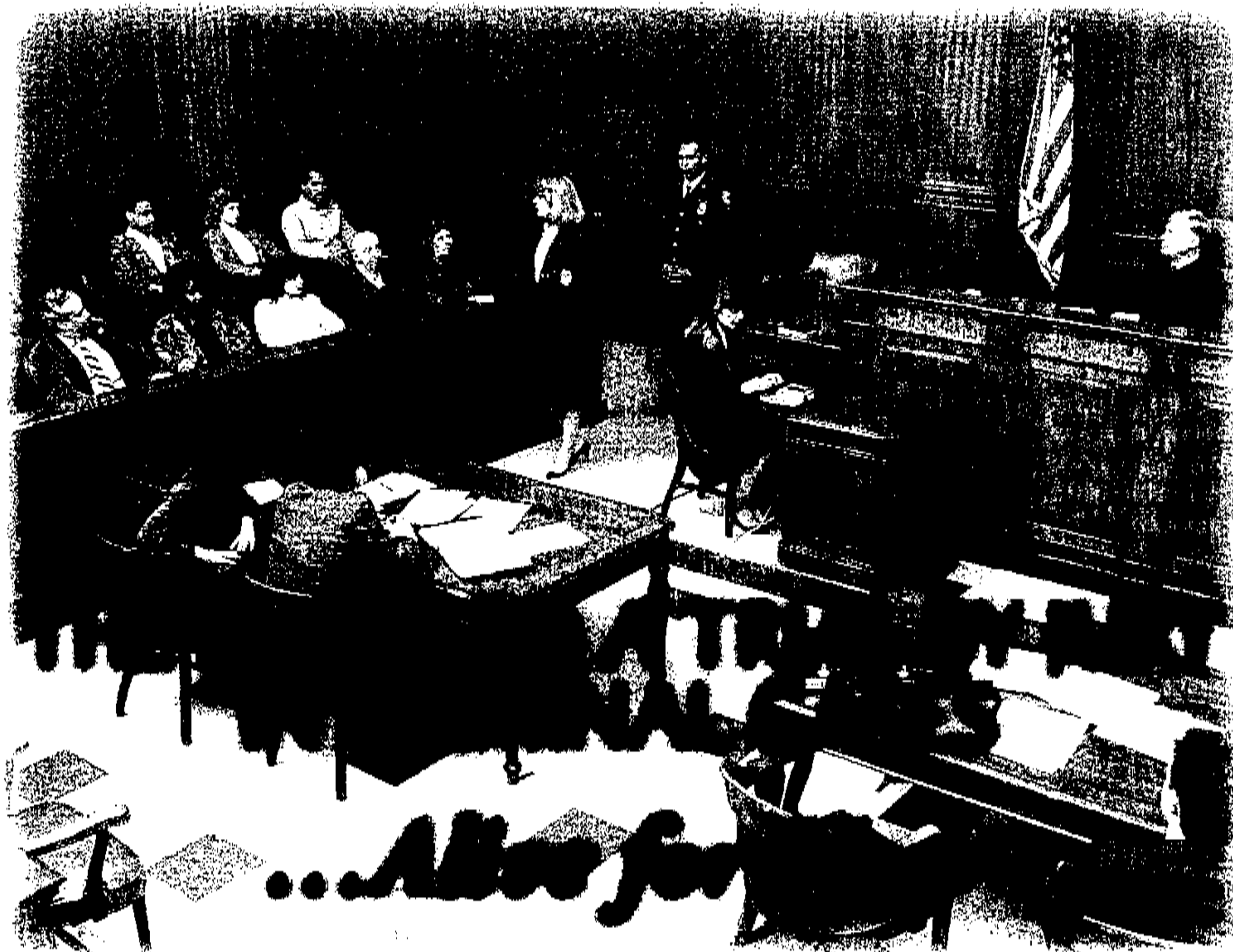

by
Robert C.
Buschel

On the heels of *Apprendi v. New Jersey*[1] and *Blakely v. Washington*,[2] will come *United States v. Booker* and *United States v. Fanfan*. The *Booker* and *Fanfan* cases will hopefully clarify whether Justice O'Connor's dissent in Blakely is correct and that the United States Sentencing Guidelines have been dismantled by the Court's majority opinion in *Blakely*. The progeny of *Apprendi* and *Blakely* has an effect on state cases as well. The principles of *Blakely* have reaffirmed the criminal jury's place in American due process at a time when access to a civil jury is eroding due to legislative and judicial designs such as compelled mediation, arbitration and caps on jury awards and attorneys fees. The state legislature has not left the criminal jury system alone either. Under Florida Statute section 924.34, appellate courts have been given the right to act as a finder of fact and convict appellants of lesser included offenses when a judgment of acquittal should have been granted by the trial court for a greater offense. A recent case illustrates the point and constitutional issue.

Christopher Michelson[3] and Junior Jay Sigler[4] were in Florida State Prison together after being convicted of strong armed robbery. Michelson avoided a significantly longer prison sentence than Sigler. Due to the disparate nature of the sentences, the State alleged Michelson agreed to boldly help Sigler escape from a correctional facility in Miami. The escape involved driving a truck through the fence of the prison yard and then driving away. Both men avoided immediate apprehension by the police and ended up in Lake Worth for the night. The next day, while driving around in one of the get away cars, the men were spotted by a police officer on patrol. During the chase, an innocent driver was allegedly killed due to a crash between Michelson, Sigler and the innocent driver.

