COMMENT OPPOSING THE AMENDMENT OF THE FLORIDA RULES OF CRIMINAL PROCEDURE TO CEMENT FOR THE PROSECUTION FIRST AND LAST SUMMATION IN CRIMINAL CASES

The Florida Association of Criminal Defense Lawyers, the Florida Public Defender Association, the American Civil Liberties Union of Florida, the Wilkie D. Ferguson, Jr. Bar Association, the Florida Innocence Initiative, the Miami Chapter of the Florida Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, H. Scott Fingerhut, and Gerald Kogan, and hereby file this Comment opposing the amendment of the Florida Rules of Criminal Procedure to forever secure rebuttal closing argument for the State of Florida in all criminal prosecutions.

Incorporated herein, and respectfully submitted for the Court's consideration, is our proposed amendment to Florida Rule of Criminal Procedure 3.250, which amendment shall ensure the State of Florida and Florida's trial judges of the genuineness of an accused's trial strategy by requiring – as the Court does in related contexts – an express advisory of the procedural consequence of opting for final summation.

Introduction

True to the call of due process for fundamental fairness in the manner in

which we adjudicate disputes under law, the development of Florida's criminal justice landscape has long, and rightly, been a matter of balance – over and again taking care, where possible, to level the playing field between prosecution and defense. No more so has the application of this principle been demonstrated than with our closing argument rule, the evolution of which has been sufficiently explicated in pleadings previously filed with the Court in this cause.

The driving argument put forth in the Legislature and before the Criminal Procedure Rules Committee to favor cementing first and last summation for the prosecution was threefold: (i) the State bears the burden of proof; (ii) Florida's procedure is an anomaly; and (iii) the Florida rule fosters a litigation atmosphere of discouragement in which, to have the last word, defense counsel simply cannot withstand temptation to forego presenting important evidence, or to flaunt exhibits before the jury without introducing them, which in turn foment postconviction ineffectiveness claims.

None of these arguments was proved empirically or in case law. Nor, for that matter, was it proved that the rule has wrought a diminishing quality of representation an accused receives at trial. Still, as it was said, the closing argument rule must go because the truth-finding process – the mainstay of our modified adversary system – is being significantly compromised.

Each of these arguments, we submit, most respectfully, is sophistry, and belie the truth about why we find ourselves here today.

As the Court has previously determined, the rule is fair. *See Heffron v. State*, 8 Fla. 73 (Fla. 1858). The rule works – as an "aid" not a "limitation." *Preston v. State*, 260 So. 2d 501, 504 (Fla. 1972). And in that the accused's procedural right to final summation in appropriate cases has "vested," the rule should not be discarded. *Wike v. State*, 648 So. 2d 683, 687 (Fla. 1994).

Florida's Closing Argument Rule Provides A Vital Balance In Our Criminal Justice System

Florida's closing argument rule was neither created as, nor, over time, has it become, a means of discouragement. To the contrary, the rule was created to present, and continues to present, a critical opportunity of which accuseds are invited to avail themselves in instances where the invitation has been deemed just and proper, most notably where no independent case for innocence can be made.

That Florida's summation procedure does not in any fashion operate to hamper effective representation or otherwise deter the exercise of an accused's constitutional right to present a defense was recognized succinctly by the Court in *Preston*:

> The basic choice confronting every defendant, guided by counsel, is whether, on balance, it is strategically desirable to call defense

> witnesses. Evaluation of that option depends on many factors like the weight of the State's case, the probable impact on the State's case of the cross-examination of State witnesses by the defense, the relative significance of the testimony of the defense witnesses to be called, possible avenues of rebuttal which the defense presentation may open up for the prosecution to explore, and anticipation of the witnesses' impression on the jury. ***There is no basis for concluding that one additional factor in the calculus on which the appellant focuses – the entitlement to the concluding argument before the jury – is so weighty that its presence overwhelms the ability of the defense to make a rational and intelligent choice.***

Preston v. State, 260 So. 2d at 504 (emphasis added). That statement was no less true 34 years ago than it is today.

