

**OFFICE OF THE FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA
FOURTH CIRCUIT CRIMINAL LAW UPDATE
Cases Published Between September 16, 2009 and March 31, 2010**

**Prepared by Laura S. Wasco
Research and Writing Attorney
Office of the Federal Public Defender
for the Eastern District of North Carolina**

TABLE OF CONTENTS

I.	INTRODUCTION	6
II.	SPECIFIC OFFENSES	6
A.	18 U.S.C. § 111–Assaulting, Resisting or Impeding Certain Officers or Employees	6
B.	18 U.S.C. § 115(a)(1)(B)–Threatening Federal Official	6
C.	18 U.S.C. § 924(e)–Armed Career Criminal	7
D.	18 U.S.C. § 1347–Health Care Fraud	10
E.	18 U.S.C. § 1343–Wire Fraud	11
III.	FOURTH AMENDMENT / SUPPRESSION	11
A.	<i>Terry</i> Stop and Frisk	11
B.	Traffic Stops	12
C.	Inventory Search	13
D.	Search Warrant	13
E.	Warrantless Search	16
F.	State Agency	16
IV.	FIFTH AMENDMENT	17
A.	Right Against Self Incrimination / <i>Miranda</i>	17
B.	Due Process	18
C.	State Agency	18

V.	SIXTH AMENDMENT	19
A.	Confrontation Clause	19
B.	Increase in Sentence Based on Uncharged Conduct	19
VI.	PLEA ISSUES/RULE 11	20
A.	Rule 11–Guilty Pleas	20
B.	Plea Agreements	20
C.	Voluntary Character of Plea	21
D.	Knowing and Intelligent Character of Plea	21
E.	Mental Competency	22
VII.	SENTENCING	22
A.	Standard of Review	22
B.	<i>Apprendi / Booker / Rita, etc.</i>	23
C.	Reasonableness of Sentences	25
D.	Restitution Pursuant to 18 U.S.C. §§ 3663, 3664	29
E.	Sentencing Reductions Pursuant to 18 U.S.C. § 3582	31
F.	U.S.S.G. § 2D1.1(b)(1)–Possession of a Dangerous Weapon	33
G.	U.S.S.G. § 2L1.2– Unlawful Reentry	33
H.	U.S.S.G. § 3B1.3–Abuse of Position of Trust	34
I.	U.S.S.G. § 4A1.1–Criminal History Score	34
J.	U.S.S.G. § 4A1.3– Upward Departures for Underrepresentation of Criminal History	35
K.	U.S.S.G. §§ 2A1.1 & 2K2.1(c)–Cross Reference to First Degree Murder	36

L.	U.S.S.G. § 2T1.4–Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud	36
M.	21 U.S.C. § 853–Criminal Forfeiture	37
N.	U.S.S.G. § 4B1.2–Definition of Terms Used in 4B1.1	37
O.	U.S.S.G. § 4B1.1– Career Offender Classification	38
P.	U.S.S.G. § 3A1.1–Vulnerable Victim	38
Q.	U.S.S.G. § 3B1.1–Aggravating Role	39
VIII.	RULES OF EVIDENCE	40
A.	Fed. R. Evid 404(b)–Character Evidence of Other Crimes, Wrongs, Acts	40
B.	Fed. R. Evid. 702–Expert Testimony	41
C.	Dual Role Testimony	41
IX.	TRIAL	41
A.	Improper Statements Made by Prosecutor at Trial	41
B.	Sufficiency of Evidence	42
C.	Joinder and Severance	43
D.	Mistrial	44
E.	Jury Instructions	45
F.	Jury Voir Dire/Jury Intimidation	45
X.	MISCELLANEOUS ISSUES	46
A.	Commitment for Mental Condition	46
B.	Harmless and Reversible Error	46
C.	Mootness	47

D.	18 U.S.C. § 3594–Eligibility for Death Penalty	47
E.	Remand	48
F.	28 U.S.C. § 2255–Ineffective Assistance of Counsel	48
G.	Judgment of Acquittal	49
H.	Fed.R.Crim.P. 17(c)–Motion for Subpoena	49
I.	Fed.R.Crim.P. 42 & 18 U.S.C. § 401–Contempt	49

I. INTRODUCTION

This outline summarizes Fourth Circuit decisions published between September 16, 2009 and March 31, 2010. For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check <http://circuit4.blogspot.com>. To receive daily published Fourth Circuit opinions, register at <http://pacer.ca4.uscourts.gov/opinions/opinion.php>. Please direct any email questions about this outline or the websites listed above to laura_wasco@fd.org.

II. SPECIFIC OFFENSES

A. 18 U.S.C. § 111—Assaulting, Resisting or Impeding Certain Officers or Employees

***United States v. Gore*, 592 F.3d 489 (4th Cir. 2010) (J. Niemeyer)**

Facts: The defendant had a heated argument with a correctional officer at FCI Gilmer. He was ordered to report to another officer, with whom he got into a similar argument, and was then told that he was going to disciplinary segregation (“the hole”). Defendant ended up in a physical altercation with several correctional officers. As a result, the defendant was charged with resisting the officers, in violation of 18 U.S.C. § 111. At trial, the defendant argued that he acted in self-defense and requested his own self-defense instruction be read to the jury. The district court refused to give the defendant’s instruction, instead opting for its own instruction on self defense, which could only be demonstrated if Defendant showed he was objectively “under an unlawful present or imminent threat of serious bodily injury or death.” The defendant was convicted and he was sentenced to an additional 87 months’ imprisonment. Defendant appealed the district court’s refusal to give his instruction.

Held: The Court disagreed with the defendant and affirmed his conviction. The Court noted that 18 U.S.C. § 111 did not have a specific provision for self-defense, however a common-law justification defense was available. It held that, under these circumstances, any affirmative defense to § 111 must be narrow so as to serve the needs of prison officials in maintaining order and a safe prison environment. Thus, the defense is available in a § 111 case if the inmate demonstrates he was responding to an unlawful and present threat of death or serious bodily injury.

B. 18 U.S.C. § 115(a)(1)(B)—Threatening Federal Official

***United States v. Armel*, 585 F.3d 182 (4th Cir. 2009) (J. Motz)**

Facts: Defendant was convicted of threatening federal officials, in violation of 18 U.S.C. § 115(a)(1)(B)), at a bench trial after placing three phone calls threatening death and loss of genitalia to the FBI’s resident agency in Fredericksburg, Virginia. Defendant was

sentenced to 30 months, with a three years of supervised release, and numerous special conditions. The special conditions included directives to receive psychiatric treatment, not possess pornography, not enter places where pornography may be obtained, not have contact with children, and submit to invasive sex offender tests. Defendant appealed the sufficiency of the conviction.

Held: Defendant’s argument that the statements made did not constitute a “true threat” fails, as an ordinary listener could conclude that the statements indicated his presence in the vicinity and a genuine threat of injury. Likewise, Defendant’s argument that § 115 does not criminalize general threats against law enforcement officers also fails because Defendant directed his threats to a group of individuals, specifically the FBI agents and support staff at the Fredericksburg office.

C. 18 U.S.C. § 924(e)–Armed Career Criminal

***United States v. Harcum*, 587 F.3d 219 (4th Cir. 2009) (J. King)**

Facts: Defendant was sentenced to 235 months’ imprisonment after being convicted by a jury of being a felon in possession of a firearm. At sentencing, the defendant argued that one of his four prior convictions (second degree assault) did not qualify as a “violent felony” for Armed Career Criminal Act (“ACCA”) purposes under Maryland law. Specifically, the defendant was originally charged with assault in the District Court of Maryland, at Baltimore City, with a statement of charges alleging he punched the victim in the face, causing the victim to fall backward through a glass window. Defendant was not tried or convicted of the charges in the District Court. Shortly thereafter, Defendant was charged with assault in Baltimore City Circuit Court in a two-count criminal information, which did not allege further facts. Defendant plead guilty to second degree assault as charged in the information and was sentenced to 18 months. The district court consulted the statement of charges from the Maryland District Court in making its determination that the assault conviction qualified as an ACCA violent felony; the defendant appealed the sentence.

Held: Pursuant to the modified categorical approach in assessing whether a prior conviction qualifies as a predicate under ACCA, the Circuit Court’s information was the only appropriate document for consideration by the court, as it did not have access to any other *Shepard*-approved documents. Standing alone, the Circuit Court’s information lacked sufficient factual allegations to support the classifying the second degree assault offense as a “violent felony” for ACCA purposes. Furthermore, nothing in the Circuit Court’s information directly or implicitly incorporated the District Court’s statement of charges. The defendant’s sentence was vacated and the case was remanded for resentencing.

***United States v. Thompson*, 588 F.3d 197 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g). At sentencing, the Court rejected the government’s argument that the defendant’s six prior convictions for “breaking or entering” under N.C.Gen.Stat. § 14-54(a) were violent felonies under ACCA, which required the Court to sentence the defendant to the mandatory minimum sentence of 15 years. Rather, the Court found that under the U.S. Supreme Court’s decision in *Begay*, 553 U.S. 137 (2008), “violent felonies” under ACCA must have “an element that demonstrates the likelihood that an assailant would come in contact with another person,” and Defendant’s prior convictions did not qualify. The Court sentenced Defendant to 92 months’ incarceration. The government appealed.

Held: *Begay* did not overrule prior precedent in *Bowden*, 975 F.2d 1080 (4th Cir. 1992), and *Thompson*, 421 F.3d 278 (4th Cir. 2005), which held that North Carolina “breaking or entering” convictions were violent felonies under ACCA. The *Begay* analysis limits the nature of crimes *other* than those listed as example crimes. Here, the defendant’s convictions meet the definition of burglary (which is specifically listed as a predicate offense) and thus qualify as violent felonies for ACCA purposes.

***United States v. Carr*, 592 F.3d 636 (4th Cir. 2010) (J. Shedd)**

Facts: The defendant plead guilty to being a felon in possession of a firearm. At sentencing, the court sentenced Defendant under ACCA based on 13 prior North Carolina state convictions for felony breaking or entering. The 13 prior convictions were based on 13 separate indictments charging Defendant with the breaking or entering of 13 separate self-storage units. On appeal, the defendant argues that the convictions were not “committed on occasions different from one another,” therefore ACCA does not apply.

Held: The defendant’s conviction was affirmed. The Court noted that the North Carolina state crime was for “breaking *or* entering” rather than “breaking and entering;” thus, it was not relevant when the defendant either broke into or entered each storage unit, as his crime was complete upon the first breaking of each storage lock. The Court concluded the defendant’s prior convictions were “separate and distinct” episodes because the crimes were committed in separate locations, the crimes had 10 different victims, and the defendant had the opportunity to cease and desist his behavior after each breaking.

***United States v. Wright*, 594 F.3d 259 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant became involved in an altercation inside a night club in Dillon County, South Carolina. Shortly thereafter, patrons began exiting the night club into the parking lot. The defendant took an AK-47 from another individual and began shooting into the parking lot, killing one and wounding another. Defendant was charged with, and convicted of, being a felon in possession of a firearm, in violation of 18 U.S.C. §

922(g)(1). At sentencing, the court determined the defendant was an armed career criminal based on an aggravated assault and battery charge, as well as three juvenile adjudications involving three separate burglaries where Defendant stole firearms; he was sentenced to life. Defendant appealed, arguing: (1) use of his juvenile adjudications as predicates for the ACCA violates *Apprendi* due to the lack of juries in South Carolina family court, and (2) his juvenile adjudications for burglary do not qualify as “violent felonies” under the ACCA because he did not “carry” firearms by stealing them.

Held: Defendant’s sentence was affirmed. (1) A jury is not constitutionally required in juvenile adjudications. The ACCA provides for qualifying juvenile adjudications to be used as predicates, and the Constitution does not forbid this, therefore, the district court did not err in using the juvenile adjudications for burglary. (2) A burglary resulting in the theft of a firearm necessarily involves “carrying” firearms, as required to be an ACCA predicate.

***United States v. Rivers*, 595 F.3d 558 (4th Cir. 2010) (J. Gregory)**

Facts: In August, 2007, Defendant plead guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) and 924(e). The presentence report determined the defendant’s convictions for burglary in the third degree, failure to stop for a blue light, and possession of cocaine with the intent to distribute qualified him for ACCA and U.S.S.G. § 4B1.4. The defendant argued his South Carolina convictions for burglary in the third degree and failure to stop for a blue light were not violent felonies under ACCA. The district court disagreed and sentenced Defendant to 188 months’ imprisonment. Defendant appealed and the Fourth Circuit upheld the finding that the burglary conviction was a violent felony and vacated the judgment on the failure to stop for a blue light because it was not clear whether the blue light conviction involved intentional conduct. The case was remanded in accordance with *United States v. Roseboro*, 551 F.3d 226 (4th Cir. 2009)(finding convictions for failure to stop for a blue light are violent felonies in limited circumstances) to determine whether the violation was intentional. The district court found it was intentional and sentenced Defendant to the same 188 month sentence. Defendant appealed.

