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CRIMINAL LAW

OVERVIEW

During the survey period, the Tenth Circuit Court of Appeals addressed several issues significant to the criminal sentencing process and considered the adequacy of jury instructions on the good faith defense to mail fraud charges.

In each of the sentencing cases, the Tenth Circuit upheld criminal sentences notwithstanding strong arguments favoring reversal. In the lead case on sentencing, the court permitted sentencing under the federal kidnapping statute to a term of years greater than life imprisonment, and ruled that the federal parole statute authorizes a minimum parole eligibility date to be set at any time up to one-third of that term of years. In another case, the Tenth Circuit allowed a general statute to be applied in sentencing for an offense covered under a more specific statute, even though the general statute prescribed a greater punishment. In a third sentencing case, the court held that there is no right to a jury in a restitution determination proceeding.

In the sole mail fraud case discussed in this survey, the Tenth Circuit ruled that a specific instruction on the "good faith" defense must be given where evidence supports that defense and the instruction is requested.

I. SENTENCING

A. *Defining Statutory Limits:* United States v. O'Driscoll

1. Background

In *United States v. O'Driscoll*,[1] the defendant, Michael James O'Driscoll, was convicted of armed bank robbery[2] and kidnapping,[3] and sentenced to consecutive prison terms of 25 and 300 years respectively.[4] The trial court further held that O'Driscoll would be eligible for parole only after serving 99 years of the latter sentence.[5]

The charges arose out of a two-month series of grisly criminal acts

1. 586 F. Supp. 1486 (D. Colo. 1984), *aff'd*, 761 F.2d 589 (10th Cir. 1985).

2. 18 U.S.C. § 2113(a), (d) (1982). The sentence rendered in connection with the bank robbery was not an issue on appeal.

3. The charge of kidnapping was brought under 18 U.S.C. § 1201 (1982) which provides in pertinent part:

> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:
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> (1) the person is willfully transported in interstate or foreign commerce;
>
> (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
>
> . . .
>
> shall be punished by imprisonment for any term of years or for life.

4. *O'Driscoll*, 761 F.2d at 595.

5. *Id.* The district court purported to derive its authority for the 99-year no-parole

committed by the defendant. The trial record disclosed that O'Driscoll had robbed and "pistol whipped" a Denver merchant. He then drove to a suburban shopping center where he and a girlfriend took a hostage and departed for Kansas. Leaving his girlfriend at a hotel in Salina, Kansas, O'Driscoll drove the hostage several miles to a wooded area where he shot the hostage several times, killing him.[6] Thereafter, O'Driscoll traveled to Massachusetts where he perpetrated a bank robbery.[7] Following his eventual arrest in Puyallup, Washington, O'Driscoll plead guilty to the bank robbery charge and was convicted by a jury on the kidnapping charge.[8]

Recognizing its authority to consider extraneous information concerning the background, character and conduct of the defendant in arriving at a sentencing decision,[9] the trial court noted additional facts aggravating O'Driscoll's culpability. During the sentencing hearing, O'Driscoll admitted to the commission of seven bank robberies and to the heavy consumption of alcohol, cocaine, and other drugs. He had been previously convicted of at least eight misdemeanor offenses, six serious traffic violations, and three or four felonies, two of which were prior acts of bank robbery and kidnapping. At the time of his sentencing, O'Driscoll had seventy-one charges pending against him in seven different courts.[10]

On appeal, O'Driscoll argued that the 300-year sentence, 99 years to be served without possibility of parole, was outside applicable statutory limits, an abuse of the trial court's discretion, and cruel and unusual punishment in violation of the eighth amendment.[11]

2. The Tenth Circuit Opinion

The Tenth Circuit, Judge Barrett writing for a unanimous three-judge panel, found both the sentence and the parole eligibility rulings to be within statutory limits for the crime of kidnapping, within the proper

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period from 18 U.S.C. § 4205(b)(1) (1982) (repealed Oct. 12, 1984; effective Nov. 1, 1986) which provides:

> (b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence of imprisonment by the court.

6. 761 F.2d at 591-92. A post mortem examination established that the hostage had been shot ten times. One shot had been fired while O'Driscoll pressed the gun against the hostage's chest.

7. *Id.* at 592.

8. *Id.* at 592-93.

9. 18 U.S.C. § 3577 (1982) states that "[no] limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence."

10. *O'Driscoll*, 761 F.2d at 593.

11. *Id.* at 595, 598-99.

discretion of the trial court, and not in violation of the eighth amendment prohibition against cruel and unusual punishment.

Initially, the court addressed O'Driscoll's interpretation of the penalty provision of the federal kidnapping statute, 18 U.S.C. § 1201, which permits "imprisonment for any term of years or for life."[12] O'Driscoll pointed to the Revisor's Note accompanying the 1948 consolidation of the federal kidnapping laws to support his contention that life imprisonment is the maximum sentence allowed under section 1201.[13] O'Driscoll's argument that Congress intended to alert sentencing judges that life imprisonment was available as a *maximum* sentence was rejected by the court without discussion.[14] The court was also unpersuaded that bringing a 300-year sentence within the meaning of "any term of years" rendered the specially added "or for life" clause superfluous. Rather, the court preferred the government's explanation that setting "life" as the maximum term of imprisonment would make "*any* term of years" superfluous.[15] In addition, the court emphasized that the disjunctive effect of "*or* for life" implied that sentencing a defendant to a term of years greater than life was permissible.[16]

Turning its attention to the federal parole law, 18 U.S.C. § 4205,[17] the court cited legislative history behind the predecessor parole statute[18] indicating that the judicial and executive branches share the responsibility for determining how long a prisoner should serve.[19] Acknowledging that section 4205(a) permits a prisoner who is serving a life sentence to become eligible for parole ten years after incarceration, the court held that subsection (b)(1) stands independently from subsection (a), permitting a judge to prohibit parole eligibility for a period up to one-third of any sentence when "the ends of justice and the best interest of the public" so require.[20] Under such circumstances, the court ruled, section 4205(b)(1) allows the trial judge to "bypass the Parole Commission," setting parole eligibility at any point during the first one-third of the sentence imposed.[21] The court advised that the kidnapping

12. *Id.* at 595-96.

13. Section 1201 consolidates former 18 U.S.C. §§ 408a, 408c (repealed 1948). H. R. REP. No. 304, 80th Cong., 1st Sess. (1947). The Revisor's Note suggested that "for any term of years or for life" was substituted for the penalty provision of the predecessor statute, 18 U.S.C. § 408a, "for such term of years as the court in it discretion shall determine," in order to remove all doubt as to whether "term of years" included life imprisonment.

14. 761 F.2d at 596 (emphasis added).

15. *Id.* (emphasis in original).

16. *Id.* at 597-98 (emphasis in original).

17. 18 U.S.C. § 4205 (1982) (repealed Oct. 12, 1984; effective Nov. 1, 1986). Subsection (a) provides:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence over thirty years, except to the extent otherwise provided by law.

18. 18 U.S.C. § 4208 (1958) (repealed 1976).

19. 761 F.2d at 596 (citing S. REP. No. 2013, 85th Cong., 2d Sess. 2, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3891, 3892).

20. 761 F.2d at 596.

21. *Id.* at 596-97 (citing United States v. Addonizio, 442 U.S. 178, 189 n.15 (1979);

statute sentencing provision should be read in connection with the parole law, but in the case of a conflict, the former, being more specific, governs.[22]

In an *amicus curiae* brief, it was further argued that the sentence imposed upon O'Driscoll was in violation of 18 U.S.C. § 4206(d)[23] "which authorizes the Parole Commission to release a prisoner sentenced to more than 45 years, including a life term, when he has served 30 years, unless 'there is reasonable probability that he will commit any Federal, state, or local crime.' "[24] The court responded that the sentence did not interfere with application of parole guidelines, but merely fixed the date when the parole mechanism is to become operative.[25]

On the eighth amendment issue, the court ruled that setting parole eligibility beyond the life expectancy of the defendant did not constitute cruel and unusual punishment.[26] O'Driscoll contended that the parole statute, contrary to judicial customs, was used in his case to increase, rather than decrease, the punishment prescribed by the substantive crime statute.[27] The Tenth Circuit rejected this argument based on its previous finding that the sentence did not exceed statutory limits.[28] Finally, abiding by widely accepted principle, the court stated that its review of a sentence generally ends with the determination that statutory limits have not been exceeded.[29] While not articulating a specific standard of review for abuse of discretion, the court found the extreme sentence rendered by the trial court easily justified given O'Driscoll's "callous, vicious propensities."[30]

3. Analysis

a. *The Kidnapping Sentence*

Section 1201 provides that a defendant convicted thereunder "shall be punished by imprisonment for any term of years or for life."[31] The statute's predecessor directed that imprisonment be required "for such term of years as the court in its discretion shall determine."[32] There is, as the Tenth Circuit observed, a dearth of legislative history explaining the addition of "or for life" to the discretionary term of years provision.

United States v. Pry, 625 F.2d 689 (5th Cir. 1980); Wilden v. Fields, 510 F. Supp. 1295, 1306-07 (W.D. Wis. 1981); United States v. Whitley, 473 F. Supp. 23, 24 (E.D. Mich. 1979)).

22. *Id.* at 598 (citing N. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.05 (4th ed. 1984)).

23. 18 U.S.C. § 4206(d) (1982) (repealed Oct. 12, 1984; effective Nov. 1, 1986).

24. 761 F.2d at 598 (citing Brief for Amicus Curiae at 4).

25. *Id.* at 598.

26. *Id.* at 599 (citing Bailey v. United States, 74 F.2d 451, 452 (10th Cir. 1934) and United States *ex rel.* Bongiorno v. Ragen, 146 F.2d 349 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945)).

27. *Id.* at 599.

28. *Id.*

29. *Id.* at 597.

30. *Id.* at 600.

31. 18 U.S.C. § 1201 (1982).

32. 18 U.S.C. § 408a (1946) (repealed 1948).

As mentioned above, the Revisor's Note to the predecessor statute suggests that the change was made in order to remove all doubt as to whether a life sentence could be imposed.[33] If the "term of years" clause in the earlier statute was meant to include 300-year sentences, it is odd that Congress subsequently authorized courts to impose the life sentence. A more reasonable inference is that "any terms of years" refers to terms of imprisonment between zero years and life and that life imprisonment is therefore the maximum possible sentence.

The Tenth Circuit's reasoning appears particularly strained when viewed in the context of statutory punishment provisions identical to those found in section 1201. The federal murder statute, 18 U.S.C. § 1111,[34] employs the same "any term of years or for life" language used in section 1201. That section requires imposition of the death sentence upon conviction of first degree murder unless the jury qualifies its verdict, "without capital punishment," in which event the defendant "shall be sentenced to imprisonment for life." For a second degree murder conviction, the statute mandates that the guilty party be "imprisoned for any term of years or for life."[35]

In *United States v. Black Elk*,[36] the Eighth Circuit Court of Appeals applied the sentencing language of section 1111 in a second degree murder case. The court held that Black Elk's fifteen year sentence was "well below the maximum penalty for second degree murder of life imprisonment."[37] This language indicates the Eigth Circuit's belief that life imprisonment is a ceiling above which "any term of years" may not extend. The Tenth Circuit, in *O'Driscoll*, thus finds itself in conflict with the Eighth Circuit in its interpretation of "any term of years." Further, the *O'Driscoll* court's reasoning, applied to section 1111, would allow a longer term of imprisonment for second degree murder than for first degree murder, a result unlikely to have been intended by Congress.

b. *Parole Eligibility*

In practical terms, the court's construction of 18 U.S.C. § 4205, the federal parole statute, was the most consequential aspect of the opinion.[38] Section 4205, governing time of eligibility for parole release, consolidates two previous sections[39] and is set forth, accordingly, in two

33. *See supra* note 13 and accompanying text.