Occasionally, as in *Preston*, an accused may find himself or herself in a strong position to take the offensive by calling witnesses to build a case for innocence. "In those instances," the Court observed, "where such an offensive tactic is possible," the State fairly closes last, because "the defense receives a more balanced exposure before the jury, and is more adequately able to offset the impression created in the minds of the jurors by the prosecution's presentation." *Id*. at 504.

But usually that is not the case, the accused is not as fortunate, and more often than not he or she is confronted with the rather difficult task of trying to prove a negative. Where this is the case, and the evidence does not make for a compelling defense, the Court has similarly spoken – again in positive terms – of

an opportunity of which accuseds may avail themselves, in equity:

> In our judgment it was precisely to counterbalance the weight of the State's offensive in such cases that the Legislature, and later this Court, created an exception to the common law rule that the party with the burden of proof is entitled to the concluding argument before the jury. ***As we view the Rule, it is intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses***.

Id. (emphasis added).

In strong prosecution cases, Florida's closing argument rule works to "adequately offset" the impression created by the prosecution's case-in-chief; to permit the accused a deserved last word; to level the advantage – not purely between prosecution and defense, as has often been argued, but between defendants who are able to build strong cases of innocence for themselves and those who are not.

Florida's Historic Closing Argument Procedure Is Part Of The Fabric Of Florida's Criminal Justice System

For over 150 years, where the case is appropriate, Florida's courts, its Legislature, and its people have accorded the criminally accused the strategic option of final summation. A grace, of sorts, to be sure, but much, much more. And all a matter of fundamental fairness.

So vital is this procedure to our system of justice that the Court has come to

view it as a "vested procedural right," *Wike v. State*, 648 So. 2d 683, 687 (Fla. 1994), and, as such, an integral part of Florida's criminal justice culture. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture") (citations and internal quotation marks omitted).[1] *Accord Wike*, 648 So. 2d at 683 ("Throughout the years, Florida courts have never deviated from the holding that the denial of a defendant's right to close under this rule constitutes reversible error") (listing cases); *Heffron v. State*, 8 Fla. 73, 75 (Fla. 1858) ("we have no hesitancy in saying that the statute was intended to secure to the defendant the right to conclude in criminal cases, where he introduces no testimony, and that the requisition is mandatory"); *Wilson v. State*, 284 So. 2d 24 (Fla. 2d DCA 1973) (defendant's right to final summation not altered by Florida's Constitutional revision), *quashed on other grounds*, 294 So. 2d 327 (Fla. 1974).

These reasons alone militate strongly against discarding Florida's closing argument rule.

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[1] Against a statutory challenge to bypass *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court in *Dickerson* reaffirmed *Miranda's* warnings in custodial interrogation and held, "Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Dickerson*, 530 U.S. at 443.

Now Is Not The Time To Make A Seismic Shift
In Florida's Overburdened Criminal Justice System

There are numerous practical reasons not to change the rule, each of which reflects the stress already placed on our criminal justice system, and each of which belies any argument that the search for truth is somehow hindered by Florida's closing argument rule.

First, Florida law enforcement agencies arrest, and prosecutors formally charge, nearly twice as many citizens – mostly indigent citizens – with felonies as were arrested and formally charged just two decades ago. Normalized for population growth, this still represents a substantial increase in the volume of criminal cases brought to court.[2]

Second, the State has substantially increased its conviction rate in the last 20

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[2] *See* The Florida Legislature, Office of Economic and Demographic Research: Criminal Justice Trends, as presented at the Criminal Justice Estimating Conference, October 12, 2006:

Arrests: 1985 – 565,929; 2005 – 1,056,121
Felony Filings: 1985 – 133,658; 2005 – 213,041
Guilty Dispositions: 1985 – 74,301; 2005 – 158,685

http://edr.state.fl.us/conferences/criminaljustice/Criminal%20Justice%20Trends.pdf.

years, without a change in the closing argument rule.[3]

Third, austere sentences continue to escalate, and are more and more to be mandatorily imposed, tripling Florida's incarceration rate.[4]

Fourth, in Florida, young prosecutors are entitled to levy felony charges by information; the State is not compelled in large part to consult the grand jury.[5]

And fifth, and finally, in the past 10 years, Florida's index crimes are down 22.4 percent in number and 37.6 percent in rate.[6]

Clearly, the closing argument rule is not hindering prosecutors.

