HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1149 Criminal Prosecutions
SPONSOR(S): Green
TIED BILLS: **IDEN./SIM. BILLS:** SB 2422

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice (Sub.)	7 Y, 0 N	Kramer	De La Paz
2) Public Safety & Crime Prevention	11 Y, 6 N	Kramer	De La Paz
3) Appropriations (REVISED VOTE)	25 Y, 10 N	DeBeaugrine	Baker
4)			
5)			

SUMMARY ANALYSIS

HB 1149 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 Rules of Criminal Procedure 3.250 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 will take effect only if the bill is passed by a 2/3 vote of the membership of each house of the legislature.

This bill does not appear to have any fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[x]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[]	N/A[x]
4. Increase personal responsibility?	Yes[]	No[]	N/A[x]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

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.*

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); Lamar v. State, 583 So.2d 771, 772 (Fla. 4th DCA 1991)("The final phrase of said rule gives the defendant in a criminal case the right to closing argument unless he offers witnesses other than himself. Stated differently, the defendant is entitled to close the argument if he offers no witnesses, or if he offers simply himself as a witness, but not if he offers someone other than or in addition to himself.").

There are a large number of reported cases in which an appellate court reversed a felony conviction based on the fact that the defendant was not given the opportunity to have the last closing argument. 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." Birge v. State, 92 So.2d 819 (Fla. 1957); Freeman v. State, 846 So.2d 552, 554 -555 (Fla. 4th DCA 2003)("This error is not subject to harmless error analysis."); 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.")

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. 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)

At least one court has urged a change in the Florida rule:

> Presently in the United States, forty-six states, the District of Columbia and all United States District Courts[1] allow the prosecution to close the final arguments in criminal cases. Florida is one of only four states that have a rule which provides the criminal defendant the right to close final arguments where the defendant presents no evidence other than his own testimony…….[W]e respectfully suggest that the time has come for our Supreme Court to revisit the wisdom of this provision.

Diaz v. State, 747 So.2d 1021, 1025 (Fla. 3rd DCA 1999).

HB 1149 creates section 918.19, F.S., relating to closing arguments. The bill provides that, as provided 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.[2]

The bill 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 in the act is passed by a two-thirds vote of the each house of the legislature.

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[1] See Federal Rule of Criminal Procedure 29.1 which states: "After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal."

[2] The bill also has several "whereas clauses" which state the following:

WHEREAS, the common law rule in criminal and civil cases granted the right to final closing argument to the party bearing the burden of proof, and

WHEREAS, the state has the burden of proving guilt beyond a reasonable doubt in criminal cases, and

WHEREAS, the Federal Rules of Criminal Procedure grant the right to final closing argument to the party which bears the burden of proof, and

WHEREAS, other states follow the common law rule in granting the right to final closing argument to the party bearing the burden of proof in civil and criminal cases, NOW, THEREFORE,

C. SECTION DIRECTORY:

Section 1. Creates s. 918.19, F.S.; relating to closing argument in criminal cases.

Section 2. Provides for repeal of rule of criminal procedure.

Section 3. Provides effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

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."[3] The constitution does not give the Legislature the authority to replace the repealed rule with a legislative enactment.

[3] Art. V, Section 2(a), Fla. Const.

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.

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".

Florida courts generally protect their rulemaking power by striking down laws that that they determine are "procedural" in nature. 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. Butterwoth, 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.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES