SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Criminal Justice Committee

BILL: SB 658

INTRODUCER: Senator Wise

SUBJECT: Order of Closing Arguments

DATE: January 17, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Favorable**
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

Senate Bill 658 creates a new section of statute which provides that in criminal prosecutions, after the closing of evidence, the prosecuting attorney shall open the closing arguments, the accused or the attorney for the accused may reply, and the prosecuting attorney may reply in rebuttal.

The bill also repeals Florida Rule of Criminal Procedure 3.250 to the extent that it is inconsistent with the provisions in the bill.

The bill will take effect upon becoming law except that the repeal of the Rule of Procedure will take effect only if the bill is passed by a two-thirds vote of the membership of each house of the Legislature.

This bill creates section 918.19, Florida Statutes. This bill repeals part of Rule 3.250, Florida Rules of Criminal Procedure.

II. Present Situation:

Florida Rule of Criminal Procedure 3.250 provides that:

> In all criminal prosecutions the accused may choose to be sworn in 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 defendant offering no*

> *testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury*. (emphasis added)

Florida Rule of Criminal Procedure 3.780 which applies to sentencing in a capital case, provides that:

> Both the state and the defendant will be given an equal opportunity for one opening statement and one closing argument. The state will proceed first.

The Florida Supreme Court has characterized the effect of these rules as follows:

> Both rules are clear and unambiguous--in a guilt phase proceeding, a defendant has the right to close in final argument only if the defendant presents no testimony other than his or her own; in a penalty phase proceeding of a death case, a defendant always has the right to close in final argument. *Wike v. State*, 648 So.2d 683, 686 (Fla.1994).

History of the Rule of Procedure
Common Law to Statute to Procedural Rule

The Florida Supreme Court has explained the history of this rule as follows:

> To fully understand the rights this state has historically 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.
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> In 1853, *this common law rule was changed* in Florida *through Chapter 539, Laws of Florida (1853),* 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 v. State*, 648 So.2d 683, 686 (Fla. 1995); *(citations omitted; emphasis added)*.

Practical Application

The application of the Rule of Procedure and before it, the statutory law, is undeniably a factor in trial strategy, for both the State and the Defendant.

The State would, ideally, prefer to "box" the defendant into "giving up last Closing" by "forcing" him to call a defense witness to testify, or into admitting some exhibit into evidence. This may be done by limiting the direct examination of State witnesses in ways that don't "open the door" for cross-examination by the defense in certain factual areas. It is not, after all, the State's responsibility to put the Defendant's case before the jury for him.

The Defendant ideally reserves the advantage of last Closing by getting as much information before the jury as possible, without calling his own witness or admitting evidence. This is usually accomplished by extensive cross-examination of the State's witnesses. Zealous defense advocates may utilize trial tactics such as eliciting testimony, making arguments, and using exhibits in ways that they know are violating the Rules of Evidence, or at least pushing the envelope. Many times, it is simply worth the risk of being admonished by the judge in front of the jury. This is so because once the jury has heard or seen something, no matter how the court instructs them to disregard it, in reality you can't "unring the bell."

Depending upon the way a trial is conducted – the level of the judge's control of the courtroom, the judge's and the attorneys' grasp and adherence to the Rules of Evidence, Rules of Procedure and the law of the case, the parties' trial strategy, and to some degree, the "style" or behavior of the attorneys – there is always the potential for appealable issues and rulings to occur at the trial level.

One such example is found in a case from the Third District Court of Appeal, in which the court discussed the application of the Rule, and the effect on the case before it, opining that if the Rule did not exist, the issues raised in the trial would have been avoided.

In Diaz v. State, 747 So.2d 1021 (Fla. 3d DCA 1999), the defendant apparently wanted to raise the defense of self-defense in a second-degree murder case. Part of his theory rested upon his knowledge of the victim's reputation for violence when the victim became intoxicated. Toward that end, the defendant's counsel attempted to cross-examine the State's witness (the medical examiner) as to the toxicology results which showed that the victim had been drinking.

Because the State had not introduced toxicology evidence during direct examination, and because the toxicology was not relevant at the time of cross-examination, the trial court did not allow defense counsel to cross-examine in that area. It should be noted that the relevance of the victim's blood-alcohol content became relevant, and therefore admissible, at the future time when the defendant established its relevance, through his own testimony as to the victim's reputation for violence while intoxicated and his perception that the victim was in that condition. However, as a result of calling the medical examiner as his own witness, to establish the fact of the victim's intoxication, the Defendant "lost last Closing."