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[3] *Id*. (Percentage of Filings Found Guilty: 1985 – 55.6%; 2005 – 74.5%).

[4] *Id*. (Prison Population: 1985 – 28,310; 2005 – 84,901). *See, e.g.*, *Paey v. State*, 2006 Fla. App. LEXIS 20376 (Fla. 2d DCA, December 6, 2006) (discussing the constitutionality of imposing a 25-year mandatory minimum prison sentence).

[5] In terms of procedural innovations, Florida's long allegiance to defense rebuttal closing argument is but one of several safeguards employed to prevent governmental overreaching. For example, Florida mandates an initial appearance for an accused within 24-hours of arrest. *See* Fla.R.Crim.P. 3.132(a). We require release on an accused's own recognizance on the 40th day unless by that date the State files formal charges. *See* Fla.R.Crim.P. 3.134(2). If not charged within 21 days from the date of arrest, an accused is entitled to an adversary preliminary hearing on any felony charge then pending. *See* Fla.R.Crim.P. 3.133(b). We permit discovery depositions. *See* Fla.R.Crim.P. 3.220(h). And, Florida requires unanimous jury verdicts. *See* Florida Standard Jury Instructions in Criminal Cases, No. 3.10(6) (Rules for Deliberation).

[6] *See* Florida Department of Law Enforcement: Statistical Analysis Center: http://www.fdle.state.fl.us/fsac/Crime_Trends/total_Index/index.asp.

Which compels us to ask, with all due respect, why change course now? Arrests are up. Prosecutions are up. Sentences are up. Crime is down. From the State's perspective, the system – including the trial system – is working.

Stated another way, "if it ain't broke, don't fix it." Now is not the right time to upend Florida's historic design – in a very real sense, a visionary one – which has long marked this southern state's concept of fairness in a delicate balance of justice as part of our "modified adversary system." *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., joined by Harlan, J., and Stewart, Jr., dissenting in part, concurring in part).

The Last Word

In the final analysis, the truth about why we find ourselves here today is the very reason why the closing argument rule should not be changed. We are not here because the State bears the burden of proof. As the Court has recognized, not all defenses are equal, and due process demands that those that are the weakest deserve a leg up to stand a fighting chance. Nor are we truly here because Florida's procedure is unique. The fact that Florida is in the minority of jurisdictions pledging allegiance in equity to this procedural balance is no more an argument against it than averring prudence simply because something is practiced

by a majority.[7] As has been said, liberty's value does not lie in counting noses. And, we certainly are not truly here because defense counsel under-represent their clients, undermine their cases, or exhibit courtroom behavior worthy of opprobrium.

No matter how the State's argument has been clothed, one simple fact remains – a fact that was admitted, quite openly, before the Legislature this past spring: prosecutors want the last word. The defendants have it, the State wants it. Purely for the upper hand in trial. For argument's sake alone. For the "fundamental advantage which simply speaks for itself." *Wike v. State*, 648 So. 2d at 687.

Because it is *this* that is the gravamen of the State's complaint and not any injustice wrought by temptation or peculiarity, the rule ought not to be changed. That this is the gravamen of the complaint – proved anecdotally at best – is simply not powerful enough to overcome an unbroken span of a century-and-a-half's

[7] Indeed, Florida is one of only a handful of states that permit the imposition of the death penalty by a simple majority of the jury, and the only state that permits both a majority death sentence or a judicial override for death. But there has been no hue and cry from prosecutors that Florida should be forced to adopt a more mainstream approach to capital sentencing. *See, e.g., State v. Steele,* 921 So. 2d 538 (Fla. 2005).

worth of fundamental fairness.[8]

