IN THE SUPREME COURT OF FLORIDA

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION RE: PROPOSED FLA. R. CRIM. P. 3.250 AND 3.381

The Florida Public Defender Association, hereby files these comments regarding the Court's consideration of proposed rule changes and the legislative enactment of Section 918.19, Florida Statutes (2006), stripping defendants of the traditional "first and last" (initial closing and rebuttal) address to the jury during Closing Arguments should he choose to elicit no evidence other than his own. The Association submits that the legislative enactment unconstitutionally encroaches upon the powers of this Court, and further submits that the proposed rule changes to tried and tested courtroom procedure are unnecessary, unwise, and not in the best interests of the criminal justice system.

HISTORY

For 150 years, prior to the 2006 Legislative session, both this 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). As noted by the House' staff analysis to Section 918.19, Florida Statutes (2006),[1] this Court has explained the history of this rule as follows:

> To fully understand the rights this state has historically

[1] http://www.flsenate.gov/data/session/2006/House/bills/analysis/pdf/h0147b.JC.pdf

> provided to defendants regarding concluding arguments under either rule, it is necessary to examine the history of these rules. At common law, the generally accepted rule was that the party who had the burden of proof had the right to begin and conclude the argument to the jury. The rule applied to both civil and criminal cases. The rationale behind this common law rule was to provide the party who shouldered the disadvantage of the burden of proof with the advantage of the opening and closing arguments before the jury. In 1853, this common law rule was changed in Florida . . . to provide that a defendant who produced no testimony at trial was entitled to the advantage of making the concluding argument before the jury. That law was later codified as section 918.09, Florida Statutes.
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> As early as 1858, this Court determined that a trial judge had no discretion in following the statutory predecessor of section 918.09 and that the erroneous denial of a defendant's right to concluding argument constituted reversible error. 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. In fact, this is true even though in 1968 section 918.09 was incorporated as rule 3.250 and in 1970 section 918.09 was repealed.

Wike, 648 So.2d 683, 686 (Fla. 1995)(citations omitted)

The operation of this court procedure is one which is based upon fairness in that the accused has not placed anything into evidence, with the possible exception of the Defendant's own testimony, and this tradition and its vested procedural right has therefore given the accused the opportunity to address the jurors last in time.

LEGISLATIVE ENCROACHMENT

The Florida Legislature recently passed the Laws of Florida Chapter 2006-96

which reads in part:

> Section 1. Section 918.19, Florida Statutes, is created to read:
> 918.19 Closing argument.—As provided in the common law, in criminal prosecutions after the closing of evidence:
> (1) The prosecuting attorney shall open the closing arguments.
> (2) The accused or the attorney for the accused may reply.
> (3) The prosecuting attorney may reply in rebuttal.
> The method set forth in this section shall control unless the Supreme Court determines it is procedural and issues a substitute rule of criminal procedure.
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> Section 2. Rule 3.250, Florida Rules of Criminal Procedure, is repealed to the extent that it is inconsistent with this act.

That recent legislative enactment, backed by Seventh Circuit State Attorney John Tanner,[2] encroaches on the Court's procedural powers in that it attempts to dictate the manner in which a court conducts a trial. If this enactment is allowed to become the rule of law, the balance of powers between the three governmental branches will further shift toward the legislative branch so that a precedent is set for future legislative forays into the judicial realm.

The legislature cannot constitutionally dictate to the courts the manner in which they conduct their trials. Article II, Section 3 of the Florida Constitution forbids one branch of government from exercising powers appertaining to the other two branches of

[2] "Tanner-backed Bill Gives Prosecutors the Last Word," Jay Stapleton, *The Daytona Beach News Journal*, March 29, 2006. *See also*, *Snelgrove v. State*, 921 So.2d 560, 569 (Fla. 2005), wherein the Court, although finding the error unpreserved, noted the trial court's criticism of Tanner for his improper outburst and attempt, during defense counsel's

government. The violation of this provision in the state constitution denies Due Process under the Fourteenth Amendment to the United States Constitution. *See Whalen v. United States*, 445 U.S. 684, 689 fn. 4 (1980).

The Court has spoken clearly on this matter and has invalidated legislation that encroached on its own exclusive Constitutional duty to establish rules of court procedure concerning imposition of the death penalty.

> Article II, section 3, of the Florida Constitution prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein." Article V, section 2(a) states that the Florida Supreme Court has the exclusive authority to "adopt rules for the practice and procedure in all courts, including the time for seeking appellate review." The Legislature has the authority to repeal judicial rules by a two-thirds vote, but the authority to initiate rules rests with the Court. *See Johnson v. State,* 336 So.2d 93, 95 (Fla.1976); art. V, §§ 2(a), Fla. Const.
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> Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law. *See Johnson.* In *In re Rules of Criminal Procedure,* Justice Adkins provided the following definitions for substantive law and procedural law:
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> > Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to

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final closing argument, to have an additional final say to the jury.

> conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.
> 272 So.2d 65, 66 (Fla.1972) (Adkins, J., concurring).

