Golden Gate University Law Review

Volume 32
Issue 1 *Ninth Circuit Survey*

Article 6

January 2002

Criminal Procedure - United States v. Buckland

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CASE SUMMARIES

CRIMINAL PROCEDURE

UNITED STATES V. BUCKLAND

277 F.3D 1173 (9TH CIR. 2002)

I. INTRODUCTION

In *United States v. Buckland*,[1] the defendant appealed his drug conviction, arguing that the penalty provisions of the federal drug statute under which he was convicted and sentenced was facially unconstitutional.[2] In light of the United States Supreme Court's ruling in *Apprendi v. New Jersey*,[3] the primary issue was whether Calvin Wayne Buckland's sentence could be enhanced without the enhancement factor, in this case the quantity of the drugs he was responsible for, being determined by a jury.[4] After rehearing the case en banc, the court concluded that the statute was not unconstitutional on its face.[5] However, the court concluded that the district court

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[1] 277 F. 3d 1173 (9th Cir. 2002).

[2] *Id.* at 1177. The statute Buckland was convicted and sentenced under was 21 U.S.C. § 841, which provides in relevant part: (a) Unlawful acts: Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance. (b) Penalties: Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows[ ] (The remainder of subsection (b) states, in detail, the potential maximum penalties imposed based upon the amount and type of drugs for which a person is found to be responsible). *See* 21 U.S.C. § 841 (b)(1)(A)–(1)(B) (1994).

[3] 530 U.S. 466 (2000).

[4] *Id.* at 468.

[5] *Buckland*, 277 F.3d at 1187.

erred in failing to submit to the jury a determination as to the quantity of drugs in Buckland's possession.[6] The court, though, ruled that this error did not affect Buckland's substantial rights and affirmed his sentence.[7]

II. FACTS AND PROCEDURAL HISTORY

In 1994, Buckland was indicted on one count of conspiracy to distribute methamphetamine, three counts of possession of methamphetamine with intent to distribute and three counts of using a firearm during a drug trafficking crime.[8] The government alleged the involvement in the conspiracy of "one thousand (1000) grams or more of a mixture or substance containing a detectable amount of methamphetamine," which, if properly proved, carries a possible life sentence.[9] However the jury was not instructed that it had to determine any particular amount of methamphetamine in Buckland's possession in order to convict him.[10] The jury convicted Buckland on all seven counts.[11] The district court judge then determined, using the preponderance of the evidence test, that Buckland was responsible for eight kilograms of methamphetamine.[12] Buckland was sentenced to 824 months in prison.[13]

On Buckland's initial appeal, the Ninth Circuit affirmed the conspiracy and drug convictions, but vacated the firearm conviction,[14] and remanded the case for resentencing.[15] On remand, Buckland attempted to argue that the court relied on an inaccurate estimate of the quantity of drugs to establish his base offense level under the sentencing guidelines.[16] However, the district court initially limited its consideration to the

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6 *Id.* at 1183 (quoting Johnson v. United States, 520 U.S. 461, 466-68 (1997)).

7 *Buckland*, 277 F.3d at 1178. U.S. 461, 466-68 (1997)).

8 *Id.* at 1177.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Buckland*, 277 F.3d at 1177.

14 *Id.* The firearm conviction was vacated under *Bailey v. United States*, 516 U.S. 137 (1995). United States v. Buckland, No. 95-30147, 1996 WL 632958, at *3 (9th Cir. Oct. 28, 1996).

15 United States v. Buckland, No. 95-30147, 1996 WL 632958 (9th Cir. Oct. 28, 1996).

16 *Buckland*, 277 F.3d at 1177.

firearm enhancement issue, so Buckland again appealed.[17] The Ninth Circuit held that the district court erred in failing to consider all of Buckland's sentencing objections and vacated his sentence and remanded for resentencing.[18] This time on remand the district court considered all of Buckland's claims and reduced his sentence to 324 months.[19]

In a decision which was subsequently withdrawn, a three judge panel of the Ninth Circuit reversed Buckland's sentence.[20] The Court held that the United States Supreme Court's holding in *Apprendi* rendered the statute unconstitutional.[21] The Ninth Circuit then heard the case en banc.[22]

III. NINTH CIRCUIT'S ANALYSIS

A. CONSTITUTIONALITY OF 21 U.S.C. § 841

Buckland argued that the United State's Supreme Court's holding in *Apprendi* rendered the federal statute under which he was convicted and sentenced facially unconstitutional,[23] therefore his sentence was invalid.[24] Buckland contended that through 21 U.S.C. § 841, Congress intended that the quantity of drugs attributed to a defendant be determined by a judge and not a jury, thereby subjecting it to the judicial "preponderance of the evidence" test instead of the "beyond a reasonable doubt" standard used by the jury.[25]

In *Apprendi*, the Supreme Court struck down a hate crimes statute because the statute expressly permitted a trial judge to increase a sentence beyond the statutory maximum if the judge found, by a preponderance of the evidence, that the crime was

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17 United States v. Buckland, Nos. 97-30204, 97-35687, 1998 WL 514852 (9th Cir. Aug. 14, 1998).

