of review. Fed. R. Evid. 103(a)(1), 103(d); Fed. R. Crim. P. 52(b); United States v. Vogt, 910 F.2d 1184, 1192 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991).

### Rule 104(a) - Preliminary Questions of Admissibility Generally:

A trial court' s ruling on the preliminary question of admissibility of co-conspirator statements is subject to the clearly erroneous standard of review. Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775 at 2781-82, 97 L. Ed. 2d 144 (1987).

### Rule 201 - Judicial Notice of Adjudicative Facts

Standard of review for the court' s taking judicial notice of an appropriate fact is abuse of discretion. Person v. Miller, 854 F.2d 656, 660 (4th Cir. 1988), cert. denied, 489 U.S. 1011 (1989).

Rule 401 - Definition of " Relevant Evidence" :

A trial court has broad discretion in ruling on the relevance and admissibility of evidence and the reviewing court will not disturb that discretion unless it has been clearly abused. United States v. Zandi, 769 F.2d 229, 237 (4th Cir. 1985); United States v. Rawle, 845 F.2d 1244, 1247 (4th Cir. 1988); United States v. Peay, 972 F.2d 71 (4th Cir. 1992), cert. denied, 506 U.S. 1071 (1993); United States v. Bostian, 59 F.3d 474, 480 (4th Cir.), cert. denied, 116 S. Ct. 929 (1996).

Rule 403 - Exclusion of Relevant Evidence:

A decision under Rule 403 is committed to the discretion of the trial court, whose judgment will not be disturbed absent a plain abuse of that discretion. United States v. Wilson, 135 F.3d 291, 306 (4th Cir.), cert. denied, 118 S. Ct. 1852 (1998); United States v. Simpson, 910 F.2d 154, 157 (4th Cir. 1990); Garraghty v. Jordan, 830 F.2d 1295, 1298 (4th Cir. 1987); United States v. Penello, 668 F.2d 789, 790 (4th Cir. 1982); United States v. Morison, 844 F.2d 1057, 1078 (4th Cir.), cert. denied, 488 U.S. 908 (1988). We review a district court's admission of evidence over a Rule 403 objection under a broadly deferential standard and will not overturn a district court's ruling in the absence of the most extraordinary circumstances in which the court's discretion has been plainly abused. United States v. Love, 134 F.3d 595, 603 (4th Cir.), cert. denied, Sheppard v. United States, 118 S. Ct. (1998); United States v. Hassouneh, 199 F.3d 175 (4th Cir. 2000).

Rule 404(b) - Other crimes, wrongs, or acts

Admissibility of evidence under Rule 404(b) is reviewed for abuse of discretion. United States v. Grimmond, 137 F.3d 823, 831 (4th Cir.), cert. denied, 119 S. Ct. 124 (1998); United States v. Sanchez, 118 F.3d 192, 195 (4th Cir. 1997); United States v. Chin, 83 F.3d 83, 87 (4th Cir. 1996); United States v. Mark, 943 F.2d 444 (4th Cir. 1991).

Rule 601 - General Rule of Competency:

Whether a witness is competent to testify at trial is determined by the trial court after appropriate examination. His exercise of discretion in this regard is to be reversed only for clear error. United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984).

Rule 609 - Impeachment by prior conviction:

The standard of review of a trial court's determination that the probative value of evidence of a prior conviction outweighs its prejudicial effect to the defendant is whether the court abused its discretion. United States v. Mitchell, 1 F.3d 235, 244-45 (4th Cir. 1993).

A district court's exclusion of impeachment evidence is reviewed for abuse of discretion. United States v. Barile, 286 F.3d 749 (4<sup>th</sup> Cir. 2002).

Rule 611(a) - Mode of Order of [Evidence] - Control by court:

A trial judge's decisions regarding control of trial proceedings will be reviewed only for abuse of discretion. Geders v. United States, 425 U.S. 80, 86, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976).

Rule 611(b) - Mode of Order . . . Scope of Cross-examination:

A district court's decision to limit cross-examination is reviewed for abuse of discretion. United States v. Guay, 108 F.3d 545, 552 (4th Cir. 1997); United States v. Ambers, 85 F.3d 173, 175 (4th Cir. 1996); United States v. McMillon, 14 F.3d 948, 955-56 (4th Cir. 1994). The district court's limitations of a defendant's cross-examination of government witnesses is reviewed for abuse of discretion. United States v. Turner, 198 F.3d 425, 430 (4th Cir. 1999). Trial courts are generally given wide latitude to set reasonable limits on cross-examination to prevent harassment, prejudice, or confusion of issues. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

Whether a trial court's curtailment of cross-examination denied defendant a fair trial is reviewable under an abuse of discretion standard. See United States v. Crockett, 813 F.2d 1310, 1312-13 (4th Cir.), cert. denied, 484 U.S. 834 (1987); United States v. Bodden, 736 F.2d 142, 145 (4th Cir. 1984); United States v. Cole, 622 F.2d 98, 100 (4th Cir.), cert. denied, 449 U.S. 956 (1980).

If the trial court erred in limiting the cross-examination, then the reviewing court must determine whether the error was "harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 87 L. Ed. 2d 674 (1986); United States v. Greenwood, 796 F.2d 49, 53 (4th Cir. 1986).

"The reopening of a criminal case after the close of evidence is within the discretion of the trial judge," United States v. Paz, 927 F.2d 176, 179 (4th Cir. 1991), and his decision is reviewed for abuse of discretion. Id. at 179; United States v. Peay, 972 F.2d 71 (4th Cir. 1992), cert. denied, 506 U.S. 1071 (1993); United States v. Abbas, 74 F.3d 506, 510 (4th Cir.), cert. denied, 517 U.S. 1229 (1996).

#### Rule 614(b) - Interrogation of Witness by Court:

The trial judge's behavior in interrogating witnesses during trial is subject to review for abuse of discretion. United States v. Parodi, 703 F.2d 768, 776 (4th Cir. 1985); United States v. Wilson, 135 F.3d 291, 306 (4th Cir. 1998).

A defendant's claim that the district court itself improperly bolstered the credibility of the government's witnesses is reviewed for abuse of discretion. United States v. Russell, 971 F.2d 1098, 1107 (4th Cir. 1992); cert. denied, 506 U.S. 1066 (1993).

A district court's comments on evidence is reviewed for abuse of discretion to determine whether the defendant was denied a fair trial. United States v. Tello, 707 F.2d 85 (4th Cir. 1983); United States v. Parodi, 703 F.2d 768, 775-78 (4th Cir. 1983) United States v. Seeright, 978 F.2d 842, 847 (4th Cir. 1992).

