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?

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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?

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I. INTRODUCTION

The gavel bangs. All rise. It begins as any other criminal trial in Florida. The jury sits patiently as the judge informs them of the charges alleged against the Defendant, and then the attorneys sweep the jurors away with their opening arguments. Slowly, the facts begin to unfold. The jury learns that on September 13, 2002, a woman from Lee County, Florida was brutally raped in her own home while her children slept in the next room.¹ When she takes the stand, she tells the jury that the Defendant broke into her home in the dead of night on that September evening.² They listen raptly as she recounts her horrific experience. The Prosecutor, representing the State of Florida, must try to prove each element of each charge beyond a reasonable doubt. The Defendant's lawyer, on the other hand, is ready to argue that the State cannot prove each charge beyond a reasonable doubt. The case will continue until the jury returns with a verdict, and the trial will be over.

¹ Britt Dys, Rape Case Sparked the Bill, FLA. B. NEWS, Apr. 1, 2004, at 10.
² Id.
Florida, corroborates the victim's testimony by presenting DNA evidence which irrefutably links the Defendant to the alleged crime.\(^3\)

When it is the Defendant's turn to take the stand, the jurors listen to his claims that he formerly dated the victim.\(^4\) He argues that the sexual intercourse with her was consensual, which is why his DNA was found at the scene.\(^5\) However, this explanation quickly becomes unsatisfactory when the prosecution calls its rebuttal witness: a police officer who testifies that the time during which the Defendant alleges to have "dated" the victim, the Defendant was in jail.\(^6\) After the Defendant testifies, his attorney declines to call any more witnesses.\(^7\)

After both sides have presented all of the evidence, the defense makes the first closing argument.\(^8\) The prosecution follows with its final attempt to remove all reasonable doubt of the Defendant's guilt from the jurors' minds.\(^9\) The defense gets up once again, this time to rebut the State's argument and impress the final words upon the jury.\(^10\)

The jury deliberates for ninety minutes before returning from the jury room.\(^11\) All rise again, this time anxiously awaiting the jury's decision as they file into the jury box. The foreman hands the verdict to the bailiff. Silence permeates the courtroom, and then a wave of shock and disbelief washes over its occupants as the clerk announces a verdict of not guilty.\(^12\)

The scene you have just envisioned is not an imaginary one. It is a recap of the true story of Christopher Hiatt's prosecution and subsequent acquittal,\(^13\) which disgusted one Florida legislator enough to try to change the process of Florida criminal trials.\(^14\) The proposed solution is articulated in

\(^3\) Id.
\(^4\) Id.
\(^5\) Id.
\(^6\) Dys, supra note 1.
\(^7\) See id.
\(^8\) See id.
\(^9\) See id.
\(^10\) See id.
\(^11\) Dys, supra note 1.
\(^12\) Id.
\(^14\) Dys, supra note 1. Representative Carol Green sponsored House Bill 1149. Id. In the article, she stated that she "was so upset by what [she] watched happen" in the trial, and that in her opinion, Hiatt lied in his testimony. Id. The prosecutor in the Hiatt case stated, "It was hideous." Id.
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House Bill 1149, and has the power to snatch away defendants’ present advantage of having the last word in criminal trials.

The order of closing arguments in criminal proceedings is currently governed by rule 3.250 of the Florida Rules of Criminal Procedure, or, as most Floridian practitioners affectionately call it, the "sandwich rule." This rule states that “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.” As was the case in State v. Hiatt, defendants who present nothing more than their own testimony at trial have the distinct advantage of giving the first closing argument and the rebuttal argument at final summation, thereby sandwiching the prosecution’s argument in between. The courts of Florida have followed rule 3.250 without question for over 150 years. Consequently, for over a century and a half, the order of closing arguments in Florida's criminal trials has hinged upon the defense’s trial strategy.

The proposal espoused by House Bill 1149 posed to end that tradition by repealing rule 3.250 and enacting section 918.19 of the Florida Statutes. Although ultimately the bill was not among those signed by the Governor, its proposition raises fascinating legal issues. A statute like proposed section 918.19 would entitle the prosecution to the first closing argument and the rebuttal argument in all criminal trials, without giving any effect to the evi-
ence the defense may or may not present. Thus, if and when the change does pass into law, it will be the defense who perpetually gets "sandwiched."

The heated debates over whether to enact this new bill\(^2\)\(^4\) begs the question: is it the law and the facts upon which jurors base their verdicts, or is it the closing arguments? Does having the last word determine whether justice will be served? This article will explore the answers to these questions, as well as which avenues should be taken to ensure that Florida's criminal justice system is one about seeking the truth.

Part II of this article discusses the purpose of the closing argument and its impact on the criminal trial. Part III surveys the history of this facet of Florida criminal procedure law, as well as how a change such as that proposed by House Bill 1149 would affect criminal procedure in Florida. Part IV analyzes the laws governing the forty-six other states that have already implemented rules similar to proposed section 918.19 of the Florida Statutes, while Part V examines the four states that have declined to follow the proposed Florida rule. Part VI discusses the possible reaction of the Supreme Court of Florida to such a rule. Finally, Part VII will conclude with a recommendation that Florida's legislators continue to seek the repeal of rule 3.250 to give prosecutors the statutory right to make the final argument in criminal trials.

II. THE POWER OF THE LAST WORD

The power of the last word is one that most of us like to have when we argue, and lawyers in particular have been known to suffer from "the last word disease."\(^2\)\(^5\) This power that lawyers crave usually takes shape in the form of the closing argument, which is one of the most crucial elements of the entire trial presentation.\(^2\)\(^6\) In fact, closing arguments are viewed by our criminal justice system as so vital that they are recognized as fundamental to the right to present a defense at trial.\(^2\)\(^7\) In 1975, the United States Supreme Court described the importance of the closing argument by stating, "[t]he difference in any case between total denial of final argument and a concise but persuasive summation could spell the difference, for the defendant, be-

\(^{23}\) H.R. 1149
\(^{24}\) Dys & Pudlow, supra note 20, at 1.
\(^{25}\) Jason Vail, To Reply or Not to Reply: When Having the Last Word Doesn't Cut It, OR. ST. BULL., Dec. 2000, at 33.
tween liberty and unjust imprisonment." Undoubtedly, most criminal defendants view the quality of their closing arguments as a factor upon which their freedom depends.

The right to assistance of counsel provided by the Sixth Amendment of the United States Constitution, along with the Due Process Clause contained within the Fourteenth Amendment, have been interpreted by the United States Supreme Court to mean that "there can be no restrictions upon the function of counsel in defending a criminal prosecution." Indeed, the right to present a closing argument in a criminal trial is one that American courts take very seriously, and failure to provide a defendant with the opportunity to exercise that right has been deemed reversible error by the highest court of this country. Even pro se defendants are entitled to present a final summation at the close of evidence, regardless of whether the case is tried before a jury. This right has also been interpreted by the United States Supreme Court, along with certain state courts, as deriving from the language of the Sixth Amendment. It is worth mentioning that although it is not the focus of this discussion, the right to final summation, though widely recognized, can, like other substantive rights, be waived.