34. 18 U.S.C. § 1111 (1982), *amended by* 18 U.S.C. § 1111(a) (Supp. II 1984). Two other federal criminal statutes, 18 U.S.C. § 2031 (1982) (governing rape) and 18 U.S.C. § 241 (1982) (governing conspiracy), share the punishment language of section 1201. Neither legislative history nor judicial interpretation related to those laws, however, are enlightening.

35. 18 U.S.C. § 1111 (1982), *amended by* 18 U.S.C. § 1111(a) (Supp. II 1984).

36. 579 F.2d 49 (8th Cir. 1978).

37. *Id.* at 51. *See also* United States v. Martell, 572 F. Supp. 110, 113 (D. Mont. 1983), *aff'd without opinion*, 742 F.2d 1463 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1772 (1985).

38. The difference between life and 300 years imprisonment is surely less interesting to the convicted felon than whether he will be entitled to parole review during his natural life expectancy.

39. 18 U.S.C. § 4205(a) is based upon former 18 U.S.C. § 4202 (1948) (repealed 1976); 18 U.S.C. § 4205(b) is based on former 18 U.S.C. § 4208 (1958) (repealed 1976).

parts.

Subsection (a) provides that a prisoner serving more than one year shall be eligible for release on parole after serving one-third of his sentence "or after serving ten years of a life sentence or of a sentence over thirty years."[40] While the Tenth Circuit acknowledged that a prisoner serving a life sentence becomes eligible for parole no later than ten years after incarceration,[41] it is especially noteworthy here that the ten-year ceiling applies equally to sentences over thirty years. The House Conference Report on section 4205 explains that subsection (a) mandates eligibility for parole consideration "in the case of a prisoner sentenced to life *or more than 30 years*, after serving 10 years of his sentence."[42]

The Tenth Circuit did not deny the plain meaning of subsection (a). Instead, the court held that section 4205(b)(1) authorizes the trial judge to prohibit parole eligibility for a period up to one-third of any determined sentence and thus to "bypass" subsection (a).[43] This holding was predicated on the court's position that subsection (b)(1) was designed to enable the sentencing judge to set parole eligibility at a date later than would be allowed under subsection (a).[44]

Legislative history of section 4205(b) is unenlightening. Former 18 U.S.C. § 4208, enacted in 1958, is the predecessor statute to section 4205(b). Its legislative history, relied upon by the Tenth Circuit, provides clear statements of congressional intent underpinning the statute. Prior to enactment of section 4208, eligibility of federal adult prisoners for parole was governed solely by former 18 U.S.C. § 4202, predecessor to the present section 4205(a).[45] Under section 4202, prisoners sentenced to a term over one year were entitled to parole consideration after serving one—third of their total sentence or, in the case of a life sentence or sentence of more than forty-five years, after fifteen years.[46] Testifying before a House Judiciary Subcommittee, a representative of the Judicial Conference of the United States explained that section 4208 was designed "to authorize the court in sentencing a prisoner to fix an *earlier* date when a prisoner shall become eligible for parole. . . ."[47] Moreover, in the Report of the Subcommittee to Consider the Problem of Disparities in Sentences, the subcommittee chairman recommended approval of legislation, which later became section 4208, "to authorize the court, in sentencing a prisoner, to fix an *earlier* date when the prisoner shall become eligible for parole."[48]

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40. 18 U.S.C. § 4205(a) (repealed Oct. 12, 1984; effective Nov. 1, 1986).
41. *O'Driscoll*, 761 F.2d at 596.
42. H. CONF. REP. No. 94-838, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 335, 357 (emphasis added).
43. *O'Driscoll*, 761 F.2d at 596.
44. *Id.*
45. Grasso v. Norton, 520 F.2d 27, 32 (2d Cir. 1975).
46. 18 U.S.C. § 4202 (1948) (repealed 1976).
47. S. REP. No. 2013, 85th Cong., 2d Sess. 2, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3891, 3896 (emphasis added).
48. *Id.* at 3900 (emphasis added). Additional statements in the Senate Report on sec-

Further legislative history cited by the Tenth Circuit advises that section 4208 permitted the trial court to share with the executive branch the responsibility for determining how long a prisoner should serve.[49] The court relied upon this legislative history to affirm, implicitly, the trial judge's statement that O'Driscoll's release should be a matter of executive clemency and not of legal entitlement. Read in context, the statement clearly refers to judicial cooperation with the attorney general and the parole board in determining parole eligibility based upon the individual prisoner's progress.[50] Nowhere in the legislative history is the shared responsibility statement associated with an extreme sentence in which the prisoner's only hope of release rests in executive clemency.

Other federal appellate decisions interpreting section 4205 and its predecessors support the position that a court's power to fix a parole eligibility date is conferred to allow parole at a date earlier than would result under the automatic parole eligibility provision. In *Grasso v. Norton*,[51] the Second Circuit reviewed committee hearing testimony of the author of section 4208. Arguing that section 4202 created a purely arbitrary limitation on parole eligibility, the author, Congressman Emmanuel Cellar, testified that section 4208 would "permit the release under supervision at an *earlier date*, should a prisoner's response to the rehabilitation justify it."[52]

The Seventh Circuit, in *Garafola v. Bensen*,[53] also examined the history of parole eligibility authority. The court noted that prior to the adoption of section 4208, the statutory scheme did not include any grant of authority to the sentencing court or the Board of Parole that would permit release of a prisoner earlier than the one—third point established by section 4202.[54] The Seventh Circuit found that section 4208 "supplied the omission by permitting the judge either to *shorten* the mandatory minimum imprisonment period ((a)(1)) or to eliminate the

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tion 4208 similarly indicate that the legislative intent behind the section was to empower judges to fix parole eligibility at a time less than the period required for automatic eligibility. *See id.* at 3902 ("[T]he court may designate in the sentence imposed a time when the prisoner may become eligible for parole, *which time may be less than, but shall not be more than, one-third limitation now provided in section 4202.*" (emphasis in original)); *id.* at 3905 ("The court will be authorized to . . . fix the maximum term of the sentence and (1) direct that the prisoner shall be eligible for parole at any time up to one-third this maximum, *as now provided by law.*" (emphasis added)).

49. *O'Driscoll*, 761 F.2d at 596 (citing S. REP. No. 2013, 85th Cong., 2d Sess. 2, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3891, 3892).

50. S. REP. No. 2013, 85th Cong., 2d Sess. 2, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS at 3892 ("The purpose of this section is to provide the court with optional procedures which will enable it to impose sentences which may be indeterminate in nature. This would permit the court, at its discretion, to share with the executive branch the responsibility for determining how long a prisoner should actually serve. The court could . . . fix the maximum term of the sentence and . . . specify that the Board of Parole shall decide when the prisoner will be considered for parole.").

51. 520 F.2d 27 (2d Cir. 1975).

52. *Id.* at 32 (quoting *Hearings on H. J. Res. 424, H. J. Res. 425, and HR 8923 Before Subcomm. No. 3, House Comm. on the Judiciary*, 85th Cong., 2d Sess. 2, at 5, 6 (1958)) (emphasis added).

53. 505 F.2d 1212 (7th Cir. 1974).

54. *Id.* at 1216.

minimum entirely and permit the Board to parole the prisoner at any time ((a)(2))."[55] Applying these same statutes, the Eighth Circuit, in *Jones v. United States*,[56] reached the same conclusion.

Most recently, the Seventh Circuit, in *United States v. Fountain*,[57] directly addressed the relationship between subsection 4205(a) and subsection 4205(b)(1). The defendant, convicted of first degree murder, was sentenced by the trial court to not less than 50 nor more than 150 years in prison.[58] Reviewing the record, the circuit court noted that the district judge was "troubled" by the fact that someone sentenced to life in prison can be paroled after serving only ten years under 18 U.S.C. § 4205(a).[59] The circuit court concluded that was why the sentencing judge imposed a term of years instead of life.[60] The court continued:

> But we are not clear how the judge thought this form of sentence would affect the defendant's parole eligibility dates, when as we have said section 4205(a) requires that every sentence of more than 30 years be treated, for purposes of computing that date, as if it were a sentence of 30 years. . . . True, the next subsection [section 4205(b)(1)] allows the judge to "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." [citation ommitted]. But the apparent purpose is to allow release on parole *before* the earliest date allowed by subsection (a).[61]

Thus, the Second, Seventh, and Eighth Circuit Courts of Appeals have concluded that the power vested in sentencing courts to fix a parole eligibility date was intended to allow parole review at a date earlier than would result under the automatic eligibility provision. The Tenth Circuit's decision in *O'Driscoll* obviously works a contrary result. In addition, a brief review of the cases cited by the Tenth Circuit in support of its holding indicates that the court misconstrued relevant language in those decisions.

The Tenth Circuit in *O'Driscoll* correctly cited the United States Supreme Court, in *United States v. Addonizio*,[62] for the proposition that the trial court may set parole at any point up to one-third of the maxi-

55. *Id.* (emphasis added). *See also* United States v. Hundley, 430 F. Supp. 500 (E.D. Pa. 1977) ("The purpose of [section 4208(a)(1)] is only to reduce below one-third of the total sentence the period within which the prisoner may be *considered* for parole.") (emphasis in original).

56. 419 F.2d 593, 595 (8th Cir. 1969) (Blackmun, J.) ("The reference in § 4208(a)(1) to one-third of the maximum sentence is geared to the general parole eligibility provisions of 18 U.S.C. § 4202.").

57. 768 F.2d 790 (7th Cir. 1985).

58. *Id.* at 793.

59. *Id.* at 799.

60. *Id.*

61. *Id.* (emphasis in original) (citing United States v. Smith, 703 F.2d 627, 628 (D.C. Cir. 1983) and United States v. Pry, 625 F.2d 689, 692 (5th Cir. 1980), *cert. denied*, 450 U.S. 925 (1981)).

62. 442 U.S. 178 (1979).

mum sentence imposed.[63] More specifically, however, the Supreme Court recognized, albeit in dicta, that the authority of sentencing judges under section 4205(b)(1) is limited to selecting an "early" parole eligibility date.[64]

Two other cases cited by the *O'Driscoll* court, *United States v. Pry*,[65] and *Wilden v. Fields*,[66] each state in dicta that the sentencing court may set parole eligibility at any time up to one-third of the total sentence imposed.[67] The Fifth Circuit in *Pry*, however, pointed out that where the trial court fails to set a parole review date during the first third of a prisoner's sentence, section 4205(a) would kick in automatically to entitle the prisoner to review at the end of that one-third period.[68] In *Wilden*, a Wisconsin federal district court stated that sentencing judges have three alternatives in setting the parole eligibility date: (1) the one-third point, not to exceed ten years (section 4205(a)), (2) a "minimum period" up to the one-third point (section 4205(b)(1)), or (3) immediate parole eligibility.[69] Again, the terms of section 4205(a) are represented, as they were in *Pry*, as a limit beyond which a sentencing judge cannot prohibit parole eligibility, contrary to the Tenth Circuit's holding in *O'Driscoll*.