#### Rule 614(c) - Objections

Failure to object to the district court's questioning at trial precludes appellate review. United States v. Gastaburo, 16 F.3d 582, 589 (4th Cir. 1994), cert. denied, 513 U.S. 829 (1994).

#### Rule 615 - Exclusion of Witnesses

" Our review of a district court's application of Rule 615 depends on the nature of the district

court' s ruling. We review de novo the district court' s order refusing sequestration or sequestering a person whom it finds exempt under section (1) or (2) and we review for clear error factual findings about who is a party, officer, or employee. But a ruling under section (3) resembles a trial court' s evidentiary rulings which fall within the court' s broad discretion over the conduct of trials. Accordingly, we apply an abuse of discretion standard to a district court' s judgment about whether section (3) exempts a person as essential to a party' s presentation of its cause." Opus 3 Ltd. V. Heritage Park, Inc., 91 F.3d 625, 628-29 (4th Cir. 1996). District court' s order excluding witnesses or striking their testimony reviewed for abuse of discretion. General Elec. Co. v. Joiner, 522 U.S. 136, 141-42 (1997), United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000).

#### Rule 702 - Testimony by Experts:

Court of Appeals reviews the district court' s decision to admit scientific evidence for abuse of discretion. United States v. Powers, 59 F.3d 1460, 1470 (4th Cir. 1995), cert. denied, 516 U.S. 1017 (1996). The trial court' s admission of expert testimony is reviewed for clear error. Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999); United States v. Barnette, 211 F.3d 803 (4th Cir. 2000) The exclusion of expert testimony under Rule 702 is within the sound discretion of the trial judge. United States v. Harris, 995 F.2d 532, 534 (4<sup>th</sup> Cir. 1993). Under this standard, a district court by definition abuses its discretion when it makes an error of law. United States v. Stitt, 250 F.3d 878, 896 (4<sup>th</sup> Cir. 2001).

Court of Appeals reviews the district court' s decision on admission of scientific evidence, such as polygraph test results, for abuse of discretion. United States v. Ruhe, 191 F.3d 376, 387-88 (4<sup>th</sup> Cir. 1999); United States v. Prince-Oyibo, 320 F.3d 494 (4<sup>th</sup> Cir. 2003).

#### Rule 704(b) - Opinion on Ultimate Issue:

A trial court' s admission of expert testimony under Rule 704(b) is reviewed for abuse of discretion. United States v. Barber, 80 F.3d 964, 970 (4th Cir.), cert. denied, 117 S. Ct. 198 (1996). The trial court' s admission of expert testimony is reviewed for clear error. Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999); United States v. Barnette, 211 F.3d 803 (4th Cir. 2000).

#### Rule 801(d)(2)(E) - Hearsay exceptions: Admission of Party-Opponent

A district court' s decision to admit evidence under Rule 801(d)(2)(E) of the Federal Rules of Evidence may only be overturned on appeal if it constituted an abuse of discretion. United States v. Blevins, 960 F.2d 1252, 1255 (4th Cir. 1992); United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000).

#### Rule 804(b)(3) - Hearsay exceptions: Statement against Interest.

The trial court' s decision regarding admissibility of evidence under Rule 804(b)(3) is reviewed for abuse of discretion. United States v. Bumpass, 60 F.3d 1099, 1101 (4th Cir. 1995), cert. denied, 116 S. Ct. 925 (1996).

#### Rule 807 (formerly 804(b)(5)& 803(24)) - Hearsay exceptions: Other.

The standard of review for admission of hearsay statements is ordinarily abuse of discretion. United States v. Hinkson, 632 F.2d 382, 385 (4th Cir. 1980). However, where a trial court relies on corroborating evidence violative of Idaho v. Wright, 497 U.S. 805 (1990), in admitting hearsay

statements of an UNAVAILABLE witness, review is de novo. United States v. Ellis, 951 F.2d 580 (4th Cir.), cert. denied, 505 U.S. 1220 (1992).

The findings of a trial judge on the guarantees of trustworthiness are subject to the clearly erroneous standard of review. United States v. Workman, 860 F.2d 140, 144 (4th Cir. 1988), cert. denied, 489 U.S. 1078 (1989) (citing United States v. Smith, 792 F.2d 441, 443-44 (4th Cir. 1986), cert. denied, 479 U.S. 1037 (1987)).

A district court's factual findings regarding the reliability of a prior statement or testimony is reviewed for clear error. United States v. Brothers Construction Co., 219 F.3d 300 (4th Cir. 2000).

A district court's determination that a witness' prior statements are not inconsistent with trial testimony will not be reversed absent an abuse of discretion. United States v. Gravely, 840 F.2d 1156, 1163 (4<sup>th</sup> Cir. 1988).

Rule 901(a) - Authentication:

The sufficiency of a showing of authenticity of a document sought to be introduced is reviewed for abuse of discretion. United States v. Wilson, 115 F.3d 1185, 1188-89 (4th Cir. 1997); United States v. Branch, 970 F.2d 1368, 1372 (4th Cir. 1992).

A determination by the trial court that an adequate CHAIN OF CUSTODY has been established is reviewed for an abuse of discretion. United States v. Ricco, 52 F.3d 58, 61 (4th Cir.), cert. denied, 516 U.S. 898 (1995).

Rule 1006 - Summaries

A district court's decision to admit evidence under Rule 1006 is reviewed for abuse of discretion. United States v. Strissel, 920 F.2d 1162, 1163 (4th Cir. 1990).

## STATUTES

### Constitutionality of a statute:

A challenge to the constitutionality of a federal statute is reviewed de novo. United States v. Mento, 231 F.3d 912, 917 (4th Cir. 2000); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1123 (4th Cir. 1995).

### Statutory Construction:

The issue of statutory construction is a pure matter of law which is reviewed de novo. United States v. Payne, 952 F.2d 827, 828 (4th Cir. 1991); United States v. Mitchell, 39 F.3d 465, 468 (4th Cir. 1994), cert. denied, 115 S. Ct. 2578 (1995); United States v. Childress, 104 F.3d 47 (4th Cir. 1996).

### Assimilative Crimes Act - 18 U.S.C. § 13

The “plainly unreasonable” standard for review is applicable for review of assimilated crimes for which there is no sentencing guideline. United States v. Finley, 531 F.3d 288, 291 (4<sup>th</sup> Cir. 2008). First, the court determines whether the sentence is procedurally or substantively unreasonable. If so, then the court determines whether the sentence is clearly or obviously unreasonable.