Perhaps the magnitude of the closing argument is best understood in light of its purpose. In a criminal trial, the closing argument is a mechanism for sharpening and clarifying the issues upon which the trier of fact must render judgment. It reinforces in the jurors' minds, in words and phrases

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28. Herring, 422 U.S. at 863.
29. U.S. CONST. amend. VI. In relevant part, the Sixth Amendment states:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
Id.
30. U.S. CONST. amend. XIV.
31. Herring, 422 U.S. at 857.
32. See, e.g., State v. Plaskonka, 577 A.2d 729, 731 (Conn. App. Ct. 1990) (stating that failure to give a defendant the opportunity to present a closing argument is grounds for a new trial on appeal).
33. Herring, 422 U.S. at 865.
34. JACOB A. STEIN, CLOSING ARGUMENT § 3 (1996) (citing Herring, 422 U.S. at 864 n. 18; Holmes v. State, 637 A.2d 113, 116 (Md. 1994)).
35. Plaskonka, 577 A.2d at 731; Holmes, 637 A.2d at 116.
37. Herring, 422 U.S. at 860.
38. 15 FLA. JUR. 2D Criminal Law § 1773 (2001); STEIN, supra note 34, § 4.
39. STEIN, supra note 34, § 2 (citing Herring, 422 U.S. at 862).
that make sense to them, a clear picture of what the evidence has already painted.\textsuperscript{40}

The trial is like a jigsaw puzzle. It has a bunch of tiny little pieces of evidence, all coming in at different times—and really meaningless to a jury. And when you put it together in the summation, it becomes a great big painting. A beautiful painting is what you want them to see.\textsuperscript{41}

Others describe the closing argument as a device through which to organize and highlight favorable evidence, rebut opposing arguments, explain the applicable law, and show the jury that the evidence leads to a verdict in favor of the arguing attorney.\textsuperscript{42} In other words, the goal is "to convince the trier of fact that the advocate's view of the disputed issues is correct and that it should render a verdict accordingly."\textsuperscript{43}

According to Texas, a state that has specifically defined the main purpose of arguments to the jury, summations must assist in proper analysis of the evidence so that the jury may reach a "just and reasonable conclusion based on the evidence alone."\textsuperscript{44} The courts of Texas have also created a specific standard by which jury arguments are measured.\textsuperscript{45} The attorney's argument must fall into one of four general categories: 1) summation of the evidence; 2) reasonable deduction from the evidence; 3) response to argument made by opposing counsel; or 4) pleas for law enforcement.\textsuperscript{46}

It is generally atypical for a court to create such methodological rules with regard to final summation.\textsuperscript{47} During closing arguments, more than at any other point in the trial, an attorney has the opportunity to truly become an advocate for his or her client.\textsuperscript{48} Thus, in the interest of encouraging advocacy, courts generally allow attorneys a wide margin for error\textsuperscript{49} and liberal

\textsuperscript{40} \textsc{Stein, supra} note 34, § 200.
\textsuperscript{41} \textsc{BettyRuth Walter, The Jury Summation as Speech Genre} 40–41 (Jacob L. Mey et al. eds., 1988) (quoting attorney Stanley E. Preiser's response to the question, "[W]hat is the main thing you are trying to do during the summation?").
\textsuperscript{42} \textsc{J. Alexander Tanford, The Trial Process} 133 (Murray L. Schwartz et al. eds., 1983).
\textsuperscript{43} \textsc{H. Mitchell Caldwell et al., The Art and Architecture of Closing Argument,} 76 \textsc{Tul. Rev.} 961, 969 (2002).
\textsuperscript{44} \textsc{Alex v. State,} 930 S.W.2d 787, 791 (Tex. Ct. App. 1996) (quoting Dickinson v. State, 685 S.W.2d 320, 322 (Tex. Crim. App. 1984)).
\textsuperscript{45} \textsc{Alex,} 930 S.W.2d at 791.
\textsuperscript{46} \textit{Id.} (citing McKay v. State, 707 S.W.2d 23, 36 (Tex. Crim. App. 1985)).
\textsuperscript{47} \textsc{75A Am. Jur. 2d Trial} § 554 (1991).
\textsuperscript{48} \textsc{Stein, supra} note 34, § 1.
\textsuperscript{49} \textit{Id.}
freedom of speech in the presentation of their arguments to the jury. It is generally true, therefore, that the law governing closing arguments is without specific rules and is noticeably less technical than other bodies of law.

However, not everyone agrees that permitting such freedom for the purposes of promoting advocacy is a good idea. One author, when commenting on the negative effects of the adversarial system as it relates to the practice of criminal law, discussed the tactics and behavior some attorneys employ at trial. The author specifically mentions that the tendency of trial lawyers to "obscure the facts rather than illuminate them" and to "increase prejudice rather than reduce it," is due to the pressure attorneys feel to create stronger cases. "Each side, after all, is not fighting for the truth to emerge; it is fighting to win." While presumably not all attorneys operate under this mentality during the normal course of a trial, some do argue to win during closing argument; and those who do not, nonetheless seek to be as persuasive as possible when speaking their final words to the jury.

The significance of being the last to speak is so entrenched in American culture that we associate the "last word" with an advantage to the person who gets it. Lawyers and judges alike carry this association directly into the legal world with regard to the order of closing arguments in criminal trials. Judge Walden of the Fourth District Court of Appeal has stated, "[A]s all acquainted with trial tactics know . . . the right to address the jury finally

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51. STEIN, supra note 34, § 1.
52. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. BAUM, supra note 53, at 182.
59. WALTER, supra note 41, at 41. Dr. Walter conducted extensive studies on jury summation, including its perceived importance in the words of attorneys. Id. When asked the question, "What is the main thing you are trying to do during the summation?", the majority (fifteen of the thirty-four attorneys questioned) responded that their goal is to persuade, while only two replied that they attempt to win the case at summation. Id at 40–41.
61. Id. at 149.
is a fundamental advantage which simply speaks for itself."63 “Under [our] system, and in reality, it does matter who gets the last opportunity to address the jury.”64

The plethora of literature on the subject of how to argue more effectively at final summation65 suggests that attorneys believe that closing arguments are powerful enough to persuade a jury to come to their conclusions, even if the law or facts on their sides are slightly lacking.66 Indeed, some say that in “close” cases, where neither the law nor the facts appear predominately one-sided, the persuasive talent of the lawyers, which will surface mostly during opening and closing arguments, could possibly be the tie-breaker.67 “The closing argument, no matter how strong, will seldom save a botched trial, but where the issues are close and the decision is in doubt, an effective final argument can be the difference between winning and losing.”68 Such ideas are undoubtedly based on attorneys’ beliefs that they possess control over the outcomes of the trials in which they argue, and that their skills can positively impact their client’s position.69 Studies show, however, that this conception may be more than a belief.70

63. Raysor, 272 So. 2d at 869.
64. Wike, 648 So. 2d at 688.
65. Mitchell, supra note 60, at 147 n.16 (listing a sampling of the books that can be found in one’s law library on the subject of closing arguments).
67. Caldwell et al., supra note 43, at 969.
68. STEIN, supra note 34, § 201.
69. Mitchell, supra note 60, at 148; WALTER, supra note 41, at 38–39. Dr. Walter questioned thirty-four attorneys in her study on jury summation. WALTER, supra note 41, at 38–39. When asked, “What is the value of the summation to the trial process,” seventy-six percent responded that it is extremely important:

1. “If a case can still be won or lost at the summation stage, then it is clearly the most important part of the trial.”
   S. Gerald Litvin

2. “I regard the trial as only a device to enable you to sum up to a jury.”
   A. Charles Peruto

3. “I think it’s probably the single most important factor that determines the guilt or innocence of the defendant. It’s that important.”
   Eugene F. Toro

   “To me the entire trial is a preface to a summation. It’s all leading up to that. The lawyer is gearing the whole trial to that hour he can stand up before the jury and GO! He can do his thing.”

4. “I think it’s probably the most important part of the trial because it’s the only part of the case that represents pure advocacy. It’s the one time in a trial when almost without restraint a lawyer can stand in front of a group of people and literally argue his case. It’s the most per-

https://nsuworks.nova.edu/nlr/vol29/iss1/6
The Department of Psychology at Yale University published a study on opinion changes in individuals, including a section focused specifically on the nature of persuasive communication as it relates to the forming and changing of opinions. The authors made several observations regarding the reactions of audiences to persuasive speeches, one of which appears to be particularly true of juries during closing arguments:

Shortly after being exposed to one communication, the audience is likely to be exposed to additional communications presenting completely different points of view and designed to create completely different opinions. Hence, the long-run effectiveness of a persuasive communication depends not only upon its success in inducing a momentary shift in opinion but also upon the sustained resistance it can create with respect to subsequent competing pressures.

suasive part of the case. He tries to explain away some of the calamities and exploit some of the good fortune he's experienced."

"His summation . . . brings to bear on the litigation all of the lawyer's skills: his imagination, his use of language . . . ."