The most obvious misinterpretation of case law in the *O'Driscoll* opinion occurs in the court's reliance on *United States v. Whitley*.[70] The *O'Driscoll* court cited *Whitley* for the proposition that section 4205(b)(1) allows the sentencing court to "bypass" section 4205(a) by setting a parole review date later than the ten-year limit imposed by subsection (a).[71] In *Whitley*, the defendant moved the federal district court for sentence modification, seeking a reduction in his thirty-five year sentence.[72] The district court in *Whitley* stated in dicta that section 4205(b)(1) empowered the sentencing judge to "bypass" section 4205(a) by setting a parole review date *earlier* than would be effected under subsection (a).[73] Nothing in the opinion lends itself to the proposition that section 4205(b)(1) allows the judge to bypass subsection (a) by exceeding the limits stated therein.

c. *Cruel and Unusual Punishment and Abuse of Discretion*

The Tenth Circuit also rejected O'Driscoll's argument that his punishment, because of its length, violated the eighth amendment.[74] Adopting the "proportionality principle," the court sided with firmly es-

63. *O'Driscoll*, 761 F.2d at 597 (citing *Addonizio*, 442 U.S. 178, 189 n.15).
64. 442 U.S. at 189.
65. 625 F.2d 689 (5th Cir. 1980), *cert. denied*, 450 U.S. 925 (1981).
66. 510 F. Supp. 1295 (W.D. Wis. 1981).
67. *Pry*, 625 F.2d at 692; *Wilden*, 510 F. Supp. at 1306.
68. 625 F.2d at 692.
69. 510 F. Supp. at 1306.
70. 473 F. Supp. 23 (E.D. Mich. 1979).
71. *O'Driscoll*, 761 F.2d at 596-97.
72. 473 F. Supp. at 23-24.
73. *Id.* at 24.
74. *O'Driscoll*, 761 F.2d at 599-600.

tablished precedent. The United States Supreme Court has held that the duration of punishment will not constitute cruel and unusual punishment unless it is determined that the length of the sentence is "grossly disproportionate" to the severity of the crime.[75] Further, the Court has noted frankly that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[76]

Reviewing the trial court's exercise of discretion, the Tenth Circuit correctly noted that sentences within statutory guidelines are rarely disturbed.[77] Because the Tenth Circuit improperly defined the statutory guidelines set forth in sections 1201 and 4205, however, the court erred in approving the trial court's exercise of discretion.

4. Conclusion

The heinous nature of O'Driscoll's conduct is well documented in the respective opinions of the Tenth Circuit and the district court.[78] If any facts justify the imposition of the maximum sentence under law, these do. But the sentence must be rendered within statutory guidelines. The Tenth Circuit in *O'Driscoll* misconstrued legislative history and judicial authority to permit a sentence and parole eligibility date which, though perhaps deserved, exceeded statutory limits.

B. *Application of Overlapping Specific and General Sentencing Statutes:* United States v. Afflerbach

1. Background

In *United States v. Afflerbach*,[79] Joseph Afflerbach and four other defendants were convicted in the United States District Court for the District of Wyoming of forcibly interfering with federal officers in violation of 18 U.S.C. § 111.[80] Specifically, the charges were based upon a confrontation between the defendants and agents of the Internal Revenue

75. Hutto v. Davis, 454 U.S. 370, 377 (1982) (Powell, J., concurring); *see* Rummel v. Estelle, 445 U.S. 263 (1980); Coker v. Georgia, 433 U.S. 584 (1977); Weems v. United States, 217 U.S. 349 (1910).

76. *Hutto*, 454 U.S. at 374; *Rummel*, 445 U.S. at 272. The Court in *Rummel* conceded, however, that life imprisonment for overtime parking might be considered "cruel and unusual."

77. 761 F.2d at 597 (citing Rummel v. Estelle, 445 U.S. 263 (1980); Schick v. Reed, 419 U.S. 256 (1974); Dorszynski v. United States, 418 U.S. 424 (1974); Gore v. United States, 357 U.S. 386 (1958)). *See also* Townsend v. Burke, 334 U.S. 736, 741 (1948).

78. 761 F.2d at 591-95; 586 F. Supp. at 1487-92.

79. 754 F.2d 866 (10th Cir.), *cert. denied*, 105 S. Ct. 3506 (1985).

80. 18 U.S.C. § 111 (1982) provides:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Three of the defendants were found guilty of using a deadly weapon in the commission of their crime. Under a separate count, the same three defendants were further con-

Service. Pursuant to a district court order, IRS special agents entered the farm property of Afflerbach's co-defendant, Harvey Annis, to seize machinery and equipment in satisfaction of a deficiency in Annis's federal tax payment. Before the machinery could be removed, Afflerbach and other neighbors of Annis approached and threatened the agents with pistols, shotguns, and a semi-automatic rifle. The agents agreed to leave and abandoned the seizure effort.[81]

Following their convictions, the defendants were sentenced to various terms of imprisonment and probation.[82] All of the defendants appealed, advancing numerous grounds for vacation of their respective sentences.[83] The defendants claimed that the sentences imposed were based upon a statute under which they should not have been charged.[84] Particularly, it was urged that the specific statute prohibiting interference with IRS officers in the performance of their duties[85] should have been applied instead of section 111 which prohibits interference with federal officers generally.[86] Because the more specific statute, 26 U.S.C. § 7212, prescribes a lesser punishment, the defendants argued that their sentences were outside statutory limits and therefore constituted cruel and unusual punishment in violation of the eighth amendment.[87]

2. The Majority Opinion

The Tenth Circuit, Judge Doyle writing for the majority,[88] rejected the defendants' "general versus specific" statutory application argument, scarcely discussing the issue. The court merely cited *United States*

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victed of using a firearm in the commission of a felony in violation of 18 U.S.C. § 924(c) which provides for an enhanced sentence when a firearm is used. 754 F.2d at 868-69.

81. *Id.* at 868.

82. *Id.* at 869. The sentences for the section 111 violations ranged from seven years imprisonment to three years probation (with three months of the probation to be served in prison). The sentences were further enhanced pursuant to section 924(c) for periods ranging from five years probation to four years probation.

83. *Id.* The first six grounds, unsuccessfully argued by the defendants, were failure to grant a motion to transfer within district, improper jury composition, illegal seizure attempted by the IRS agents, denial of effective assistance of counsel, improper instructions to the jury, and lack of jurisdiction due to improper notice of the IRS levy.

84. *Id.* at 871.

85. 26 U.S.C. § 7212 (1982) provides in pertinent part:

(a) Corrupt or forcible interference.

— Whoever corruptly or by force or threats of force . . . endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000 or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

86. 754 F.2d at 871.

87. *Id.*

88. Judge Logan joined Judge Doyle. Judge McKay filed a separate dissenting opinion. 754 F.2d at 871-73. *See infra* text accompanying notes 91-104.

v. MacClain[89] for the proposition that sentences within statutory limits do not constitute cruel and unusual punishment. The court did not, however, cite any authority or set forth any argument in support of its finding that the sentences imposed upon Afflerbach and the other defendants were within statutory guidelines. Nor did the majority address the broad question of whether a general statute may allow sentencing in excess of that permitted by a specific statute covering the same offense.[90]

3. Judge McKay's Dissent[91]

Judge McKay argued in dissent that the defendants were improperly sentenced under the general provisions of section 111 when their conduct violated the specific provisions of section 7212 of Title 26.[92] Citing *Busic v. United States*,[93] Judge McKay reiterated the "time-honored rule of statutory construction," that a specific statute is given precedence over a general statute, regardless of their temporal sequence.[94] Judge McKay further noted that the rule has long been applied to prevent conviction under a general statute where a specific statute governs the same criminal offense.[95]

Judge McKay acknowledged that the clarity of the rule was somewhat blurred by the Supreme Court's decision in *United States v. Batchelder*.[96] In *Batchelder*, the Court held that the United States Attorney had the discretion to prosecute under either of two statutes prohibiting receipt of a firearm by a convicted felon, though one of the statutes prescribed a greater punishment than the other.[97] Judge McKay observed that certain courts have used *Batchelder* to allow the government to pro-

89. 501 F.2d 1006, 1013 (10th Cir. 1974) (citing Page v. United States, 462 F.2d 932 (3d Cir. 1972)).

90. Although the Tenth Circuit upheld the sentences imposed under section 111, the court ruled that the "deadly weapon" provision contained in section 111 precluded further enhancement of the sentences under the "firearm" provisions of section 924(c). In support of this holding the court cited Busic v. United States, 446 U.S. 398 (1980), in which the Supreme Court ruled that the defendants could not be sentenced consecutively under the enhancement provisions of both sections 111 and 924(c). Accordingly, the *Afflerbach* majority vacated the probationary sentences imposed by the trial court pursuant to section 924(c). *Afflerbach*, 754 F.2d at 871.

91. *Id.* (McKay, J., dissenting). Judge McKay concurred in the court's opinion as it related to the first six issues addressed therein. *Id.* at 873. *See supra* note 83.

92. 754 F.2d at 872-73

93. 446 U.S. 398 (1980).

94. *Id.* at 871.

95. *Id.* at 871-72 (citing United States v. Bates, 429 F.2d 557 (9th Cir.), *cert. denied*, 400 U.S. 831 (1970); Enzor v. United States, 262 F.2d 172 (5th Cir. 1958) (conspiracy to sell narcotics must be punished under statute respecting conspiracy to violate narcotics laws rather than under the general conspiracy statute), *cert. denied*, 359 U.S. 953 (1959); Robinson v. United States, 142 F.2d 431 (8th Cir. 1944) (stealing property from the post office must be punished under the statute specifically prohibiting that act, rather than under the general statute outlawing theft of personal property belonging to the United States)).

96. 442 U.S. 114 (1979).

97. *Id.* at 123-24. (The defendant in *Batchelder* was convicted under 18 U.S.C. § 922(h) which prohibits convicted felons from receiving firearms which have traveled in interstate commerce. 18 U.S.C. § 924(a) permits the trial court to sentence a defendant to a maximum of five years imprisonment for such offense. In contrast, 18 U.S.C. app.

ceed under a general statute which contravenes the provisions of a specific statute covering the same offense.[98] However, Judge McKay declined to follow the rule announced by those courts favoring government discretion, distinguishing *Batchelder* on the ground that two specific statutes were involved, rather than one general and one specific.[99] In addition, Judge McKay noted that *Busic*, decided after *Batchelder*, affirms the contention that *Batchelder* did not undermine the doctrine that a specific statute governs over a general one.[100]

Judge McKay further stated that this doctrine is a "corollary" to the rule of lenity which mandates resolving ambiguity in criminal statutes in favor of the less onerous penalty,[101] and also noted the Supreme Court's reluctance to increase punishment absent a "clear and definite legislative directive."[102] Concluding that the defendants should have been sentenced under 26 U.S.C. § 7212,[103] Judge McKay would have remanded the case to the district court for resentencing under that statute.[104]

4. Analysis

a. *The Legacy of* Busic

In *Busic*, the United States Supreme Court faced an appeal by two defendants convicted of armed assault of federal officers in violation of 18 U.S.C. § 111.[105] In addition, each of the defendants' sentences was enhanced pursuant to 18 U.S.C. § 924(c).[106]

As the majority in *Afflerbach* correctly noted, the Court in *Busic*[107] held that section 924(c) may not be used to increase the defendants' sentences where section 111 contained its own "deadly weapon" enhancement provision.[108] But unlike *Afflerbach*, in *Busic* the government sought to enhance the defendants' sentences under section 924 *rather than* under the provisions of section 111. No double enhancement question was involved in *Busic*. The question was, instead, whether the general enhancement provisions of section 924 could be employed by the

§ 1202(a) authorizes not more than two years imprisonment for an offense with identical elements.) *Batchelder*, 442 U.S. at 116-17.

98. *Afflerbach*, 754 F.2d at 872 (citing United States v. Carpenter, 611 F.2d 113 (5th Cir.), *cert. denied*, 447 U.S. 922 (1980); United States v. Simon, 510 F. Supp. 232, 237 (E.D. Pa. 1981)).

99. *Afflerbach*, 754 F.2d at 872.

100. *Id.*

101. *Id.* (citing Simpson v. United States, 435 U.S. 6 (1978); United States v. Bass, 404 U.S. 336, 347 (1971)).

102. 754 F.2d at 872 (citing *Simpson*, 435 U.S. at 15).

103. *Id.* at 873 (Judge McKay noted that the absence of an enhancement provision in section 7212 allowed section 924 to supplement the sentence without violating *Busic*.).

104. *Id.*

105. *Busic*, 446 U.S. at 401.

106. *Id.*

107. Justice Brennan wrote for a four-justice plurality. Chief Justice Burger joined Justice Blackmun concurring. 446 U.S. at 412. Justice Blackmun's separate opinion affirmatively supported Justice Brennan's interpretation and application of *Simpson*. *Id.*

108. *Busic*, 446 U.S. at 399-400.

government where the provisions of section 111 permitted an enhanced sentence for the specific crime committed.[109] In addition to its interpretation of the rule announced in *Simpson v. United States*,[110] the *Busic* Court found its holding supported by "two tools of statutory construction relied upon in *Simpson*:"[111] the rule of lenity, and the principle that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence."[112] The Court concluded that section 111, being the more specific statute, provided the exclusive channel through which the defendants' sentences could be enhanced.[113] This line of reasoning was ignored by the *Afflerbach* court.