Nor is it an acceptable proposition that the closing argument rule is somehow to blame for the corruption of the truth-seeking process and the manner we conduct our trials. It has long been our interest in "not convicting the innocent," not the closing argument rule, that has sustained us, by permitting an accused to "put the State to its proof." *United States v. Wade,* 388 U.S. at 257-258. Our fidelity to justice, to the intention of justice, and to the promise of the law as manifested in our reasonable doubt standard, is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In Re Winship*, 397 U.S. 358, 380-381 (1970) (Harlan, J., concurring). Moreover, the very proposition that there is some tactical advantage to be gained from making the concluding argument before the jury has been questioned by the Court as "psychologically unsound."[9] And even if one accepts

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[8] The State's argument in favor of discarding the rule also evinces a surprising lack of faith in our jury system, and begets the misguided question whether one would rather a person be acquitted because of a defense attorney's oratory or convicted because of a prosecutor's eloquence? Stated another way, how strong is a prosecutor's case if an eloquent defense closing may carry the day? The State's argument implies that juries will not follow instructions, that they will disregard evidence, and that they are too prone to be carried away by mere words. We do not subscribe to this crabbed view of the jury system.

[9] *Preston* at 505, *citing* Kunkel, Marilyn Vavra, and Geis, Gilbert, *Order of Final Argument in Minnesota Criminal Trials*, 42 Minn. L. Rev. 549 (1958). *See*

this questionable proposition, "Rule 3.250 adequately balances this advantage between prosecution and the defense by giving the defense the closing argument in those instances when the trial situation is weighted in favor of the prosecution." *Preston* at 505.

RULE PROPOSAL

Although we strongly believe that no change to Rule 3.250 is warranted, given the prosecution's stated argument that the accused need be protected from counsel who forsake valid defenses merely to salvage rebuttal close, we respectfully submit that any lingering anxiety in the Bench, Bar, and the Legislature as to the genuineness of an accused's decision to reserve final argument in the appropriate case may be relieved by inserting into the rule a requirement that the trial court expressly advise the accused of the procedural option they are availing themselves of and the consequence therefor.[10] This

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also Mitchell, John B., *Why Should the Prosecutor Get the Last Word?* 27 Am. J. Crim. L. 139 (2000).

[10] The Court has approved such advisories at similarly critical stages where the accused is poised to make important plea and trial decisions. *See, e.g., In re: Amendments to Florida Rules of Criminal Procedure 3.10 and 3.172*, 938 So. 2d 978 (Fla. 2006) (existence of physical evidence containing DNA); *In re: Amendments to Florida Rule of Criminal Procedure 3.172*, 911 So. 2d 763 (Fla. 2005) (consequences of Jimmy Ryce Act); *Nixon v. State*, 857 So. 2d 172 (Fla. 2003) (attorney may not concede guilt for crimes to which defendant pleads "not guilty" unless court finds defendant understands consequences of concession),

limited advisory should take place before the defense has rested its case and outside the presence of the jury.

The amended rule would read thusly:

Proposed Amendment of Florida Rule of Criminal Procedure 3.250

Rule 3.250. Accused as Witness

(1) In all criminal prosecutions the accused may choose to be sworn as a witness in the accused's own behalf and shall in that case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself or herself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his or her own behalf~~, and a~~.

(2) An ~~defendant~~ accused offering no testimony in his or her own behalf, except the ~~defendant's~~ accused's own, shall be entitled to the concluding argument before the jury. In this event, before the defense has rested its case, the court shall advise the accused outside the presence of the jury of the right to call witnesses and present physical evidence in his or her own behalf, in which case the prosecuting

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reversed and remanded, *Florida v. Nixon*, 543 U.S. 175 (2004); *In re: Amendments to Florida Rules of Criminal Procedure*, 536 So. 2d 992 (Fla. 1988) (immigration consequences).

attorney would be entitled to the concluding argument before the jury.[11]

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

CONCLUSION

Florida decided long ago that an exemption should be made in strong prosecution cases to give an accused the option to forego the presentation of evidence, save their own testimony, perhaps, in return for which they are to be accorded the privilege of final summation to the jury. Such a rule neither penalizes the State nor discourages the presentation of potentially beneficial defense evidence by exacting a toll. The rule's connotation was never intended in the negative. Rather, Florida's rule encourages analysis and reflection; a calculated streamlining of presentation; an opportunity to weigh, against the loss of final summation, just what is to be gained by introducing the collateral or the