The Third District Court upheld the trial judge on appeal. The court, however, suggested that the Florida Supreme Court consider revisiting the Rule, and presumably, make a change.

The court points out that there are only four states that give the defendant right to the last word to the jury when he presents no witnesses or evidence other than his own testimony. The other 46 states, the District of Columbia, and the federal trial courts adhere to the common law rule that the party with the burden of proof should have that right.

The court cited two other reasons for taking the common law approach:

- "[T]he purpose of our adversarial system is to enhance the search for truth. … It seems clear that the goal of this search for truth is to bring before the fact-finder as much relevant evidence as possible to assist in the deliberative process. As presently written, the rule discourages criminal defendants from presenting potentially beneficial evidence by exacting a price for that presentation. Although a criminal defense attorney may not fail to introduce evidence which directly exculpates his client of the crime charged for the sake of preserving the right to address the jury last in closing argument, the same cannot be said of other types of important evidence … Before introducing such evidence counsel is forced to weigh what is to be gained by the introduction of that evidence against the loss of the final argument. All too often, defense attorneys believe that their oratorical persuasive abilities in final argument can better serve their clients and the balance is erroneously stricken in favor of closing argument. If the defendant is convicted, this decision inevitably creates an issue concerning whether the defendant received the effective assistance of counsel." *Id.* at 1025-1026 (citations omitted).

- "[T]he rule sometimes leads to less than ethical behavior in the courtroom. Having evidence which would be useful, but unwilling to surrender final argument, defense counsel will have exhibits they have no intention of introducing marked for identification. They will then question a witness(es) about the exhibit, parade the exhibit in front of the jury and ultimately refuse to offer it into evidence." *Id.* at 1026.

A change in the Rule, whether by the Florida Supreme Court, under its constitutional authority to adopt procedural rules or by the Legislature, would likely address the concerns of the Third District Court of Appeal.

III. Effect of Proposed Changes:

Senate Bill 658 creates s. 918.19, F.S., relating to the order of the presentation of closing arguments in criminal trials. The bill provides that, as in common law, in criminal prosecutions after the closing of evidence, the prosecuting attorney shall open the closing arguments, the accused or the attorney for the accused may reply, and the prosecuting attorney may reply in rebuttal.

The bill also repeals Rule 3.250 of the Florida Rules of Criminal Procedure to the extent that it is inconsistent with the bill. The bill will take effect upon becoming law, except that the repeal of

the rule of procedure shall take effect only if the act is passed by a two-thirds vote of each house of the Legislature.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Separation of Powers
The Florida Constitution provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts." *Art. V. Section 2(a), Fla. Const.* The separation of powers provision of the state constitution prohibits one branch of government from exercising a power given to another branch. *Art. II, Section 3, Fla. Const.*

According to the constitution, a rule of court "may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature." The constitution does not give the Legislature the authority to replace the repealed rule with a legislative enactment. The constitution also does not preclude the Supreme Court from reenacting a rule that is similar or identical to one that the Legislature has repealed.

Florida courts generally protect their rulemaking power by striking down laws that they determine are "procedural" in nature. For instance, in January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA) of 2000 in order to reduce the amount of time spent in litigation of capital cases. The bill advanced the start of the postconviction appeals process in capital cases to have it begin while the case was on direct appeal. The bill also imposed time limitations at key points of the postconviction process, limited successive postconviction motions, and prohibited amending a postconviction motion after the expiration of the time limitation. The bill repealed the rules of criminal procedure applying to capital postconviction motions.

In *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), the Florida Supreme Court held that the Death Penalty Reform Act of 2000 was an "unconstitutional encroachment" on the Court's "exclusive power to 'adopt rules for the practice and procedure in all courts'." *Id.* at 54.

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.

In this particular context, the Florida Supreme Court has characterized the defendant's right to have the final closing argument as a "vested procedural right." On the other hand, based on the fact that the Court has reversed a number of criminal convictions because a defendant has not been given the right to a closing argument, it could be argued that the right is substantive in nature and therefore something that the Legislature could constitutionally alter.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.