In the Courts of Appeals, *Busic* is most frequently cited for the broad principle that a specific statute supercedes a general statute covering the same factual situation. At least six circuits, including the Tenth Circuit, have cited the principle as a fundamental maxim of statutory construction and have applied it to questions of statutory application, including those arising outside the realm of criminal law.[114]

In *Otero Savings and Loan Association v. Federal Home Loan Bank Board*,[115] the Tenth Circuit, citing *Busic*, held that the general language of a federal statute prohibiting interest bearing demand deposit accounts "must give way to the specific language" of another statute authorizing one such type of account.[116]

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109. *Id.* at 404.

110. *Simpson*, 435 U.S. 6 (1978).

111. 446 U.S. at 406 (citing United States v. Bass, 404 U.S. 336, 347 (1971) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

112. 446 U.S. at 406 (citing Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973) (habeus corpus is the appropriate relief for state prisoners challenging the validity of their confinement and is exclusive of other general statutory remedies, such as those provided in the Civil Rights Act)).

113. 446 U.S. at 411.

114. United States v. Olinger, 759 F.2d 1293, 1299 (7th Cir. 1985) (approving the two "tools" of statutory construction enunciated in *Busic*, but holding that the more specific of two statutes prohibiting conspiracy to commit vote fraud was, in the present case, *too* specific to be applied); Union of Concerned Scientists v. NRC, 711 F.2d 370, 380-81 (D.C. Cir. 1983) (holding that hearing and notice requirements of the Atomic Energy Act are not subject to the general "good cause" exception of the Administrative Procedure Act); Water Transport Association v. I.C.C., 722 F.2d 1025, 1029 (2d Cir. 1983) (water carriers denied standing because specific statute, 49 U.S.C. § 10713(d), contemplates challenges to I.C.C. rules only by shippers and ports, although the general provisions of section 707 of the Staggers Rail Act of 1980 could be construed to permit water carriers' standing); *In re* Morristown & Erie R.R. Co., 677 F.2d 360, 368 (3d Cir. 1982) (holding that the precise mandates of the Milwaukee Railroad Restructuring Act of 1979 regarding procedural requirements of an "interim" railroad operation should be followed instead of general rules set forth in the Bankruptcy Act); Otero Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., 665 F.2d 279, 282 (10th Cir. 1981); United States v. Saade, 652 F.2d 1126, 1132 (1st Cir. 1981) (applying the more specific of two competing criminal statutes forbidding unauthorized entry into military danger zones). Each of the above cited cases relied expressly upon *Busic* in support of its holding.

115. 665 F.2d 279 (10th Cir. 1981). *Otero* involved an appeal by savings and loan associations from an administrative finding by the Federal Home Loan Bank Board that its customer "check-in" procedures violated the federal statutes "forbidding deposit in or withdrawal from interest bearing accounts via negotiable or transferable instruments payable to a third party."

116. *Id.* at 282.

In criminal cases, however, two other circuits have given the holding in *Busic* a limited reading. The Fourth Circuit, in *United States v. Computer Sciences Corp.*,[117] permitted prosecution of the defendants therein under mail and wire fraud statutes, although the defendants' conduct was more specifically proscribed by the statute outlawing false claims against the government.[118] The Fourth Circuit conceded, however, that "[s]ince the particular statute controls and rules out the more general . . ." *Busic* reached a "sensible result."[119] The court declined to apply *Busic* and *Simpson*, reasoning that the defendants had violated more than one statute by a single act or combination of acts.[120]

The Sixth Circuit, however, in *United States v. Schaffner*,[121] went further, holding that the government, at the prosecutor's discretion, may prosecute under any applicable statute.[122] The court rejected the district court's reliance on *Busic* and *Simpson*, citing *Computer Sciences* to support the position that those cases governed only situations involving two sentencing enhancement provisions.[123]

The rule announced in *Busic*, that a specific statute supercedes a general statute covering the same offense, has been treated with great deference.[124] The courts which have declined to apply *Busic* have done so by distinguishing it, not by denying its applicability to criminal sentencing statutes.[125] The Tenth Circuit's decision in *Afflerbach* appears incongruous not only to the position of sister circuits regarding the *Busic* rule, but to the Tenth Circuit's previous willingness to adopt the rule as a guideline for statutory construction generally.[126]

b. *The* Batchelder *Problem*

While the majority in *Afflerbach* did not cite *United States v. Batchelder* to support its holding, Judge McKay noted the importance of distinguishing *Batchelder* from the rule of statutory construction set forth in *Busic*.[127] In *Batchelder*, the Supreme Court reviewed a Seventh Circuit decision in which the defendant's sentence was reduced to the maximum length permitted by the more lenient of two otherwise identical statutes.[128] The defendant, a previously convicted felon, was convicted of receiving a firearm which had traveled in interstate commerce, in violation of 18 U.S.C. § 922(h). The defendant was sentenced to five years imprisonment under section 924(a) of the same title.[129] Noting that the

117. 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).
118. *Id.* at 1186-87.
119. *Id.*
120. *Id.* at 1187.
121. 715 F.2d 1099 (6th Cir. 1983).
122. *Id.* at 1102.
123. *Id.* The applicability of *Busic* to sentencing statutes was not questioned.
124. *See supra* note 114.
125. *See supra* notes 117-23 and accompanying text.
126. *See supra* notes 115-16 and accompanying text.
127. *Afflerbach*, 754 F.2d at 872 (McKay, J., dissenting).
128. *Batchelder*, 442 U.S. at 116-18.
129. *Id.* at 116.

substantive elements of section 922(h) and 18 U.S.C. app. § 1202(a)[130] are identical, and that the latter permits a maximum two-year sentence, the court of appeals remanded for resentencing under section 1202(a). The Supreme Court reversed, holding principally that the government may prosecute and defendants may be sentenced under any statute violated by their conduct, "so long as it does not discriminate against any class of defendants."[131] While acknowledging the partial redundancy of sections 922(h) and 1202(a), the Court maintained that the statutes represented independent criminal laws, each enforceable on its own terms.[132] The Court further declined to apply the doctrine that ambiguity in criminal statutes should be construed in favor of lenity, stating that no ambiguity was present in the statutes in question.[133]

As Judge McKay noted in *Afflerbach*, the *Batchelder* holding has been relied upon by a number of lower courts to uphold convictions and sentencing under general statutes allowing greater punishment when a specific, more lenient statute covers a defendant's conduct.[134] A comparison of the circuits adopting *Batchelder* for this purpose with those circuits which have followed *Busic*,[135] reveals that, with two exceptions,[136] the courts applying *Batchelder* have not adopted the rule announced in *Busic*.

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130. 18 U.S.C. app. § 1202(a).

131. *Batchelder*, 442 U.S. at 116-17.

132. *Id.* at 118-19.

133. *Id.* at 121-22.

134. *Afflerbach*, 754 F.2d at 872 (McKay, J., dissenting) (citing United States v. Carpenter, 611 F.2d 113 (5th Cir.), *cert. denied*, 447 U.S. 922 (1980); United States v. Simon, 510 F. Supp. 232, 237 (E.D. Pa. 1981)). *See also* United States v. Boggs, 739 F.2d 1376, 1378 n.2 (8th Cir. 1984) (Defendants who moved freight by truck in violation of certain Interstate Commerce Act provisions were convicted of a felony violation of the Act under a section generally proscribing interstate shipments of freight not complying with regulations, though a misdemeanor section of the Act disallowed such shipments specifically by "motor common carriers."); United States v. Davis, 707 F.2d 880, 883 n.4 (6th Cir. 1983) (government allowed to prosecute conspiracy under RICO, 18 U.S.C. § 1961, instead of more specific state statutes); United States v. Fern, 696 F.2d 1269, 1273-74 (11th Cir. 1983) (A defendant convicted of making a materially false statement to an IRS auditor was prosecuted and sentenced under 18 U.S.C. § 1001 forbidding false statements to be made to any department or agency of the United States, though 26 U.S.C. § 7207, prescribing a lesser punishment, applied to false statements made to officers of the IRS. The court upheld the conviction stating that the existence of a more specific statute would never be grounds for reversal, citing *Batchelder* among other cases.); United States v. Anderez, 661 F.2d 404, 407 & n.9 (5th Cir. 1981) (upholding convictions under the felony provisions of 18 U.S.C. § 1001 prohibiting false statements to departments or agencies of the United States and under the misdemeanor provisions of the more specific Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 1101, 1058); United States v. Abraham, 627 F.2d 205, 206 (9th Cir. 1980) (conviction for assaulting a federal officer under 18 U.S.C. § 111 upheld though defendant's conduct was more particularly forbidden by 18 U.S.C. § 1501 making it a misdemeanor to assault a federal officer serving process).

135. *See supra* note 98.

136. *Davis*, 707 F.2d 880, 883 (6th Cir. 1983) (But the Sixth Circuit's application of *Batchelder* came prior to its decision in *Schaffner*, 715 F.2d 1099, which, though distinguishing *Busic*, conceded its applicability to criminal punishment statutes.); *Abraham*, 627 F.2d 205, 206 (9th Cir. 1980) (The Ninth Circuit found that applying the specific statute in this instance would permit only the filing of misdemeanor charges against an individual assaulting a police officer who was making an arrest as opposed to the usual felony charges which would apply under any other circumstances).

Judge McKay correctly pointed out that reliance on *Batchelder* in opposition to *Busic* is misplaced. The Supreme Court in *Batchelder* never considered the question of whether sentencing may proceed under a general statute when a specific statute is available. In *Batchelder*, the defendant's conduct was proscribed by two specific statutes with identical substantive elements.[137] Moreover, the fact that *Busic* was decided subsequent to the Court's decision in *Batchelder* indicates that the *Batchelder* rule allowing discretionary prosecution is limited to cases involving two equally specific statutes.[138]

The First Circuit, in *United States v. Saade*,[139] adopted reasoning similar to Judge McKay's, finding that *Batchelder* permits prosecutorial discretion only where the *Busic* principle of statutory construction does not apply.[140] In *Saade*, the defendants entered a military danger zone without authorization during a naval gunnery practice session.[141] The government sought to proceed under the sweeping provisions of 33 U.S.C. § 1[142] which authorizes the Secretary of the Army to prescribe regulations for the use of navigable waters for the protection of life and property. Section 3 of the same title empowers the Secretary to promulgate similar regulations for waters likely to be endangered by coastal artillery fire.[143] The government argued that *Batchelder* permitted prosecution under either section.[144] Citing *Busic*, the First Circuit held that the specific statute, section 3, was exclusive and that *Batchelder* would apply only if section 1 specifically authorized danger zone regulations.[145]

The soundness of Judge McKay's reasoning in *Afflerbach*, and the precise balancing of *Batchelder* and *Busic* by the First Circuit in *Saade*, demonstrate that *Batchelder* should not be used in contravention of the statutory construction maxim articulated in *Busic*.

c. *The Tenth Circuit Since* Afflerbach

Since the Tenth Circuit decided *Afflerbach*, it has considered the question of prosecution under general versus specific statutes on two occasions. In *Timberlake v. United States*,[146] defendants were indicted for transportation of drugs as a part of a conspiracy.[147] The defendants plead guilty to two and three counts of conspiracy, respectively, including counts based upon specific and general conspiracy statutes.[148] Fol-

137. *Afflerbach*, 754 F.2d at 872 (McKay, J., dissenting).
138. *Id.*
139. 652 F.2d 1126 (1st Cir. 1981).
140. *Id.* at 1132.
141. *Id.* at 1129.
142. 33 U.S.C. § 1 (1982).
143. 652 F.2d at 1130 n.4.
144. *Id.* at 1132 n.5.
145. *Id.* at 1132 & n.7.
146. 767 F.2d 1479 (10th Cir. 1985).
147. *Id.* at 1480.
148. One defendant plead guilty to conspiracy to import cocaine in violation of 21 U.S.C. § 963 (1982), conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 (1982), and conspiracy to travel in interstate and foreign commerce with intent to promote unlawful activity in violation of 18 U.S.C. § 371 (1982) (general conspiracy statute). The

lowing the imposition of sentences, the defendants retained new counsel and moved to vacate the sentences pursuant to 28 U.S.C. § 2255.[149] The defendants asserted that sentencing under multiple conspiracy statutes constituted double jeopardy in violation of the fifth amendment.[150] The Tenth Circuit, Judge Doyle writing, explained that a single illegal act may be punished under several statutory provisions, and added that the act may be punished "under the general conspiracy statute (18 U.S.C. § 371) and a more specific conspiracy statute."[151] While Judge Doyle did not cite his opinion in *Afflerbach*, the similarity of the holdings is evident.