[11] Beyond this advisory, we note that the trial court would be entitled, although certainly not required, to inquire into the knowing and voluntariness of an accused's decision to forego the presentation of additional witnesses and physical evidence. This was not made part of the rule itself because, traditionally, such colloquies have developed as a matter of case precedent. Should a trial court wish to engage in this inquiry, however, we respectfully submit that its scope should be limited to whether the accused has discussed this matter with counsel – not the substance of their discussion – and whether the accused is satisfied with the strategic advice of counsel. Perhaps the trial court might inquire whether any threats or promises have been made to the accused as well. In either event, this discretionary inquiry of the accused by the trial court is to be independent of the trial court's inquiry into the voluntariness of an accused's decision not to testify in his or her own behalf under section (1) of the rule as amended.

unimportant.

No experienced defense counsel would believe, let alone be effective for believing, that oratory best serves clients. There is simply no evidence to support a proposition otherwise: No empirical evidence, for no criminal defense lawyer would ever sacrifice more justice for more argument; and no case precedent either. Indeed, there is not a single reported Florida decision reversing for ineffective assistance of counsel where the defense, in order to capture final summation, was "overwhelmed" or otherwise "discouraged" by the determination whether to present relevant evidence.[12]

And as for unethical behavior, like parading exhibits before the jury and ultimately refusing to offer them in evidence, such conduct, in the rare instance it may occur, is better remedied by the use of more traditional methods of maintaining courtroom decorum than by this unnecessary and seismic shift in

[12] In *Williams v. State*, 507 So. 2d 1122, 1123 (Fla. 5th DCA 1987), the court indeed ordered a new trial based on a litany of failures in case investigation, preparation, and presentation, and held in essence that an all-encompassing "do nothing" strategy – including counsel's transparent excuse that he chose to do "nothing" in order to preserve rebuttal during closing argument – is no strategy at all. *Williams* is a powerful illustration that there are simply no reported Florida cases where defense counsel actually determined, after careful consideration and deliberation, to forego a viable defense merely to have the last word before the jury.

criminal procedure.[13]

How a society treats its outcasts, the least among it, says perhaps the most about the type of society it is, and yearns to become. Especially where liberty is at stake. Hence to strip final summation from an accused for whom there is little or no evidence worthy to build a case for innocence is, for all practical purposes, to reduce the glorious right to a jury trial to a shell; to reduce community participation in the determination of guilt or innocence to a false promise that the system is fair.

In terms of what justice has come to mean – and is to mean – to all Floridians, we must not take away the "vested procedural right" of an accused, presumed innocent, to opt for final summation to the jury in a strong prosecution case, and stand just a little bit taller in the fight to see that justice is done.

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[13] Contrary to the State's concern for defense ethics, stripping the accused of final summation will likely result in the increase of *prosecutorial* misconduct during closing argument, the instances of which already are legion. *See, e.g.*, *Lugo v. State*, 845 So. 2d 74, 108 (Fla. 2003); *Ruiz v. State*, 743 So. 2d 1, 21 (Fla. 1999); *Johnson v. State*, 917 So. 2d 226 (Fla. 3d DCA 2005); (Ramirez, J., dissenting) (listing cases); *Johns v. State*, 832 So. 2d 959, 963 (Fla. 2d DCA 2002) (listing cases); *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001) (listing cases). With the current rule in place, defense counsel may thus continue to correct such prosecutorial misconduct, and thereby obviate the need for appellate review.

WHEREFORE we urge the Court not to discard the vested right of Florida's accuseds to first and last summation in all criminal prosecutions under Florida Rule of Criminal Procedure 3.250.

Respectfully submitted this 15th day of December, 2006, by,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this day, the 15th of December, 2006, an original, nine (9) paper copies, and an electronic copy of this Comment were filed with the Florida Supreme Court, and that an electronic copy and a paper copy has been served on William C. Vose, Chair, The Florida Bar Criminal Procedure Rules Committee, 1104 Bahama Drive, Orlando, Florida 32806-1440.

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