"Those of us who defend criminal cases are concerned with that perhaps 20% in the middle where the lawyer's skill can make the difference. And in that category of cases, I think the summation is probably the most influential part of the trial."

Herald Price Fahringer

5. "It's the most important thing I can contribute." 
Donald J. Goldberg

6. "I think proper summation can make a difference in a case that's not even close." 
Raymond A. Brown

7. "From a defense lawyer's standpoint, it's the critical stage of the trial. Particularly in fairly lengthy cases involving complicated factual patterns, where it's not going to be clear to the jury what the case is really about until they hear it summarized and put together and related to one theory or another. I think it's probably, from the defense standpoint, the single most important phase of the trial." 
Thomas Colas Carroll

8. "It's priceless—if properly used. Communicating is the key point. By communicating you persuade." 
John Rogers Carroll

9. "It's of real significant value primarily because you have an opportunity for the first time—and actually for the last—to have direct contact with the jury."
Joseph J. McGill

Id.

70. See generally CARL I. HOVLAND ET AL., COMMUNICATION AND PERSUASION PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953).

71. Id. at 6–11.

72. WALTER, supra note 41, at 18 (referring to HOVLAND ET AL., supra note 70, at 17).

73. HOVLAND ET AL., supra note 70, at 17.
However, no subsequent competition exists for the attorney with the last word in a jury trial, which may explain, at least in part, why the last word is so coveted.

In an ideal criminal justice system, the party with the law and the facts on his or her side would always win,74 regardless of who was the last to speak to the jury. In reality, however, there are times when the party with the law and the facts loses at trial.75 While such losses are exceptions and may occur for any number of reasons,76 some might blame the closing arguments,77 probably even more so when they mirror the theatrical, persuasive summations that are so often seen on television.78 Along with books and film, television has had a significant impact on society’s perception of the legal system.79 Consistent with the media’s portrayal is the picture of the closing argument as “the great dramatic moment.”80 Trial attorneys who understand that society expects this kind of drama at trial, perhaps in an attempt to live up to the image, incorporate it intentionally into their closing arguments.81

Jurors like to be entertained. ‘OK, smart, big time, well paid lawyer. Entertain us a little.’ And they expect to hear just a tad of oratory. To the extent that we all try to dress well, and not use bad language before them, and try not to show our worst side to them, we are catering to that fact.82

Attorneys have been fixated on the idea that closing arguments affect jury verdicts for at least ninety years.83 In 1912, Yale Law Journal published an article criticizing the new time constraints that the attorneys of that time were beginning to face with regard to closing arguments.84 The author blamed the “foolish verdict[s]” that often resulted on the brevity of these

74. Caldwell et al., supra note 43, at 969.
75. Id.
76. Id.
77. Dys, supra note 1, at 10. The article quotes Florida Representative Carole Green, who, upon learning of the jury’s not-guilty verdict in the Hiatt case, stated that the victim “was victimized by what’s happened in the court proceedings.” Id.
78. Mitchell, supra note 60, at 149.
79. Id. Mr. Mitchell suggests in his article that perhaps this image persuades some lawyers to join the legal profession in the first place. Id.
80. Id.
81. WALTER, supra note 41, at 42.
82. Id. (citing the response of a criminal defense attorney when asked, “What is the main thing you are trying to do during the summation?”).
84. Id.
arguments, an accusation which contains an underlying message that closing arguments are crucial to the verdict-rendering process.

But perhaps to the dismay of some trial lawyers, at least one study has revealed that closing arguments are irrelevant to the decision-making process of jurors. The heads of this study labeled the "crucial importance" with which attorneys regard the last word as merely "another myth lawyers hold dear." According to the authors of the study, closing arguments do not even factor into the jury’s process of verdict rendition. Not a single juror, in over 2000 post-verdict interviews, attested to reaching a final decision during or because of closing arguments. The authors found instead that most jurors make up their minds during the trial itself, based on both testimonial and documentary evidence, while the rest of them decide during deliberations with their peers in the jury room.

In a separate study conducted by Dr. Walter in which 214 jurors were questioned on the importance of the final summation, eighty-eight percent reported that they found the closing arguments to be important. However, Dr. Walter conducted yet another study using different jurors, which revealed that only six percent of those surveyed felt that the closing speeches of the lawyers were important in reaching their decision in that particular case.

85. Id. at 491.
86. Howard Varinsky & Paulette Taylor, Trial Myths and Misconceptions, For the Defense, Nov. 2003, at 26, 56. The authors state that the article was written, after two decades of speaking with jurors and conducting research to better understand jury behavior and decision-making processes, with the goal of naming and dispelling age-old trial myths. Id. at 27.
87. Id. at 56.
88. Id.
89. Id. Even for those attorneys who believe that jurors expect to hear closing arguments at trial, this information may not be surprising, as not all attorneys deem closing arguments to be essential to the trial process. See Walter, supra note 41, at 39. "Closing speeches don't make a damn bit of difference. It's part of the show." Id. (quoting the response of a criminal defense attorney when asked, "What is the value of the summation to the trial process?").
90. Note that this is entirely consistent with the instructions jurors receive which prohibit them from forming decisions about the case until deliberations, when all of the evidence has been presented. Fla. Bar, Florida Standard Jury Instructions in Criminal Cases § 2.1 (4th ed. 2002). However, as Herbert J. Stern says, "people are never impartial for any longer than they have to be." Herbert J. Stern, Trying Cases to Win 115, 119 (1991).
91. Varinsky & Taylor, supra note 86, at 56.
92. Walter, supra note 41, at 197. According to the study, the number one reason jurors find the summation to be important is because it helps to refresh their memories. Id.
93. Mitchell, supra note 60, at 152 (referring to Walter, supra note 41, at 205). Dr. Walter mentions in her analysis of these results that the jurors were told, prior to deliberating and filling out the questionnaires, to rely more on the law and the evidence than on the closing
Despite these findings, jurors have been known to ignore irrefutable physical evidence of guilt and acquit defendants who strongly appear to be guilty of violent crimes.94 Psychological experts say that the reason for this phenomenon is the use of certain implicit trial tactics by defense attorneys.95 If the defense attorney can engage the jurors in "absolutely essential psychological processes and address[s] certain emotional issues" the attorney will successfully sway the jury in his or her direction.96 One way that attorneys do this is by creating a strong portrayal of the defendant as "psychologically innocent" and as someone who is just like them.97 Or, if such a portrayal is not likely to be convincing, the defense might play upon the jurors’ emotions98 by focusing on the defendant’s tearful family.99 Often they will paint a picture of the victim as the monster, as long as it is "someone or something else other than the defendant against whom the jury can feel anger and to whom they may apply punishment, so as to lend balance to their decision to grant the perpetrator of a crime absolution, and thereby provide themselves emotional equity."100

Although experts attribute the success of attorneys who are able to win this psychological game to clever selection of receptive jurors during voir dire,101 it is not illogical to conclude that closing statements must also be of aid. Arguments are instruments of persuasion,102 and a key element of persuasion is the recommended conclusion that is presented in the communication.103 At closing arguments, the recommended conclusion is that the arguing attorney is correct.104 During that time, the attorney must “sell” his or her case to the jury.105 It is likely that sometimes this “sale” helps to convince arguments of the attorneys. WALTER, supra note 41, at 205. In Dr. Walter’s opinion, the resulting data, indicating that only six percent felt closing arguments were important to their decision-making process, was strongly influenced by the jurors not wanting anyone to think that they disobeyed the instructions of the court. Id. at 205–06.

95. Id.
96. Id. § 9:1(b), at 837.
97. Id.
98. Id. However, it is generally thought to be improper for an attorney to appeal to the sympathies of the jury. 75A AM. JUR. 2D Trial § 649 (1991).
99. BLINDER, supra note 94, § 9:1(b), at 837.
100. Id.
101. Id. § 9:1(b), at 839.
102. FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS § 493 (1949).
103. HOVLAND ET AL., supra note 70, at 10.
104. Caldwell et al., supra note 43, at 969.
105. TANFORD, supra note 42, at 133.
The debate about whether jurors base their verdicts on the information they hear at closing arguments, or on information that they receive during the trial, is one of primacy versus recency. Primacy and recency describe trends that lawyers have always intuitively sensed, though perhaps without complete understanding. The term “primacy” refers to the notion that what we hear first is significant, because it induces us to commit to certain positions and lays a foundation for the information that follows. The term “recency” refers to the notion that what we hear last is most memorable, and is therefore easier to recall and has the largest impact on our decisions.