Judge McKay dissented, noting that the general rule allowing prosecution of a single conspiracy under several statutes applies only when charges are based on two or more *specific* conspiracy statutes.[152] Following reasoning similar to that expressed in his dissent in *Afflerbach*, but citing cases pertaining specifically to conspiracy statutes,[153] Judge McKay argued that the defendants in *Timberlake* should have been convicted and sentenced only under the specific statutes.[154]

More recently, in *United State v. Largo*,[155] the Tenth Circuit heard an appeal by a defendant convicted of converting to his own use money belonging to the United States.[156] The charges stemmed from the defendant's embezzlement of federal funds provided by the Bureau of Indian Affairs to a local childhood development program.[157] The defendant argued on appeal, *inter alia*, that he was improperly convicted under 18 U.S.C. § 641,[158] when 25 U.S.C. § 450,[159] prescribing a lesser punishment, specifically prohibited embezzlement of Indian Self-Determination and Education Assistance funds.[160] The Tenth Circuit found the issue to be controlled by *Afflerbach* and rejected the defendant's argument.[161] Judge McKay, again dissenting, filed a separate opinion, nearly identical in language, analysis, and authority to his dissent in *Afflerbach*.[162]

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second defendant plead guilty to the conspiracy charges under sections 963 and 371. 767 F.2d at 1481.

149. 28 U.S.C. § 2255 (1982).

150. *Timberlake*, 767 F.2d at 1481.

151. *Id.*

152. *Id.* at 1483 (McKay, J., dissenting).

153. 767 F.2d at 1484 (McKay, J., dissenting) (citing United States v. Corral, 578 F.2d 570, 572 (5th Cir. 1978); United States v. Marotta, 518 F.2d 681, 684 (9th Cir. 1975); United States v. Mori, 444 F.2d 240, 245 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971); Enzor v. United States, 262 F.2d 172 (5th Cir. 1958), *cert. denied*, 359 U.S. 953 (1959)).

154. 767 F.2d at 1486.

155. 775 F.2d 1099 (10th Cir. 1985).

156. *Id.* at 1100.

157. *Id.*

158. 18 U.S.C. § 641 (1982).

159. 25 U.S.C. § 450 (1982).

160. *Largo*, 775 F.2d at 1100.

161. *Id.* at 1101.

162. *Id.* at 1102-04 (McKay, J., dissenting).

5. Conclusion

The Tenth Circuit, in *Afflerbach*, again demonstrated its willingness to uphold criminal sentences when sound reasoning and ample authority suggest a contrary result. In subsequent decisions, the Tenth Circuit has found itself bound by the precedent set in *Afflerbach*. While the Tenth Circuit in *Afflerbach* did not rely on the Supreme Court's decision in *Batchelder* to support its holding, future decisions will do well to heed Judge McKay's artful distinction of that case from cases involving specific and general criminal statutes. Finally, if the Tenth Circuit wants to square itself with the decisions of sister circuits and with its own holding in *Otero*,[163] it must consistently acknowledge the fundamental principle of statutory construction that a general sentencing statute may not be applied in derogation of a specific one covering the same conduct.

C. *Restitution and the Seventh Amendment:* United States v. Watchman

1. Background

In *United States v. Watchman*,[164] the defendant, a Native American man, plead guilty to an indictment for assault with intent to murder on an Indian reservation.[165] The victim, a Native American woman, received serious injuries requiring extensive medical treatment.[166] In sentencing Watchman, the district court ordered him to pay the victim restitution in the amount of $13,556.88.[167] This order was based on 18 U.S.C. § 3579,[168] which authorizes an order of restitution, and 18 U.S.C. § 3580,[169] which specifies procedures to be used before restitution can be ordered. Watchman's motion to reduce his sentence was denied and he appealed, attacking the restitution award specifically.[170] He challenged the constitutionality of the statutes authorizing restitution, the amount of restitution awarded and the procedure used for determining that amount.[171] As to the constitutionality of the statutes authorizing restitution, Watchman urged that the restitution award amounted to a civil judgment in excess of twenty dollars, thereby requiring a jury trial under the seventh amendment.[172]

2. The Tenth Circuit Opinion

The Tenth Circuit, Judge Seth writing for the court, rejected

163. *See supra* notes 115-16 and accompanying text.
164. 749 F.2d 616 (10th Cir. 1984).
165. *Id.* at 618.
166. *Id.*
167. *Id.* at 617.
168. 18 U.S.C. § 3579 (1982), *amended by* 18 U.S.C. § 3579(c), (f)(4) (Supp. II 1984) (renumbered as section 3663, Oct. 12, 1984; effective Nov. 1, 1986).
169. 18 U.S.C. § 3580 (1982) (renumbered as section 3664, Oct. 12, 1984; effective Nov. 1, 1986).
170. 749 F.2d at 617.
171. *Id.*
172. U.S. CONST. amend. VII. The seventh amendment states: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Watchman's claim that the restitution statute was unconstitutional. In so doing, the court refused to recognize the restitution award as a civil action governed by the seventh amendment. Rather, the court held that restitution is a "constitutional extension of sentencing."[173]

In a very brief analysis, the court held that the enforcement clause in the Victim and Witness Protection Act of 1982,[174] providing that a restitution order may be enforced by the victim in the same manner as civil action,[175] did not affect the nature of the sentencing hearing.[176] Distinguishing between civil adjudications and sentencing, the court noted that the victim does not appear as a party in the determination of restitution and is not entitled to appeal the order.[177] The court was persuaded by the analysis expounded in *United States v. Brown*.[178] Noting that the sixth amendment permits length of incarceration to be determined at a non-jury sentencing hearing, the Second Circuit in *Brown* ruled that restitution determined at sentencing does not infringe upon seventh amendment guarantees.[179] Finally, the Tenth Circuit recognized that the concept of restitution was in place when the seventh amendment was adopted, implying that the framers understood restitution to be a criminal sanction.[180]

The court then looked to the lower court's factual findings and procedures and determined that its findings of fact were deficient.[181] The court ruled that the Act requires sentencing courts to make certain factual determinations when the victim has received physical injuries inflicted by the defendant.[182] These determinations include the extent of the victim's losses,[183] and the defendant's financial condition and ability to pay under the Act.[184] While approving the use of presentence reports as a fact-finding tool, the court held that such reports may be too general to suffice as the sole source of information in the determination of restitution.[185] The court found that the sentencing court record did not, therefore, reflect sufficient development of facts regarding the victim's restitutionary needs.[186] Accordingly, the restitution order was va-

173. 749 F.2d at 617.

174. 18 U.S.C. §§ 1512-14, 3579-80 (1982) (hereinafter referred to as "VWPA" or "the Act").

175. 18 U.S.C. § 3579(h).

176. 749 F.2d at 617.

177. *Id.*

178. 744 F.2d 905 (2d Cir.), *cert. denied*, 105 S. Ct. 599 (1984).

179. *Id.* at 909-10.

180. *Watchman*, 749 F.2d at 617.

181. *Id.* at 618-19. Congress has mandated that certain factual determinations be made and that certain procedures be followed. 18 U.S.C. §§ 3579, 3580.

182. *Id.* at 618 (citing 18 U.S.C. § 3579(b)(2) (1982)).

183. *Id.* Additionally, the victim must participate in the fact finding process and the record must reflect such participation. *Id.*

184. *Id.* In *Watchman*, the necessity of such fact gathering was particularly acute. Watchman had been declared indigent for the purpose of representation at trial. *Id.*

185. *Id.* at 619. The government has the burden of developing sufficient facts on behalf of the victim and the defendant has the burden of developing facts on his own behalf. *Id.*

186. The trial court had relied on a presentence report and "figures" related to the victim's "losses" which were determined by telephone conversations with unidentified

cated and the case remanded.[187]

3. Analysis

a. *The Seventh Amendment*

The Victim and Witness Protection Act of 1982[188] provides, in part, that a judge sentencing an offender, in addition to or in lieu of any other penalty, may order that the offender make restitution to any victim of the offense.[189] The Act thus allows a victim to recover damages without bringing a separate civil action against the offender. The amount of restitution is determined at sentencing without the right to jury trial. This attempt by Congress to expedite justice has recently met with some criticism.

Relying on the distinction between legal and equitable proceedings, one commentator has argued that the Act violates the seventh amendment.[190] The Act authorizes essentially three types of restitution: return of property stolen, damaged or destroyed, or its value; compensation by the offender to the victim for medical expenses and lost income; and, payment of funeral expenses where the offense results in the death of the victim.[191] Noting the familiar principle that the seventh amendment preserves the right to jury trial as it existed at English common law when the amendment was adopted in 1791,[192] that commentator states that only the first type of restitution would be considered a remedy in equity in which the offender was required to "disgorge ill-gotten gains"[193] without the right to a jury trial.[194] The second and third categories represented remedies at common law for which the defendant was entitled to demand a jury.[195]

In addition, the restitution order authorized by the Act shares a number of characteristics with traditional civil actions. The sentencing

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persons. The record failed to reflect that the victim had ever been interviewed as to her "losses." *Id.*

187. 749 F.2d at 619.

188. *See supra* note 174.

189. 18 U.S.C. § 3579(a)(1) (1982).

190. *See* Raymond, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 COLUM. L. REV. 1590 (1984).

191. *Id.* at 1592-93 (citing 18 U.S.C. § 3579(b)(1)-(b)(3) (1982)).

192. *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (a jury trial is constitutionally mandated if a right to it existed in England in 1791 when the seventh amendment was ratified).

193. *See* Raymond, *supra* note 190, at 1597 & n.39 (citing 5 J. MOORE, W. TAGGERT & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 38.24[2] ("In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo or to accomplish both objectives.") (footnote omitted)).

194. *See* Raymond, *supra* note 190, at 1596 & n.32 (citing Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) ("It is well known, that in civil causes in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court.").

195. Raymond, *supra* note 190, at 1595 & n.31 (citing S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 419 (2d ed. 1981) ("Even if a misdemeanor was brought before the King's Bench, it was treated wholly as a crime, the injured party being left to bring separate proceedings for compensation if he would.").

court, pursuant to the Act, may order restitution only where there is a victim,[196] only to the extent of the victim's injury,[197] and only to the victim or his heirs or designees.[198] Further, the amount of restitution awarded is set off against any judgment the victim may recover in a separate civil proceeding.[199] Finally, it is argued that the award of restitutionary relief puts the offender in precisely the same position as a losing defendant in a civil suit in the sense that he is made to pay the injured party damages which are determined without the benefit of a jury.[200]

The sole case finding the Act unconstitutional is *United States v. Welden*.[201] This decision of the United States District Court for the Northern District of Alabama was reversed on the seventh amendment issue by the Eleventh Circuit Court of Appeals in *United States v. Satterfield*.[202] Nevertheless, the district court's reasoning in *Welden* is worthy of inspection since several United States circuit courts have examined the arguments set forth by the district court in *Welden* prior to and since modification of the decision on appeal.[203]

In an analysis which has been described as "far from rigorous,"[204] the district court in *Welden* found that the portions of the Act pertaining to restitution violate the seventh amendment.[205] The *Welden* court stated initially that 18 U.S.C. § 3579(h), by allowing enforcement of the restitution order by the victim in the same manner as a civil action, turns the order into a civil judgment.[206] The court noted that the seventh amendment requires that "the right of jury trial shall be preserved" in civil cases "where the value in controversy exceeds twenty dollars."[207] The court was further persuaded that the *res judicata* effect of proceed-

196. 18 U.S.C. § 3579(a)(1) (1982) ("The court . . . may order . . . that the defendant make restitution to any victim of the offense.").

