

Criminal Law



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United States Attorney's Office

In the aftermath of September 11, 2001, the United States Attorney's Office was allowed to hire six new Assistant United States Attorneys (AUSAs). Five will be added to the Portland Office and one will serve in the Eugene Office. The attorneys selected for these positions are Kathleen Bickers (a former ROCN prosecutor and currently a Special Assistant United States Attorney (SAUSA) employed by the Social Security Administration (SSA) working at the Portland Office prosecuting SSA cases), Tom Edmonds (Senior Criminal Deputy District Attorney (DDA) for Multnomah County), Scott Kerin (a DDA for Multnomah County and SAUSA assigned to YGAT), Jennifer Martin (Oregon DOJ, and a former ROCN prosecutor), Greg Nyhus (DDA for Marion County and SAUSA, assigned to the Mid-Willamette Valley Drug Task Force) and David Atkinson the Interim United States Attorney in the Virgin Islands. Prior to joining the United States Attorney's Office in the Virgin Islands in 1988, Atkinson served as a DDA for Lane County from 1975 to 1988.

On the civil side of the office, Jeff Handy, a long time attorney with the Office of General Counsel, U.S. Department of Agriculture, joined the office to fill a vacancy left by a retirement.

Supreme Court

On May 20, 2002, the Supreme Court decided *United States v. Cotton*, ___ U.S. ___, 2002 WL 1008494 (No. 01-687) (May 20, 2002), and *Alabama v. Shelton*, ___ U.S. ___, 2002 WL 1008481 (2002).

In *Cotton*, the Supreme Court limited *Apprendi* by upholding an enhanced sentence despite an *Apprendi* error where no *Apprendi* objection was made at trial and the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Cotton* and six other defendants were found guilty of conspiring to distribute cocaine in Baltimore. The original indictment specified the amount as 5 kilograms or more, but a superseding indictment merely specified a "detectable amount." The trial judge imposed enhanced sentences upon the defendants (30 years for two defendants and life in prison for the others) based on the trial evidence that showed the large amount of drugs involved. The defendants did not object that these sentences were based on a fact not alleged in the indictment. While the defendants' appeal was pending, the Supreme Court decided *Apprendi*, which held that a fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt. The Fourth Circuit held that *Apprendi* required the vacation of the sentences in this case.

The Supreme Court reversed and remanded in a 9-0 decision by the Chief Justice. The Court first held that defects in an indictment do not deprive the district court of jurisdiction, overruling its 1887 decision to the contrary in *Ex parte Bain*, 121 U.S. 1. The Court then addressed whether the defendants met the plain-error test for reversal on a non-jurisdictional ground not raised at trial. The Court noted that the government conceded that the first two elements of that test were met: that is, the enhanced sentences were erroneous under *Apprendi*, and the error was plain at the time of the court of appeals' decision. The Court held, however, that it need not decide whether the third element of the plain-error test – that the plain error "affect[s] substantial rights" – was satisfied. Instead, applying the test of *Johnson v. United States*,

520 U.S. 461 (1997), the Court held that the error in this case “did not seriously affect the fairness, integrity, or public reputation of judicial proceedings,” given the “overwhelming” and “essentially uncontroverted” evidence at trial on the quantity of drugs involved. On this basis, the Court held that the defendants were not entitled “to receive a sentence prescribed for those committing less substantial drug offenses.”

In *Shelton*, the Supreme Court held that a suspended misdemeanor sentence that may “end up in the actual deprivation of a person’s liberty” cannot be imposed unless the defendant who chose to represent himself at trial knowingly and intelligently waived his right to counsel. Shelton was convicted by a jury in an Alabama court of a misdemeanor assault for participating in a fistfight following a minor traffic accident. The court sentenced him to 30 days in jail, but suspended that sentence and placed him on unsupervised probation for two years, upon the condition that he pay a \$500 fine, \$542 in reparations and restitution, and court costs. The trial court had repeatedly warned Shelton about the problems of self-representation, but it never offered him counsel at state expense. The Alabama Supreme Court reversed the suspended sentence and vacated the term of probation.

