IN THE SUPREME COURT OF FLORIDA

JAMES RANDALL,	:	
Appellant,	:	
vs.	:	Case No. 90,977
STATE OF FLORIDA,	:	
Appellee.	:	
______________________________	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831

(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT 1

ARGUMENT 1

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF DISSIMILAR INCIDENTS IN WHICH APPELLANT CHOKED HIS EX-WIFE AND HIS LIVE-IN GIRLFRIEND DURING SEXUAL INTERCOURSE, AND IN WHICH HE CHOKED HIS GIRLFRIEND AFTER A DOMESTIC ARGUMENT. 1

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF APPELLANT'S FLIGHT FROM THE POLICE WHEN THEY ATTEMPTED TO ARREST HIM ON THE OUTSTANDING MASSACHUSETTS PROBATION WARRANT. 5

ISSUE III

APPELLANT'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL WAS IRREPARABLY COMPROMISED WHEN, JUST PRIOR TO HAVING THE PROSECUTOR READ TO PROSPECTIVE JURORS THE LENGTHY LIST OF POSSIBLE WITNESSES, THE TRIAL JUDGE MADE AN EXTEMPORANEOUS COMMENT WHICH COULD ONLY HAVE BEEN TAKEN BY THE JURORS AS MEANING THAT FOR EVERY WITNESS THE STATE ACTUALLY CALLED AT TRIAL, THERE WERE NUMEROUS OTHER UNCALLED WITNESSES WHO COULD CORROBORATE THAT PERSON'S TESTIMONY. 5

ISSUE IV

TOPICAL INDEX TO BRIEF (continued)

APPELLANT'S CONVICTIONS SHOULD BE REDUCED TO SECOND DEGREE MURDER, AND HIS DEATH SENTENCES VACATED, BECAUSE THE CIRCUMSTANTIAL EVIDENCE, WHILE SUFFICIENT TO PROVE THAT THE KILLINGS WERE UNLAWFUL, IS INSUFFICIENT TO PROVE THAT THEY WERE PREMEDITATED. 7

ISSUE V

THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS WAS VIOLATED BY THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT IT COULD WEIGH AS AN AGGRAVATING CIRCUMSTANCE THE FACT THAT APPELLANT WAS ON FELONY PROBATION, AND BY THE TRIAL COURT'S FINDING OF THIS AGGRAVATING CIRCUMSTANCE IN HER ORDER SENTENCING APPELLANT TO DEATH. 8

CERTIFICATE OF SERVICE 13

TABLE OF CITATIONS

CASES	PAGE NO.
Bolender v. State, 422 So. 2d 833 (Fla. 1982)	8
Carlile v. State, 129 Fla. 860, 176 So. 2d 862 (1937)	7
Carr v. State, 561 So. 2d 617 (Fla. 5th DCA 1990)	4
Castor v. State, 365 So. 2d 701 (Fla. 1978)	4
Coffee v. State, 699 So. 2d 299 (Fla. 2d DCA 1997)	4
Donaldson v. State, 369 So. 2d 691 (Fla. 1st DCA 1979)	3, 5
Donley v. State, 694 So. 2d 149 (Fla. 4th DCA 1997)	4
Elledge v. State, 346 So. 2d 998 (Fla. 1997)	9
Espinosa v. Florida, 505 U.S. 1079 (1992)	9
Evans v. State, 692 So. 2d 966 (Fla. 5th DCA 1997)	12
Ferguson v. State, 417 So. 2d 631 (Fla. 1982)	8
Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988)	9
Grant v. State, 194 So. 2d 612 (Fla. 1967)	7
Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)	10
Howard v. State,	

TABLE OF CITATIONS (continued)

616 So. 2d 484 (Fla. 1st DCA 1993) 3, 5

Jackson v. State,
648 So. 2d 85 (Fla. 1994) 10

Johnson v. State,
537 So. 2d 117 (Fla. 1st DCA 1988) 3, 5

Johnson v. Singletary,
612 So. 2d 575 (Fla. 1993) 9

Kearse v. State,
662 So. 2d 677 (Fla. 1995) 9

Merritt v. State,
523 So. 2d 573 (Fla. 1988) 12

Pait v. State,
143 Fla. 28, 196 So. 596 (1940) 7

Peek v. State,
395 So. 2d 492 (Fla. 1981) 8

Sochor v. Florida,
504 U. S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) 9, 10

Spurlock v. State,
420 So. 2d 875 (Fla. 1982) 4

State v. Heathcote,
442 So. 2d 955 (Fla. 1983) 3-5

State v. Rhoden,
448 So. 2d 1013 (Fla. 1984) 4

State v. Zenobia,
614 So. 2d 1139 (Fla. 4th DCA 1993) 4

Thomas v. State,
599 So. 2d 158 (Fla. 1st DCA 1992) 3

Thomas v. State,
419 So. 2d 634 (Fla. 1982) 4, 5

TABLE OF CITATIONS (continued)

Thompson v. State,
615 So. 2d 737 (Fla. 1st DCA 1993) 3

Thompson v. State,
318 So. 2d 549 (Fla. 4th DCA 1975) 6

Trotter v. State,
576 So. 2d 691 (Fla. 1990) 8

Trotter v. State,
690 So. 2d 1234 (Fla. 1996) 8

Williams v. State,
619 So. 2d 487 (Fla. 1st DCA 1993) 3-5

Williamson v. State,
459 So. 2d 1125 (Fla. 3d DCA 1984) 6

Wilson v. State,
294 So. 2d 327 (Fla. 1974) 7

Yohn v. State,
476 So. 2d 123 (Fla. 1985) 12

PRELIMINARY STATEMENT

The state's brief will be referred to as SB. Other references are as denoted in appellant's initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF DISSIMILAR INCIDENTS IN WHICH APPELLANT CHOKED HIS EX-WIFE AND HIS LIVE-IN GIRLFRIEND DURING SEXUAL INTERCOURSE, AND IN WHICH HE CHOKED HIS GIRLFRIEND AFTER A DOMESTIC ARGUMENT.

As to the merits, appellant will rely on his initial brief.

As to the state's contention that defense counsel waived his objection (SB32-34), the salient facts are as follows: In a pretrial Williams Rule hearing on February 19, 1997, the defense argued extensively that the choking incidents involving appellant's girlfriend Terry Jo Howard and his ex-wife Linda Graham were inadmissible and should be excluded (R6/977-81,990-96). While prohibiting any mention of kidnapping or rape, the trial judge ruled that the choking incidents, and the testimony that appellant obtains sexual gratification from choking women, would be admitted

into evidence (R6/983-84,996). On the morning of jury selection, February 24, 1997 (in conducting a colloquy with appellant to ensure that his waiver of the severance of the counts and the cross-admissibility of the Evans and Pugh homicides was voluntary), the judge recognized that as to the other items in the state's Williams Rule notice, "Obviously, Mr. Schwartzberg [defense counsel] objects to those items coming in, and I understand that" (T14/ 5). A written order (dated March 14, 1997, nunc pro tunc to February 24, 1997) was entered reaffirming that the state would be allowed to present evidence of the manual strangulations of Terry Howard and Linda Randall (Graham), as well as the testimony of either David Oikemus or Dr. Wesley Profit regarding sexual gratification (R8/1236-39).

The trial commenced, and on the morning of the third day of trial, immediately before the state called the two women who would testify about appellant's penchant for choking his sexual partners, defense counsel again renewed his objection (T21/1002-11). The argument was focused on Linda Graham, likely under the assumption that she was to be the next witness (see T21/1012), but during the discussion the prosecutor brought up Terry Jo Howard as well:

> But what I believe [Ms. Graham's] testimony will be -- and I have worked to -- through a combination of somewhat leading questions, and trying to focus the inquiry, to try to comply

> with the Court's order, which I understood was choking behavior during sexual activity, or as a prelude to sexual activity, was relevant to establish motive in this case. And although we were not to prove it up as Williams Rule of a rape or a kidnapping, you were going to allow evidence of force or violence that occurred during the choking behavior, that that was permissible. That was my understanding of your ruling, as to Linda Graham.
>
> And of course, we've got similar incidents with Terry Howard, that you also ruled were admissible. And this is illustrative and corroborative.

(T21/1005-06).

After hearing the argument of both counsel, the trial court adhered to her previous ruling:

> And yes, I agree with you, this is prejudicial. Williams Rule evidence generally is.
>
> But again, as I told you, this is a circumstantial case. I've heard it. And once again, I think that it is relevant. It tends to show, from the State's perspective, motive. It tends to show identity. It tends to show lack of mistake or whatever that -- accident or mistake. And so I'm going to let it in.

(T21/1009).

Shortly afterwards, the judge asked the prosecutor if Linda Graham was first, and the prosecutor answered "No. I was going to put on Terry Howard first, but . . ." (T20/1012). Immediately thereafter -- without further objection -- the state called Ms. Howard to the stand (T21/1013).