197. *See* S. REP. No. 532, 97th Cong., 2d Sess. 30, *reprinted* in 1982 U.S. CODE CONG. & AD. NEWS 2515, 2536 ("The premise of [the section governing restitution] is that the court . . . should insure that the wrongdoer make goods [sic], to the degree possible, the harm he has caused to his victim.").

198. 18 U.S.C. § 3579(b)(4) (1982) permits the victim to designate a person or organization to receive the restitution.

199. 18 U.S.C. § 3579(e)(2) (1982) ("Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim. . . .").

200. Raymond, *supra* note 190, at 1598.

201. 568 F. Supp. 526 (1983), *rev'd in part sub nom.* United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985).

202. 743 F.2d 827, 831.

203. *See* United States v. Palma, 760 F.2d 475, 479-80 (3d Cir. 1985); United States v. Brown, 744 F.2d 905, 909-11 (2d Cir.), *cert. denied*, 105 S. Ct. 599 (1984); United States v. Florence, 741 F.2d 1066, 1067-68 (8th Cir. 1984).

204. Raymond, *supra* note 190, at 1590 n.6.

205. 568 F. Supp. at 534. Aside from the seventh amendment infirmities, the *Welden* court found the Act consistent with requirements of the eighth and sixth amendments and inconsistent with the due process and equal protection requirements of the fifth and fourteenth amendments. *Id.* at 533-35. The due process and equal protection questions analyzed in *Welden*, however, were not raised on appeal in *Watchman* and are therefore beyond the scope of this survey discussion.

206. *Id.* at 534; *See* 18 U.S.C. § 3579(h) (1982) ("An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.").

207. *Id.* (citing U.S. CONST. amend. VII).

ings under the Act rendered such proceedings civil "suit[s] at common law" within the contemplation of the seventh amendment.[208] The district court also ruled that the restitution hearing could not be classified as a proceeding in equity, for which a jury is not required.[209]

Arguments advanced by the district court in *Welden*, and in commentary offering more developed constitutional criticism, have not persuaded courts considering the seventh amendment question. In *Watchman*, the Tenth Circuit became the fourth federal appellate court to address the constitutionality of the Act under the seventh amendment.[210] Since then, three other circuits and one district court have faced seventh amendment attacks upon the Act's validity.[211] In each case the court has held that restitution proceedings under the Act are properly classified as criminal sentencing rather than civil judgment and upheld the Act.

The courts have advanced four basic reasons for this characterization. First, legislative history advises that the Act should be construed to create a criminal sanction. Second, a restitution hearing focuses on appropriate punishment of the offender rather than the precise compensation of the victim sought in a civil action. Third, an award of restitution advances traditional goals of the criminal system. Fourth, the factors considered by the district court in *Welden* do not transform the restitution hearing into a civil proceeding.

The question of whether the Act imposes a criminal or civil penalty has been held to be, in the first instance, one of statutory construction.[212] In attempting such construction, two courts have relied, in part, upon legislative history. The Third Circuit, in *United States v. Palma*,[213] pointed generally to the Senate Report highlighting the objective underlying the Act. The Report refers to restitution as "victim-oriented sentencing" and notes that "[t]his kind of sentencing" was not specially authorized prior to the Act.[214] In *United States v. Ciambrone*,[215] the United States District Court for the Southern District of New York cited

208. *Id. See* 18 U.S.C. § 3580(e) (1982) (directing that the restitution order shall "estop" the defendant from denying the essential allegations in a subsequent civil proceeding).

209. *Id.*

210. The first three federal circuit cases addressing the question were: *Satterfield*, 743 F.2d at 836-39; *Brown*, 744 F.2d at 908-11; and, *Florence*, 741 F.2d at 1067-68.

211. *Palma*, 760 F.2d at 479-80; United States v. Durham, 755 F.2d 511, 514 (6th Cir. 1985); United States v. Keith, 754 F.2d 1388, 1391-92 (9th Cir.), *cert. denied*, 106 S. Ct. 93 (1985); United States v. Ciambrone, 602 F. Supp. 563, 567-68 (S.D. N.Y. 1984).

212. *Florence*, 741 F.2d at 1068; *Keith*, 754 F.2d at 1391. *See generally* United States v. Ward, 448 U.S. 242, 248 (1980). In *Ward*, the United States Supreme Court suggested a two-level inquiry to determine whether a particular statutorily defined penalty is civil or criminal. First, it must be determined "whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or another." Second, if Congress intended to establish a civil penalty, is the statutory scheme "so punitive in purpose or effect as to negate that intention?" 448 U.S. at 248-49.

213. 760 F.2d at 479.

214. S. REP. No. 532, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2515, 2537.

215. 602 F. Supp. 563 (S.D.N.Y. 1984).

the floor statement of one House member that restitution would be "a sentence that could, in and of itself, be imposed" and that the legislation "does not intend that restitution become a substitute for civil damages. . . ."[216]

Courts have also focused on the characteristics of a restitution hearing and the factors considered in the determination of restitution which distinguish the proceeding from civil suits at common law. The Second Circuit, in *United States v. Brown*,[217] pointed out that the victim is not a party to a sentencing hearing and therefore has only a limited ability to influence the outcome. He cannot control the presentation of evidence in either the criminal trial or the sentencing hearing and is not even guaranteed the right to testify as to his losses. Neither can he appeal if the award appears inadequate.[218] The *Brown* court further noted that a court imposing an order of restitution is required to consider the defendant's ability to pay, information generally inadmissible in a civil suit.[219] The victim may therefore be awarded less than full compensation solely because of the offender's financial circumstances.[220]

One writer has noted additional features of the restitution process which are distinct from features characterizing civil actions. The restitution order considers the defendant's background and is balanced with other forms of sentencing to achieve the maximum rehabilitative effect.[221] Moreover, a victim may not recover speculative damages such as "pain and suffering"[222] and the sentencing court may, at its discretion, refuse to award restitution altogether,[223] an option clearly unavailable at common law.

The Second Circuit's opinion in *Brown* also illustrates the argument that the Act advances the traditional objectives of criminal sentencing. The prospect of having to pay restitution adds to the deterrent effect of fines and imprisonment and the defendant may feel less likely to be excused from such a sentence.[224] Moreover, restoration of the victim to his condition prior to the offense satisfies society's interest in peaceful retribution.[225] Restitution also contributes to rehabilitation in several ways: the offender is forced to acknowledge the harm done to his victim and assume personal responsibility for righting his wrong; the offender can develop a sense of accomplishment; and the option of imposing a

216. *Id.* (citing 128 CONG. REC. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum)).

217. 744 F.2d 905 (2d Cir.), *cert. denied*, 105 S. Ct. 599 (1984).

218. *Id.* The Tenth Circuit adopted this analysis in *Watchman*. *See supra* note 177 and accompanying text.

219. *Id.* (citing 18 U.S.C. § 3580(a)); *see also Brown*, 760 F.2d at 479; *Ciambrone*, 602 F. Supp. at 568.

220. *Id.*

221. Project, *Congress Opens a Pandora's Box — The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 541 (1984).

222. *Id.* at 542 (citing 18 U.S.C. § 3579(b) (1982) (providing the types of damages for which the court may require a defendant to make restitution)).

223. *Id.* (citing 18 U.S.C. § 3579(d)).

224. *Brown*, 744 F.2d at 909.

225. *Id.*

restitution order represents a useful rehabilitative compromise between imprisonment and probation.[226]

Finally, courts deciding the issue subsequent to *Welden* have persuasively found that the factors relied on by the *Welden* court do not change the restitution hearing into a civil proceeding. The Eighth Circuit, in *United States v. Florence*,[227] disagreed with the district court's contention in *Welden* that the Act's enforcement provision renders the restitution proceeding a civil action. The court argued that section 3580(e) specifically contemplates the possibility of civil actions subsequent to the restitution order at sentencing.[228] In *Brown*, the Second Circuit acknowledged that the enforcement provision authorized procedures similar to those for enforcing a civil judgment, but held that such similarities do not transform the nature of the restitution award so long as restitution is a permissible form of punishment.[229] Furthermore, the court cited legislative history specifying that the victim's right to enforce the restitution order was enacted only to supplement the government's normal enforcement procedures, thus "increas[ing] the victim's chances of collecting restitution."[230] Therefore, a restitution order is to be primarily enforced by normal governmental procedures for enforcing any criminal sanction.

The second argument advanced by the district court in *Welden*, that the *res judicata* effect of a restitution order in subsequent civil actions renders the restitution hearing civil in nature, has also met with effective opposition. The Third Circuit, in *Palma*, pointed out that the collateral estoppel provision merely codifies the general rule that a criminal conviction may be accorded collateral estoppel effect as to some issues raised in a subsequent civil suit.[231] Furthermore, the defendant is estopped to deny only the essential allegations underlying the criminal conviction, established by a plea of guilty or by a jury at the time of trial.[232] Facts regarding the extent and nature of the victim's injury are not given the same effect.[233]

In *United States v. Satterfield*,[234] the Eleventh Circuit heard an appeal brought in the name of one of Welden's co-defendants. The court upheld the convictions and sentence to imprisonment of each defendant,[235] but reversed the district court's holding in *Welden* that the VWPA was unconstitutional under the seventh amendment.[236] Relying upon

226. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 938 (1984).

227. 741 F.2d 1066 (8th Cir. 1984).

228. *Id.* at 1068. *See supra* note 208.

229. 744 F.2d at 910.

230. *Id.* The court noted that the enforcement provisions of the Act "parallel" enforcement procedures for the collection of fines under 18 U.S.C. § 3565 (1982). *Id.*

231. *Palma*, 760 F.2d at 475.

232. *Id.*

233. *Id.*

234. 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2362 (1985).

235. *Id.* at 851.

236. *Id.* at 836-39.

analysis similar to that set forth in *Brown*, the Eleventh Circuit rejected the district court's argument that the right to "civil" enforcement renders the restitution hearing a civil proceeding[237] and, using analysis similar to that articulated in *Palma*, rejected the district court's finding that the *res judicata* effect of a restitution order in later civil actions also serves to transform the restitution hearing into a civil proceeding.[238] In addition, the court examined legislative history and traditional goals of criminal sentencing to support its holding that the restitution proceeding is criminal, rather than civil in nature.[239]

b. *Fact Finding Requirements*

Most of the Victim and Witness Protection Act is dedicated to amendments of the Crimes and Criminal Procedure sections of title 18.[240] In addition, however, the Act amends Rule 32(c) of the Federal Rules of Criminal Procedure. Rule 32(c) governs "Presentence Investigation."[241] Subsection (c)(1) of Rule 32 instructs the probation service of the court to make a presentence investigation and report to the court before any sentence is imposed or probation is granted.[242] Subsection (c)(2) of the rule sets forth the required elements of the presentence report.[243] Prior to the Act, information relevant to a restitution order was not an element of the report. Rather, the report was designed to focus primarily on the behavorial background of the defendant. However, the Act amended subsection (c)(2) to require a "victim impact

237. *Id.* at 838-39. *See supra* notes 229-30 and accompanying text.

238. *Id.* at 838 (citing S. REP. No. 532, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2515, 2536). *See supra* notes 231-32 and accompanying text.