### 18 U.S.C. §§ 921(a)(20) and 922(g)(1) - [definition]

Definition of “convicted felon” - a district court’s determination of whether a defendant is a convicted felon within the meaning of 18 U.S.C. §§ 921(a)(20) and 922(g)(1) involves a legal decision reviewed de novo. United States v. Haynes, 961 F.2d 50, 51 (4th Cir. 1992).

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

Whether a defendant’s prior conviction qualifies as a predicate offense is reviewed de novo. United States v. Brandon, 247 F.3d 186, 188 (4<sup>th</sup> Cir. 2001).

District court’s determination that defendant had been committed to a mental institution with in the meaning of section 922(g)(4) is reviewed de novo. United States v. Hall, 972 F.2d 67, 69 (4th Cir. 1992). United States v. Midgett, 198 F.3d 143 (4th Cir. 1999).

### 18 U.S.C. § 1956(a) - money laundering

When raised below, the court reviews the multiplicity of money laundering charges de novo. United States v. Stewart, 256 F.3d 231 (4th Cir. 2001).

### 18 U.S.C. § 2251(A) - Child porn

Analysis of scope of statute is a question of law that is reviewed de novo.

18 U.S.C. § 2518 - Wiretaps - The court will review for abuse of discretion the determinations of necessity under § 2518. United States v. Wilson, 484 F.3d 267, 280 (4<sup>th</sup> Cir. 2007).

### 18 U.S.C. § 3006A(e)(1) - [CJA] Services other than counsel:

Indigents are entitled by law to money for investigative and expert services that are “necessary for adequate representation.” A district court’s decision that certain resources are not “necessary” is reviewed for abuse of discretion. United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997) (internal citations omitted).

### 18 U.S.C. § 3161 - Speedy Trial Act:

Legal conclusions in the district court' s application of the Speedy Trial Act are reviewed de novo, United States v. Reavis, 48 F.3d 763, 770 (4th Cir.), cert. denied, 515 U.S. 1151 (1995); United States v. Jarrell, 147 F.3d 315, 317 (4<sup>th</sup> Cir. 1998); United States v. Stoudenmire, 74 F.3d 60, 63 (4th Cir. 1996), factual findings, for clear error. Id.

Review of the district court' s ultimate legal determination regarding an alleged speedy trial violation is subject to de novo review. However, the district court' s factual findings underlying speedy trial determinations are entitled to considerable deference and should not be disturbed unless clearly erroneous. United States v. Keith, 42 F.3d 234 (4th Cir. 1994); United States v. Stoudenmire, 74 F.3d 60 (4th Cir. 1996).

#### 18 U.S.C. § 3500 - Jencks statements:

The existence of Jencks Act material not produced by the government is a factual determination to be made by the trial court and will be overturned on appeal only for clear error. United States v. Smith, 31 F.3d 1294, 1301 (4th Cir. 1994), cert. denied, 513 U.S. 1181 (1996); United States v. Escamilla, 467 F.2d 341 (4th Cir. 1972).

#### 18 U.S.C. § 3501 - Voluntariness of Statements

Voluntariness of confessions are reviewed de novo. United States v. Braxton, 112 F.3d 777, 781 (4th Cir. 1997).

#### 18 U.S.C. § 3565 - Probation Revocation:

Probation may be revoked at the discretion of the court when it is reasonably satisfied that the terms of release were violated - reviewable for abuse of discretion. Burns v. United States, 287 U.S. 216, 222-23 (1932); Black v. Romano, 471 U.S. 606, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985).

#### 18 U.S.C. § 3583(d) - Conditions of Supervised Release:

Special conditions of supervised release imposed by a district court are reviewed for abuse of discretion. United States v. Dotson, 324 F.3d 256, 259 (4<sup>th</sup> Cir. 2003).

#### 18 U.S.C. § 3583(e) - Supervised Release Revocation:

Whether the district court erred in revoking supervised release is reviewed for abuse of discretion. United States v. Copley, 978 F.2d 829, 831 (4th Cir. 1992).

A district court' s decision whether to terminate an individual' s term of supervised release before the expiration of the term under 18 U.S.C. § 3583(e) is reviewed under the narrow abuse of discretion standard. United States v. Pregent, 190 F.3d 279 (4th Cir. 1999).

A district court' s order imposing a sentence after revocation of supervised release is reviewed for abuse of discretion. United States v. Davis, 53 F.3d 638, 642-43 (4th Cir. 1995)

#### 18 U.S.C. § 3584 - Multiple Sentences of Imprisonment:

A district court' s decision to order consecutive or concurrent sentences is reviewed for abuse of discretion. United States v. Puckett, 61 F.3d 1092, 1098-99 (4th Cir. 1995).

18 U.S.C. §§ 3663, 3664 - Restitution Orders [Pre-MVRA]:<sup>1</sup>

Explicit findings of fact by the trial court regarding an order of restitution are reviewable for abuse of discretion. United States v. Henoud, 81 F.3d 484, 487 (4th Cir. 1996). United States v. Karam, 201 F.3d 320 (4th Cir. 2000).

18 U.S.C. § 4241 - Competence to stand trial:

The district court's determination that a defendant is competent to stand trial will not be disturbed unless it was "clearly arbitrary or unwarranted." United States v. Crump, 120 F.3d 462, 466 (4th Cir. 1997), quoting Hall v. United States, 410 F.2d 653, 658 (4th Cir. 1969).

18 U.S.C. § 4285 - Transportation of released persons for court:

The standard of review of a district court's order under 18 U.S.C. § 4285 is abuse of discretion. Kemp v. Peterson, 940 F.2d 110 (10th Cir. 1995).

18 U.S.C. § 6001 et seq. - Immunity

A district court's finding as to whether the government has reached an agreement with the defendant not to prosecute him in exchange for his cooperation is reviewed for clear error. See United States v. McHan, 101 F.3d 1027, 1034 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997).

28 U.S.C. § 455(b)(5)(ii) Recusal of Judge

A district court's refusal to recuse himself is reviewed for abuse of discretion. United States v. DeTemple, 162 F.3d 279, 283 (4th Cir. 1998), cert. denied, 526 U.S. 1137 (1999).

28 U.S.C. § 753(b) - Court Reporter Act

Review de novo district court's compliance with the Court Reporter Act, 28 U.S.C § 753(b) and Fed. R. App. P. 10(c). United States v. Brown, 202 F.3d 691 (4th Cir. 2000).

28 U.S.C. § 1651 - Writs

The standard of review of a district court's order under 28 U.S.C. § 1651 is abuse of discretion. United States v. Kennedy, 64 F.3d 1465 (4th Cir. 1993).

28 U.S.C. 2044 - Payment of fine with bond money:

The district court's decision to grant the government's request for transfer of bail funds under 28 U.S.C. § 2044 involves an exercise of discretion, United States v. Higgins, 987 F.2d 543, 546 n.3 (8th Cir. 1993); therefore, the standard of review is for abuse of discretion.