Defense counsel did everything that was required to preserve this issue for appeal. The trial judge fully understood the nature and grounds of the objection, and with that understanding, she adhered to her prior ruling that the evidence of the prior choking incidents was admissible. Further objection would have been pointless and futile. See State v. Heathcote, 442 So. 2d 955 (Fla. 1983); Williams v. State, 619 So. 2d 487, 492 (Fla. 1st DCA 1993); Thompson v. State, 615 So. 2d 737, 744 (Fla. 1st DCA 1993); Howard v. State, 616 So. 2d 484, 485 (Fla. 1st DCA 1993); Thomas v. State, 599 So. 2d 158, 159-61 n.1 (Fla. 1st DCA 1992); Johnson v. State, 537 So. 2d 117, 120 (Fla. 1st DCA 1988); Donaldson v. State, 369 So. 2d 691, 694 (Fla. 1st DCA 1979).

The purposes of the contemporaneous objection rule are to apprise the trial judge of the error in time for her to avoid or correct it, to permit intelligent review on appeal, and to prevent sandbagging.[1] The purpose of requiring renewal at trial of an unsuccessful pretrial motion in limine is to give the trial judge

---

[1] Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); Thomas v. State, 419 So. 2d 634 (Fla. 1982); Spurlock v. State, 420 So. 2d 875 (Fla. 1982); State v. Heathcote, 442 So. 2d 955 (Fla. 1983); State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984); Williams v. State, 619 So. 2d 487, 492 (Fla. 1st DCA 1993). See also Carr v. State, 561 So. 2d 617, 619 (Fla. 5th DCA 1990) ("The purpose of requiring contemporaneous objection is to signify to the trial court that there is an issue of law and to give notice as to its nature and the terms of the issue").

an opportunity to reconsider her ruling in light of the "shifting sands" of the trial in progress.[2] All of these objectives were satisfied in the instant case. As in Williams v. State, supra, 619 So. 2d at 492, the trial judge expressly made it clear before admitting the evidence that she understood the nature and grounds of the objection (T21/1009, see also T14/5). Immediately after the judge announced that she was going to adhere to her pretrial ruling and admit the evidence of the prior choking incidents, the prosecutor indicated that he was going to call Ms. Howard first instead of Ms. Graham. For defense counsel to repeat his objection at that point -- when it had just been unequivocally overruled seconds earlier -- would have been an exercise in futility and an annoyance to the trial judge. When the legitimate purposes of the contemporaneous objection rule are satisfied, the law does not exalt form over substance or require useless acts. Heathcote; Williams; Howard; Thomas; Johnson; Donaldson.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF APPELLANT'S FLIGHT FROM THE

[2] See State v. Zenobia, 614 So. 2d 1139 (Fla. 4th DCA 1993); Donley v. State, 694 So. 2d 149 (Fla. 4th DCA 1997); Coffee v. State, 699 So. 2d 299, 300 (Fla. 2d DCA 1997).

POLICE WHEN THEY ATTEMPTED TO ARREST HIM ON THE OUTSTANDING MASSACHUSETTS PROBATION WARRANT.

Appellant will rely on his initial brief as to this Point on Appeal.

ISSUE III

APPELLANT'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL WAS IRREPARABLY COMPROMISED WHEN, JUST PRIOR TO HAVING THE PROSECUTOR READ TO PROSPECTIVE JURORS THE LENGTHY LIST OF POSSIBLE WITNESSES, THE TRIAL JUDGE MADE AN EXTEMPORANEOUS COMMENT WHICH COULD ONLY HAVE BEEN TAKEN BY THE JURORS AS MEANING THAT FOR EVERY WITNESS THE STATE ACTUALLY CALLED AT TRIAL, THERE WERE NUMEROUS OTHER UNCALLED WITNESSES WHO COULD CORROBORATE THAT PERSON'S TESTIMONY.

The state's main argument seems to be that the prejudicial effect of the judge's remark was cured by the standard jury instructions (see SB59-61,63). It can reasonably be assumed that the standard instructions were given in all of the nine cited cases[3] in which comments of this nature necessitated reversal. When the judge -- the dominant figure in the trial and the one participant whose neutrality must be beyond question -- tells the

---

[3] See appellant's initial brief, p.71-72.