Held: The judgment was vacated and the case remanded for resentencing. Based on the Supreme Court’s decision in *Chambers v. United States*, __ U.S. __, 129 S.Ct. 687 (2009), under no circumstance is a violation of South Carolina’s blue light statute a violent felony under ACCA. (*Chambers*, which came out eight days after *Roseboro*, effectively overruled *Roseboro*.) The Court used a categorical approach to determine whether the blue light conviction is ACCA eligible (*Chambers* held that varying from this approach is only permissible where different types of behavior satisfy an element of the offense and the proscribed behaviors constitute at least two separate crimes for purposes of ACCA). The Fourth Circuit found that the blue light statute does not contain the requisite intent to make it a “violent felony,” therefore it does not qualify as a predicate offense for ACCA purposes.

***United States v. McNeill*, 598 F.3d 161 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant plead guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1). At sentencing, the district court determined that Defendant was an armed career criminal and upwardly departed to sentence him to 300 months' incarceration on the firearm count and a concurrent 240 months' incarceration on the drug count. The sentences were the maximum sentence applicable under 21 U.S.C. § 841(b)(1)(C). Defendant appealed arguing the district court erred in sentencing him as an armed career criminal.

Held: The sentence was affirmed. The Court rejected Defendant's argument that his 1992 and 1995 North Carolina convictions for selling cocaine and possession with intent to sell cocaine do not qualify as predicates for purposes of ACCA because at the time of his federal sentencing, the maximum penalty was not ten years. (At the time the offenses were committed, the maximum sentence was ten years. Subsequently, in 1994, North Carolina revised its sentencing laws and the underlying crimes now carry a maximum penalty of 25 months in prison.) The Court found that the date the defendant committed his crime is critical to the determination of his sentence under North Carolina law; specifically, if he were tried and convicted today for the drug offenses, he would be subject to the higher maximum sentences imposed by pre-structured sentencing.

D. 18 U.S.C. § 1347–Health Care Fraud

***United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010) (J. Agee)**

Facts: Defendant owned and operated a medical transportation service, which provided transportation to Medicaid patients in Virginia. In the course of its services, Defendant's company would receive a daily trip log, including patient's contact information, date of birth, and Medicaid identification number. An investigation discovered that Defendant submitted claim forms with substantially inflated mileage and claim forms for non-existent trips. The defendant was eventually charged with numerous counts of health care fraud, in violation of 18 U.S.C. § 1347, and two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. He was convicted of all counts and sentenced to 62 months' incarceration. Defendant appealed, arguing the evidence was insufficient to establish his guilt of identity theft because the government failed to prove he used Medicaid patients' identifying information "without lawful authority."

Held: The district court judgment was affirmed. A person need not "misappropriate" another's identity to use it "without lawful authority." Although the defendant had authority to possess the Medicaid information, he had no authority to use that information unlawfully so as to commit a fraud.

E. 18 U.S.C. § 1343–Wire Fraud

***United States v. Mehta*, 594 F.3d 277 (4th Cir. 2010) (J. Shedd & J. Duncan)**

Facts: The defendant was charged with 16 counts of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. § 7206(2) and 17 counts of wire fraud, in violation of 18 U.S.C. § 1343, after preparing tax returns for clients containing fabricated or exaggerated deductions. These tax returns were electronically submitted by Defendant to the IRS and BankOne under a program where BankOne would issue a check to the taxpayer and the actual refund would be sent by the IRS to BankOne to cover the “loan” made to the taxpayer through the defendant. Defendant was convicted and sentenced to 48 months’ imprisonment. Defendant appealed his convictions and sentence, arguing that the district court erred in denying his motion for judgment of acquittal on the wire fraud counts.

Held: The judgment was affirmed. The evidence was sufficient to prove the tax information was submitted by interstate wire communication in furtherance of a scheme to defraud. Further, although the defendant argued there was a variance between the indictment and proof at trial, the variance did not prejudice Defendant, as nothing indicates he would have prepared his defense differently.

III. FOURTH AMENDMENT / SUPPRESSION

A. *Terry* Stop and Frisk

***United States v. Griffin*, 589 F.3d 148 (4th Cir. 2009) (J. Shedd)**

Facts: Defendant was sentenced to 40 months’ incarceration after pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The firearm was recovered from the defendant’s vehicle after a traffic stop based, in part, on an anonymous 911 call. Defendant filed a motion to suppress challenging the traffic stop and the search of the firearm, which was denied by the district court. Defendant appealed, arguing that the stop and protective search of his vehicle were unconstitutional.

Held: The defendant’s judgment was affirmed (the decision was 2-1, with J. Gregory dissenting). First, the Court found that, although the 911 call was anonymous, the officer met with the informant face-to-face and had the opportunity to observe the informant’s credibility, demeanor, appearance, and location. Therefore, the credibility of the information provided was enhanced, providing sufficient reasonable suspicion to justify the *Terry* stop of the defendant’s car. Second, based on the face-to-face with the informant, the location of the stop in a high-crime neighborhood, and the defendant’s evasive behavior, there was reasonable suspicion to believe the defendant could be dangerous and could access a weapon. Thus, a protective search was permissible. Judge

Gregory dissent noted that this decision “brings the Fourth Amendment two steps closer to a death by a thousand cuts,” and came close to establishing a per se rule that any face-to-face encounter with an informant creates reasonable suspicion necessary for a *Terry* stop.

***United States v. Rooks*, 596 F.3d 204 (4th Cir. 2010) (J. King)**

Facts: In September, 2006, the car in which Defendant was traveling as a passenger was stopped by Newport News police for a broken windshield. While speaking with the driver, the officer smelled marijuana and he observed what appeared to be a cigarette butt and a plastic bag in the ashtray of the vehicle. Ultimately, the driver consented to a search of the vehicle’s ashtray where marijuana was discovered. After the driver was secured, the officer asked the defendant to exit the vehicle. Defendant fled, tossing a plastic bag along the way. After he was apprehended, Defendant realized the officer had the plastic bag (which contained individually wrapped bags of crack and cocaine) and asked the officer to get rid of it. Defendant was charged with possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). Defendant filed a motion to suppress the evidence and statement as fruit of an unconstitutional seizure, which was denied. Defendant was convicted after a jury trial and sentenced as a career offender to 360 months’ incarceration. Defendant appealed, arguing the district court erred in denying the motion to suppress.

Held: The judgment was affirmed. An officer who has reasonable suspicion to believe a vehicle contains illegal drugs may order its occupants out of the vehicle and pat them down for weapons. Here, the officer detected the odor of marijuana and was authorized to conduct a pat-down for weapons. Therefore, the drugs discarded during the chase and subsequent statement upon capture were not the fruit of an unconstitutional seizure.

B. Traffic Stops

***United States v. Griffin*, 589 F.3d 148 (4th Cir. 2009) (J. Shedd)**

Facts: Defendant was sentenced to 40 months’ incarceration after pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The firearm was recovered from the defendant’s vehicle after a traffic stop based, in part, on an anonymous 911 call. Defendant filed a motion to suppress challenging the traffic stop and the search of the firearm, which was denied by the district court. Defendant appealed, arguing that the stop of his vehicle was unconstitutional.

Held: The defendant’s judgment was affirmed. The Court found that, although the 911 call was anonymous, the officer met with the informant face-to-face and had the opportunity to observe the informant’s credibility, demeanor, appearance, and location. Therefore, the credibility of the information provided was enhanced, providing sufficient reasonable

suspicion to justify the *Terry* stop of the defendant's car.

C. Inventory Search

***United States v. Matthews*, 591 F.3d 230 (4th Cir. 2009) (J. Duncan)**

Facts: Defendant's vehicle was stopped for a tinted license plate cover. During the stop, the officer recognized the defendant and remembered that he had an outstanding warrant for his arrest. Defendant was arrested on the warrant. Subsequently, the car was impounded and an inventory search was performed on the vehicle's contents. The officer discovered drugs in the trunk. Defendant attempted to suppress the drug evidence, but was unsuccessful. The defendant appealed the denial of his motion to suppress.

Held: The defendant's judgment was affirmed. The search fell within the inventory search exception and did not violate the Fourth Amendment. Specifically, the officer's Department policy sufficiently regulated the opening of "closed containers" to provide standardized criteria to justify the officer's search of Defendant's bags. Additionally, the Department's policy properly curtailed the discretion of searching officers by requiring the search of particular areas, requiring officers to lock valuables found in the vehicle interior in the trunk, and requiring officers complete an inventory form.

D. Search Warrant

***United States v. Phillips*, 588 F.3d 218 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendant was convicted at a jury trial of numerous counts of fraud. The fraud was related to the defendant's fraudulent use of credit cards in his personal life and professional life with a business named Phydea, Phydea.com, and Phydea Equity Fund. The U.S. Postal Inspection Service executed a search warrant at Defendant's home, which authorized seizure of documents related to Phydea.com and items related to fraudulent conduct and financial crimes. Items seized included documents related to the Phydea Equity Fund. Defendant moved to suppress the evidence seized as exceeding the scope of the seizure authorized by the search warrant. The defendant's motion was denied and he was sentenced to 121 months' imprisonment. Defendant appealed the denial of his motion to suppress.

Held: The judgment was affirmed. The contested seizures fell comfortably within the scope of the warrant's language, which was broad and permissive. Law enforcement may seize items pursuant to a warrant even if it does not expressly mention and painstakingly describe it. Finally, as courts have never held that a search is overbroad because it results in additional criminal charges, the Court declined to hold that an item reasonably encompassed by the terms of the warrant somehow falls outside of its scope because the item is probative of charges other than those initial charges set forth by the warrant.

Therefore, agents reacted reasonably in seizing both Phydea and Phydea Equity Fund documents because of the clear connections between Defendant's alleged fraud and the links between Defendant, Phydea, and Phydea Equity Fund.

***United States v. Coleman*, 588 F.3d 816 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendant and his girlfriend returned home after a trip to a store. Unbeknownst to them, two intruders broke into the garage and hid inside. The girlfriend was attacked while trying to open the garage door, and was pushed back into the residence. The defendant saw the struggle and pulled the assailants from his girlfriend. The girlfriend went to Defendant's friend and called 911. Meanwhile, the defendant went to check on his girlfriend's son and was shot by the assailants, who then fled. The defendant went to the master bedroom and retrieved a pistol, leaving a blood trail around the bedroom and on the bed. Defendant took the pistol and went to make sure the assailants were gone. Defendant's friend and girlfriend arrived back at her residence, and Defendant gave his girlfriend the pistol to put away. She hid the pistol under the mattress in the master bedroom while Defendant's friend took Defendant to the hospital. When the police officers arrived, the girlfriend gave consent to search "anywhere in the house." The officers followed the blood trail to the master bedroom and recovered the pistol under the mattress. Defendant was later charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). He filed a motion to suppress the firearm, which was granted by the district court. The district court held that the search under the mattress exceeded the scope of the girlfriend's consent, and stressed that the pistol turned out not to have been used by the intruders. The government appealed.

Held: The Court reversed the district court's suppression ruling, and remanded the case for further proceedings. There was no question that the consent to search by the girlfriend was voluntary. Additionally, the consent was broad, and without limitations. Therefore, it was reasonable for officers to follow the blood trail leading to the master bedroom and bed, and to search under the mattress. It was not relevant that the gun found in the master bedroom later turned out to be unrelated to the break-in and shooting.

***United States v. Williams*, 592 F.3d 511 (4th Cir. 2010) (J. Niemeyer)**

Facts: Investigation of threatening e-mails to a church, which indicated the writer's desire to molest young boys at the church, led to the e-mail account of Defendant's wife. Authorities obtained a search warrant for Defendant's home, which authorized search and seizure of evidence of the Virginia crimes of computer harassment and threats of bodily harm. During the search, an officer searched a lock box in the defendant's garage, which held a machine gun and silencer; upon safety inspection, the officer determined neither contained serial numbers. Additionally, officers seized a DVD that was later determined to contain child pornography. The defendant was charged with two counts of possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5861(d) and 5871, and one count

of possession of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(A). Defendant filed a motion to suppress the machine gun, silencer, and child pornography. The district court denied the motion and Defendant was convicted and sentenced to 41 months' imprisonment. Defendant appealed the denial of the motion to suppress.

Held: The judgment was affirmed. As to the DVD, Defendant argued the search warrant did not authorize a search of all files on his computer, rather only those files related to the two Virginia crimes involving threats of bodily harm and harassment by computer. Additionally, he argued that the seizure of the DVD did not fall within any exception to the Fourth Amendment, specifically the plain-view exception. The Court rejected these arguments. The Court agreed with the district court that the child pornography on the DVD was an instrumentality of the computer harassment charge. Additionally, it found that the warrant impliedly authorized a review of each file on his computer and thereafter seizure under the plain-view doctrine. As to the machine gun and silencer, the Court also upheld the seizure under the plain view doctrine, as the warrant permitted a search inside the lockbox for disks and thumbnail drives. A thorough search of the lockbox would require the officer to move the gun and silencer; before moving the weapons, the officer was permitted to pick them up and inspect them for safety purposes.

