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III. Criminal Law and Procedure

change of venue order is successful the inconvenienced party will not be able to recoup the expenses resulting from the erroneous change of venue order.[88] The Fourth Circuit's holding in *Purina* demonstrates that without a more sensible approach to mandamus review an erroneous change of venue order may be practically unassailable on appeal.

ROBERT WALKER HUMPHRIES

III. CRIMINAL LAW AND PROCEDURE

A. *Abatement of Restitution Orders Under the Victim and Witness Protection Act*

The Victim and Witness Protection Act (the "Act") added sections 3579 and 3580 to title 18 of the United States Code.[1] The sections allow the judge in a criminal suit under title 18 or under the Federal Aviation Act[2] to order restitution[3] to the victim[4] of the crime as part of the criminal sentence.[5]

88. *See supra* note 13 and accompanying text (erroneous change of venue order may not be capable of correction on appeal of final judgment).

1. Victim and Witness Protection Act, Pub. L. No. 97-291, § 5(a), 96 Stat. 1253 & 1255 (1982) (codified at 18 U.S.C. §§ 3579 & 3580 (1982)).

2. *See* 49 U.S.C. §§ 1472(h), (i), (j), & (n) (1982) (crimes under Federal Aviation Act for which judge may order restitution include aircraft piracy, interference with flight crew members or attendants, and transportation of hazardous materials on board aircraft); 18 U.S.C. §§ 1-6005 (1982) (title 18 contains statutes enumerating crimes and criminal procedure).

3. Restitution refers to the allocation of the victim's loss to the offender. *See* S. SCHAFFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME, x (2d ed. 1970). Restitution differs from compensation, in which society assumes responsibility for restoring the victim's loss rather than assigning that responsibility to the offender. *Id.* Restitution is part of the offender's sentence, whereas compensation takes the form of payments through a civil agency. *Id.*

4. *See* 18 U.S.C. § 3579 (1982). The Victim and Witness Protection Act (the "Act") does not define the term "victim." One authority has interpreted the Act to apply only to human victims, and not to institutional victims. *See* Memo of F. X. Altimari, U.S. District Judge, to Judges of Eastern District of New York, Victim and Witness Protection Act of 1982 at 14 (June 28, 1983) (available in files of WASH. & LEE L. REV.); *see also infra* note 27 (discussion of Fourth Circuit's treatment of issue of institutional victims in *United States v. Dudley*).

5. 18 U.S.C. §§ 3579-3580 (1982). In addition to providing for restitution orders, the Victim and Witness Protection Act proscribes certain acts against witnesses occurring prior and subsequent to witness testimony or communication with law enforcement officers. *See* 18 U.S.C. §§ 1512-1513 (1982); *see also* S. REP. No. 532, 97th Cong. 2d Sess. (1982), *reprinted in* U.S. CODE CONG. & AD. NEWS 2515, 2520, 2528 [hereinafter cited as 1982 Senate Report]. Other provisions in the Act set forth criminal penalties for offenses against witnesses while the offender is on release awaiting trial. *See* 18 U.S.C. §§ 1514-1515 (1982); 1982 Senate Report, *supra*, at 2528-33. The Act also permits a civil suit by the Attorney General to enjoin intimidation of

Section 3579 authorizes restitution, and section 3580 details the procedure for ordering restitution.[6] The legislative history of the Act reveals that restitution orders have rehabilitative, penal, and recompensatory objectives.[7] These mixed objectives render classification of restitution orders as criminal or civil in nature a difficult task.[8]

Under federal law, criminal penalties abate upon the death of the defendant pending appeal.[9] In contrast, a person holding a judgment for

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victims or witnesses. *See* 18 U.S.C. § 3523 (1982); 1982 Senate Report, *supra*, at 2533-35. Under the Act, probation departments must develop Victim Impact Statements to aid judges in sentencing. *See* 1982 Senate Report, *supra*, at 2517-20. Furthermore, the Act creates a civil cause of action for persons injured by the negligent acts of federal government employees which lead to the escape or release of the offender. *See* 28 U.S.C. § 1346(b) (1982) (Federal Tort Claims Act); 1982 Senate Report, *supra*, at 2539-43. Title V of the Victim and Witness Protection Act required the Attorney General to set forth and implement guidelines for the fair treatment of victims and witnesses. *See* 18 U.S.C. § 1512 (1982); 1982 Senate Report, *supra*, at 2543-48. Finally, the Act required a report from the Attorney General on laws necessary to prevent a criminal from profiting from the sale of his story before the victim has obtained compensation for his criminal acts. *See* 18 U.S.C. § 3579 (1982); 1982 Senate Report, *supra*, at 2548-50.

6. *See* 18 U.S.C. § 3579-3580 (1982) (restitution provisions of Victim and Witness Protection Act).

7. *See* 1982 Senate Report, *supra* note 5, at 2536-39 (legislative history of Victim and Witness Protection Act). The 1982 Senate Report concerning the Victim and Witness Protection Act states that the various restitution options that the Act permits allow the court to determine the type of restitution which will "both satisfy the victim and provide maximum rehabilitative incentives to the offender." *Id.* at 2538. The 1982 Senate Report also refers to the penal objective of restitution orders, stating that society should require offenders to compensate their victims in addition to imposing other criminal sanctions on the offender. *Id.* at 2536. According to the Senate Report's summary of the restitution provisions, Congress' premise was that restitution is a part of the "just sanctions" which compose an offender's sentence. *Id.* A prior senate report termed the restitution order a "penal sanction." *See* S. REP. No. 307, 97th Cong., 1st Sess. 993, 1001 (1981). Representative Rodino, the primary sponsor of the House version of the Act, termed the restitution provision a criminal sanction. *See* 128 CONG. REC. H8205 (daily ed. Sept. 30, 1982). In general remarks during floor debates over the Act, senators and representatives referred to restitution as part of the defendant's sentence. *See, e.g.*, 128 CONG. REC. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum); 128 CONG. REC. S11,436 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias); 128 CONG. REC. S 3860 (daily ed. April 22, 1982) (statement of Sen. Chiles). The orientation of §§ 3579 and 3580 towards recompensing the victim is apparent in other parts of the legislative history. *See* 1982 Senate Report, *supra* note 5, at 2537 (terming restitution "victim oriented"). The Senate Report accompanying the Act states that restitution should be "as fair as possible to the victim without unduly complicating . . . the sentencing procedure." *Id.*

8. *See also infra* notes 52-64 and accompanying text (provisions of Act are similar to civil penalties in some respects and similar to criminal sentences in other respects).

9. *See* United States v. Pauline, 625 F.2d 684 (5th Cir. 1980). In *Pauline*, the Fifth Circuit reviewed the effect of *Dove v. United States* on the doctrine of abatement *ab initio* when a criminal defendant dies pending appeal. *Id.* at 685; *Dove*, 423 U.S. 325 (1971). Under the rule of abatement *ab initio*, upon the death of the defendant the Court would dismiss the appeal as moot, vacate the judgment below, and remand the case with directions to dismiss the indictment against the decedent. *See* Durham v. United States, 401 U.S. 481, 483 (1971). Until the *Dove* decision, the Supreme Court applied the rule of abatement *ab initio* pending petitions for certiorari. *See* United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977). In *Dove*, the Court dismissed the petition for certiorari without vacating the decedent's conviction. *Dove*,

civil damages against someone who dies prior to enforcement of the judgment can enforce the judgment against the decedent's estate.[10] Thus, when a criminal defendant's sentence includes a restitution order and the defendant dies pending appeal, the characterization of the restitution order as a civil award or a criminal penalty controls whether that order abates.[11] In *United States v. Dudley*,[12] the Fourth Circuit considered whether a restitution order under the Victim and Witness Protection Act abates upon the death of the defendant.[13]

In *Dudley*, the United States District Court for the District of Maryland convicted the defendant of conspiracy to use and unlawful use of food stamps.[14] The trial court imposed a sentence that required the defendant to reimburse the United States Department of Agriculture in the amount of the value of the food stamps that the defendant had stolen.[15] The defendant died

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423 U.S. at 325. The Court stated that insofar as *Durham* was inconsistent with the Court's action in *Dove*, *Dove* overruled *Durham*. *Id.*

Since the Supreme Court's decision in *Dove*, the Fifth, Seventh, Eighth and Ninth Circuits have decided that *Dove* changed the rule of abatement *ab initio* only with regard to petitions for certiorari and not appeals as of right. *See, e.g., Pauline*, 625 F.2d at 685 (Fifth Circuit remanded case to lower court following defendant's death pending appeal with directions to vacate judgment and dismiss appeal); United States v. Littlefield, 594 F.2d 682, 683 (8th Cir. 1979) (Eighth Circuit vacated judgment and remanded case for dismissal of indictment after defendant died pending appeal); United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977) (Seventh Circuit vacated conviction and remanded cause to lower court for dismissal of indictment after defendant died prior to resolution of appeal); United States v. Bechtel, 547 F.2d 1379, 1380 (9th Cir. 1977) (Ninth Circuit held that all proceedings from inception of prosecution abated subsequent to defendant's death pending appeal).

While courts have interpreted the *Dove* decision as changing the rule of abatement *ab initio* regarding petitions for certiorari, the rule of abatement *ab initio* remains valid in its application to direct criminal appeals. *See Pauline*, 625 F.2d at 685. Under the rule of abatement *ab initio* as applied in federal court, the death of the defendant pending appeal abates not only the appeal, but all proceedings from the inception of the prosecution. *See* Crooker v. United States, 325 F.2d 318, 320 (8th Cir. 1963) (reviewing federal courts' treatment of abatement upon death of defendant pending appeal). The rationale for the rule is that allowing the conviction to stand when death has prevented a defendant from exercising the defendant's right of appeal would be unjust. *See Moehlenkamp*, 557 F.2d at 128.

10. *See* Howard v. Wilbur, 166 F.2d 884, 885 (6th Cir. 1948) (in contrast to rule in criminal cases, in civil action death of losing party pending appeal does not abate appeal).

11. *See* Epstein, *Crime & Tort: Old Wine in Old Bottles*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS, 231, 255 (R. Barnett & J. Hagel, eds. 1977). Epstein examined the theoretical basis of the distinction between tort and criminal law, and concluded that valid reasons exist for maintaining tort law as a separate entity from criminal law. *Id.* at 231-54. Epstein then discussed problems that arise in creating a system of restitution based on combined tort and criminal theories as part of the criminal process. *Id.* at 255-57. Among the problems that restitution creates, Epstein anticipated the question of whether restitution in a criminal context should abate following the defendant's death. *Id.* at 255.

12. 739 F.2d 175 (4th Cir. 1984).

13. *Id.*

14. *Id.* at 175-76. In addition to charges of conspiracy to use and unlawful use of food stamps, the defendant in *United States v. Dudley* also faced a charge of illegal distribution of Demerol. *Id.* at 175. The court convicted Dudley of all charges. *Id.* at 175-76.

15. *Id.* at 176. The trial court in *Dudley* imposed the restitution order requiring reimbursement for the stolen food stamps pursuant to 18 U.S.C. § 3579. *Id.; see* 18 U.S.C. § 3579

while awaiting appeal.[16] The defendant's counsel sought to have the entire sentence vacated.[17] Although the government conceded that Dudley's death voided the assessment of the fine and the prison and parole terms, the government argued that the restitution order differed from the other, purely penal, sanctions.[18] The government contended that the purposes of the required reimbursement were primarily restitutionary, and that the defendant's estate therefore was responsible for the repayment.[19] Dudley's counsel argued that because the context of the restitution order was criminal, the reimbursement was a penal sanction which should have abated upon the death of the defendant.[20]

Whether the section 3579 restitution order abated upon Dudley's death pending appeal presented the Fourth Circuit with an issue of first impression.[21] The Fourth Circuit therefore considered the analogous case of *United States v. Oberlin*[22] for guidance in deciding the abatement issue.[23] In *Oberlin*, the Court of Appeals for the Ninth Circuit held that the defendant's death caused the abatement of a forfeiture decreed under the Comprehensive Drug Abuse Prevention and Control Act of 1970.[24] The Fourth Circuit reasoned,

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(1982) (authorizing restitution orders). The amount of the restitution order was $4,807.50. *See* 739 F.2d at 176. In addition to the restitution requirement in *Dudley*, the defendant's complete sentence included concurrent sentences of four years on each of the six counts Dudley faced, a parole term of four years on the count of distribution of Demerol, and a fine of $10,000 for conspiracy to use food stamps. *Id.*

16. 739 F.2d at 176.

17. *Id.* In *Dudley*, defendant's counsel moved to have the Fourth Circuit dismiss the appeal as moot pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. *Id.*; Appellant's Brief at 3-4, United States v. Dudley, 739 F.2d 175 (4th Cir. 1984) [hereinafter cited as Appellant's Brief]; *see* FED. R. CIV. P. 42(b) (procedure for voluntary dismissal of appeal).

18. *See* 739 F.2d at 176.

19. *Id.* at 177.

20. *Id.* at 176.

21. *See id.* at 179. Since the Victim and Witness Protection Act applies only to crimes occurring after January 1, 1983, only two courts other than *Dudley* have published opinions dealing with the Act. *See* United States v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983); United States v. Florence, 741 F.2d 1066 (8th Cir. 1984) (decided after *Dudley*); *infra* notes 67-72 and accompanying text (discussion of *Welden*); *infra* notes 76-84 and accompanying text (discussion of *Florence*).

22. 718 F.2d 894 (9th Cir. 1983).

23. *See* 739 F.2d at 177.

24. 718 F.2d at 896; *see* 21 U.S.C. § 848(a)(2) (1982) (forfeiture clause of Comprehensive Drug Abuse Prevention and Control Act of 1970). Forfeiture is the divestiture of specific property without compensation, as a result of some default or illegal act. *See* State v. DeGress, 72 Tex. 242, 11 S.W. 1029 (1888) (defining forfeiture).

In *United States v. Oberlin*, the defendant committed suicide following his conviction on charges of drug trafficking and operating a continuing criminal enterprise. *See* 718 F.2d at 895. Oberlin's sentence included an order to forfeit the proceeds from Oberlin's criminal activities. *Id.* at 896. Following entry of judgment and the filing of a notice of appeal on Oberlin's behalf, Oberlin's attorney moved to abate the prosecution. *Id.* The Ninth Circuit held that the rule of abatement *ab initio* applied, resulting in the abatement of all proceedings in the prosecution from its inception. *Id.* at 895. The Ninth Circuit rejected the government's argument that a criminal forfeiture proceeding under 21 U.S.C. § 848 does not abate. *Id.* at 896. The *Oberlin*

however, that the decision in favor of abatement in *Oberlin* was not directly analogous to the issue that *Dudley* presented because forfeiture to the government had much more of a penal quality than restitution to the victim of a crime.[25] The Fourth Circuit maintained that while forfeiture has exclusively punitive aims, the objective of a restitution order is to recompense the victim.[26] Based on the Fourth Circuit's view of restitution orders as essentially compensatory, the court held that the restitution provided by section 3579 constituted a recovery of property as in civil litigation, despite the criminal context in which the lower court imposed the restitution order.[27]

After determining that a restitution order under section 3579 essentially is civil in nature, the Fourth Circuit considered the defendant's contention that if the restitution order was a civil penalty, the statute was unconstitutional.[28] Since the Act entrusts the determination of the amount of restitution

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court reasoned that although some aspects of the forfeiture may have been remedial, the criminal context and the essentially penal nature of the forfeiture indicated that the forfeiture should abate in the same manner as other criminal penalties. *Id.* The criminal context in which the district court ordered restitution showed that the forfeiture was a penal sanction. *Id.* The Ninth Circuit contrasted the forfeiture proceeding's criminal nature with civil tax cases involving forfeiture, in which the forfeiture does not abate upon the death of the defendant. *Id.*

25 *See* 739 F.2d at 177.

26. *See id. But see* United States v. Elliot Hall Farm, 42 F. Supp. 235, 238 (D.N.J. 1941) (forfeiture not requiring criminal conviction is civil in nature). In addition to noting distinctions between forfeiture and restitution, the Fourth Circuit in *Dudley* contrasted 21 U.S.C. § 848(a)(2), the statute under which the *Oberlin* trial court sentenced Oberlin to forfeiture, and 18 U.S.C. § 3579, the restitution statute before the *Dudley* court. *See* 739 F.2d at 177; 21 U.S.C. § 848(a)(2) (1982) (courts may order restitution as a condition of probation); 18 U.S.C. § 3579 (1982) (authorizing restitution orders independent of probation). The Fourth Circuit noted that 21 U.S.C. § 848(a)(2) appears under the title of "Offenses and Penalties," whereas the restitution statute's title is "Criminal Procedure, Sentence, Judgment and Execution." 739 F.2d at 177. Moreover, the legislative history of 21 U.S.C. § 848(a)(2) reveals only penal and deterrent motives in Congress' enactment of 21 U.S.C. § 848(a)(2). *See* 1970 U.S. CODE CONG. & AD. NEWS, 4566, 4575-76; *cf. supra* note 7 and accompanying text (legislative history of Victim and Witness Protection Act reveals rehabilitative, penal, and restitutionary objectives).

27. 739 F.2d at 177. The *Dudley* court commented that unlike criminal penalties such as forfeitures, fines, and incarceration, whose punitive purpose ceases with the death of the defendant, restitution after the wrongdoer's death still serves the purpose of compensating the victim. *Id.* Since the defendant's counsel had not argued that the government was not a victim under the statute, the court saw no reason to distinguish between the government and other victims of food stamp theft. *Id.* at 178. The Fourth Circuit in *Dudley* found that the language of 18 U.S.C. § 3579(h), providing for enforcement of the restitution order by the United States, indicated that the government was a proper victim under the Act. *Id.; see* 18 U.S.C. § 3579(h) (1982). The court noted, however, that the language of 18 U.S.C. § 3579(h) merely could indicate that the United States could serve in a fiduciary capacity to recover the judgment on behalf of the victim. 739 F.2d at 178; *see supra* note 4 (discussion of whether Victim and Witness Protection Act applies to institutional victims). Although defendant's counsel in *Dudley* did not expressly argue that the government was not a victim under the Victim and Witness Protection Act, defendant's counsel did contend that the victim's identity as an arm of the government made the restitution order in *Dudley* a penal sanction for a crime against the state. *See* Appellant's Brief at 15.

28. *See* 739 F.2d at 178. In addition to arguing that restitution is a criminal penalty, or alternatively, that 18 U.S.C. § 3580 is unconstitutional, defense counsel in *Dudley* contended that the sentence of restitution order applies only to crimes under title 18 and certain other

to the judge, the defendant's counsel claimed that the Act violated the defendant's right to a jury trial under the seventh amendment of the United States Constitution by not providing for a jury determination of the amount of restitution.[29] In evaluating the defendant's constitutional argument, the *Dudley* court discussed whether a restitution proceeding was a suit at common law.[30] Unlike a suit at common law, the restitution statute requires that the court consider the financial status of the defendant and the defendant's dependents.[31] Differences between restitution proceedings and traditional common-law actions are not necessarily dispositive, however, because courts have held that the seventh amendment guarantees a right to a jury trial in actions which did not exist when the United States enacted the seventh amendment.[32]

The Fourth Circuit in *Dudley* recognized that the similarities between a restitution order proceeding and an ordinary civil suit for damages might require that a defendant have the option of a jury trial.[33] The Fourth Circuit

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Federal Aviation Act crimes. *See supra* note 2 (enumerating crimes for which courts may issue restitution orders). Although the court convicted Dudley of stealing food stamps, that crime is not a crime for which courts may order restitution, because theft of food stamps is a crime under title 7, which has no restitution provision. *See* 7 U.S.C. § 2024(b) (1982) (defining crime of food stamp theft). The only crime for which Dudley was subject to a restitution order was conspiracy to use, transfer, acquire, alter and possess food stamps. *See* 18 U.S.C. § 371 (1982) (conspiracy to defraud United States government); 18 U.S.C. § 3579(a)(1) (1982) (authorizing restitution for title 18 crimes). Dudley's counsel maintained that conspiracy is an inchoate crime which does not in itself cause harm. Appellant's Brief at 22 (citing *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975)). Dudley's counsel, therefore, argued that the trial court had no authority to order restitution for the conspiracy, since no one had sustained actual damages solely as a result of the conspiracy. *Id.* The government responded to appellant's argument by citing *United States v. Tiler*, in which the Second Circuit affirmed an order of restitution under 18 U.S.C. § 3651 although the only crime of which Tiler was convicted was conspiracy. Appellee's Brief at 8, United States v. Dudley, 739 F.2d 175 (4th Cir. 1984); *see* United States v. Tiler, 602 F.2d 30, 33-34 (2d Cir. 1979); 18 U.S.C. § 3651 (1982) (courts may order restitution as a condition of probation). The Fourth Circuit in *Dudley* did not address the question of whether a restitution order was a proper sanction for conspiracy.

29. *See* 739 F.2d at 178; 18 U.S.C. § 3580(a) (1982) (procedure for ordering restitution); U.S. CONST. amend. VII (citizens have right to trial by jury in suits at common law when amount in controversy exceeds twenty dollars). Although Dudley received a trial by jury, he did not receive a jury determination of his liability for restitution or of the amount of restitution. *See* 739 F.2d at 178; *see also* United States v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983). The court in *United States v. Welden* addressed whether the lack of provision for a jury determination of restitution under § 3579 violated the seventh amendment. *See* 568 F. Supp. at 534; *infra* notes 67-72 and accompanying text (discussion of *Welden*).

30. *See* 739 F.2d 175, 178-79.

31. *Id.* at 178; 18 U.S.C. § 3580(a) (1982); *cf.* Washington Annapolis Hotel Co. v. Riddle, 171 F.2d 732, 740 (D.C. Cir. 1948) (common-law suit in which counsel's remarks concerning plaintiff's financial status provided grounds for declaring mistrial).

32. *See* Curtis v. Loether, 415 U.S. 189, 193 (1973) (right to jury trial encompasses actions which did not exist at common law at time of seventh amendment's enactment), *citing* Parsons v. Bedford, 3 Pet. 433, 446-47 (1830) (courts may apply seventh amendment to any suits which determine legal rights as opposed to equitable or admiralty rights).

33. *See* 739 F.2d at 179.

did not decide the seventh amendment issue, however, because the court found that no issues of fact remained for a jury to decide.[34] The defendant's counsel had raised no issue of fact concerning the correctness of the sum ordered restored to the government, nor had the defendant's counsel preserved other factual defenses.[35] The defendant thus had no standing on appeal to raise the constitutional issue.[36] The *Dudley* court, therefore, concluded that it need not decide whether the seventh amendment requires provision of a jury trial under section 3579 when questions of fact are present.[37] Since the Fourth Circuit found that the restitution order was civil in nature and that the defendant had no standing on appeal to raise the constitutional issue, the court held that the restitution order did not abate upon the defendant's death.[38] Accordingly, the court denied the defendant's motion to dismiss the appeal as moot insofar as the motion concerned the restitution order.[39]

The legislative history of the Victim and Witness Protection Act is inconclusive with respect to the civil or criminal character of restitution orders under section 3579.[40] Although the legislative history of section 3579 reveals restitutionary motives on the part of Congress, the legislative history shows that Congress also had penal and rehabilitative goals in enacting section 3579.[41] The Senate Report accompanying the Act makes clear that Congress intended that restitution be part of a victim-oriented sentencing procedure which would bring the effect of the crime on the victim to the attention of prosecutorial, judicial and probationary authorities.[42] The restitution order has civil overtones since the order compensates the victim.[43] Yet considerable evidence from the legislative history of section 3579 suggests that Congress intended section 3579 as a criminal sanction.[44] During floor debates on the Act, senators and representatives referred to the restitution

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.; see* FED. R. APP. P. 42(b) (procedure for voluntary dismissal of appeal).

40. *See supra* note 7 (legislative history of Act reveals restitutionary, penal and rehabilitative goals of restitution orders).

41. *Id.*

42. *See* 1982 Senate Report, *supra* note 5, at 2537. The Senate Report accompanying the Act recites the story of a victim of a purse snatching who received restitution under 18 U.S.C. § 3651 in the amount of $350 as a condition of the defendant's probation. *See id.* at 2536; 18 U.S.C. § 3651 (1982). The victim knew nothing of the defendant's trial until the victim received a notice of the award of restitution. *See* 1982 Senate Report, *supra* note 5, at 2536. Unknown to any of the authorities involved in the plea bargaining, sentencing, and probation processes, the victim had incurred medical bills of over $10,000. *Id.* at 2537. The Senate Report lamented such neglect of the victim in the criminal justice system. *Id.*

43. *See* 18 U.S.C. § 3579 (1982) (restitution order recompenses victim).

44. *See supra* note 7 (legislative history of Act reveals restitutionary, penal and rehabilitative goals of restitution orders).

order as part of the offender's sentence.[45] The restitution order was an attempt to provide not only compensation to the victim, but also rehabilitation of the offender.[46] Representative Rodino, the primary sponsor of the House version of the Act, termed the restitution order a criminal sanction.[47] A Senate report similarly termed the restitution order a penal sanction against the offender.[48] Although the Senate Report accompanying the Act stated that restitution should be as fair as possible to the victim, the report also cautioned against allowing the sentencing hearing to become a lengthy, involved trial on the issue of damages.[49]

Since the legislative history of section 3579 does not resolve the question of the civil or criminal nature of the restitution order, resolution of the problem requires an inference of legislative intent from the provisions of the Act itself.[50] An analysis of the restitution order provisions suggests that Congress intended the restitution order to differ markedly from the damage remedy obtainable in a civil suit.[51] For example, the restitution order procedure requires a judge to consider the financial position and needs of the defendant and any dependents the defendant may have.[52] Consideration of the defendant's financial status would constitute reversible error in a civil damage suit.[53] Moreover, several types of damages traditionally available in a civil suit are unavailable as part of a restitution order.[54] The Act excludes damages for pain and suffering, punitive damages and loss of use damages

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45. *Id.* The term "sentence" refers to the formal declaration by a criminal tribunal to a criminal defendant of the legal consequences of the defendant's guilt. *See* Barnes v. United States, 223 F.2d 891, 892 (5th Cir. 1955).

46. *See* 1982 Senate Report, *supra* note 5, at 2538. The Act permits restitution in the form of services, and includes an option for the victim to substitute another person or organization to receive the restitution payment. 18 U.S.C. § 3579(b)(1)(A) and § 3579(b)(4). Congress included the various restitution options to provide courts with the flexibility to recompense the victim while maximizing the offender's incentive for rehabilitation. *See* 1982 Senate Report, *supra* note 5, at 2538.

47. *See* 128 CONG. REC. H8205 (daily ed. Sept. 30, 1982) (in section-by-section analysis of Act's provisions, Rep. Rodino stated that § 3579 provided explicit recognition of importance of restitution as criminal sanction).

48. *See* S. REP. No. 307, 97th Cong., 1st Sess. 993, 1001 (1981) (in discussion of effect of restitution on sentencing process, report accompanying Criminal Code Reform Act of 1981 stated that restitution is penal sanction against offender).

49. *See* 1982 Senate Report, *supra* note 5, at 2537.

50. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971) (court must infer congressional intent from statutory provisions when legislative history does not clearly indicate congressional intent).

51. *See infra* notes 52-61 and accompanying text (restitution order and restitution proceeding differ from civil damage award and civil trial).

52. *See* 18 U.S.C. § 3580(a) (1982) (enumerating considerations in determining amount of restitution order).

53. *See supra* note 31 and accompanying text (in contrast to restitution proceeding, statements made in civil damage suit concerning party's financial position constitute reversible error).

54. *See infra* note 55 and accompanying text (types of damages includible in restitution order are more limited than civil damages).

from restitution orders.[55] In addition, the trial court may decide not to award restitution despite the guilt of the defendant and the existence of damages to the plaintiff.[56] Finally, unlike a civil damage suit, which provides a final adjudication of remedies,[57] Congress drafted section 3579 with the expectation that a suit for civil damages could follow the procurement of a restitution order.[58] Additionally, Congress included in the Act the provision that the court in a subsequent proceeding must consider facts adjudicated in the criminal proceeding as established.[59] Furthermore, the statute permits the defendant to set off sums paid pursuant to a restitution order against any subsequent civil damage award.[60] The estoppel and set off provisions showing that Congress anticipated civil damage suits following orders of restitution suggest that a restitution order under section 3579 is not a civil damage award.[61]

Alternatively, the set off provision in section 3579(h) arguably implies that the restitution order amounts to a civil damage award since the restitution payment substitutes for a damage payment.[62] The provision for enforcement of the restitution order in the same manner as a civil judgment represents another similarity between restitution orders and civil damage awards.[63] Although restitution orders therefore resemble civil damage awards

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55. *See* Implementation of Restitution Provisions of the Victim and Witness Protection Act of 1982 at 9 (August 29, 1983) (memorandum of D. Lowell Jensen, Assoc. Att'y. Gen.) (expressing opinion on allowable types of damages in restitution orders under 18 U.S.C. § 3579); *see also* 18 U.S.C. § 3579(b)(1) (computation of damages for restitution order for offense which has caused damage, loss or destruction of property).

56. *See* 18 U.S.C. § 3579(a)(2) (1982) (court must state reasons for decision not to order restitution).

57. *See* J. MOORE, J. LUCAS & T. CURRIER, 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1] (2d ed. 1984) (res judicata renders final determination of all matters actually decided in prior proceeding conclusively binding on parties).

58. *See* 1982 Senate Report, *supra* note 5, at 2538 (amount paid under § 3579 shall be set off against amount later recovered in civil damage suit); United States v. Florence, 741 F.2d 1066, 1067-68 (8th Cir. 1984) (18 U.S.C. § 3580(e) provides for civil suits subsequent to determination of restitution); Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV., 301, 314 (1984) [hereinafter cited as *Victim Impact*] (Victim and Witness Protection Act specifies effect of restitution order on subsequent civil suit); *infra* notes 59-60 and accompanying text (restitution order provisions anticipate subsequent civil suit).

59. 18 U.S.C. § 3580 (1982) (criminal conviction has estoppel effect in subsequent civil suits).

60. 18 U.S.C. § 3579(e)(2) (1982) (defendant may set off amount of restitution order against subsequent civil damage award).

61. *See infra* notes 96-100 and accompanying text (courts have viewed setoff and estoppel provisions of restitution statutes as indication that restitution is criminal in nature).

62. *But see* Cannon v. State, 246 Ga. 754, 755, 272 S.E.2d 709, 710 (1980) (restitution proceeding following criminal conviction is not civil action despite provision in restitution statute for setoff of amount of restitution against subsequent civil judgment).

63. *See* 18 U.S.C. § 3579(h) (1982) (United States or victim may enforce restitution order in same way as civil judgment). *But see infra* notes 73-75 and accompanying text (§ 3579(h) simply enhances enforcement of restitution orders).

in some respects, the differences between restitution under section 3579 and civil damages appear to be greater than the similarities.[64]

Judicial interpretations of the statute offer some guidance concerning the civil or criminal character of section 3579 restitution orders. Only two federal courts in addition to the Fourth Circuit have addressed the issue of whether restitution orders are civil or criminal in nature.[65] In *United States v. Welden*,[66] the United States District Court for the Northern District of Alabama determined that section 3579(h), which provides for the enforcement of a restitution order in the same manner as a civil judgment, renders the restitution order a civil judgment.[67] The defendants in *Welden* received a sentencing hearing following their conviction for kidnapping that resulted in the death of one victim, psychological damage and sexual abuse of a second victim, and damage to a third victim's automobile.[68] At the sentencing hearing, the defendants argued that sections 3579 and 3580 unconstitutionally deprived defendants of their seventh amendment right to a jury trial in suits at common law.[69] In holding that the restitution order under section 3579(h) was a civil judgment, the *Welden* court reasoned that the seventh amendment applies to the proceeding for ordering restitution under section 3579 because a proceeding that leads inevitably to a civil judgment is a suit at common

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64. *See supra* notes 51-63 and accompanying text (discussing similarities and differences between restitution and civil damage suit).

65. *See* United States v. Florence, 741 F.2d 1066, 1067-68 (8th Cir. 1984) (restitution order is criminal sanction); United States v. Welden, 568 F. Supp. 516, 534 (N.D. Ala. 1983) (enforcement provision of 18 U.S.C. § 3579(h) renders restitution order an award of civil damages); *infra* notes 67-84 and accompanying text (discussing *Welden* and *Florence*).

66. 568 F. Supp. 516 (N.D. Ala. 1983).

67. *Id.* at 534.

68. *Id.* at 517; 18 U.S.C. § 3579(h) (1982) (United States or victim may enforce restitution order in same way as civil judgment). *But see infra* note 73 and accompanying text and text accompanying note 84 (§ 3579(h) simply allows greater enforceability of restitution order); 1982 Senate Report, *supra* note 5, at 2539 (enforcement section of § 3579 enhances likelihood of collecting restitution).