jury panel that the state will call whatever amount of witnesses they feel is appropriate to prove their case beyond a reasonable doubt, and "[t]hey won't parade in five witnesses to repeat what one witness can tell you", the clear messages to the jurors are (1) the judge knows there is more evidence of guilt than what we will hear, and (2) for every witness the state calls, there are others out there who would corroborate his or her testimony. The prejudicial effect of such a statement is so destructive of the fairness of a trial that even rebuke or retraction, or a special instruction to disregard it, cannot cure the harm. Thompson v. State, 318 So. 2d 549, 551 (Fla. 4th DCA 1975); Williamson v. State, 459 So. 2d 1125, 1128 (Fla. 3d DCA 1984). When the comment is made not by the prosecutor (who is correctly perceived by the jury as an advocate for one side), but by the judge herself, the impact is that much worse. In Thompson, 318 So. 2d at 551, the appellate court held that the prosecutor's statement to the jury that he could have put on other police officers but he saw no need to was highly improper and prejudicial, and required reversal for a new trial even in the absence of an objection below:

> The rule is generally stated that:
>
> ". . . whether requested to or not, it is the duty of the trial judge to check improper remarks of counsel to the

> jury, and by proper instructions to remove any prejudicial effect such remarks may have created. A judgment will not be set aside because of the omission of the judge to perform his duty in the matter unless objected to at the proper time. This rule is, however, subject to the exception that if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in such event, a new trial should be awarded regardless of the want of objection or exception." Carlile v. State, 129 Fla. 860, 176 So. 2d 862, 864 (1937).
>
> Accord, Wilson v. State, 294 So. 2d 327 (Fla. 1974); Grant v. State, 194 So. 2d 612 (Fla. 1967); Pait v. State, 143 Fla. 28, 196 So. 596, 600 (1940). We believe the prosecutors remarks in this case to have been so prejudicial to the rights of the accused and unsusceptible to eradication by rebuke or retraction as to necessitate the reversal of appellant's conviction for the award of a new trial.

In the instant case, it was the judge herself who, however inadvertently, told the jury that the state had more evidence of guilt than it would need to present. That statement was so prejudicial that it could not have been cured by rebuke or retraction; ipso facto it was not cured by the standard jury instructions.

ISSUE IV

APPELLANT'S CONVICTIONS SHOULD BE REDUCED TO SECOND DEGREE MURDER, AND HIS DEATH SENTENCES VACATED, BECAUSE THE CIRCUMSTANTIAL EVIDENCE, WHILE SUFFICIENT TO PROVE THAT THE KILLINGS WERE UNLAWFUL, IS INSUFFICIENT TO PROVE THAT THEY WERE PREMEDITATED.

Appellant will rely on his initial brief as to this Point on Appeal.

ISSUE V

THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS WAS VIOLATED BY THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT IT COULD WEIGH AS AN AGGRAVATING CIRCUMSTANCE THE FACT THAT APPELLANT WAS ON FELONY PROBATION, AND BY THE TRIAL COURT'S FINDING OF THIS AGGRAVATING CIRCUMSTANCE IN HER ORDER SENTENCING APPELLANT TO DEATH.

The state's suggestion that the legislature's 1996 adoption of felony probation as an aggravating circumstance is a "mere refinement" (SB84) in the law is wrong. The inclusion of probationary status within the (5)(a) aggravator was a 180-degree change in the law. From the early 1980s until May 30, 1996, the law of this state was absolutely clear that this aggravator was not applicable to persons on probation. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Ferguson v. State, 417 So. 2d 631, 636 (Fla. 1982); Bolender v. State, 422 So. 2d 833, 837-38 (Fla. 1982). Unlike the situation in Trotter [4], there was never any ambiguity, and no swift legislative response to "clarify its intent." The legislature simply decided to change the existing substantive law, effective May 30, 1996. The legislature, of course, can do that. What the state cannot do is apply the new law retroactively to

[4] Trotter v. State, 576 So. 2d 691 (Fla. 1990) [Trotter I] and Trotter v. State, 690 So. 2d 1234 (Fla. 1996) [Trotter II].

offenses committed before its effective date. That is the essence of the state and federal constitutional protection against ex post facto laws.

The fact that the trial judge had an idea she might be violating this constitutional principle, and therefore assigned the invalid aggravator moderate weight instead of great weight, does not render the error "harmless" (see SB 85). It was a thumb on the scale in her decision to impose the death penalty, and it is sheer self-serving speculation for the state to say it made no difference. See Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1997), in which this Court said:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered.

See also Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (recognizing that a "high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Moreover, the trial court's constitutional error affected not only her sentencing decision but also the jury's crucial penal-

ty recommendation. The Eighth Amendment's prohibition against weighing invalid aggravating factors applies equally to the jury and the judge (co-sentencers under Florida law). See Sochor v. Florida, 504 U.S. 527 (1992); Espinosa v. Florida, 505 U.S. 1079 (1992); Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1993). In Kearse v. State, 662 So. 2d 677, 786 (Fla. 1995), this Court said:

> As the United States Supreme Court noted in Espinosa v. Florida, 505 U.S. 1079, 1082, 112 S. Ct. 2926, 2929, 120 L. Ed. 2d 854 (1992), "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." While a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." Sochor v. Florida, 504 U. S. 527, 538, 112 S. Ct. 2114, 2122, 119 L. Ed. 2d 326 (1992); Jackson, 648 So. 2d at 90.

In Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994), the Court wrote:

> As the [United States] Supreme Court explained in [Sochor], while a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." See also, Griffin v. United States, 502 U.S. 46, 59, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371 (1991) ("When jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and experience will save them from that error.")

In the instant case, the jury was instructed that it could find and weigh as an aggravating circumstance that appellant was on felony probation. The prosecutor -- labeling appellant as "the probation violator and fugitive" -- argued forcefully to the jury that this was an aggravating factor of significance (T24/1572-73) (see appellant's initial brief, p. 97-98). In contrast to the way the trial judge tried to smooth the edges off the ex post facto problem in her sentencing order, the jury of course could not be instructed to give the aggravator only "moderate weight" because it might be unconstitutional . Quite simply, the jurors were permitted to return a death verdict based in substantial part on constitutionally invalid considerations, and nothing in their own intelligence or experience could save them from that error.

The state's accusation that defense counsel engaged in a "gotcha maneuver" because he conceded the applicability of the probation aggravator in his penalty phase argument to the jury is not only wrong, it is itself a "gotcha maneuver" (see SB84-85). Prior to closing arguments defense counsel objected to the jury being instructed on the probation aggravator, and the judge twice explicitly recognized that the defense's ex post facto objection was preserved (T24/1555-56). Once the objection was overruled, what was defense counsel supposed to do? Argue that appellant

wasn't on probation, when the evidence clearly established that he was? Argue the ex post facto clause to the jury? Obviously, that would have been improper and counterproductive. Realistically the only thing defense counsel could do at that point was abide by the trial court's ruling and try as best he could to ameliorate its harmful effect.

As for the state's contention that it was the defense in the guilt phase who informed the jury that appellant was a probation violator and fugitive, that simply illustrates the extremely prejudicial effect of the trial court's erroneous admission of ambiguous flight evidence [Issue II]. The jury should not have known -- and the defense did not want the jury to know -- in either phase of the trial that appellant was a fugitive from Massachusetts with a probation violation warrant; it was irrelevant to the charged crime and irrelevant to any valid aggravating factor. However, once the trial court allowed the state over objection to introduce the flight evidence, defense counsel had no real choice in the matter because, absent the explanation that appellant feared being returned to prison in his home state, the jury would infer that appellant's flight must have been motivated by Officers Quinlan and Klein's non-accusatory questioning concerning the murders (see 6/ 1003-04). This putting the accused between a rock

and a hard place, where in order to rebut an insupportable inference of consciousness of guilt of the charged crime, he has to introduce irrelevant and prejudicial evidence of an uncharged crime, is one of the main reasons why the admission of ambiguous flight evidence is harmful and reversible error. Merritt v. State, 523 So. 2d 573, 574 (Fla. 1988); Evans v. State, 692 So. 2d 966, 969-70 (Fla. 5th DCA 1997).

One last point should be made as to the merits of the ex post facto issue. The state has argued that "the correctness of the lower court's action is fortified by this Court's action in promulgating Standard Jury Instructions in Criminal Cases--No. 96-1, 690 So. 2d 1263 (Fla. No. 89,053, March 6, 1997), wherein this Court ordered that these new instructions `will be effective on the date this opinion is filed'" (SB82-83). The state conveniently omits the immediately preceding sentence, which states:

> . . . [w]e express no opinion on the correctness of these instructions and remind all interested parties that this approval forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the new instructions.

See also Yohn v. State, 476 so. 2d 123, 126-27 (Fla. 1985), and In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 598, modified 431 So. 2d 599 (Fla. 1981) (no approval of any set of standard instructions "could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him"). Since the standard jury instruc-

tions are not substantive law, and are not even entitled to a presumption of correctness, it follows that they do not supersede protections guaranteed by the Florida and United States Constitutions. The issue of whether all or any of the newer aggravating factors may or may not be applied to crimes committed before those aggravators were enacted was not before the Committee when it drafted the standard instructions nor before this Court when it approved them. The ex post facto issue was not briefed or argued, and no litigant had a life or liberty interest at stake. That is why the issues of substantive constitutional law remain to be decided on appeal, in an actual case like this one.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of April, 2000.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/ddv