Whether jurors base any part of their verdicts on the statements made by counsel during closing arguments is a debate that is not likely to cease. However, if it is true that jurors make up their minds during the trial based on the evidence, then changing rule 3.250 so that it entitles the prosecutor to the first and final closing arguments, without giving any effect to the testimony presented by the defense, would actually benefit the defendant. Without the current version of rule 3.250, the defense would be free to present as much testimony or other evidence as needed, thereby having a presumably significant impact on those jurors who make up their minds during the trial based on the evidence presented to them.

Even if, on the other hand, jurors are swayed by the statements attorneys make, and closing arguments do factor into their decisions, a change in rule 3.250 is warranted. Given the susceptibility of jurors to sometimes ignore the evidence before them, the arguments in favor of giving the State of Florida the final argument before the jury in all criminal trials are sufficiently compelling, especially when coupled with the fact that the prosecution bears the heavy burden of proof.

106. BLINDER, supra note 94, § 9:1(b), at 837.
107. STERN, supra note 90, at 115.
108. Id.
109. Id.
110. Id.
111. Varinsky & Taylor, supra note 86, at 56.
112. Id.
113. Dys & Pudlow, supra note 20, at 10. As Representative Carole Green stated, Florida needs to “take some of the gamesmanship out of this process, and get truth back where it needs to be.” Id.
114. BLINDER, supra note 94, § 9:1(b), at 836.
115. Faulk v. State, 104 So. 2d 519, 521 (Fla. 1958).
III. THE BIRTH OF THE "SANDWICH" RULE

The "sandwich" rule has been an integral part of Florida jurisprudence for more than 150 years.\textsuperscript{116} The concept of allowing the defendant in a criminal trial to have the final word before the jury was originally codified in chapter 539 of the \textit{Laws of Florida} in 1853.\textsuperscript{117} In its original form, the statute provided that "in all cases wherein the defendant upon his trial introduces no testimony, he shall, by himself or counsel, be entitled to the concluding argument before the jury,"\textsuperscript{118} which the Supreme Court of Florida unequivocally ratified in 1858.\textsuperscript{119}

It was not until 1911 that the legislature added the words "except his own"\textsuperscript{120} to the statute to allow a defendant to testify in his or her own behalf without losing the right of having the final say before the jury.\textsuperscript{121} The development of the rule finally culminated in 1939,\textsuperscript{122} and thus, the "sandwich" rule as we currently know it was born.

A. \textit{The Common Law}

At common law, the widely accepted rule in the United States\textsuperscript{123} is that the party with the burden of proof has the right to open and conclude the final argument before the jury.\textsuperscript{124} In criminal trials, that party is the prosecution, who has the great burden of proving the guilt of the defendant beyond a
reasonable doubt. Before 1853, this was the law in Florida, and it continues to be the law in all but three other states.

The rationale behind the common law rule is that the party with the burden of proof should be entitled to the opening and closing arguments to the jury. This structure for the order of closing arguments is grounded in the premise that justice is best served if the defendant knows the actual arguments that the prosecution will make in support of a conviction before the defendant is faced with the decision whether to reply, and if so, what to reply.

Perhaps another reason for the rule has to do with rules of psychology. The legal system has always understood the principles of primacy and recency, which may be why the overwhelming majority of jurisdictions give the party who carries the burden of proof the absolute right to speak last. Many psychologists agree that between primacy and recency, recency is more powerful.

Admittedly, if rule 3.250 was repealed so that it mirrors the common law, the defense would never have the benefit of either primacy or recency at closing argument. However, this seemingly unjust proposition is counter-

125. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.7(c) (1999).
126. Faulk, 104 So. 2d at 521. The common law theories governing closing arguments are still the law in Florida for civil trials. See City of Fort Lauderdale v. Casino Realty, 313 So. 2d 649 (Fla. 1975) (Overton, J., concurring) (stating that “[t]he right to open and close final argument rests upon the general principle of law that the party on whom rests the burden of proof is required to go forward with the evidence and ... is entitled to open and close.”).
127. Only Georgia, North Carolina, and South Carolina operate under criminal procedure laws like that of Florida, which allows the defendant in a criminal trial the last word before the jury, if he or she offers no testimony. See GA. CODE ANN. § 17-8-71 (2003); N.C. GEN. R. PRACT. SUPER. AND DIST. CTS. 10; State v. Mouzon, 485 S.E.2d 918, 921 (S.C. 1997); State v. Crowe, 188 S.E.2d 379, 384 (S.C. 1972); State v. Brisbane, 2 S.C.L. (2 Bay) 451 (S.C. 1802).
128. 15 FLA. JUR. 2D Criminal Law § 1771 (2001) (citing Wike v. State, 648 So. 2d 683, 686 (Fla. 1994)).
129. 5 LAFAVE ET AL., supra note 125, § 24.7(c), at 552 (citing FED. R. CRIM. P. 29.1, Notes of Advisory Comm.).
130. STERN, supra note 90, at 116.
131. Note that Florida, along with Georgia, North Carolina, and South Carolina, is not among the majority referred to.
132. STERN, supra note 90, at 116.
133. Id. Mr. Stern disagrees, and argues that it is most effective to begin strongly and corroborate a powerful opening with evidence and testimony along the way. Id. at 117. He suggests that being the first to speak at closing argument is beneficial, and advocates that the method of beginning strongly should be applied throughout the trial. Id. In his opinion, what the jurors hear first is most powerful. Id. This theory that primacy is more powerful than recency may support the old saying that you never get a second chance to make a first impression. See STERN, supra note 90, at 116.
acted by the great burden of proof that is placed upon the prosecution. Additionally, the state cannot appeal an acquittal, while the defendant, if convicted, has a constitutionally protected right to an appeal. Repealing rule 3.250 and returning to the principles embedded in the common law favors traditional notions of fairness.

B. Rule 3.250 of the Florida Rules of Criminal Procedure

The portion of rule 3.250 of the Florida Rules of Criminal Procedure relevant to this discussion provides that "[i]n all criminal prosecutions the accused may choose to be sworn as a witness in the accused's 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." To properly understand the application of this rule, one must first know what constitutes testimony. Various appellate courts of Florida, including the supreme court, have established that testimony includes documents, diagrams, a sketch or drawing of the premises upon which the alleged crime took place, a video tape viewed by the jury, and still photographs. Indeed, rule 3.250 applies to documentary evidence.

134. 15 Fla. Jur. 2D Criminal Law § 1771 (2001); 75A Am. Jur. 2D Trial § 539 (2004); 5 Lafave et al., supra note 125, § 24.7(c), at 552; Stein, supra note 34, § 5; Stern, supra note 90, at 116.

135. Balikes v. Speleos, 173 So. 2d 735, 737 (Fla. 3d Dist. Ct. App. 1965) (citing Fla. Stat. § 924.07(1)).


137. United States v. 2,353.28 Acres of Land, 414 F.2d 965, 972 (5th Cir. 1969) (stating that allowing the party with the burden of proof to proceed first and last at final argument favors traditional notions of fairness).