69. *Id.* at 534. The defendants in *Welden* raised fifth, sixth, eighth, and fourteenth amendment arguments in addition to the defendants' seventh amendment challenge to 18 U.S.C. §§ 3579 and 3580. *Id.* at 532-35. After consideration of the eighth amendment issue, the United States District Court for the Northern District of Alabama found that the restitution statute did not constitute an excessive fine or cruel and unusual punishment, since the Act permitted sentencing courts to consider the defendant's financial status in setting the amount of restitution. *Id.* at 532-33. The defendant's eighth amendment challenge therefore failed. *Id.* The district court further held that §§ 3579 and 3580 did not violate the sixth amendment because the sixth amendment requirement of a jury trial applies only to the determination of a criminal defendant's guilt. *Id.* at 534. The *Welden* court determined, however, that the restitution provisions did violate defendants' rights to due process and equal protection under the fifth and fourteenth amendments. *Id.* at 534-35. Since the Federal Rules of Evidence do not apply to sentencing, courts may decide the amount of restitution based on hearsay. *Id.* In addition, the *Welden* court found that the lack of procedural rules in §§ 3579 and 3580 for calculating the amount of restitution permits disparate results, thereby contravening defendants' rights to equal protection. *Id.* at 535; *see also infra* notes 70-72 and accompanying text (*Welden* court's response to defendants' seventh amendment challenge to §§ 3579 and 3580).

law.[70] Consequently, a defendant in a restitution proceeding must have the option of a jury determination of the amount of restitution, if any.[71] The *Welden* court held that since the Victim and Witness Protection Act prohibits such jury determinations, imposition of the restitution order pursuant to the Act violated the defendant's seventh amendment rights.[72]

Although the *Welden* court held that the restitution order is a civil judgment, the majority of authorities have found fault with the rationale of the *Welden* decision.[73] Basic to the *Welden* decision was the *Welden* court's interpretation that section 3579(h) transforms the restitution order into a civil judgment.[74] Most authorities, however, view section 3579(h) as merely improving the enforcement of restitution orders, rather than an indication that the restitution order is a civil judgment.[75]

Shortly after the Fourth Circuit decided *Dudley*, the United States Court of Appeals for the Eighth Circuit considered the civil or criminal nature of restitution orders in *United States v. Florence*.[76] The *Florence* court held that the imposition of a restitution order did not violate the defendant's seventh amendment right to a jury determination of damages since restitution under section 3579 did not constitute civil damages.[77] In *Florence*, the defendant pleaded guilty to a charge of armed robbery.[78] The district court imposed a restitution order as part of the defendant's sentence.[79] The defendant ap-

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70. 568 F. Supp. at 534. The *Welden* court's characterization of a restitution determination as necessarily resulting in a civil judgment is difficult to understand, even if one accepts the *Welden* court's finding that the restitution order is a civil judgment because the sentencing judge can decide not to impose a restitution order. *See* 18 U.S.C. § 3579(a)(2) (1982) (judge must state reasons for failure to order restitution); *see also supra* note 29 and accompanying text (explaining argument that §§ 3579 and 3580 violate seventh amendment).

71. 568 F. Supp. at 534.

72. *See id.* (holding that 18 U.S.C. §§ 3579 and 3580 violate defendant's right to jury trial); 18 U.S.C. § 3480(a) (1982) (court determines whether to order restitution and amount of restitution order).

73. *See, e.g., Victim Impact, supra* note 58, at 312 (§ 3579(h) does not render restitution order civil judgment); Special Project, *Congress Opens A Pandora's Box—the Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 538-39 (1984) [hereinafter cited as *Pandora's Box*] (§ 3579(h) is simply means of enforcement and does not render restitution order civil judgment); Note, *Where Offenders Pay for their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 707 (1984) (*Welden* court was incorrect concerning meaning of § 3579); *see also infra* text accompanying note 84 (Eighth Circuit in *United States v. Florence* held that § 3579(h) merely provides for enhanced enforcement of restitution orders).

74. United States v. Florence, 741 F.2d 1066, 1067-68 (8th Cir. 1984); *see Welden*, 568 F. Supp. at 534 (provision for enforcement of restitution order in same manner as civil judgment renders restitution order civil penalty).

75. *See supra* note 73 (discussing criticism of *Welden* by commentators).

76. 741 F.2d 1055, 1067-68 (8th Cir. 1984).

77. *Id.* at 1068.

78. *Id.* at 1067. The defendant in *United States v. Florence* was charged with armed bank robbery under 18 U.S.C. § 2113(a) and (d). *Id.*; 18 U.S.C. § 2113(a) and (d) (1982).

79. 741 F.2d at 1067. In *Florence*, the United States District COurt for the Eastern District of Missouri imposed an order requiring the defendant to make restitution in the amount

pealed, challenging the district court's imposition of the restitution order on the ground that the restitution proceeding violated the defendant's seventh amendment right to a jury determination of damages.[80] The Eighth Circuit rejected the defendant's seventh amendment argument.[81] The *Florence* court found that the defendant's seventh amendment argument was invalid because the basis of that argument was that a restitution order is a civil penalty.[82] The Eighth Circuit reasoned that terming restitution a civil penalty conflicts with the provisions of section 3580(e) which anticipate a subsequent civil trial.[83] The Eighth Circuit interpreted section 3579(h), which allows for the enforcement of restitution orders in the same manner as civil judgments, as merely a means for facilitating execution of the criminal judgment.[84]

In addition to federal court interpretations of sections 3579 and 3580, several state courts have addressed the question of the civil or criminal nature of state restitution provisions.[85] State courts in ten states have held

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of $2694. *Id.* That sum was equal to the amount that the defendant had stolen, minus the amount that authorities had recovered. *Id.*

80. *Id.* In addition to arguing that the imposition of a restitution order violated the defendant's seventh amendment right to a jury determination of damages, the defendant in *Florence* contended that the imposition of the restitution order violated the due process and equal protection provisions of the fifth and fourteenth amendments. *Id.* at 1068-69. The Eighth Circuit rejected the defendant's due process and equal protection claims, holding that the traditional procedural protections afforded defendants in ordinary sentencing proceedings, combined with the express proceedural provisions of § 3580, sufficiently protected the defendant's fifth and fourteenth amendment rights. *Id.*

81. *Id.* at 1067-68.

82. *Id.* at 1067.

83. *Id.* at 1067-68; *see* 18 U.S.C. § 3580(e) (1982) (conviction upon which court orders restitution estops religitation of underlying facts of conviction in subsequent civil suit).

84. 741 F.2d at 1068.

85. *See, e.g.*, State v. Garner, 115 Ariz. 579, 581, 566 P.2d 1055, 1057 (1977) (restitution order which exceeded defendant's ability to pay would contravene rehabilitative and penal objectives of restitution); Cannon v. State, 246 Ga. 754, 755, 272 S.E.2d 709, 710 (1982) (restitution determination following criminal conviction is not civil action); People v. Tidwell, 33 Ill. App. 3d 232, 237, 338 N.E.2d 113, 117 (1975) (state need not supply corroborated evidence of damage to victim since restitution is not suit to recover civil damages); People v. Good, 287 Mich. 110, 115, 282 N.W. 920, 923 (1938) (order of restitution does not require hearing because restitution is not award of damages); State v. Harris, 70 N.J. 586, 597-98, 362 A.2d 32, 38 (1976) (rehabilitative purpose of restitution predominates over objective of victim compensation); State v. Lack, 98 N.M. 500, 508, 650 P.2d 22, 30 (1982) (defendant in restitution proceeding has no right to jury determination of amount of restitution since restitution is part of sentencing process, not trial); State v. Dillon, 292 Or. 172, ____, 637 P.2d 602, 607 (1981) (although restitution statute with setoff and estoppel provisions includes mixture of criminal and civil concepts, restitution is penal in nature and not form of civil judgment); Commonwealth v. Fuqua, 267 Pa. Super. 504, 507-08, 407 A.2d 24, 26 (1979) (restitution is not damage award); State v. Scherr, 9 Wis. 2d 418, 425, 101 N.W.2d 77, 81 (1960) (theory of restitution as civil action to determine civil liability is erroneous).

In *In re Gartner's Estate*, the Pennsylvania Superior Court addressed the question of abatement of restitution upon a defendant's death, and held that the restitution requirement abated. *See In re* Gartner's Estate, 94 Pa. Super. 45, 48 (1928). *In re Gartner's Estate* concerned a decedent who had received a sentence for obtaining money under false pretenses. *Id.* The sentence required the defendant to make restitution. *Id.* The appellate court held that the victim

that state statutory provisions for restitution within criminal proceedings are criminal sanctions, rather than a form of civil liability.[86] For example, in *Cannon v. State*[87] the Georgia Supreme Court held that the Georgia restitution statute did not violate the defendant's right to a jury trial in civil actions because the procedure by which the court imposed restitution was not a civil trial.[88] In *Cannon*, the defendant pleaded guilty to charges of hit and run, driving under the influence of alcohol, and driving after revocation of the defendant's license.[89] The trial court imposed restitution as a condition of probation.[90] At the guilty plea hearing, the defendant challenged the constitutionality of the Georgia statute that permitted courts to impose restitution as a condition for probation.[91] The defendant charged that the statute violated the defendant's right to a jury trial in civil actions.[92] The Georgia Supreme Court held that a determination of restitution following a criminal conviction is not a civil action.[93] The court noted that the restitution statute provided for setoff in the amount of restitution against an award of damages in a subsequent civil action.[94] The court apparently reasoned that since the restitution statute contemplated a subsequent civil action, the restitution proceeding was not a civil proceeding.[95]

Although some provisions of sections 3579 and 3580 suggest similarities between restitution orders and civil judgments, the *Florence* and *Cannon* courts reasoned that the provisions are consistent with the characterization of restitution as a criminal sanction.[96] The *Florence* court explained the provision for the enforcement of a restitution order in the same manner as a civil judgment as merely providing for enhanced enforcement of the criminal penalty.[97] The setoff provisions of sections 3579 and 3580 suggest that restitution orders can replace civil damages.[98] The *Cannon* court,

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of the fraud could not enforce the claim for restitution against the decedent's estate because the wrongdoer's death discharged all obligations resulting from the criminal sentence. *Id.*

86. *See supra* note 85 (state courts have found that state restitution statutes are criminal rather than civil in nature).

87. 246 Ga. 754, 272 S.E.2d 709 (1980).

88. *See* 246 Ga. 754, 755, 272 S.E.2d 709, 710 (1980).

89. 246 Ga. at 754, 272 S.E.2d at 709.

90. 246 Ga. at 754, 272 S.E.2d at 710.

91. *Id.*

92. 246 Ga. at 755, 272 S.E.2d at 710.

93. *Id.*

94. 246 Ga. at 755 n.4, 272 S.E.2d at 710 n.4; *cf.* 18 U.S.C. § 3579(e)(2) (1982) (provision for setoff of restitution against subsequent civil judgment).

95. *See* 246 Ga. at 755, 272 S.E.2d at 710; *supra* note 83 and accompanying text (Eighth Circuit in *Florence* found that provisions in restitution statute for subsequent civil action contradicted notion that restitution is civil matter).

96. *See supra* notes 76-84 and accompanying text (discussion of *Florence*); *supra* notes 88-95 and accompanying text (discussion of *Cannon*); *supra* notes 62-63 and accompanying text (discussion of similarities between restitution orders and civil damage awards).

97. *See supra* note 73 and text accompanying notes 73-75 (§ 3579(h) merely allows for improved enforcement of restitution orders).

98. *But see supra* notes 54-55 and accompanying text (Act excludes some kinds of civil damages from restitution orders).

however, viewed the setoff provisions in the Georgia restitution statute as an indication that a civil suit was to follow the criminal restitution proceeding.[99] The *Florence* court concluded that viewing the restitution proceeding as civil in nature would contradict the estoppel provision of the federal restitution statute.[100] Thus, the setoff and estoppel provisions which anticipate a civil suit following the restitution proceeding are evidence of the criminal nature of the restitution proceeding.[101]

A fundamental difficulty with the Fourth Circuit's holding in *Dudley* that the restitution order did not abate lies in the rule of abatement *ab initio*.[102] Under the rule of abatement *ab initio*, the death of a criminal defendant pending appeal abates all proceedings from the inception of the prosecution.[103] Therefore, in applying the rule of abatement *ab initio*, a court typically dismisses the defendant's appeal as moot and vacates the judgment below.[104] The Fourth Circuit conceded that the rule of abatement *ab initio* applied to all of Dudley's sentence apart from the restitution order.[105] Under the rule of abatement *ab initio*, however, since all proceedings against the defendant are void from their inception, no conviction remains upon which to base a restitution order.[106] For the court to allow a portion of the sentence to stand is illogical when the criminal conviction forming the basis for the restitution order is void.[107]

Instead, the Fourth Circuit should have held that the restitution requirement abated upon Dudley's death pending appeal.[108] Even following the Fourth Circuit's approach under which the abatement determination rests on the civil or criminal nature of the restitution order, however, sections 3579 and 3580 markedly differentiate the restitution procedure from a civil damage action.[109] The inclusion of the restitution proceedings within the criminal

99. *See supra* notes 94-95 and accompanying text (*Cannon* court apparently viewed setoff provision in Georgia statute as evidence that restitution is not substitute for civil damages).

100. *See supra* note 83 and accompanying text (Eighth Circuit in *Florence* found characterization of restitution as civil contradicted estoppel provision of restitution statute).

101. *See supra* notes 83 & 94-95 and accompanying text (restitution order is not civil damage award since restitution provision shows expectation of subsequent civil suit).

102. Durham v. United States, 401 U.S. 481, 483 (1971), (rule of abatement *ab initio* which applies when criminal defendant dies pending appeal renders all proceedings against decedent void from inception of prosecution), *overruled*, 423 U.S. 325 (1976); *see* United States v. Mohlenkamp, 557 F.2d 126, 127 (7th Cir. 1977) (abatement rule of *Durham* remains valid when applied to appeals as of right); *supra* note 9 (Court overruled *Durham* rule of abatement *ab initio* only with respect to petitions for certiorari).

103. *Id.*

104. *See id.*

105. *See* 739 F.2d at 176.

106. *See supra* note 102 (under rule of abatement *ab initio*, all proceedings against decedent are void from inception of prosecution).

107. *Id.*

108. *See supra* note 102 and text accompanying notes 102-07 (applicable rule of abatement *ab initio* renders all proceedings against deceased criminal defendant void from inception of prosecution).

109. *See supra* notes 52-61 and accompanying text (restitution and restitution procedure under 18 U.S.C. §§ 3579 and 3580 differ from civil judgment in many respects).

sentencing process further indicates the criminal character of the restitution order.[110]

The Fourth Circuit based the *Dudley* decision on the restitutionary intent of Congress in enacting the Victim and Witness Protection Act.[111] The legislative history, however, reveals that Congress had both penal and rehabilitative intentions in enacting section 3579.[112] Since an examination of legislative intent does not resolve the question of the civil or criminal nature of section 3579, the *Dudley* court should have engaged in a close analysis of the section's express provisions.[113] Such an analysis shows that the similarities between restitution under section 3579 and a criminal proceeding overshadow the civil aspects of restitution under the Act.[114] Thus, both courts and commentators have indicated that a restitution proceeding under section 3579 is a criminal proceeding resulting in an essentially criminal penalty, despite the compensatory benefits that the restitution order confers on the victim.[115]

If courts rely on *Dudley* for the prosposition that a restitution order under section 3579 is a civil damage award, those courts may well conclude that the restitution provisions of the Act amount to an unconstitutional deprivation of defendants' seventh amendment rights, since the Act precludes a jury determination of restitution.[116] If courts use Dudley to declare the restitution provisions unconstitutional, victims of federal crimes will be unable to obtain the relief that Congress intended under section 3579.[117] The triumph for the institutional victim in *Dudley*, which enabled the government to collect restitution from the defendant's estate, ironically could result in defeat for many individual victims in the future.

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110. *See* 18 U.S.C. § 3579(a)(1) (court orders restitution under 18 U.S.C. § 3579 when sentencing convicted criminal defendant).

111. *See* 739 F.2d at 177 (Fourth Circuit determined that restitution order in *Dudley* did not abate because legislative intent behind Act was restitutionary); *supra* note 7 (legislative history indicates that compensation of victims was one of Congress' goals in enacting 18 U.S.C. §§ 3579 and 3580).

112. *See supra* notes 7 & 40-49 and accompanying text (legislative history of Act discloses penal, restitutionary, and rehabilitative motives behind § 3579).

113. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971) (court must infer congressional intent from statutory provisions when legislative history does not clearly indicate congressional intent).

114. *See supra* notes 51-64 and accompanying text (analysis of statutory provisions in §§ 3579 and 3580 demonstrates that restitution and procedure for ordering restitution more closely resemble criminal sentence than civil judgment).

115. *See supra* notes 77-84 and accompanying text (Eighth Circuit in *Florence* held that restitution orders under 18 U.S.C. § 3579 are criminal in nature); *see also Victim Impact, supra* note 58, at 312-15 (restitution under 18 U.S.C. § 3579 is criminal sanction); *Pandora's Box, supra* note 73, at 540 (restitution under 18 U.S.C. § 3579 is criminal sanction).

116. *See* 18 U.S.C. § 3580(a) (1982) (court determines whether to order restitution and amount of restitution order).

117. *See* 1982 Senate Report, *supra* note 5, at 2536 (premise of § 3579 is that court should require offender to compensate victim).

B. *Beyond Reasonable Doubt: Appellate Review of Jury Instructions Containing Erroneous Reasonable Doubt Definitions*

The United States Constitution protects a person accused of a crime from conviction unless every element of the crime is proved beyond a reasonable doubt.[1] Reasonable doubt has been an elusive concept to define or explain.[2] Many courts have stated that reasonable doubt should not be defined because a definition would create more confusion than assistance.[3] In *Holland v. United States*,[4] however, the United States Supreme Court sanctioned a definition of reasonable doubt that defined the concept as doubt that would make a reasonable person hesitate to act in his more serious and

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1. *See In re* Winship, 397 U.S. 358, 364 (1970) (due process clause requires prosecution to prove every element of offense beyond reasonable doubt to sustain criminal conviction). Society has made a policy choice that conviction of an innocent man is significantly less desirable than to allow one who is guilty to go free. *See* Champagne and Nagel, *The Psychology of Judging*, in THE PSYCHOLOGY OF THE COURTROOM, 279, 279 (N. Kerr & R. Bray 1982) (survey showed that judges frequently state that it is ten times less desirable to convict innocent man than to acquit guilty one); C. MCCORMICK, LAW OF EVIDENCE § 341, at 798 (2d ed. 1972) (society has decided it is considerably worse to find innocent man guilty of crime than to acquit guilty man). The common law therefore required that a prosecutor satisfy an exacting standard, that is, convince the jury of the defendant's guilt beyond a reasonable doubt, to obtain a conviction. *See id.* at 798-99.

In *Winship*, the United States Supreme Court held that the due process clause, and not merely common law tradition, requires that the trier of fact be convinced beyond a reasonable doubt of the defendant's guilt before returning a conviction. *See* 397 U.S. at 364; *see also* Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (Maine criminal statute which shifted burden of proof to defendant to show that he acted in heat of passion did not satisfy due process requirement that prosecution prove beyond reasonable doubt every fact necessary to constitute crime charged); State v. Dobbs, 163 W. Va. 630, 633, 259 S.E.2d 829, 831 (1979) (fourteenth amendment due process requires state to prove defendant's guilt beyond reasonable doubt to obtain criminal conviction).

2. *See* Miles v. United States, 103 U.S. 304, 312 (1880) (explanations of reasonable doubt usually do not clarify concept in minds of jurors); United States v. Martin-Trigona, 684 F.2d 485, 492 (7th Cir. 1982) (defining reasonable doubt often creates more confusion than term itself); State v. Sauer, 38 Minn. 438, ____, 38 N.W. 355, 355-56 (1888) (attempting to define reasonable doubt is more likely to confuse jurors than to enlighten them).

3. *See, e.g.*, United States v. Martin-Trigona, 684 F.2d 485, 493 (7th Cir. 1982) (court should not explain reasonable doubt because definition often confuses jury); United States v. Rodriguez, 585 F.2d 1234, 1240-42 (5th Cir. 1978) (little explanation of reasonable doubt can or should be added after judicial use of term for 200 years), *cert. denied*, 449 U.S. 835 (1980), *modified on other grounds sub nom.*, Albernaz v. United States, 612 F.2d 906 (1980) (en banc), *aff'd* 450 U.S. 333 (1981); Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir.) (appellate courts repeatedly have warned trial courts that definitions of reasonable doubt are seldom effective and may impermissibly reduce prosecution's burden), *cert. denied*, 437 U.S. 910 (1978). *But see* Holland v. United States, 348 U.S. 121, 140 (1954) (trial courts should define reasonable doubt as kind of doubt that would cause one to hesitate to act in important affairs); McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 258 (1944) (courts should use plain words to define reasonable doubt).

4. 348 U.S. 121 (1954).

important affairs.[5] Despite the Supreme Court's recommended definition in *Holland*, trial courts continue to define reasonable doubt in many different ways.[6] Trial courts have defined reasonable doubt as the kind of doubt that would make one hesitate to act,[7] the kind of doubt that one would be willing to act upon,[8] a substantial doubt,[9] a real doubt,[10] a doubt based on reason,[11] a doubt that is substantial and not shadowy,[12] a doubt for which one can give a good and sufficient reason,[13] a strong and abiding conviction as to the defendant's innocence,[14] and a doubt which is substantial and not the mere possibility of innocence.[15] Appellate courts, however, have disapproved of nearly all trial court definitions of reasonable doubt.[16] In *Smith v.*

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5. *Id.* at 140. The trial court in *Holland* defined reasonable doubt as "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." *Id.* The Supreme Court found that the trial court's definition was erroneous. *See id.* The *Holland* court, however, held that the "willing to act" definition was not prejudicial to the defendant because the jury instructions, taken as a whole, conveyed the proper understanding of reasonable doubt. *Id.*

6. *See infra* notes 7-16 and accompanying text (discussing various trial court definitions of reasonable doubt).

7. *See, e.g.,* Holland v. United States, 348 U.S. 121, 140 (1954) (recommending that courts define reasonable doubt as kind of doubt that would make reasonable person hesitate to act in important affairs of his life); United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) (endorsing use of *Holland* hesitate to act definition); Bishop v. United States, 107 F.2d 297, 303 (D.C. Cir. 1939) (trial court properly defined reasonable doubt as doubt that "would cause men to hesitate to act in matters of importance").

8. *See, e.g.,* Holland v. United States, 348 U.S. 121, 140 (1954) (trial court incorrectly defined reasonable doubt as "kind of doubt . . . which you folks in the more serious and important affairs of your own life might be willing to act upon"); United States v. Gordon, 634 F.2d 639, 644 (1st Cir. 1980) (same); United States v. Robinson, 546 F.2d 309, 313-14 (9th Cir. 1976) (same), *cert. denied*, 430 U.S. 918 (1977).

9. *See* Payne v. Smith, 667 F.2d 541, 547 (6th Cir. 1981) (reasonable doubt is substantial doubt), *cert. denied*, 456 U.S. 932 (1982).

10. *See id.* (reasonable doubt is real doubt).

11. *See* United States v. Regilio, 669 F.2d 1169, 1178 (7th Cir. 1981) (reasonable doubt is doubt based on reason), *cert. denied*, 457 U.S. 1133 (1982).

12. *See* United States v. Magnano, 543 F.2d 431, 437 (2d Cir. 1976) (reasonable doubt is "doubt founded on reason and is substantial and not shadowy"), *cert. denied*, 429 U.S. 1091 (1977).

13. *See* Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir.) (reasonable doubt is "doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason"), *cert. denied*, 437 U.S. 910 (1978).

14. *See id.* at 24 (reasonable doubt is "such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments").

15. *See* United States v. Fallen, 498 F.2d 172, 177 (8th Cir. 1974) ("reasonable doubt means a substantial doubt and not the mere possibility of innocence").

16. *See, e.g.,* United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) (criticizing instruction which defined reasonable doubt as kind of doubt upon which one would be willing to act); United States v. Regilio, 669 F.2d 1169, 1178 (7th Cir. 1981) (defining reasonable doubt as "doubt that is based on reason" is neither helpful nor harmful), *cert. denied*, 457 U.S. 1133 (1982); Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir.) (reasonable doubt should not be defined as doubt for which "reasonable person can give or suggest a good and sufficient reason for its existence"), *cert. denied*, 437 U.S. 910 (1978); *Id.* at 23, 24 (defining reasonable doubt as strong

Bordenkircher,[17] the Fourth Circuit determined whether a jury charge defining reasonable doubt amounted to prejudicial error.[18]

In *Smith*, the defendant, Keith Austin Smith (Smith), was indicted for the murder of Johnny Richmond.[19] Smith was tried in the Circuit Court of Raleigh County, West Virginia.[20] Smith asserted two defenses at trial, that he was intoxicated, and that he acted in the heat of passion.[21] Smith did not produce any witnesses or introduce any evidence in support of his defenses.[22] At the close of the evidence, the trial judge instructed the jury that the state must prove Smith's guilt beyond a reasonable doubt in order to sustain a conviction.[23] In an attempt to clarify the concept of reasonable doubt, the court equated reasonable doubt with "good and substantial doubt," and further explained reasonable doubt as "one for which he who entertains such doubt shall be able to give a good and substantial reason."[24] The jury found Smith guilty of first degree murder.[25] Thereafter, pursuant to section 58-5-1(j) of the West Virginia Code[26] Smith filed an appeal with the West

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and abiding conviction remaining after careful consideration was constitutionally erroneous); United States v. Rodriguez, 585 F.2d 1234, 1241 (5th Cir. 1978) (trial court should not have given instruction stating that reasonable doubt must be "substantial rather than speculative"); United States v. Alvero, 470 F.2d 981, 982-83 (5th Cir. 1972) (defining reasonable doubt as "substantial reasonable doubt" and "very substantial doubt" is grounds for new trial); United States v. Harris, 346 F.2d 182, 184 (4th Cir. 1965) (criticizing definition of reasonable doubt as "doubt for which you can assign a reason" and recommending use of *Holland* hesitate to act definition).

17. 718 F.2d 1273 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2355 (1984).

18. *See* 718 F.2d at 1274.

19. *See id.* In *Smith*, Keith Austin Smith and Ronald Morton, Jr. walked to a local store on November 3, 1978 to purchase some beer. *Id.* On their return trip, the boys passed a local bar, and Keith Smith made an obscene gesture toward a female. *Id.* The female reported Smith's action to her brother, Johnny Richmond, who was inside the bar. *Id.* Richmond and some friends immediately ran outside to confront Smith and Morton. *Id.* Richmond kicked Morton in the groin, then took the boys' beer and laughingly distributed it among the patrons of the bar. *Id.* Smith and Morton returned to the Morton home where they told Tom Morton, Ronald's father, of the incident. *Id.* Tom Morton armed himself with a pistol, then he and the two boys returned to the bar. *Id.* Richmond and a group of friends confronted the Mortons and Smith outside the bar. *Id.* An argument ensued, with Richmond asking for a pistol at one point. *Id.* As the Mortons began to walk back toward their home, Smith went to the Morton house to retrieve a shotgun. *Id.* By the time Smith returned to the scene, Tom Morton has fired several shots at Richmond, who was lifting up his shirt and yelling, "Shoot me, motherfucker." *Id.* Smith thereupon shot and killed Richmond. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* at 1275.

24. *Id.* (state's instruction no. 7).

25. *Id.* at 1274-75. The trial court in *Smith* instructed the jury that it could return a verdict of first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter. *Id.* The jury found Smith guilty of first degree murder, but recommended mercy. *Id.* at 1275.

26. *See* W. VA. CODE § 58-5-1(j) (1981). A defendant who has been convicted of a crime in any circuit court may appeal a judgment, decree or order of such circuit court to the Supreme Court of Appeals. *Id.*

Virginia Supreme Court of Appeals.[27] The Supreme Court of Appeals refused to hear Smith's appeal.[28] Smith next petitioned the court for a writ of habeas corpus.[29] The court denied Smith's habeas petition.[30] Having exhausted his state court remedies, Smith filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a) in the United States District Court for the Northern District of West Virginia.[31] The district court denied Smith's habeas petition.[32] Smith then filed an appeal with the United States Court of Appeals for the Fourth Circuit.[33] In support of his appeal, Smith claimed that the trial court's jury instruction lowered the state's constitutionally mandated burden of proof in violation of the due process clause of the fourteenth amendment to the United States Constitution.[34]

In considering Smith's due process claim, the Fourth Circuit first addressed the question of whether Smith's failure to object at the time the trial judge gave the jury instructions defining reasonable doubt precluded the defendant from challenging the constitutionality of the instruction in a federal habeas corpus proceeding.[35] The *Smith* court noted that the West Virginia Supreme Court of Appeals has stated that the failure to register a contemporaneous objection does not preclude a constitutional challenge in West Virginia state courts.[36] Applying West Virginia law,[37] the Fourth Circuit held

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27. *See* 718 F.2d at 1275.

28. *Id.*

29. *See id.;* W. VA. CONST., art. VIII, § 3 (original jurisdiction of habeas corpus proceedings is in Supreme Court of Appeals); W. VA. CODE § 53-4A-1 (1981) (right to habeas corpus for post-conviction review). § 53-4A-1 of the West Virginia Code provides:

> . . . any person convicted of a crime and incarcerated under sentence of imprisonment therefore who contends that there was such a denial or infringement of his rights as render the conviction or sentence void under the Constitution of the United States or the Constitution of this State, or both . . . may . . . file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same . . .

W. Va. Code § 53-4A-1 (1981).

30. *See* 718 F.2d at 1275.

31. *Id.; see* 28 U.S.C. § 2254(a) (1984) (federal courts may grant habeas relief from state conviction if conviction violates "Constitution, laws, or treaties of the United States"). The United States Constitution guarantees a state prisoner access to federal habeas relief to challenge his custody based on alleged violations of the Constitution or laws or treaties of the United States, regardless of whether state habeas proceedings are provided. *See* U.S. CONST. art. I, § 9, cl. 2.

32. *See* 718 F.2d at 1275.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* West Virginia courts apply the state's procedural default rules liberally. *See* Wallace v. McKenzie, 449 F. Supp. 802, 807 (S.D. W. Va. 1978) (failure to comply with contemporaneous objection rule does not bar review of jury instruction for constitutionality); *cf.* Spaulding v. Warden, West Virginia State Penitentiary, 158 W. Va. 557, 559, 212 S.E.2d 619, 621 (1975) (defendant's failure to object at trial barred review of alleged errors because errors had no constitutional or jurisdictional basis).

37. *See* Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (state procedural rule bars federal habeas relief unless defendant can show cause for failure to object and actual prejudice resulting

that Smith's failure to object at trial did not bar his due process claim.[38]

After concluding that the constitutionality of the jury instruction was reviewable, the Fourth Circuit examined whether the challenged jury instructions denied Smith his constitutional guarantee that the government be required to prove every element of the crime beyond a reasonable doubt to convict.[39] The *Smith* court held that the challenged jury instructions did not deny the defendant due process and therefore affirmed the district court's denial of the habeas petition.[40] In support of its holding, the Fourth Circuit stated that in a federal habeas corpus proceeding, the reviewing court must examine a challenged state court instruction in light of the overall charge to the jury.[41] The *Smith* court stated that the standard of review was whether, in the context of the entire charge, the challenged instructions so affected the trial as to constitute a denial of due process.[42] According to the *Smith* court, a federal court may not grant a habeas petition merely because a state court jury instruction is objectionable, a misstatement, or universally disapproved.[43]

Applying the due process standard of review to the two challenged jury instructions, the *Smith* court first noted that the Fourth Circuit and other appellate courts disapprove of instructions equating reasonable doubt with "good and substantial doubt."[44] However, the *Smith* court held that the

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therefrom). Failure to make a contemporaneous objection required by state law bars a defendant from habeas relief, unless the defendant can show cause for his failure to object and actual prejudice from the challenged action. *Id.; see also* C. WRIGHT, LAW OF FEDERAL COURTS § 53, at 340-43 (4th ed,. 1983) (historical analysis of effect of failure to comply with state rule requiring contemporaneous objection on availability of federal habeas corpus relief). Under West Virginia law, however, failure to make a contemporaneous objection does not bar a constitutional challenge to state courts. *See* Wallace v. McKenzie, 449 F. Supp. 802, 807 (S.D. W. Va. 1978) (failure to comply with contemporaneous objection rule does not bar review of jury instruction for constitutionality); *cf.* Spaulding v. Warden, West Virginia State Penitentiary, 158 W. Va. 557, 559, 212 S.E.2d 619, 621 (1975) (defendant's failure to object at trial barred review of alleged errors because errors had no constitutional or jurisdictional basis). Therefore, the defendant's petition in *Smith* was reviewable by the federal courts in a federal habeas corpus proceeding. *See Wainwright,* 433 U.S. at 85-86.

38. 718 F.2d at 1275.

39. *See id.* at 1277.

40. *Id.*

41. *Id.* at 1276. The practice of examining a challenged jury instruction in light of the entire charge to ascertain whether constitutional error has occurred is not limited to federal habeas corpus review of state court proceedings. *See* Holland v. United States, 348 U.S. 121, 140 (1954) (reviewing challenged jury instruction in light of entire charge on direct appeal from district court). When reviewing a federal district court decision, a federal appellate court examines a challenged jury instruction in the context of the whole charge to determine whether constitutional error has occurred. *See id.*

42. 718 F.2d at 1276.

43. *Id.; cf.* Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (in federal habeas proceeding, issue is whether jury instruction violated defendant's due process rights and not whether instruction was undesirable, erroneous, or even universally condemned).