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<sup>1</sup> The Mandatory Victim Witness Protection Act of 1996 (MVRA), 18 U.S.C.A §§ ~~3663A-3664~~, eliminates the provisions of the Victim Witness Protection Act of 1982 (VWPA), requiring the district court to make specific factual findings as to the defendant's financial resources, etc., and requires an order of full restitution without regard to economic circumstances. After ordering full restitution, however, under MVRA, the court must set a payment schedule. 18 U.S.C.A § ~~3664(f)(2)~~ (West Supp. 1998).

## SEARCH AND SEIZURE

### Generally

“ De novo review is preferred for determinations of whether a search or seizure violates the Fourth Amendment in order to minimize the variations of conclusions drawn by different trial judges applying facts to law, because such varied results would be inconsistent with the idea of a unitary system of law.” United States v. Gwinn, 219 F.3d 326 (4th Cir. 2000);

Standard of appellate review of reasonable suspicion determination is de novo. United States v. Arvizu, 122 S. Ct. 744 (2002).

### Motion to Suppress

Review of a district court's denial of a motion to suppress evidence involves a two-stage standard: Findings of historical fact only are reviewed for clear error. The district court's ultimate conclusion that historical facts, when viewed from the standpoint of an objectively reasonable police officer, support a conclusion that reasonable suspicion or probable cause existed is reviewed de novo. Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996). See also United States v. Arvizu, 122 S.Ct. 744 (2002); United States v. Gray, 137 F.3d 765, 769 (4th Cir. 1998) (citing Ornelas). In reviewing a denial of a motion to suppress, we review the factual findings of the district court for clear error and its legal conclusions de novo. United States v. Johnson, 114 F.3d 435, 439 (4th Cir. 1997); United States v. Simons, 206 F.3d 392 (4th Cir. 2000). We review legal conclusions involved in the district court's suppression determination de novo but review factual findings underlying the legal conclusions subject to the clearly erroneous standard. United States v. Rusher, 966 F.2d 868, 873 (4th Cir. 1992). The legal conclusion in a district court's decision on a motion to suppress are reviewed de novo and the factual findings are reviewed for clear error, and the evidence is viewed in the light most favorable to the prevailing party below. United States v. Seidman, 156 F.3d 542, 547 (4<sup>th</sup> Cir. 1998); United States v. Jones, 356 F.3d 529, 532-33 (4<sup>th</sup> Cir. 2004).

Where defendant prevailed on motion to suppress, the appellate court reviews the facts in the light most favorable to him. United States v. Kimbrough, 477 F.3d 144, 147 (4<sup>th</sup> Cir. 2007); United States v. Cain, 524 F.3d 477 (4<sup>th</sup> Cir. May 9, 2008).

Voluntariness of confessions are reviewed de novo. United States v. Braxton, 112 F.3d 667, 781 (4th Cir. 1997).

The denial of a request for blanket suppression is reviewed for abuse of discretion. United States v. Robinson, 275 F.3d 371 (4<sup>th</sup> Cir. 2001); United States v. Borromeo, 954 F.2d 245, 246 (4<sup>th</sup> Cir. 1992).

### Motion for Reconsideration of Suppression Order:

A district court's decision to grant the Government's motion for reconsideration is reviewed for abuse of discretion. United States v. Dickerson, 166 F.3d 667, 678 (4th Cir. 1999) rev' d on other grounds, 530 U.S. 428 (2000). A district court abuses its discretion when it makes an error of law. Id. The propriety of the original ruling must be addressed. In reviewing whether the district court erred in rescinding its earlier suppression ruling.

#### Search Warrant - Probable Cause:

A district court's factual findings that a search warrant was supported by probable cause in the affidavit is subject to clearly erroneous review.<sup>2</sup> United States v. Jones, 913 F.2d 174 (4th Cir. 1990), cert. denied, 498 U.S. 1052 (1991), citing United States v. Fawole, 785 F.2d 1141, 1144-46 (4th Cir. 1986). Where the facts are not in dispute, the appellate court reviews the magistrate's finding that probable cause existed for issuance of a search warrant de novo. United States v. Wilhelm, 80 F.3d 116, 118 (4th Cir. 1996); United States v. Miller, 925 F.2d 695, 698 (4th Cir.), cert. denied, 502 U.S. 833 (1991).

#### Police-Citizen Encounter:

A district court's determination whether a seizure occurred is factual in nature and will be overturned on appeal only if clearly erroneous. United States v. Analla, 975 F.2d 119, 123-34 (4th Cir. 1992), cert. denied, 507 U.S. 1033 (1993); United States v. Wilson, 895 F.2d 168, 172 (4th Cir. 1990); United States v. Gordon, 895 F.2d 932, 937-38 (4th Cir.), cert. denied, 498 U.S. 846 (1990); United States v. Porter, 738 F.2d 622, 625 (4th Cir.) (en banc), cert. denied, 469 U.S. 983 (1984).

Whether an encounter between citizens and the police is a Fourth Amendment seizure or a consensual encounter raising no constitutional questions is an issue of fact that cannot be reversed unless the district court's findings are clearly erroneous. See United States v. Porter, 738 F.2d 622, 625 (4th Cir. 1984) (en banc). However, because the test to determine whether an encounter was consensual or a Fourth Amendment seizure is an objective one, its proper application is a question of law. United States v. Sullivan, 138 F.3d 126, 133 (4th Cir. 1998).

Ultimate questions of reasonable suspicion to make a warrantless seizure of a person involve both questions of fact and law and are reviewed de novo on appeal, although the appellate court is bound by the trial court's findings of historical facts leading up to the stop or search unless clearly erroneous based on the evidence. Ornelas v. United States, 517 U.S. 690, 699 (1996).

The reasonableness of a search and seizure is a legal conclusion which is reviewed de novo. United States v. Carter, 139 F.3d 424 (4th Cir. 1998) (en banc).

#### Curtilage

A district court's determination of whether an area is within the curtilage of a home is ultimately a legal one, and is subject to de novo review; antecedent factual findings are reviewed for clear error. United States v. Breza, 308 F.3d 430, 435 (4<sup>th</sup> Cir. 2002).

#### Knock and Announce

With respect to compliance with the "knock and announce" rule, we review the district court's factual findings for clear error and its legal conclusions de novo. United States v. Ward, 171 F.3d 188, 193 (4th Cir. 1999); United States v. Lipford, 203 F.3d 259 (4th Cir. 2000).