***United States v. Kelly*, 592 F.3d 586 (4th Cir. 2010) (J. Wilkinson)**

Facts: Officers in the Hampton Roads, Virginia area conducted an investigation of the defendant's drug activities. A warrant to search the defendant's home was obtained; it did not refer to any of Defendant's three vehicles. During the search of the home, the defendant admitted (by nodding "yes" to questions of whether there was cocaine in the vehicles) that there was cocaine in the vehicles, although there was no specificity as to vehicle. A drug dog alerted positively around Defendant's Lexus, which was searched. Cocaine and ecstasy was found in a backpack in the trunk. Defendant moved to suppress the drug evidence found in the Lexus. The court denied the motion. Subsequently, the Defendant was convicted by a jury, and sentenced to life imprisonment. Defendant appealed the denial of the motion to suppress.

Held: The defendant's conviction was affirmed. As to the motion to suppress, the Court declined to find an exception to the automobile exception to the search warrant requirement, noting the inherent mobility of automobiles. Further the Court found that police had probable cause to search the Lexus based on the presence of an additional individual found at the defendant's home during the search (believed to be the defendant's drug supplier) and Defendant's admission that there were drugs in the vehicles.

E. Warrantless Search

***United States v. Rumley*, 588 F.3d 202 (4th Cir. 2009) (J. Motz)**

Facts: Defendant's vehicle was stopped by a police officer because his taillights were not working. The defendant told the officer that his license was suspended, and he was arrested and placed in the back of the officer's patrol car. The officer went back to the defendant's vehicle to request the passenger get out of the vehicle. When the passenger moved his leg to step out, the officer noticed a silver pistol on the floorboard in front of the passenger-side seat. The officer conducted a pat-down of the passenger and secured him in his patrol car. The pistol was seized, and the defendant was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Defendant moved to suppress the pistol, but his motion was denied. Defendant appealed, challenging the constitutionality of the search and seizure.

Held: The district court's decision on the suppression was affirmed. The Court rejected the defendant's contention that the officer had no justification under *Gant*, __ U.S. __, 129 S.Ct. 1710 (2009), for any search of, or seizure from, his vehicle. Specifically, the court found that the officer lawfully seized the pistol when it came into plain view before any search of the vehicle, therefore *Gant* was not applicable to the case at bar.

***United States v. Griffin*, 589 F.3d 148 (4th Cir. 2009) (J. Shedd)**

Facts: Defendant was sentenced to 40 months' incarceration after pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The firearm was recovered from the defendant's vehicle after a traffic stop based, in part, on an anonymous 911 call. Defendant filed a motion to suppress challenging the traffic stop and the search of the firearm, which was denied by the district court. Defendant appealed, arguing that the protective search of his vehicle was unconstitutional.

Held: The defendant's judgment was affirmed. Based on the face-to-face with the informant, the location of the stop in a high-crime neighborhood, and the defendant's evasive behavior, there was reasonable suspicion to believe the defendant could be dangerous and could access a weapon. Thus, a protective search was permissible.

F. State Agency

***United States v. Day*, 591 F.3d 679 (4th Cir. 2010) (J. King)**

Facts: Defendant was arrested by two "armed security officers" (with the power to arrest under Virginia Code § 9.1-138) who observed him pull a firearm from a car and advance upon an apartment while shouting at the individuals inside. After officers ordered the defendant to "freeze," Defendant dropped the firearm and raised his hands. He was

restrained and a *Terry* search was conducted, which uncovered nothing. The officers then questioned the defendant about the firearm and whether he had “anything illegal” on him, without giving *Miranda* warnings. The defendant advised he had marijuana on him and had the firearm for safety. Defendant moved to suppress the evidence, which the district court granted in part, based on the district court’s ruling that the officers were state actors bound by the Fourth and Fifth Amendments. Specifically, the court suppressed the defendant’s statements and the drug evidence. The government made an interlocutory appeal on the day case was to proceed to trial.

Held: The Court reversed and remanded the case. It held that the armed security officers were not state agents subject to the Fourth and Fifth Amendments because, despite the Virginia law authorizing the officers to make certain arrests, the Commonwealth did not affirmatively encourage the conduct. The Court also rejected an agency theory that the officers were *de facto* police.

IV. FIFTH AMENDMENT

A. Right Against Self Incrimination / *Miranda*

***United States v. Kelly*, 592 F.3d 586 (4th Cir. 2010) (J. Wilkinson)**

Facts: Officers in the Hampton Roads, Virginia area conducted an investigation of the defendant’s drug activities. A warrant to search the defendant’s home was obtained; it did not refer to any of Defendant’s three vehicles. During the search of the home, the defendant admitted (by nodding “yes” to questions of whether there was cocaine in the vehicles) that there was cocaine in the vehicles, although there was no specificity as to vehicle. A drug dog alerted positively around Defendant’s Lexus, which was searched. Cocaine and ecstasy was found in a backpack in the trunk. At trial, the prosecution discussed the defendant’s two prior arrests for possession of drugs as overt acts charged in furtherance of the charged conspiracy; however it only sought to introduce evidence of one of the arrests (a witness explained the defendant had not been prosecuted for the arrest). Defendant’s motions for a mistrial based on prosecutorial misconduct were denied. Subsequently, the Defendant was convicted by a jury, and sentenced to life imprisonment. Defendant appealed the district court’s denial of his motion for a mistrial based on prosecutorial misconduct.

Held: The defendant’s conviction was affirmed. As to the motion for mistrial, the Court rejected the Defendant’s argument that the prosecutor’s comments violated his Fifth Amendment rights against self-incrimination because the comments were fleeting and non-prejudicial.

B. Due Process

***United States v. Grubbs*, 585 F.3d 793 (4th Cir. 2009) (J. Agee)**

Facts: Defendant was sentenced to 240 months of incarceration and a life term of supervised release after pleading guilty to six counts of knowingly transporting someone under the age of eighteen in interstate commerce with intent to engage in a sexual activity, in violation of 18 U.S.C. § 2423(a), and six counts of traveling in interstate commerce for the purpose of engaging in a sexual act with a person under the age of 18, in violation of 18 U.S.C. § 2324(b). In the presentence report, the probation office detailed allegations from numerous other victims of similar past conduct by the defendant. At sentencing, the court upwardly departed from a Guidelines range of 151 to 188 months to a range of 210 to 262 months because the original range did not take into account the additional allegations set forth in the presentence report. Defendant appealed his sentence, arguing the district court violated the Fifth Amendment by failing to require the government to prove uncharged conduct by more than a preponderance of the evidence.

Held: The defendant's sentence was affirmed. Applying plain error, the court found no error, plain or otherwise, of a Fifth Amendment violation because after *Booker*, the due process clause does not require the district court to find uncharged conduct by a heightened standard of proof before using it as a basis for determining a defendant's sentence.

C. State Agency

***United States v. Day*, 591 F.3d 679 (4th Cir. 2010) (J. King)**

Facts: Defendant was arrested by two "armed security officers" (with the power to arrest under Virginia Code Sec. 9.1-138) who observed him pull a firearm from a car and advance upon an apartment while shouting at the individuals inside. After officers ordered the defendant to "freeze," Defendant dropped the firearm and raised his hands. He was restrained and a *Terry* search was conducted, which uncovered nothing. The officers then questioned the defendant about the firearm and whether he had "anything illegal" on him, without giving *Miranda* warnings. The defendant advised he had marijuana on him and had the firearm for safety. Defendant moved to suppress the evidence, which the district court granted in part, based on the district court's ruling that the officers were state actors bound by the Fourth and Fifth Amendments. Specifically, the court suppressed the defendant's statements and the drug evidence. The government made an interlocutory appeal on the day case was to proceed to trial.

Held: The Court reversed and remanded the case. It held that the armed security officers were not state agents subject to the Fourth and Fifth Amendments because, despite the Virginia law authorizing the officers to make certain arrests, the Commonwealth did not affirmatively encourage the conduct. The Court also rejected an agency theory that the

officers were *de facto* police.

V. SIXTH AMENDMENT

A. Confrontation Clause

***United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendants were convicted of conspiracy and other offenses related to an extensive drug distribution scheme. Defendants appealed several issues, both collectively and individually. Co-defendant Martin appealed the admission of expert testimony and a prior conviction.

Held: As to Martin's individual claims, he first argued the district court admitted testimony of two expert witnesses in violation of his Sixth Amendment confrontation right because the experts based their opinions on testimonial statements from unidentified witnesses. The Court held that although *Crawford* prohibits the introduction of testimonial hearsay as evidence, it does not prohibit use of opinions based on testimonial hearsay. Here, the experts presented their own independent judgments and were subject to cross-examination, therefore there was no confrontation clause violation. The judgment of the district court was affirmed.

B. Increase in Sentence Based on Uncharged Conduct

***United States v. Grubbs*, 585 F.3d 793 (4th Cir. 2009) (J. Agee)**

Facts: Defendant was sentenced to 240 months of incarceration and a life term of supervised release after pleading guilty to six counts of knowingly transporting someone under the age of eighteen in interstate commerce with intent to engage in a sexual activity (18 U.S.C. § 2423(a)) and six counts of traveling in interstate commerce for the purpose of engaging in a sexual act with a person under the age of 18 (18 U.S.C. § 2324(b)). In the presentence report, the probation office detailed allegations from numerous other victims of similar past conduct by the defendant. At sentencing, the court upwardly departed from a Guidelines range of 151 to 188 months to a range of 210 to 262 months because the original range did not take into account the additional allegations set forth in the presentence report. Defendant appealed his sentence, arguing the district court violated the Sixth Amendment by considering uncharged conduct when deciding the sentence.

Held: The defendant's sentence was affirmed. The Court found the defendant's Sixth Amendment rights under *Booker* were nullified by clear precedent holding that a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence.

VI. PLEA ISSUES/RULE 11

A. Rule 11–Guilty Pleas

***United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant pled guilty to six criminal conspiracy counts arising from a terrorist plot to use commercial airliners to commit the terrorist attacks that occurred in this country on September 11, 2001. At the capital sentencing, a jury declined to impose the death penalty. The district court sentenced the defendant to several life terms. After sentencing, Defendant filed a motion to withdraw his plea and for a new trial. The motion was denied. The defendant appealed the validity of his guilty plea.

Held: The Court affirmed the defendant’s convictions. As to the defendant’s claims concerning the validity of his guilty plea, the Court: (1) held that Defendant’s claims that his plea was involuntary due to pre-plea rulings by the Court that allegedly violated his Fifth and Sixth Amendment rights were not cognizable because he waived all nonjurisdictional errors by pleading guilty; (2) rejected Defendant’s claims that his guilty plea was not made knowingly and intelligently because of lack of access to, and counsel on, exculpatory, classified information, (3) rejected Defendant’s argument that the district court should have ordered a competency hearing before accepting his plea; and (4) found there were no errors in Defendant’s challenge to the Rule 11 proceedings

***United States v. Manigan*, 592 F.3d 621 (4th Cir. 2010) (J. King)**

Facts: Defendant plead guilty to three counts of possession with intent to distribute cocaine. The plea was made pursuant to a plea agreement wherein Defendant waived, *inter alia*, his right to contest the conviction and sentence in an appeal. However, at the Rule 11, the district court advised that after his sentencing, he may have a right to appeal his sentence. Defendant was sentenced to 169 years’ imprisonment. Defendant appealed the issue of whether he waived his right to appeal.

Held: The Court affirmed the judgment. The appellate waiver was not enforceable. The district court never mentioned the waiver or questioned Defendant about it during the Rule 11. Further, the court advised the defendant that he would be able to appeal his sentence.

B. Plea Agreements

***United States v. Dawson*, 587 F.3d 640 (4th Cir. 2009) (J. Hamilton)**

Facts: Defendant was charged with conspiracy to distribute crack and powder cocaine. He entered into a written plea agreement wherein the government agreed to recommend that he receive a two-level reduction for his minor role in the conspiracy, although the final

determination was left to the district court and the terms of the plea agreement did not bind the court at sentencing. The presentence report did not include the two-level reduction, and neither party objected to the omission. At sentencing, the government argued that the defendant was a critical component of the conspiracy. Defendant was sentenced to 70 months' incarceration, which was the bottom of the advisory guidelines range. Defendant appealed the government's breach of the plea agreement.

Held: The Court applied a plain error standard (as the defendant did not object to the government's breach at sentencing). The government conceded that it breached the agreement, establishing that there was error and that it was plain. The defendant's substantial rights were affected because the error affected the sentence imposed, as it was based on a Guidelines range that did not include the two-level reduction for minor role, and because the sentence was based in part on the government's argument that the defendant was a key player in the conspiracy. The error was noted as affecting the integrity of the judicial system. The sentence was vacated and the case remanded for resentencing.

