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## Tenth Circuit: Our Mandate Means What It Says

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The Tenth Circuit recently reaffirmed the scope of the mandate rule in *United States v. Dutch*, 978 F.3d 1341 (10th Cir. 2020) (*Dutch II*). The circuit court ruled that in a prior appeal, it had issued specific directions—not a general remand—and the district court erred by failing to follow those directions. The circuit court explained that, while it was not infallible, the district court was obligated to follow its instructions, even if the court believed the circuit court had erred or had insufficiently explained its rationale. The court noted that a district court may deviate from the mandate only in a few exceptional circumstances that did not exist here.

### **Procedural History: 'Dutch I'**

In January 2016, Albuquerque police officers responded to a scene where a vehicle crashed into a wall. They took the defendant (*Dutch*) into custody and discovered he had a loaded pistol and methamphetamine. *Id.* at 1343. *Dutch* pleaded guilty to being a felon in possession of a firearm under 18 U.S.C. §§922(g) and 924(e). *Id.*

Ten years earlier, *Dutch* had pleaded guilty to three counts of bank robbery and aiding and abetting those robberies, which took place on different days and at different locations. *Id.* Notably, under the Armed Career Criminals Act (ACCA), a defendant is subject to a minimum 15 years of imprisonment if he has three prior violent felony convictions “committed on different occasions from one another.” 18 U.S.C. §924(e)(1). Given *Dutch*’s prior felonies, the probation department recommended an enhanced sentence under the ACCA. *Dutch II*, 978 F.3d at 1343.

At the sentencing hearing, to prove the robberies occurred at different times and places, the government submitted the indictment, the plea agreement, and the criminal judgment from the bank robberies. *Id.* at 1344. But the district court concluded that the ACCA didn’t apply, because at the time of the robberies, *Dutch* was addicted to drugs and had no meaningful opportunity to stop between each robbery. *Id.* The court thus declined to impose the ACCA sentencing enhancement and instead sentenced *Dutch* to 60 months in prison and three years of supervised release. *Id.*

The government appealed. In an unpublished opinion, a Tenth Circuit

panel ruled that the government had proved that Dutch's prior felonies “occurred on different dates and at different locations.” *United States v. Dutch (Dutch I)*, 753 F. App'x 632, 635 (10th Cir. 2018), cert. denied, 139 S. Ct. 1590 (2019). In the *Dutch I* opinion, the panel held that “the ACCA governs because Dutch's crimes were committed on occasions different from one another.” *Id.* at 633–34. The panel then concluded, “We REVERSE the district court's conclusion that the ACCA does not apply and REMAND with instructions to VACATE Dutch's sentence and resentence him consistent with this order and judgment.” *Id.* at 635. Dutch filed petitions for rehearing and for a writ of certiorari, but they were denied. *Dutch II*, 978 F.3d at 1344.

### **Procedural History: 'Dutch II'**

On remand, Dutch's counsel again argued that the ACCA should not apply because of ambiguities in the charging documents and plea agreement. *Id.* The district court responded by inquiring, “[O]n what basis do I resentence disregarding [*Dutch I*’s] mandate?” *Id.* Counsel replied by asking rhetorically, “Is the Tenth Circuit infallible?” and insisted that the circuit court hadn't fully understood the argument. *Id.* at 1344-45. Ultimately, the district court agreed and ruled once again that the ACCA didn't apply, because the argument was neither fully developed nor fully addressed in *Dutch I*. *Id.* at 1345. The court then reimposed its original sentence, and the government once again appealed. *Id.*

### **The Law of the Case and the Mandate Rule**

In an opinion by Chief Judge Tymkovich, the Tenth Circuit again reversed. The court began by explaining the mandate rule: “When we remand a case, we generally provide instructions to the district court—the so-called ‘mandate.’ We have said ‘[t]he mandate consists of our instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions.’” *Id.* at 1345 (quoting *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003)). This rule “follows from the law of the case doctrine.” *Id.* It requires district courts to “strictly comply with any mandate” on remand. *Id.*

The court noted that, in the resentencing context, it has established a presumption in favor of general remands, such that on remand, a district court may “expand its considerations beyond the original error this court addressed absent an express limitation by this court.” *Id.* The mandate in *Dutch I*, however, “was specific and limited the district court's discretion on remand: the ACCA governs Dutch's sentencing.” *Id.* at 1346. The district court was bound by that determination on remand. *Id.* By disregarding the *Dutch I* mandate, the lower court erred. *Id.*

The circuit court noted that, even when a mandate precludes reconsideration of an issue, there are several exceptions to the mandate rule. “These exceptional circumstances include a dramatic change in controlling legal authority, significant new evidence that was not obtainable earlier through due diligence, or a blatant error from the prior sentencing decision that would result in serious injustice if left uncorrected.” *Id.* at 1345-46. Dutch argued for the third exception, but the court observed that

this exception applied “only to blatant errors by the prior *sentencing court*,” not the appellate court. *Id.* at 136 (emphasis in original). There was no such error here. *Id.*

The court concluded by acknowledging that Dutch and the district court were correct about two things: The Tenth Circuit is “not infallible” and it doesn't always address issues as fully as a district court might hope. *Id.* But even if the *Dutch I* panel had erred, “a district court's discretion on remand is not determined by our fallibility or the district court's satisfaction with our explanation.” *Id.* A district court cannot ignore a specific mandate “because it disagrees with it or thinks it insufficiently explained.” *Id.* The circuit court's comments harken back to Justice Robert Jackson's famous quip, “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

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