The State of Florida charged Michelson and Sigler with felony first degree murder with the underlying felony being escape from a correctional facility. At the first trial, the jury concluded that since there was a passage of time from the escape from the correctional facility, the State did not prove the underlying

felony. The jury convicted the men of second degree murder.[5]

The Fourth District Court of Appeal reviewed Michelson and Sigler's appeal on the ground that there was insufficient evidence for the jury to convict of second degree murder because they did not know the innocent driver who was killed; therefore, did not have "ill-will spite or hatred" toward him. The Court of Appeal agreed that the State did not prove the elements of second degree murder for that reason. However, instead of remanding the cases for new trials, the appellate court found that there was sufficient evidence to convict the men of felony third degree murder merely by reading the record. After making these findings, the court promptly convicted the men of third degree murder and remanded the cases for sentencing only. The court justified its authority to make these findings of fact, convictions and remand for sentencing based upon Florida Statute section 924.34.

On remand, defense counsel objected to the trial court's entry of judgment and sentences for third degree murder on the ground that no jury found Michelson and Sigler guilty of that offense. Defense counsel cited *Apprendi v. New Jersey* and *Franks v. Alford*[6] for the proposition that the appellate court's conviction violated the defendants' right to a jury trial.

The obstacle that defense counsel had to overcome was the "law of the case."[7] The law of the case was a finding of guilt on felony third degree murder by the very appellate court the defendants sought for review. "However, an appellate court has the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case where reliance on the previous decision would result in manifest injustice."[8] Defense counsel was asking the appellate court to reverse its own findings of fact and conviction. In so doing, counsel had to ask the court to hold that Florida Statute section 924.34 was unconstitutional. Defense counsel, without the benefit of *Blakely*, wrote the briefs requesting reversal of the appellate court's own rulings.

Recently the Fourth District Court of Appeal reviewed *Sigler v. State*, in light of *Blakely* and reviewed Florida Statute section 924.34, which allows an appellate court to make findings of fact and convict a defendant of a lesser included offense on its own, without the selected jury hearing the evidence.[9] In its opinion, the Fourth District Court of Appeal reversed itself and held the statute authorizing them to find a defendant guilty of lesser included offenses was unconstitutional. The court referred to *Blakely*, but mostly relied on Florida law to determine the statute unconstitutional.

The law in Florida, although not necessarily relied upon by the *Sigler* court in striking down the statute, is the common requirement that the State has to prove all the elements of an offense in front of a jury. Regardless of the ease of that task by a prosecutor, the jury must accept the proof, not an appellate court. Examples include drug trafficking cases even when weight is not in controversy. The court must allow the jury to make a finding on the issue of weight when a mandatory minimum is to be imposed at sentencing.[10] This is based upon the jury's pardon power. Another example is in cases where a crime charging the use of a firearm is alleged. In those cases, the jury must make a finding that a firearm was used if a mandatory minimum is to be imposed.[11] The United States Supreme Court in *Jones v. United States*[12] upheld the same rule of law when reviewing the federal carjacking statute. Any questions that need to be proven beyond a reasonable doubt, should be determined by jury interrogatories on the verdict form. Due process requires that no matter how clear the facts may be in a given case, the jury must reach the verdict in order to maintain the jury's pardon or nullification power.

The issue of the appellate court's authority to conclude that the State did not prove the charge for the greatest offense recognized by the jury and affirm a conviction for a lesser included offense on its own, has been rejected by the First District in *Carrin v. State*.[13] In reviewing *I. T. v. State*,[14] a supreme court case which reviewed the procedure outlined in Statute 924.34, but reversed the conviction on grounds other than constitutionality, the First District concluded that the procedure in *I. T.* would not pass federal constitutional muster. The First District Court of Appeal certified this question of great public importance:

> DOES THE PROCEDURE PRESCRIBED IN *I. T. v. STATE* DENY DEFENDANTS THEIR FEDERAL CONSTITUTIONAL RIGHT TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT?

When the question makes its way to the Supreme Court of Florida, the FACDL should marshal its resources and file an amicus brief to combat the legislative branch's continuation of the erosion of the right to a trial by jury.

[1] 530 U.S. 466 (2000).

[2] 124 S. Ct. 2531 (2004).

[3] *Michelson v. State*, 805 So. 2d 983 (Fla. 4th DCA 2002).

[4] *Sigler v. State*, 805 So. 2d 32 (Fla. 4th DCA 2002).

[5] *Michelson*, 805 So. 2d at 986 n.2.

[6] 820 F.2d 345 (10th Cir. 1987).

[7] *Wallace v. P.L. Dodge Memorial Hospital*, 399 So. 2d 114, 115-16 (Fla. 3d DCA 1981).

[8] *Zolache v. State*, 687 So. 2d 298, 299-300 (Fla. 4th DCA 1997) (citations omitted).

[9] *Sigler v. State*, 2004 WL 1562912. This author represents Sigler's codefendant on appeal Christopher Michelson in *Michelson v. State*, pending on appeal. This author expects the same ruling as in *Sigler*.

[10] *Estevez v. State*, 753 So. 2d 1 (1999).

[11] *State v. Hargrove*, 694 So. 2d 729 (Fla. 1997).

[12] 526 U.S. 227, 119 S. Ct. 1215 (1999).

[13] 2004 WL 1237113 (Fla. 1st DCA Je. 7, 2004).

[14] 694 So. 2d 720 (Fla. 1997).

Robert Buschel is a founding partner in the Fort Lauderdale law firm Buschel Carter Schwartzreich & Yates. Robert contributed as an author on behalf of amicus curiae in Rush Limbaugh v. State *on behalf of the ACLU and* Martin v. State *on behalf the Broward Association of Criminal Defense Lawyers.*