C. Voluntary Character of Plea

***United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant pled guilty to six criminal conspiracy counts arising from a terrorist plot to use commercial airliners to commit the terrorist attacks that occurred in this country on September 11, 2001. At the capital sentencing, a jury declined to impose the death penalty. The district court sentenced the defendant to several life terms. After sentencing, Defendant filed a motion to withdraw his plea and for a new trial. The motion was denied. The defendant appealed the validity of his guilty plea.

Held: The Court affirmed the defendant's convictions. As to the defendant's claims concerning the validity of his guilty plea, the Court held that Defendant's specific claim that his plea was involuntary due to pre-plea rulings by the Court that allegedly violated his Fifth and Sixth Amendment rights was not cognizable because he waived all nonjurisdictional errors by pleading guilty.

D. Knowing and Intelligent Character of Plea

***United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant pled guilty to six criminal conspiracy counts arising from a terrorist plot to use commercial airliners to commit the terrorist attacks that occurred in this country on September 11, 2001. At the capital sentencing, a jury declined to impose the death penalty. The district court sentenced the defendant to several life terms. After sentencing, Defendant filed a motion to withdraw his plea and for a new trial. The

motion was denied. The defendant appealed the validity of his guilty plea and sentences.

Held: The Court affirmed the defendant's convictions. As to the defendant's claim concerning the validity of his guilty plea, the Court rejected Defendant's specific claim that his guilty plea was not made knowingly and intelligently because of lack of access to, and counsel on, exculpatory, classified information.

E. Mental Competency

***United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant pled guilty to six criminal conspiracy counts arising from a terrorist plot to use commercial airliners to commit the terrorist attacks that occurred in this country on September 11, 2001. At the capital sentencing, a jury declined to impose the death penalty. The district court sentenced the defendant to several life terms. After sentencing, Defendant filed a motion to withdraw his plea and for a new trial. The motion was denied. The defendant appealed the validity of his guilty plea.

Held: The Court affirmed the defendant's convictions. As to the defendant's claims concerning the validity of his guilty plea, the Court rejected Defendant's specific argument that the district court should have ordered a competency hearing before accepting his plea.

VII. SENTENCING

A. Standard of Review

***United States v. Wilkinson*, 590 F.3d 259 (4th Cir. 2010) (J. Hamilton)**

Facts: Defendant plead guilty to conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, wire fraud, in violation of 18 U.S.C. § 1349, and conspiracy to steal trade secrets, in violation of 18 U.S.C. § 1832(a)(5). The charges arose out of a scheme where Defendant acquired confidential bid information for purposes of securing fuel supply contracts with Defense Energy Support Center (DESC). The district court found the defendant's advisory Guidelines range to be 12 to 18 months (as opposed to the advisory range in the PSR of 51 to 63 years) and sentenced Defendant to, *inter alia*, 3 years of probation and restitution for a different victim.

Held: The Court remanded for resentencing and reconsideration of a determination as to restitution for DESC. The district court did not provide a sufficient explanation of its rationale in making loss findings for DESC so that the Court could review it under a clearly erroneous standard.

***United States v. Lynn*, 592 F.3d 572 (4th Cir. 2010) (J. Motz)**

Facts: The Court consolidated four cases (*United States v. Lynn*, *United States v. Rhodes*, *United States v. Peake*, and *United States v. Tucker*) to resolve the issue of what appellate standard of review applies when a party lodges (or fails to lodge) an objection to the sentencing court's failure to consider the required sentencing factors and offer an adequate explanation for the sentence imposed.

Held: Preserved objections to a sentencing court's failure to consider the required sentencing factors and offer an adequate explanation for the sentence imposed are subject to an abuse of discretion standard, followed by an examination for harmless error, if the Court concludes the district court committed an abuse of discretion; unpreserved objections are subject only to plain-error review. In order to preserve such an objection, the aggrieved party need only make an argument under § 3553(a) for a sentence different than the one ultimately imposed; it is unnecessary to make a post-imposition objection to preserve the issue.

B. *Apprendi / Booker / Rita*, etc.

***United States v. Grubbs*, 585 F.3d 793 (4th Cir. 2009) (J. Agee)**

Facts: Defendant was sentenced to 240 months of incarceration and a life term of supervised release after pleading guilty to six counts of knowingly transporting someone under the age of eighteen in interstate commerce with intent to engage in a sexual activity (18 U.S.C. § 2423(a)) and six counts of traveling in interstate commerce for the purpose of engaging in a sexual act with a person under the age of 18 (18 U.S.C. § 2324(b)). In the presentence report, the probation office detailed allegations from numerous other victims of similar past conduct by the defendant. At sentencing, the court upwardly departed from a Guidelines range of 151 to 188 months to a range of 210 to 262 months because the original range did not take into account the additional allegations set forth in the presentence report. Defendant appealed his sentence, arguing (1) the district court violated the Sixth Amendment by considering uncharged conduct when deciding the sentence; and (2) the district court violated the Fifth Amendment by failing to require the government to prove uncharged conduct by more than a preponderance of the evidence.

Held: The defendant's sentence was affirmed. The Court found: (1) The defendant's Sixth Amendment rights under *Booker* were nullified by clear precedent holding that a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence. (2) Applying plain error, the court found no error, plain or otherwise, of a Fifth Amendment violation because after *Booker*, the due process clause does not require the district court to find uncharged conduct by a heightened standard of proof before using it as a basis for determining a defendant's sentence.

***United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendants were convicted of conspiracy and other offenses related to an extensive drug distribution scheme. Defendants appealed several issues, both collectively and individually. Co-defendant Martin appealed a sentencing issues related to a potential variance under *Gall*.

Held: Martin argued he should be resentenced under *Gall*, because had the district court known a non-guidelines sentence would be accorded deference, it may have granted him a variance. The Court disagreed, finding that it could only review the actual sentence imposed for reasonableness, rather than a hypothetical sentence that was not given. The Court concluded the sentence was free from procedural error and was substantively reasonable. The judgment of the district court was affirmed.

***United States v. Wilkinson*, 590 F.3d 259 (4th Cir. 2010) (J. Hamilton)**

Facts: Defendant plead guilty to conspiracy to defraud the United States (18 U.S.C. § 371) wire fraud (18 U.S.C. § 1349), and conspiracy to steal trade secrets (18 U.S.C. § 1832(a)(5)). The charges arose out of a scheme where Defendant acquired confidential bid information for purposes of securing fuel supply contracts with Defense Energy Support Center (DESC). The district court found the defendant's advisory Guidelines range to be 12 to 18 months (as opposed to the advisory range in the PSR of 51 to 63 years) and sentenced Defendant to, *inter alia*, 3 years of probation and restitution for a different victim.

Held: The Court remanded for resentencing and reconsideration of a determination as to restitution for DESC. The district court did not provide a sufficient explanation of its rationale in making loss findings for DESC so that the Court could review it under a clearly erroneous standard.

***United States v. Mendoza-Mendoza*, 597 F.3d 212 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant plead guilty to one count of illegal reentry, in violation of 8 U.S.C. § 1326. At sentencing, he argued that a Guidelines sentence was excessive and requested a sentence below the advisory Guidelines range. The district court noted that although it did not agree with a Guidelines range, it was "obligated" to give Defendant a Guidelines sentence unless "a reason for departure from those Guidelines, or a variance based on 18 U.S.C. § 3553" was present. The court sentenced Defendant to 46 months' imprisonment, the bottom of the Guidelines range, after rejecting the government's claim that Defendant was dangerous but nevertheless concluding it could not see a reason for a variance. Defendant appealed the procedural reasonableness of the sentence.

Held: The sentence was vacated and remanded for resentencing. The Court found the district court erroneously believed it was bound by the Guidelines in violation of the "*Rita*

presumption” (the presumption that the Guidelines are reasonable). *Rita v. United States*, 551 U.S. 338 (2007).

C. Reasonableness of Sentences

***United States v. Armel*, 585 F.3d 182 (4th Cir. 2009) (J. Motz)**

Facts: Defendant was convicted of threatening federal officials, in violation of 18 U.S.C. § 115(a)(1)(B), at a bench trial after placing three phone calls threatening death and loss of genitalia to the FBI’s resident agency in Fredericksburg, Virginia. Defendant was sentenced to 30 months, with a three years of supervised release, and numerous special conditions. The special conditions included directives to receive psychiatric treatment, not possess pornography, not enter places where pornography may be obtained, not have contact with children, and submit to invasive sex offender tests. Defendant appealed the special conditions imposed with the supervised release portion of his sentence.

Held: The record lacked sufficient justification by the district court for the sentence imposed, therefore, the appellate court could not conduct a meaningful review. The special conditions were vacated and the case was remanded for resentencing.

***United States v. Grubbs*, 585 F.3d 793 (4th Cir. 2009) (J. Agee)**

Facts: Defendant was sentenced to 240 months of incarceration and a life term of supervised release after pleading guilty to six counts of knowingly transporting someone under the age of eighteen in interstate commerce with intent to engage in a sexual activity, in violation of 18 U.S.C. § 2423(a), and six counts of traveling in interstate commerce for the purpose of engaging in a sexual act with a person under the age of 18, in violation of 18 U.S.C. § 2324(b). In the presentence report, the probation office detailed allegations from numerous other victims of similar past conduct by the defendant. At sentencing, the court upwardly departed from a Guidelines range of 151 to 188 months to a range of 210 to 262 months because the original range did not take into account the additional allegations set forth in the presentence report. Defendant appealed his sentence, arguing the district court procedurally erred in calculating his Guidelines range.

Held: The defendant’s sentence was affirmed. The Court found the district court did not err in the calculation of the defendant’s Guidelines range, therefore it was procedurally reasonable.

***United States v. Engle*, 592 F.3d 495 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant plead guilty to tax evasion, 26 U.S.C. § 7201, having evaded taxes for sixteen years and owing over \$2 million (with interest and penalties) to the IRS. The defendant plead guilty in 2004, but was not initially sentenced until 2006. At sentencing, the district

court found his criminal history was overstated, reducing his criminal history category, and resulting in an advisory Guidelines range of 24 to 30 months. The government sought a term of incarceration within the advisory range, however the district court was concerned with the defendant paying his tax debt and sentenced him to four years' probation, with conditioned confinement for eighteen months in a halfway house, and permission for international travel as required by Defendant's job. Soon thereafter, the district court learned the BOP would not permit international travel while the defendant was in its halfway house. The district court vacated the sentence. Over two years later, the court reconvened sentencing. Although the defendant had only paid \$480 towards outstanding taxes (which was paid two weeks before sentencing at the urging of the IRS), the district court again ultimately decided on a similar sentence, which provided for home detention in lieu of a halfway house and only partial restitution payments. The government appealed the sentence as inconsistent with policy considerations underlying income tax prosecutions and the insufficient reasoning for declining a sentence of imprisonment.

Held: The Court reversed, vacating the defendant's sentence, and remanded the case for further proceedings before a different judge. The district court committed significant procedural error by minimizing the seriousness of the defendant's offense, failing to consider relevant Guideline policy statements (which emphasize the need for deterrence), and providing an insufficient explanation for its view that a term of imprisonment was not proper. The sentence was substantively unreasonable because of the district court's almost-exclusive focus on the defendant's financial ability to pay restitution. The Court noted this focus permits rich tax-evaders to avoid imprisonment while poor tax-evaders would end up imprisoned.

United States v. Lynn, 592 F.3d 572 (4th Cir. 2010) (J. Motz)

Facts: The Court consolidated four cases (*United States v. Lynn, United States v. Rhodes, United States v. Peake, and United States v. Tucker*) to resolve the issue of what appellate standard of review applies when a party lodges (or fails to lodge) an objection to the sentencing court's failure to consider the required sentencing factors and offer an adequate explanation for the sentence imposed.

Held: Preserved objections to a sentencing court's failure to consider the required sentencing factors and offer an adequate explanation for the sentence imposed are subject to an abuse of discretion standard, followed by an examination for harmless error, if the Court concludes the district court committed an abuse of discretion; unpreserved objections are subject only to plain-error review.

- (1) *United States v. Peake*—Defendant failed to preserve his objection to his bottom-of-the-Guidelines sentence. At sentencing, the defendant did not argue for a sentence different from the within-Guideline sentence that he received, nor did he

ask the court to depart based on § 3553(a) factors. Therefore, the case was subject to plain error review. The Court found no error affecting substantial rights and the sentence was affirmed.