141. Barkley v. State, 10 So. 2d 922, 925 (Fla. 1942).


143. 15 Fla. Jur. 2D Criminal Law § 1778 (2004) (citing Kennedy v. State, 83 So. 2d 4, 5 (Fla. 1955); Talley v. State, 36 So. 2d 201, 205 (Fla. 1948)). However, the Fourth District Court of Appeal recently held that still photos taken from a video entered into evidence by the state, which was not a motion-picture video but a compilation of still frames, does not constitute evidence on behalf of the defense separate from that offered by the state. Zackery v. State, 849 So. 2d 343, 345–46 (Fla. 4th Dist. Ct. App. 2003). If, however, the defense had made the still photographs from a motion-picture video offered into evidence by the state, those photographs would have constituted evidence, and therefore the defendant would have forgone his right to conclude the argument to the jury, as the photographs would have been additional to that which the state used to prove its case. Id. at 345.
Consequently, to secure the rebuttal argument at closing under rule 3.250, a defense attorney may forgo presentation not only of relevant or even significant testimony, but of nearly all documentary evidence as well. For example, in *Williams v. State*, the defendant's attorney failed to call witnesses of whose existence the attorney knew, and who would have corroborated the defendant's story. On appeal, the court found that such a failure on the part of defense counsel was committed intentionally and solely for the purpose of reserving the rebuttal at closing argument in accordance with rule 3.250. The court held that Mr. Williams had been convicted at trial of rape and kidnapping as a consequence of his attorney's ineffective assistance, and stated that it would have made a difference to Mr. Williams' case had his attorney called the relevant witnesses to testify on his behalf. Accordingly, the court held that Mr. Williams did not receive a fair trial and reversed for a new trial.

Situations like this one provide opponents of rule 3.250 with ammunition. Not surprisingly, those in favor of repealing rule 3.250 argue that it allows, and on some level may even encourage, defense attorneys to employ tactical procedures at trial. As the *Williams* case illustrates, such tactics can include refusing to call witnesses on behalf of the defendant, even if those witnesses' testimony could mean the difference between liberty and imprisonment, for fear of losing the sandwich against the prosecution at closing argument.

This reluctance to give up rebuttal arguments in criminal trials is unlikely to subside. Perhaps one reason for opposition to a new rule is the principle embedded so deeply in American society that a criminal defendant is presumed innocent until proven guilty, and that it is better to lose scores of guilty convictions than to wrongfully convict one innocent person. As John Adams once said,
We are to look upon it as more beneficial that many guilty persons should escape unpunished than one innocent should suffer. The reason is because it is of more importance to the community that innocence should be protected than it is that guilt should be punished, for guilt and crimes are so frequent in the world that all of them cannot be punished, and many times they happen in such a manner that it is not of much consequence to the public whether they are punished or not. But when innocence itself is brought to the bar and condemned, especially to die, the subject or victim will exclaim, “it is immaterial to me whether I behave well or ill, for virtue itself is no security.” And if such a sentiment as this should take place in the mind of the subject there would be an end to all security whatsoever. 155

Indeed, attorneys opposed to the change in the law base their opposition in part on the theory that allowing prosecutors to have the last word will result in wrongful convictions. 156 However, one might conclude that guaranteeing prosecutors the rebuttal in all criminal trials would have entirely the opposite effect, given the propensity of defense attorneys to omit potentially significant evidence for the tactical sake of having the final word before the jury. 157 Without the pressure weighing upon their shoulders to reserve the rebuttal argument at closing, defense attorneys can devote true zeal to the representation of their clients by presenting as much defensive evidence as may be appropriate for the particular case.

The Third District Court of Appeal recently addressed this issue in Diaz v. State. 158 At trial, the court encountered a rule 3.250 problem that arose due to an issue with the scope of cross-examination of a particular witness. 159 The court had placed certain restrictions upon cross-examination, 160 relying on the premise set forth by the Supreme Court of Florida that “the defendant may not use cross-examination as a vehicle for presenting defensive evi-

155. Stein, supra note 34, § 553.
156. Dys & Pudlow, supra note 20, at 10. The article quotes Tallahassee criminal defense attorney Tim Jansen, who warned that if the bill becomes law, “[y]ou may see more convictions where the evidence does not rise to beyond reasonable doubt.” Id.
157. Diaz, 747 So. 2d at 1026; Williams, 507 So. 2d at 1123.
158. 747 So. 2d 1021, 1021 (Fla. 3d Dist. Ct. App. 1999).
159. Id.
160. Id. at 1023. The court relied on Steinhorst v. State, 412 So. 2d 332 (Fla. 1982), in which the Supreme Court of Florida set forth the proper purposes of cross examination: “(1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness . . . . Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination.” Id. at 337.
TAKING THE "SANDWICH" OFF THE MENU

Dence."161 Defense counsel was therefore unable to question one of the state's witnesses regarding a fact pertinent to establishing his client's defense of self-defense, as the court deemed it outside the scope of cross-examination.162 Consequently, defense counsel had to "make the witness his own,"163 thereby losing the advantageous "sandwich" at closing argument.164 The defendant was found guilty of second-degree murder.165

On appeal, the Third District Court of Appeal expressed its agreement with the trial court by stating, with distinct annoyance, that "but for the existence of rule 3.250 of the Florida Rules of Criminal Procedure the scope of cross-examination issue presented in this case would not exist," and that "[t]he truth finding process was not compromised."166 In the court's learned opinion, rule 3.250 as currently written discourages criminal defendants from presenting evidence that could potentially benefit their clients, because defense attorneys feel as if they must pay a price to present such evidence.167

Although a criminal defense attorney may not withhold evidence which directly exculpates his client of the crime charged for the sake of addressing the jury last in closing argument, the same cannot be said of other types of important evidence which may not be per se exculpatory, but are significant to a secondary, but nevertheless important issue.168

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.169

Additionally, the court pointed out that rule 3.250 promotes "less than ethical behavior in the courtroom."170 Defense attorneys are prone to produce exhibits with which to question witnesses on cross-examination and to parade before the jury, but then refuse to enter those exhibits into evidence for fear of losing the right to "sandwich" the prosecution with two closing

161. Id.
162. Diaz, 747 So. 2d at 1024.
163. Id. at 1023 (quoting Steinhorst, 412 So. 2d at 337).
164. Id. at 1023.
165. Id. at 1022.
166. Id. at 1025.
167. Diaz v. State, 747 So. 2d at 1026.
168. Id.
169. Id.
170. Id.
arguments. Each of these problems can easily be eliminated by changing rule 3.250 so that the state has the first and final closing arguments in all criminal trials.

C. The Guilt Phase Versus the Penalty Phase

It is important to understand that the procedures used during the guilt and penalty phases of a criminal prosecution in Florida are governed by separate rules. Rule 3.250 of the Florida Rules of Criminal Procedure governs closing arguments during the guilt phase. The guilt phase is the part of a criminal trial during which the jury, or in the case of a bench trial, the judge, determines whether the defendant is guilty of committing a crime. By contrast, during the penalty phase, which is also known as the sentencing phase, the finder of fact determines the punishment for a defendant who has already been found guilty. Perhaps the distinction is most simply understood as the difference between "did he commit murder?" and "should he die for committing murder?"

In capital cases, the order of closing arguments during the penalty phase is governed by rule 3.780 of the Florida Rules of Criminal Procedure, which provides that both the state and the defense will be given an equal opportunity to present one final statement, and the state shall proceed first. Under rule 3.780, a trial judge has no discretion to change the order of final arguments during the penalty phase; it is mandatory that the defendant address the jury last. "[A] defendant always presents the final closing argument in the sentencing phase." The "sandwich" rule has no bearing on the penalty phase of a criminal trial, and therefore repealing rule 3.250 will not have any adverse effects on the rights of a defendant in a capital sentencing hearing.

171. Id.
172. Diaz, 747 So. 2d at 1026.
174. Id. § 1777; FLA. R. CRIM. P. 3.250.
175. BLACK'S LAW DICTIONARY 727 (8th ed. 2004).
176. Id. at 1169.
178. FLA. R. CRIM. P. 3.780(c).
180. Wike v. State, 648 So. 2d 683, 687 (Fla. 1994).
In the federal system, the order of closing arguments is as follows: the prosecution opens the argument, the defendant is then given an opportunity to reply, and then the prosecution is allowed to reply in rebuttal. This structure is set forth in rule 29.1 of the Federal Rules of Criminal Procedure. To preserve fairness, the government’s rebuttal is limited to issues raised by the defendant in his or her argument.