239. *Id.* at 837 (citing S. REP. No. 532, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2515, 2536 ("[R]estitution . . . lost its priority status in the sentencing procedures of our federal courts long ago."); *id.* at 2538 ("permitting its use in conjunction with imprisonment, fine, suspended sentence, or other sentence imposed by the court"); 128 CONG. REC. H8467 (daily ed. Oct. 1, 1982) (statement of Representative McCollum) ("Restitution would become a sentence that could in and of itself be imposed. . . . This legislation does not intend that restitution become a substitute for civil damages."); [further citation omitted]).

240. *See* Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

241. FED. R. CRIM. P. 32(c).

242. FED. R. CRIM. P. 32(c)(1) remains unchanged by the Act. It provides in part:

> (c) Presentence Investigation.
>
> (1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.
>
> . . .

243. FED. R. CRIM. P. 32(c)(2) provides:

> (2) Report. — The presentence report shall contain —
>
> (A) any prior criminal record of the defendant;
>
> (B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;
>
> (C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and
>
> (D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

statement" containing information concerning specific losses suffered by the victim of the offense.[244]

The Tenth Circuit's holding in *Watchman*, that the trial court should not have relied solely upon the presentence report in determining the amount of restitution, reflects a judicial effort to pay even closer attention to the victim's damages. Other federal courts have reached a variety of conclusions as to the adequacy of methods used to determine a restitution award.

Two federal courts have upheld findings of fact based exclusively on the presentence reports,[245] but neither of those decisions necessarily conflicts with the Tenth Circuit's ruling in *Watchman*. As noted in *Watchman*, the Eighth Circuit in *Florence* implicitly approved a restitution award determined by reference to the presentence report alone.[246] The Tenth Circuit in *Watchman* took issue with the *Florence* court's exclusive reliance on the presentence report, apparently understanding *Florence* to stand for the proposition that the presentence report is the only fact finding resource necessary in cases involving restitution awards.[247] But the Eighth Circuit did not raise the adequacy of fact finding as a specific issue and did not suggest that presentence reports provided sufficient information in all cases. In *Palma*, the Third Circuit upheld the exclusive use of a presentence report which detailed losses sustained by the victim and specifically analyzed the defendant's financial circumstances.[248] The *Palma* court's approval of fact finding absent testimony by the victim is distinguishable from *Watchman* inasmuch as the victim in *Palma*, a bank, was incapable of personal allocution.[249]

Other federal courts have recognized the value of resources other than the presentence report in determining a victim's restitutionary needs. In *Brown*, the Second Circuit found that facts gleaned from the trial court record, in addition to conclusions set forth in the probation officer's presentence report, provided the sentencing judge with ample evidence to allow proper determination of the restitution amount.[250] In *Ciambrone*, the federal district court ordered a hearing to resolve factual questions concerning the damages claimed by the victim.[251] The court

244. *See supra* note 243. The Senate Report accompanying the Act's amendments to Rule 32(c)(2) discloses that the victim impact statement is intended "as a first step to ensure that the victim's side is heard and considered by adjudicative officials." S. REP. NO. 532, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2515, 2519. The Senate Report further advises that courts are encouraged to take advantage of additional victim assistance techniques such as "allocution by the victim at the sentencing. . . ." *Id.* The victim impact statement was proposed to "lend balance to the present information available to the court. . . ." *Id.* at 2520.

245. United States v. Palma, 760 F.2d at 476; United States v. Florence, 741 F.2d at 1067.

246. *Florence*, 741 F.2d at 1067.

247. *Watchman*, 749 F.2d at 617.

248. *Palma*, 760 F.2d at 476. Apparently no factual testimony was heard regarding the defendant's financial condition or the extent of the victim's losses.

249. *See supra* note 248.

250. 744 F.2d at 908 n.1.

251. 602 F. Supp. at 570-71.

ordered the hearing after consideration of documents and memoranda provided by the parties, as opposed to the presentence report.[252] The court found that the risk of error in arriving at a restitution amount without a hearing would be greater than the burden imposed by such a hearing.[253]

While such investigative techniques may be useful in determining the restitution award, it is clear that Rule 32 does not necessarily compel fact finding procedures beyond review of the presentence report.[254] The Ninth Circuit in *United States v. Keith*,[255] for example, rejected the defendant's argument that failure to provide an evidentiary hearing on the amount of restitution constituted an abuse of discretion.[256] The court noted that Rule 32 provides that a trial court may, in its discretion, entertain testimony relating to alleged factual inaccuracy of the presentence report,[257] but added that no form of hearing is sanctioned by Rule 32 or the Act unless a factual dispute exists regarding the presentence report.[258] The Act clearly does not prescribe fact-finding procedures beyond consideration of the presentence report.[259]

The presentence report is intended to satisfy the need for accurate assessment of a victim's restitutionary needs. Legislative history indicates that the report should include the detailed information necessary to reach an informed conclusion as to the appropriate amount of restitution.[260] The legislative history makes it equally clear that additional efforts to ascertain relevant facts are not precluded.[261] The Tenth Circuit in *Watchman* was faced with a presentence report that was inadequate for factual determinations associated with the restitution order. Accordingly, the court demanded a record reflecting more active participation by the victim in the fact-finding process.[262] Likewise, other courts have required supplemental procedures where additional facts were necessary. The essential concern expressed by Congress and the courts is not the adequacy of victim impact statement *per se*, but the sufficiency of facts ultimately relied upon. The presentence report containing the victim impact statement may or may not accomplish this purpose. When it does not, additional requirements are warranted.

5. Conclusion

The Victim and Witness Protection Act empowers the sentencing

252. *Id.* at 571.
253. *Id.* at 570.
254. 18 U.S.C. § 3580(b) (1982) empowers the court to order the probation service to issue a presentence report. Section 3580(a) deliniates information to be considered by the sentencing judge in determining restitution. The Act does not specify other means by which the court may acquire necessary information.
255. 754 F.2d 1388 (9th Cir. 1985).
256. *Id.* at 1392.
257. *Id.*
258. *Id.* at 1393.
259. *See supra* note 254.
260. S. REP. No. 532, *supra* note 198, at 2519.
261. *Id.*
262. 749 F.2d at 618-19.

judge to address more adequately the needs of criminal victims. Critics of the Act fail to acknowledge the multi-dimensional nature of the criminal system. Penalties imposed upon criminal offenders may serve traditional penal objectives and simultaneously satisfy compensatory needs of criminal victims. Indeed, it is persuasively argued that restitution advances such objectives. There is simply no rigid dichotomy between civil and criminal actions such that the seventh amendment precludes a sentencing court from attending to some of the losses suffered by victims of criminal acts. Procedurally, Congress has authorized the formulation and consideration of presentence reports to facilitate accurate determination of restitution amounts. Where the reports do not satisfy the need for specific factual determination, Congress has allowed sentencing courts flexibility in ordering further fact-finding procedures.

II. MAIL FRAUD AND THE GOOD FAITH DEFENSE: *UNITED STATES V. HOPKINS*

A. *Facts*

The Tenth Circuit, in *United States v. Hopkins*,[263] reconsidered the sufficiency of instructions pertaining to the "good faith" defense to mail fraud charges.[264] The defendant, Hopkins, was charged with devising a scheme to defraud and obtain money by inducing people, generally of Native American descent, to pay for his assistance in filing a claim for an Indian land allotment in Nevada.[265] Hopkins told claimants that by submitting a claim form and nominal recording fee to the Clark County, Nevada, Record's Office, an individual, by virtue of Indian ancestry, could obtain up to 160 acres of public domain land in Nevada for various purposes.[266] Hopkins also represented that claimants would have some rights in the land when the claim was filed. For his assistance, Hopkins charged between $100 and $125 per claim.[267] Contrary to *Hopkins'* representations, the land was either unavailable for Indian land allotments until it was "reclassified" by the Secretary of the Interior, or was already patented to other persons.[268]

At trial, Hopkins submitted that the claim procedure was suggested in good faith, and that he believed claimants would eventually obtain the

263. 744 F.2d 716 (10th Cir. 1984).

264. 18 U.S.C. § 1341 (1982) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

265. United States v. Hopkins, 716 F.2d 739, 742-43 & n.2 (10th Cir. 1982) (*Hopkins I*), *rev'd and vacated on reh'g*, 744 F.2d 716 (10th Cir. 1984) (en banc) (*Hopkins II*).

266. *Hopkins I*, 716 F.2d at 743.

267. *Id.*

268. *Id.* at 742 n.2.

lands for which the papers were filed.[269] Accordingly, Hopkins requested specific instructions on his defense of good faith.[270] This request was denied and Hopkins was subsequently convicted on eleven counts of mail fraud and one count of conspiracy to commit mail fraud.

The Tenth Circuit initially upheld the substantive mail fraud conviction,[271] ruling, *inter alia*, that while no specific instruction was given by the trial court on Hopkins' good faith theory of defense, the instructions viewed as a whole were sufficient to advise the jury on the defense of good faith.[272] The Tenth Circuit subsequently granted the defendant's request for rehearing.

B. *The Tenth Circuit Opinion On Rehearing*

On rehearing, the Tenth Circuit consolidated *Hopkins* with *United States v. Peterman*[273] for en banc consideration of the adequacy of instructions on the good faith defense.[274] Judge Seth, writing for the majority,[275] ruled that a good faith instruction is required to be given as a separate subject where "sufficient evidence" supports the defense of good faith.[276]

Initially, the court reiterated the well-established rule that "good faith" is a complete defense to mail fraud charges under section 1341.[277] In addition, the court gleaned from previous Tenth Circuit decisions that a defendant is entitled to proper instructions on the good

269. *Id.* at 746. Hopkins testified at trial that he believed that filing the claim form served as notice of an Indian allotment selection, that it was a proper method of establishing constructive settlement on the land, and that federal laws restricting availability of the land did not diminish or impair tribal "vested rights" in the land. *Id.* at 744 (citing Record vol. XI at 1227, 1238).

270. The requested instructions provided, in pertinent part:

> Bad faith is an essential element of fraudulent intent. Good faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element. One who acts with honest intention is not chargeable with fraudulent intent . . . . [T]o establish fraudulent intent on the part of a person, it must be established that such persons knowingly and intentionally attempted to deceive another. . . .
>
> A man may be visionary in his plans and believe they will succeed, and yet, in spite of their ultimate failure, be incapable of committing concious fraud.

Id. at 750 n.13 (quoting Record vol. I at 50-51). Relevant portions of the charge given stated:

> To act with intent to defraud means to act knowingly and with specific intent to deceive. . . . [The acts charged were] alleged to have been done knowingly and willfully by the defendants. . . . An act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Id. at 751 n.14 (quoting Record vol. XI at 1369, 1376, 1377).

271. *Id.* at 752. The court reversed the conspiracy conviction on grounds of insufficient evidence. *Id.* at 749.

272. *Id.* at 751-52.

273. No. 82-1100 (10th Cir. 1984). The case was originally submitted to a Tenth Circuit panel but no opinion was filed. The facts of *Peterman* were not reviewed by the court in *Hopkins II*.

274. United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984).

275. The sole separate opinion was Judge McWilliams' dissent which stated simply that he remained in agreement with the views expressed by the panel in the initial *Hopkins I* decision.

276. *Hopkins II*, 744 F.2d at 718.

277. *Id.*

faith theory where there is evidence to support that defense and such an instruction is requested.[278] Evidence is sufficient to support the defense, the court said, when the jury could reasonably find from such evidence that the defendant, in good faith, believed that the plan would succeed, however visionary in retrospect it may seem to be, and that the promises made would be kept and that the representations would be carried out.[279] Most significantly, the court required that the "good faith" instruction be given as a separate subject and that instructions on various elements of the mail fraud offense were held insufficient for that purpose.[280] Both *Hopkins* and *Peterman* were remanded for new trials.[281]

C. *Analysis*

1. The Good Faith Defense

Federal courts have long recognized the good faith theory as a complete defense to mail fraud charges.[282] While section 1341 does not specifically mention a requisite statutory intent, courts have read the mail fraud statute to include among its essential elements, specific intent to defraud.[283] Good faith has been described as the "obverse" of bad motive or intent to defraud.[284] Proof of good faith negates and therefore operates as a defense to the element of fraudulent intent.[285]

The meaning of "good faith" was, for a time, somewhat obscured. Language used to describe the concept in the Tenth Circuit and elsewhere was not consistent.[286] The first federal case to determine *in what*

278. *Id.* at 717 (citing United States v. Roylance, 690 F.2d 164 (10th Cir. 1982); United States v. Westbo, 576 F.2d 285 (10th Cir. 1978); Sparrow v. United States 402 F.2d 826 (10th Cir. 1968); Steiger v. United States, 373 F.2d 133 (10th Cir. 1967)).