- (2) *United States v. Tucker*—At sentencing, after granting Defendant’s unopposed motion to remove the Armed Career Criminal designation from the PSR, the district court considered an upward departure based on over-representation of criminal history. Defendant argued against the departure, noting the unusual circumstances of the case (the felon in possession charge arose out of an incident where the defendant shot himself in the leg) and the unexplained three-year delay between the issuance and execution of the arrest warrant (during which time he had not gotten into trouble). Without addressing these arguments, the court imposed a sentence of 101 months (nearly twice as long as the low-end of the advisory Guidelines range). The Court found Defendant preserved his objection for procedural reasonableness, and that there was insufficient evidence to make a harmless error review. Thus, the defendant’s sentence was vacated and remanded.
- (3) *United States v. Lynn*—At sentencing, despite his classification as a career offender, the defendant argued for a downward variance because he was “at the very margins of career offender status.” The court, without addressing any of Defendant’s § 3553(a) arguments, sentenced the defendant to a within-Guidelines sentence of 396 months’ incarceration. The Court determined Defendant properly preserved his objection as to procedural reasonableness, and concluded that the government failed to carry its burden to show the error was harmless. Therefore, the sentence was vacated and remanded.
- (4) *United States v. Rhodes*—Defendant did not challenge his sentence.

United States v. Herder, 594 F.3d 352 (4th Cir. 2010) (J. Davis)

Facts: Defendant was followed by a deputy from a commuter parking lot known for drug activity in the evenings, to a nearby convenience store. The deputy noted the defendant’s driving was “overcautious” and therefore suspicious. The deputy approached the defendant and asked where he was coming from; the defendant said he was coming from dinner at a restaurant. The defendant consented to a K-9 scan of his car. The K-9 positively alerted to the odor of contraband. A search found 21 bags of crack cocaine and three bags of marijuana in false-bottom containers. Additionally, Defendant had \$1223 on his person. Defendant was charged and later convicted of possession with intent to distribute marijuana and possession with intent to distribute more than five grams of cocaine base (crack), both in violation of 21 U.S.C. § 841. He was sentenced to, *inter alia*, 41 months’ incarceration (the bottom of the advisory Guidelines range) and ordered to forfeit the \$1223. Defendant appealed, arguing his sentence is procedurally unreasonable.

Held: The Court affirmed in part, and vacated in part, remanding for resentencing. The district court did not recognize its discretion to sentence outside the crack cocaine Guidelines; therefore, the sentence is procedurally unreasonable; accordingly, the sentence was vacated and the case remanded for resentencing.

***United States v. Morace*, 594 F.3d 340 (4th Cir. 2010) (J. Shedd)**

Facts: Defendant plead guilty to one count of possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). The defense and government stipulated that a bottom-of-the-Guidelines sentence was appropriate (the defendant's advisory Guidelines range was 41 to 51 months). At sentencing, the court announced a downward variance, sentencing Defendant to five years' probation. The government objected to the sentence, and appealed the reasonableness of the sentence.

Held: The sentence was vacated and the case was remanded for resentencing. Although the government conceded that a downward variance in this case is not *per se* improper and that a downward variance to probation in a child pornography case could be reasonable under certain circumstances, it argued the probationary sentence in this case was improper. Defendant had a "mine-run" case, which was evident by counsel and government's agreement to a 41-month sentence and the district court's "fairly commonplace reasons for imposing the probation sentence." The Court noted the factors listed by the district court, although commendable, were not unusual. Thus, given the common circumstances of this case, the court erred by not providing an adequate explanation why a prison term was not warranted in light of the Guidelines policy statements.

***United States v. Thompson*, 595 F.3d 544 (4th Cir. 2010) (J. Gregory)**

Facts: In January, 2009, the United States Probation Office filed a petition to revoke the defendant's supervised release on allegations that he possessed methamphetamine, committed battery on and obstruction of a police officer, and had twice previously tested positive for narcotics. At the revocation hearing, defendant conceded the government could prove the violations. The court determined the advisory Guidelines range was 12 to 18 months. The Defendant argued for a six-month sentence based on family obligations for minor children, gainful employment, and that this was his first violation. The court imposed an 18-month sentence. After defense counsel requested the defendant self-report, the court noted he was probably not a flight risk but it could not say he was not a danger to the community. The defendant appealed.

Held: The sentence was vacated and the case remanded for resentencing. First, the Court determined that Defendant properly preserved appellate review by requesting a sentence outside the Guidelines range; thus, the sentence was reviewed under the "plainly unreasonable" standard. Second, the Court found the failure to give any indication of the

reasons for its sentence was procedurally unreasonable. Third, it determined the district court had an obligation to provide some basis for appellate review in imposing a revocation sentence and failure to provide any reasons was plainly unreasonable. Finally, the government did not argue the error was harmless and the Court declined to presume that it was under the circumstances.

***United States v. McNeill*, 598 F.3d 161 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant plead guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1). At sentencing, the district court determined that Defendant was an armed career criminal and upwardly departed to sentence him to 300 months' incarceration on the firearm count and a concurrent 240 months' incarceration on the drug count. The sentences were the maximum sentence applicable under 21 U.S.C. § 841(b)(1)(C). Defendant appealed arguing the district court erred in failing to explain its rejection of the defendant's mitigating factors.

Held: The sentence was affirmed. The Court rejected the defendant's argument that the district court erred in failing to explain its rejection of mitigating factors, noting the district court's thoughtful and thorough application of sentencing factors to the case and adequate explanation of the sentence.

D. Restitution Pursuant to 18 U.S.C. §§ 3663, 3664

***United States v. Squirrel*, 588 F.3d 207 (4th Cir. 2009) (J. Hamilton)**

Facts: Defendant and co-defendant (Slee) plead guilty to being accessories-after-the-fact to first degree murder, in violation of 18 U.S.C. §§ 3, 1111. At sentencing, the district court imposed, *inter alia*, joint and several restitution of over \$5,000 in funeral and related expenses, and indicated that it would also order a second restitution "for the use and benefit" of the victim's daughter. After a hearing, the district court imposed another restitution order that defendant, and two co-defendants (Slee and Roach), were jointly and severally liable for nearly \$1.5 million. Defendants appealed the second restitution award on numerous grounds. The government moved to dismiss the appeal, which was granted in part and denied in part. The surviving arguments on appeal were (1) whether the district court erred in finding co-defendants jointly and severally liable for additional restitution in the amount of \$1.5 million as accessories-after-the-fact and (2) whether the order of restitution was permissible under the co-defendant's plea agreements.

Held: The judgments were vacated and remanded with instructions to delete the award of additional restitution. Specifically, the Court found: (1) There is no *per se* rule against imposing restitution on persons based on their conviction for being accessories-after-the-fact. However, the victim's loss must be proximately caused by the specific conduct for

which the co-defendants were convicted. In this case, there is no evidence to suggest that the defendant and co-defendant Slee's conduct as accessories-after-the-fact directly or proximately caused any financial loss to the victim's estate. (2) The co-defendant's plea agreements did not provide a valid basis for the district court's decision in imposing a second restitution award.

***United States v. Wilkinson*, 590 F.3d 259 (4th Cir. 2010) (J. Hamilton)**

Facts: Defendant plead guilty to conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, wire fraud, in violation of 18 U.S.C. § 1349, and conspiracy to steal trade secrets, in violation of 18 U.S.C. § 1832(a)(5). The charges arose out of a scheme where Defendant acquired confidential bid information for purposes of securing fuel supply contracts with Defense Energy Support Center (DESC). Sentencing focused on the amount of loss for Guidelines purposes and whether DESC suffered an actual pecuniary loss that would require restitution under the Mandatory Victims Restitutions Act (MVRA). The district court found the defendant's advisory Guidelines range to be 12 to 18 months (as opposed to the advisory range in the PSR of 51 to 63 years) and sentenced Defendant to, *inter alia*, 3 years of probation and restitution for a different victim.

Held: The Court remanded for resentencing and reconsideration of a determination as to restitution for DESC. A proper calculation of the advisory Guidelines range depends upon a non-clearly erroneous finding of such a loss.

***United States v. Llamas*, 599 F.3d 381 (4th Cir. 2010) (J. King)**

Facts: In 2004, Defendant participated in an elaborate sweepstakes scheme that was operated out of San Jose, Costa Rica. Defendant plead guilty to multiple fraud and money laundering convictions in 2007. He was sentenced to 132 months' incarceration and ordered to make restitution of over \$4 million. On appeal, Defendant argued the district court erred: (1) in applying a Guidelines adjustment for vulnerable victims, (2) by applying an adjustment for aggravating role, and (3) in calculating the restitution order.

Held: The judgment was affirmed in part, vacated in part, and remanded. (1) The district court failed to provide a sufficient explanation of its finding that Defendant should have known his victims were unusually vulnerable. (2) The evidence supported a finding that Defendant exercised management responsibilities over the activities of the sweepstakes call center by controlling its operators; therefore, the district court did not clearly err in finding an aggravating role adjustment. (3) The restitution order was not limited to losses attributable to the instant sweepstakes call center, therefore the court erred in imposing a restitution order that included other call centers.

E. Sentencing Reductions Pursuant to 18 U.S.C. § 3582

***United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendants were convicted of conspiracy and other offenses related to an extensive drug distribution scheme. Defendants appealed several issues, both collectively and individually. Co-defendant Martin appealed the applicability of retroactive crack cocaine amendments to his sentence. The judgment of the district court was affirmed.

Held: Martin argued that his case should be remanded for resentencing under the retroactive crack cocaine amendments (the amendment became retroactive while his appeal was pending). The Court declined to remand the case for resentencing, although it affirmed, without prejudice, to his right to seek relief in the district court.

***United States v. Fennell*, 592 F.3d 506 (4th Cir. 2010) (J. Davis)**

Facts: In 2005, Defendant plead guilty to conspiracy to distribute an possess with intent to distribute more than 50 grams of cocaine base. He was sentenced to 97 months' imprisonment, which was a 20% reduction below the 120-month mandatory minimum and the Guidelines range of 121 to 151 months, as a result of a substantial assistance motion. In 2008, the defendant filed a motion seeking reduction of his sentence in light of the retroactive crack cocaine amendments (18 U.S.C. § 3582(c)). Defendant requested a comparable 20% reduction from the bottom of his new Guidelines range (100-125 months), or an 80-month sentence. Alternatively, Defendant requested a comparable reduction from the top of the amended Guidelines range (or a 36% reduction from 125, which amounted to an 80-month sentence). Although the district court found the defendant eligible for a reduction, it concluded that it was limited to reducing the sentence to only 96 months (a 20% reduction from the bottom of the mandatory minimum) because the new Guideline range was controlled by the mandatory minimum and was actually 120 to 125 months. The defendant appealed the sentence, contending the district court erred in its belief that it lacked the discretion to impose a sentence below 96 months.

Held: The Court vacated and remanded the case for resentencing. Any reasonable method that results in a comparable reduction are available to a sentencing court during an 18 U.S.C. § 3582(c) resentencing. The Court noted that the Guidelines do not state that an *identical* departure is appropriate, only a *comparable* departure. Although the district court imposed a comparable reduction, it erred when determining that it was bound to an identical percentage-based reduction method that was used at the original sentencing.

***United States v. Stewart*, 595 F.3d 197 (4th Cir. 2010) (J. Gregory)**

Facts: In 2002, Defendant plead guilty to a drug offense. Shortly thereafter, he was sentenced to

235 months' imprisonment, the low end of his 235 to 293 Guidelines range. In 2007, the government filed a substantial assistance motion; the court granted the motion and Defendant was resentenced to 187 months' imprisonment. In 2008, the defendant filed a motion pursuant to 18 U.S.C. § 3582(c)(2), requesting a reduction in his sentence based on the retroactive crack cocaine amendments. The district court denied the motion; it calculated the range under the new Guidelines as 188 to 235 months but found the sentence of 187 months "remains appropriate." Defendant appealed the denial of the motion.

Held: The sentence was vacated and the case was remanded for resentencing. Defendant and the government argued that the term "original sentence" in U.S.S.G. § 1B1.10(b) refers to the sentence the defendant is currently serving during the filing of his § 3582(c)(2) motion, rather than the first sentence imposed. The Fourth Circuit agreed, holding when a defendant is serving a below-Guidelines sentence as a result of a Rule 35, if the defendant makes a motion under § 3582(c)(2), his sentence may be reduced comparable to the previous reduction received. Noting the discretionary nature of § 3582(c)(2), the Court did not reach the issue of whether a reduction was appropriate in Defendant's case; instead, it remanded the case to the district court to make this determination.

***United States v. Munn*, 595 F.3d 183 (4th Cir. 2010) (J. King)**

Facts: In 2001, Defendant plead guilty to distribution of fifty grams or more of crack, in violation of 21 U.S.C. § 841(a)(1). Although the presentence report classified Defendant as a career offender, the district court determined an overrepresentation departure was warranted under 4A1.3 because his criminal history category was overstated. Additionally, the government moved for a downward departure based on a substantial assistance motion. In 2009, Defendant filed a motion under 18 U.S.C. § 3582(c)(2) for a sentence reduction in accordance with the retroactive crack cocaine amendments. The district court denied the motion, finding the defendant was not eligible because the amendments did not lower his applicable guideline range due to his status as a career offender. Defendant appealed.