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<sup>2</sup>A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

#### Consent to Search:

The determination that a defendant has voluntarily consented to a search is a finding of fact that will be upheld on appeal unless the finding is clearly erroneous. United States v. Analla, 975 F.2d 119, 125 (4th Cir. 1992), cert. denied, 507 U.S. 1033 (1993); United States v. Elie, 111 F.3d 1135, 1144 (4th Cir. 1997); United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996)(en banc).

#### Investigatory Stop:

The standard of review of an investigatory stop on appeal is twofold. Underlying factual determinations are reviewed under a “clearly erroneous” standard. The determination of whether the particular facts constitute “reasonable suspicion” is reviewed de novo. United States v. McCraw, 920 F.2d 224, 227 (4th Cir. 1990); United States v. Porter, 738 F.2d 622, 625 (4th Cir.) (en banc), cert. denied, 469 U.S. 983 (1984); accord Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). Whether an officer has reasonable suspicion to justify a stop-and-frisk is subject to de novo review. United States v. Perrin, 45 F.3d 896, 871 (4th Cir. 1995); United States v. Swann, 149 F.3d 271, 274 (4th Cir. 1998).

#### Warrantless Arrest:

Appellate court must make independent determination on issue of legality of arrest; however, factual findings will not be disturbed unless they are clearly erroneous. United States v. McCraw, 920 F.2d 224 (4th Cir. 1990); United States v. Williams, 10 F.3d 1070, 1074 (4th Cir. 1993), cert. denied, 513 U.S. 926 (1994).

#### Warrantless Search - Exigent Circumstances:

The Fourth Circuit will affirm a district court’s finding of exigent circumstances unless it is clearly erroneous. United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981).

#### Challenging the Validity of Affidavit Supporting a Search Warrant

Once defendant has satisfied a 2-part test, he is entitled to a hearing where he bears the burden of proving the allegations by a preponderance of the evidence. United States v. Shorter, 328 F.3d 167 (4<sup>th</sup> Cir. 2003).

## SENTENCING GUIDELINES

Generally:

Appellate courts are to review the reasonableness of the district court's imposition of a criminal sentence under an abuse of discretion standard. Rita v. United States, 127 S. Ct. 2456, 2465, 2470 (2007) (Steven, J., concurring); United States v. Booker, 543 U.S. 220, 264 (2005); Gall v. United States, 128 S. Ct. 586, 591, 598 (2007).

The Fourth Circuit reviews the district court's factual findings at the sentencing hearing for clear error. United States v. Battle, 499 F.3d 315, 323 (4<sup>th</sup> Cir. 2007).

NOTE - BOOKER HOLDING THAT THE GUIDELINES ARE ONLY ADVISORY.

A sentence imposed by the district court is reviewed for reasonableness. United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 765 (2005).

Legal determinations underlying the imposition of a criminal sentence are reviewed *de novo*. United States v. Davenport, 445 F.3d 366, 370 (4<sup>th</sup> Cir. 2006).

Post-Booker, appellate courts continue to review the district court's interpretation of the Guidelines *de novo* and its findings of fact for clear error. United States v. Green, 436 F.3d 449, 456 (4<sup>th</sup> Cir. 2006).

A sentencing error not raised in the district court may be noticed for plain error. United States v. Davis, 954 F.2d 182, 187 (4th Cir. 1992); United States v. Ford, 88 F.3d 1350, 1355 (4th Cir. 1996), cert. denied, 117 S. Ct. 496 (1996).

Booker issues: Plain error where not preserved below; harmless error where the issue was preserved. United States v. Booker, 125 S. Ct. 738, 769 (2005.) (Use Apprendi standard below.)

A timely and sufficient Apprendi sentencing objection is reviewed *de novo*. Reversal is required unless the court finds the constitutional error harmless beyond a reasonable doubt, with the Government bearing the burden of proving harmlessness. United States v. Mackins, 315 F.3d 399, 405 (4<sup>th</sup> Cir. 2003).

District court's order imposing a term of imprisonment is reviewed for an abuse of discretion. United States v. Davis, 53 F.3d 638, 642-43 (4th Cir. 1995).

In reviewing an application of the sentencing guidelines, a district court's legal determinations are reviewed *de novo* and its factual determinations are reviewed for clear error. United States v. Blake, 81 F.3d 498 (4th Cir. 1996).

Appellate courts review *de novo* whether a sentence violates the *ex post facto* clause of the Fifth Amendment. United States v. Ruhbayan, 527 F.3d 107 (4<sup>th</sup> Cir. 2007), vacated on other grounds, 128 S. Ct. 1132.

A district court's decision as to where to impose sentence within a properly calculated guideline range is not reviewable. United States v. Jones, 18 F.3d 1145, 1151 (4<sup>th</sup> Cir. 1994). (No longer

good law after Booker.)

The Fourth Circuit remands for resentencing cases where the sentencing court failed to resolve a disputed fact on which it relied at sentencing. United States v. Morgan, 942 F.2d 243, 245 (4<sup>th</sup> Cir. 1991); United States v. Bolden, 325 F.3d 471 (4<sup>th</sup> Cir. 2003).

When there are two permissible ways to view the evidence at sentencing, “factual findings by the trial court . . . based on the credibility of witnesses . . . are virtually unreviewable.” United States v. Jones, 356 F.3d 529 (4<sup>th</sup> Cir. 2004).

The court of appeals will not review a district court decision not to depart downwards from the advisory guideline range pursuant to USSG § 5K2.13 based on a defendant’s diminished capacity so long as the court recognized that it had the authority to do so. United States v. Brewer, 520 F.3d 367, 371 (4<sup>th</sup> Cir. 2008).

#### 1B1.1 - Application instructions

The district court’s selection of the relevant sentencing guideline is reviewed de novo. United States v. Cutler, 36 F.3d 406, 407 (4th Cir. 1994); United States v. Jones, 31 F.3d 1304, 1315 (4th Cir. 1994); United States v. Lambert, 994 F.2d 1088, 1091 (4th Cir. 1993).

The standard of review of legal determinations involving sentencing guideline application is de novo; of factual determinations, clear error. United States v. Daughtrey, 874 F.2d 213, 217 (4th Cir. 1989); United States v. Martinez, 136 F.3d 972, 979 (4th Cir. 1998); United States v. Romer, 148 F.3d 359, 371 (4th Cir. 1998), cert. denied, 119 S. Ct. 1032 (1999).

#### 1B1.8 - Proffer Agreement

Whether the district court’s consideration of the defendant’s proffer statement during sentencing violated the terms of the proffer agreement raises a question of law that is reviewed de novo. United States v. Lopez, 219 F.3d 343 (4th Cir. 2000); United States v. Blake, 81 F.3d 498, 503 (4th Cir. 1996).