44. *Id.* at 1277; *see* United States v. Rodriguez, 585 F.2d 1235, 1241 (5th Cir. 1978) (trial court should not have given instruction stating that reasonable doubt must be "substantial

"good and substantial doubt" instruction did not so prejudice the defendant as to deny him his constitutional right to due process of law.[45] The *Smith* majority reasoned that several proper instructions in the trial court's charge to the jury mitigated any prejudicial effects attributable to the court's use of "good and substantial doubt" language.[46] In support of its contention that the "good and substantial doubt" instruction did not prejudice Smith, the Fourth Circuit emphasized the ameliorating effect of another instruction the trial court gave which defined proof beyond a reasonable doubt as "proof that excludes every reasonable hypothesis but that of guilt."[47] Moreover, the *Smith* court stated that two instructions on the defendant's presumption of innocence also served to mitigate the prejudicial effects of the "good and substantial doubt" instruction.[48] Thus, the Fourth Circuit found that, in light of the entire charge to the jury, the "good and substantial doubt" instruction was not constitutionally erroneous.[49]

In addition to challenging the "good and substantial doubt" instruction on due process grounds, Smith claimed that the trial court's other definition of reasonable doubt as "one for which he who entertains such doubt should be able to give a good and substantial reason" constituted prejudicial error.[50] The Fourth Circuit acknowledged that a "good and substantial reason" definition of reasonable doubt might prejudice a defendant.[51] The *Smith* court stated that if the instruction gave a juror the impression that he might be required to defend his decision to acquit the defendant with a good and substantial reason, the instruction may have violated the federal Constitution.[52] The Fourth Circuit, however, emphasized that the "good and substantial reason" instruction could not be read in isolation, but had to be

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rather than speculative"); United States v. Alvero, 470 F.2d 981, 982-83 (5th Cir. 1972) (defining reasonable doubt as "substantial reasonable doubt" and "very substantial doubt" is grounds for new trial). In *State v. Davis,* Justice Seiler of the Missouri Supreme Court in a concurring opinion used the following example to demonstrate the problem of equating reasonable doubt with substantial doubt. Justice Seiler said:

> "Reasonable" and "substantial" are not synonomous, as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told there was a substantial chance of success.

State v. Davis, 482 S.W.2d 486, 490 (Mo. 1972) (Seiler, J., concurring).

45. *See* 718 F.2d at 1277 (in light of entire charge, reasonable doubt standard as explained to jury was not below that guaranteed by fourteenth amendment due process clause).

46. *Id.; see infra* text accompanying notes 47-48. (*Smith* court found that proper jury instructions mitigated prejudice attributable to trial court's erroneous definitions of reasonable doubt).

47. *See* 718 F.2d at 1277.

48. *Id.*

49. *Id.* at 1277-78.

50. *Id.* at 1277.

51. *Id.* at 1278.

52. *Id.*

read in light of the entire jury charge.[53] In context of the entire charge, the Fourth Circuit found that the challenged instruction did not suggest that a juror might be called upon to give the trial judge a sound reason why the juror chose to vote not guilty.[54] The *Smith* court explained that the "good and substantial reason" instruction merely suggested to the jurors that reasonable doubt was the kind of doubt that they conscientiously could retain if opposed by fellow jurors.[55]

To support its conclusion that the "good and substantial reason" instruction did not prejudice the defendant, the *Smith* court emphasized the importance of a subsequent instruction which explained the juror's duty not to surrender a conscientious opinion merely because fellow jurors held a different opinion.[56] Citing decisions of other circuit courts as support,[57] the Fourth Circuit held that the "good and substantial reason" language did not constitute reversible error in the context of the charge as a whole.[58] Thus, while the *Smith* court disapproved of both the "good and substantial doubt" instruction and the "good and substantial reason" instruction, the Fourth Circuit affirmed the district court's denial of habeas corpus relief because the court concluded that, in light of the overall charge, the challenged jury instructions did not deny Smith his due process rights.[59]

Although the majority in *Smith* refused to grant the defendant habeas corpus relief, the dissent stated that the court should have issued the habeas writ, subject to West Virginia's right to reprosecute.[60] The dissent asserted that reversal subject to reprosecution is necessary to deter continued use of

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53. *Id.*

54. *Id.; see supra* test accompanying notes 51-52 (reasonable doubt instruction violates due process if instruction gives jurors impression that they may be called upon to articulate reasons for acquitting defendant).

55. 718 F.2d at 1278.

56. *See id.*

57. *Id.* The Fourth Circuit in *Smith* cited six cases from other circuits to support its holding that the "good and substantial reason" instruction did not constitute reversible error. *Id. See* Robinson v. Callahan, 694 F.2d 6, 7 (1st Cir. 1982) (defining reasonable doubt as "doubt for which you can give a reason" was not violation of due process); Bumpus v. Gunter, 635 F.2d 907, 910 (1st Cir. 1980) (not constitutional error to define reasonable doubt as doubt "that you can stand up in the jury room and argue with principle and integrity to your fellow jurors"), *cert. denied*, 450 U.S. 1003 (1981); Tsoumas v. New Hampshire, 611 F.2d 412, 413-14 (1st Cir. 1980) (defining reasonable doubt as doubt that can not be easily explained away is not reversible error); Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir.) (not reversible error to define reasonable doubt as doubt for which one can give or sufficient reason), *cert. denied*, 437 U.S. 910 (1978); United States v. MacDonald, 455 F.2d 1259, 1262-63 (1st Cir.) (defining proof beyond reasonable doubt as proof for which you can state "an intelligent reason" was not reversible as matter of law), *cert. denied*, 406 U.S. 962 (1972); United States v. Davis, 328 F.2d 864, 867-68 (2d Cir. 1964) (unwise but not reversible error to define reasonable doubt as doubt that appears reasonable after explained to fellow juror).

58. 718 F.2d at 1278.

59. *See id.* at 1276-78.

60. *Id.* at 1279 (Murnaghan, J., dissenting). The dissent in *Smith* stated that the habeas writ should be issued, subject to West Virginia's right to reprosecute within a reasonable time. *Id.*

inaccurate definitions of reasonable doubt.[61] The dissent in *Smith* explained that appellate courts uniformly disapprove of the substantial doubt definition, yet trial courts continue to include the definition in their jury instructions.[62] The dissent, therefore, concluded that since experience has demonstrated that words of disapproval are not effective in preventing trial courts from using the substantial doubt definition, reversal is a necessary sanction to preclude future use of the definition.[63]

The great weight of authority supports the Fourth Circuit's decision in *Smith*.[64] The United States Supreme Court has held that a federal court sitting to review a petition for habeas relief must judge the constitutionality of a challenged jury instruction in light of the entire charge.[65] A federal court must determine whether the instruction is so prejudicial as to deny the defendant due process of law, and not merely whether the instruction is undesirable, a misstatement, or universally disapproved.[66] The *Smith* court, in examining the entire charge, correctly noted several other instructions that minimized any prejudicial effects the erroneous instructions otherwise might have caused.[67]

In reviewing reasonable doubt jury instructions for prejudicial error, several circuits have placed importance on the presence of mitigating instructions because such instructions counteract the tendency of erroneous definitions to lessen the government's burden of proof.[68] For example, in *United*

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61. *Id.*

62. *Id.* The dissent in *Smith* acknowledged that case precedent supports the majority's decision to deny the defendant habeas relief. *Id.*

63. *Id.* at 1279.

64. *See infra* notes 65-89 and accompanying text (analysis of case precedent in support of Fourth Circuit's holding in *Smit*

65. *See* Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). In *Cupp*, the Supreme Court reviewed a writ of habeas corpus the Ninth Circuit has issued in response to defendant's petition challenging the constitutionality of a jury instruction. *Id.* at 143-44. The challenged jury instruction stated that a witness is "presumed to speak the truth." *Id.* at 142. Only the prosecution produced witnesses at trial. *Id.* The Ninth Circuit found that since the defendant did not testify or call any witnesses, the instruction impermissibly reduced the government's burden of proof because the instruction placed the burden on the defendant to prove his innocence. *Id.* at 143-44. The Supreme Court stated that it is a well-established rule that a reviewing court must examine the constitutionality of a challenged jury instruction in the context of the overall charge. *Id.* at 146-47. The Court held that, in light of the entire charge, the trial court's instruction did not rise to the level of constitutional error. *Id.* at 149-50.

66. *See* Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (issue in federal habeas proceeding is whether jury instruction violated defendant's due process rights and not whether instruction was undesirable, erroneous, or even universally condemned); Cupp v. Naughten, 414 U.S. 141, 146 (1973) (same); Cooper v. North Carolina, 702 F.2d 481, 483-84 (4th Cir. 1983) (same) (quoting *Cupp v. Naughten*).

67. *See infra* notes 82-89 and accompanying text (analysis of mitigating effect of proper jury instructions in *Smith*).

68. *See, e.g.*, United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) (trial court's use of *Holland* "hesitate to act" definition of reasonable doubt and repeated references to presumption of innocence mitigated prejudice of erroneous instruction which also was part of charge); *see infra* text accompanying notes 70-75 (discussion of *Drake*); United States v. Fallen, 498 F.2d

States v. Drake,[69] the First Circuit held that defining proof beyond a reasonable doubt as proof "you would be willing to rely and act upon . . . in the most important of your own affairs" did not constitute reversible error.[70] In *Drake*, the defendant was indicted for manufacturing a controlled substance in violation of section 841(a)(1) of title 21 of the United States Code.[71] The jury found the defendant guilty.[72] Drake appealed the conviction, claiming that the "willing to act" instruction was unconstitutional.[73] The First Circuit held that, because the trial court used the *Holland* "hesitate to act" definition of reasonable doubt[74] in another part of the charge, and because the court made repeated references to the defendant's presumption of innocence, the "willing to act" instruction did not constitute reversible error.[75]

Placing similar emphasis on mitigating instructions, the Sixth Circuit in *United States v. Christy*[76] held that equating reasonable doubt with substantial doubt did not constitute plain error.[77] The United States District Court for the Eastern District of Tennessee convicted the defendant in *Christy* of passing and aiding and abetting the passing of counterfeit currency.[78] The defendant appealed the conviction, claiming that the substantial doubt definition unconstitutionally lowered the government's burden of proof.[79] The Sixth Circuit found that, in light of the whole charge, the challenged

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172, 177 (8th Cir. 1974) (single instruction equating reasonable doubt with substantial doubt was harmless error because trial court also used *Holland* "hesitate to act" definition in charge); United States v. Christy, 444 F.2d 448, 450-51 (6th Cir. 1971) (defining reasonable doubt as substantial doubt was not prejudicial since charge included phrase "reasonable doubt" nine times without mention of substantial doubt); *see infra* text accompanying notes 77-80 (discussion of *Christy*).

69. 673 F.2d 15 (1st Cir. 1982).

70. *Id.* at 20.

71. *Id.* at 16; *see* 21 U.S.C. § 841(a)(1) (1982) (prohibiting intentional manufacture of controlled substance).

72. *Id.*

73. *Id.* at 20. The district court in *Drake* convicted the defendant of manufacturing methamphetamine. *Id.* at 16. Authorities obtained the evidence supporting the conviction pursuant to a federal search warrant. *Id.* The defendant appealed the conviction, challenging both the validity of the search warrant and the trial judge's instruction on reasonable doubt. *Id.*

74. *See supra* note 5 and accompanying text (discussion of reasonable doubt definition Supreme Court recommended in *Holland*).

75. 673 F.2d at 20.

76. 444 F.2d 448 (6th Cir. 1971).

77. *Id.* at 450-51. The trial court in *Christy* instructed the jury that proof beyond a reasonable doubt is proof that will "leave no reasonable, substantial doubt in the minds of the jury." *See id.* at 450. Although the defendant did not object to the instruction at trial, the defendant argued on appeal that the definition impermissibly reduced the government's burden of proof and therefore constituted plain error. *Id.*

78. *Id.* at 449; *see* 18 U.S.C. §§ 2 and 472 (1982) (intentionally passing, publishing, uttering, selling, or aiding the passing, publishing, uttering or selling of counterfeit funds shall be punishable by fine or imprisonment, or both).

79. *Id.* at 450.

instruction did not impermissibly reduce the government's burden of proof because the district court's jury charge included the phrase "reasonable doubt" nine times without indicating that reasonable doubt need be substantial.[80]

Appellate courts are correct in placing grate importance on the presence of mitigating instructions when reviewing the constitutionality of a jury charge that contains an undesirable definition of reasonable doubt. The United States Supreme Court clearly has stated that the standard of review applicable to criminal burden of proof instructions is whether the charge as a whole conveys to the jury the idea that the government has the burden to prove guilt beyond a reasonable doubt.[81] The greater the number of instructions that convey the correct understanding of reasonable doubt, the less likely a jury is to rely on an erroneous definition that also is part of the charge.[82] In *Smith*, both the good and substantial doubt instruction and the good and substantial reason instruction appeared only once in the jury charge.[83] The charge in *Smith* also contained several proper instructions on the reasonable doubt standards.[84] For example, the trial judge twice instructed the jury on the defendant's presumption of innocence.[85] The jury charge also equated proof beyond a reasonable doubt with proof that "excludes every reasonable hypothesis but that of guilt."[86] Furthermore, the trial judge's charge contained at least three instructions offering no definition or explanation of reasonable doubt and stating that the government's burden was to prove the defendant's guilt beyond a reasonable doubt.[87] Under the deferential constitutional standard of review, an appellate court may not overturn a conviction based on the trial court's use of an erroneous definition of reasonable doubt unless the charge as a whole does not convey to the jury the idea that the government must prove guilt beyond a reasonable doubt.[88]

80. *See id.* at 450-51.

81. *See* Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (standard in reviewing jury charge is whether definition was so prejudicial as to deny defendant due process).

82. *See supra* note 68 (appellate courts emphasize importance of whether proper instructions on reasonable doubt are included in charge because such instructions lessen prejudicial effect of erroneous definitions).

83. *See* 718 F.2d at 1275, 1277-78.

84. *See id.* at 1277.

85. *Id.*

86. *Id.; see* United States v. Alonzo, 681 F.2d 997, 1002 (5th Cir. 1982) (not necessary to instruct jury that "evidence must exclude every reasonable hypothesis but [that of] guilt" if trial court instructs jury that government's burden is to prove guilt beyond a reasonable doubt), *cert. denied*, 459 U.S. 1021 (1983); United States v. Burchinal, 657 F.2d 985, 992 (8th Cir.) (government must prove guilt beyond a reasonable doubt, but need not exclude every reasonable hypothesis but that of guilt for conviction), *cert. denied*, 454 U.S. 1086 (1981).

87. *See* 718 F.2d at 1277 (judge in *Smith* informed jury several times that government's burden was to prove guilt beyond reasonable doubt, making no reference to good and substantial doubt); *see also* Appellee's Answer to Petition for Rehearing En Banc at 5, Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983).

88. *See supra* note 66 (in reviewing jury instructions for constitutional error, issue is whether jury instruction violated defendant's due process rights and not whether instruction was undesirable, erroneous, or even universally condemned).

Therefore, in light of the mitigating instructions contained in the jury charge, the *Smith* court correctly held that the "good and substantial doubt" instruction and the "good and substantial reason" instruction did not deny the defendant due process of law.[89]

The *Smith* court's finding that the reasonable doubt instructions did not violate the federal constitution precluded the court from reversing the state court conviction. When a federal court reviews a habeas corpus petition that challenges a state court jury instruction, the federal court is limited to determining whether the challenged instruction was in accordance with the United States Constitution.[90] In *Smith*, the state jury instruction on reasonable doubt did not violate the federal Constitution.[91] Therefore, the relief suggested by the dissent, that the Fourth Circuit should have reversed the defendant's conviction, was not an option available to the *Smith* court.[92] However, the dissent's arguments would be pertinent when a federal appellate court is reviewing a federal district court conviction rather than a state court conviction. When a defendant challenges a jury instruction given by a federal trial court, a federal appellate court is not limited to constitutional review of the instruction.[93] In addition to the power to determine the constitutionality of lower court's actions, federal appellate courts have supervisory powers to establish standards of procedure and evidence for federal trial courts.[94]

When reviewing an erroneous reasonable doubt instruction given by a federal trial court, a federal appellate court may utilize its supervisory powers to reverse the conviction even though the instruction does not deny the defendant due process of law.[95] Through the court's supervisory power, a federal appellate court may require a federal trial court to refrain from using certain reasonable doubt instructions that the appellate court deems undesirable from the viewpoint of sound judicial practice.[96] State appellate courts

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89. *See supra* notes 65-88 and accompanying text (analysis of case precedent supporting Fourth Circuit's holding in *Smith*).

90. *See* Cupp v. Naughten, 414 U.S. 141, 146 (1973) (federal court may not overturn state conviction unless challenged instruction violates due process clause of fourteenth amendment).

91. *See supra* text accompanying notes 64-89 (case precedent supports *Smith* court's decision to deny habeas relief on constitutional grounds).

92. 718 F.2d at 1279 (Murnaghan, J., dissenting); Cupp v. Naughten, 414 U.S. 141, 146 (1973) (federal court may not overturn state conviction unless challenged instruction violates due process clause of fourteenth amendment).

93. *See* Cupp v. Naughten, 414 U.S. 141, 145-46 (1973) (appellate courts may utilize supervisory powers to require trial courts to follow sound judicial practice although practice is not required by statute or Constitution); McNabb v. United States, 318 U.S. 332, 340 (1943) (federal appellate courts may set standards of evidence and procedure for lower federal courts pursuant to power to supervise administration of criminal justice).

94. *See supra* note 93.

95. *See* Cupp, 414 U.S. at 145-46 (appellate courts may utilize supervisory powers to require trial courts to follow sound judicial practice although practice is not required by statute or Constitution); McNabb, 318 U.S. at 340-41 (court utilized supervisory powers to reverse federal conviction and therefore found that it was not necessary to reach constitutional issue).

96. *See* Cupp v. Naughten, 414 U.S. 141, 146 (1973) (appellate courts may utilize

possess similar supervisory powers over state trial courts.[97] Appellate courts at both the state and federal levels should use their supervisory power of reversal to compel trial courts to discontinue the use of erroneous reasonable doubt definitions. As the dissent correctly pointed out, appellate due process review and strong criticism by reviewing courts have not succeeded in removing incorrect definitions of reasonable doubt from jury instructions.[98] In attempting to define reasonable doubt, trial courts continue to use language that appellate courts consistently have criticized.[99] The continued use of incorrect definitions is dangerous because erroneous explanations of reasonable doubt often confuse the jury and create misunderstanding of the government's burden of proof.[100] Empirical studies have demonstrated that the reasonable doubt standard is a very difficult concept for jurors to comprehend.[101] Since juries are uncertain about the meaning of reasonable

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supervisory powers to require trial courts to follow sound judicial practice although practice is not required by statute or Constitution).

97. *See, e.g.,* State v. Byrd, 163 W. Va. 248, 251-52, 256 S.E.2d 323, 325 (1979) (utilizing inherent supervisory powers, Supreme Court of Appeals imposed procedural rule that requires trial courts to permit defendant to read and comment on presentence investigation report); State v. Gary, 162 W. Va. 136, 139, 247 S.E.2d 420, 421 (1978) (pursuant to inherent rule-making and supervisory powers, Supreme Court of Appeals established rule requiring trial courts to conduct bail hearing if State opposes bail); Stubbs v. Cowden, 179 Va. 190, 199, 18 S.E.2d 275, 280 (1942) (Virginia Supreme Court possesses supervisory power to prevent "miscarriage of justice").

98. *See* 718 F.2d at 1279 (Murnaghan, J., dissenting). Strong warnings by appellate courts against the use of certain erroneous definitions of reasonable doubt followed by affirmance of convictions have not prevented trial courts from using such definitions. *Id.; see, e.g.,* United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) (trial court in *Drake* included "willing to act" definition of reasonable doubt in jury charge even though both Supreme Court and First Circuit had expressly disapproved of such definition); Payne v. Smith, 667 F.2d 541, 547 (6th Cir. 1981) (trial court in *Payne* defined reasonable doubt as "as substantial doubt, a real doubt" even though Supreme Court had criticized use of such definition), *cert. denied,* 102 S. Ct. 1983 (1982); Dunn v. Perrin, 570 F.2d 21, 23-24 (1st Cir. 1978) (trial court in *Dunn* included "good and sufficient" reason instruction in jury charge even though appellate courts previously had criticized defining reasonable doubt as "doubt for which one can give a good and sufficient reason"); United States v. Rodriguez, 585 F.2d 1234, 1241 (5th Cir. 1978) (trial court in *Rodriguez* instructed jury that reasonable doubt must be "substantial rather than speculative" even though Fifth Circuit expressly disapproved of instructing jury that reasonable doubt "must be substantial rather than speculative" in two prior cases), *cert. denied,* 449 U.S. 835 (1980), *modified on other grounds sub nom.,* Albernaz v. United States, 602 F.2d 906 (1980) (en banc), *aff'd* 450 U.S. 333 (1981).

99. *See supra* note 98 (discussing cases in which trial court used reasonable doubt definition that appellate court previously had criticized).

100. *See* Taylor v. Kentucky, 436 U.S. 478, 488 (1978) (defining reasonable doubt as "a substantial doubt, a real doubt" creates confusion); Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir. 1978) (trial courts must carefully define reasonable doubt because reasonable doubt definitions may reduce government's burden of proof).

101. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 173, 174-75 (1982) (reasonable doubt standard was confusing to deliberating juries). In a 1982 study, researchers Severance and Loftus examined questions that juries submitted to Washington state trial judges during deliberations. *Id.* at 164-73. Severance and Loftus found that the meanings of reasonable doubt

doubt, they are particularly susceptible to the improper influence of erroneous definitions of the standard.[102]

To prevent trial courts from unnecessarily increasing jury confusion, appellate courts should utilize their supervisory powers[103] to reverse convictions when a trial court includes a universally condemned definition of reasonable doubt in the jury charge. The reasonable doubt standard plays a central role in the criminal justice system.[104] When possible, appellate courts must prevent jury confusion from reducing the level of proof required to satisfy the reasonable doubt standard.[105] Incorrect definitions of reasonable doubt can only increase the difficulties jurors have in understanding the actual meaning of the concept.[106] Through the power of reversal, appellate courts should compel trial courts to discontinue the use of erroneous definitions, and thereby alleviate some of the unnecessary confusion which surrounds the reasonable doubt standard.[107]

Although appellate courts could reduce some of the uncertainty surrounding the application of the reasonable doubt standard through the power

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is unclear and confusing to juries. *Id.* at 174-75; *see also* Kerr, Atkin, Stasser, Meek, Holt & Davis, *Guilt Beyond A Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERS. & SOC. PSYCH. 282, 292 (1976) [hereinafter cited as Kerr et al.] (considerable uncertainty resulted when mock jurors were not given definition of reasonable doubt). The Kerr study on jury behavior found that mock jurors participating in the study were confused about the concept of reasonable doubt. *See* Kerr et al., *supra* at 292.

102. *See supra* note 101 (empirical research has demonstrated that jurors are uncertain about meaning of reasonable doubt). Although jurors are confused about the concept of reasonable doubt, proper definitions of reasonable doubt can substantially improve juror comprehension of the elusive standard. *See* Severance & Loftus, *supra* note 101, at 180, 190, 194 (jurors instructed on reasonable doubt had significantly fewer comprehension errors than jurors who received no instructions on concept); Kerr et al., *supra* note 101, at 292 (mock jurors were considerably more uncertain when researchers gave no definition of reasonable doubt). Consequently, jurors can be substantially influenced by improper reasonable doubt definitions as well. *See id.* at 291 (variations in reasonable doubt definitions affected mock juror verdicts); *see also* Champagne & Nagel, *supra* note 1, at 278-80 (juror comprehension of reasonable doubt standard is affected by content of jury instruction on standard).

103. *See supra* notes 93-97 and accompanying text (discussing appellate courts' power to supervise administration of justice in lower courts).

104. *See In re* Winship, 397 U.S. 358, 364 (1970) (reasonable doubt standard plays essential part in administration of criminal justice); *see supra* note 1 (discussing importance of exacting standard of proof in criminal trials).

105. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) (appellate courts must carefully guard against dilution of principle that government must establish defendant's guilt beyond reasonable doubt to obtain conviction).

106. *See supra* note 101 (empirical research has demonstrated that jurors are uncertain about meaning of reasonable doubt). Since psychological research has demonstrated that reasonable doubt definitions affect juror comprehension of the reasonable doubt concept, an erroneous definition of reasonable doubt is likely to have a detrimental effect on a juror's ability to understand the actual meaning of reasonable doubt. *See* Severance & Loftus, *supra* note 101, at 180, 190, 194 (jurors instructed on reasonable doubt had significantly fewer comprehension errors than jurors who received no instructions on concept).

107. *See supra* notes 98-106 and accompanying text (appellate courts should use supervisory power of reversal to prevent future use of erroneous reasonable doubt definitions because such definitions often confuse jury and create misunderstanding of government's burden of proof).

of reversal, the threat of reversal is not the most effective means of clarifying the concept.[108] Legislation is the best method of alleviating the conflict and confusion surrounding the reasonable doubt standard.[109] Appellate courts are limited to deciding whether the particular definition of reasonable doubt before them is erroneous and therefore should not be used in jury instructions.[110] Consequently, the process of controlling the use of improper reasonable doubt instructions would require a series of appellate decisions in each jurisdiction. Case law development of an acceptable reasonable doubt definition would not be as efficient a means of clarifying the proper definition of reasonable doubt as would be the passage of a statute adopting a particular definition of the standard.[111] A legislature, unlike an appellate court, could promulgate a specific definition of reasonable doubt and thereby eliminate the use of all other formulations in a single act.[112]

In formulating a statutory definition of reasonable doubt, the "hesitate to act" instruction the Supreme Court approved in *Holland* should provide guidance for legislators.[113] Since the "hesitate to act" definition is the only definition of reasonable doubt that the judiciary generally has accepted,[114] a

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108. *See* McBaine, *supra* note 3, at 259 (legislation is best method, if not only method, to remove confusion which surrounds reasonable doubt standard).

109. *Id.; see infra* notes 111-12 and accompanying text (legislative act adopting particular reasonable doubt definition is most effective means of clarifying reasonable doubt standard).

110. *See* W. MURPHY & C. PRITCHETT, COURTS, JUDGES AND POLITICS 489 (1979). The role of a court is to decide the immediate case before the tribunal. *Id.* A judicial opinion has precedential value only when it is based on the facts of the controversy before the court. *Id.* Thus, while an appellate court could criticize erroneous definitions of reasonable doubt that were not used in the particular case before it, such criticism would not serve as precedent for future cases. *See id.* Furthermore, an appellate court is a passive lawmaker and can pass on the propriety of a particular definition only when a defendant has brought the issue before the court. *See* B. FISHER, INTRODUCTION TO THE LEGAL SYSTEM 65 (1977) (courts can make law only when lawsuit is brought before court).

111. *See supra* note 110 (courts are limited to deciding immediate cases before them).

112. *See supra* note 110 (courts are limited to deciding immediate case before them); McBaine, *supra* note 3, at 259 (legislation is best method of removing confusion which surrounds reasonable doubt standard).

113. *See* Holland v. United States, 348 U.S. 121, 140 (1954); *supra* note 5 and accompanying text (discussion of reasonable doubt definition Supreme Court recommended in *Holland*).

114. *See* Holland v. United States, 348 U.S. 121, 140 (1954). Ten federal circuit courts of appeals have approved the hesitate to act definition of reasonable doubt. *See* United States v. Wilkerson, 691 F.2d 425, 427 n.3, 428 (8th Cir. 1982) (approving instruction which defined reasonable doubt as "doubt that would make a reasonable person hesitate to act"); United States v. Miller, 688 F.2d 652, 662 (9th Cir. 1982) (hesitate to act definition is proper explanation of reasonable doubt); United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) (courts prefer hesitate to act definition of reasonable doubt); United States v. Clayton, 643 F.2d 1071, 1075 (5th Cir. 1981) (courts should use "hesitate to act" definition to define reasonable doubt); United States v. Magnano, 543 F.2d 431, 436 (2d Cir. 1976) (courts should use hesitate to act definition because definition is superior to other explanations of reasonable doubt), *cert. denied*, 429 U.S. 1091 (1977); United States v. Leaphart, 513 F.2d 747, 750 (10th Cir. 1975) (trial courts should substitute hesitate to act definition of reasonable doubt for definitions courts presently use); United States v. Restaino, 369 F.2d 544, 546 (3d Cir. 1966) (courts should phrase reasonable doubt instructions in terms of hesitate to act instead of willing to act); United States v. Releford,

legislature should use the "hesitate to act" definition as a guide to assure the legal accuracy of a statutory reasonable doubt definition. Psychological studies concerning the effect of jury instructions on juror comprehension can provide additional guidance to legislators on properly defining reasonable doubt. Psychological research has demonstrated that jury instructions utilizing sound psycholinguistic principles improve juror comprehension of the instructions.[115] The vocabulary, grammar and organization of a jury instruction on reasonable doubt can affect a juror's ability to comprehend and apply the reasonable doubt standard.[116] A legislature, therefore, should combine the judicially accepted "hesitate to act" definition with sound psycholinguistic principles to draft a legally accurate and comprehensible reasonable doubt instruction.[117]

In *Smith v. Bordenkircher*, the Fourth Circuit disapproved of two reasonable doubt definitions the trial court included in the jury charge, but denied the defendant habeas relief because the challenged instructions did

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352 F.2d 36, 41, 41 n.2 (6th Cir. 1965) (trial court's use of willing to act definition of reasonable doubt was not reversible error, but court should have used hesitate to act definition of reasonable doubt), *cert. denied*, 382 U.S. 984 (1966); Scurry v. United States, 347 F.2d 468, 470, 470 n.4 (D.C. Cir. 1965) (trial court should have defined burden of proof in terms of hesitate to act and not as kind of proof one is willing to act upon in his own affairs), *cert. denied* 389 U.S. 883 (1967); United States v. Harris, 346 F.2d 182, 184 (4th Cir. 1965) (preferable to define reasonable doubt as doubt that would make one hesitate to act); *see also supra* note 16 (discussion of appellate court disapproval of reasonable doubt definitions).

115. *See* Severance & Loftus, *supra* note 101, at 194 (psycholinguistic changes in jury instructions improve jurors' ability to comprehend and apply instructions). Jurors are more confident in applying the law when the trial court's jury instructions are based on sound psycholinguistic principles. *Id.* Psycholinguistic improvements in jury instructions include using active voice, eliminating multiple negatives, reducing item lists, and replacing uncommon words with those more common to jurors. *Id.* at 159-60, 185-87.

116. *See id.* at 194 (psycholinguistic changes in jury instructions improve jurors' ability to comprehend and apply instructions).

117. *See supra* notes 113-16 and accompanying text (discussion of judiciary's general acceptance of hesitate to act definition of reasonable doubt and benefits of utilizing sound psycholinguistic principles in jury instructions). An article in a recent law journal proposed a definition of reasonable doubt combining the hesitate to act definition and sound psycholinguistic principles. *See* Bain, *A Proposed Definition of Reasonable Doubt and the Demise of the Circumstantial Evidence Charge Following Hawkins v. State*, 15 ST. MARY'S L.J. 353, 377-78 (1984). The proposed reasonable doubt definition provides:

> A reasonable doubt is a doubt based on reason and common sense. It is the kind of doubt that would make a reasonable person hesitate to act in the conduct of his or her serious and important business or personal matters. Proof beyond a reasonable doubt is proof that will remove from your mind any reasonable doubt, which is the kind of doubt that would make you hesitate to act in the conduct of your serious and important business or personal matters. If you are satisfied beyond a reasonable doubt that all elements of the crime have been proved, then you must find the defendant guilty. However, if you are left with a reasonable doubt about the proof of any element, then you must find the defendant not guilty.

See id. at 377-78. Bain's proposed definition of reasonable doubt applies findings of the Severance & Loftus study to the *Holland* hesitate to act definition. *See id.; see also supra* note 101 (explanation of Severance and Loftus study).

not so affect the trial as to deny the defendant due process of law.[118] The Fourth Circuit found that several proper instructions on the reasonable doubt standard mitigated any prejudicial effects attributable to the two erroneous definitions.[119] The great weight of authority supports the *Smith* court's denial of habeas relief on constitutional grounds.[120] Although the Fourth Circuit could not overturn the trial court's conviction in *Smith* because the court was reviewing a state conviction, appellate courts should nonetheless utilize their supervisory powers to overturn convictions when a trial court unnecessarily increases juror confusion by including universally condemned reasonable doubt definitions in the jury charge.[121] Since the state trial court's erroneous reasonable doubt instructions in *Smith* did not deny the defendant due process, however, the Fourth Circuit was limited to merely criticizing the erroneous instructions.[122] The decision in *Smith* therefore does little to alleviate the uncertainty that jurors experience when applying the reasonable doubt standard.[123]

JAMES R. LANCE

C. *"Bright Lines" Enter the Gray Zone: Application of Automobile Search Incident to Arrest Standards to Non-Automobile Cases*

A search conducted incident to a lawful custodial arrest is a recognized exception to the warrant requirement of the fourth amendment to the United

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118. *See supra* text accompanying notes 44-58 (*Smith* court found that both "good and substantial doubt" instruction and "good and substantial reason" instruction were erroneous, but concluded that instructions did not deny defendant due process of law).

119. *See supra* text accompanying notes 46-56 (*Smith* court found that proper jury instructions mitigated prejudice attributable to trial court's erroneous definitions of reasonable doubt).

120. *See supra* text accompanying notes 64-89 (discussion of precedent supporting Fourth Circuit's holding in *Smith*).

121. *See supra* notes 90-107 and accompanying text (discussing need for appellate courts to use supervisory power to compel trial courts to discontinue use of erroneous definitions of reasonable doubt); *see also supra* notes 108-12 and accompanying text (appellate courts could reduce uncertainty surrounding reasonable doubt standard by using supervisory power of reversal, but legislative act adopting particular reasonable doubt definition is most effective means of clarifying reasonable doubt standard).