The Supreme Court affirmed in a 5-4 decision by Justice Ginsburg. The Court began by noting that its precedents establish a Sixth and Fourteenth Amendment right to state-appointed counsel in any misdemeanor case “that actually leads to imprisonment.” The Court then held that “the Sixth Amendment [does not] permit activation of a suspended sentence upon the [uncounseled] defendant’s violation of the terms of probation.” It noted that under Alabama law a defendant has no right to counsel at a parole-revocation proceeding where the issue is whether the defendant breached the terms of his probation, not whether he was guilty of the original offense. The Court then rejected the dissent’s position that a right-to-counsel issue arises only if the suspended sentence is activated. “Severing the analysis in this manner makes little sense,” the Court stated, because the error at the trial would not be cured by the procedures Alabama provides at the parole-revocation stage. Responding to the argument of the Court-appointed *amicus* (former Solicitor General Charles Fried) that some states could not afford to provide counsel whenever probation was ordered, the Court held that its holding does not limit “pretrial probation,” where “the prosecutor and defendant agree to the defendant’s participation in a pretrial rehabilitation program.”

Justice Scalia, joined by the Chief Justice and Justices Kennedy and Thomas, dissented. For them, the Court’s precedents establish “actual imprisonment as the touchstone of entitlement to appointed counsel.” They would not extend this right “to cases bearing the mere threat of imprisonment.” In their view, “[t]he Court has miraculously divined how the Alabama justices would resolve a constitutional question” that is not presently presented, that is, by “speculat[ing] that the Alabama Supreme Court would mechanically apply its decisional law applicable to routine probation revocation,*** rather than adopt special procedures for situations that raise constitutional questions” under Supreme Court right-to-counsel cases. The dissenters also faulted the Court for giving only “the back of its hand” to “the practical consequences of expanding the right to appointed counsel beyond cases of actual imprisonment” to all cases where a suspended sentence, “no matter how short,” might be imposed.

Ninth Circuit

As we all know, on June 26, 2000, the Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” And then the fun began in the Ninth Circuit. On January 18, 2002, the Ninth Circuit decided *en banc* the case of *United States v. Buckland*, 277 F.3d 1173 (9th Cir. 2002). In *Buckland*, the Ninth Circuit held that the federal drug statutes (21 U.S.C. §§ 841(a)(1), 846 and by implication the importation statutes 21 U.S.C. §§ 952, 960 & 963) were not facially unconstitutional under *Apprendi*. If you research *Buckland* in Westlaw a red flag will now pop up. Don’t be concerned, it’s the Ninth Circuit at work again. On May 7, 2002, the Ninth Circuit filed an amended opinion in *Buckland*. *United States v. Buckland*, __ F.3d __, 2002 WL 857751 (9th Cir. (Wash.) May 7, 2002) (No. 99-30285). The amended opinion has no substantial affect on the Ninth Circuit’s original opinion in *Buckland*. The Ninth Circuit was merely correcting a clerical error. At the beginning of its May 7, 2002, opinion the Ninth Circuit states,

The mandate issued February 11, 2002 is hereby recalled for the purpose of amending the opinion. The opinion filed January 18, 2002, and located at 277 F.3d 1173 is amended as follows:

Page 1184 in section “B. § 5G1.2(d) STACKING” which reads in the second to the last sentence in the first paragraph, “However, the district court determined under U.S.S.G. § 2D1.1(a)(3) that his sentence should be 324 months based on a combined offense level of 36 and a Guideline range of 320 to 405 months.”, is amended to read: However, the district court determined under U.S.S.G. § 2D1.1(a)(3) that his sentence should be 324 months based on a combined offense level of 36 and a Guideline range of 324 to 405 months.

The mandate shall issue forthwith.

Buckland, __ F.3d __, 2002 WL 857751 at * 1.

On May 3, 2002, the Ninth Circuit decided *United States v. Godinez-Rabadan*, __ F.3d __, 2002 WL 841163 (9th Cir. (Nev.) May 3, 2002) (No. 01-10455). Godinez-Rabadan pled guilty to unlawful reentry by a deported alien previously convicted of an aggravated felony in violation of 8 U.S.C. § 1326(a). Godinez-Rabadan argued that there was a jurisdictional defect in the indictment because it did not delineate the specific date he was found in the United States. He also argued that *Apprendi* overruled *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In *Almendarez-Torres*, the Supreme Court held that the previous conviction for an aggravated felon which enhanced the penalties for illegal reentry after deportation was merely a sentencing factor. The Ninth Circuit rejected Godinez-Rabadan’s claim that *Apprendi* overruled *Almendarez-Torres*.