#### 2A2.2(b)(1) - More than minimal planning:

District court’s determination that defendant’s action constituted more than minimal planning is reviewed for clear error. United States v. Pearce, 65 F.3d 22, 26 (4th Cir. 1995).

#### 2B3.1 - Threat of Death

A district court’s finding that a threat of death was made is reviewed de novo. United States v. Franks, 183 F.3d 335, 337 (4th Cir. 1999).

#### 2B3.1(b)(2)(E) - Dangerous weapon is brandished, displayed, or possessed

The determination that a dangerous weapon was brandished, displayed, or possessed is reviewed de novo. United States v. Souther, 221 F.3d 626 (4th Cir. 2000).

#### 2B5.1(b)(2) - Counterfeiting

A district court’s interpretation of USSG § 2B5.1(b)(2) is reviewed de novo. United States v. Miller, 77 F.3d 71, 75 (4<sup>th</sup> Cir. 1996).

#### 2D1.1 - Offenses involving drugs:

The quantity of drugs involved in the offense conduct is a factual issue reviewable under the

clearly erroneous standard. United States v. Uwaeme, 975 F.2d 1016, 1018 (4th Cir. 1992); United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), cert. denied, 517 U.S. 1162 (1996); United States v. Fletcher, 74 F.3d 49, 55 (4th Cir. 1996). A challenge of the amount of drugs attributed to the defendant by the district court is reviewed for clear error. United States v. Sampson, 140 F.3d 585, 591 (4th Cir. 1998). A district court's calculation of drug quantity is a factual finding and is reviewed for clear error. United States v. Carter, 300 F.3d 415, 425 (4<sup>th</sup> Cir. 2002).

Whether a firearm was present in the sense that it justifies an enhancement under USSG § 2D1.1(b)(1) is reviewed for clear error. United States v. Harris, 128 F.3d 850, 852 (4th Cir. 1997). A district court's determination as to whether a firearm was present and justifies enhancement is a factual determination reviewed for clear error. United States v. Apple, 915 F.2d 899, 914 (4<sup>th</sup> Cir. 1990).

Whether a district court has properly found the existence of a substantial risk of harm to human life or the environment within the meaning of Guidelines § 2K1.1(b)(5)(B) is a mixed question of law and fact that is reviewed de novo. United States v. Houchins, 364 F.3d 182 (4<sup>th</sup> Cir. 2004), vacated on other grounds, 543 U.S. 1104.

#### 2E2.1 - Extortionate extension of credit:

A district court's determination that an enhancement under 2E2.1(b)(2) for "bodily injury" is justified is reviewable for clear error. United States v. Isaacs, 947 F.2d 112 (4th Cir. 1991).

#### 2F1.1 - Fraud and Deceit

The district court's finding of intended loss is a factual one, United States v. Rothberg, 954 F.2d 217 (4th Cir. 1992), thus reviewable for clear error. However, the application of a loss enhancement to undisputed facts is a question of law which is reviewed de novo. United States v. Chatterji, 46 F.3d 1336, 1340 (4th Cir. 1995). A sentencing court's interpretation of the term "loss" is a legal issue, reviewed de novo. United States v. Miller, 316 F.3d 495, 498 (4<sup>th</sup> Cir. 2003); Elliott v. United States, No. 02-4755 (4<sup>th</sup> Cir. June 18, 2003). The correctness of the district court's calculation of loss is a question of fact, reviewed for clear error. United States v. Godwin, 272 F.3d 659, 671 (4<sup>th</sup> Cir. 2001); Elliott v. United States, 332 F.3d 753 (4<sup>th</sup> Cir. 2003).

#### 2F1.1(b)(2)(A) - More than minimal planning:

Determination of whether a certain crime involves more than minimal planning is essentially one of fact; appellate court will reverse only upon finding that district court's decision is clearly erroneous. United States v. Daughtrey, 874 F.2d 213, 217 (4th Cir. 1989); United States v. Hummer, 916 F.2d 186 (4th Cir. 1990), cert. denied, 499 U.S. 970 (1991); United States v. Pearce, 65 F.3d 22, 26 (4th Cir. 1995).

#### 2F1.1(b)(2)(B) - Scheme to defraud more than one victim:

The Court of Appeals reviews the district court's findings with respect to its application of sentencing guideline covering schemes to defraud more than one person for clear error, giving due regard to the opportunity of the district court to judge the credibility of the witnesses. United States v. Aramony, 166 F.3d 655, 663 (4th Cir. 1999).

#### 2P1.1 - Escape, Instigating or Assisting Escape:

Whether a corrections facility meets the definition for application of decrease under § 2P1.1(b)(3) is a legal determination reviewable de novo. United States v. Sarno, 24 F.3d 618 (4th Cir. 1994).

2X3.1 - Accessory after the fact:

The sentencing court's determination of whether 2X3.1, accessory after the fact, is applicable is a legal conclusion which is subject to de novo review. United States v. Pierson, 946 F.2d 1044 (4th Cir. 1991).

3A1.1 - Vulnerable victim:

The question of whether a victim is particularly susceptible to the criminal conduct involves factual determinations made by the court reviewable for clear error. United States v. Blake, 81 F.3d 498, 504 (4th Cir. 1996).

3B1.1, 3B1.2 - Role in the offense:

The standard of proof for application of an adjustment for role in the offense is the preponderance of evidence. United States v. Reavis, 48 F.3d 763, 768 (4th Cir.), cert. denied, 515 U.S. 1151 (1995); United States v. Love, 134 F.3d 595 (4th Cir. 1998).

A district court's factual determination concerning the defendant's role in the offense will only be reversed if clearly erroneous. United States v. Campbell, 935 F.2d 39, 46 (4th Cir. 1991); United States v. Love, 134 F.3d 595, 606 (4<sup>th</sup> Cir. 1998).

3B1.3 - Abuse of position of trust/Using a special skill:

Determination under § 3B1.3 for "using a special skill" to facilitate the crime is primarily factual, reviewable under the clearly erroneous standard. United States v. Daughtrey, 874 F.2d 213, 217 (4th Cir. 1989); United States v. Hummer, 916 F.2d 186 (4th Cir. 1990).

Determination under § 3B1.3 for abuse of position of trust is primarily factual, reviewable under the clearly erroneous standard. United States v. Helton, 953 F.2d 867, 869 (4th Cir. 1992); United States v. Gordon, 61 F.3d 263, 269 (4<sup>th</sup> Cir. 1995); United States v. Glymph, 96 F.3d 722, 727 (4<sup>th</sup> Cir. 1996); United States v. Mackey, 114 F.3d 470, 475 (4<sup>th</sup> Cir. 1997); United States v. Kinkoye, 185 F.3d 192, 203 (4<sup>th</sup> Cir. 1999).