As with the common law, the order of closing arguments in federal trials favors the party bearing the burden of proof. The Fifth Circuit has held that because an order that permits the prosecution to proceed first and last during final jury summation mirrors the burden of proof, it is improper for a defendant to argue that allowing the prosecution to do so is unfair. Accordingly, state statutes that imitate the federal system with regard to the order of closing arguments have been upheld against due process challenges. In fact, the Supreme Court of Florida addressed the constitutionality of rule 3.250 when applied “against” the defendant in Preston v. State.

At trial, Mr. Preston called two witnesses to testify on his behalf, and was thus not entitled to “sandwich” the prosecution with two closing arguments. On appeal, he raised three issues: 1) that the rule violated due process by having a “chilling effect” on a defendant’s right to call witnesses, because if a defendant does call witnesses, he relinquishes his right to the first and final arguments at closing; 2) that the rule denies defendants the equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution, as it discriminates procedurally against those who do call witnesses; and 3) that allowing the prosecution to have the final argument has the psychological effect of diluting the defendant’s presumption of innocence, thereby violating due process.

With regard to the defendant’s first argument, the court was disinclined to agree that rule 3.250 produces a “chilling effect” on the defendant’s right
to call witnesses, as the decision to call witnesses is a basic choice that every defendant must make if his counsel agrees that it is strategically desirable.\textsuperscript{191} To the defendant’s second argument about unequal protection of the laws, the court responded that the accusation is based on the premise that all defendants are similarly situated, which is not at all true.\textsuperscript{192} To the contrary, when the situation arises in which the defense may call witnesses to build “its own case for innocence,” the defense receives “a more balanced exposure before the jury.”\textsuperscript{193} As for the defendant’s third issue, the court stated simply that the right to open and close the argument to the jury at final summation, while substantial, has never been raised to constitutional status and the court was not about to raise it then.\textsuperscript{194} Instead, the court highlighted the fact that under the common law and under statutes in the vast majority of states, the right to open and close the final arguments belongs to the prosecution, who bears the great burden of proof.\textsuperscript{195}

After reading the opinion in \textit{Preston}, one might conclude that the Supreme Court of Florida supports a rule that allows the prosecution to address the jury last, given the fine arguments the court makes in support of the structure of summations employed by so many other states.\textsuperscript{196} Indeed, the prevailing view throughout the nation with respect to the order of closing arguments in criminal trials emulates the view adopted by the federal system.\textsuperscript{197} Florida, Georgia, North Carolina, and South Carolina are the only four out of our fifty states that have not embraced this structure.\textsuperscript{198}

\begin{itemize}
\item \textsuperscript{191} \textit{Id.} at 504.
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Preston}, 260 So. 2d at 504.
\item \textsuperscript{194} \textit{Id.} at 504–05.
\item \textsuperscript{195} \textit{Id.} at 505.
\item \textsuperscript{196} \textit{Id.} at 504–05.
\item \textsuperscript{197} 5 LAFAVE ET AL., \textit{supra} note 125, § 24.7(c) at 552.
\item \textsuperscript{198} See FLA. R. CRIM. P. 3.250; GA. CODE ANN. § 17-8-71 (2003); N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10; State v. Mouzon, 485 S.E.2d 918, 921 (S.C. 1997); State v. Crowe, 188 S.E.2d 379, 384 (S.C. 1972); State v. Brisbane, 2 S.C.L. (2 Bay) 451 (S.C. 1802); Dys & Pudlow, \textit{supra} note 20, at 10 (mentioning that forty-six other states in the United States employ procedural rules that grant the prosecution the right to the first and final arguments at closing in criminal trials). 
\end{itemize}
IV. THOSE FORTY-SIX OTHER STATES

Although the majority of the United States employs an order for closing arguments that favors traditional notions of fairness, not all forty-six of those rules were originally enacted that way. For example, California's statute governing the order of closing arguments in criminal trials initially made the prosecution's opportunity to conclude the argument before the jury merely discretionary, thereby leaving room for the possibility that the defendant could conclude. However, in 1873, only one year after its enactment, the legislature amended the section giving the prosecution the absolute right to rebut the defendant's closing statement. The order of closing arguments in California has since remained the same.

The history of the order of closing arguments in Minnesota presents a particularly fascinating story. At one time, Minnesota had the unique distinction of being the only state in the entire country to always give the defendant in criminal trials the concluding argument at final summation. The proposition was introduced in 1875 as section 631.07 of the Minnesota Statutes and, despite frequent agitation for change, was not amended until 112 years later.

199. In most states, the order of closing arguments is either identical to that used by the federal system, or else provides that each side will have the opportunity to speak only once, with the defense being the first to proceed. Examples of the former structure include: Connecticut, CONN. GEN. STAT. ANN. § 54-88 (West 2004); California, CAL. PENAL CODE § 1093(e) (West 2004); and Arkansas, ARK. CODE ANN. § 16-89-123 (Michie 2003). Arkansas, however, includes a clause in its statute that requires both parties to state openly and fully their basis for arguing that a certain verdict applies. If a party refuses, the party "so refusing" will be denied the conclusion of the argument. New York is an example of the latter type of statute. N.Y. CRIM. PROC. LAW § 260.30 (McKinney 2004). Texas simply requires that the prosecution proceed last, and leaves the specifics to the discretion of the trial judge. TEX. CRIM. PROC. CODE ANN. § 36.07 (Vernon 1981).

200. United States v. 2,353.38 Acres of Land, 414 F.2d 965, 972 (5th Cir. 1969) (stating that allowing the party with the burden of proof to proceed first and last at final argument favors traditional notions of fairness).

201. CAL. PENAL CODE § 1093 (2004) (Historical and Statutory notes). As enacted in 1872, the pertinent subsection read: "When the evidence is concluded . . . the District Attorney or other counsel for the people must open and the District Attorney may conclude the argument." Id. (emphasis added).


203. Id.

204. Kunkel & Geis, supra note 123, at 550.

205. Id.

206. Id. The article cites and discusses a Minnesota Crime Commission report from 1927, which was one of several attempts made to change the law. Id.

207. MINN. STAT. ANN. § 631.07 (West 2002) (Historical and Statutory Notes).
During the time that section 631.07 governed in its pre-amended form, researchers conducted a survey of the attorneys in Minnesota, inviting each attorney in the state’s eighty-seven counties to respond to a questionnaire. Upon analyzing the results, the researchers noted that:

The most persuasive contention of [the] prosecutors is that defense counsel may wander far afield in his final argument, including irrelevant, often prejudicial material, and possibly misleading comments on fact or law. Defense counsel may interject any number of theories on the evidence that the prosecution cannot answer [sic]. One respondent concluded that “...this statute... enables the defense to throw out a last-minute red herring.” The state’s remedy is limited to corrective instruction by the presiding judge and the unwise tactic of objecting during defense counsel’s argument.

The researchers further found that “the rights of the accused in a criminal trial are thought to be adequately protected by constitutional safeguards without the additional advantage of having the final argument before the jury,” which was one reason those in opposition of the Minnesota statute advocated its amendment. The study also revealed some attorneys’ beliefs that section 631.07 led to fewer convictions. Those attorneys grounded their belief in the notion that a typical jury is “highly vulnerable to strong arguments by counsel,” and that when the factors and merits of the case appear to be equal, the order of closing arguments could be the deciding factor.

On the other hand, some of the prosecutors who responded felt that allowing the defendant to have the final word balances the equities, because prosecutors are privileged with unconstrained financial resources for investigation, more advanced investigative facilities, and cooperation from state and

208. Kunkel & Geis, supra note 123, at 551. One hundred twenty-eight attorneys replied. Id.
209. Id. at 552.
210. Id. at 553.
211. Id. at 555.
212. Kunkel & Geis, supra note 123, at 555. However, the authors of the article noted that psychological studies (conducted during that time) on the importance of the argument produced inconclusive findings. Id.
213. Id. The heads of the study commented on this statement, saying that if the factors and merits of the case appear to be equal, then the state has established no more than an equal case, and has therefore not met its burden of proof. Id.
214. Id. at 555.
federal agencies.\textsuperscript{215} One attorney went so far as to say that if the state’s evidence is sufficiently compelling in and of itself, then their case should be able to withstand the defense’s closing argument.\textsuperscript{216}

Clearly, the struggle to change the law in Minnesota was an uphill climb.\textsuperscript{217} Ultimately, however, perseverance prevailed, and the statute was amended in 1987.\textsuperscript{218} It now reads:

when the giving of evidence is concluded in a criminal trial . . . the prosecution may make a closing argument to the jury. The defense may then make its closing argument to the jury. The prosecution shall then have the right to reply in rebuttal to the closing argument of the defense.\textsuperscript{219}

The result of this 112-year-old battle surely provides optimism for those who wish to change the laws in the misfit states.