Also on May 3, 2002, the Ninth Circuit decided *United States v. Carranza*, __ F.3d __, 2002 WL 841175 (9th Cir. (Cal.) May 3, 2002) (No. 00-50607). Carranza was charged with importing marijuana in violation of 21 U.S.C. §§ 952 & 960 and with possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Carranza claimed that the trial court had incorrectly instructed the jury on the *mens rea* requirement and

that under *Apprendi*, the statutes were unconstitutional on their face. The facial unconstitutionality was quickly rejected by the Ninth Circuit relying on *Buckland and United States v. Mendoza-Paz*, 286 F.3d 1104 (9th Cir. 2002). Of more interest was Carranza's claim that he knew that the vehicle in which he had transported the drugs across the border contained illegal drugs but he maintained that he did not know the type of drugs or the location in which the drugs were hidden. The Ninth Circuit said,

A defendant charged with importing or possessing a drug is not required to know the type and amount of drug. [A] defendant can be convicted under § 841 and § 960 if he believes he has *some* controlled substance in his possession. The base offense level for guideline sentencing may be determined by the volume of the drug actually imported, whether or not the defendant knows either the volume or the nature of the substance – if he knows only that he is importing a controlled substance. *Apprendi* did not change the long established rule that the government need not prove that the defendant knew the *type* and *amount* of a controlled substance that he imported or possessed; the government need only show that the defendant knew that he imported or possessed some controlled substance.

Carranza, __F.3d __, 2002 WL 841175 at *7. (citations and internal quotation marks omitted).

Supreme Court Allows Review in 2002

State v. Ausmus, 178 Or App 321, 37 P3d 1024, *rev allowed* 334 Or __ (2002): Whether ORS 166.025(1)(e), which prohibits a person, with the “intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk there of,” from “congregating with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse,” is constitutional. The Court of Appeals rejected the defendants’ challenges under Article I, sections 8, 20, or 26 of the Oregon Constitution and comparable provisions of the federal constitution.

State v. Hirsch, 177 Or App 441, 34 P23d 1209 (2001), *rev allowed* 334 Or __ (June 11, 2002); *State v. Friend*, 178 Or App 157, 35 P3d 1105 (2001), *rev allowed* 334 Or __ (June 11, 2002): Whether ORS 166.270(1), which prohibits a person convicted of a felony from possessing a firearm, unconstitutionally infringes on a citizen’s right under Article I, section 27, of the Oregon Constitution to “bear arms.” The Court of Appeals rejected the defendants’ challenge.

Barker v. Baldwin, 179 Or App 142, 38 P3d 962, *rev allowed* 334 Or __ (June 4, 2002): Whether the petitioner is entitled to post-conviction relief based on his claim that his trial counsel provided constitutionally inadequate assistance when he acquiesced in petitioner being handcuffed in front of jury during trial without any showing that the restraints were necessary. The Court of Appeals concluded that petitioner’s counsel provided him deficient assistance but nonetheless denied his claim on the ground that he failed to prove prejudice, because the evidence of his guilt “was overwhelming.”

State v. Vasquez, 177 Or App 477, 34 P3d 1188 (2001), *rev allowed* 334 Or 190 (2002): Whether an 11-year delay between the filing of an information charging defendant with murder and commencement of the trial violated his right to a speedy trial under Article I, section 10, of the Oregon Constitution. The Court of Appeals held that the filing of the information triggered the speedy-trial clause, that the delay was excessive, and that defendant suffered prejudice that requires dismissal.

Delzer v. DMV, 177 Or App 723, 33 P3d 1069 (2001), *rev, rev allowed* 334 Or 121 (2002); *McNutt v. DMV*, 176 Or App 171, 31 P3d 1087 (2001), *rev allowed* 334 Or 121 (2002); *Mannelin v. DMV*, 176 Or App 9, 31 P3d 438 (2001), *rev allowed* 334 Or 121 (2002): Whether the DMV properly enforced the 1995 amendment to ORS 809.410 (Or Laws 1995, ch 661, §§ 1, 3), which retroactively lengthened the revocation period for revocations based on certain types of convictions. The Court of Appeals rejected the petitioners’ claims (1) that DMV should be estopped from applying that amendment to lengthen their revocation periods, and (2) that retroactive application unconstitutionally imposes double jeopardy, impairs a contract, and violates due process.

State v. Sims, 176 Or App 484, 31 P3d 1129, *rev allowed* 334 Or 121 (2002): Whether, in the criminal prosecution of a person for driving in violation of a HTO revocation order, the person may challenge the validity of that order even though he could have contested the order in the administrative process but did not. The Court of Appeals held that the defendant was entitled to collaterally attack the order.