Held: The sentence was vacated and the case remanded for resentencing. Although there is a circuit split on this issue, the Fourth Circuit concluded that a defendant's designation as a career offender does not bar a § 3582(c)(2) sentence reduction if (1) the sentencing court granted a departure based on overrepresentation of criminal history from the career offender Guidelines range, and (2) the court relied on the crack Guidelines in calculating the extent of the departure.

***United States v. Goodwyn*, 596 F.3d 233 (4th Cir. 2010) (J. Motz)**

Facts: In 1997, Defendant plead guilty to conspiracy to distribute powder and crack cocaine; he was sentenced to 264 months' imprisonment. In 2008, Defendant moved for a reduction

of his sentence to time served under the retroactive crack cocaine amendments in accordance with 18 U.S.C. § 3582(c)(2). The motion was granted in part by a reduction to 240 months' imprisonment. Nearly eight months later, Defendant again asked the court to reduce his sentence under § 3582(c)(2). The request was considered a motion for reconsideration, which the court granted and sentenced Defendant to 216 months. The government appealed.

Held: The sentence was vacated and the case remanded for reinstatement of the 240-month sentence. The district court acted within its authority under § 3582(c)(2) and U.S.S.G. 1B1.10 in granting Defendant's first motion to modify his sentence. However, the district court was not permitted to reduce the sentence a second time. Although § 3582(c)(2) is silent on the issue of how many sentence modifications a court may impose, the Court held that this silence precludes unlimited motions for reconsideration over an unspecified period of time, as the statute's intent is to constrain postjudgment sentence modification.

F. U.S.S.G. § 2D1.1(b)(1)–Possession of a Dangerous Weapon

***United States v. Manigan*, 592 F.3d 621 (4th Cir. 2010) (J. King)**

Facts: Defendant plead guilty to three counts of possession with intent to distribute cocaine. The plea was made pursuant to a plea agreement. During sentencing, the parties contested whether the defendant possessed two firearms, which could result in an enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon. The district court denied the defendant's objection to the enhancement, although the enhancement did not affect the defendant's sentence due to his status as a career offender. Defendant was sentenced to 169 years' imprisonment. Defendant appealed the issue of whether the district court erred in enhancing his sentence under § 2D1.1(b)(1), requiring resentencing.

Held: The Court affirmed the judgment. The district court did not err in enhancing Defendant's sentence, as the PSR circumstantially supported the enhancement and the defendant failed to show that it was "clearly improbable" for the firearms to be connected to the common scheme or plan of the drug activity.

G. U.S.S.G. § 2L1.2– Unlawful Reentry

***United States v. Maroquin-Bran*, 587 F.3d 214 (4th Cir. 2009) (J. Motz)**

Facts: Defendant pled guilty to illegal reentry following deportation. The district court applied a sixteen-level sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(A), based on a 1989 California "drug trafficking" conviction for selling or transporting marijuana, and sentenced the defendant to 57 months of imprisonment and three years of supervised release. Defendant appealed the sentencing enhancement, arguing that it was not a prior

conviction for actual drug trafficking activity, but rather a prior conviction under a law that prohibits drug trafficking.

Held: If a statute prohibits several offenses, some that constitute drug trafficking and others that do not, the defendant must have been convicted of an offense that specifically involves drug trafficking before the enhancement may be imposed. The California conviction does not categorically qualify Defendant for the enhancement, as it prohibits two offenses—sale of marijuana and transportation of marijuana. Only the sale of marijuana may trigger the enhancement. The Court vacated and remanded for resentencing so that the sentencing court may determine the character of the prior offense in accordance with *Shepard*, 544 U.S. 13 (2005).

H. U.S.S.G. § 3B1.3—Abuse of Position of Trust

***United States v. Abdelshafi*, 592 F.3d 602 (4th Cir. 2010) (J. Agee)**

Facts: Defendant owned and operated a medical transportation service, which provided transportation to Medicaid patients in Virginia. In the course of its services, Defendant's company would receive a daily trip log, including patient's contact information, date of birth, and Medicaid identification number. An investigation discovered that Defendant submitted claim forms with substantially inflated mileage and claim forms for non-existent trips. The defendant was eventually charged with numerous counts of health care fraud, in violation of 18 U.S.C. § 1347, and two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. He was convicted of all counts and sentenced to 62 months' incarceration. Defendant appealed, arguing his sentence on the health care fraud counts should be vacated because the court erred in imposing a two-level enhancement for abuse of trust under U.S.S.G. § 3B1.3.

Held: The district court judgment was affirmed. The facts of this case fall plainly within application note 2(B) of U.S.S.G. § 3B1.3 demonstrating an abuse of trust by a hospital orderly who misuses patient identification information from a patient's chart. Similarly, Defendant used the authority of his position by misusing patient identification information from his daily trip logs, without authority, to file fraudulent claims.

I. U.S.S.G. § 4A1.1—Criminal History Score

***United States v. Martinez-Meglar*, 591 F.3d 733 (4th Cir. 2010) (J. Ellis—by designation)**

Facts: Defendant plead guilty to drug trafficking and possession of a firearm during and in relation to a drug trafficking crime. At sentencing, the defendant objected to the use of his participation in a NC District Court Step Drug Program in the calculation of his criminal history score. Specifically, Defendant objected to findings that he made an admission of guilt in connection with the program and that he was on probation at the

time of the offense of conviction. The district court disagreed after hearing testimony from the Step program coordinator who testified that program participants were required to sign a statement of responsibility, which was an admission of guilt (although the government was unable to provide such a statement in this case). The district court increased the defendant's criminal history score by three points, and sentenced him to 117 months' imprisonment. Defendant appealed.

Held: The Court vacated Defendant's sentence and remanded for resentencing. To qualify as a prior sentence and as a criminal justice sentence within the meaning of U.S.S.G. §§ 4A1.1(c) and 4A1.1(d), the sentence must result from an admission of guilt or finding of guilt in a judicial proceeding or open court. Here, although the district court made findings with respect to the admission, those findings were clearly erroneous. The Court noted that the district court properly relied on computerized printouts from the NC Offender Information System to support his finding that Defendant was charged with a qualifying offense and that he completed the Step program, there was insufficient evidence for the district court to conclude that Defendant's admission of guilt occurred in a judicial proceeding in open court. Because the error regarding the defendant's participation in the Step program required that the sentence be vacated, the Court did not reach the issue regarding probation.

J. U.S.S.G. § 4A1.3– Upward Departures for Underrepresentation of Criminal History

***United States v. Myers*, 589 F.3d 117 (4th Cir. 2009) (J. King)**

Facts: Defendant was sentenced to 360 months' imprisonment after a jury conviction on numerous drug offenses. Defendant appealed, arguing the court erred in sentencing him to a prison term in excess of his advisory Guidelines range.

Held: The defendant's judgment was affirmed. The court's decision to upwardly depart was properly based on criminal history and recidivism. Additionally, the determination of de facto career offender level was appropriate, thoroughly articulated, and not an abuse of discretion.

***United States v. McNeill*, 598 F.3d 161 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant plead guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1). At sentencing, the district court determined that Defendant was an armed career criminal and upwardly departed to sentence him to 300 months' incarceration on the firearm count and a concurrent 240 months' incarceration on the drug count. The sentences were the maximum sentence applicable under 21 U.S.C. § 841(b)(1)(C). Defendant appealed arguing the district court erred in finding that the

criminal category VI underrepresented the seriousness of his criminal history and likelihood of recidivism.

Held: The sentence was affirmed. The Fourth Circuit found the court's decision to depart was not procedurally or substantively unreasonable, noting the court's emphasis of the defendant's criminal past, multiple unscored offenses, increase in violence, and continuing criminal conduct. Additionally, it found the district court's extent of departure was reasonable after a consideration of offense levels that the court did not feel adequately addressed the seriousness of Defendant's criminal history or risk of recidivism.

K. U.S.S.G. §§ 2A1.1 & 2K2.1(c)–Cross Reference to First Degree Murder

***United States v. Wright*, 594 F.3d 259 (4th Cir. 2010) (J. Wilkinson)**

Facts: Defendant became involved in an altercation inside a night club in Dillon County, South Carolina. Shortly thereafter, patrons began exiting the night club into the parking lot. The defendant took an AK-47 from another individual and began shooting into the parking lot, killing one and wounding another. Defendant was charged with, and convicted of, being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the court sentenced Defendant to life. Defendant appealed, arguing the district court improperly cross-referenced the sentencing guideline for first degree murder in sentencing him.

Held: Defendant's sentence was affirmed. The defendant "behaved willfully, deliberately, maliciously, and with premeditation," therefore, the cross-reference to first degree murder was appropriate.

L. U.S.S.G. § 2T1.4–Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

***United States v. Mehta*, 594 F.3d 277 (4th Cir. 2010) (J. Shedd & J. Duncan)**

Facts: The defendant was charged with 16 counts of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. § 7206(2) and 17 counts of wire fraud, in violation of 18 U.S.C. § 1343, after preparing tax returns for clients containing fabricated or exaggerated deductions. These tax returns were electronically submitted by Defendant to the IRS and BankOne under a program where BankOne would issue a check to the taxpayer and the actual refund would be sent by the IRS to BankOne to cover the "loan" made to the taxpayer through the defendant. At sentencing, the court based Defendant's tax loss amount on an IRS sample audit of a portion of the total returns in question. The loss was based on the amount of additional tax owed that the taxpayers involved agreed to pay to the IRS. Defendant was convicted and sentenced to 48 months' imprisonment.

Defendant appealed, arguing that the district court erred in calculating the tax loss by extrapolating from a non-random sample of audited returns to determine the offense level under U.S.S.G. § 2T1.4(a).

Held: The judgment was affirmed. The Court rejected Defendant’s argument that the district court should not have relied on the agreements by tax payers to determine loss amount, finding there was ample evidence to support the court’s finding that it was more probable than not that Defendant fraudulently prepared the audited returns such that they could be used to calculate tax loss. Additionally, although the Court agreed with Defendant’s argument that the court erred by taking the average tax liability from the IRS audit sample and multiplying it by the total number of fraudulent returns to calculate loss, it found the error to be harmless because the record supported a loss amount within the same advisory Guidelines range.

M. 21 U.S.C. § 853–Criminal Forfeiture

***United States v. Herder*, 594 F.3d 352 (4th Cir. 2010) (J. Davis)**

Facts: Defendant was followed by a deputy from a commuter parking lot known for drug activity in the evenings, to a nearby convenience store. The deputy noted the defendant’s driving was “overcautious” and therefore suspicious. The deputy approached the defendant and asked where he was coming from; the defendant said he was coming from dinner at a restaurant. The defendant consented to a K-9 scan of his car. The K-9 positively alerted to the odor of contraband. A search found 21 bags of crack cocaine and three bags of marijuana in false-bottom containers. Additionally, Defendant had \$1223 on his person. Defendant was charged and later convicted of possession with intent to distribute marijuana and possession with intent to distribute more than five grams of cocaine base (crack), both in violation of 21 U.S.C. § 841. He was sentenced to, *inter alia*, 41 months’ incarceration (the bottom of the advisory Guidelines range) and ordered to forfeit the \$1223. Defendant appealed, arguing he should not have been subject to the forfeiture.

Held: The Court affirmed in part, and vacated in part, remanding for resentencing. The Court adopted the “substantial connection” standard test in determining whether property may be subject to forfeiture; here, the evidence was sufficient to meet that standard.

N. U.S.S.G. § 4B1.2–Definition of Terms Used in 4B1.1

***United States v. Jarmon*, 596 F.3d 228 (4th Cir. 2010) (J. Motz)**

Facts: Defendant plead guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). His predicate felony was a North Carolina conviction for larceny from the person. At sentencing, the district court counted his prior conviction as a “crime

of violence” over the defendant’s objection. He was sentenced to 40 months’ imprisonment. Defendant appealed.

Held: The judgment was affirmed. The Court reaffirmed its conclusion in *United States v. Smith*, 359 F.3d 662 (4th Cir. 2004)(holding larceny from the person constitutes a crime of violence for sentencing purposes because it presents a risk of violent confrontation and therefore a serious risk of physical injury). Although larceny from the person does not include the element of threatened, attempted, or actual use of physical force, it does involve “conduct that presents a serious potential risk of physical injury to another.” Additionally, larceny from the person resembles the enumerated offense of burglary in kind and in degree of risk. As such, it qualifies as a “crime of violence” under U.S.S.G. § 4B1.2.

O. U.S.S.G. § 4B1.1– Career Offender Classification

***United States v. Rooks*, 596 F.3d 204 (4th Cir. 2010) (J. King)**

Facts: Defendant was charged with possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). At trial, the Government introduced evidence of Defendant’s three 1993 federal drug convictions in Illinois and Defendant filed a motion *in limine* arguing the evidence was only relevant to his character and was unfairly prejudicial; the motion was denied. Defendant was convicted after a jury trial and sentenced as a career offender to 360 months’ incarceration. Defendant appealed, arguing the court erred in sentencing him as a career offender because he did not have two qualifying prior felony convictions.