18 *Buckland*, 277 F.3d at 1177.

19 *Id.*

20 United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001).

21 *Id.*

22 265 F.3d 1085 (9th Cir. 2001).

23 *Buckland*, 277 F.3d at 1178.

24 *Id.* Buckland also claimed that: (1) he was entitled to points for acceptance of responsibility; (2) he received ineffective assistance of counsel; and (3) that the evidence was insufficient to establish the type of methamphetamine. *Id.* The court dismissed these as having "no merit." *Id.*

25 *Id.* at 1179.

motivated by bigotry.[26] The Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[27]

In comparing Section 841 to the statute struck down in *Apprendi*, the Ninth Circuit found Section 841 "most striking for what it did not say. The statute does not specify who shall determine drug quantity or identify the appropriate burden of proof for these determinations."[28] Since the statute did not contain any clause expressly, and unconstitutionally, granting additional power to the judge, the court determined that Buckland had in effect asked the court to "add a distinctive feature to this statute that not only does not appear in it, but, as far as we can tell, also was never debated or discussed in Congress."[29] In cases like Buckland's, it was the courts, not the statute, which assigned judges the responsibility for determining sentence enhancements. [30]

The court found this to be the key distinction between Buckland's case and *Apprendi*.[31] In *Apprendi*, the statute at issue explicitly provided for a hate crime sentencing enhancement to be imposed based on a finding of the trial court by a preponderance of the evidence.[32] Unlike the statute in *Apprendi*, Section 841 was silent as to whether the court or the jury was to determine the quantity of drugs for which a defendant was responsible.[33] Since Section 841 differed in this material way, the court held that the rule in *Apprendi* "in no way conflicts" with the explicit terms of the statute at issue in *Buckland*.[34]

The court was also critical of Buckland's attempt to draw a distinction between "elements" of the crime that the jury is

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[26] *Apprendi*, 530 U.S. at 490.

[27] *Id.*

[28] *Buckland*, 277 F.3d at 1179.

[29] *Id* . at 1181. Buckland failed to identify "any persuasive legislative history" that shows Congress clearly intended "the procedure" he was attacking as unconstitutional. *Id.*

[30] *Id.*

[31] *Id.* at 1179.

[32] *Id.*

[33] *Buckland*, 277 F.3d at 1179.

[34] *Id.* at 1180 (quoting United States v. Cernobyl, 255 F.3d 1215, 1219 (10th Cir. 2001)).

charged to determine and "penalties" or "sentencing factors" that are determined by judges.[35] The court called this "semantical hair splitting"[36] and found that such "conceptual pigeon-holing" interfered with the language of the statute.[37] The court found this distinction misguided because ""the relevant inquiry is one not of form, *but of effect*--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[38] The court concluded that *Apprendi* compels it to submit to the jury questions of fact that may increase a defendant's exposure to penalties, regardless of whether that fact is labeled an element or a sentencing factor.[39]

The court also acknowledged a tension between its decisions in *Buckland* and *United States v. Nordby*.[40] In *Nordby*, the court used the "sentencing factor" label as a basis for concluding that Congress committed "quantity" to the sentencing judge for a finding by a preponderance of the evidence.[41] To the extent that the cases conflict, the Ninth Circuit held that its decision in *Buckland* expressly overruled *Nordby*.[42] Accordingly, the court concluded that it was "fairly possible" to give 21 U.S.C. § 841 and its various provisions a constitutional construction under *Apprendi*.[43]

B. PLAIN ERROR

Buckland did not object to the district court's use of the "preponderance of the evidence" standard in determining the amount of methamphetamine he was charged with.[44] As a result, the Ninth Circuit reviewed the district court's actions

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35 *Id.* at 1180-81.

36 *Id.*

37 *Id.* at 1180.

38 *Id.* (quoting *Apprendi*, 530 U.S. at 494).

39 *Buckland*, 277 F.3d at 1181.

40 225 F.3d 835 (9th Cir. 2000); *Buckland*, 277 F.3d at 1182. In *Nordby*, the jury determined that the defendant had only harvested a "measurable" amount of marijuana, which triggered a maximum sentence of five years. *Id.* at 1182. However, the judge at sentencing determined by a preponderance of the evidence that Nordby was responsible for more than 1000 plants and sentenced him to 10 years to life. *Id.* at 1182.

41 *Buckland*, 277 F.3d at 1182.

42 *Id.*

43 *Id.* at 1187.