V. FOUR BLACK SHEEP

Each of the four misfit states have similar rules with regard to the order of final arguments that give the defendant an opportunity to close before the jury.\textsuperscript{220} None of these rules grants the criminal defendant an absolute right to the last word, as section 631.07 of the \textit{Minnesota Statutes} did in its pre-amended form. Instead, each of the four states makes the defendant’s right to close contingent upon the defendant’s refusal or failure to present evidence at trial in defense of the charge alleged against him or her.\textsuperscript{221}

South Carolina was the first of the misfit states to adopt such a rule.\textsuperscript{222} The Supreme Court of South Carolina made its departure from traditional laws in 1802 with its decision in \textit{State v. Brisbane}.\textsuperscript{223} On an appeal, defense counsel raised the issue of changing the order of closing arguments for the

\begin{enumerate}
\item \textsuperscript{215} Kunkel & Geis, \textit{supra} note 123, at 554.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} See \textit{id}. According to a news article published by the Star Tribune in 1999, the struggle is far from over. \textit{Id.}; see Paul Gustafson, \textit{Criminal Prosecutors Want Last Word}, STAR TRIB. (Minneapolis-St. Paul), Feb. 20, 1999, at 1B, available at 1999 WL 7493933.
\item \textsuperscript{218} MINN. STAT. ANN. § 631.07 (West 2002) (Historical and Statutory Notes).
\item \textsuperscript{219} § 631.07.
\item \textsuperscript{221} FLA. R. CRIM. P. 3.250; § 17-8-71; N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10; Mouzon, 485 S.E.2d at 918; Crowe, 188 S.E.2d at 379; Brisbane, 2 S.C.L. at 451.
\item \textsuperscript{222} See Brisbane, 2 S.C.L. at 451.
\item \textsuperscript{223} Id.
sole purpose of having "the point settled as a rule [there]after." He swayed the court by stating that allowing the prosecution to open and close the arguments before the jury at final summation was a relict of English rule, and that our country would be better served by a law "more agreeable to the rights of freemen."

At that time, the order of closing arguments in civil trials in South Carolina provided a defendant who called no witnesses in his or her defense with the privilege of the last word. Defense counsel convinced the Brisbane court that the rule would serve an even stronger purpose in criminal trials because much more is at stake in a criminal trial. Thus, the rule became one of standing practice in South Carolina's criminal justice system.

It seems clear from the Brisbane case that the court's motivation in implementing the rule was to create a more just system for those defendants who opt not to present a defense at trial; not, as it seems today, to discourage defendants from presenting a defense at trial. But the practice of allowing a criminal defendant, who presents no defensive evidence or testimony, to speak to the jury last continues to be upheld by the courts of modern-day South Carolina. One cannot help but wonder whether such support for the rule is based on belief in its validity, or on the typical reluctance of a society to change the way things have been done for over 200 years.

In North Carolina, like in Florida, the order of closing arguments is governed by rule as opposed to common law or statute. It provides that in both civil and criminal cases, if the defendant introduces no evidence, the right to open and close the argument to the jury "shall belong to him." The practice of allowing this order for closing arguments in North Carolina dates back to at least the mid-1800's. Today, the Supreme Court of North Caro-

224. Id. at 453.
225. Id.
226. Id.
228. Id. at 454.
229. Diaz v. State, 747 So. 2d 1021, 1026 (Fla. 3d Dist. Ct. App. 1999). Judge Sorondo made this observation in Diaz with regard to this structure of closing arguments. See id.
231. See N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10. The order of closing arguments in the penalty phase of a North Carolina trial is governed by statute, and provides that the defendant shall have the right to the final argument. N.C. GEN. STAT. § 15A-2000 (2003).
233. State v. Anderson, 7 S.E. 678, 680 (N.C. 1888). In State v. Anderson, the Supreme Court of North Carolina briefly acknowledged the right of a defendant presenting no evidence in his behalf to conclude the argument before the jury, indicating that by 1888, the rule was common knowledge. Id.
lina continues to protect the right of a defendant who presents no evidence in his defense at trial to address the jury finally, by holding that it is not a right of which the defendant can be deprived by an exercise of judicial discretion.234

Additionally, by statute in North Carolina, up to three attorneys may argue to the jury on behalf of the defendant. 235 The Supreme Court of North Carolina has set forth the rule that in capital cases, although the maximum number of attorneys per side that may argue to the jury is three, each attorney may address the jury as many times as they wish during closing. 236

Thus, for example if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury and may, upon being refreshed, rise again to make another address during the defendant’s time for argument. However, if the defendant presents evidence, all such addresses must be made prior to the prosecution’s closing argument. 237

Failure to allow each attorney to address the jury in this manner constitutes prejudice to the defendant per se, and warrants a new trial. 238 Clearly, a defendant in North Carolina who presents no evidence with which to defend himself at trial is entitled to great procedural advantages.

The purpose of Georgia’s rule, according to the Supreme Court of Georgia, is to allow counsel for an accused with no defense “every opportunity to persuade the jury that the State has failed to prove his guilt.” 239 Allowing a defendant to open and conclude the argument under these circumstances has been common practice in Georgia since 1852.240 Lawmakers created the law to make the order of closing arguments in criminal trials parallel to the order used in civil trials. 241 Today, this aspect of Georgia’s criminal procedure is controlled by section 17-8-71 of the Georgia Code. 242

235. N.C. GEN. STAT. § 7A-97 (2003). The statute permits three attorneys per side to address the jury. Id.
237. Gladden, 340 S.E.2d at 688 (explaining the court’s interpretation of N.C. GEN. STAT. § 84-14, now § 7A-97, which grants this right).
238. Barrow, 517 S.E.2d at 377; Mitchell, 365 S.E.2d at 559.
240. Hargrove v. State, 45 S.E. 58 (Ga. 1903) (explaining the origin of Georgia’s rule).
241. Id.; see Phelps v. Thurman, 74 Ga. 873 (1885); Chapman v. Atlanta & W. Point R.R., 74 Ga. 547 (1885). These civil cases held that unless the defendant’s plea was one of justifi-
Although on its face, the statute does not explicitly state that a defendant who offers only his own testimony at trial is entitled to the final closing argument, the courts of Georgia have interpreted the law to mean just that. Unlike Florida, however, Georgia courts have held that a defendant who is wrongfully denied the right to open and close the arguments to the jury, but who, from the evidence, is clearly guilty of the crime alleged, is not entitled to a new trial. In Florida, even in light of evidence indicating the defendant’s guilt beyond a reasonable doubt, the Supreme Court of Florida has reversed convictions when the defendant has been wrongfully denied his right to open and close the final arguments to the jury.

The legislatures of Georgia and Florida appear to have been in synch very recently, as the Georgia Senate attempted to change their statute through the passage of Senate Bill 414. Much like Florida House Bill 1149, Georgia’s bill posed to amend section 17-8-71 and repeal all laws conflicting with the statute as amended, so that “the prosecuting attorney shall always conclude the argument to the jury.” Unfortunately, the fates of the Georgia and Florida bills also appear to have been in synch, as neither Georgia Senate Bill 414 nor Florida House Bill 1149 will become law in 2004.

Thus, it is Georgia, North Carolina, South Carolina, and Florida which comprise the four states that have perhaps become known as black sheep among America’s criminal justice system.

Phelps, 74 Ga. at 837; Chapman, 74 Ga. at 547-48.