Held: The judgment was affirmed. The Court rejected Defendant’s argument that the district court should have applied the 2005 edition of the Guidelines (rather than 2007) to show two of his convictions count as a single predicate. Evaluating under a plain-error standard (as Defendant did not present this argument at sentencing), the Court found the defendant could not show the district court erred in applying the 2007 Guidelines manual, therefore he could not show there was an error.

P. U.S.S.G. § 3A1.1–Vulnerable Victim

***United States v. Llamas*, 599 F.3d 381 (4th Cir. 2010) (J. King)**

Facts: In 2004, Defendant participated in an elaborate sweepstakes scheme that was operated out of San Jose, Costa Rica. Defendant plead guilty to multiple fraud and money laundering convictions in 2007. He was sentenced to 132 months’ incarceration and ordered to make restitution of over \$4 million. On appeal, Defendant argued the district court erred: (1) in applying a Guidelines adjustment for vulnerable victims, (2) by applying an adjustment for aggravating role, and (3) in calculating the restitution order.

Held: The judgment was affirmed in part, vacated in part, and remanded. (1) The district court failed to provide a sufficient explanation of its finding that Defendant should have known his victims were unusually vulnerable. (2) The evidence supported a finding that Defendant exercised management responsibilities over the activities of the sweepstakes call center by controlling its operators; therefore, the district court did not clearly err in finding an aggravating role adjustment. (3) The restitution order was not limited to losses attributable to the instant sweepstakes call center, therefore the court erred in imposing a restitution order that included other call centers.

Q. U.S.S.G. § 3B1.1–Aggravating Role

***United States v. Llamas*, 599 F.3d 381 (4th Cir. 2010) (J. King)**

Facts: In 2004, Defendant participated in an elaborate sweepstakes scheme that was operated out of San Jose, Costa Rica. Defendant plead guilty to multiple fraud and money laundering convictions in 2007. He was sentenced to 132 months' incarceration and ordered to make restitution of over \$4 million. On appeal, Defendant argued the district court erred: (1) in applying a Guidelines adjustment for vulnerable victims, (2) by applying an adjustment for aggravating role, and (3) in calculating the restitution order.

Held: The judgment was affirmed in part, vacated in part, and remanded. (1) The district court failed to provide a sufficient explanation of its finding that Defendant should have known his victims were unusually vulnerable. (2) The evidence supported a finding that Defendant exercised management responsibilities over the activities of the sweepstakes call center by controlling its operators; therefore, the district court did not clearly err in finding an aggravating role adjustment. (3) The restitution order was not limited to losses attributable to the instant sweepstakes call center, therefore the court erred in imposing a restitution order that included other call centers.

VIII. RULES OF EVIDENCE

A. Fed. R. Evid. 404(b)–Character Evidence of Other Crimes, Wrongs, Acts

***United States v. Myers*, 589 F.3d 117 (4th Cir. 2009) (J. King)**

Facts: Defendant was sentenced to 360 months' imprisonment after a jury conviction on numerous drug offenses. Defendant appealed, arguing the district court erred in excluding certain reverse 404(b) evidence relating to the prior criminal conduct of a prosecution witness.

Held: The defendant's judgment was affirmed. The evidence that Defendant intended to present with respect to reverse 404(b) evidence—that a prosecution witness could have purchased drugs from another individual—had already been presented to the jury. The

trial court was within its discretion to rule that further evidence on this issue was not of “high probative value.”

***United States v. Rooks*, 596 F.3d 204 (4th Cir. 2010) (J. King)**

Facts: In September, 2006, the car in which Defendant was traveling as a passenger was stopped by Newport News police for a broken windshield. While speaking with the driver, the officer smelled marijuana and he observed what appeared to be a cigarette butt and a plastic bag in the ashtray of the vehicle. Ultimately, the driver consented to a search of the vehicle’s ashtray where marijuana was discovered. After the driver was secured, the officer asked the defendant to exit the vehicle. Defendant fled, tossing a plastic bag along the way. Defendant was charged with possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). Defendant filed a motion to suppress the evidence and a statement as fruit of an unconstitutional seizure, which was denied. At trial, the Government introduced evidence of Defendant’s three 1993 federal drug convictions in Illinois and Defendant filed a motion *in limine* arguing the evidence was only relevant to his character and was unfairly prejudicial; the motion was denied. Defendant was convicted after a jury trial and sentenced as a career offender to 360 months’ incarceration. Defendant appealed, arguing the court misapplied the Rules of Evidence when it admitted his prior federal convictions.

Held: The judgment was affirmed. The district court did not abuse its discretion in admitting evidence of the federal convictions under Fed.R.Evid. 404(b), as it was relevant to the defendant’s familiarity with the drug distribution business and with his intent to distribute the drugs recovered from the plastic bag. Additionally, evidence of the convictions was “necessary” to prove an element of the charged offense. Finally, the evidence was not unfairly prejudicial or unreliable in light of the court’s limiting instruction to the jury.

B. Fed.R.Evid. 702–Expert Testimony

***United States v. Baptiste*, 596 F.3d 214 (4th Cir. 2010) (J. Duncan)**

Facts: In 2005, a drug task force mounted a large-scale investigation of a cocaine distribution ring in Cecil County, Maryland. Defendant was arrested as a result of the investigation. Just before trial, the judge learned some jurors felt they were being intimidated by individuals in the hallway; as a result, the court warned that the intimidation would not be tolerated. At trial, one officer was called to testify as both an expert witness (for the method and means of drug packaging and distribution as well as street jargon) and as a lay witness; the court gave a brief instruction regarding expert opinions in jury instructions. During closing arguments, the government made an analogy involving Defendant funding a terrorist act to demonstrate non-foreseeability. Defendant was ultimately convicted by a jury of one count of conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846 and four counts

of possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1), and sentenced to 300 month concurrent sentences on each count. Defendant appealed, arguing that the district court erred in permitting the officer to testify as an expert because he lacked a reliable methodology supporting his testimony.

Held: The judgment was affirmed. Defendant did not raise this issue at trial; therefore, the court reviewed under a plain error analysis. The officer's approach to decoding language was so similar to that found acceptable under prior case law and Fed.R.Evid. 702, the Court could not find that the district court plainly erred in finding the officer's methodology sufficiently reliable to permit him to testify as an expert.

C. Dual Role Testimony

***United States v. Baptiste*, 596 F.3d 214 (4th Cir. 2010) (J. Duncan)**

Facts: In 2005, a drug task force mounted a large-scale investigation of a cocaine distribution ring in Cecil County, Maryland. Defendant was arrested as a result of the investigation. Just before trial, the judge learned some jurors felt they were being intimidated by individuals in the hallway; as a result, the court warned that the intimidation would not be tolerated. At trial, one officer was called to testify as both an expert witness (for the method and means of drug packaging and distribution as well as street jargon) and as a lay witness; the court gave a brief instruction regarding expert opinions in jury instructions. During closing arguments, the government made an analogy involving Defendant funding a terrorist act to demonstrate non-foreseeability. Defendant was ultimately convicted by a jury of one count of conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846 and four counts of possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1), and sentenced to 300 month concurrent sentences on each count. Defendant appealed, arguing that the district court erred by allowing the officer to testify as both an expert and lay witness without establishing a safeguard to prevent jury confusion.

Held: The judgment was affirmed. Defendant did not raise this issues at trial; therefore, the court reviewed under a plain error analysis. Defendant failed to show the alleged lack of clear distinction between the officer's role as a fact witness and his role as an expert witness affected the outcome at trial; therefore, he has not shown the prejudice necessary to support a plain error finding.

IX. TRIAL

A. Improper Statements Made by Prosecutor at Trial

***United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendants were convicted of conspiracy and other offenses related to an extensive drug distribution scheme. Defendants appealed several issues, both collectively and individually. Collectively, the defendants argued they were prejudiced by prosecutorial vouching during closing arguments. The judgment of the district court was affirmed in all cases.

Held: The defendants argued the government improperly vouched for its witnesses credibility during closing arguments. The Court held that the prosecutor's use of phrases such as "I think" and "I'm convinced" were not used to vouch for its witnesses. The judgment of the district court was affirmed.

***United States v. Baptiste*, 596 F.3d 214 (4th Cir. 2010) (J. Duncan)**

Facts: In 2005, a drug task force mounted a large-scale investigation of a cocaine distribution ring in Cecil County, Maryland. Defendant was arrested as a result of the investigation. During closing arguments, the government made an analogy involving Defendant funding a terrorist act to demonstrate non-foreseeability. Defendant was ultimately convicted by a jury of one count of conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846 and four counts of possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1), and sentenced to 300 month concurrent sentences on each count. Defendant appealed, arguing that the district court erred by permitting the prosecutor to include in his closing statement an improper analogy involving defendant funding a terrorist act.

Held: The judgment was affirmed. Defendant did not raise this issue at trial; therefore, the court reviewed under a plain error analysis. The remarks by the prosecutor were not plainly inappropriate and did not affect the defendant's substantial rights; therefore, the district court did not commit plain error in permitting the closing argument.

B. Sufficiency of Evidence

***United States v. Kelly*, 592 F.3d 586 (4th Cir. 2010) (J. Wilkinson)**

Facts: Officers in the Hampton Roads, Virginia area conducted an investigation of the defendant's drug activities. A warrant to search the defendant's home was obtained; ultimately cocaine and ecstasy was found in a backpack in the trunk of a Lexus found on the property. At trial, the government called several witnesses to testify, many of whom did so pursuant to plea agreements. Subsequently, the Defendant was convicted by a jury, and sentenced to life imprisonment. Defendant challenged the sufficiency of the evidence by arguing the government witnesses were not worth of belief because they were testifying according to plea agreements.

Held: The defendant's conviction was affirmed. The Court rejected Defendant's argument that the government witnesses were unworthy of belief (i.e. sufficiency of the evidence), as it was within the province of the jury to weigh each witness's credibility in light of their plea agreements.

***United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendants were convicted of conspiracy and other offenses related to an extensive drug distribution scheme. Defendants appealed several issues, both collectively and individually. Johnson appealed the sufficiency of the evidence used to convict her. The judgment of the district court was affirmed in all cases.

Held: As to Johnson's individual claim, the Court held the evidence was sufficient to support the jury's verdict. The judgment of the district court was affirmed.

***United States v. Herder*, 594 F.3d 352 (4th Cir. 2010) (J. Davis)**

Facts: Defendant was followed by a deputy from a commuter parking lot known for drug activity in the evenings, to a nearby convenience store. The deputy noted the defendant's driving was "overcautious" and therefore suspicious. The deputy approached the defendant and asked where he was coming from; the defendant said he was coming from dinner at a restaurant. The defendant consented to a K-9 scan of his car. The K-9 positively alerted to the odor of contraband. A search found 21 bags of crack cocaine and three bags of marijuana in false-bottom containers. Additionally, Defendant had \$1223 on his person. Defendant was charged and later convicted of possession with intent to distribute marijuana and possession with intent to distribute more than five grams of cocaine base (crack), both in violation of 21 U.S.C. § 841. He was sentenced to, *inter alia*, 41 months' incarceration (the bottom of the advisory Guidelines range) and ordered to forfeit the \$1223. Defendant appealed, arguing there was insufficient evidence to support his conviction.

Held: The Court affirmed in part, and vacated in part, remanding for resentencing. The evidence presented at trial, including Defendant's highly suspicious activity while being observed by the deputy and money seized with "folds" used in drug distribution, was more than ample to support the jury's verdict.

C. Joinder and Severance

***United States v. Hawkins*, 589 F.3d 694 (4th Cir. 2009) (J. Agee)**

Facts: Defendant was indicted on counts related to car jacking and a subsequent count as a felon in possession of a firearm. Before trial, Defendant moved to sever the carjacking counts from the felon in possession charge based on a theory of improper joinder. The district

court denied the motion. Subsequently, the defendant was found guilty by a jury of all counts. Defendant raises two issues on appeal: (1) whether the district court erred in denying his motion to sever the carjacking counts from the felon in possession count as being improperly joined under Fed.R.Crim.P. Rule 8, and alternatively, if the counts were properly joined, whether the district court abused its discretion in denying the motion to sever because the joinder was unduly prejudicial under Fed.R.Crim.P. Rule 14, and (2) whether the district court erred in admitting into evidence statements he made during his post-arrest interview.

Held: The judgment was affirmed in part (conviction on felon in possession count vacated due to Defendant's concession at oral argument that he was not contesting his conviction on felon in possession, but remanded for resentencing) and vacated in part (carjacking convictions vacated and remanded for retrial). The carjacking counts were not of the "same or similar character" as the felon in possession count. Further, a mere temporal relationship is insufficient to establish the propriety of joinder. The misjoinder of the counts was prejudicial to the defendant, in particular was the use of statements the defendant made about the felon in possession count, which referenced other acts that may have strengthened the government's case on the carjacking counts. Further, the misjoinder and use of the statements affected the defendant's substantial rights and "had substantial injurious effect or influence in determining the jury's verdict," as the evidence with respect to the carjacking counts was not overwhelming.