122. *See supra* note 92 and accompanying text (federal court review of state jury instruction is limited to determining whether instruction violates federal Constitution).

123. *See supra* notes 98-99 and accompanying text (merely criticizing trial court's use of erroneous definition of reasonable doubt does not deter future use of such definitions and therefore is not effective in alleviating jury confusion which surrounds reasonable doubt).

States Constitution.[1] The United States Supreme Court in *Chimel v. California*[2] held that, contemporaneous with and incident to a lawful custodial arrest, law enforcement personnel may search the arrestee's person and the area within the arrestee's immediate control.[3] The *Chimel* Court defined the area

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1. Chimel v. California, 395 U.S. 752, 755-56 (1969); Agnello v. United States, 269 U.S. 20, 30 (1925); *see* U.S. CONST. amend. IV. The fourth amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The fourth amendment protects people from unreasonable searches, and a search conducted without first obtaining a valid search warrant based on probable cause is unreasonable per se. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (mandate of fourth amendment requires adherence to judicial process). Because society's interest in crime prevention sometimes may outweigh an individual's privacy expectations, however, the fourth amendment's warrant requirement is not without exception. United States v. Ross, 456 U.S. 798, 823 (1982); *see* Note, *Reasonable Suspicion and Probable Cause in Automobile Searches: A Validity Checklist for Police, Prosecutors, and Defense Attorneys*, 40 WASH. & LEE L. REV. 361, 362 n.10 (1983) (discussion of thirteen recognized exceptions to fourth amendment's warrant requirement). A search incident to arrest is the oldest exception to the fourth amendment's warrant requirement. C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 6.01, at 133 (1980). The Supreme Court has had trouble defining the scope of the search incident to arrest exception. *See* 1 W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 12.2, at 12-1 to 12-2 (2d ed. 1979) (discussion of contradictory history of search incident to arrest cases decided by Supreme Court). The Supreme Court first recognized the search incident to arrest exception in dicta in *Weeks v. United States*, noting that both English and American law always have recognized the government's right to search the person of an arrestee to seize fruits or evidence of the crime. *See* 232 U.S. 383, 392 (1914) (warrantless search of defendant's house and seizure of letters and papers found there held violative of fourth amendment). The Supreme Court in *Carroll v. United States* further permitted officers to search incident to arrest the area within the control of the arrestee. *See* 267 U.S. 132, 158 (1925) (warrantless search of defendant's automobile for illegal liquor upheld pursuant to prohibition statute). The Supreme Court then embarked on a series of shifting and conflicting cases interpreting the search incident to arrest exception. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 58-66 (1950) (search of arrestee's place of business, including desk, files and safe, valid as incident to arrest), *overruled*, 395 U.S. 752, 768 (1969); Trupiano v. United States, 334 U.S. 699, 705-06 (1948) (search incident to arrest exception will not justify search when officers could have obtained warrant), *overruled*, 339 U.S. 56, 66 (1950); Harris v. United states, 331 U.S. 145, 152 (1947) (warrantless search of arrestee's four-room apartment held reasonable), *overruled*, 395 U.S. 752, 768 (1969); United States v. Lefkowitz, 285 U.S. 452, 463-64 (1932) (warrantless search of arrestee's office held unreasonable); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931) (warrantless search of arrestee's office held unreasonable); Marron v. United States, 275 U.S. 192, 199 (1927) (warrantless search of all parts of premises used for unlawful purposes held reasonable).

2. 395 U.S. 752 (1969). In *Chimel*, the police waited at Chimel's house for Chimel's arrival with a warrant for Chimel's arrest. *Id.* at 753. When Chimel arrived home, the police arrested him and conducted a warrantless search of the entire house without Chimel's consent. *Id.* at 753-54.

3. *Id.* at 763. In holding that the arrestee's person and the area within the arrestee's immediate control are searchable incident to a lawful custodial arrest, the *Chimel* Court stressed that concern for the arresting officer's safety and preservation of evidence justified the rule.

within the arrestee's immediate control as the area from within which the arrestee might gain possession of a weapon or destructible evidence.[4]

The federal circuit courts were unable to reach a consensus interpretation of *Chimel*.[5] Depending on the relative significance a court placed on certain facts surrounding an arrest, the area within the immediate control of the arrestee could be either very large or nonexistent.[6] At least one commentator recognized that one way to end the confusion in the area of search incident

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Id. at 762-64. The *Chimel* opinion expressly overruled the Supreme Court's *Harris* and *Rabinowitz* decisions. *Id.* at 768; *see Rabinowitz*, 339 U.S. 56, 63-64 (1950); *Harris*, 331 U.S. 145, 151-52 (1947); *supra* note 1 (description of *Harris* and *Rabinowitz* decisions). The *Chimel* Court stressed that the fourth amendment considerations of protecting the arresting officer and preserving evidence no longer exist if the rule permits the search to exceed the arrestee's person and the area within the arrestee's reach. *Chimel*, 395 U.S. at 766. The *Chimel* Court reasoned that permitting a search beyond the reach of the arrestee would create an essentially limitless scope of search. *Id.*

4. 395 U.S. at 763.

5. *Compare* United States v. Matlock, 558 F.2d 1328, 1331 (8th Cir.) (seizure of arrestee's briefcase from wife's possession upheld even though arrestee was in police car), *cert. denied*, 434 U.S. 872 (1977) *and* United States v. Mulligan, 488 F.2d 732, 734 (9th Cir. 1973) (seizure of money from garment bag in closet while arrestee detained on bed upheld because arrestee made "furtive movements" toward closet), *cert. denied*, 417 U.S. 930 (1974) *and* United States v. Ciotti, 469 F.2d 1204, 1207 (3d Cir. 1972) (seizure of stolen credit cards from briefcase permitted while arrestee handcuffed), *vacated on other grounds*, 414 U.S. 1151 (1974) *with* United States v. Cooks, 493 F.2d 668, 672 (7th Cir. 1974) (warrantless search of entire house pursuant to arrest of two armed men in one room held unreasonable), *cert. denied*, 420 U.S. 996 (1975) *and* United States v. Shye, 473 F.2d 1061, 1066 (6th Cir. 1973) (warrantless search of sack found four feet from arrestee behind water heater held unreasonable).

One federal circuit court held the relevant time for determining whether an item was within the arrestee's immediate control to be the time of the arrest rather than the time of the search, thereby allowing searches of items beyond the arrestee's reach at the time of the search. *See* Watkins v. United States, 564 F.2d 201, 205 (6th Cir. 1977) (search under mattress upheld although arrestee was restrained in handcuffs at time of search), *cert. denied*, 435 U.S. 976 (1978). Other circuit courts simply endowed the arrestee with superhuman skills capable of bringing vast areas within the arrestee's control, thereby permitting warrantless searches incident to arrest although the arrestee was restrained at the time of the search. *See* United States v. Frick, 490 F.2d 666, 669 (5th Cir. 1973) (search of attache case on back seat of automobile upheld although arrestee standing outside car, handcuffed, and guarded by four officers); United States v. Patterson, 447 F.2d 424, 426 (10th Cir. 1971) (search of kitchen cabinet upheld although arrestee guarded by five officers in next room), *cert. denied*, 404 U.S. 1064 (1972).

6. *See supra* note 5 (discussion of cases interpreting *Chimel* differently). One commentator has suggested four factors which the courts usually consider in determining the area within the arrestee's reach. 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.3, at 415-16 (1978). First, the courts consider whether the law enforcement officers have restrained the arrestee in some way. *Id.*; *see* United States v. Berenguer, 562 F.2d 206, 210 (2d Cir. 1977) (seizure and search of billfold on bedroom bureau illegal while arrestee shackled to bed); *see also* United States v. Jones, 475 F.2d 723, 727-28 (5th Cir.) (dictum) (court states suitcase would have been within arrestee's reach if arrestee's hands cuffed in front of arrestee, but not if cuffed in back), *cert. denied*, 414 U.S. 841 (1973). Second, the courts usually consider the relative positions of the arresting officer and the arrestee in relation to the area searched. LAFAVE, *supra*, at 415-16; *see* United States v. Becker, 485 F.2d 51, 55 (6th Cir. 1973) (court mentions that no officer stood between arrestee and desk as one factor in upholding

to arrest was to establish a rule and apply it to a certain type of case regardless of the particular factual variations.[7]

The Supreme Court in *New York v. Belton*[8] developed such a "bright line" test for the troublesome area of warrantless searches of automobiles incident to arrest of the occupants.[9] Concerned with the ability of police to apply the standard for determining areas within the reach of the arrestee, the *Belton* Court generalized that articles in the passenger compartment of

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warrantless search of desk), *cert. denied* 416 U.S. 992 (1974); United States v. Mapp, 476 F.2d 67, 80 (2d Cir. 1973) (bedroom closet not within arrestee's reach while armed officer stood between closet and arrestee). Third, courts usually consider the accessibility of the area searched. LAFAVE, *supra*, at 416. *Compare* United States v. Wysocki, 457 F.2d 1155, 1160 (5th Cir.) (warrantless search of box in open closet within six feet of arrestee upheld), *cert. denied*, 409 U.S. 859 (1972) *with Mapp*, 476 F.2d at 80 (court mentions that closet was closed as one factor putting closet beyond reach of arrestee). The final consideration is the relative number of officers and arrestees. LAFAVE, *supra*, at 415-16; *see Mapp*, 476 F.2d at 80 (officers outnumbering arrestee six to one as one factor in holding that searched closet was beyond arrestee's reach).

7. *See* LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142-43 (1974) (advocating set rules applicable to all cases of certain type, in lieu of less precise ad hoc decisions).

8. 453 U.S. 454 (1981). In *Belton*, a lone officer stopped a car with four occupants for speeding. *Id.* at 455. Upon approaching the automobile and smelling burnt marijuana, the officer ordered the occupants out of the car and arrested them for possession of marijuana. *Id.* at 455-56. With the four occupants standing away from each other and the car, the officer searched the interior of the automobile, finding cocaine in a jacket on the back seat. *Id.* at 456. The Supreme Court upheld the officer's search of the jacket as incident to the arrest of the automobile's occupants. *Id.* at 462-63.

9. *Id.* at 460. The Supreme Court first recognized the problems inherent in obtaining warrants for automobile searches in *Carroll v. United States*. 267 U.S. 132, 153 (1925). In *Carroll*, federal prohibition agents stopped Carroll as he was driving between Detroit and Grand Rapids, Michigan and searched Carroll's car, finding 68 bottles of liquor. *Id.* at 134-36. The *Carroll* Court recognized that the mobile nature of automobiles requires the arresting officer to take quick action before the arrestee or his accomplices have a chance to remove evidence from the jurisdiction, preventing the officer from obtaining a warrant. *Id.* at 153. Consequently, the *Carroll* Court permitted the warrantless search of Carroll's automobile upon a showing of probable cause to believe that illegal alcohol was in the automobile. *Id.* at 149. After *Chimel*, the circuit courts came to different conclusions about the permissible scope of a search incident to arrest of the occupants of an automobile. *Compare* United States v. Sanders, 631 F.2d 1309, 1313 (8th Cir. 1980) (warrantless search of container in car upheld as incident to arrest although occupants stood outside car during search), *cert. denied*, 449 U.S. 1127 (1981) *and* United States v. Dixon, 558 F.2d 919, 922 (9th Cir. 1977) (warrantless search of bag in car while occupant handcuffed outside upheld as incident to arrest), *cert. denied*, 434 U.S. 1063 (1978) *and* United States v. Frick, 490 F.2d 666, 669-70 (5th Cir. 1973) (warrantless search of attache case found inside car while occupant stood outside car upheld as incident to arrest) *with* United States v. Benson, 631 F.2d 1336, 1339-40 (8th Cir. 1980) (warrantless search of tote bag in car while occupant outside held unreasonable), *vacated*, 453 U.S. 918 (1981) *and* United States v. Rigales, 630 F.2d 364, 366-68 (5th Cir. 1980) (warrantless search of zippered case found on car's floorboard while occupant under guard outside held unreasonable). At least one state court held that *Chimel* did not apply to automobile searches because of the added exigency of the automobile's mobility. *See* Paxton v. State, 255 Ind. 264, ____, 263 N.E. 2d 636, 640 (1970) (court extended permissible scope of search incident to arrest beyond *Chimel* because of added exigency of automobile's mobility).

an automobile are almost inevitably within the area into which the automobile's occupants might reach to grab a weapon or destructible evidence.[10] The *Belton* Court held, therefore, that law enforcement officers may search the passenger compartment of an automobile as a contemporaneous incident to the lawful custodial arrest of the automobile's occupants.[11] The *Belton* Court noted that it based its decision solely on the theory of search incident to arrest and not on the automobile exception.[12] Furthermore, the *Belton* Court explicitly rejected the theory that a law enforcement officer reduces an article to his exclusive control as soon as the officer seizes the article because such a theory would effectively destroy the search incident to arrest exception to the fourth amendment.[13] In two recent cases, *United States v. Litman*,[14] and *United States v. Porter*,[15] the Fourth Circuit applied the reasoning in *Belton* to uphold warrantless searches incident to arrest in situations not involving automobiles.[16]

In *Litman*, the defendant arrived at a hotel room to sell cocaine pursuant to a prior arrangement with an undercover agent of the Drug Enforcement Administration (DEA).[17] Litman entered the room carrying a black leather shoulderbag and a plastic shopping bag from which protruded a triple-beam balance.[18] Three DEA agents were waiting in the room and immediately arrested Litman.[19] The agents ordered Litman to drop the bags, and one of

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10. 453 U.S. at 460.

11. *Id.* The Supreme Court's holding in *Belton* was the result of the Court's search for a workable rule to deal with the permissible scope of a search incident to the arrest of the occupants of an automobile. *See id.* at 459-60 (discussion of need for straightforward, easily applied rule for cases involving automobiles and search incident to arrest). Automobile searches have proven particularly troublesome for the courts because of the inherent exigency of the automobile's mobility and the diminished expectation of privacy that an automobile provides its occupants. *See* United States v. Chadwick, 433 U.S. 1, 12 (1977) (discussion of reasons for justifying warrantless searches of automobiles). In stating its "bright line" rule, the *Belton* Court decided that the lawful arrest alone, and not any variable set of exigent circumstances, justifies the warrantless search of the automobile passenger compartment incident to the arrest of the automobile's occupants. 453 U.S. at 461. The *Belton* Court relied heavily on language in *United States v. Robinson* in holding that the probable cause required to make an arrest is sufficient to justify a search incident to that arrest. *Id.*; *see Robinson*, 414 U.S. 218, 235 (1973) (validity of search of arrestee's person depends solely on lawfulness of arrest and not on subsequent judicial determination of whether arresting officer was actually likely to discover weapons or evidence).

12. 453 U.S. at 462-63 n.6.

13. *Id.* at 461-62 n.5.

14. 739 F.2d 137 (4th Cir. 1984).

15. 738 F.2d 622 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 389 (1984).

16. *Litman*, 739 F.2d at 138-39; *Porter*, 738 F.2d at 627.

17. 739 F.2d at 138. In *Litman*, a Drug Enforcement Administration (DEA) agent made arrangements to buy cocaine from Litman through an intermediary, who was arrested prior to the arrest of Litman. Appellant's Brief at 3, United States v. Litman, 739 F.2d 137 (4th Cir. 1984) (hereinafter cited as Appellant's Brief).

18. Appellant's Brief at 4, *supra* note 17. The *Litman* court described the triple-beam balance as a type of scale used in narcotics transactions. 739 F.2d at 138.

19. 739 F.2d at 138. In *Litman*, the intermediary had delivered the hotel room key to the DEA agent before the DEA agent arrested the intermediary. Appellant's Brief at 3, *supra* note

the agents frisked Litman while the other two agents kept their weapons aimed at the defendant.[20] After the frisk, one of the agents searched both bags and found cocaine in clear plastic bags in the shoulderbag and the balance in the shopping bag.[21] The agents did not have a warrant to search the bags.[22]

Before trial, Litman moved to suppress the cocaine and balance as fruits of an illegal search.[23] The prosecution argued that the shoulderbag was within Litman's reach at the time of the search and therefore that the agents reasonably searched the bag incident to Litman's lawful arrest.[24] The district court agreed that the bags were within Litman's reach at the time of the search.[25] The district court nonetheless suppressed the evidence, holding that the bags were in the exclusive control of the agent conducting the search, which destroyed any exigency that would have justified the agent's warrantless search.[26]

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17. The hotel management consented to have the three DEA agents wait in the hotel room for Litman. *Id.*

20. 739 F.2d at 138.

21. *Id.*

22. *Id.*

23. *Id.*; *see* FED. R. CRIM. P. 12(b)(3) (defendant must make motion to suppress evidence prior to trial). Litman did not dispute the lawfulness of his arrest. 739 F.2d at 138.

24. *Litman*, 739 F.2d at 139 n.4. The prosecution in *Litman* argued that the black leather bag was only ten to twelve inches from Litman's left foot at the time of the search. *Id.* At trial, however, Litman testified that the bag was several feet away from him. *Id.* The district court decided that the bag was within Litman's reach under either version of the facts. *Id.*

25. 739 F.2d at 138.

26. *Id.* All exceptions to the fourth amendment's warrant clause are based on exigent circumstances. 1 W. RINGEL, *supra* note 1, § 10.1. The relevant exigencies justifying a warrantless search incident to arrest are protection of the arresting officer and prevention of destruction of evidence. Chimel v. California, 395 U.S. 752, 762-63 (1969). When the police reduce property to their exclusive control so that the arrestee can no longer reach the property to obtain a weapon or destroy evidence, the exigencies justifying a search of that property as incident to the arrest no longer exist. *See* United States v. Chadwick, 433 U.S. 1, 13-15 (1977) (warrantless search of footlocker in exclusive control of police for more than one hour after arrest held unreasonable).

The triple-beam balance in *Litman*, which was protruding from the plastic bag and visible when Litman entered the hotel room, was admissible as evidence under the "plain view" exception to the warrant requirement. 739 F.2d at 138 n.2. The Supreme Court in *Coolidge v. New Hampshire*, first recognized the "plain view" exception to the fourth amendment's warrant requirement although the Court held that the exception was inapplicable in that case because the search was not contemporaneous with the arrest. *See* 403 U.S. 443, 464-65 (1971) (warrantless search of automobile two days after seizure held unreasonable). The *Coolidge* Court recognized that any evidence seized is necessarily in plain view at the time of seizure. *Id.* at 465. The *Coolidge* Court, therefore, held that the "plain view" exception applies only when the police have prior justification for the initial intrusion and discover the evidence inadvertently. *Id.* at 466-70; *see* United States v. Griffin, 530 F.2d 739, 744 (7th Cir. 1976) (discovery and seizure of stolen mail scattered on floor of room upheld when defendant consented to initial police entry); United States v. Pacelli, 470 F.2d 67, 70-72 (2d Cir. 1972) (inadvertent discovery and seizure of boric acid upheld although search warrant described heroin), *cert. denied*, 410 U.S. 983 (1973).

On appeal, the Fourth Circuit reversed, holding that the shoulderbag in *Litman* was within the area from which Litman could grab a weapon or destroy evidence and therefore was subject to a search incident to Litman's arrest.[27] The Fourth Circuit explicitly rejected the defendant's theory that an item seized by and in the exclusive control of law enforcement personnel necessarily is not subject to search without a warrant.[28] The *Litman* court explained that such a theory would place an article in the "exclusive control" of the officer as soon as the officer made the seizure, essentially destroying the search incident to arrest exception to the fourth amendment's warrant requirement.[29]

The Fourth Circuit decided *United States v. Porter* the same day it decided *Litman*, using reasoning similar to that in *Litman*.[30] In *Porter*, detective John Dawley accosted the defendant, Penny Porter, in the general passenger area of the Washington National Airport after Dawley received an anonymous tip that Porter was transporting cocaine.[31] In addition to match-

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27. 739 F.2d at 139.

28. *Id.*

29. *Id.*

30. *Porter*, 738 F.2d 622 (4th Cir. 1984); *Litman*, 739 F.2d 137 (4th Cir. 1984).

31. 738 F.2d at 623-24. In *Porter*, John Dawley, a Washington, D.C., Metropolitan Police Department detective on special assignment to the DEA Task Force at Washington National Airport, received a telephone call from an anonymous informant on February 20, 1982. *Id.* at 623. The informant claimed that Penny Porter would be leaving Washington from National Airport that evening bound for Miami and would return carrying a quantity of cocaine. *Id.* The informant described Porter as a black female between 5'3" and 5'7", weighing between 115 and 125 pounds, with long brown hair, and wearing a red miniskirt and brown leather coat and carrying a large gold-colored purse. *Id.* The informant also gave Dawley information concerning someone other than Porter, which Dawley investigated and found to be correct. *Id.* Although the *Porter* court acknowledged that details of the information concerning the other individuals were lacking in the record, the *Porter* court later stressed the accuracy of this other information as corroborative of the information concerning Porter in providing probable cause to arrest Porter as soon as Porter identified herself. *Id.* at 623, 625, 626; *see infra* note 49 (*Porter* court stressed anonymous informant's proven reliability in justifying *Terry* stop of Porter). Dawley also discovered that a "T. Porter" had taken a flight to Miami that night, providing Dawley with apparent verification of the anonymous informant's information about Penny Porter. 738 F.2d at 623. On February 22, the informant again called Dawley, claiming that Porter would arrive at Washington National Airport that afternoon. *Id.* That afternoon, Dawley observed a woman matching Porter's physical description deplane from a flight arriving from Miami. *Id.* Instead of the red miniskirt and gold purse described by the informant's first phone call, the woman who caught Dawley's attention as matching Porter's physical description was wearing jeans and carrying a piece of carry-on luggage. *Id.* at 623-24. The woman further roused Dawley's suspicion by being one of the last passengers to leave the plane, looking directly at Dawley, continuously looking over her shoulder while walking rapidly down the concourse, and generally seeming nervous. *Id.* at 624.

The *Porter* court recognized Dawley's description of Porter's actions as containing elements of the DEA's drug courier profile. *Id.* at 626 n.3. The drug courier profile is an informally compiled list of characteristics typical of people transporting drugs. *See* United States v. Mendenhall, 446 U.S. 544, 547 (1980) (Court upheld consent search conducted after federal agents stopped and questioned arrestee on basis of her display of drug courier profile characteristics); *see also* Constantino, Cannavo and Goldstein, *Drug Courier Profiles and Airport*

ing Porter's physical description given by the anonymous informant, Porter attracted Dawley's attention by displaying several characteristics of the DEA's drug courier profile.[32] Dawley positively identified Porter as the woman he was looking for by checking Porter's boarding pass.[33] On Dawley's request, Porter accompanied Dawley to the DEA office at the airport.[34] Although Dawley later testified that Porter was free to refuse his request and go her own way, Dawley did not inform Porter that she was free to leave.[35] The DEA office was part of the Federal Aviation Administration

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Stops: Is the Sky the Limit?, 3 W. NEW ENG. L. REV. 175, 181-82 (1980) (discussion of various characteristics usually included in drug courier profiles). Some of the more common characteristics included in drug courier profiles are the use of small denomination of currency in purchasing tickets, travel to or from cities considered major sources of drugs, nervousness, bulky clothing, and traveling with little or no luggage. *See* Constantino, *supra*, at 181-82; *see also* Greenberg, *Drug Courier Profiles*, Mendenhall *and* Reid: *Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49, 77-78 (1981) (discussion of drug courier profile and determining reasonable suspicion). Although the mere fact that a person fits a drug courier profile does not justify even a *Terry* stop, profile characteristics supplemented by other information may provide the officer with a reasonable, articulable suspicion of criminal activity necessary for a limited seizure of the person. *See* Royer v. State, 389 So.2d 1007, 1019 (Fla. Dist. Ct. App. 1980) (mere similarity with drug courier profile characteristics is inadequate even to satisfy articulable suspicion requirement to justify *Terry* stop), *aff'd*, 460 U.S. 491, 502 (1983); *infra* note 49 (discussion of *Terry v. Ohio* as requiring law enforcement officers to have reasonable, articulable suspicion of criminal activity by person to justify a limited seizure of that person); *see also* United States v. Harrison, 667 F.2d 1158, 1161 (4th Cir. 1982) (seizure of defendant upheld because defendant made peculiar movement, ran up stairs, and had long bulge on his back beneath jacket as well as matching drug courier profile), *cert. denied*, 457 U.S. 1151 (1982); Greenberg, *supra* at 77 (contending that drug courier profile is neither specific enough nor reliable enough to evidence reasonable suspicion). *See generally* 3 LAFAVE, *supra* note 6, § 9.3, at 39-43 (Supp. 1984) (discussion of DEA drug courier profiles and establishing grounds for *Terry* stop).

Upon approaching Porter, Dawley identified himself as a special agent for the DEA, and Porter consented to speak with him. *Porter*, 738 F.2d at 624. Upon Dawley's request, Porter handed Dawley her boarding pass, which bore the name "T. Porter," and she said her name was Teresa Porter. *Id.*

32. *Porter*, 738 F.2d at 626; *see supra* note 31 (discussion of DEA drug courier profiles).

33. 738 F.2d at 624.

34. *Id.* In *Porter*, at the time Dawley asked Porter to accompany him to the DEA office, Dawley was not accompanied by any other agents, nor had Dawley touched Porter or made any show of authority. *Id.*

35. *Id.* Enroute to the DEA office, Porter said that she urgently needed to go to the bathroom, but Dawley told Porter that a policewoman would accompany Porter to the restroom once they arrived at the DEA office. *Id.* The *Porter* court noted that what had begun as a *Terry* stop probably turned into an arrest when Dawley told Porter that Porter could go to the restroom only in the company of a policewoman. 738 F.2d at 625 n.2; *see infra* note 49 (discussion of Dawley's encounter with Porter in terms of *Terry v. Ohio*). An initially consensual encounter between police and a citizen becomes a seizure if a reasonable person, viewing the totality of circumstances surrounding the incident, would believe that he was not free to leave. *See* Immigration and Naturalization Service v. Delgado, 104 S. Ct. 1758, 1761 (1984) (no seizure of workers during factory search for illegal aliens although armed federal agents stationed at all exits because workers free to walk around); Florida v. Royer, 460 U.S. 491, 503 (1983) (as practical matter, defendant was under arrest when police seized defendant's plane ticket,

(FAA) office at Washington National Airport, and when Dawley and Porter arrived at the FAA office, Dawley asked Porter for further identification.[36] Porter started going through her carry-on bag before Dawley asked Porter if he could look in the bag.[37] Porter permitted Dawley to frisk the sides of the bag and look inside, but Dawley did not place his hands inside the bag.[38]

After Dawley and Porter walked back to the DEA office, Dawley asked Porter if she had brought anything with her from Miami.[39] Porter replied that she had some marijuana and pulled from her left rear pocket an envelope containing marijuana cigarettes.[40] Dawley promptly placed Porter under arrest, fifteen minutes after Porter stepped off the plane.[41] After advising Porter of her *Miranda* rights,[42] Dawley conducted a warrantless search of Porter's carry-on bag, which was between Dawley and Porter and within Porter's reach at the time of the arrest.[43] Dawley discovered approximately 60,000 dollars worth of cocaine hidden in Porter's bag.[44]

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identification, and luggage and never informed defendant that he was free to leave room in which police detained him).

Dawley was unable to find a policewoman at the DEA office to accompany Porter to the restroom, so Dawley asked the FAA desk sergeant to summon a policewoman to the office. *Porter*, 738 F.2d at 624.

36. 738 F.2d at 624.

37. *Id.*

38. *Id.* At least one circuit court has held that once the police seize and search an item, subsequent searches of that item do not require a warrant if the item remains in the legitimate, uninterrupted possession of the police. *See* United States v. Burnette, 698 F.2d 1038, 1049 (9th Cir.), *cert. denied*, 461 U.S. 936 (1983). In *Burnette*, police officers searched the defendant's purse at the scene of the arrest, then searched the purse more thoroughly at the police station. *Id.* The *Burnette* court reasoned that the initial search significantly reduced the arrestee's expectation of privacy in the purse, thereby making the subsequent search reasonable. The *Porter* record is silent as to who carried Porter's bag from the front desk of the FAA police office, where the initial pat-down and visual search of the bag occurred, to the DEA office. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* The Supreme Court will not validate searches incident to arrest unless the police conduct the search contemporaneously in time and place with the arrest. *See* Preston v. United States, 376 U.S. 364, 367 (1964) (once defendant is under arrest and in custody, search made at another place, without warrant, is not incident to arrest because no danger to officer or evidence); *see also* C. WHITEBREAD, *supra* note 1, § 6.04, at 138-39 (discussion of contemporaneousness requirements for search incident to arrest).

42. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (to safeguard fifth amendment privilege against self-incrimination, law enforcement officers must immediately inform person in custody that he has right to remain silent and right to have attorney present during questioning). In *Porter*, after advising Porter of her rights as required by *Miranda*, Dawley asked Porter if she understood the *Miranda* rights, and Porter said that she did but Porter did not express any desire to see a lawyer at that time. *Porter*, 738 F.2d at 624.

43. 738 F.2d at 624.

44. *Id.* In *Porter*, the cocaine that Dawley discovered in Porter's carry-on bag was in a clear plastic bag, wrapped in a red miniskirt, which was itself stuffed inside a gold-colored purse. *Id.* After the warrantless search of Porter's carry-on bag, resulting in discovery of the cocaine, Dawley again advised Porter of her *Miranda* rights. *Id.* Porter made several inculpatory statements, not elaborated upon in the record, before indicating that she wished to see a lawyer. *Id.*

Porter made a pretrial motion to suppress the seized cocaine as fruit of an illegal search.[45] The district court denied the motion, holding that Dawley's warrantless search of Porter's carry-on bag was a legitimate search incident to arrest.[46] The district court subsequently found Porter guilty of possession of cocaine with intent to distribute.[47] On appeal, the Fourth Circuit affirmed, holding that the district court was not clearly erroneous in characterizing the initial encounter between Dawley and Porter as a limited seizure justifiable under *Terry v. Ohio*[48] because Dawley had a reasonable, articulable suspicion of criminal activity sufficient to justify detention and questioning of Porter.[49]

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45. *Id.*; *see* FED. R. CRIM. P. 12(b)(3) (defendant must make motion to suppress evidence prior to trial).

46. 738 F.2d at 624-25. The district court in *Porter* held that Dawley's initial encounter with Porter was justifiable as a *Terry* stop and that Porter voluntarily consented to accompany Dawley to the DEA office. *Id.* at 625; *see infra* note 49 (discussion of *Terry v. Ohio* as requiring law enforcement officers to have reasonable, articulable suspicion of criminal activity by person to justify limited seizure of that person).

47. 738 F.2d at 623.

48. 392 U.S. 1 (1968).

49. 738 F.2d at 624-25; *see* Terry v. Ohio, 392 U.S. 1, 21 (1968). A law enforcement officer is justified in making a limited seizure if he can point to specific and articulable facts concerning criminal activity that, with rational inferences from those facts, reasonably warrant a belief by the officer that the seized person is, was, or is about to be involved in criminal activity. 392 U.S. at 21. The reasonable, articulable suspicion needed to justify a limited seizure of a person under *Terry* is necessarily less than probable cause to arrest but must be more substantial than an inarticulable hunch on the part of the officer. *Id.* at 22. If a district court determines that an encounter between police and a citizen never reached the point where the citizen reasonably believed he could not leave, then the police officer has not violated the citizen's constitutional rights. *See* Florida v. Royer, 460 U.S. 491, 497-99 (1983) (plurality opinion) (even momentary detention without reasonable, objective grounds violates fourth amendment); United States v. Mendenhall, 446 U.S. 544, 552 (1980) (Stewart, J.) (law enforcement officers may address questions to anyone on the street without violation of fourth amendment); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (not all personal interactions between police and citizens involve seizure of citizen). A police officer's reasonable, articulable suspicion of criminal activity will justify a limited seizure of the person under *Terry*. *See Terry*, 392 U.S. at 30; *see also* Reid v. Georgia, 448 U.S. 438, 440 (1980) (per curiam) (police must show reasonable, articulable suspicion that person is engaged in criminal activity to support any restriction of that person's liberty). If the court characterizes the encounter as a full arrest, only probable cause to believe that the arrestee has committed or is committing a crime will justify the detention. *See* Henry v. United States, 361 U.S. 98, 100 (1959) (police power to make warrantless arrest limited to situations in which reasonable grounds exist to believe that arrestee has committed or is committing crime). The *Porter* court, citing *United States v. Gooding*, stated that the nature of an encounter between police and citizen is a question of fact for the district court to decide. 738 F.2d at 625; *Gooding*, 695 F.2d 78, 82 (4th Cir. 1982) (court refused to find clearly erroneous district court's factual determination that police had seized defendant). An appellate court will not reverse a district court's finding of fact unless that finding is clearly erroneous. *Gooding*, 695 F.2d at 82; *see* Campbell v. United States, 373 U.S. 487, 493 (1963) (appellate court may not disturb district court's factual determination unless clearly erroneous).