3C1.1 - Obstructing/impeding justice:

Determination by the district court that a defendant engaged in conduct that obstructed justice is a finding of fact subject to clearly erroneous standard of review. United States v. Murray, 65 F.3d 1161, 1165 (4th Cir. 1995); United States v. Puckett, 61 F.3d 1092, 1095 (4th Cir. 1995). Whether conduct amounted to an obstruction of justice is a legal question that is reviewed de novo. United States v. Saintil, 910 F.2d 1231, 1232 (4th Cir. 1990). Underlying factual findings are reviewed for clear error. United States v. Daughtrey, 874 F.2d 213, 217 (4th Cir. 1989).

3D1.2 - Groups of closely-related counts:

Incorrectly applying guidelines for grouping multiple counts involves a legal interpretation of guidelines terminology and the application of that terminology to a particular set of facts - reviewable de novo. United States v. Toler, 901 F.2d 399 (4th Cir. 1990); United States v. Porter, 909 F.2d

789 (4th Cir. 1990).

3E1.1 - Acceptance of responsibility:

Whether to apply guideline 3E1.1 for acceptance of responsibility is clearly a factual issue, thus reviewable under the clearly erroneous standard. United States v. Holt, 79 F.3d 14, 17 (4th Cir. 1996); United States v. White, 875 F.2d 427, 431 (4th Cir. 1989); United States v. Harris, 882 F.2d 902, 906-07 (4th Cir. 1989). A district court's decision to adjust a defendant's sentence for acceptance of responsibility is reviewed for clear error. United States v. Ruhe, 191 F.3d 376, 388 (4<sup>th</sup> Cir. 1999); United States v. May, 359 F.3d 683 (4<sup>th</sup> Cir. 2004).

4A1.2 - Definitions/instruction for computing criminal history:

When facts related to prior convictions are undisputed, questions of whether such prior convictions are "related" under the Sentencing Guidelines for purposes of calculating criminal history score is a legal determination which is reviewed *de novo*. United States v. Allen, 50 F.3d 294, 296 (4th Cir.), *cert. denied*, 515 U.S. 1167 (1995).

Deferential review is appropriate when a court of appeals reviews a trial court's Sentencing Guideline determination as to whether an offender's prior convictions were functionally consolidated for purposes of sentencing. Buford v. United States, 532 US 59 (2001).

4B1.1 - Career offender:

The question of whether a defendant is a "career offender" involves a legal determination reviewable *de novo*. United States v. Rivers, 929 F.2d 136, 141 (4th Cir.), *cert. denied*, 502 U.S. 964 (1991).

5E1.1 - Restitution - [Pre-MVRA]:

A district court's criminal restitution order under the Victim Witness Protection Act of 1982, as amended 18 U.S.C.A. §§ 3663-64 (West 1985 & Supp. 1995), is reviewable for abuse of discretion. United States v. Henoud, 81 F.3d 484, 487 (4th Cir. 1996); United States v. Blake, 81 F.3d 498, 505 (4th Cir. 1996).

5E1.2 - Fines for individual defendants:

A district court's factual findings with respect to imposition of a fine are reviewed under the clearly erroneous standard of review. United States v. Aramony, 166 F.3d 655, 665 (4th Cir. 1999).

5G1.3 - Sentence of Defendant Serving an Unexpired Term:

The issue of consecutive versus concurrent sentencing is a legal issue which the Fourth Circuit will review under the *de novo* standard of review. United States v. Myers, 66 F.3d 1364 (4th Cir. 1995); United States v. Mosley, 200 F.3d 218, 221 (4<sup>th</sup> Cir. 1999).

5K1.1 - Substantial assistance to authorities:

The amount of departure from the guideline range is reviewed for reasonableness. United States v. Wilson, 896 F.2d 856, 859 (4th Cir. 1990).

5K2.0 - Grounds for departure:

In reviewing guideline departures, appellate courts should apply an abuse of discretion standard to the questions whether a sentencing factor is present to a degree not adequately considered by the Commission and whether a factor that has been considered is present in an unusual or exceptional way. Koon v. United States, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996).

**Koon replaced by section 401(d) of PROTECT Act, which reviews departure de novo. Pub. L. 108-21. 18 U.S.C. §§ 3742(e) & (f). Appeals court may review de novo a district court's application of the guidelines to the facts in making its decision to depart on the ground that the case involves a factor of a kind or to a degree not adequately considered by the Sentencing Commission. See also, United States v. May, 359 F.3d 683, 687-88 (4<sup>th</sup> Cir. 2004).**

Consistent with Koon, the Fourth Circuit “clarified” the standards for review of departure decisions in United States v. Rybicki, 96 F.3d 754, 757-58 (4th Cir. 1996), as follows:

1. The district court must first determine the circumstances and consequences of the offense of conviction. This is a factual inquiry which is reviewed only for clear error.
2. The district court must then decide whether any of the circumstances or consequences of the offense of conviction appear “atypical,” such that they potentially take the case out of the applicable guideline’s heartland. This determination will necessarily be informed by the district court’s experience in criminal sentencing. Unlike the other steps in this analysis, a district court’s identification of factors for potential consideration is purely analytical and, therefore, is never subject to appellate review.
3. Having identified factors that may potentially remove a case from the applicable guideline’s heartland, the district court must identify each according to the Guidelines’ classification as a “forbidden,” “encouraged,” “discouraged,” or “unmentioned” basis for departure. Because a court’s classification of potential bases for departure is a matter of guideline interpretation, we review such rulings de novo in the context of our ultimate review for abuse of discretion. . . .
4. Factors that are “encouraged,” “discouraged,” or “unmentioned” require further analysis. “Encouraged” factors, . . ., are usually appropriate bases for departure. But such factors may not be relied upon if already adequately taken into account by the applicable guideline, which we review de novo to determine whether the district court abused its discretion. . . .
5. And the last step, the district court must consider whether circumstances and consequences appropriately classified and considered take the case out of the applicable guideline’s heartland and whether a departure from the guideline’s specified sentencing range is therefore warranted. Because this step requires the sentencing court to “make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing”

and its comparison of the case with other Guidelines cases, this part of the departure analysis“ embodies the traditional exercise of discretion by [the] sentencing court.” [Koon], 116 S. Ct. at 2046-47. While we review this ultimate departure decision for abuse of discretion, id. at 2047-48, if the district court bases its departure decision on a factual determination, our review of that underlying determination is for clear error. And if the court’s departure is based on a misinterpretation of the Guidelines, our review of that underlying ruling is de novo. See id., 116 S. Ct. at 2046-48.