279. *Hopkins II*, 744 F.2d at 717.

280. *Id.* at 718. The court further specified that the rule articulated is intended to apply equally to substantive and conspiracy counts for mail and wire fraud. *Id.*

281. *Id.*

282. Durland v. United States, 161 U.S. 306 (1896). In *Durland*, the defendant was charged under a predecessor statute to section 1341 with using the mails to further a fraudulent investment scheme. The Court therein stated:

> If the testimony had shown that . . . the defendant . . . had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction would be sustained, no matter how visionary might seem the scheme.

Id. at 314-15.

283. *See, e.g.*, United States v. Williams, 728 F.2d 1402, 1404 (11th Cir. 1984); United States v. Goss, 650 F.2d 1336, 1341 (5th Cir. 1981); *Sparrow*, 402 F.2d at 829.

284. United States v. Gatewood, 733 F.2d 1390, 1395 (10th Cir.), *cert. denied*, 105 S. Ct. 200 (1984); United States v. Westbo, 576 F.2d 285, 289 (10th Cir. 1978).

285. *Williams*, 728 F.2d at 1404; United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979). *See also* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 356 (1972) (noting that ignorance and mistake, close cousins of good faith, serve as defenses where they negate a required mental state).

286. Although some courts have treated fraudulent intent and good faith as synonymous issues (*see, e.g.*, United States v. Foshee, 569 F.2d 401, 404 n. 3, 405 (5th Cir.), *modified on reh'g*, 578 F.2d 629 (5th Cir. 1978)), they are in fact distinct. The former "is an element of the offense to be proven beyond a reasonable doubt, and the latter is developed as a defense to be asserted by the defendant as part of his theory of the case and becomes an issue upon which he is entitled to adequate instructions if the evidence warrants." *Sparrow*, 402 F.2d at 829. Failure by the defendant to prove his own good faith

the defendant must have "good faith" was a Tenth Circuit case, *Hawley v. United States*.[287] Approving the trial court's defense theory instruction, the *Hawley* court suggested that a defendant acted in good faith where he "earnestly and sincerely believed the truth of the representations made."[288] Some years later, in *Steiger v. United States*,[289] the Tenth Circuit ordered the trial court to grant a new trial and instruct the jury that the good faith defense must prevail if the defendant "actually believed that the plan was practical and would succeed."[290]

There is an apparent consensus among other circuits rejecting the standard enunciated in *Steiger*. Four circuits have stated specifically, for example, that an honest belief that the venture or enterprise will ultimately be successful is not in itself a defense to mail fraud charges.[291] Two of those circuits accept the principle that the defendant's belief in his plan, however sincere, will not justify "baseless, false, or reckless representations or promises."[292] When the Tenth Circuit, in *Sparrow v. United States*,[293] combined the "successful plan" language set forth in *Steiger*, with the reckless representation caveat elucidated in prior Tenth Circuit opinions,[294] the court announced a new concept of good faith.[295] "Thus the good faith of the defendant in the plan or scheme *and* good faith intention to carry out the promises and representations constitutes a defense . . . in a prosecution . . . under the Mail Fraud Statute . . . ."[296] *Hopkins II* modified that language only slightly, pointing out that good faith is present when the defendant "believed the plan would succeed, that the representations would be carried out and [that] the promises were true."[297] The notion of good faith articulated in *Hopkins II* is consistent with The Tenth Circuit's leadership role in refining the concept.

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does not relieve the prosecution of its burden on the element of intent. If the defendant succeeds in proving good faith, however, the element of intent is necessarily defeated.

287. 133 F.2d 966 (10th Cir. 1943).

288. *Id.* at 970.

289. 373 F.2d 133 (10th Cir. 1967).

290. *Id.* at 136.

291. United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1779 (1985); United States v. Beecroft, 608 F.2d 753, 757 (9th Cir. 1979); United States v. Amrep Corp. 560 F.2d 539, 547 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); United States v. Diamond, 430 F.2d 688, 691 (5th Cir. 1970).

292. *Stull*, 743 F.2d at 446 (quoting Sparrow v. United States, 402 F.2d 826, 828 (10th Cir. 1968)); *Diamond*, 430 F.2d at 692 (quoting *Sparrow*, 402 F.2d at 828)).

293. 402 F.2d 826, 828-29 (10th Cir. 1968).

294. *Id.* (citing *Hawley*, 133 F.2d 966; Elbel v. United States, 364 F.2d 127 (10th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967)). *See also* Note, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L.F. 237, 242.

295. *See, e.g., United States v. Preston*, 634 F.2d 1285, 1294 (10th Cir. 1980), *cert. denied*, 455 U.S. 1002 (1982) ("Good faith is employed to mean a genuine belief that the information being sent or given is true. Good faith does not mean an ultimate hope or even faith that eventually the project will come out even. Nor does it mean a hope or belief that money which is being obtained will eventually be put back.").

296. *Sparrow*, 402 F.2d at 828-29 (emphasis added).

297. *Hopkins II*, 744 F.2d at 718.

2. Adequacy of Instructions

In federal criminal law, it is axiomatic that a defendant is entitled to proper instructions on his theory of defense if evidence introduced supports the theory.[298] The federal courts commonly apply this maxim to the good faith defense in mail fraud prosecutions.[299] The more difficult question concerns the adequacy of instructions given on the defense theory. The *Hopkins II* court, overruling precedent, contributed to Tenth Circuit law most significantly in this area. Prior to *Hopkins II*, the Tenth Circuit did not require a separate instruction on good faith, though the defense had been raised and supported by evidence. The Tenth Circuit standard frequently used to evaluate the adequacy of good faith instructions was set forth originally in *Beck v. United States*.[300] Reviewing instructions concerning false representation, intent to defraud, knowledge and willfullness, the Tenth Circuit in *Beck* found that the jurors were adequately apprised of the defendant's good faith theory. In so finding, the court ruled that "the sufficiency of the instructions may not be determined by the giving or the failure to give, any one or more instructions. To make this determination, all of the instructions given must be viewed as a whole."[301]

Steiger represents the single deviation from the standard articulated in *Beck*. In *Steiger*, the Tenth Circuit held that general instructions on willfullness, unlawful intent, specific intent, untruth of a representation, fraudulent statements, and acting on advice of counsel were insufficient to "fairly, clearly and fully" submit the defense of good faith interposed by each defendant.[302]

The holding in *Steiger*, however, had been largely ignored in other cases addressing the issue. In *United States v. Westbo*,[303] for example, the court adopted the *Beck* principle and, maintaining that good faith is the obverse of intent to defraud, ruled that a specific intent instruction "adequately and sufficiently advised the jury about defendant's good-faith-principle theory of defense."[304]

The relationship between fraudulent intent and good faith[305] has also convinced other circuit courts to dispense with the specific instruction requirement. The First Circuit, in *New England Enterprises, Inc. v. United States*,[306] said that instructions on knowledge and specific intent

298. Beck v. United States, 305 F.2d 595, 599 (10th Cir.) (citing Bird v. United States, 180 U.S. 356 (1901), *cert. denied*, 371 U.S. 890, 895 (1962)).

299. *See, e.g.*, United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1866 (1985); United States v. Williams, 728 F.2d 1402, 1404 (11th Cir. 1984); United States v. Seymour, 576 F.2d 1345, 1348 (9th Cir.), *cert. denied*, 439 U.S. 857 (1978); Kroll v. United States, 433 F.2d 1282, 1290 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); Steiger v. United States, 373 F.2d 133 (10th Cir. 1967).

300. 305 F.2d 595 (10th Cir.), *cert. denied*, 371 U.S. 890 (1962).

301. *Beck*, 305 F.2d at 599.

302. *Steiger*, 373 F.2d at 599.

303. 576 F.2d 285 (10th Cir. 1978).

304. *Id.* at 289.

305. *See supra* note 286 and accompanying text.

306. 400 F.2d 58 (1st Cir. 1968), *cert. denied*, 393 U.S. 1036 (1969).

to defraud were "necessarily inconsistent with good faith and forced the jury to consider good faith and honest belief. . . ."[307] The addition of "other synonyms," the court concluded, was not required.[308] In *United States v. Wilkinson*,[309] the Fifth Circuit held that an instruction on specific intent was sufficient, effectively equating the concepts of specific intent and good faith.[310] Specifically relying on language in *Westbo*, the Ninth Circuit, in *United States v. Cusino*,[311] held that an instruction on specific intent to defraud "can be deemed an instruction on good faith."[312]

Several courts have examined the trial record to determine whether the jury was adequately apprised of the defendant's good faith defense or whether a specific instruction should have been given. The Fifth Circuit, in *Kroll v. United States*,[313] found that instructions on knowledge, willfullness and intent, combined with clear statements of the good faith defense in defendant's testimony, placed the defense adequately before the jury.[314] In *New England Enterprises, Inc.*, the First Circuit, facing the same issue, stated the determinative question to be ". . . whether the record evidences a substantive presentation of the defense of good faith to the jury."[315] The court found such a presentation in defense counsel's opening statement which emphasized the good faith defense.[316] In *United States v. Diggs*,[317] the United States District Court for the District of Columbia noted the similarity between good faith and intent concepts in the defendant's case and reasoned that the specific intent instruction given the jury posed the question of good faith "exactly as the defendant himself had presented the issue at trial."[318]

D. *Conclusion*

The achilles heel of the Tenth Circuit's first opinion in *Hopkins* was its reliance on the erroneous rule announced in *Beck*. The court permitted the charge on fraudulent intent and other "fundamental issues" to suffice in communicating the good faith defense because the trial court's instructions were "viewed as a whole."[319] On rehearing, the Tenth Circuit permanently retired that approach. *Hopkins II* is not the first case among the various circuits to hold that intent instructions do not direct the jury's attention to the defense of good faith with sufficient specificity to avoid reversible error.[320] Arguably, the rule was announced within

307. *Id.* at 71.
308. *Id.* (citing *Beck*, 305 F.2d at 599-600).
309. 460 F.2d 725 (5th Cir. 1972).
310. *Id.* at 729 (citing *New England Enterprises, Inc.*, 400 F.2d 58 (1st Cir. 1968)).
311. 694 F.2d 185 (9th Cir. 1982), *cert. denied*, 461 U.S. 932 (1983) .
312. *Id.* at 188.
313. 433 F.2d 1282 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).
314. *Id.* at 1290-91.
315. *New England Enterprises, Inc.*, 400 F.2d at 71.
316. *Id.*
317. 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).
318. *Id.* at 1000.
319. *Hopkins I*, 716 F.2d at 750.
320. *See, e.g.*, United States v. Goss, 650 F.2d 1336, 1345 (5th Cir. 1981) (The Fifth Circuit distinguished *Wilkinson* on grounds that the instruction therein actually addressed

the Tenth Circuit, if not subsequently followed, in *Steiger*. But *Hopkins II* resolved any ambiguity by stating expressly that "[t]he 'good faith' instruction is required to be given as a separate subject."[321] While the court specifically overruled only *Westbo* as to contrary points of law,[322] the Hopkins opinion clearly represents the abrogation of the standard originally stated in *Beck*.

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"good faith" specifically. The court then ruled: "Charging the jury that a finding of specific intent to defraud is required for conviction . . . does not direct the jury's attention to the defense of good faith with sufficient specificity to avoid reversible error.").

321. *Hopkins II*, 744 F.2d at 718.

322. *Id.*