44 *Id.* at 1183.

only for "plain error."[45] Under the plain error standard, Buckland was required to establish the existence of an error, that was plain, and that affected his substantial rights.[46] In addition, the court stated that the error would only be corrected if it "'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'"[47]

On appeal, the government "forthrightly" acknowledged that it erred in failing to submit the question of drug quantity to the jury for a finding beyond a reasonable doubt.[48] The government also conceded that the district court erred by imposing a unitary sentence in excess of the 20-year maximum penalty for any unspecified amount of methamphetamine.[49] Nonetheless, the government argued that the sentencing errors were not prejudicial.[50]

The Ninth Circuit concluded that the trial judge's determination of drug quantity which increased Buckland's sentence beyond the statutory maximum was indeed "clear" and "obvious" error.[51] Nevertheless, the court held that the trial judge's determination did not prejudice Buckland in a manner that "affected the outcome of the proceeding."[52] The primary justification was that the trial judge made the quantity determination only after looking to information with other indicia of reliability.[53] "Whether the court looked at the unchallenged amount taken from Buckland by police" or at the amount "conceded" by Buckland's attorney, the amount of drugs was sufficient to trigger the sentence.[54] As a result, the *Apprendi* error did not affect the outcome of the proceedings and accordingly did not affect Buckland's substantial rights.[55]

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[45] *Id.* at 1188.

[46] *Id.* at 1178 (citing *Johnson*, 520 U.S. at 467).

[47] *Buckland*, 277 F.3d at 1178 (citing *Johnson*, 520 U.S. at 467 and quoting United States v. Olano, 507 U.S. 725 (1993)).

[48] *Buckland*, 277 F.3d at 1178.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 1183 (quoting *Johnson*, 520 U.S. at 467-68).

[52] *Buckland*, 277 F.3d at 1183 (quoting United States v. Olano, 62 F.3d 1180, 1188 (9th Cir. 1995) and *Olano*, 507 U.S. at 734).

[53] *Buckland*, 277 F.3d at 1184.

[54] *Id.* Buckland had failed to object to the amounts of methamphetamine set forth in the pre-sentence report and rejected the trial court's offer to hold an evidentiary hearing at the beginning of his three sentencing hearings. *Id.* at 1183-84.

[55] *Id.* at 1184.

The court also noted that Buckland's sentence could also have been upheld under the stacking provision of the United States Sentencing Guideline § 5G1.2,[56] under which the trial judge would have been required to sentence him to 324 months.[57] The court therefore determined that the *Apprendi* error was "immaterial."[58]

C. FAIRNESS, INTEGRITY AND PUBLIC REPUDIATION

Lastly, the court concluded that even if it were to assume that the error did affect Buckland's substantial rights, the court would still affirm his conviction because the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[59] In making this determination, the court relied on the reasoning set forth in *United States v. Keys*.[60] In *Keys*, the court concluded that the "failure of the district court to submit an element of the offense to the jury was inconsequential because (1) the evidence proving that element was overwhelming, and (2) the defendant did not contest it as part of his defense."[61]

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[56] *Id.* United States Sentencing Guideline § 5G1.2, Sentencing on Multiple Counts of Conviction, provides:

> (a) The sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment shall be determined by that statute and imposed independently. (b) Except as otherwise required by law (see § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter. (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law. (d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 (2001).

[57] *Buckland,* 277 F.3d at 1186.

[58] *Id.*

[59] *Id.* (citing *Johnson,* 520 U.S. at 469-70).

[60] 133 F.3d 1282 (9th Cir. 1998) (en banc), *as amended by* 143 F.3d 479 (9th Cir. 1998) and 153 F.3d 925 (9th Cir. 1998), *and cert. denied,* 525 U.S. 891; *Buckland,* 277 F.3d at 1186.

[61] *Buckland,* 277 F.3d at 1186 (citing *Keys,* 133 F.3d 1282).

In Buckland's case, his counsel failed to argue "*any* quantity issue" (emphasis in original) until the third sentencing hearing and the evidence "fairly indicates" that Buckland was directly responsible for over nine kilograms of methamphetamine.[62] In fact, the Ninth Circuit found the trial court's determination about the quantity of drugs to be "conservatively discounted" and all discrepancies were resolved in Buckland's favor.[63] In this respect, the district court's calculations, "although based on the preponderance standard, appear fully supported by the record and accurate."[64]

D. CONCURRING OPINION

Judge Hug concurred in the judgment and with "much" of the majority, but dissented with regard to one of the majority's alternative bases for sentencing.[65] Hug articulated that the "key inquiries" should be, "(a) whether the aggravated offense was charged in the indictment, and (b) whether the jury did find or reasonably could have found beyond a reasonable doubt the quantity required for the offense."[66] In essence, Judge Hug stated that the defendant should only be sentenced for the offense for which he was indicted and of which the jury found him guilty.[67] "[F]ailure to do so cannot be overcome under the plain error doctrine."[68]