D. Mistrial

***United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009) (J. Wilkinson)**

Facts: Defendants were convicted of conspiracy and other offenses related to an extensive drug distribution scheme. Defendants appealed several issues, both collectively and individually. Collectively, the defendants argued the court abused its discretion by not granting a mistrial when a government witness refused to testify.

Held: As to the first issue collectively raised, the defendants argued the government put its witness on the stand knowing she would refuse to testify and leave the jury with the impression that she had incriminating evidence to offer against them. The Court held there was no basis to find any misconduct on the part of the prosecution or that there was prejudice to the defendants. The judgment of the district court was affirmed.

***United States v. Chapman*, 593 F.3d 338 (4th Cir. 2010) (C.J. Traxler)**

Facts: Following a conviction by a jury of multiple charges including mail and wire fraud, the defendant filed a 28 U.S.C. § 2255 motion arguing that his trial counsel was ineffective for ignoring his instruction to accept the district judge's offer of a mistrial without prejudice. Specifically, the defendant argued that after the government's rebuttal closing

argument went beyond the limits the trial court had set with respect to Fed.R.Evid. 404(b), his counsel was ineffective for failing to accept the district court's offer of a mistrial without prejudice (rather than the requested mistrial with prejudice), over his objection. The district court denied the defendant's § 2255 motion. Defendant appealed the denial.

Held: The district court's denial of Defendant's § 2255 motion was affirmed. The Court found that decisions involving mistrials (whether to seek or accept offer of such) is a tactical decision left to the judgment of counsel, even if the client expresses disagreement with counsel's decision.

E. Jury Instructions

***United States v. Herder*, 594 F.3d 352 (4th Cir. 2010) (J. Davis)**

Facts: Defendant was followed by a deputy from a commuter parking lot known for drug activity in the evenings, to a nearby convenience store. The deputy noted the defendant's driving was "overcautious" and therefore suspicious. The deputy approached the defendant and asked where he was coming from; the defendant said he was coming from dinner at a restaurant. The defendant consented to a K-9 scan of his car. The K-9 positively alerted to the odor of contraband. A search found 21 bags of crack cocaine and three bags of marijuana in false-bottom containers. Additionally, Defendant had \$1223 on his person. Defendant was charged and later convicted of possession with intent to distribute marijuana and possession with intent to distribute more than five grams of cocaine base (crack), both in violation of 21 U.S.C. § 841. He was sentenced to, *inter alia*, 41 months' incarceration (the bottom of the advisory Guidelines range) and ordered to forfeit the \$1223. Defendant appealed, arguing the district court erred in declining to give his proposed jury instruction on possession.

Held: The Court affirmed in part, and vacated in part, remanding for resentencing. The district court's jury instruction "substantially covered" the defendant's request and the failure to give the requested instruction did not impair the defendant's ability to conduct his defense.

F. Jury Voir Dire/Jury Intimidation

***United States v. Baptiste*, 596 F.3d 214 (4th Cir. 2010) (J. Duncan)**

Facts: In 2005, a drug task force mounted a large-scale investigation of a cocaine distribution ring in Cecil County, Maryland. Defendant was arrested as a result of the investigation. Just before trial, the judge learned some jurors felt they were being intimidated by individuals in the hallway; as a result, the court warned that the intimidation would not be tolerated. Defendant was ultimately convicted by a jury of one count of conspiracy to

distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846 and four counts of possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1), and sentenced to 300 month concurrent sentences on each count. Defendant appealed, arguing that the district court erred by failing to voir dire jurors regarding the jury intimidation incident.

Held: The judgment was affirmed. Defendant did not raise this issue at trial; therefore, the court reviewed under a plain error analysis. There was nothing in the record to support a conclusion that the intimidation was attributed by the jury to Defendant to his detriment. Without a showing of prejudice, the Court could not find the district court's failure to conduct voir dire affected his substantial rights.

X. MISCELLANEOUS ISSUES

A. Commitment for Mental Condition

***United States v. Bush*, 585 F.3d 806 (4th Cir. 2009) (J. Niemeyer)**

Facts: Defendant was indicted on two counts of threatening a federal judge. A psychiatric evaluation concluded that Defendant was not competent to stand trial, but that medication could restore her competency. Defendant refused medication, therefore the government sought an order to forcibly medicate Defendant. The district court granted the government's motion, ordering the defendant medicated under *United States v. Sell*, 539 U.S. 166 (2003). Defendant sought an interlocutory appeal, and the district court's order was stayed.

Held: The Fourth Circuit reversed and remanded the case for further proceedings. First, the Court determined that the government must satisfy the *Sell* factors by clear and convincing evidence. In applying this standard, the Court found the district court record was inadequate on the issue of whether involuntary medication will "significantly further" the government's interest (the second prong of the *Sell* test). Second, the Court found the district court failed to address whether forced medication was medically appropriate and would serve Defendant's best medical interest.

B. Harmless and Reversible Error

***United States v. Hawkins*, 589 F.3d 694 (4th Cir. 2009) (J. Agee)**

Facts: Defendant was indicted on counts related to car jacking and a subsequent count as a felon in possession of a firearm. Before trial, Defendant moved to sever the carjacking counts from the felon in possession charge based on a theory of improper joinder. The district court denied the motion. Subsequently, the defendant was found guilty by a jury of all counts. Defendant raises two issues on appeal: (1) whether the district court erred in

denying his motion to sever the carjacking counts from the felon in possession count as being improperly joined under Fed.R.Crim.P. Rule 8, and alternatively, if the counts were properly joined, whether the district court abused its discretion in denying the motion to sever because the joinder was unduly prejudicial under Fed.R.Crim.P. Rule 14, and (2) whether the district court erred in admitting into evidence statements he made during his post-arrest interview.

Held: The judgment was affirmed in part (conviction on felon in possession count vacated due to Defendant's concession at oral argument that he was not contesting his conviction on felon in possession, but remanded for resentencing) and vacated in part (carjacking convictions vacated and remanded for retrial). The carjacking counts were not of the "same or similar character" as the felon in possession count. Further, a mere temporal relationship is insufficient to establish the propriety of joinder. The misjoinder of the counts was prejudicial to the defendant, in particular was the use of statements the defendant made about the felon in possession count, which referenced other acts that may have strengthened the government's case on the carjacking counts. Further, the misjoinder and use of the statements affected the defendant's substantial rights and "had substantial injurious effect or influence in determining the jury's verdict," as the evidence with respect to the carjacking counts was not overwhelming.

C. Mootness

***United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant pled guilty to six criminal conspiracy counts arising from a terrorist plot to use commercial airliners to commit the terrorist attacks that occurred in this country on September 11, 2001. At the capital sentencing, a jury declined to impose the death penalty. The district court sentenced the defendant to several life terms. After sentencing, Defendant filed a motion to withdraw his plea and for a new trial. The motion was denied. The defendant appealed the validity of his sentences.

Held: The Court affirmed the defendant's sentences. As to the defendant's claims on sentencing, the Court rejected Defendant's specific argument that the district court erred in denying his motions for acquittal on the death-eligible question as moot.

D. 18 U.S.C. § 3594—Eligibility for Death Penalty

***United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant pled guilty to six criminal conspiracy counts arising from a terrorist plot to use commercial airliners to commit the terrorist attacks that occurred in this country on September 11, 2001. At the capital sentencing, a jury declined to impose the death penalty. The district court sentenced the defendant to several life terms. After

sentencing, Defendant filed a motion to withdraw his plea and for a new trial. The motion was denied. The defendant appealed the validity of his sentences.

Held: The Court affirmed the defendant's sentences. As to the defendant's claims on sentencing, the Court : (1) rejected Defendant's argument that the district court erred in denying his motions for acquittal on the death-eligible question as moot; and (2) found that the district court did not wrongly believe a life sentence was mandated after the jury did not unanimously recommend a death sentence.

E. Remand

***United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (C.J. Traxler)**

Facts: Defendant pled guilty to six criminal conspiracy counts arising from a terrorist plot to use commercial airliners to commit the terrorist attacks that occurred in this country on September 11, 2001. At the capital sentencing, a jury declined to impose the death penalty. The district court sentenced the defendant to several life terms. After sentencing, Defendant filed a motion to withdraw his plea and for a new trial. The motion was denied. The defendant filed a motion to remand based on classified information disclosed by the government during the appeal.

Held: The Court denied Defendant's motion to remand, finding no need for further proceedings because it reviewed, *in camera*, the classified information submitted by the government *ex parte* and found it was not exculpatory.

F. 28 U.S.C. § 2255–Ineffective Assistance of Counsel

***United States v. Chapman*, 593 F.3d 338 (4th Cir. 2010) (C.J. Traxler)**

Facts: Following a conviction by a jury of multiple charges including mail and wire fraud, the defendant filed a 28 U.S.C. § 2255 motion arguing that his trial counsel was ineffective for ignoring his instruction to accept the district judge's offer of a mistrial without prejudice. Specifically, the defendant argued that after the government's rebuttal closing argument went beyond the limits the trial court had set with respect to Fed.R.Evid. 404(b), his counsel was ineffective for failing to accept the district court's offer of a mistrial without prejudice (rather than the requested mistrial with prejudice), over his objection. The district court denied the defendant's § 2255 motion. Defendant appealed the denial.

Held: The district court's denial of Defendant's § 2255 motion was affirmed. The Court found that decisions involving mistrials (whether to seek or accept offer of such) is a tactical decision left to the judgment of counsel, even if the client expresses disagreement with counsel's decision.

G. Judgment of Acquittal

United States v. Mehta, 594 F.3d 277 (4th Cir. 2010) (J. Shedd & J. Duncan)

Facts: The defendant was charged with 16 counts of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. § 7206(2) and 17 counts of wire fraud, in violation of 18 U.S.C. § 1343, after preparing tax returns for clients containing fabricated or exaggerated deductions. These tax returns were electronically submitted by Defendant to the IRS and BankOne under a program where BankOne would issue a check to the taxpayer and the actual refund would be sent by the IRS to BankOne to cover the “loan” made to the taxpayer through the defendant. Defendant was convicted and sentenced to 48 months’ imprisonment. Defendant appealed, arguing that the district court erred in denying his motion for judgment of acquittal on the wire fraud counts.

Held: The judgment was affirmed. The evidence was sufficient to prove the tax information was submitted by interstate wire communication in furtherance of a scheme to defraud. Further, although the defendant argued there was a variance between the indictment and proof at trial, the variance did not prejudice Defendant, as nothing indicates he would have prepared his defense differently.

H. Fed.R.Crim.P. 17(c)–Motion for Subpoena

United States v. Mehta, 594 F.3d 277 (4th Cir. 2010) (J. Shedd & J. Duncan)

Facts: The defendant was charged with 16 counts of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. § 7206(2) and 17 counts of wire fraud, in violation of 18 U.S.C. § 1343, after preparing tax returns for clients containing fabricated or exaggerated deductions. Defendant was convicted and sentenced to 48 months’ imprisonment. Defendant appealed, arguing that the district court erred in denying his motion for a subpoena under Fed.R.Crim.P. 17(c).

Held: The judgment was affirmed. In a footnote, the Court affirmed the district court’s denial of his motion for a Rule 17(c) pre-trial subpoena of tax returns filed by the tax payers who testified at trial, finding that the district court did not abuse its discretion in ruling the defendant failed to provide support for his speculation as to the contents of the tax returns sought.

I. Fed.R.Crim.P. 42 & 18 U.S.C. § 401–Contempt

In re: Gates, 600 F.3d 333 (4th Cir. 2010) (C.J. Traxler)

Facts: Appellant, an attorney practicing in the Western District of North Carolina, was convicted of contempt, in violation of 18 U.S.C. § 401(3) for failing to appear in court on time for a

plea hearing. Appellant appealed, arguing (1) the court erred in summarily concluding he committed criminal contempt and by failing to provide a minimum of reasonable notice and a chance to prepare a defense against the allegations that he failed to appear on time for the plea hearing, and (2) the record is devoid of evidence of the intentional conduct required for a contempt conviction under the statute.

Held: The judgment was reversed. (1) Mere tardiness or failure to appear in court at a scheduled proceeding is not a direct contempt subject to summary disposition under Rule 42(b). Rule 42 required notice to Appellant of the contempt and the opportunity to defend the allegations. The Court concluded that the Appellant demonstrated plain error, which affected the Appellants substantial rights. Because the Court found the error to be fundamental, it exercised its discretion to correct the error. (2) The Court found no reason to remand the case to the district court to follow the proper procedures under Rule 42(a), as there was insufficient evidence to sustain a conviction for contempt under § 401(3).