A district court’s refusal to depart based upon a perceived lack of legal authority to do so is a legal decision reviewable de novo. United States v. Bayerle, 898 F.2d 28, 31 (4th Cir.), cert. denied, 498 U.S. 819 (1990); United States v. Hall, 977 F.2d 861 (4th Cir. 1992); United States v. Brock, 108 F.3d 31 (4th Cir. 1997). A district court’s discretionary refusal to depart from the applicable sentencing guidelines is not an appealable issue. Bayerle, supra; United States v. Jones, 18 F.3d 1145, 1147 (4th Cir. 1994).

To the extent a defendant challenges the extent of a downward departure, the court of appeals is not authorized to entertain appeal. 18 U.S.C.A. § 3742(a); United States v. Hill, 70 F.3d 321 (4th Cir. 1995).

The court of appeals will review the downward departures de novo. Public Law 108-21, April 30, 2003 Freeney Amendment to the Amber Alert Bill.

A district court’s determination that it does not have the authority to depart downward from a defendant’s guideline range presents a question of law reviewable de novo. United States v. Payne, 952 F.2d 827, 828 (4th Cir. 1991); United States v. Pinckney, 938 F.2d 519, 520 (4th Cir. 1991).

A district court’s decision to depart upward from a defendant’s guideline range is reviewed for abuse of discretion. United States v. Hairston, 96 F.3d 102, 105 (4th Cir. 1996), cert. denied, 519 U.S. 1114 (1997), citing Koon v. United States, 518 U.S. 81 (1996). Review for abuse of discretion includes a determination of whether the extent of the departure was reasonable. United States v. Risher, 966 F.2d 868, 884 (4th Cir.), cert. denied, 506 U.S. 926 (1992).

A district court’s decision to depart downward from a defendant’s guideline range is reviewed for abuse of discretion. United States v. LeRose, 219 F.3d 335 (4th Cir. 2000)

Whether a defendant’s presentation of evidence whose only purpose was to support a downward departure constituted a breach of the plea agreement is a question of contract interpretation which is reviewed de novo. United States v. Martin, 25 F.3d 211, 216-17 (4th Cir. 1994); United States v. Bowe, 257 F.3d 336 (4th Cir. 2001).

5K2.10 - Victim conduct - Court’s application of victim conduct guideline to facts reviewed de novo. United States v. May, 359 F.3d 683 (4<sup>th</sup> Cir. 2004).

5K2.20 - Aberrant Behavior - Court’s application of aberrant behavior guideline to facts reviewed de novo. United States v. May, 359 F.3d 683 (4<sup>th</sup> Cir. 2004).

6A1.3 - Resolution of disputed factors at sentencing:

Whether the district court erred in failing to hold an evidentiary hearing in resolving disputed

sentencing factors pursuant to U.S.S.G. § 6A1.3 is reviewable for abuse of discretion. United States v. Gerante, 891 F.2d 364, 367 (1st Cir. 1989).

Revocation of Supervised Release - A sentence imposed on revocation of supervised release is reviewed for whether it is “plainly unreasonable.” United States v. Crudup, 461 F.3d 433 (4<sup>th</sup> Cir. 2006). This requires a two-step analysis. First, the court determines if the sentence is “unreasonable.” If the court determines that the sentence is procedurally or substantively unreasonable, the court determines if the sentence is clearly or obviously unreasonable. 461 F.3d at 439.

## WAIVERS

### Waiver of Lawyer' s Conflict

Review defendant' s waiver of his lawyer' s conflict de novo. United States v. Singleton, 107 F.3d 1091, 1097 n.3 (4th Cir. 1997); United States v. Brown 202 F.3d 691 (4th Cir. 2000).

### Waiver of Right to Counsel

Review defendant' s right to counsel de novo. United States v. Singleton, 107 F.3d 1091, 1097 n.3 (4th Cir. 1997); United States v. Brown 202 F.3d 691 (4th Cir. 2000).

### Waiver of Constitutional Rights

The district court' s determination of whether the defendant knowingly, intelligently, and voluntarily waived her Fifth and Sixth Amendment rights is reviewed de novo. United States v. Guay, 108 F.3d 545, 549 (4th Cir. 1997).

Voluntariness of confessions are reviewed de novo. United States v. Braxton, 112 F.3d 777, 781 (4th Cir. 1997).

District court' s admission of testimony from previous criminal trial over defendant' s assertion of Fifth Amendment privilege is reviewed de novo (testimony not compelled). United States v. Butler, 211 F.3d 826 (4th Cir. 2000), Hawkins v. Stables, 148 F.3d 379, 382 (4th Cir. 1998).

A motion to withdraw a waiver of trial by jury is committed to the discretion of the district judge. Wyatt v. United States, 591 F.2d 260 (4<sup>th</sup> Cir. 1979). Denial of a defendant' s motion to rescind his waiver of a jury trial is reviewed for abuse of discretion. United States v. Holmen, 586 F.2d 322, 323-24 (4<sup>th</sup> Cir. 1978).

### Waiver of Right to Appeal

The question of whether a defendant has effectively waived his right to appeal his sentence is a matter of law that is reviewed de novo. United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990); United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992); United States v. Brown, 232 F.3d 399(4th Cir. 2000).

A sentencing error not raised in the district court may be noticed for plain error. United States v. Davis, 954 F.2d 182, 187 (4th Cir. 1992); United States v. Ford, 88 F.3d 1350 (4th Cir. 1996).

An issue not properly preserved in the lower court is waived for purposes of appellate review absent plain error. United States v. Seidlitz, 589 F.2d 152, 160 (4th Cir. 1978), cert. denied, 441 U.S. 922 (1979); United States v. Maxton, 940 F.2d 103 (4th Cir.), cert. denied, 502 U.S. 949 (1991); United States v. McLamb, 985 F.2d 1284 (4th Cir. 1993).

An objection to evidence not properly invoked is waived for purposes of appeal unless there is plain error. United States v. Vogt, 910 F.2d 1184 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); Fed. R. Evid. Rule 103(d).

If there is a failure to object to the court' s instruction at trial, the issue is reviewed on appeal for plain error. United States v. Chavis, 880 F.2d 788, 794 (4th Cir. 1989).

Absent an injustice, appeal court will not review arguments on appeal not raised before the district court. United States v. Anderson, 481 F.2d 685, 694 (4th Cir. 1973), aff' d, 417 U.S. 211 (1974).

An issue that has been rendered moot in the lower court is not amenable to appellate review. Harris v. Bailey, 675 F.2d 614, 616 (4th Cir. 1982).