IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, THE FLORIDA RULES OF CRIMINAL PROCEDURE, THE STANDARD JURY INSTRUCTIONS IN CIVIL CASES, AND THE STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES B IMPLEMENTATION OF JURY INNOVATIONS COMMITTEE RECOMMENDATIONS

Case No. SC05-1091

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COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association hereby respectfully submits comments in opposition to the Criminal Court Steering Committee=s proposal to replace Rule 3.250, Fla. R. Crim. Procedure, with proposed Rule 3.381. We contend that allowing the State the right to final argument in all criminal trials, irrespective of whether the defense calls witnesses, would damage the fairness of the criminal justice process in Florida. Furthermore, we believe that the rule change would cause a host of practical problems in the administration of justice in our criminal courts. For these reasons, we argue that the proposal to alter Rule 3.250 should be rejected by this Court.

I.

ALLOWING THE STATE FINAL ARGUMENT EVEN WHEN THE DEFENSE CALLS NO WITNESSES OTHER THAN THE DEFENDANT WILL UNBALANCE THE SCALES OF CRIMINAL JUSTICE IN FLORIDA.

For 150 years, both the Court and the Legislature have embraced Florida=s current scheme of allowing the defense final argument when it does not call witnesses other than the defendant. See Wike v. State, 648 So. 2d 683 (Fla. 1994). Both prosecutors and defense attorneys have for decades grown into criminal practice with Rule 3.250 or its predecessors in place, learning its particular nuances and intricacies. In 150 years, only one reported case, Diaz v. State, 747 So. 2d 1021 (Fla. 3d DCA 1999), has in dicta, criticized the current rule. The Legislature, too, has held to the current practice; as recently as the 2005 session, HB 409 was considered in the House of Representatives but did not pass the Legislature. There is no evidence that the current rule has caused an unjust verdict in a single criminal trial in our state in 150 years. Moreover, there is no evidence that Florida=s acquittal rate is higher or lower than the states and federal districts that have a contrary rule.

Unbalancing the current equilibrium would be damaging to the defense side of the criminal justice equation. First, the defense would never have the psychological advantage of primacy or recency in the closing argument stage of the trial. See Taking the Sandwich off of the Menu: Should Florida Depart from over 150 years of its Criminal Procedure and Let Prosecutors Have the Last Word, 29 Nova. L. Rev. 99 at 105-106.

Secondly, the difficulties of proving a negative, i.e. that a person did not commit a criminal act would be compounded. Many, if not most, criminal cases involve facts in which defense witnesses, such as co-defendants or accomplices, are unavailable due to their own legal jeopardy. The State, on the other hand, has the full resources of victims, eyewitnesses, law enforcement agencies and crime labs to carry its burden of proof.

Finally, as a policy matter, we believe that an accused citizen whose freedom is on the line should have the final word if he or she calls no witnesses. The FPDA would call the Court=s attention to one of the earliest cases decided on this issueBState v. Brisbane, 1802 WL 494 (S.C. Const. Appeals 1802), in which the counsel for a defendant who had not called witnesses claimed the privilege of making the final arguments to the jury. This attorney argued that the practice of giving the final argument to the state was a Arelict of the Kingly perogative, which he hoped to see abolished in this country and a practice more agreeable to the rights of free man introduced.@ Id. at 495. The Court ruled:

> The Judges, after consultation on this last point, observed, that they considered the rights of the citizen upon a perfect equality with those of the state, and they saw no good reason, why the latter should have any exclusive advantage or privilege in which the former should not equally participate. No good reason could be assigned, why a body politic should have higher rights than those who were protected by it. It was created by the people for the benefit of the people, and each individual ought to have every advantage which the aggregate had, otherwise there would not be a perfect reciprocity between the state and the citizen.

II.

THE PROPOSED RULE CHANGE WILL CAUSE PRACTICAL PROBLEMS IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

Defense lawyers currently eliminate many marginal witnesses and character witnesses from trials in order to preserve the final closing argument. If Rule 3.381 is enacted, this practice will cease and criminal trials will inevitably be longer and more complex. This will strain our already-overburdened criminal justice system. Already there are too few judges, too few courtrooms, and too few days of the week to timely try all of the criminal cases set for trial. Delays in criminal trials are already common (and unpopular with both victims and defendants.) Enacting a rule which lengthens trials will exacerbate these pressures.

Inevitably, the proposed rule would also increase the probability of appellate reversals based on improper prosecutorial argument. Florida has an ongoing problem with inflammatory closing arguments. See Urbin v. State, 714 So. 2d 411 (Fla. 1998); Gore v. State, 719 So. 2d 1197 (Fla. 1998); always having the last word would create additional pressure on prosecutors to make overzealous final arguments resulting in appellate reversals.

Last, we point out that Florida is one of only 28 states that allow felony prosecutions to be initiated by a prosecutor rather than a grand jury indictment. Lafave, 4 Crim. Procedure ' 15.1(g). Florida=s liberal charging practices--allowing

elected State Attorneys to charge citizens with crimes without grand jury indictmentsBhave been the subject of commentary and discussion since the early 1970's. See, e.g. Gerstein v. Pugh, 420 U.S. 103 (1975). Prosecutorial decision alone clearly is not sufficient to justify restraint of liberty; thus Florida has developed a unique scheme of 24-hour First Appearances, discovery depositions, unanimous jury verdicts and other procedural safeguards to protect against prosecutorial overreaching. The FPDA suggests that Rule 3.250 falls into line with this protective procedural scheme. Allowing the defense the final word when it calls no witnesses balances the scales in a system dominated by prosecutorial discretion.

III.

CONCLUSION

The defendant=s right to final argument if he or she has not put on evidence other than personal testimony has become a Avested procedural right@ in Florida jurisprudence. Wike v. State, 648 So. 2d 683 (Fla. 1994). The tradition of allowing criminal defendants this privilege is well-entrenched, and has proven to be sound and workable in our state=s criminal practice. The arguments against the rule do not take into account Florida=s liberal scheme for charging citizens with criminal offenses. Modification of any piece of our protective procedural fabric would damage the equilibrium in our system. Moreover, changing Rule 3.250 would cause longer trials and create pressure for more improper final arguments by prosecutors. Most fundamentally, the precious Afinal word@ in a criminal

trial should be given to the individual whose freedom is at risk if he or she does not present evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to: Adrienne Frischberg Promoff, 44 West Flagler Street, Suite 2100 Miami, Florida 33130-6807; Aubrey George Rudd, 7901 Southwest 67th Avenue, Suite 206, South Miami, Florida 33143-4538; George Euripedes Tragos, 600 Cleveland Street, Suite 700, Clearwater, Florida 33755-4158; Judge Winifred J. Sharp, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32114-5002; Judge Dedee Costello, Post Office Box 1089, Panama City, Florida 32402; Judge Chris W. Alternbernd, Second District Court of Appeal, 1700 N. Tampa Street, Suite 300, Tampa, Florida 33602; and Judge O. H. Eaton, Seminole county Courthouse, 301 North Park Avenue, Sanford, Florida 32771-1243 by mail delivery this _____ day of November, 2005.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
Florida Public Defender Association
Post Office Box 11057
Tallahassee, Florida 32302
(850) 488-6850
Fla. Bar No. 242705