The *Porter* court held that the anonymous informant's tip gave Dawley sufficient justification to subject Porter to a *Terry* stop, especially in light of the informant's proven reliability. *Id.* The *Porter* court did not consider whether Porter acted voluntarily in accompanying Dawley to the DEA office. *Id.* The *Porter* court noted, rather, that other courts have found that a detainee consented to accompany a police officer even when the officer later testifies that the

The Fourth Circuit proceeded on the premise that Porter was under arrest following her identification during the *Terry* stop because, at that time, Dawley had probable cause to arrest Porter based on the anonymous informant's corroborated information.[50] The Fourth Circuit in *Porter* noted the *Belton* Court's rejection of the "exclusive control" theory in holding that Dawley was not in exclusive control of Porter's bag at the time of the search.[51] The *Porter* court also relied on *Belton* as establishing a "bright line" rule that a lawful custodial arrest justifies a contemporaneous, warrantless search of the arrestee and the immediately surrounding area.[52] The *Porter* court noted that Porter did not dispute that her carry-on bag was within her reach at the time of the search.[53] The *Porter* court also stated that the prosecution does not have to show that an officer's safety or the existence of evidence is actually threatened.[54] According to the *Porter* court, for the search incident to arrest exception to apply, all the prosecution need show is that the arrest was lawful and that the searched article was within the arrestee's reach.[55] The Fourth Circuit alternatively held that Dawley did not

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detainee was not free to leave the officer's presence. *Id.* at 625 n.2; *see* United States v. Mendenhall, 446 U.S. 544, 574-75 (1980) (White, J., dissenting) (Supreme Court found that defendant consented to accompany officers because defendant was asked rather than ordered to accompany officers and officers neither threatened defendant nor made show of force, although officer later testified that defendant was, in fact, not free to leave); United States v. Corbin, 662 F.2d 1066, 1071 (4th Cir. 1981) (court held that defendant consented to accompany officers although officer later testified that defendant was not free to leave). In light of Dawley's testimony that Porter was free to leave, the *Porter* court held that Porter consented to answer Dawley's questions. 738 F.2d at 625.

50. 738 F.2d at 625-26. While the *Porter* court admitted that the DEA drug courier characteristics alone could not supply the requisite reasonable, articulable suspicion for even a *Terry* stop, the *Porter* court was quick to point out that the drug courier characteristics displayed by Porter supplemented the informant's tip. *Id.* at 626 n.3; *see* Reid v. Georgia, 448 U.S. 438, 439-41 (1980) (officer could not reasonably have suspected criminal activity afoot merely on strength of defendant displaying drug courier profile characteristics). The *Porter* court also noted the similarity of factual situations in *Porter* and *Draper v. United States*, reasoning that, if the agent in *Draper* had probable cause to arrest Draper, then Dawley was equally justified in arresting Porter. 738 F.2d at 626; *see Draper*, 358 U.S. 307, 312-13 (1959) (federal narcotics agent had probable cause to arrest man matching description, provided by proven reliable source, of man who informant claimed was drug dealer); *see also* Illinois v. Gates, 103 S. Ct. 2317, 2327-28 (1983) (veracity of informant is one element in determining whether police have probable cause to arrest individual in light of totality of circumstances).

51. 738 F.2d at 626-27; *see* New York v. Belton, 453 U.S. 454, 461 n.5 (1981) (Supreme Court labeled broad exclusive control doctrine espoused by New York Court of Appeals a "fallacious theory" because theory would wipe out search incident to arrest exception to fourth amendment by not allowing officers to search what they seize); *supra* note 8 (discussion of *Belton* facts).

52. 738 F.2d at 627; *see Belton*, 453 U.S. at 457 (citing *Chimel v. California* for proposition that lawful arrest creates situation justifying warrantless, contemporaneous search of arrestee and area within arrestee's control); *Chimel*, 395 U.S. 752, 762-63 (1969).

53. 738 F.2d at 627.

54. *Id.*

55. *Id.* The permissibility of a search of the arrestee's person and the area within the arrestee's immediate control does not depend on whether a threat to the arresting officer or

have exclusive control of Porter's carry-on bag and that, therefore, the exigency of danger to evidence was present if the prosecution needed to show an exigency to justify the search incident to arrest.[56] The *Porter* court held that Dawley was not in exclusive control of Porter's carry-on bag because the bag was within Porter's reach during the arrest and therefore within the area from which Porter could attempt to conceal or destroy evidence.[57] Consequently, the Fourth Circuit affirmed the district court's admission of the cocaine as the product of a valid search incident to the lawful arrest of Porter.[58]

The dissent in *Porter* disapproved of the majority's extension of *Belton* to deal with a factual setting not involving an automobile.[59] The *Porter* dissent stressed that *Belton* did no more than resolve the meaning of *Chimel* in the narrow context of searches incident to arrest of an automobile's occupants.[60] The dissent maintained that no authority existed which validated all searches of the arrestee and the surrounding area regardless of the presence of exigent circumstances.[61] The dissent emphasized the total lack of exigencies

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destructible evidence exists. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (authority to search arrestee's person incident to arrest not dependent on subsequent judicial finding that search was likely to uncover weapons or destructible evidence); *Belton*, 453 U.S. at 459 (application of *Robinson* to area within arrestee's reach); *see also Chimel*, 395 U.S. at 763 (concern for arresting officer's safety and preservation of evidence justifies search of area within reach of arrestee as well as person of arrestee). The prosecution in *Porter* did not have to prove that any exigency existed to justify the search incident to arrest because the *Porter* court determined that Porter's arrest was lawful and that the carry-on bag was within Porter's reach at the time of the arrest. 738 F.2d at 627.

56. 738 F.2d at 627.

57. *Id.*

58. *Id.* at 626-27. The *Porter* court dismissed any problem of contemporaneousness in the fifteen minute interval between the arrest and the search incident to arrest in *Porter*. *Id.* at 627 n.4. The *Porter* court noted that the Fourth Circuit had held searches permissible as incident to arrest where as much as half an hour separated the arrest from the search. *Id.*; *see* United States v. McEachern, 675 F.2d 618, 622 (4th Cir. 1982) (warrantless search held incident to arrest even though police arrested defendant and drove to FBI office thirty minutes away before conducting search of arrestee's wallet).

59. 738 F.2d at 627-28 (Murnaghan, J., dissenting); *see Belton*, 453 U.S. 459-60 (*Belton* Court explicitly states issue of case as determining proper scope of search of automobile incident to arrest of automobile's occupants); *see also supra* notes 8-12 and accompanying text (discussion of *Belton* facts and holding).

60. 738 F.2d at 628 (Murnaghan, J., dissenting); *see Belton*, 453 U.S. at 460 n.2. The *Porter* dissent maintained that the *Belton* Court upheld the officer's search of the automobile's passenger compartment because of the exigent circumstances inherently present in the automobile. 738 F.2d at 628; *see Belton*, 453 U.S. at 457. Exigent circumstances noted by the *Belton* Court were that a lone police officer was faced with four men in a speeding car owned by none of them and the car apparently contained an uncertain quantity of a controlled substance. *Belton*, 453 U.S. at 457. Further supporting its view that the outcome in *Belton* depended on the search being of an automobile, the *Porter* dissent claimed that the inherent exigency of mobility exists in any case involving an automobile. 738 F.2d at 628; *see* Preston v. United States, 376 U.S. 364, 366 (1964) (common sense dictates distinction between search of automobile and search of immovable structure).

61. 738 F.2d at 629 (Murnaghan, J., dissenting). The *Porter* dissent noted the distinctions between a search of the arrestee's person and a search of the area within the arrestee's immediate

to justify the warrantless search of Porter's carry-on bag, noting that Dawley conducted the search at the FAA police station, which was staffed by at least two other officers, and that Dawley already had frisked the bag for weapons.[62] The *Porter* dissent suggested that Dawley was in exclusive control of Porter's carry-on bag for several minutes prior to the search.[63] The dissent further implied that Dawley created whatever exigencies existed by placing the bag within Porter's reach when Dawley searched the bag.[64] Claiming that the majority's holding set a precedent for erosion of the public's right to privacy, the dissent maintained that the warrantless search of Porter's carry-on bag violated the fourth amendment and that the district court should have suppressed the seized cocaine.[65]

The Fourth Circuit properly upheld the warrantless searches in both *Litman* and *Porter*.[66] The rule established by *Chimel* and its progeny, that law enforcement officers may search, contemporaneous to a lawful custodial arrest, the arrestee's person and the area within the arrestee's immediate control, is easily applicable in *Litman*.[67] Litman did not dispute the lawfulness of his arrest, and the district court made a finding of fact that the shoulderbag was within Litman's reach at the time of the search.[68] The police officer

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control in claiming that the *Porter* majority misapplied *United States v. Robinson*. *Id.*; *see Robinson*, 414 U.S. 218, 224 (1973); *supra* note 55 (discussion of *Porter* majority's application of *Robinson*). The *Porter* dissent reasoned that an article on the person of the arrestee remains accessible to the arrestee, and therefore, represents a danger to the arresting officer and destructible evidence, until the police seize the article and remove it from the arrestee's reach. 738 F.2d at 629 (Murnaghan, J., dissenting). The *Porter* dissent then noted the lack of absolutes governing searches of the area within the reach of the arrestee, concluding that the courts in such cases must look to the exigencies presented by the situations involved in each case in deciding the legality of the search. *Id.*; *see* Terry v. Ohio, 392 U.S. 1, 26 (1968) (exigencies which justify initiation of search also limit permissible scope of that search).

62. 738 F.2d at 629.

63. *Id.* at 630. The *Porter* dissent considered Dawley's possession of Porter's bag during Dawley's frisk of the bag and the level of detail of Dawley's testimony compared with Dawley's silence on whether he ever returned the bag to Porter in concluding that Dawley had uninterrupted control over the bag from the time of his initial frisk of the bag until the time of the search. *Id.*

64. *Id.* Police may not justify a warrantless search of an article as incident to arrest when the possibility of the arrestee reaching the article is due to the acts of the police. *See* United States v. Wright, 577 F.2d 378, 381 (6th Cir. 1978) (search of checked luggage held unreasonable because police brought luggage within reach of arrestee); United States v. Griffith, 537 F.2d 900, 903 (7th Cir. 1976) (search of bathroom and luggage, brought within reach of arrestee by police ordering arrestee to get dressed, held unreasonable); United States v. Rothman, 492 F.2d 1260, 1266 (9th Cir. 1973) (search of checked luggage held unreasonable when luggage in custody of airline at time of arrest and police responsible for bringing luggage within reach of arrestee).

65. 738 F.2d at 630.

66. *Litman*, 739 F.2d at 139; *Porter*, 738 F.2d at 627.

67. *See Chimel*, 395 U.S. at 763 (incident to arrest, police may search arrestee and area within arrestee's immediate control).

68. 739 F.2d at 138; *see supra* note 24 (*Litman* trial court decided that Litman's shoulderbag was within his reach during search as result of either Litman's testimony or testimony of arresting officers).

searched the shoulderbag immediately following Litman's arrest, thus satisfying the requirement that the search be contemporaneous with the arrest.[69] The *Litman* court properly affirmed Litman's conviction by applying the *Chimel* tests to the facts of *Litman*.

In *Porter*, the Fourth Circuit again applied the *Chimel* tests to uphold a search incident to arrest.[70] Porter never disputed that her carry-on bag was within her reach at the time of the search, thereby satisfying the requirement that the searched article must be within the immediate control of the arrestee.[71] Although Porter disputed the legality of her arrest, the Fourth Circuit's decision in *Porter* is consistent with the Supreme Court's decisions in *Draper v. United States*[72] and *Illinois v. Gates*[73] in holding that the tip given Dawley by the anonymous informant provided Dawley with probable cause to arrest Porter.[74] The *Draper* and *Gates* decisions established that corroborated information from an anonymous informant can provide an officer with probable cause to arrest.[75] In *Litman*, Dawley had sufficient probable cause to arrest Porter because Dawley had verified personally every aspect of the anonymous informant's detailed tip.[76]

Despite the strenuous objection of the dissent, the *Porter* majority properly determined that the prosecution is not required to prove that any

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69. 739 F.2d at 138; *see* United States v. Garcia, 605 F.2d 349, 352 (7th Cir. 1979) (search conducted within fifteen seconds of arrest is contemporaneous with that arrest), *cert. denied*, 446 U.S. 984 (1980) *see generally* 1 W. RINGEL, *supra* note 1, at 12-13 to 12-22 (general discussion of contemporaneousness of search incident to arrest in various situations).

70. 738 F.2d at 627.

71. *Id.*; *see Chimel*, 395 U.S. at 763 (Court defines area within arrestee's immediate control as that area from within which arrestee could gain possession of weapon or destructible evidence).

72. 358 U.S. 307 (1959). The facts of *Draper* closely paralleled those *Porter*. *See Draper*, 358 U.S. at 309-10 (facts of *Draper*); *Porter*, 738 F.2d at 623-24 (facts of *Porter*). In *Draper*, a narcotics agent relied on information from a reliable informant to provide probable cause to arrest a man who matched exactly the description given by the informant. *Draper*, 358 U.S. at 309-10. The *Draper* Court held that the informant's tip, personally verified in every detail by the narcotics agent, provided reasonable grounds for the agent to arrest a man exactly matching the detailed description given by the informant. *Id.* at 312-13.

73. 103 S. Ct. 2317 (1983). In *Gates*, the police received an anonymous letter detailing the drug-related activities of *Gates* and his wife. *Id.* at 2319. The police corroborated much of the information in the letter through investigation and then, on the strength of the anonymous letter and corroborating investigation, obtained a search warrant for the Gates home and automobile. *Id.* The Supreme Court upheld the warrant's validity, holding that the warrant was based on sufficient probable cause to justify the search. *Id.* at 2334-35.

74. 738 F.2d at 626.

75. *Draper*, 358 U.S. at 312-13; *Gates*, 103 S. Ct. at 2334-35. Corroboration of part of an informant's information indicates that the rest of the information is probably true. *Gates*, 103 S. Ct. at 2335. In *Porter*, Dawley's verification of the anonymous informant's tip concerning someone other than Porter increased the probability that the tip concerning Porter was also true. 738 F.2d at 626; *see supra* note 31 (discussion of information anonymous informant gave Dawley). Dawley's corroboration of the informant's information concerning Porter's physical appearance and travel plans lent further credence to the informant's assertion that Porter was transporting cocaine. *See id.*

76. *See supra* notes 74 & 75 (discussion of Dawley's verification of the anonymous informant's information).

danger to police or evidence actually existed to justify the warrantless search of items within the immediate control of the arrestee.[77] Exigent circumstances, which are emergency situations that make securing a warrant impractical, are the basis for nearly all exceptions to the fourth amendment's warrant requirement.[78] The exigencies justifying a warrantless search incident to arrest are the potentially immediate dangers of assault on the arresting officer and the destruction of evidence.[79] Those potential dangers exist any time weapons or evidence are within the reach of an arrestee.[80] Containers within the arrestee's reach may hold weapons or destructible evidence accessible to the arrestee, and therefore such containers are subject to search for the protection of officers and preservation of evidence.[81] Noting that the decision to search in any arrest situation is necessarily a quick, ad hoc decision by the arresting officer, the Supreme Court in *United States v. Robinson*[82] held that the right to conduct a search incident to arrest flows automatically from the fact of the lawful arrest and does not depend on a case-by-case adjudication of whether danger to the officer or evidence actually existed.[83] The circumstances that the *Porter* dissent noted, such as the relative number of law enforcement officers and arrestees, the surroundings in which the officers conducted the search, and who was holding the article at the time of the search, may be relevant in determining the area within Porter's immediate control.[84] As long as the arrest is lawful and the searched article is within the arrestee's reach,

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77. 738 F.2d at 627.

78. W. RINGEL, *supra* note 1, at 10-1 to 10-2.

79. *Chimel*, 395 U.S. at 762-63; *see* United States v. Chadwick, 433 U.S. 1, 14-15 (1977) (potential dangers present in all custodial arrests make warrantless searches of items within arrestee's immediate control reasonable).

80. *Chimel*, 395 U.S. at 762-63.

81. *See Belton*, 453 U.S. at 460-61 (police may search contents of any container within reach of arrestee whether container is opened or closed because fact of lawful custodial arrest justifies police infringement of any privacy interest arrestee may have in container); *Chadwick*, 433 U.S. at 15 (when police have exclusive control of article and that article is no longer accessible to arrestee, search of that article is no longer incident to arrest).

82. 414 U.S. 218 (1973).

83. *Id.* at 235. The *Robinson* decision dealt only with a search of the arrestee's person incident to arrest. *Id.* The *Chimel* Court, however, recognized that the area within the arrestee's reach is as subject to search as the arrestee's person. *See* 395 U.S. at 763 (area within arrestee's reach is as subject to search as arrestee's person). Considering the *Robinson* Court's disapproval of sophisticated judicial scrutiny of necessarily quick, ad hoc police decisions, the rule in *Robinson*, that the fact of the lawful arrest establishes the authority to search, should apply to a search of the area within the arrestee's reach as well as to a search of the arrestee's person. *See* 414 U.S. at 235 (*Robinson* Court states that fourth amendment does not require rigorous analysis of officer's quick, ad hoc decision) *see also* 2 W. LAFAVE, *supra* note 7, § 6.3 at 417 (*Robinson* likely is applicable to search of area within arrestee's immediate control); Moylan, *Further Thoughts on the* Belton *and* Robbins *Decisions*, 3 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 113, 114-116 (1980-1981) (explanation of impact of *Robinson* and *Belton* on relieving police and prosecution from proving that danger to arresting officer or destructible evidence actually exists).

84. *See* 738 F.2d at 629-30 (Murnaghan, J., dissenting) (examination of circumstances dissent deems relevant in determining reasonableness of search of Porter's carry-on bag); *supra*

however, the prosecution need not show any further exigent circumstances to justify the search incident to arrest.[85]

For a warrantless search to be valid as a search incident to arrest, not only must the arrest be legal and the searched item be within the arrestee's immediate control, but the search must be contemporaneous with the arrest.[86] The *Porter* court properly allowed the search of Porter's carry-on bag as a contemporaneous incident to Porter's arrest, despite the fifteen minute lapse between Porter's deplaning and the search.[87] Contemporaneousness is tied closely to concepts of exclusive control and proximity of the searched article to the arrestee.[88] Circuit courts generally have permitted law enforcement officers to conduct a search of an item as contemporaneous to arrest if the searched item is within reach of the arrestee at the time of arrest or search.[89] Rather than fix a certain number of minutes beyond which a search is not contemporaneous with the arrest, courts consider the facts of each case in determining whether the search is reasonably and substantially contemporaneous with the arrest.[90] For example, in *United States v. Fleming*,[91] the Seventh Circuit reasoned that a constitutional test of contemporaneousness should not be entirely at odds with safe and sensible police procedures and upheld a warrantless search of a paper bag separated from the arrest by a five minute delay occasioned by handcuffing the arrestee and moving him to the street.[92] In *Porter*, Dawley's search of Porter's carry-on bag was reason-

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notes 5 & 6 (discussion of cases noting circumstances courts considered in holding that article searched was within reach of arrestee).

85. *See Chimel*, 395 U.S. at 763 (lawful arrest justifies contemporaneous, incidental search of arrestee and area within immediate control of arrestee); *supra* note 84 (justification for search incident to arrest flows directly from fact of arrest and prosecution need not show further exigency).

86. *See* Preston v. United States, 376 U.S. 364, 367 (1964) (justification for search incident to arrest, danger to officer or evidence, no longer present if search is remote in time or place from arrest). The *Preston* Court held the search of the defendant's automobile unreasonable because the police had the defendant in custody at the police station and had towed the automobile to a garage where the search occurred. *Id.*

87. 738 F.2d at 626.

88. *See id.* (search not contemporaneous with arrest if conducted at time or place where searched article no longer on arrestee's person or within arrestee's immediate control). *See generally* 1 W. RINGEL, *supra* note 1, at §§ 12.4(b)-12.4(b)(3) (discussion of courts' general flexibility in defining period after arrest during which police may search arrestee and area within immediate control of arrestee).

89. *See, e.g.*, United States v. Garcia, 605 F.2d 349, 355 (7th Cir. 1979) (search of arrestee's luggage upheld as contemporaneous to arrest when search conducted within fifteen seconds of arrest and in presence of arrestee), *cert. denied*, 446 U.S. 984 (1980); United States v. Eatherton, 519 F.2d 603, 610 (1st Cir.) (search of briefcase carried by arrestee at time of arrest upheld although police handcuffed arrestee and placed him in patrol car before conducting search), *cert. denied*, 423 U.S. 987 (1975); *see also supra* notes 5 & 6 (discussion of cases finding searched article within arrestee's reach).

90. *See supra* note 89 (description of cases considering contemporaneousness requirement of search incident to arrest exception to fourth amendment).

91. 677 F.2d 602 (7th Cir. 1982).

92. *Id.* at 607. The Seventh Circuit in *United States v. Fleming* rejected the contention that a search incident to arrest must be absolutely contemporaneous with the arrest regardless

ably contemporaneous with Porter's arrest because the bag was within Porter's reach at the time of the search.[93]

Both *Litman* and *Porter* properly applied the *Belton* Court's rejection of an exclusive control doctrine that would prohibit officers from searching an article without a warrant the instant the arresting officer seizes the article.[94] Prior to *Belton*, the Supreme Court in *United States v. Chadwick*[95] established the rule that, once a law enforcement officer reduces an article to his exclusive control and any danger that the arrestee might reach the article to grab a weapon or destroy evidence no longer exists, a search of that article is no longer incident to the arrest.[96] At least one circuit court held that the *Chadwick* Court, in promulgating the exclusive control doctrine, had limited the doctrine to situations in which the article was not only in the possession of the arresting officer, but also outside the reach of the arrestee.[97] The Seventh Circuit, in *United States v. Garcia*,[98] reasoned that the justification for a search incident to arrest existed as long as the searched article was within reach of the arrestee, regardless of who had physical possession of the article at the time of the search.[99] Other circuits, however, have held that an article came within the exclusive control of the police at the instant the arresting officer seized the article, thereby rendering the article no longer subject to a search incident to arrest.[100] The *Belton* Court subse-

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of the immediate peril to the officer or to bystanders. *Id. But see* United States v. Monclavo-Cruz, 662 F.2d 1285, 1287-88 (9th Cir. 1981) (court held that potential security risk at time of arrest did not justify delaying warrantless search until one hour later at police station).

93. *See* 738 F.2d at 627 (Porter did not dispute that her carry-on bag was within her reach at time of search); *supra* notes 86-90 (courts generally find search contemporaneous to arrest if article searched is still within arrestee's reach).

94. *Litman*, 739 F.2d at 139; *Porter*, 738 F.2d at 627.

95. 433 U.S. 1 (1977).

96. *Id.* at 15. In *United States v. Chadwick*, federal narcotics agents arrested the defendants and seized a 200 pound, double-locked footlocker that the agents had probable cause to believe contained illegal drugs. *Id.* at 4. An hour and a half after the arrests and more than an hour after the police had placed the defendants in jail cells, the police conducted a warrantless search of the footlocker, finding a large amount of marijuana. *Id.* The *Chadwick* Court held that the search was not a valid search incident to arrest because the search was not contemporaneous in time or place with the arrest and there was no longer any danger of the arrestees gaining access to the footlocker at the time of the search. *Id.* at 15.

97. *See* United States v. Garcia, 605 F.2d 349, 355-56 (7th Cir. 1979), *cert. denied*, 446 U.S. 984 (1980).

98. 605 F.2d 349 (7th Cir. 1979), *cert. denied*, 446 U.S. 984 (1980).

99. *See id.* at 354-55.

100. *See* United States v. Johnson, 588 F.2d 147, 151 (5th Cir. 1979) (court held that article ordinarily comes into exclusive control of arresting officer at time of initial seizure); United States v. Schleis, 582 F.2d 1166, 1172 (8th Cir. 1978) (same). The *Schleis* court reasoned that an interpretation of *Chadwick* that did not place an article in the exclusive control of the police upon the initial seizure would encourage police to circumvent *Chadwick* by conducting a search of luggage incident to arrest. *Id.*; *see supra* note 96 (discussion of *Chadwick* requirement that police obtain warrant before searching article within exclusive control of police); *see also* Note, *Criminal Procedure—Search and Seizure—Persons Lawfully Arrested for Alleged Possession of Narcotics Have a Privacy Interest in a Footlocker in Their Possession at the Time of*

quently held that such a broad theory of exclusive control essentially would eviscerate altogether the search incident to arrest exception to the fourth amendment because the police could not search an article after seizing it.[101] Although the *Belton* holding contemplated facts involving search of an automobile, other circuit courts have applied the *Belton* Court's rejection of a broad exclusive control theory to cases not involving automobiles.[102] The reasoning employed in *Belton* to reject the exclusive control argument does not depend on any characteristics inherent in automobiles, and should be applicable in non-automobile cases such as *Litman* and *Porter*.[103]

Although the Fourth Circuit's use of *Belton* to settle the issue of exclusive control was reasonable, both the *Litman* and *Porter* courts inappropriately cited *Belton* to support other propositions.[104] The *Belton* decision, designed to provide a workable rule for warrantless searches of automobiles incident to arrest, should not be applicable to cases not involving automobiles.[105] The *Belton* Court's generalization that any article within the relatively small confines of an automobile's passenger compartment almost inevitably will be within the reach of the automobile's occupants produces a bright line presumption of exigent circumstances justifying, incident to arrest, a warrantless search of the automobile's interior for the protection of the arresting officer and for the preservation of evidence.[106] The presumption in *Belton*,

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Their Arrest Which is Protected by the Warrant Clause of the Fourth Amendment, 6 AM. J. CRIM. L. 81, 94 (1978) (initial police seizure of article must be sufficient to establish exclusive control by officers to give *Chadwick* any substantial impact on search and seizure law).

101. *Belton*, 453 U.S. at 461-62 n.5.

102. *See* United States v. Brown, 671 F.2d 585, 586-87 (D.C. Cir. 1982) (seizure and immediate search of zippered leather pouch from between arrestee's knees held valid as incident to street arrest of defendant); United States v. Mefford, 658 F.2d 588, 592-93 (8th Cir. 1981) (search held valid as incident to defendant's arrest when police allowed defendant to retrieve paper bag from bus after his arrest and police then seized and searched the bag), *cert. denied*, 455 U.S. 1003 (1982).

103. *See supra* text accompanying note 101 (discussion of policy behind *Belton* Court's rejection of exclusive control theory); *supra* text accompanying note 12 (*Belton* decision based on search incident to arrest and not automobile exception).

104. *See Litman*, 739 F.2d at 139 n.4 (*Litman* court claimed that Litman's bag was at least as accessible to Litman as Belton's jacket was to Belton in *Belton*); *Porter*, 738 F.2d at 627 (citing *Belton* as establishing "bright line" rule that lawful arrest justifies contemporaneous search of arrestee and area within arrestee's reach).

105. *See Belton*, 453 U.S. at 460 (Supreme Court intended *Belton* to settle question of what was within reach of arrestee in cases involving arrest of automobile's recent occupants); *see* United States v. Vaughan, 718 F.2d 332, 333-34 (9th Cir. 1983) (any extension of *Belton* beyond exact limits of objects within vehicle's passenger compartment would create temporal and spatial uncertainties and increase likelihood of unjustified invasion of individual's privacy). In *Vaughan*, the defendant was a passenger in an automobile driven by a man for whom the police had an arrest warrant. 718 F.2d at 333. Vaughan twice tried to walk away from the scene of the driver's arrest, but the police brought Vaughan back to the car each time and searched the briefcase Vaughan was carrying after Vaughan's second attempt to leave. *Id.* The *Vaughan* court ruled that the police never had probable cause to arrest Vaughan and that *Belton* did not apply because the briefcase was not in the car at the time of the seizure. *Id.* at 333-34.

106. *See Belton*, 453 U.S. at 460.

that an article within a certain space is within the reach of a recent occupant of that space, is defensible precisely because the space that *Belton* contemplated is relatively small and easily defined.[107] The *Belton* Court explicitly limited its decision to the search of an automobile incident to the arrest of the automobile's recent occupants.[108] Applying the "bright line" rule of *Belton* to searches involving less easily defined areas such as a hotel room, an FFA police office, or the middle of a street is less easily rationalized.[109] Justice Brennan, in his *Belton* dissent, and several commentators have warned of the consequences of applying *Belton*'s "bright line" rule in non-automobile cases.[110] Justice Brennan hypothesized that the *Belton* reasoning could justify the warrantless search of a house as incident to the arrest of a suspect who had recently exited the house.[111] One commentator indicated that application of the *Belton* rule to arrests in homes, offices, and other locations could easily permit the search of the entire room in which the officers made the arrest.[112] Potentially, the courts might permit searches of items clearly beyond the reach of the arrestee as incident to arrest.[113] As the Supreme Court noted in *Chimel*, once the courts permit a search to go beyond the area from which the arrestee might obtain a weapon or evidence, no consideration relevant to the fourth amendment suggests any point of rational limitation of the scope of the search.[114] Both *Litman* and *Porter*, nonetheless, applied the *Belton* "bright line" rule to justify the warrantless searches in each case.[115] The Fourth Circuit's use of the *Belton* "bright line" reasoning

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107. *See id.*

108. *See id.* at 455, 460 & 462 (*Belton* Court consistently mentions that *Belton* decision deals with limited situation of search of automobile incident to arrest of automobile's occupants).

109. *See infra* notes 110-12 (discussion of problems in applying *Belton* bright line rule to non-automobile situations).

110. *See Belton*, 453 U.S. at 463-72 (Brennan, J., dissenting) (characterizing *Belton* as expanding permissible scope of search incident to arrest beyond reach of arrestee). *See generally* 2 W. LAFAVE, *supra* note 6, § 7.1 at 176-85 (Supp. 1984) (criticizing *Belton* as difficult to apply, unnecessary, and subject to abuse and manipulation); Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 583-97 (1982) (criticizing *Belton* generally for raising more issues than it answers); Note, *Expanding the Scope of a Search Incident to an Arrest: Efficiency at the Expense of Fourth Amendment Rights*—New York v. Belton, 31 DEPAUL L. REV. 581 (1982) (criticizing *Belton* for disregarding arrestee's privacy interests in containers and for undermining *Chimel* requirements of danger to police or evidence).

111. *See Belton*, 453 U.S. at 470 (Brennan, J., dissenting).

112. *See* Katz, *supra* note 108, at 593. Katz reasons that application of the *Belton* rule to non-automobile situations could invite reconsideration of *Chimel*'s reversal of *Rabinowitz* and *Harris* by allowing a warrantless search of an entire room incident to an arrest made in that room, even though some areas of the room are not actually within reach of the arrestee. *Id.*; *see supra* note 1 (discussion of *Harris* and *Rabinowitz* decisions).

113. *See supra* notes 108-110 (discussion of dangers of applying *Belton* to non-automobile situations).

114. *Chimel*, 395 U.S. at 766.

115. *See Litman*, 739 F.2d at 139 n.4 (Fourth Circuit used result of *Belton* bright line rule, which was that Belton's jacket was presumptively within Belton's reach because jacket was in automobile's passenger compartment, to justify holding that Litman had access to his shoulder-bag at time of search); *Porter*, 738 F.2d at 627 (Fourth Circuit cites to *Belton* for bright line

does not expand the scope of the searches in *Litman* and *Porter* because both cases are justifiable under *Chimel*.[116] Application of the *Belton* rule in non-automobile cases, however, sets a precedent for applying the *Belton* "bright line" reasoning in other non-automobile cases in which the search would be unreasonable under *Chimel*.[117]

The Fourth Circuit correctly upheld the warrantless searches in *Litman* and *Porter* as incident to arrest because the facts in each case satisfied the *Chimel* requirements of a lawful arrest and restriction of the scope of the search to the area within the arrestee's immediate control.[118] In reaching the holdings in *Litman* and *Porter*, the Fourth Circuit reasonably employed the *Belton* Court's rejection of a broad exclusive control theory in determining that the searched items were not in the exclusive control of the arresting officers at the time of the search.[119] The Fourth Circuit's application of the *Belton* "bright line" rule to situations not within the contemplation of the *Belton* Court, however, was inappropriate and expansionary.[120] As a result of the *Litman* and *Porter* decisions, the trend in the Fourth Circuit appears to be toward an expansion of the area which law enforcement officers may properly search incident to arrest through the use of "bright line" reasoning in cases outside the automobile context.[121]

D. *Federal Misapplication Statute: The Worthless Funds Doctrine and Determining What Constitutes Bank Funds under 18 U.S.C. Section 656*

Section 656 of title 18 of the United States Code makes criminal the embezzlement, abstraction, theft or willful misapplication of the funds of a federally-connected bank by its officers or employees.[1] Section 656 is designed

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rule that lawful custodial arrest justifies contemporaneous search of arrestee and area within arrestee's reach).

116. *See supra* notes 66-76 (analysis of *Litman* and *Porter* in context of meeting *Chimel* tests).

117. *See supra* notes 110-12 (discussion of implications of applying *Belton* to non-automobile situations).

118. *See supra* notes 66-76 (analysis of *Litman* and *Porter* in context of meeting *Chimel* tests).

119. *See supra* notes 94-103 (analysis of exclusive control theory and Fourth Circuit's rejection of that theory in *Litman* and *Porter*).

120. *See supra* notes 104-17 (analysis of Fourth Circuit's use of *Belton* "bright line" rule in *Litman* and *Porter*).

121. *See id.*

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1. *See* 18 U.S.C. § 656 (1982). § 656 of Title 18 provides:
Whoever being an officer, director, agent or employee of, or connected in any

to protect the assets of the Federal Deposit Insurance Corporation and all banks having a federal relationship[2] by protecting such banks from wrongdoing by their own servants.[3] The misapplication provision of section 656 is one of the federal government's primary weapons in attacking bank fraud.[4]

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capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Id.