Allen v. Butterworth, 756 So.2d 52, 59 -60 (Fla. 2000). In *Allen v. Butterworth*, *supra*, the Court found that the legislatively-enacted Death Penalty Reform Act (DPRA) was procedural and also significantly changed Florida's postconviction procedures as already promulgated by the Court. Accordingly, the Court held that the DPRA unconstitutionally encroached upon its rulemaking authority.

This Court has defined procedural rules and substantive law, and has distinguished the two. In *State v. Garcia*, 229 So.2d 236 (Fla. 1969), the Court stated that "procedural law" is sometimes referred to as "adjective law" or "law of remedy" or "remedial law" and has been described as the legal machinery by which substantive law is made effective. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. The Court has also held that "[a] statute can have both substantive provisions and procedural requirements. If the procedural requirements conflict with or

interfere with the procedural mechanisms of the court system, they are unconstitutional under a separation of powers analysis . . . . *See* art. II, § 3, art. V, § 2, Fla. Const." *Jackson v. Florida Dept. of Corrections,* 790 So.2d 381, 384 (Fla. 2000) (copy requirement of Prisoner Indigency Statute was unconstitutional as violation of separation of powers and usurpation of Supreme Court's exclusive rulemaking authority). *See also State v. J.A. Jr.*, 367 So.2d 702 (Fla. 2nd DCA 1979) (holding that the method of computing the thirty-day time limit for filing a delinquency petition is a matter of procedure subject to the constitutional rulemaking authority of the Supreme Court; substantive law, the responsibility of the legislature, prescribes duties and rights while procedural law, determined by the Supreme Court, concerns the means and methods to apply and enforce those duties and rights).

In *State v. Raymond*, 906 So.2d 1045 (Fla. 2005), the Court ruled that the state statute prohibiting a person charged with certain "dangerous crimes" from being granted nonmonetary pretrial release at a first appearance hearing was purely a matter of "practice and procedure" in all courts, and therefore the statute was an unconstitutional violation of the Separation of Powers Clause of the Florida Constitution. There, the state argued unsuccessfully that any procedural aspect to the statute was incidental to the substantive aspect and thus the statute was constitutional. *Raymond*, 906 So.2d at 1049. The Supreme Court, however, held that while there are some substantive statutes that permissibly include procedural elements, the Court ruled that "where there is no

substantive right conveyed by the statute, the procedural aspects are not incidental; accordingly, such a statute is unconstitutional." *Raymond*, *supra* at 1049. *See also Knealing v. Puleo*, 675 So.2d 593 (Fla. 1996) (provision of mediation statute permitting offer of settlement to be made at any time after mediator declares impasse was unconstitutional).

Although the Legislature may repeal a court procedural rule (by two-thirds majority vote), it cannot *create* a new procedural rule by statute. *See Allen v. Butterworth*, 756 So.2d at 59; *In re Clarification of Florida Rules of Practice and Procedure*, 282 So.2d 204 (Fla. 1973) (declaring unconstitutional certain laws that attempted to rewrite the rules of appellate procedure).

The question, then, remains of whether this particular legislation, which purports to repeal a rule of the state's highest court and establish court procedure, can be termed a "substantive" matter, rather than one of procedural due process. That answer must be, "No." In *Federal Communications Commission v. WJR*, 337 U.S. 265, 276 (U.S. 1949), the United States Supreme Court held that the right of oral argument was a matter of *procedural* due process. *Cf. Jordan v. State Bd. of Nursing Educ.*, 1987 WL 9338 (Ohio App. 4 Dist. 1987) (even in an *administrative* hearing, a state agency denies a licensee's fundamental *procedural* due process rights by limiting her attempt to make argument).

That this matter is one of procedural due process and not substantive due process, then, should not be in dispute. Therefore, where life or liberty are at stake, there can be

no less due process than in the above-cited civil instances, and it is *procedural* due process, rather than substantive due process, that the legislature is tinkering with in this particular foray. As such, this is not a matter for the legislative branch, but it remains for the judicial branch to determine how best to administer its procedural matters.

THE COURT HAS SPOKEN

As further noted by the House' staff analysis,[3] the state's high Court has also made its position clear on this subject; closing argument in a criminal trial is a matter of procedure:

> The Florida Supreme Court has determined that the right to make the closing argument where no evidence except the defendant's own testimony has been introduced, "is a vested *procedural* right, the denial of which constitutes reversible error."

See Birge v. State, 92 So.2d 819 (Fla. 1957); *Freeman v. State*, 846 So.2d 552, 554 -555 (Fla. 4th DCA 2003); *Morales v. State*, 609 So.2d 765, 766 (Fla 3rd DCA 1992) (reversing grand theft, burglary and resisting arrest convictions because "[i]n spite of the overwhelming evidence against [the defendant], the trial court did not scrupulously follow a required rule of procedure.")