State v. Marrington, 176 Or App 651, 34 P3d 754 (2001), *rev allowed* 333 Or 655 (2002): Whether the state, in a prosecution for sexual offenses against a child, laid a proper foundation for admitting the testimony of a sexual-abuse counselor concerning behaviors common to child sexual-abuse victims, or whether such evidence is scientific evidence of sexual-abuse syndrome that must meet the foundational requirements of *State v. Brown*, 297 Or 404 (1984). The Court of Appeals affirmed defendant’s convictions without opinion.

State v. McGinnis, 175 Or App 276, 28 P3d 635 (2001), *rev allowed* 333 Or 399 (2002): Whether admission of the unlawfully obtained body-wire evidence was harmless error in light of the fact that defendant testified at trial and acknowledged that he, in fact, had participated in the transaction. The Court of Appeals held that the error was harmless. *See State ex rel. Juv. Dept. v. Cook*, 325 Or 1 (1997). Defendant contends that his trial testimony cannot be considered in the harmless-error analysis because it was prompted by admission of the unlawfully obtained evidence.

State v. Cartwright, 173 Or App 59, 20 P3d 223 (2001), *rev allowed* 333 Or 399 (2002): Whether defendant, who was being prosecuted for harassment and criminal trespass arising from his conduct toward employees he supervised, was entitled to inspect privileged audiotaped recordings of witness interviews made by his employer, a nonparty, for possible prior inconsistent statements made by the victims, under ORS 136.567, ORS 136.580(1), or the state and federal constitutional compulsory-process and confrontation clauses. The Court of Appeals held that the trial court properly denied defendant’s demands to inspect the recordings.

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Contacting Jurors

Both Oregon State UTCR 3.120 and the U.S. District Court for the District of Oregon Local Rule 48.3 and 48.4 prohibit a lawyer from initiating contact with a juror. The rules are identical, precluding "contact with any juror concerning any case which that juror was sworn to try" by parties, witnesses, or court employees, except as necessary during trial or on order of the court. Furthermore, DR 7-108(D) states that after the discharge of a jury from a case, "the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's activities in future jury service."

The above rules are clearly designed to prohibit lawyer contact with jurors regarding their official duties. However, what about contact with jurors regarding the lawyer's performance in trial, should this be allowed? There is an ethics opinion on this topic, LEO No. 1995-143, which says contact with a juror for a critique of a lawyer's performance is not allowed.

Should lawyers be allowed to discuss with jurors what arguments were effective at trial and/or the lawyers' performance? Do the rules regarding lawyer contact with jurors need expansion or clarification to allow for such communication between lawyer and juror? The OSB Criminal Law Section is soliciting your input on this issue to determine whether an effort should be made to alter or clarify the rules regarding contact with jurors. Please e-mail your comments to Lindsey Partridge at partridgelaw@msn.com

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State v. Perry, 165 Or App 342, 996 P3d 995 (2001), *rev allowed* 333 Or 260 (2002): Whether the lone employee working at a convenience store is at his "place of business" for purpose of ORS 166.250(2)(b), which allows a person to possess or keep "within the person's *** place of business any handgun" without committing the offense of unlawful possession of a concealed firearm. The Court of Appeals held that the exemption applies only to employees who also are owners of the business.

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Criminal Law Section News

■ The executive board of the Criminal Law Section currently has a position open for a criminal-defense lawyer, particularly someone from outside the Portland/Salem area. If you are interested in serving on the board, please contact Whitney Boise at (503) 228-0497 (or at wboise@hoevet-snyder.com).

■ The next meeting of the executive board will be on Saturday, August 17, 2002, at the Embarcadero Resort Hotel in Newport. If you are interested in attending the meeting or wish to provide comment on one of the agenda topics, please contact Boise of one of the other board members. A copy of the meeting agenda will be posted on the section's web page. <http://www.osbcrim.homestead.com/index.html>

■ The board tentatively has decided to move the location of its annual CLE, which is scheduled for Friday, April 4, 2003, from the Doubletree Hotel in Portland to the Spirit Mountain Casino in Grande Ronde, Oregon (on Highway 18 between the Salem and Lincoln City). If you wish to comment on that issue, please contact Boise of one of the other board members.

■ We still have a few binders available of the materials presented at the April 2001 CLE.