2. *See* United States v. Arthur, 544 F.2d 730, 736 (4th Cir. 1976) (18 U.S.C. § 656 protects assets of F.D.I.C. and banks having a federal relationship). Banks that have a "federal relationship" under § 656 are national banks, Federal Reserve Banks, any bank or trust company that is a member of the Federal Reserve System, or any banking institution insured by the Federal Deposit Insurance Corporation. 18 U.S.C. § 656 (1982).

3. *See* Coffin v. United States, 162 U.S. 664, 669 (1896) (primary object of federal misapplication statute is to protect banks from their own servants). Congress enacted the original federal statute addressing misappropriation of funds by bank employees in 1864. *See* National Bank Act, § 5209, ch. 106, 13 Stat. 116 § 55 (1864). The National Bank Act of 1864 provides that:

every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle,abstract or willfully misapply any of the moneys, funds, or credits of the association . . . with intent . . . to injure or defraud the association of any other company . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than five years nor more than ten years.

National Bank Act, § 5209, ch. 106, 13 Stat. 116 § 55 (1864). Although the National Bank Act, for the most part, codified the common law, the crime of misapplication has no common law ancestry and was included in the statute to enlarge the common-law definition of embezzlment. *See* United States v. Krepps, 605 F.2d 101, 103 (3d Cir. 1979) (incorporation of misapplication in 1864 statute was intended to enlarge definition of embezzlement). In 1940, Congress revised the National Bank Act in § 592 of title 12 of the United States Code. *See* 18 U.S.C.A. § 656 (1976), Reviser's Note; *see also* O'Malley, *The Federal Criminal Liability of Bank Personnel Under the Misapplication Statute*, 99 BANKING L.J. 100, 103 n.15 (1982) (§ 592 revised National Bank Act). In 1948, Congress recodified the substance of the earlier federal misapplication statutes in § 656 of title 18 as part of a revision of the entire federal criminal code. *See* O'Malley, *supra*, at 103; *see also* 18 U.S.C.A. § 656 (1976), Reviser's Note. Section 656, however, did not change the meaning or substance of the existing law. *See* 18 U.S.C.A. § 656 (1976), Reviser's Note (Congress enacted revised § 656 to clarify existing law, not to modify it). Therefore, the cases decided under the earlier federal misapplication statute remain relevant. *Id.; see also* United States v. Adamson, 700 F.2d 953, 956 n.5, 957 (5th Cir.) (since § 656 was not intended to change existing law, old case law remains pertinent), *cert. denied*, 104 S. Ct. 116 (1983).

4. *See* O'Malley, *supra* note 3, at 102 (§ 656 is one of most commonly used means to control misappropriation of bank funds by bank employees).

The Third Circuit, in *United States v. Moraites*,[5] defined misapplication as the "unauthorized or unjustifiable or wrongful use of a bank's funds."[6] In *United States v. Kellerman*,[7] the Fourth Circuit addressed the issue of what constitutes bank funds under the misapplication provision of section 656.[8]

In *Kellerman*, the defendant, Fred M. Kellerman (Kellerman), former president of the Southwest Virginia National Bank (Bank),[9] authorized payment on several overdrafts on the checking account of Cowan Associated Mining Company, Inc. (Cowan).[10] By February of 1980, Cowan had accumulated overdrafts in excess of 90,000 dollars.[11] On February 20, 1980, Kellerman submitted a request to the Bank's Board of Directors for approval of a 170,000 dollar loan to Cowan to cover the overdrafts and other expenses.[12] As security for the proposed loan to Cowan, Kellerman presented to the Board of Directors a 165,000 dollar check drawn on N-S Corporation (N-S), a mining venture.[13] Kellerman told the Board of Directors that N-S had agreed to purchase Cowan's assets if a substantial reduction in Cowan's indebtedness was not made in ninety days.[14] Kellerman further stated that he would place the N-S check in an escrow account for the Bank.[15] However,

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5. 456 F.2d 435 (3d Cir.), *cert. denied*, 409 U.S. 891 (1972).

6. *Id.* at 441. The offense of misapplication of funds under § 656 has four essential elements. *See* United States v. Broome, 628 F.2d 403, 405 (5th Cir. 1980) (indictment alleging violation of § 656 must contain four essential elements of offense). The prosecution must show that the defendant is an officer, director, agent or employee of the bank, that the Federal Deposit Insurance Corporation insures the bank or the bank is a member of the Federal Reserve System, that the defendant willfully misapplied funds, money or credits belonging to or intrusted to the bank, and that the defendant committed the act with the intent to injure or defraud the bank. *See id.*; United States v. Duncan, 598 F.2d 839, 858 (4th Cir.) (government must prove four essential elements under § 656 to obtain conviction), *cert. denied*, 444 U.S. 871 (1979); United States v. Schoenhut, 576 F.2d 1010, 1024 (3d Cir.) (government must prove four essential elements under § 656 to obtain conviction), *cert. denied*, 439 U.S. 964 (1978).

7. 729 F.2d 281 (4th Cir. 1984).

8. *Id.* at 284-85. In *Kellerman*, the Fourth Circuit noted that the defendant clearly deceived the Bank's Board of Directors. *See id.* at 284 n.4. The court therefore stated that the only question for review was whether the check the defendant allegedly misapplied constituted "funds" of the Bank under § 656. *Id.*

9. Southwest Virginia National Bank has merged with the Dominion Bankshares Corporation and is presently Dominion Bank N.A., Bluefield. *See* Dominion Bankshares Corporation, 1981 Annual Report.

10. *See* 729 F.2d at 282.

11. *Id.*

12. *Id.* In *Kellerman*, Cowan applied to the Bank for a $170,000 loan to cover $90,000 of overdrafts on the Cowan checking account at the Bank and to provide capital for Cowan mining operations. *Id.* To secure this loan, Cowan was to assign its stock and coal reserves to the Bank. *Id.*

13. *Id.* The Board of Directors in *Kellerman* initially approved a proposed loan to Cowan, but the next day the Chairman of the Board requested that Kellerman call a special meeting to reevaluate the loan transaction. *Id.* After the Chairman of the Board requested the special meeting, Kellerman, with the assistance of the Bank's attorney, obtained a check from N-S Corporation. *Id.* Kellerman presented the N-S check at the special meeting as security for the Cowan loan. *Id.*

14. *Id.*

15. *Id.* In *Kellerman*, despite having told the Board of Directors he would place the N-S

an escrow letter from N-S to Cowan produced at trial stated that the N-S check was consideration for a coal lease Cowan owned in West Virginia and that the check was payable to "Southwest Virginia National Bank for Cowan."[16] The escrow letter further stated that the Bank should hold the check pending final negotiations and closing of the lease transaction between Cowan and N-S.[17]

The Bank's Board of Directors approved a ninety-day loan of 165,000 dollars to Cowan.[18] About the time that Cowan's ninety-day note matured, an N-S corporate officer telephoned Kellerman stating that N-S needed the check returned to begin a mining operation in Wise County, Virginia.[19] Kellerman then returned the check to N-S without the knowledge or consent of the Bank's Board of Directors.[20]

Kellerman subsequently was indicted on thirty-two counts of bank fraud arising out of a series of loans made while he was president of the Bank.[21] Count twenty-eight of the indictment charged that Kellerman's return of the N-S check constituted a violation of the misapplication provision of section 656.[22] In count twenty-eight, Kellerman was charged with misapplying the funds of the Bank and not with misapplying funds intrusted to the custody or care of the Bank.[23] The United States District Court for the Western District of Virginia found Kellerman guilty on count twenty-eight.[24] Keller-

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check in an escrow account for the Bank, Kellerman never placed the check in an escrow account. *Id.*

16. *Id.* In *Kellerman*, the evidence revealed that Cowan never owned a leasehold interest in the particular tract of West Virginia property described in the escrow letter. *Id.; see infra* note 17 (escrow letter from N-S to Cowan).

17. *Id.* The escrow letter from N-S to Cowan provided:

> This check [was] to be held by [Southwest Virginia National Bank] pending final negotiations and closing of transaction for prospective coal lease and related equipment which [Cowan] control[s] or will control in the near future.
>
> By copy of this letter, said bank is directed to deliver said check back to [Cowan] upon [Cowan's] assignment to [N-S Corporation] of a valid marketable leasehold estate of [Cowan's] property near Brewster-Dale [sic], McDowell County, West Virginia, free from any valid objections. *Id.*

18. *Id.*

19. *Id.; see also* Brief for Appellant at 8, United States v. Kellerman, 729 F.2d 281 (4th Cir. 1984).

20. *See* 729 F.2d at 282. In *Kellerman*, the N-S check was never negotiated, nor was the check or a copy thereof ever located. *Id.*

21. *Id.* at 283. In *Kellerman*, the government indicted the defendant on thirty-two counts of bank fraud. *Id.* Four courts were dismissed before trial, twenty-five were dismissed following the close of the government's case-in-chief, and Kellerman was acquitted of two counts after trial. *Id.* at 283 n.2. The Fourth Circuit reviewed only count twenty-eight of the indictment, which charged that Kellerman's return of the N-S check was a misapplication of bank funds. *See id.* at 283.

22. *Id.*

23. *Id.* at 284.

24. *See id.* at 283.

man moved for acquittal on the ground that the government had failed to prove that Kellerman had misapplied the Bank's funds.[25] The district court vacated its prior ruling and acquitted Kellerman.[26]

Although the district court found that Kellerman intentionally misrepresented to the Bank's Board of Directors that he had a "good check" as security for the Cowan loan,[27] the court concluded that Kellerman's actions did not violate section 656 because the N-S check was worthless.[28] The district court found that the N-S check was valueless because N-S never had sufficient funds to cover the check.[29] In addition, the district court reasoned that the N-S check was worthless because if the Bank had attempted to sue N-S to collect on the check, the Bank would have been subject to N-S's valid defense of lack of consideration.[30] The district court held that since valueless paper cannot be considered funds of a bank, Kellerman was not guilty of misapplying Bank funds when he returned the check to N-S.[31] The government appealed the district court's judgment of acquittal.[32]

On appeal, the Fourth Circuit affirmed the district court's acquittal of Kellerman.[33] The Fourth Circuit noted that Kellerman was indicted for misapplying funds of the Bank and not for misapplying funds intrusted to the custody or care of the Bank.[34] Therefore, the crucial issue in *Kellerman*

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25. *Id.*

26. United States v. Kellerman, 555 F. Supp. 843, 847 (W.D. Va. 1983), *aff'd*, 729 F.2d 281 (4th Cir. 1984).

27. *Id.* at 844.

28. *Id.* at 847.

29. *Id.*

30. *Id.* The district court in *Kellerman* found that the Bank was not a holder in due course, and therefore concluded that the Bank was subject to N-S Corporation's defense of lack of consideration. *Id.; see infra* note 53 (defining holder in due course).

31. *Id.*

32. 729 F.2d at 283. In *Kellerman*, the government appealed the district court's judgment of acquittal pursuant to 18 U.S.C. § 3731. *Id.;* Criminal Appeals Act of 1970, 18 U.S.C. § 3731 (1982) (United States may appeal district court judgment dismissing indictment unless double jeopardy clause prohibits further prosecution). Kellerman claimed that both the double jeopardy clause of the United States Constitution and § 3731 of title 18 prohibited the appeal of the district court's judgment of acquittal. *See* Brief for Appellee at 10, United States v. Kellerman, 729 F.2d 281 (4th Cir. 1984); *see also* Criminal Appeals Act of 1970, 18 U.S.C. § 3731 (1982); U.S. CONST. amend. V (no person shall "be subject for the same offense to be twice put in jeopardy of life or limb"). Section 3731 provides that there shall be no appeal in a criminal case when the double jeopardy clause of the United States Constitution prohibits an appeal. *See* 18 U.S.C. § 3731 (1982). The Fourth Circuit held that the government's appeal did not violate the double jeopardy clause because the government's success on appeal would not result in a new trial, but merely a reinstatement of the district court's prior ruling that Kellerman violated § 656. 729 F.2d at 283 n.3; *see* United States v. Morrison, 429 U.S. 1, 3-4 (1976) (government may appeal pursuant to 18 U.S.C. § 3731 because success on appeal would result in reinstatement of prior finding of guilt and not further factfinding on issue of defendant's guilt of innocence). Therefore, the Fourth Circuit concluded that it had jurisdiction pursuant to § 3731 to hear the government's appeal. 729 F.2d at 283.

33. 729 F.2d at 285.

34. *Id.* at 284. Section 656 makes criminal the misapplication of federal bank funds. *See*

was whether the check drawn on N-S Corporation constituted funds of the Bank within the meaning of section 656.[35] The Fourth Circuit held that the government had not proved beyond a reasonable doubt[36] that the check constituted bank funds.[37] The court stated that for the N-S check to have been of value to the Bank, [38] the Bank would have to have been a holder of the check as defined by section 8.1-201 (20) of the Virginia Code.[39] Section 8.1-201 (20) defines a holder as "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank."[40] The *Kellerman* court noted that the government produced no evidence and made no claim that the check was payable to bearer or that the payee line was left blank.[41] The escrow letter N-S Corporation sent to Cowan was the only evidence the government offered concerning the identity of the payee.[42] The court found that the government's evidence merely established that the Bank possessed the N-S check as an escrow agent, and was not sufficient to prove that the

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18 U.S.C. § 656 (1984). A separate clause in § 656 protects funds intrusted to the care of a federal bank. *Id.; see also* United States v. Rickert, 459 F.2d 352, 354 (5th Cir. 1972) (it is not necessary for misapplied funds to be bank property to obtain conviction under § 656 because statute also protects funds intrusted to care of bank).

35. *See* 729 F.2d at 284, 284 n.4.

36. *See In re* Winship, 397 U.S. 358, 364 (1970) (due process clause requires government to prove every element of criminal offense beyond reasonable doubt to sustain conviction). Since § 656 is a criminal statute, the government has the burden of proving every element of the offense beyond a reasonable doubt. *See id.; see also* Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (criminal statute which shifted burden to defendant to show that he acted in heat of passion did not satisfy due process requirement that prosecution prove beyond reasonable doubt every fact necessary to constitute crime charged); Powers v. Commonwealth, 211 Va. 386, 388, 177 S.E.2d 628, 629 (1970) (Commonwealth has burden to prove every element of offense beyond reasonable doubt).

37. 729 F.2d at 284, 285.

38. *Id.* at 284, 284 n.6. The Fourth Circuit in *Kellerman* implied that if the N-S check had value to the Bank, the check would constitute Bank funds. *Id.*

39. *Id.* at 284; *See* VA. CODE § 8.1-201(20) (1950) (defining holder as "a person who is in possession of a document of title or an instrument or investment security drawn, issued or endorsed to him or to his order or to bearer in blank").

40. VA. CODE § 8.1-201(20) (1950). The Uniform Commercial Code defines a holder as "a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." U.C.C. § 1-201(20) (1950). The definition of holder in the Virginia Commercial Code is identical to that of the U.C.C. except that the term "certificated" is not included to describe investment security in the Virginia definition. *See* VA. CODE § 8.1-201(20) (1950); *supra* note 39 (definition of "holder" under § 8.1-201(20) of the Virginia Code). However, § 8.1-201(20) of the Virginia Commercial Code recently has been amended to substitute "certificated investment security" for "investment security," making the Virginia definition of holder parallel the Uniform Commercial Code definition. *See* VA. CODE § 8.1-201(20) (1950). The amendment to § 8.1-201(20) of the Virginia Code is effective January 1, 1985. *Id.*

41. 729 F.2d at 284, 284 n.5, 6.

42. *Id.* at 285; *see* FED. R. EVID. 1004 (extrinsic evidence of content of writing is admissible if original is lost, destroyed, or not obtainable by judicial process or procedure).

Bank was the payee of the check.[43] Therefore, the Fourth Circuit concluded that since the government had not established beyond a reasonable doubt that the check was Bank funds, the government had failed to prove an element necessary to establish a violation of section 656.[44]

Addressing the dissent's claim that all feasible constructions of the endorsement[45] would have made the Bank a holder of the N-S check,[46] the *Kellerman* court stated that each endorsement the dissent proposed merely made the Bank an escrow agent with no rights in the check.[47] In addition, the Fourth Circuit held that even if the government had proven that the Bank was a holder, a misapplication of the check could not support a section 656 conviction because the check was a worthless instrument.[48] In support of its holding, the Fourth Circuit noted that the Supreme Court in *Batchelor v. United States*[49] held that no criminal misapplication of funds can occur if the funds allegedly misapplied are worthless.[50] The Fourth Circuit found that the N-S check was worthless because if the Bank had attempted to collect on the check, the Bank would have been subject to N-S's defense of lack of consideration and not entitled to payment.[51] The Fourth Circuit explained that since N-S never received an interest in Cowan's West Virginia property in return for its check, N-S had a valid defense of lack of consideration.[52]

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43. 729 F.2d at 285. In concluding that the government in *Kellerman* had failed to meet its evidentiary burden, the Fourth Circuit reasoned that the government had to prove beyond a reasonable doubt that the bank was the payee to show that the bank was a holder, which in turn would establish that the N-S check constituted Bank funds. *See id.* at 284, 284 n.6, 285; *see also supra* note 36 (discussing government's burden of proof in criminal case). The N-S check or a copy thereof was never located. *See* 729 F.2d at 282. At trial, the government did not inquire of any witness, including Kellerman, whether he or she knew the identity of the payee of the N-S check. *See id.* at 284 n.6. The Fourth Circuit concluded that the government had not satisfied its burden of proving that the Bank was a holder. *Id.* at 284 n.6, 285.

44. 729 F.2d at 285.

45. For purposes of this article, the term endorsement refers to the way N-S issued the check in *Kellerman*.

46. *See* 729 F.2d at 287 (Murnaghan, J., dissenting). Based on the escrow letter, the dissent in *Kellerman* stated that there are four plausible ways the N-S check could have been issued. *Id.* The four possibilities are (1) to "Southwest Virginia National Bank Escrow for Cowan Mining," (2) to "Southwest Virginia National Bank, Escrow Agent for Cowan Mining," (3) to "Southwest Virginia National Bank" with the notation, "for Cowan Mining Escrow Account," (4) to "Southwest Virginia National Bank and Cowan Mining." *Id.* These four possibilities account for all of the plausible ways the N-S check could have been issued. *Id.*

47. 729 F.2d at 285. In *Kellerman*, the majority and dissent disagreed over what is required to be a holder of a negotiable instrument under § 8.1-201(20) of the Virginia Code. *Id.* at 284 n.6, 287 n.5; *see* VA. CODE § 8.1-201(20) (1950) (defining holder as "a person who is in possession of a document of title or an instrument or investment security drawn, issued or indorsed to him or to his order or to bearer or in blank").

48. *See* 729 F.2d at 284 n.6, 285; *infra* notes 50-57 and accompanying text (explaining Fourth Circuit's finding in *Kellerman* that N-S check was worthless).

49. 156 U.S. 426 (1895); *see infra* notes 108-11 and accompanying text (discussion of *Batchelor v. United States*).

50. 156 U.S. at 431.

51. 729 F.2d at 285.

52. *Id.*

The defense of lack of consideration is a valid defense against anyone attempting to collect on a check except as against a holder in due course.[53] The court found, however, that the Bank was not a holder in due course.[54] Since N-S therefore possessed a valid defense to the check, the Fourth Circuit concluded that the N-S check was worthless to the Bank.[55] Furthermore, the court determined that the N-S check had no value to the Bank because N-S did not have sufficient funds in its account to cover the 165,000 dollar check form the time that the check was presented to the Board of Directors up until the time Kellerman returned the check.[56] The Fourth Circuit reasoned that both the lack of sufficient funds to cover the check and N-S Corporation's defense of lack of consideration rendered the check worthless.[57] Citing *Batchelor* as support, the Fourth circuit in *Kellerman* concluded that even if the N-S check constituted Bank funds, the defendant could not be held guilty of criminal misapplication under section 656.[58]

The dissent in *Kellerman* disagreed with the majority's holding that either N-S Corporation's defenses or the fact that N-S Corporation did not have sufficient funds to cover the check rendered the check worthless.[59] The dissent stated that N-S Corporation's defense of lack of consideration was only a potential defense because N-S had not yet asserted the defense.[60] The dissent emphasized that a check subject only to potential defenses has value to a holder until a court renders a final judgment in favor of the drawer.[61] The dissent also noted that N-S might have failed to assert the lack of consideration defense or that a court might have rejected the defense and found in favor of the Bank.[62] The dissent stated that an instrument has value

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53. *See* VA. CODE § 8.3-408 (1950) (want of consideration is defense against all persons not holding instrument in due course). Section 8.3-302(1) of the Virginia Code defines a holder in due course as ". . . a holder who takes the instrument for value; and in good faith; and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." *See id.* § 8.3-302(1) (1950).

54. *See* 729 F.2d at 284, 285. One must be a holder of a negotiable instrument to be a holder in due course. VA. CODE § 8.3-302(1) (1950). The *Kellerman* court determined that the Bank could not be a holder in due course because the Bank was an escrow agent and therefore not a holder. *See* 729 F.2d at 284, 285; *see supra* notes 42-43 and accompanying text (Fourth Circuit found that escrow letter established that Bank possessed N-S check as escrow agent).

55. *See* 729 F.2d at 285.

56. *Id.* at 284 n.6. The *Kellerman* court stated that even if the Bank was a holder of the N-S check and had attempted to cash the check, the drawee bank would have refused payment for insufficient funds. *Id.* The court therefore concluded that the N-S check was worthless. *Id.*

57. *See id.* at 284 n.6, 285; *see supra* notes 50-55 (*Kellerman* court found that N-S check was worthless instrument).

58. *See id.* at 284, 284 n.6, 285; *see also infra* notes 108-11 and accompanying text (discussion of *Batchelor*).

59. *See* 729 F.2d at 288, 288 n.10 (Murnaghan, J., dissenting).

60. *See id* at 288 n.10 (Murnaghan, J., dissenting).

61. *Id.; see* VA. CODE § 8.3-307 (1950) (presentment of negotiable instrument entitles holder to payment unless maker establishes defense); *see infra* notes 120-21 and accompanying text (explaining rights of holder of negotiable instrument).

62. 729 F.2d at 288 n.10 (Murnaghan, J., dissenting).

to its holder when such uncertainty exists as to the validity of a defense.[63] In addition, the dissent disagreed with the majority's claim that the check was worthless to the Bank because N-S Corporation did not have sufficient funds to cover the check.[64] The dissent stated that the Bank could have demanded satisfaction of the underlying obligation if payment was refused for insufficient funds, utilizing judicial process if necessary.[65] The dissent concluded that since the N-S check was not worthless to the Bank, the Fourth Circuit should have reinstated the district court's initial decision that Kellerman was guilty of misapplication of Bank funds.[66]

In determining whether the defendant in *Kellerman* violated section 656, the crucial factor is the government's wording of the indictment.[67] The government's indictment charged Kellerman with misapplying Bank funds and not with misapplying funds intrusted to the custody or care of the Bank.[68] The Bank in *Kellerman* was holding the N-S check in escrow.[69] Therefore, the N-S check constituted funds intrusted to the custody and care of the Bank and was protected from misapplication by section 656.[70] If the indictment in *Kellerman* had included the language of section 656 which protects funds intrusted to a federal bank, the question whether the N-S check constituted bank funds or intrusted funds would not have been at issue.[71]

Since the government failed to include the proper language in the indictment, the critical issue in *Kellerman* was whether the N-S check constituted Bank funds under section 656.[72] The Fourth Circuit's theory in *Kellerman* was that in order for a check to constitute bank funds under

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63. *Id.; see infra* notes 120-21 and accompanying text (explaining rights of holder of negotiable instrument).

64. 729 F.2d at 288 n.10 (Murnaghan, J., dissenting).

65. *Id.* at 288. When a check is given to satisfy an obligation, the obligation is suspended until the check is presented for payment. *See* VA. CODE § 8.3-802(1)(b) (1950). If the check is dishonored upon presentation, the obligee may sue either on the check or on the underlying obligation. *Id.*

66. 729 F.2d at 288-89 (Murnaghan, J., dissenting).

67. *See infra* notes 68-71 and accompanying text (discussing importance of government's failure to include in indictment language of § 656 that protects funds intrusted to care of federal bank).

68. 729 F.2d at 284; *see* 18 U.S.C. § 656 (1982); *supra* note 34 (describing funds that § 656 protects from misappropriation).

69. *See* 729 F.2d at 285 (government proved Bank was escrow agent). In *Kellerman*, the Bank was an escrow agent under each of the four alternative endorsements the dissent proposed. *See id.* at 284 n.6.

70. *See supra* note 34 (explaining that § 656 protects funds intrusted to care of federal banks from misappropriation); *see also* 18 U.S.C. § 656 (1984).

71. *See supra* text accompanying notes 69-70 (N-S check was entrusted to care of Bank in *Kellerman*); *supra* note 34 (explaining that § 656 protects funds intrusted to care of federal bank from misappropriation).

72. *See* 729 F.2d at 284, 284 n.4; *supra* text accompanying notes 68-71 (N-S check was intrusted to care of Bank in *Kellerman*, but government's indictment did not include language of § 656 which protects intrusted funds).

section 656, the bank must be a holder of the instrument allegedly misapplied.[73] Since section 656 is a criminal statute, the government had the burden of proving beyond a reasonable doubt each element of the offense.[74] Thus, the government in *Kellerman* had the burden of proving beyond a reasonable doubt that the Bank was a holder of the N-S check, which in turn would establish the necessary element that the check constituted Bank funds.[75] The court stated that the only evidence adduced at trial established that the Bank merely was an escrow agent and not a holder of the check.[76] The Fourth Circuit implicitly assumed that an escrow agent could not also be a holder.[77] Therefore, the *Kellerman* court reasoned that the government had not carried its burden of proving beyond a reasonable doubt that the N-S check was Bank funds.[78]

Although the Fourth Circuit's finding that the Bank was an escrow agent was correct, the court's assumption that an escrow agent cannot be a holder was not correct.[79] Section 8.1-201 (20) of the Virginia Commercial Code defines a holder as a person in possession of a check to whom it is drawn, issued or indorsed.[80] Any of the four possible endorsements of the N-S check proposed by the dissent would have made the Bank a holder of the check.[81] Under the first suggested endorsement, to "Southwest Virginia National Bank and Cowan Mining,"[82] the Bank clearly was a holder because a check

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73. *See* 729 F.2d at 284, 284 n.6, 285.

74. *See supra* note 36 (discussion of Supreme Court's *Winship* and *Mullaney* decisions prescribing constitutional requirements for government's burden of proof in criminal cases).

75. *See* 729 F.2d at 284 n.6.

76. *See id.* at 285 (escrow letter establishes that Bank in *Kellerman* only was escrow agent).

77. *See id.* at 284, 284 n.6, 285.

78. *Id.*

79. *See* Liebowitz v. Wright Properties, Inc., 427 So. 2d 783, 784-85 (Fla. Dist. Ct. App.) (real estate brokerage company was holder of instrument which brokerage company held as escrow agent), *pet. for rev. den.*, 440 So. 2d 352 (Fla. 1983). In *Liebowitz*, the Florida District Court of Appeals held that under § 671.201(20) of the Florida Commercial Code, a real estate company was a holder of a deposit check which the company held in escrow, and that the company had a holder's right of recourse when the purchaser stopped payment on the check. 427 So. 2d at 784-85. The definition of holder in § 671.201(20) of the Florida Commercial Code is identical to the definition of holder contained in § 8.1-201(20) of the Virginia Commercial Code. *Compare* FLA. STAT. § 671.201(20) (1966) (defining holder as "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or endorsed to him or to his order or to bearer or in blank") *with* VA. CODE § 8.1-201(20), *supra* note 39 (same). The *Kellerman* court incorrectly assumed that an escrow agent cannot be a holder under § 8.1-201(20) of the Virginia Code. *See infra* notes 80-91 and accompanying text (demonstrating that Bank in *Kellerman* was holder of N-S check as well as escrow agent).

80. *See* VA. CODE § 8.1-201(20) (1950) (definition of "holder"); *supra* note 39 (text of § 8.1-201(20)).

81. *See supra* note 46 (stating *Kellerman* dissent's four proposed ways in which N-S check could have been issued); *see also infra* notes 83-93 and accompanying text (Bank in *Kellerman* was holder of N-S check as well as escrow agent).

82. 729 F.2d at 287 (Murnaghan, J., dissenting).

issued in this manner would make the Bank and Cowan joint payees.[83] Either one or both of the payees in possession of an instrument issued in this manner would satisfy the definition of holder under section 8.1-201 (20) of the Virginia Code.[84] Since the Bank was in possession of the N-S check and the check was issued to the Bank, the Bank was a section 8.1-201 (20) holder under the first suggested endorsement.[85]

The three other possible endorsements the dissent proposed were to "Southwest Virginia National Bank Escrow for Cowan Mining," to "Southwest Virginia National Bank, Escrow Agent for Cowan Mining," and to "Southwest Virginia National Bank" with the notation, "for Cowan Mining Escrow Account."[86] In all three of these possibilities, the N-S check would have been issued to the Bank with additional words describing the Bank as an escrow agent.[87] Section 8.3-117 (b) of the Virginia Code provides that "an instrument made payable to a named person[88] with the addition of words describing him as . . . [a] fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him."[89] Since an escrow agent is a fiduciary,[90] the remaining three ways in which the N-S check could have been issued come within the provisions of section 8.3-117 (b).[91] The Bank thus had the status, rights, powers and duties

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83. *See* VA. CODE § 8.3-116(b) (1950) (instrument payable to more than one person and not in alternative is payable to all such persons as joint payees); *see also* L.B. Smith, Inc. v. Bankers Trust Co. of Western N.Y., 80 A.D.2d 496, 496, 439 N.Y.S.2d 543, 543-44 (1981) (check payable to "A and B" creates joint payees and requires endorsement of both parties before bank properly may honor check under U.C.C. § 3-116).

84. *See* VA. CODE § 8.1-201(20) (1950) (definition of "holder"); *supra* note 39 (definition of "holder" under § 8.1-201(20) of the Virginia Code). In *Kellerman*, the bank was a holder of the N-S check if the check was made payable to "Southwest Virginia National Bank and Cowan Mining," because the Bank was in possession of an instrument issued to it as the definition of holder requires. 729 F.2d at 287.

85. *See* VA. CODE § 8.1-201(20) (1950) (definition of "holder"); *supra* note 39 (definition of "holder").

86. *See* 729 F.2d at 287 (Murnaghan, J., dissenting); *see also supra* note 46 (stating *Kellerman* dissent's four proposed ways in which N-S check could have been issued).

87. *See* 729 F.2d at 287 (Murnaghan, J., dissenting); *see also supra* note 46 (stating *Kellerman* dissent's four proposed ways in which N-S check could have been issued).

88. *See* VA. CODE § 8.1-201(30) (1950). In the Virginia Commercial Code, the word "person" includes "an individual or an organization." *Id.* The term "organization" includes "a corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, or any other legal or commercial entity." *Id.* § 8.2-201(28). The Bank in *Kellerman*, as a corporation, was a person under the Virginia Commercial Code. *See id.* § 8.1-201(28), (30).

89. *See* VA. CODE § 8.3-117(b) (1950).

90. *See* Buffington v. Title Ins. Co. of Mn., 26 Ariz. App. 97, ____, 546 P.2d 366, 368 (1976) (escrow agent is fiduciary and may act only within terms of escrow agreement); *see also* Delson Lumber Co. v. Washington Escrow Co., 16 Wash. App. 546, 550, 558 P.2d 832, 834 (1976) (escrow agent owes same duty of fidelity that agent or trustee owes to its principal).

91. *See* VA. CODE § 8.3-117(b) (1950). Section 8.3-117(b) details the legal consequences that result when a maker issues a check to a named person and includes additional words describing the payee as a fiduciary for a specific person or purpose. *See id.* If the N-S check was issued to "Southwest Virginia National Bank Escrow for Cowan Mining," "Southwest

of a fiduciary under section 8.3-117 (b).[92] Since a section 8.3-117 (b) fiduciary is a holder,[93] the Bank would have been a holder under the remaining three plausible ways the N-S check could have been issued. Therefore, while the *Kellerman* majority correctly found that the Bank was an escrow agent, the court's assumption that an escrow agent cannot be a holder was incorrect because in *Kellerman* the Bank was both an escrow agent and a holder.[94]

Although the Bank in *Kellerman* was a holder of the N-S check, the instrument did not constitute Bank funds because the Bank had no proprietary interest in the check.[95] The "holder test" that the *Kellerman* court applied to determine if the N-S check was Bank funds was an inadequate means of resolving the issue.[96] The shortcomings of the holder test are demonstrated in *Kellerman*. As an escrow agent, the Bank in *Kellerman* was merely a conduit and had only those powers that the escrow agreement explicitly granted.[97] Thus, while the Bank was a holder of the N-S check, the Bank could not legally negotiate, transfer, or release the instrument unless the escrow agreement granted such authority.[98] Most importantly, the

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Virginia National Bank, Escrow Agent for Cowan Mining," or "Southwest Virginia National Bank" with the notation, "for Cowan Mining Escrow Account," then the check comes within the terms of § 8.3-117(b) of the Virginia Code. *Id.* In each of the three endorsements the N-S check is issued to the Bank. The Bank is a "person" under the Virginia Code. *See supra* note 88 (definition of "person" in § 8.1-201(30) of Virginia Code). Each endorsement describes the Bank as an escrow agent for Cowan Mining. An escrow agent is a fiduciary. *See supra* note 90. Cowan Mining is a "person" under the Virginia Code. *See supra* note 88 (definition of "person" in § 8.1-201(30) of Virginia Code. Therefore, in all three of these possible endorsements the N-S check is issued to a named person with additional words describing "him" as a fiduciary for a specified person and thus the three endorsements come within the terms of § 8.3-117(b) of the Virginia Code. *See* VA. CODE § 8.3-117(b) (1950).