Furthermore, the legislative staff report itself even anticipated a controversy over the division of powers between the branches:

[3] http://www.flsenate.gov/data/session/2006/House/bills/analysis/pdf/h0147b.JC.pdf

> It is possible that the statute created by this bill will be challenged on the grounds that it violates the separation of powers provision of the state constitution by dealing with procedural matters that are the province of the court. In ruling on the constitutionality of a statutory provision, the court determines whether the statute deals with "substantive" or "procedural" matters. As discussed earlier, although the court was not being asked to rule specifically on the issue of whether the rule was substantive or procedural, *the Florida Supreme Court has characterized the defendant's right to have the final closing argument as a "vested procedural right."*

This Court is currently in the process of considering a rules change proposal which would change the order of closing arguments to that passed by the Legislature. However, until and unless such time as the Florida Supreme Court changes the closing argument procedural rule in criminal trials, the Legislature's attempt to is an invalid and unconstitutional attempt to regulate court procedure.

It is crystal clear that the judicial branch of Florida government has already decided this matter of procedural due process, and the legislative enactment flies in the face of that judicial determination in an unconstitutional manner. It is a violation of Article II, section 3 of the Florida Constitution and Article V, section 2(a).

PRACTICALITIES & EQUITY

Practically speaking, unbalancing the current equilibrium as provided by court rule would be damaging to 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.[4] 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.

Equitably speaking, as a policy matter, an accused citizen whose freedom is on the line should have the final word if he or she calls no witnesses. One of the earliest cases decided on this issue, *State v. Brisbane,* 1802 WL 494 (S.C. Const. Appeals 1802), involved counsel for a defendant who had not called witnesses and 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 "relict of the Kingly prerogative, 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

[4] 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.

reciprocity between the state and the citizen.

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 indictments – have 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 established court procedure of current 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. The Florida Bar Board of Governors, at a recent meeting, voted against the proposed rule changes for these very reasons by an overwhelming vote of 30-5, despite the subcommittee's recommendation for passage, adopting instead the subcommittee's minority report:[5]

> In those were the accused puts on no evidence, for example, she has only counsel to convince the jury of reasonable doubt, and thus rebuttal is paramount. "Similarly, where the accused presents an affirmative defense – whether one requiring proof

[5] *See* "Board Opposes Closing Argument Rule" *Florida Bar News* (Oct. 15, 2006), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9fl3012b96736985256aa900624829/603b296dd7e3flee8525720200578715?OpenDocument

> beyond a reasonable doubt or merely "some" evidence – the final closing argument, when appropriate as a matter of law, too, is essential. Moreover, it is nearly impossible to prove a negative. Yet since it is precisely this that defendants are most often called on to do, they deserve the last word, in turn: to level the playing field – not between defendant and state, as has been argued, but between defendants independently fortified with evidence and those without.

LEGISLATIVE FINDINGS INACCURATE

The staff analysis for both legislative bodies found there would be *no* financial impact with this change in court procedure:

> II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT
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> A. FISCAL IMPACT ON STATE GOVERNMENT:
> 1. Revenues:
> None.
>
> 2. Expenditures:
> None.
>
> B. FISCAL IMPACT ON LOCAL GOVERNMENTS:
> 1. Revenues:
> None.
>
> 2. Expenditures:
> None.
>
> C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:
> None.
>
> D. FISCAL COMMENTS:
> None.

However, any trial practitioner or jurist recognizes that this is not borne out by fact.[6]

Any change in traditional courtroom procedure would not be in the interests of judicial economy. Defense lawyers currently eliminate many marginal witnesses and character witnesses from trials in order to preserve the final closing argument. If the legislative enactment is followed, this practice will cease and criminal trials will inevitably be longer and more complex.[7] 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.) Allowing the statutory change to this procedural rule or adopting the proposed rule changes which would lengthen 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). *See also Farina v. State*, 2006 WL 1837933, *15 (Fla. 2006). Always having the last word would create additional pressure on prosecutors to make overzealous final arguments resulting in appellate reversals.

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[6] *See* "Who Gets the Last Say?" *Florida Bar News* (April 1, 2004), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/b075a77dc143b53085256e60006d0f28?OpenDocument

[7] *See* footnote 5, *supra*.

In summary, the defendant's right to final argument if he or she has not put on evidence other than personal testimony has become a "vested procedural right" in Florida jurisprudence. *Wike v. State*, 648 So. 2d 683 (Fla. 1994). Being a matter of court procedure and procedural due process, the Legislature may not encroach on the rulemaking power of the Court. The tradition of allowing criminal defendants this procedural 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 the court procedure of Rule 3.250 would cause longer trials and create pressure for more improper final arguments by prosecutors. Most fundamentally, the precious "final word" in a criminal trial should be given to the individual whose freedom is at risk if he or she does not present evidence.

CONCLUSION

For the foregoing reasons, the Florida Public Defender Association respectfully asks this Court to consider Section 918.19, Florida Statutes (2006), unconstitutional as a violation of the Separation of Powers and Due Process of Law, as guaranteed by the United States and Florida Constitutions; to reject proposed Rules 3.250 and 3.381, Florida Rules of Criminal Procedure; and to re-enact the current Rule 3.250, thus continuing the 150-year old practice of granting to defendants the initial address to jurors during Closing Arguments, followed by any State argument, and concluding with any rebuttal argument by the accused, for it is his life or liberty at stake in his criminal trial.

Respectfully submitted,

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