244. Id. at 700.
245. Wike v. State, 648 So. 2d 683, 686 (Fla. 1994); Birge v. State, 92 So. 2d 819, 822 (Fla. 1957); 15 FLA. JUR. 2D Criminal Law § 1777 (2001).
247. Id.
248. Georgia Senate Bill 414 was not among those signed by the Governor. The list of those bills that were signed by the Governor after the 2003-2004 Session are available at the Georgia General Assembly website. Ga. Gen. Assemb. available at http://www.legis.state.ga.us/(last visited Oct. 14, 2004). Florida House Bill 1149 died in committee on April 30, 2004, after being introduced to the Florida Senate and referred to the Judiciary and Criminal Justice Committees. For a complete history, visit the Florida Senate website. Fla. Sen. available at http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&Tab =session&BI_Mode=ViewBillInfo&BillNum=1149&Chamber=House&Year=2004&Title=%2D%3EBill%2520Info%3AH%25201149%2D%3ESession%25202004 (last visited Oct. 14, 2004).
VI. WHAT WILL THE SUPREME COURT OF FLORIDA SAY?

The Supreme Court of Florida enjoys the right, under article V, section 2(a) of the Constitution of Florida, to adopt rules for the practice and procedure in all courts of Florida. Rules that are substantive in nature are left to the legislature. Neither branch of the government may exercise a power given to the other. Thus, the fate of the proposition espoused by House Bill 1149 may ultimately depend upon whether the rule is deemed procedural or substantive.

The question, of course, is what makes a rule procedural as opposed to substantive? The Supreme Court of Florida defines substantive law as it relates to criminal law and procedure as “that which declares what acts are crimes and prescribes the punishment therefor.” The court defined procedural law in the same context as “that which provides or regulates the steps by which one who violates a criminal statute is punished.” Put simply, substantive law creates and defines rights, while procedural law is “legal machinery” through which those rights are made effective.

If rule 3.250 were ever to be repealed by a statute enacted by the legislature, the issue will arise of how the Supreme Court of Florida will react. Attorneys in opposition of the change argue that the rule is procedural, and that the Supreme Court of Florida will find it unconstitutional. Not surprisingly, advocates of the change argue that the rule is clearly substantive: “[If you don’t follow that rule . . . cases are reversed. And they are not subject to a harmless error analysis. That means it is a fundamental error. In

249. FLA. CONST. art. V, § 2(a).
250. TGI Friday’s, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995); Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975).
251. FLA. CONST. art. II, § 3.
253. In re Fla. R. Crim. P., 272 So. 2d 65 (Fla. 1972) (quoting State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969)).
254. Fla. R. Crim. P., 272 So. 2d at 65 (quoting Garcia, 229 So. 2d at 238).
255. Garcia, 229 So. 2d at 238.
256. Id.; Benyard v. Wainright, 322 So. 2d 473, 475 (Fla. 1975).
257. Dys & Pudlow, supra note 20, at 10.
258. Id. An example of the supreme court’s power occurred in 2000, when the court declared the Death Penalty Reform Act of 2000, passed by the legislature, an “unconstitutional encroachment” on the court’s “exclusive power to ‘adopt rules for the practice and procedure in all courts.’” STAFF ANALY. H.B. 1149 CRIM. PROSECUTIONS, H.R., 2004 Reg. Sess., at 5 (citing Allen v. Butterworth, 756 So. 2d 52, 54 (Fla. 2000)).
our view, that means it is a substantive right, which . . . the legislature [has] the total power to change." 259

Admittedly, the Supreme Court of Florida said that the right that is granted to defendants in rule 3.250 is a "vested procedural right." 260 However, the court has also said that "the fact that a statutory provision could appropriately be labeled 'procedural' does not necessarily mean that it violates article V, section 2(a)." 261 In fact, the court has refused to nullify procedural statutory provisions that are "intimately related to" or "intertwined with" statutory provisions that are substantive in nature. 262 With specific regard to laws that combine substantive and procedural provisions, the Supreme Court of Florida has stated that the judiciary and legislature must work together to give effect to such laws without encroaching on each other's constitutional power. 263 It is certainly arguable that rule 3.250, even if considered procedural, also involves substantive law, given the fact that failure to follow rule 3.250 is reversible error 264 and can result in the reversal of convictions even when the court acknowledges overwhelming evidence of guilt. 265 In this respect, the Supreme Court of Florida actually appears to harbor some resentment toward the "sandwich" rule, which is apparent from the court's words in Birge v. State 266 when forced to reverse the conviction of a heinous crime: "It is not our privilege to disregard it even though we as individuals might feel that [a defendant] is as guilty as sin itself." 267

Furthermore, the rule was originally enacted by the Florida Legislature, not the Supreme Court of Florida, in 1853. 268 When the supreme court ratified the rule in 1858, 269 and again in 1958, 270 it stated that the rule is a "positive clear-cut unequivocal legislative enactment and we are bound to follow it until the Legislature in its wisdom sees fit to change it." 271 If the legisla-

259. Dys & Pudlow, supra note 20, at 10 (citing Brad Thomas, public safety policy director for Governor Jeb Bush). Mr. Thomas also mentioned when interviewed for the article that the Governor supports the proposition contained in House Bill 1149. Id.

260. Wike v. State, 648 So. 2d 683, 684 (Fla. 1994); Faulk v. State, 104 So. 2d 519, 521 (Fla. 1958); Birge v. State, 92 So. 2d 819, 822 (Fla. 1957) (emphasis added).


262. Id. (citing Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 54 (Fla. 2000)).


264. Wike, 648 So. 2d at 686; Faulk, 104 So. 2d at 521; Birge, 92 So. 2d at 822.

265. Wike, 648 So. 2d at 686; Birge, 92 So. 2d at 822.

266. 92 So. 2d at 819.

267. Id. at 822.

268. Heffron v. State, 8 Fla. 73 (1858).

269. Id.

270. Faulk, 104 So. 2d at 521.

271. Id. (emphasis added).
ture now sees fit to change the law, as House Bill 1149 indicates, then it seems appropriate that the supreme court shall stay true to its word.

VII. CONCLUSION

It is a fundamental tenet of American jurisprudence that the party with the burden of proof shall proceed first and last during the final arguments of a trial.\(^{272}\) It seems unreasonable that in a country which has adopted this procedure in an overwhelming majority of jurisdictions, Florida seeks to remain behind. Rule 3.250 of the *Florida Rules of Criminal Procedure*, as currently written, discourages defendants from presenting evidence in their defense,\(^{273}\) increases the risk of ineffective assistance of counsel,\(^{274}\) and promotes unethical behavior in the courtroom.\(^{275}\) Whether a bill like House Bill 1149 ultimately becomes law and changes the order of closing arguments in criminal trials in Florida, the problem is unlikely to disappear. Like the prosecutors of Minnesota, who faced a similar struggle years ago, the prosecutors of Florida should not give up on this issue.\(^{276}\)

A rule that began perhaps as a protective measure for defendants who fail to defend themselves during their own criminal prosecutions,\(^{277}\) has evolved into a mechanism for snatching away from the prosecution what the common law clearly dictates belongs to them.\(^{278}\) Florida should take the advice of its learned Third District Court of Appeal and change rule 3.250, so that we can "enhance the search for the truth and eliminate the misguided notion that having the final argument in summation is more important than the introduction of potentially important evidence."\(^{279}\)

\(^{275}\) *Diaz*, 747 So. 2d at 1026.
\(^{276}\) Gustafson, *supra* note 217 (reporting that prosecutors vowed to keep pushing for a change in the order of closing arguments until successful).
\(^{277}\) Preston v. State, 260 So. 2d 501, 504 (Fla. 1972) (stating that the rule, as the Supreme Court of Florida sees 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.") (emphasis added). It is clear, however, that what the court intends the rule to be, and how defendants actually view it, are separate and distinct. *See id.*
\(^{278}\) 15 FLA. JUR. 2D Criminal Law § 1771 (2001).
\(^{279}\) *Diaz*, 747 So. 2d at 1026.