92. *See* VA. CODE § 8.3-117(b) (1950).

93. *See* Maplewood Bank & Trust Co. v. F.I.B., Inc., 142 N.J. Super. 480, 483-84, 19 U.C.C. Rep. Serv. (Callaghan) 1164, 1165-66 (1976) (court held that Biscamp was payee and holder of check made out to "Robert Biscamp Atty. for F.I.B."). The *Maplewood Bank* court held that a check issued to "Robert Biscamp Atty. for F.I.B." came within the terms of § 12A:3-117(b) of the New Jersey Code. *Id.* at 484; N.J. REV. STAT. § 12A:3-117(b) (1962). Therefore, the court concluded that Robert Biscamp was the payee and holder of the instrument. 142 N.J. Super. at 484. Section 12A:3-117(b) of the New Jersey Code is identical to § 8.3-117(b) of the Virginia Code. *Compare* N.J. REV. STAT. § 12A:3-117(b) (1962) ("an instrument made payable to a named person with the addition of words describing him . . . as [a] fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him") *with* VA. CODE § 8.3-117(b) (1950) (same).

94. *See* 729 F.2d at 285; *supra* notes 80-93 and accompanying text (Bank in *Kellerman* was holder of N-S check as well as escrow agent).

95. *See infra* notes 98-103 and accompanying text (holding N-S check in escrow gave Bank in *Kellerman* no ownership rights in check and therefore N-S check was not Bank funds).

96. *See infra* notes 97-102 and accompanying text (use of holder test in *Kellerman* was inadequate test to determine whether N-S check was Bank funds).

97. *See* Marathon U.S. Realties, Inc. v. Kalb, 244 Ga. 390, 392, 260 S.E.2d 85, 87 (1979) (escrow agent's powers are limited to those set out in escrow agreement); *see also* Tamburine v. Center Savings Assn., 583 S.W.2d 942, 949 (Tex. Civ. App. 1979) (powers of escrow agent are strictly limited to those powers granted in escrow agreement).

98. *see* Amen v. Merced County Title Co., 25 Cal. Rptr. 65, 67, 375 P.2d 33, 35 (1962)

Bank could not legally cash the N-S check for its own benefit.[99] If the Bank had cashed the check for its own benefit, the Bank would have been liable for criminal embezzlement and breach of fiduciary duty.[100] In short, the N-S check had no value to the Bank in *Kellerman* because the Bank possessed no ownership rights in the instrument.[101] The fact that a check the Bank held in escrow could constitute bank funds under the holder test, when the bank had no proprietary interest in the check, demonstrates the inadequacy of the holder test.[102]

To determine if the N-S check constituted bank funds, the Fourth Circuit in *Kellerman* should have concentrated on the Bank's ownership rights in the check, rather than the Bank's status as a holder of the instrument. Under such an ownership analysis, the majority's conclusion that the N-S check did not constitute funds of the Bank would be correct, because as an escrow agent the Bank's rights in the N-S check were not proprietary.[103] Thus, the *Kellerman* court's conclusion that the N-S check did not constitute bank funds, unlike its analysis in reaching the conclusion, was sound.[104]

As an alternative ground for affirming the district court's acquittal of the defendant in *Kellerman*, the Fourth Circuit stated that even if the government had proved that the N-S check constituted funds of the Bank, Kellerman would not be guilty of criminal misapplication because the check was worthless paper.[105] *Batchelor v. United States* is the seminal case ad-

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(escrow agent must strictly comply with escrow agreement); *see also* Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, ____, 259 P.2d 554, 557 (1953) (escrow agent must act in strict accordance with terms of escrow agreement).

99. *See* Casolaro v. Blau, 158 N.Y.S.2d 589, 593, 4 Misc. 2d 206, 210 (1956) (escrow agent has no personal interest other than to make payments pursuant to terms of escrow agreement). An escrow agent's application of escrow funds for personal use constitutes a breach of fiduciary duty and criminal embezzlement. Hildebrand v. Beck, 196 Cal. 141, ____, 236 P. 301, 303 (1925).

100. *See* Hildebrand v. Beck, 196 Cal. 141, ____, 236 P. 301, 303 (1925) (application of escrow funds for own purposes constitutes breach of fiduciary duty and criminal embezzlement).

101. *See supra* notes 97-100 and accompanying text (Bank in *Kellerman* had no ownership rights in N-S check).

102. *Id.* Although the Bank in *Kellerman* had no ownership rights in the N-S check, the Bank was a holder of the check. *Id.; see supra* notes 83-93 and accompanying text (Bank in *Kellerman* was holder of N-S check as well as escrow agent). Since the Bank was a holder, the N-S check constituted funds of the Bank under the holder test. *See supra* note 43 (*Kellerman* court stated that government had to prove Bank was holder of N-S check to establish that check was Bank funds).

103. *See supra* notes 97-101 and accompanying text (escrow agent's rights in escrow funds are not proprietary).

104. *See supra* notes 97-103 and accompanying text (N-S check did not constitute Bank funds in *Kellerman*).

105. 729 F.2d at 284 n.6, 285. The Fourth Circuit in *Kellerman* utilized the worthless funds doctrine as an alternative ground for holding that Kellerman was not guilty of misapplication of Bank funds. *Id.* Although the *Kellerman* court held that the N-S check did not constitute Bank funds, the majority assumed *arguendo* in its worthless funds analysis that the government had demonstrated that the N-S check was security for the Cowan loan. *Id.* Therefore, the Fourth Circuit's worthless funds analysis proceeded under the assumption that the N-S check was Bank funds. *Id.*

dressing the issue of whether the misappropriation of worthless funds can constitute criminal misapplication.[106] The Fourth Circuit read too broadly the Supreme Court's holding in *Batchelor*.[107] The reasoning in *Batchelor* for exempting the misapplication of worthless notes from the purview of section 656 does not support the majority's holding in *Kellerman*.[108] In *Batchelor*, a bank president allowed John Batchelor to substitute an unsecured note in satisfaction of an earlier note.[109] The Supreme Court held that since Batchelor was insolvent, the first note was worthless to the bank.[110] The action of the bank president in *Batchelor* therefore amounted to a substitution of a worthless note for one equally worthless.[111] Since the transaction did not deplete the Bank's funds, the Court held that the transaction did not violate the federal misapplication statute.[112]

The Fourth Circuit applied the worthless funds doctrine in *Cooper v. United States*.[113] In *Cooper*, a bank official was indicted under the misapplication statute for trading an unsecured note for an equally unsecured debt.[114] The Fourth Circuit followed the reasoning of *Batchelor* and stated that before criminal misapplication can occur, the bank must suffer some financial loss.[115] The *Cooper* court concluded that the substitution of worthless funds for equally worthless funds did not constitute a financial loss and therefore

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106. *See* Batchelor v. United States, 156 U.S. 426, 431 (1895).

107. *Id.*

108. *See infra* notes 108-32 and accompanying text (Fourth Circuit incorrectly applied worthless funds doctrine in *Kellerman*).

109. 156 U.S. at 431. In *Batchelor*, the defendant, Harry F. Batchelor, was the president and a director of a national banking association. *Id.* at 427. The indictment in *Batchelor* alleged that the defendant substituted unsecured notes to cancel the indebtedness of John Batchelor, whom the defendant knew to be insolvent. *Id.* at 431.

110. *Id.*

111. *Id.*

112. *See id.* The United States Supreme court refined the worthless funds doctrine in *Coffin v. United States*. *See* 162 U.S. 664 (1896). In *Coffin*, the defendant was charged with aiding and abetting the misapplication of bank funds. *Id.* at 665. Although the Supreme Court found that the worthless funds doctrine did not apply in *Coffin*, the Court stated that the mere renewal of a worthless note, when the renewal does not in any way deplete bank funds, is not a criminal misapplication of funds. *Id.* at 676-77.

113. 13 F.2d 16 (4th Cir. 1926).

114. *See id.* at 19. In *Cooper v. United States*, the president of a national bank was indicted for misapplying bank funds. *Id.* at 17. The trial court instructed the jury that substituting a worthless note to discount equally unsecured debt constituted criminal misapplication of funds. *Id.* at 18. The jury found the defendant guilty of misapplication of bank funds. *Id.* at 17. Finding the jury instructions erroneous, the Fourth Circuit reversed the judgment of the trial court and remanded the case for a new trial. *Id.* at 19. The Fourth circuit stated that no criminal misapplication of bank funds can occur unless the bank suffers a financial loss. *Id.* at 18, 19. The *Cooper* court further stated that substituting a worthless note for a note equally worthless does not constitute a financial loss. *Id.*

115. *Compare id.* at 18 *with* Batchelor v. United States, 156 U.S. at 431. The *Cooper* court stated that if the bank was not in a less desirable position after the alleged misapplication of funds than it was before the transaction took place, then the misapplication statute had not been violated. *Id.* at 19.

found that Cooper's action was not a misapplication of bank funds.[116]

In light of the *Batchelor* worthless funds doctrine, criminal misapplication under section 656 requires more than a renewal of worthless paper or the substitution of a worthless note for a note equally worthless.[117] A bank official is not guilty of criminal misapplication unless the bank loses control, possession, or the benefit of bank funds or funds intrusted to the bank.[118] In *Batchelor*, the bank official's actions did not, even temporarily, place the bank in a less desirable financial position.[119] In contrast, the action of Kellerman in returning the N-S check did put the Bank in a less desirable financial position because the check was not worthless paper. As the dissent observed, the mere fact that N-S had a potential defense to the check did not make the check valueless.[120]

A potential defense to payment relieves a drawer of his obligation to pay only when the drawer asserts his defense and a judicial body of competent jurisdiction accepts the defense as terminating the obligation.[121] Until a drawer establishes a defense to an instrument, the instrument represents an obligation to pay a sum to the holder on demand.[122] At the time Kellerman returned the N-S check, it was not known whether N-S would assert its defense if the Bank cashed the check, or whether a court would accept the defense if asserted.[123] Therefore, N-S Corporation's potential defense to the N-S check did not render the check worthless to the Bank.[124]

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116. *Id.* at 18, 19; *see also* Batchelor v. United States, 156 U.S. 426, 431 (1895) (substitution of worthless notes for notes equally worthless is not misapplication of funds because bank incurs no loss).

117. *See supra* notes 108-15 and accompanying text (discussing worthless funds doctrine); *see also* United States v. Michael, 456 F. Supp. 335, 340 (D.N.J. 1978) (summarizing worthless funds doctrine).

118. *See* 456 F. Supp. at 340 (misapplication conviction cannot stand unless bank loses control or possession of its moneys, funds or credits).

119. *See* Batchelor v. United States, 156 U.S. 426, 431 (1895). The bank in *Batchelor* was in an equally secured, or unsecured, position both before and after the alleged misapplication of funds. *Id.*

120. *See* 729 F.2d at 288 n.10 (Murnaghan, J., dissenting).

121. *See* VA. CODE § 8.3-307 (1950) (maker of instrument has burden of establishing defense to negotiate instrument). Presentment of a negotiable instrument entitles a holder to payment unless the maker establishes a defense. *Id.* The maker has the burden of clearly proving his defense. Catron v. Bostic, 123 Va. 355, 372, 96 S.E. 845, 850 (1918).

122. *See* VA. CODE § 8.3-307 (1950) (presentment entitles holder to payment unless maker establishes defense); *see also* VA. CODE § 8.3-108 (1950) (instruments are payable on demand when no time for payment is stated).

123. *See* 729 F.2d at 288 (Murnaghan, J., dissenting).

124. *See supra* notes 120-22 and accompanying text (holder is entitled to payment if maker does not establish defense by preponderance of evidence). In *Kellerman*, at the time the defendant returned the N-S check, N-S Corporation had no asserted a defense to payment of the instrument. *See* 729 F.2d at 282, 288 n.10. Assuming that the N-S check was collateral for the Cowan loan, the Bank had the legal right to cash the check upon Cowan's default. *See* 6 MICHIE ON BANKS AND BANKING Ch. 11, § 7 (rev. perm. ed. 1975) (bank can satisfy obligation from collateral if borrower defaults on loan). Therefore, at the time Kellerman returned the N-S check, the check had value to the Bank until N-S established a defense to the instrument. *See* VA. CODE § 8.3-307 (1950). The fact that N-S had a potential defense to the check did not

To further support its assertion that the N-S check was worthless paper, the *Kellerman* court stated that because N-S never had sufficient funds in its account to cover the $165,000 check, the N-S check had no value to the Bank.[125] The Fourth Circuit, however, incorrectly assumed that a check drawn on insufficient funds has no value to its holder. When a drawer issues a check to satisfy an obligation, the obligation is suspended until the payee presents the check for payment.[126] If the check is dishonored upon presentment, the obligee may sue either on the check or on the underlying obligation.[127] Assuming *arguendo*, as the *Kellerman* court does in its worthless funds analysis, that the N-S check was security for the Cowan loan, N-S had an obligation to the Bank.[128] When Cowan failed to pay its note, the Bank had the legal right to cash the N-S check.[129] If payment on the N-S check was refused due to insufficient funds, the Bank could have maintained an action on the check.[130] Therefore, the N-S check was not worthless to the Bank even if N-S did not have sufficient funds to cover the check.[131]

Given that the N-S check was not worthless paper, the Fourth Circuit in *Kellerman* should not have applied the worthless funds doctrine. Assuming that the N-S check was collateral for the Cowan loan, the Bank had valuable security for the loan before Kellerman returned the check.[132] After Kellerman returned the N-S check, the Bank was left holding an unsecured note. Thus, the Bank in *Kellerman* suffered a financial loss. Since the worthless funds doctrine is only applicable when a bank has suffered no financial loss, the Fourth Circuit incorrectly applied the doctrine in *Kellerman*.[133]

In *United States v. Kellerman*, the Fourth circuit found that the Bank

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render the check worthless to the Bank. *Id.; see supra* notes 60-63 and accompanying text (*Kellerman* dissent's argument that N-S defense to check did not render check worthless).

125. 729 F.2d at 284 n.6.

126. *See* VA. CODE § 8.3-802(1)(b) (1950) (instrument given for underlying obligation suspends obligation until instrument is due or until presented if payable on demand).

127. *See id.* (obligee may maintain action on instrument or obligation when check given to satisfy underlying obligation is dishonored).

128. *See supra* note 105 (Fourth Circuit's worthless funds analysis in *Kellerman* proceeds under assumption that N-S check was security for Cowan loan and therefore constituted Bank funds).

129. *See* 6 MICHIE ON BANKS AND BANKING Ch. 11, § 7 (rev. perm. ed. 1975) (bank can satisfy obligation from collateral if borrower defaults on loan).

130. *See* VA. CODE § 8.3-802(1)(b) (1950) (obligee may maintain action either on instrument or underlying obligation when check given to satisfy obligation is dishonored).

131. *See supra* notes 125-29 and accompanying text (N-S check was not worthless to Bank in *Kellerman* merely because N-S did not have sufficient funds in its account to cover check).

132. *See supra* notes 119-29 and accompanying text (N-S check was not worthless to Bank in *Kellerman*).

133. *See* Coffin v. United States, 162 U.S. 664, 677-78 (1896) (transactions that do not deplete funds of bank are not criminal misapplications); Batchelor v. United States, 156 U.S. 426, 431 (1895) (substitution of worthless notes for notes equally worthless is not misapplication of funds because bank incurred no loss); Cooper v. United States, 13 F.2d 16, 18 (4th Cir. 1926) (no criminal misapplication occurs unless some financial loss to bank results); United States v. Michael, 456 F. Supp. 335, 342 (1978) (bank official's action does not constitute misapplication of bank funds unless some detriment to bank occurs).

was not a holder of the check that the defendant allegedly misapplied, and therefore held that the check did not constitute Bank funds under section 656.[134] Although the Fourth Circuit incorrectly used a holder test to determine whether the N-S check constituted Bank funds, the court properly held that the check was not funds of the Bank.[135] The *Kellerman* court, therefore, correctly affirmed the district court's judgment of acquittal.[136] However, since the check was not worthless to the Bank, the Fourth Circuit incorrectly applied the worthless funds doctrine as an alternative basis for holding that Kellerman had not violated section 656.[137] In its worthless fund analysis, the *Kellerman* court expands the worthless funds doctrine beyond its intended scope.[138] Since the government worded the indictment in *Kellerman* too narrowly,[139] however, the Fourth Circuit's analysis and decision on the issue of whether the check in question constituted Bank funds will have little precedential value in future actions brought under the federal misapplication statute. Unless the government neglects to include in its indictment language concerning funds intrusted to the bank, the issue of whether the funds in question are bank funds or intrusted funds will be of no importance in future section 656 actions.[140]

JAMES R. LANCE

E. *Untimely Government Motion to Rehear Criminal Appeal: Is the Delay Allowable Under the Speedy Trial Act?*

Congress enacted the Speedy Trial Act[1] (the Act) to impose a statute of limitations on delay between accusation[2] and trial of federal criminal defend-

134. *See* 729 F.2d at 284, 284 n.6, 285; *supra* note 43 (N-S check did not constitute Bank funds because Bank in *Kellerman* was not holder of check).

135. *See supra* notes 96-103 and accompanying text (holder test is inadequate but *Kellerman* court correctly concluded that N-S check did not constitute Bank funds).

136. *See* 729 F.2d at 284, 284 n.4 (government could not obtain conviction of defendant in *Kellerman* unless government established that N-S check constituted bank funds).

137. *See supra* notes 119-32 and accompanying text (worthless funds doctrine was not applicable in *Kellerman* because N-S check was not worthless to Bank).

138. *See supra* notes 131-32 and accompanying text (reasoning of worthless funds doctrine does not support application of doctrine in *Kellerman*).

139. *See supra* notes 68-71 and accompanying text (issue whether N-S check constituted Bank funds in *Kellerman* was important only because government failed to include in indictment language charging defendant with misapplication of funds intrusted to Bank).

140. *Id.*

1. 18 U.S.C. §§ 3161-3174 (1982).

2. "Accusation" refers to the formal charge against a person to the effect that he is

ants.[3] Congress limited the permissible period for pretrial delay to protect the public interest in swift conviction of offenders[4] and to codify the right of a defendant to a speedy trial under the sixth amendment.[5] The Act

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guilty of a punishable offense. *See* BLACK'S LAW DICTIONARY 11 (5th ed. 1979). The Supreme Court has determined that a suspect becomes "accused" for purpose of the sixth amendment right to a speedy trial at the time of indictment or arrest. *See* Dillingham v. United States, 423 U.S. 64, 65 (1975) (per curiam) (arrest); United States v. Marion, 404 U.S. 307, 313, 325 (1971) (indictment). The sixth amendment specifically states that the "accused" in a criminal prosecution shall enjoy the right to a speedy trial. U.S. CONST. amend. VI. The Supreme Court developed a balancing test to measure post-accusation delay in *Barker v. Wingo*. *See* 407 U.S. 514, 530 (1972); *infra* note 5 (discussing application of balancing test in *Barker*); *see also* Note, *Misapplication of the Constitutional Right to a Speedy Trial*, 38 WASH. & LEE L. REV. 563, 578-98 (1981) (discussion of Fourth Circuit decision applying the sixth amendment right to a speedy trial).

3. *See* 18 U.S.C. § 3161(a)-(h) (1982) (establishing time limits for delay). Congress asked district courts to implement the Speedy Trial Act over a four-year period beginning in 1974 and to develop docket management systems to meet the time standards of the Act. *See* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 11-23 (1980). In enacting the Speedy Trial Act, Congress intended to alleviate public concern over crime, especially crime attributed to criminal defendants who were released awaiting trial. *See* H.R. REP. No. 1508, 93rd Cong., 2d Sess. 1, 8, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7401, 7402 [hereinafter cited as *1974 House Report*]. The Speedy Trial Act also responded to the Supreme Court's holding in *Barker v. Wingo* that determination of a uniform time period for a speedy trial under the Sixth Amendment is a legislative function. *See* 407 U.S. 514, 523 (1972). In 1979, Congress enacted revisions to the Act to require a minimum thirty-day preparation period between accusation and trial, to modify the Act's statutes of limitation, and to provide for additional delay periods in which the court and prosecution could toll the running of the Act's time limits. *See* Speedy Trial Act Amendments of 1979, H.R. REP. No. 390, 96th Cong., 1st Sess. 1-2, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 805, 806; *see also* Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 HASTINGS L.J. 635, 635-41 (1981) (comparing intent of 1974 Act's sponsors with effect of 1979 amendments).

4. *See 1974 House Report, supra* note 3, at 15-16, 7408-09 (taxpayer bears costs of pretrial detention for defendant, and released defendant may pose danger to the community); PARTRIDGE, *supra* note 3, at 11 (purpose of Act is to reduce high recidivism among defendants released awaiting trial). The Act legislated the concept that the public enjoys a right to a defendant's speedy trial independent of the defendant's Sixth Amendment right. *1974 House Report* at 15-16, 7408-09; *cf.* Project, *The Speedy Trial Act: An Empirical Study*, 47 FORDHAM L. REV. 713, 716-17 (1979) (tracing historical sources of public's right to speedy trial of defendants). Proponents of the Act argued that speedy trials were necessary for adequate operation of the criminal justice system. *1974 House Report* at 15-16, 7408-09; *see* Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY, 50, 51 (1982) (discussing address to Congress emphasizing anti-crime purposes of the Act); *see also* Barker v. Wingo, 407 U.S. 514, 519 n.8 (1972) (citing research showing 70.1% of persons arrested in Washington, D.C. in 1968 for robbery who were released on bail were rearrested before trial). The Act places the burden of efficient prosecution on courts and prosecutors. *See* Bridges, *supra*, at 58-60 (discussing duties imposed on courts and prosecution, and measuring prosecutorial performance in certain courts); *cf.* 18 U.S.C. § 3161(h)(8)(C) (1982) (court congestion, lack of preparation by prosecution, and prosecutorial failure to obtain available witness shall not be grounds for delay beyond Act's limitation period).

5. *1974 House Report, supra* note 3, at 1, 7401; *see supra* note 2 (defendant's speedy trial rights attach upon arrest or indictment); *see also* Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 706-07 (1976) (discussing sixth amendment speedy trial dimensions of Act). In *Barker v. Wingo*, the Supreme Court implemented a four-part balancing test to

determine whether a prosecutor has violated the defendant's Sixth Amendment right to a speedy trial. *See* 407 U.S. 514, 530 (1972). The *Barker* court stated that, in evaluating whether a sixth amendment violation has occurred, a court should consider the length of pretrial delay, the validity of the government's reasons for delay, the timeliness of the defendant's assertion of speedy trial right, and the prejudice accruing to the defendant as a result of delay. *See id.* at 530-32. In *Barker*, the court determined that the purposes of the sixth amendment speedy trial clause are to protect the defendant from enforced idleness, scorn and suspicion resulting from pretrial incarceration, to prevent needless anxiety on the part of defendant, his or her family and friends, and to insure that delay will not hamper the defendant's ability to mount a defense. *Id.* at 532-33. *See 1974 House Report, supra* note 3, at 15, 7408 (due process dictates that courts try defendant without undue haste or delay). The Supreme Court noted in *United States v. MacDonald* that Congress enacted the Act to protect defendant's sixth amendment speedy trial rights. *See* 456 U.S. 1, 7 n.7 (1982).

The Act specifically provides that the government's compliance with the provisions of the Act will not bar a defendant's claim for denial of sixth amendment speedy trial rights. 18 U.S.C. § 3173 (1982); *see* United States v. Herman, 576 F.2d 1139, 1144 n.3 (5th Cir. 1978) (compliance with the Act's time limits does not preclude claim by defendant for denial of sixth amendment rights). In contrast to the jurisprudential balancing test of *Barker*, the Act measures prejudice to defendants' speedy trial rights solely in terms of delay. *See* United States v. Mehrmanesh, 652 F.2d 766, 769-70 (9th Cir. 1980); *see id.* at 769-770 (Congress enacted Act out of dissatisfaction with sixth amendment jurisprudence and to revive defendants' speedy trial rights); *cf. 1974 House Report, supra* note 3, at 12, 7405 (*Barker* test is neutral in effect, provides no guidance regarding sixth amendment rights of defendants, and reinforces the practice of delay by courts and prosecutors). *But see* Barker v. Wingo, 407 U.S. at 530 (length of delay alone may be grounds for dismissal of charges).

In contrast to the rigid limits on delay under the Act, courts have adopted a wide range of time limits in determining whether pretrial delay violates a defendant's constitutional speedy trial right. *See, e.g.*, United States v. Nance, 666 F.2d 353, 360-61 (9th Cir.) (five-month delay did not violate defendant's sixth amendment right), *cert. denied*, 456 U.S. 918 (1982); United States v. Rich, 589 F.2d 1025, 1033 (10th Cir. 1978) (nine-month delay did not trigger *Barker* analysis of whether delay prejudiced defendant's sixth amendment rights); United States v. Rankin, 572 F.2d 505 (5th Cir.) (seven-month delay did not trigger *Barker* analysis), *cert. denied*, 439 U.S. 979 (1978); United States v. Garcia, 553 F.2d 432, 432 (5th Cir. 1977) (one-year delay did not violate defendant's sixth amendment rights under *Barker* analysis); Brady v. Superintendent, Anne Arundel County Detention Center, 443 F.2d 1307, 1310 (4th Cir. 1971) (eight-year delay in bringing trial for sentencing of incarcerated defendant did not violate defendant's sixth amendment rights).

Since the Act sets an absolute limit on the maximum number of days the government can delay, while the *Barker* test permits the government to justify delay in many cases, a delay that is permissible under the Act arguably will never give rise to a sixth amendment claim under *Barker*. *See* United States v. Saintil, 705 F.2d 415, 417-18 (11th Cir. 1983) (five-month delay did not exceed Act's time limits and was insufficient to trigger *Barker* analysis of sixth amendment violation), *cert. denied*, 104 S. Ct. 171 (1983); United States v. Nance, 666 F.2d 353, 360 (9th Cir.) (since Congress enacted Act to compel speedier trials than courts had required under sixth amendment, delay that is permissible under Act rarely will violate defendant's sixth amendment right), *cert. denied*, 456 U.S. 918 (1982).

In addition, the Act narrowly prescribes the circumstances under which delay may toll the Act's time limits. *See* 18 U.S.C. § 3161(h)(l)(A)-(I) (1982) (allowing exclusion from computation of delay for specific procedures necessary to prepare defendant for trial). In contrast to the specific reasons for delay that the Act permits, the *Barker* sixth amendment speedy trial right analysis balances the reason for delay against the prejudice to the defendant and the timeliness of the defendant's assertion of the speedy trial right. *See* Barker v. Wingo, 407 U.S. at 531 (valid reason for government delay will justify commensurate delay for purposes of determining whether defendant's speedy trial right was violated); *cf.* United States v. Marion, 404 U.S. 307, 324 (1971) (court will weigh heavily in favor of defendant any deliberate governmental delay in determining whether government violated defendant's speedy trial right). Since the Act exclu-

prescribes a seventy day limit on pretrial delay.[6] Prosecutorial delay beyond seventy days will result in dismissal of charges.[7]

The Act provides that delays not attributable to the prosecution will not be included in computation of the seventy day period.[8] The Act also permits

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sively specifies when a delay will be justified, a delay that is permissible under the Act rarely will violate the defendant's right to speedy trial under *Barker*. *See* 18 U.S.C. § 3161(h)(l)(A)-(I) (1982) (specifying procedures requiring delay that will toll Act's time limits); 18 U.S.C. §3161(h)(8)(A) (1982) (Act permits indefinite delay where court determines, in writing, that the ends of justice require delay); *cf.* United States v. Mehrmanesh, 652 F.2d 766, 769 (9th Cir. 1980) (Act eliminates requirement that courts measure factors other than delay as computed under terms of Act).

6. *See* 18 U.S.C. § 3161(c)(1) (1982) (trial must commence within 70 days of filing date of information or indictment, or within 70 days of date defendant last appeared before judicial officer of court in which charge is pending, whichever occurs last); *see also* 18 U.S.C. § 3161(d)(1) (1982) (when government files more than one indictment or information for same offense, seventy day period begins with filing date of latest information or indictment); 18 U.S.C. § 3161(d)(2) (1982) (when trial court dismisses indictment or information that is subsequently reinstated on appeal, retrial shall begin within 180 days if unavailability of witnesses or other factors resulting from passage of time make trial within 70 days impractical); 18 U.S.C. § 3161(e) (1982) (when trial follows mistrial or order for new trial, seventy day period begins on date that action occasioning retrial became final).

7. 18 U.S.C. §3162(a)(1)-(2) (1982); *see* United States v. Caparella, 716 F.2d 976, 982 (2d Cir. 1983) (charges dismissed under § 3162 for failure to file indictment within Act's time limit); United States v. Perez-Reveles, 715 F.2d 1348, 1353-54 (9th Cir. 1983) (reversing trial court for failure to dismiss in circumstances requiring dismissal under § 3162); United States v. Antonio, 705 F.2d 1483, 1486 (9th Cir. 1983) (reversing trial court that failed to dismiss where § 3162 required dismissal). A defendant must move to dismiss charges before trial or before entering a plea of guilty or nolo contendere, or the defendant will have waived his right to speedy trial under the Act. 18 U.S.C. § 3162(a)(2) (1982). The court may dismiss charges without prejudice in exceptional circumstances. *See id.* at (a)(1) (court shall consider all relevant factors, including the seriousness of the offense, the facts and circumstances that led to dismissal, and the impact of reprosecution on speedy trial policies and administration of justice); United States v. Perez-Reveles, 715 F.2d 1348, 1354 (9th Cir. 1983) (remand to trial court to dismiss charges and determine whether dismissal shall be with or without prejudice); United States v. Antonio, 705 F.2d 1483, 1486 (9th Cir. 1983) (remand to trial court to dismiss charges and determine whether dismissal shall be with or without prejudice); United States v. Thomas, 705 F.2d 709, 710 (4th Cir. 1983) (holding that district court properly dismissed charges without prejudice), *cert. denied*, 104 S. Ct. 232 (1983); United States v. Hawthorne, 705 F.2d 258, 260-61 (7th Cir. 1983) (same); United States v. van Brandy, 563 F. Supp. 438, 441 (S.D. Cal. 1983) (dismissing charges with prejudice); United States v. Quillen, 468 F. Supp. 480, 482 (E.D. Tenn.) (dismissing charges with prejudice), *aff'd without opinion*, 588 F.2d 831 (6th Cir. 1978); *cf.* Strunk v. United States, 412 U.S. 434, 439-40 (1973) (when government violates defendant's sixth amendment right to speedy trial, dismissal of charges is only possible remedy); *accord*, Barker v. Wingo, 407 U.S. 514, 522 (1972).

8. *See, e.g.*, 18 U.S.C. § 3161(h)(l)(A)-(I) (1982) (excluding delay resulting from physical and mental examinations, trials on other charges, interlocutory appeals, hearings on pretrial motions, and transfers under Federal Rules of Criminal Procedure); *id.* § 3161(h)(l)(J) (automatically excluding delay up to thirty days for consideration of proceeding concerning the defendant); *id.* § 3161(h)(2)-(7) (excluding delay attributable to factors beyond control of trial court); *id.* § 3161(h)(8) (excluding delay by trial court for good cause shown where ends of justice require delay); *cf.* Bridges, *supra* note 4, at 60-63 (survey showing that courts used exclusions under § 3161(h) to accommodate delays caused by court congestion and that median

exclusion of time from the seventy day limit during which parties perform certain pretrial procedures.[9] Section 3161(h)(l)(J) of the Act further permits the exclusion of a period up to thirty days during which a court takes under advisement a proceeding concerning the defendant.[10] In *United States v. Black*,[11] the Fourth Circuit determined whether the prosecution's untimely motion for rehearing en banc was excludable as a "proceeding taken under advisement" under section 3161(h)(l)(J).[12]

The litigation in *Black* arose from the trial and conviction of a federal prison inmate for armed assault on a prison guard.[13] The Fourth Circuit reversed the conviction after finding error in an instruction to the jury concerning the law of self-defense.[14] The government initially sought rehear-

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pretrial delay remained unchanged from 1977-1981, despite time limits of Act).

9. *See supra* note 8 (listing trial procedures that toll running of Act's time limits). Congress intended the exclusions allowed by the Act to add flexibility to enforcement of the Act's strict time standards. *See 1974 House Report* at 12, 7414 (Act time limits should be tolled by hearings, proceedings, and necessary delay occurring prior to trial); United States v. Saintil, 705 F.2d 415, 418 (11th Cir.) (exclusions in Act are intended to add flexibility and should be liberally construed), *cert. denied*, 104 S. Ct. 171, 172 (1983); *cf.* Bridges, *supra* note 4, at 60-63 (exclusions in Act may have undermined Act's goal of reducing number of calendar days of pretrial delay).

10. *See* 18 U.S.C. § 3161(h)(l)(J) (1982). § 3161(h)(l)(J) provides in part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (l) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceedings concerning the defendant is actually under advisement by the court.

18 U.S.C. § 3161 (h)(l)(J) (1982).

11. 733 F.2d 349 (4th Cir. 1984).

12. *Id.* at 350.