Judge Hug dissented from the majority's conclusion that Buckland's sentence could be affirmed in the alternative under the stacking provision.[69] He characterized the majority's conclusion as stating that "even if Buckland was not indicted for a conspiracy to violate § 841(b)(1)(A) with a quantity of more than 1,000 grams, his sentence of 324 months could still be upheld by stacking consecutive sentences on the possession counts pursuant to § 5 G1.2(d) of the sentencing guidelines."[70]

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[62] *Buckland,* 277 F.3d at 1187.
[63] *Id.* at 1187.
[64] *Id.*
[65] *Id.* at 1198.
[66] *Id.* at 1188.
[67] *Id.* at 1188.
[68] *Buckland,* 277 F.3d at 1194.
[69] *Id.* at 1190. Judges Rheinhardt and Nelson joined in this part of Judge Hug's opinion. *Id.* at 1187.
[70] *Id.* at 1196.

Judge Hug argued that if Buckland were sentenced to the statutory maximum for each of his Section 841(a) drug offenses, the total punishment would not exceed the statutory maximum.[71] As a result, Section 5G1.2(d) actually would not be triggered and there would be no basis for "stacking."[72]

E. DISSENTING OPINION

The dissent joined Hug in challenging the alternative basis for sentencing Buckland, but also criticized the majority for failing to follow "basic principals" of statutory construction.[73] The dissent found that Congress' intent to have drug quantity decided by the judge at sentencing was "clear in both the statute and legislative history."[74] The dissent also accused the majority of construing any perceived "silence" in the statute "as a license for the court to legislate its own solution."[75]

The dissent concluded that determining the precise scope of the drug sentencing scheme was the prerogative of Congress.[76] "It is not the courts' function to jerry-build a sentencing scheme that Congress might or might not have intended, had it foreseen the collision between *Apprendi* and Section 841(b)(1)(A) & (B)."[77]

IV. IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION

The decision in *Buckland* brought the Ninth Circuit into conformity with its sister circuits.[78] As noted by the Ninth Circuit in conclusion, "Our decision that the statute is not facially unconstitutional, of course, results in felicitous unanimity among the United States Circuit Courts of

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[71] *Id.* at 1197 n.4.

[72] *Id.*

[73] *Buckland,* 277 F.3d at 1198. Judge Tashima authored the dissenting opinion, joined by Judges Rheinhardt and Paez. *Id.* Judge Tashima stated, "My position that 21 U.S.C. § 841 is facially unconstitutional is fully set forth in the panel opinion." *See* United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001), *reh'g en banc granted,* 265 F.3d 1085 (9th Cir. 2001)." *Id.*

[74] *Buckland,* 277 F.3d at 1201.

[75] *Id.* at 1200.

[76] *Id.* at 1202.

[77] *Id.* at 1202.

[78] *Id.* at 1176.

Appeal."[79] Although the statute remains valid, the dissent warned that such "felicitous unanimity" was not desirable for its "own sake."[80] In his dissent, Judge Tashima argued that differences between the Circuit Courts of Appeal are useful in ventilating important legal questions and creating a background against which the Supreme Court can ultimately resolve "an issue for the country as a whole." [81]

Buckland makes clear that since the *Nordby* distinction between sentencing factors and elements of the crime is no longer valid, prosecutors will now be forced to ask juries to determine the relevant drug quantities. [82] Judicial economy will likely not be compromised since the same evidence advanced at trial will still be provided to the jury. However, it introduces the possible quirk that a jury could convict on drug possession, yet hang on the determination of quantity and, therefore, leave the sentence in flux. At the same time, the *Buckland* decision narrows the application of *Apprendi* by allowing the federal drug statute to stand because of – not in spite of – its ambiguity.[83]

In the concurrence, Judge Hug also suggested that there persists some additional ambiguity as to whether *Apprendi* applies only when the sentence would go *beyond* the prescribed statutory maximum.[84] Judge Hug inquired, "[h]ow would one know at the time of trial whether, if the defendant is convicted, the judge's ultimate sentence would exceed the statutory maximum?"[85] Judge Hug proposed that the same standard should be applied prospectively and retrospectively, and the inquiry should not be governed by whether the judge's sentence ultimately exceeded the maximum statutory sentence. [86]

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[79] *Buckland*, 277 F.3d at 1187.
[80] *Id.* at 1203.
[81] *Id.*
[82] *Id.* at 1181.
[83] *Id.* at 1201.
[84] *Id.* at 1195.
[85] *Buckland*, 277 F.3d at 1195.
[86] *Id.*

Thus, while the Ninth Circuit may have resolved one issue surrounding the constitutionality of 21 U.S.C. § 841 in light of *Apprendi,* it may actually have created more uncertainty regarding the application of the federal statute.

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