13. *Id.*

14. *Id.*; *see* United States v. Black, 692 F.2d 314, 318 (4th Cir. 1982) (errors as to law of self defense in instruction to jury constitute reversible error). At trial, Black alleged that a guard had ordered him to return to his cell and had swung at him with a putty knife when Black refused to return to his cell. *Id.* at 315. Black admitted that he then threatened the guard with a homemade knife, backed the guard away, and returned to his cell. *Id.* At trial, Black offered a jury instruction on self-defense under which the jury would have been required to acquit if the jury found that the guard had used excessive force and that Black had responded with an amount of force he reasonably deemed necessary to protect himself from bodily harm. *Id.* at 317. The court rejected Black's proffered instruction, however, and instead charged the jury to the effect that Black was entitled to use "deadly force" only to protect himself from serious bodily harm or death. *Id.*

The Fourth Circuit held that the district court's instruction was erroneous because the instruction implied that the lesser force used by Black could not be justified unless a threat of death or serious injury existed. *Id.* at 318. The court held the rule applicable to the *Black* trial to be that the quantum of force one may use in self-defense is proportional to the threat one reasonably apprehends. *Id.*

ing by the panel[15] to introduce new arguments that traditional principles of self-defense should not apply to a confrontation between a prison guard and a disobedient inmate.[16] The Fourth Circuit denied rehearing, and subsequently remanded the case for trial with a mandate of reversal on December 15, 1982.[17]

On January 12, 1983, the government moved for leave to file an untimely motion for rehearing en banc.[18] The government made the motion fourteen days after the time limit for requesting rehearing under the Federal Rules of Appellate Procedure had expired.[19] After taking the motion under advisement

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15. 733 F.2d at 350. Under the Federal Rules of Appellate Procedure, appellant ordinarily must move for rehearing within 14 days of judgment, regardless whether or not appellant suggests rehearing en banc. *See* FED. R. APP. P. 40(a). The timely filing of a petition for rehearing ordinarily will stay the court's mandate until disposition of the petition. FED. R. APP. P. 41(a). A party seeking an extension to file a petition for rehearing may request an extension within the initial fourteen day period. FED. R. APP. P. 40(a).

The *Black* dissent questioned whether both a petition for rehearing and a subsequent motion for rehearing en banc were justified. 733 F.2d at 350, 352 n.1 (Winter, J., dissenting). According to the government, the government had asked the panel to rehear the case before the government requested an en banc rehearing, because the government did not make the arguments offered on rehearing in the original appeal, and the panel had not been able to address those arguments in the *Black* opinion. *Id.* at 352. The government contended that the Solicitor General would not authorize a petition for rehearing en banc until the panel had an opportunity to hear the arguments offered to justify rehearing. *Id.*; *and see id.* (under Federal Rule of Appellate Procedure and Fourth Circuit internal rehearing procedures, it is not necessary to frame a petition for rehearing as "en banc," since panel will rehear all petitions, whether en banc or not, in which there is any possibility of rehearing by panel); FED. R. APP. P. 35 advisory committee note (court may treat petition for rehearing en banc simply as petition for rehearing).

16. *See* 733 F.2d at 350; *supra* note 14 (discussing grounds for error in self-defense instruction). In *Black*, the government argued that the public's interest in orderly management of prisons requires courts to abrogate a disobedient inmate's right to resist the reasonable and necessary use of force by a prison guard. *See* Brief for Appellant at 29, United States v. Black, 733 F.2d 349 (4th Cir. 1984). According to the government, application of self-defense rules to confrontations between inmates and guards would deter exercise of authority by guards over disobedient inmates. *Id.* at 29-30.

17. *See* 733 F.2d at 350. An appellate court's mandate comprises a certified copy of the judgment, a copy of the opinion, if any, and a statement as to costs, if any. FED. R. APP. P. 41(a).

18. *See* 733 F.2d at 350. A majority of circuit judges in regular active service may elect to order rehearing en banc, which refers to a rehearing by the full court. FED. R. APP. P. 35(a). Under the Federal Rules of Appellate Procedure, an appellate court will not grant rehearing en banc except to decide questions of exceptional importance, or to consider a decision that fails to maintain conformity with legal doctrine of prior decisions in the circuit. *Id.*; *see* 733 F.2d at 352 n.1 (Winter, J., dissenting) (discussing Fourth Circuit rehearing practice). An appellate court has the power to entertain successive petitions for rehearing, as well as to entertain petitions filed out of time. *See infra* note 53 (listing cases granting untimely motions for rehearing). Parties filing an untimely petition for rehearing should preface the petition with a motion for leave to file out of time. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE, § 3986 at 471 (1977 and Supp. 1984) [hereinafter cited as WRIGHT & MILLER].

19. *See* 733 F.2d at 350. In *Black* the government contended that the Solicitor General authorized both the timely filing of the rehearing petition and the late filing of the petition for

for twenty-seven days, the Fourth Circuit denied the motion on February 8, 1983.[20] The government took no further action on the appeal.[21] On March 3, 1983, seventy-seven days after the Fourth Circuit issued the mandate, Black filed a motion in the United States District Court for the Eastern District of Virginia to dismiss the indictment[22] for failure by the government to bring a new trial within the Speedy Trial Act statute of limitations.[23]

The district court granted Black's motion to dismiss the indictment.[24] The court reasoned that the Fourth Circuit's reversal of the conviction had become final upon issuance of the mandate.[25] The district court found that the limitation period under the Act had expired because the government's untimely motion for rehearing en banc did not toll the Act's time limit.[26] The district court rejected the government's argument that section 3161(h)(l)(J) applied to exclude the twenty-seven day period when the untimely motion was under advisement.[27] The court explained that the untimely motion could not be considered a "proceeding concerning the defendant" as required by section 3161(h)(l)(J) of the Act.[28] According to the district court, the Fourth Circuit lost jurisdiction over the defendant when the *Black* panel issued the mandate of reversal to the district court.[29] The district court therefore concluded that all seventy-seven days following the issuance of the mandate

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rehearing en banc. *See id.*; *supra* note 15 (government wished to give panel opportunity to consider new arguments before raising arguments to en banc court); *see also supra* note 15 (discussing time limits for filing rehearing); WRIGHT & MILLER, *supra* note 18, § 3986 at 470-71 (describing procedure for filing untimely motion).

20. 733 F.2d at 350.

21. *See* 733 F.2d at 350. The *Black* dissent noted that the government did not respond to defendant's request for a new trial date for 15 days between denial of rehearing en banc and expiration of Act's seventy day time limit. *Id.* at 352 (Winter, J. dissenting).

22. 733 F.2d at 350. The Act requires a defendant to move for dismissal before trial or before entering a plea of guilty or nolo contendere, or defendant will waive speedy trial rights. *See* 18 U.S.C. § 3162(a)(2). In *Black*, since the parties had not set a trial date, the defendant apparently moved prematurely for dismissal under section 3162. *See id.* (defendant need not move for dismissal until trial).

23. *See* 733 F.2d at 350; 18 U.S.C. § 3162(a)(1) (1982) (sanction for violation of Act's statute of limitations is dismissal of indictment); *see also supra* note 22 (defendant in *Black* moved prematurely for dismissal).

24. 733 F.2d at 350.

25. *See* 733 F.2d at 350-51; 18 U.S.C. § 3161(e) (1982). Section 3161(e) of the Act provides that retrial following reversal must "commence within seventy days from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e) (1982). The district court held that issuance of the mandate was the "action occasioning retrial" for purposes of § 3161(e). 733 F.2d at 350-351; *cf.* United States v. Dunn, 706 F.2d 153, 154 (5th Cir. 1983) (issuance of mandate will begin running of Act's time limit unless government petition for certiorari is pending), *vacated on other grounds*, 104 S. Ct. 2380 (1984).

26. 733 F.2d at 351.

27. *Id.*; *supra* note 9 (discussing purpose of Act exclusion provisions); *supra* note 10 (text of § 3161(h)(l)(J)).

28. 733 F.2d at 351; *supra* note 10 (§ 3161(h)(l)(J) provides that Act's statute of limitation may be tolled during a proceeding concerning defendant).

29. 733 F.2d at 351; *see infra* notes 35-36 and accompanying text (discussing effect of issuance of mandate on court's jurisdiction over defendant).

were includable for purposes of computing pretrial delay under the Act.[30]

On appeal, the Fourth Circuit initially considered whether the district court's denial of an exclusion for the twenty-seven day deliberation period was proper in light of the purposes of the Act's exclusion provisions.[31] The *Black* court stated that Congress had provided exclusions to the Act's time limits to accommodate courts' needs for flexibility in administering trials.[32] In addition, the court stated that 1979 amendments to the Act had conferred on courts the authority to define more broadly the Act's exclusion provisions, thereby adding greater flexibility to courts' docket management.[33]

After explaining the purposes of the Act's exclusion provisions, the *Black* court considered the appellee's argument that the Fourth Circuit lacked jurisdiction to entertain a motion that tolled the running of the Act's limitation period.[34] The court stated that jurisdiction over the appellant was not necessary to entertain a motion for rehearing subsequent to issuance of the mandate.[35] The *Black* court reasoned that the Fourth Circuit's inherent authority to recall or stay a mandate after issuance guaranteed the court's continuing authority to hear motions to alter the judgment, even after issuance of the mandate.[36] Citing decisions from other circuits, the *Black*

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30. 733 F.2d at 351.

31. *Id.* at 351; *see supra* note 9 (discussing purposes of Act's exclusion provisions).

32. 733 F.2d at 351.

33. *Id.*; *supra* note 9 (discussing purposes of Act's exclusion provisions).

34. 733 F.2d at 351; *infra* notes 51-59 and accompanying test (discussing appellate court's authority to entertain motions on case after issuing mandate).

35. 733 F.2d at 351. The *Black* court cited dicta from *United States v. DiLapi* stating that a court may take a motion under consideration in order to deny the motion even though the mandate had issued. *Id.*; *see* United States v. DiLapi, 651 F.2d 140 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982). In *DiLapi*, the Second Circuit denied the appellant's request to rehear an appeal after the issuance of a mandate. 651 F.2d at 144. The Second Circuit acknowledged that appellant's filing of a petition for rehearing did not revest jurisdiction in the appellate court, but noted that a court was not required to reacquire appellate jurisdiction to deny a petition for rehearing after issuing the mandate. *Id.* at 144, n.2. As an analogous proposition, the *DiLapi* opinion cited Rule 33 of the Federal Rules of Criminal Procedure. *Id.* Rule 33 enables a district court to deny a motion for new trial after appellant has filed a notice of appeal in the court of appeals, despite the fact that a district court lacks jurisdiction over the defendant until the court of appeals issues the mandate. *Id.*; *cf.* FED. R. CRIM. P. 33 (wording of rule offers negative implication that appellate court must issue mandate for district court to grant motion for new trial, but not to deny such motion).

36. *See* 733 F.2d at 351. The *Black* court cited *United States v. DiLapi* and *Sparks v. DuVal County Ranch Company* to support the proposition that courts of appeal have inherent power to take under advisement a proceeding notwithstanding issuance of the mandate. *See* 733 F.2d at 351; *supra* note 35 (discussion of *DiLapi*); Sparks v. DuVal County Ranch Co., 604 F.2d 976, 979 (5th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980). In *Sparks*, the Fifth Circuit considered whether an appellate court automatically lost jurisdiction over an appeal once the twenty-one day limit for issuance of mandate passed. *See* 604 F.2d at 979; FED. R. APP. P. 41(a) (court must issue mandate within 21 days). The Fifth Circuit stated that since it had not issued the mandate, jurisdiction remained in the Fifth Circuit. *See* 604 F.2d at 979. In dicta, the *Sparks* court added that even if the mandate issued, appellate courts possess well-established authority to recall and reform a mandate. *Id.*

The *Black* court also relied on *United States v. Dunn*, in which the Fifth Circuit held that

court noted that jurisdiction over the appellant ordinarily is not a prerequisite to obtaining recall of the mandate and modification of the judgment.[37]

The court next considered whether the section 3161(h)(l)(J) exclusion allowed government delay resulting from a motion for rehearing that was untimely under the Federal Rules of Appellate Procedure.[38] If not, the court explained, appellate courts could be compelled to recall a mandate merely to prevent the expiration of the Act's statute of limitations, and the subsequent release of a criminal defendant.[39] The *Black* court concluded that a literal construction of section 3161(h)(l)(J) permitted exclusion of the twenty-seven days.[40]

In contrast to the holding of the majority that the government's untimely motion constituted an excludable proceeding under section 3161(h)(l)(J), the dissent argued that the section allowed exclusion of only those proceedings that were initiated according to appellate court rules.[41] The dissent noted that the government failed to meet the time limit for filing a motion for rehearing imposed by Federal Rule of Appellate Procedure 40(a).[42] Further, the dissent maintained that the government had failed to demonstrate good cause for permission to file an untimely motion for rehearing.[43] The dissent

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a pending petition for certiorari tolls the Act, regardless whether the appellate court stayed the mandate or issued the mandate. *See* 733 F.2d at 351; United States v. Dunn, 706 F.2d 153, 155 (5th Cir. 1983), *vacated on other grounds*, 104 S. Ct. 2380 (1984). The *Dunn* court held that to recall a mandate while a petition for certiorari pended would be redundant, because the Speedy Trial Act required that a court reach a final result in a prior case before the Act's time clock could begin to run. *See* 706 F.2d at 155, 18 U.S.C. § 3161(e) (1982) (trial following order granting new trial must commence within seventy days of when action occasioning new trial becomes final).

37. 733 F.2d at 351; *see supra* note 35 (discussing *DiLapi* holding that jurisdiction is not necessary to deny petition for rehearing); *supra* note 36 (discussing *Sparks* and *Dunn* holdings that jurisdiction obtains after issuance of mandate); *but cf. infra* note 45 (arguing that *DiLapi* holding means jurisdiction over appeal ends when court issues mandate).

38. 733 F.2d at 351; *see supra* note 35 (discussing *DiLapi* dicta that court may consider motion without recalling mandate).

39. *See* 733 F.2d at 351. The *Black* court argued that if a § 3161(h)(l)(J) exclusion did not encompass untimely motions, a court that had taken a motion for rehearing under advisement near the end of the seventy day limit could be forced to grant rehearing not on the merits of the rehearing petition, but to prevent release of defendant due to expiration of the Act's time limit. *Id.* at 351-52.

40. *See* 733 F.2d at 351-352; *infra* notes 63 & 70 and accompanying text (discussing when motion will constitute "proceeding" to implicate Act policies).

41. *See* 733 F.2d at 353 (Winter, J., dissenting).

42. *Id.* at 352 n.1 (Winter, J., dissenting). *See supra* note 15 (discussing Rule 40(a)). *But see* Court of Appeals for the Fourth Circuit, *Internal Operating Procedure* 40.2, "Applications From The United States For An Extension Of Time Within Which To File A Petition For Rehearing To Enable The Solicitor General's Office To Review The Merits Of A Case" [hereinafter *I.O.P. 40.2*]. *I.O.P. 40.2*, which was developed after the *Black* decision, provides that effective October 3, 1984, government attorneys may request additional time in which to file a petition for rehearing, in view of the Solicitor General's rule that the Solicitor General's Office must thoroughly review all appeals and court decisions before United States attorneys may petition for rehearing. *Id.*

43. *See* 733 F.2d at 353 (Winter, J., dissenting). The dissent in *Black* noted that the

contended that an untimely motion for rehearing was not a legitimate proceeding within a proper construction of section 3161(h)(l)(J), and thus was not a proceeding that tolled the Act's time limit.[44]

In addition, the dissent noted that other circuits have held that once an appellate court issues a mandate, that court loses jurisdiction over the defendant.[45] To reacquire jurisdiction, the dissent argued, an appellate court must recall the mandate.[46] The dissent argued that, absent a recall, the Fourth Circuit could not take under advisement any proceeding concerning the defendant.[47]

Examining the district court record, the dissent noted the government's delays in response to attempts by the district court and the defendant to set a trial date within the Act's limitation period.[48] The dissent argued that the government's fault led to the government's untimely filing for rehearing and failure to bring the defendant to trial within seventy days.[49] The dissent concluded, therefore, that the Act mandated dismissal of the charges against the defendant.[50]

The correctness of the *Black* decision depends on whether section 3161(h)(l)(J) requires that an appellate court have jurisdiction over a case before a proceeding in the appellate court will toll the running of the Act's

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government filed both a petition for rehearing and a petition for rehearing en banc. *Id.* The dissent contended that under rule 35 of the Federal Rules of Appellate Procedure, the second petition was unnecessary and provoked unwarranted delay. *Id.* at 352 n.1; FED. R. APP. P. 35 (court will consider all petitions for rehearing as having potential for en banc rehearing, regardless of form).

44. 733 F.2d at 353 (Winter, J., dissenting); *see supra* notes 42-43 and accompanying text (discussing *Black* dissent's contention that second motion for rehearing resulting in delay is not excludable under Act).

45. 733 F.2d at 353 (Winter, J., dissenting). The dissent in *Black* cited *United States v. DiLapi* for the proposition that jurisdiction does not obtain in an appellate court after the court issues its mandate. *Id.*; *see* United States v. DiLapi, 651 F.2d 140, 144 (2d Cir. 1981) (citing cases holding that issuance of mandate terminates jurisdiction), *cert. denied*, 455 U.S. 938 (1982).

46. *See* 733 F.2d at 351. The *Black* dissent construed § 3161(h)(l)(J) of the Act to encompass only proceedings concerning the defendant in which the court has jurisdiction to order the relief sought. *Id.* The dissent argued that although the court had authority to recall the mandate and thereby reacquire jurisdiction over the defendant, the court could not assume jurisdiction unless the court recalled the mandate. *Id.* The dissent argued that without actually recalling the mandate, the court did not have jurisdiction. *Id.* The dissent stated jurisdiction was a prerequisite to a "proceeding" under the language of § 3161(h)(l)(J). *Id.*

47. 733 F.2d at 353 (Winter, J., dissenting). *See supra* notes 42-46 and accompanying text (discussion of dissent's reasoning in *Black*).

48. *See* 733 F.2d at 352, 353 & n.1, 354 (Winter, J., dissenting) (citing examples of unexplained government delay). *But see supra* note 42 (Fourth Circuit internal procedures recognize that, under Solicitor General's review policy, United States attorneys must submit petitions for rehearing to thorough review of merits by Solicitor General before filing petition).

49. 733 F.2d at 354 (Winter, J., dissenting).

50. *Id.* The *Black* dissent separately considered whether the district court correctly had ordered the dismissal with prejudice of charges against Black. *Id.*; *see supra* note 7 (discussing Act provision for dismissal of charges with or without prejudice). The dissent stated that the

limitation period.[51] The majority correctly noted that jurisdiction does not affect the court's power to rehear or recall a mandate after it has issued.[52] The majority's view is consistent with decisions in other circuits that recall of a mandate may be obtained regardless of whether the motion to recall is timely.[53] For example, in *American Iron and Steel Institute v. EPA*,[54] the District of Columbia Circuit recalled a mandate issued two years earlier because a Supreme Court decision in the intervening period undermined the basis for the original *American Iron* decision.[55] In deciding to recall the mandate, the *American Iron* court examined the source of an appellate court's authority to recall a mandate, and held that the authority is rooted

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dismissal with prejudice was entirely within the district court's discretion. 733 F.2d at 354 (Winter, J., dissenting).

51. *See* 733 F.2d at 351 (court's power to take motion under advisement is grounded in appellate court's inherent authority to recall and modify mandate); *id.* at 353 (Winter, J., dissenting) (untimely motion to rehear was not "proceeding" under § 3161(h)(l)(J) because Fourth Circuit did not have jurisdiction once court issued mandate).

52. *See* 733 F.2d at 351; *infra* note 60-62 and accompanying text (analyzing *Black* court's interpretation of "proceeding" as used in § 3161(h)(l)(J)).

53. *See, e.g.*, Cruz v. Alexander, 708 F.2d 31, 37 (2d Cir. 1983) (court granted untimely motion for recall of mandate for modification); United States v. DiLapi, 651 F.2d 140, 144 n.2 (2d Cir. 1981) (dicta that no reacquisition of jurisdiction is needed to deny petition for rehearing after mandate issued), *cert. denied*, 455 U.S. 938 (1982); A to Z Portion Meats, Inc. v. NLRB, 643 F.2d 390, 392 n.1 (6th Cir. 1980) (court possesses inherent power to recall mandate and rehear appeal); Dilley v. Alexander, 627 F.2d 407, 410 (D.C. Cir. 1980) (court's power to recall mandate emanates from inherent power to recall on good cause shown); Sparks v. DuVal County Ranch Co., Inc., 604 F.2d 976, 979 (5th Cir. 1979) (dicta that power to recall mandate is well-established), *cert. denied*, 445 U.S. 943 (1980); American Iron & Steel Inst. v. E.P.A., 560 F.2d 589, 593 & n.15 (3rd Cir. 1977) (citing prior circuit court decisions adopting proposition that appellate court may recall mandate in appropriate circumstances), *cert. denied*, 435 U.S. 914 (1978); Alphin v. Henson, 552 F.2d 1033, 1035 (4th Cir.) (dictum that court possesses power to recall mandate in exceptional circumstances), *cert. denied*, 434 U.S. 823 (1977); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir.) (court has duty and power to permit untimely petition for rehearing and to modify an erroneous decision after time for rehearing has expired), *cert. denied*, 400 U.S. 829 (1970). *But see* Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973) (ruling of law that later was overruled in another case was not so unconscionable in its effect as to justify reopening judgment not void when issued); Hines v. Royal Indemnity Co., 253 F.2d 111, 113-14 (6th Cir. 1958) (although court has power to recall mandate, court will not do so unless mandate is void, fraudulent, or manifestly unconscionable). *See generally* WRIGHT & MILLER, *supra* note 18, at § 3938, 276 (discussing sources of authority for recall); Note, *Recall of Appellate Mandates in Federal Civil Litigation*, 64 CORNELL L. REV. 704, 706-07 (1979) (discussing balancing of court's authority to recall in order to protect court processes against public's interest in finality of judgment).

54. 560 F.2d 589 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 914 (1978).

55. *See* 560 F.2d at 591. In *American Iron*, the District of Columbia Circuit had ordered the EPA in 1975 to restructure the methodology used to arrive at water discharge standards embodied in certain EPA regulations. *Id.* at 591-592. In February, 1977, the Supreme Court implicitly approved the same regulations. *Id.* at 595; *see* E. I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 138-39 (1977) (upholding EPA regulations setting water discharge standard-setting methodology). The EPA then petitioned for recall and modification of the D.C. Circuit's original mandate. 560 F.2d at 590. The EPA pointed out in its motion for recall that recall would not injure either party's reliance because the EPA made little progress toward compliance with its original judgment in the intervening two years. *Id.* at 592.

in a court's inherent power to protect the integrity of its processes and the uniformity of decisions within the circuit.[56] The *American Iron* court determined that the parties had not acted in reliance on the mandate and held that recall of the mandate would not disturb the strong public interest in finality of decisions.[57]

Applying the *American Iron* holding to the *Black* case, the majority properly noted that, where grounds for recall and modification of a mandate exist, grounds must exist for an appellate court to accept untimely motions for rehearing.[58] However, the issue of whether an appellate court can reacquire jurisdiction over a defendant when it finds insufficient grounds to recall and modify a mandate is one of first impression in the circuit courts.[59] The *Black* court correctly analyzed the question in terms of a court's inherent power to recall.[60] Under the *Black* analysis, the inherent power to recall a mandate must include the power to take under advisement a motion that will toll the Act's limitation period.[61] The *Black* analysis supports the policies

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56. *See* 560 F.2d at 592-93. The *American Iron* court cited cases in which courts relied on statutory foundations for the authority to recall. *Id.*; *see* Greater Boston Television Corp. v. FCC, 643 F.2d 268, 277 (D.C. Cir. 1971) (construing 28 U.S.C. § 2106, which authorizes appellate court to modify or vacate any judgment as that court deems just, to permit reassessment of an appellate court's own decisions), *cert. denied*, 406 U.S. 950 (1972). The *American Iron* court noted several circuit decisions allowing recall under an "inherent authority" theory. 560 F.2d at 592-93 & n.15, n.17.

57. 560 F.2d at 594. The *American Iron* court held that situations dictating recall include, first, where clarification of a mandate was critical, second, where misconduct had affected the propriety of judicial processes, third, where there existed a danger of incongruent results in cases pending at the same time, fourth, where an unintended mandate instruction had caused an unjust result, and fifth, where a subsequent Supreme Court decision showed that the original judgment was wrong. *Id.* at 594. In one Fourth Circuit decision, the court held that the facts justified recall because the en banc court that issued the mandate improperly included a circuit judge no longer in service, rendering the judgment defective. Uzzell v. Friday, 625 F.2d 111, 112 (4th Cir.), *cert. denied*, 446 U.S. 951 (1980).

58. *See supra* notes 55-57 and accompanying text (discussing grounds for recall of mandate).

59. *See* 733 F.2d at 351 (cases cited for support of majority involve factual and legal issues different from issues in *Black*); U.S. v. Dunn, 706 F.2d 153, 154 (4th Cir. 1983) (stay of mandate not necessary for purposes of tolling Act time clock, because pending petition for certiorari will toll Act), *vacated on other grounds*, 104 S. Ct. 2380 (1984); United States v. DiLapi, 651 F.2d 140, 144 n.2 (2d. Cir. 1981) (dicta that court need not reacquire appellate jurisdiction to deny motion for rehearing), *cert. denied*, 455 U.S. 938 (1982).

60. *See supra* notes 56-57 and accompanying text (discussing court's inherent power to recall); *infra* notes 65-68 and accompanying text (courts should dispose of recall motion based on validity of grounds for motion rather than on procedural untimeliness).

61. *See* 733 F.2d at 351 (if motion to rehear does not toll Act's limitation period, court will endure possibly meritless rehearing merely in order to prevent release of criminal). The Federal Rules of Appellate Procedure vest power in appellate courts to enlarge sua sponte the time limits for filing motions. *See* FED. R. APP. P. 2 (court may suspend sua sponte filing requirements of any rule); FED. R. APP. P. 26(b) (court may enlarge filing period for good cause shown); FED. R. APP. P. 40(a) (local rule or court order may modify rule 40(a) time limits); *supra* note 42 (Fourth Circuit rules now allow extension for government filing of petition for rehearing where good cause shown); *see also* Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (vacating court of appeals decision for failure to consider relevant new state court opinion,

underlying appellate courts' recall authority, because the government will not be forestalled from bringing a motion to rehear when the law provides a legitimate ground for modifying a mandate.[62] The Fourth Circuit analysis also comports with the policies of the Act, since the Act's exclusion provisions treat proceedings necessary to establish a law under which a defendant will be tried as proceedings that must toll the running of the Act.[63]

Because the majority in *Black* relied on the discretionary authority of appellate courts to take under advisement untimely motions to rehear, the *Black* decision protects defendants from the risk that the government will delay trial by filing meritless untimely motions.[64] The Fourth Circuit, like other circuits,[65] follows the rule that an untimely motion to recall a judgment must show that injustice would result if the parties relied on the judgment.[66] Since the Fourth Circuit can refuse to take under advisement an untimely motion that asserts insufficient grounds,[67] the *Black* rule limits the prosecution's opportunity to delay retrial to the time needed by the appellate court to evaluate the government's grounds for untimeliness of filing.[68] In view of

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issued six months after court of appeals judgment; parties raised issue of new opinion on untimely motion for rehearing).

62. *See* American Iron & Steel Institute v. EPA, 560 F.2d 589, 594-95 (3rd Cir. 1977) (balancing need to modify erroneous judgment against need for finality of judgment), *cert. denied*, 435 U.S. 914 (1977); *supra* notes 55-57 and accompanying text (discussing *American Iron* case); *see also supra* note 53 (cases holding that recall of mandate is necessary in some circumstances).

63. *See* S. REP. No. 212, 96th Cong., 2d Sess., 9-10 (1979) [hereinafter *1979 Senate Report*] (§ 3161(h) exclusions are designed to alleviate harsh time limits of Act to ensure that Act limitation period will not impair proper trial procedures).

64. *See* 733 F.2d at 351 (citing district court finding that government acted in good faith).

65. *See supra* note 53 (decisions recognizing duty to recall to protect court processes and to prevent injustice).

66. *See* Uzzell v. Friday, 625 F.2d 1117, 1120 (4th Cir.) (recalling mandate one year after issuance where decisions turned on vote of judge later shown not to be qualified for panel), *cert. denied*, 446 U.S. 951 (1980); Alphin v. Henson, 552 F.2d 1033, 1034 (4th Cir.) (modifying mandate nine months after judgment to reflect intervening change in statute), *cert. denied*, 434 U.S. 823 (1977); *see also supra* notes 56-57 and accompanying text (discussing balancing of public's interest in finality and prevention of unjust result due to erroneous mandate).

67. *See, e.g.*, Trail v. International Brotherhood of Teamsters, 542 F.2d 961, 965 (6th Cir. 1976) (defendant's untimely motion for rehearing dismissed for untimeliness); Burkette v. Shell Oil Co., 487 F.2d 1308, 1317 (5th Cir. 1973) (court will ignore untimely attempt to obtain rehearing); United States v. Doe, 455 F.2d 753, 762-63 (1st Cir.) (motion for rehearing dismissed because motion was disguised attempt to reargue matters already adjudicated), *vacated on other grounds sub nom.*, Gravel v. United States, 408 U.S. 606 (1972); *cf.* Cross Baking Co. v. NLRB, 453 F.2d 1346, 1351 (1st Cir. 1971) (court will hear argument of issue only once barring substantial excuse).

68. *See supra* notes 65-67 and accompanying text (courts will not review motions for rehearing unless adequate grounds exist); *see also* FED. R. APP. P. 26(b) (appellate court may allow untimely motion for good cause shown); Shumar v. United States, 423 U.S. 879 (1976) (denial of certiorari) (Douglas, J., dissenting) (mere inadvertence does not excuse untimeliness in filing of untimely motion for rehearing, notwithstanding substantive grounds for rehearing); *1979 Senate Report, supra* note 63, at 34, (necessary time for deliberation on motion should be considerably less than thirty days if motion is routine); *1974 House Report, supra* note 3, at

the district court's finding that the government acted in good faith in filing its untimely motion,[69] the *Black* court properly allowed exclusion of the deliberation period as a "proceeding" contemplated by section 3161(h)(l)(J).[70]

In contrast to the majority's emphasis on the substance of the government's untimely motion, the dissent in *Black* focused on the procedural abuse resulting from the government's use of duplicative motions.[71] The dissent, however, failed to address the district court's finding that the government acted in good faith when it entered the duplicative filing that resulted in the twenty-seven day delay.[72] Further, by relying on a procedural analysis, the dissent failed to consider whether the motion for rehearing was necessary to determine the law of the case, in view of the Act's policy that necessary pretrial procedures shall toll the Act's time limit.[73] Finally, the dissent erroneously concluded that a motion to recall a mandate is not a proceeding with regard to the mandate unless the motion results in actual recall of the mandate.[74] The dissent thus obscured the Speedy Trial Act issue of whether the petition under advisement was so necessary to the proper trial of Black that a court should excuse the delay attributable to the proceeding.[75]

The decision in *Black* indicates that the Fourth Circuit will adopt a flexible construction of the Speedy Trial Act exclusion provisions in order to prevent unwarranted dismissal of criminal charges.[76] *Black* is consistent

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22, 7415 (for proceeding to be "actually under advisement" under § 3161(h)(l)(J), court actually must be considering motion or conducting research on novel legal question).

69. *See* 733 F.2d at 351 (district court dismissed Black's indictment with prejudice despite finding good faith in government delay).

70. *See id.* at 351, 352 n.7 (language of § 3161(h)(l)(J) does not restrict definition of "proceeding" to motions timely filed).

71. *See id.* at 352 & n.1 (Winter, J., dissenting) (government use of duplicative motions unnecessarily delayed retrial); *supra* notes 3-5 (purpose of sixth amendment speedy trial right is to eliminate unwarranted governmental delay of trial).

72. *See* 733 F.2d at 352, 352 n.1 (Winter, J., dissenting) (government attorneys' procedural errors unnecessarily delayed retrial). *But see supra* note 42 (Fourth Circuit internal operating procedures recognize government's special circumstances, based on inherent delay required by Solicitor General's review, may dictate extension of filing time).

73. *See* 733 F.2d at 353 (Winter, J., dissenting); *supra* notes 42-44 (discussing dissent's view of reasons for delay); *1974 House Report, supra* note 3, at 21, 7414 (hearings, proceedings, and other necessary delays which normally occur prior to trial of criminal cases will toll Act's time limits).

74. *See* 733 F.2d at 353 (Winter, J., dissenting) (Fourth Circuit lost jurisdiction of Black's case when court issued mandate); *supra* note 45 (discussing decision determining that court loses jurisdiction over case when court issues mandate); *supra* notes 65-68 and accompanying text (grounds for rehearing, not issuance of mandate, should determine whether motion for rehearing tolls Act time limit).

75. *See* 733 F.2d at 352 n.1 (Winter, J., dissenting) (discussing government's procedural errors); *supra* notes 3-5 & 73 (discussing purposes of excludable delay provisions in Speedy Trial Act).

76. *See* 733 F.2d at 351-352 (*Black* court's concern that Act's statute of limitations not be allowed to run out during time Fourth Circuit holds petition for rehearing under advisement); *supra* note 39 (petition for rehearing constitutes proceeding with regard to defendant's case, notwithstanding untimely filing).