IN THE SUPREME COURT OF FLORIDA

CHARLES ANDERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 95,773
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

CORRECTED REPLY BRIEF OF APPELLANT

On Appeal from the Seventeenth Judicial Circuit of Florida, in and for Broward County, Florida.

CAREY HAUGHWOUT
Public Defender

RICHARD B. GREENE
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 265446
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Charles Anderson

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the lower court. The record volume will be referred to by Roman numeral. The page number will be referred to by Arabic numeral. The symbol "AB" will be used for the Answer Brief.

STATEMENT OF THE CASE AND FACTS

Appellant will rely on the Statement of the Case and Facts in his Initial Brief.

ARGUMENT

Appellant relies on his Initial Brief for argument on Points I, III, VII, IX, X, XI and XIII.

POINT II

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL BAD ACT EVIDENCE.

Mr. Anderson will rely on his Initial Brief for most of the incidents described in this issue. However, he would like to point out that the most egregious and prejudicial error described in this point is the admission of testimony concerning the nature of offense for which Mr. Anderson was on probation, attempted sexual battery on a minor. Whatever arguable relevance the fact of Mr. Anderson's probation status had, the nature of the underlying offense was completely irrelevant to any issue in the case and is highly inflammatory.

Assuming arguendo, that Mr. Anderson's probation status is relevant, the underlying offense is not. Defense counsel specifically objected on these grounds. IX285-294. This aspect of the issue is controlled by Bain v. State, 422 So. 2d 962 (Fla. 4th DCA 1982) and McIntosh v. State, 424 So. 2d 147 (Fla. 4th DCA 1982).

In both cases the defendant took the stand and volunteered that he was on parole and the prosecutor was allowed to cross-examine him as to what offense. The Court found it to be reversible error. The argument for the admission of the underlying charge is even weaker in this case as the defendant did not take the stand (in the guilt phase) and did not put his character in issue.

The error is similar to that in Taylor v. State, 508 So. 2d 1265 (Fla. 1st DCA 1987). In Taylor, the defendant was charged with witness tampering. The State was allowed to bring out that the pending charges were battery and indecent exposure of sexual organs. The Court reversed and stated:

> The appellant contends that the introduction of this evidence within the context of this case was for the purpose of character assassination, was inflammatory and was not relevant to any element of the crime of offering pecuniary reward to a witness. We agree and reverse for a new trial. The fact that appellant was charged with a crime is an essential element of the state's case. Fischer v. State, 429 So. 2d 1309 (Fla. 1st DCA 1983). However, the nature of the charges is not essential in this case. Machara v. State, 272 So. 2d 870 (Fla. 4th DCA), cert. den., 277 So. 2d 535 (1973).
>
> Accusations of sexually deviant behavior are inherently denigrating. Sias v. State, 416 So. 2d 1213 (Fla. 3d DCA), rev. den., 424 So. 2d 763 (1982). The charge of such conduct, unanswered, cannot be said to have produced no harmful or prejudicial effect on the jury toward appellant. In the prosecution of cases such as this one, the evidentiary relevance of the specific criminal charges must be weighed against their prejudicial effect. While the general fact that appellant was charged with a crime is relevant to appellant's motive in tampering with a witness, any relevance of the specific criminal allegations of sexually deviant behavior is far out-weighed by its prejudicial effect.

508 So. 2d at 1266-67.

The error here is very similar to that held to be improper in Garron v. State, 528 So. 2d 353 (Fla. 1988).

> The evidence admitted includes the testimony of Linda Garron that appellant had previously engaged in sexual misconduct with his two stepdaughters. This activity took place more than two years prior to the killings. The state claims that the evidence is relevant to show appellant's motive for killing his wife and stepdaughter in that he was attempting to prevent his wife from taking the stepdaughters away to avoid his improper advances....
>
> In this case, however, the alleged sexual misconduct in no way resembles the act for which appellant was convicted. Moreover, the prior acts are far too remote in time to support any allegation that they could have provided appellant with a motive for the killings.
>
> As such, the only possible issue for which this evidence could be used is to prove character and propensity. As the statute states, these issues are not valid grounds for the admission of similar fact evidence. A danger of unfair prejudice arises if alleged acts of sexual misconduct are put before the jury when such evidence is not relevant to prove a material issue. This danger renders the evidence inadmissible. Here, the inflammatory effect of this type of evidence played a role in the conviction of appellant.

528 So. 2d at 357-8.

The cases relied on by Appellee do not mandate a contrary result AB27-8. In Jorgenson v. State, 714 So. 2d 423 (Fla. 1998), the victim had worked for the defendant as a delivery person in the amphetamine business. Id. at 428. She had stolen from him. Id. This case stands for the general principle that a defendant's criminal activities may be relevant to the issue of motive in a specific case. In this case there is no showing that the nature of crime for which Mr. Anderson is on probation is relevant to any issue in the case. Vasquez v. State, 763 So. 2d 1161 (Fla. 4th DCA 2000) involved evidence of the defendant's use of cocaine when he had stated that he wanted to burglarize a house to get money for cocaine. Zack v. State, 753 So. 2d 9, 13-17 (Fla. 2000) involved the admission of incidents which occurred within 9 days of the

murder. In the present case, it was undisputed that the sexual activity had ended 4 years earlier. Escobar v. State, 699 So. 2d 988 (Fla. 1997) provides little support for Appellee's position. In Escobar, this Court did hold the fact that the defendant had an outstanding warrant was admissible. Id. at 998. This may provide some support for the admissibility of Mr. Anderson's parole status. However, it provides no support for the admissibility of the underlying offense. Indeed, this Court reversed the conviction in Escobar due to improper joinder and held several pieces of collateral crime evidence to be inadmissible.

Appellee's attempt to distinguish the cases relied on by Mr. Anderson is misplaced. Appellee asserts that Bain v. State, 422 So. 2d 962 (Fla. 4th DCA 1982) and McIntosh v. State, 424 So. 2d 147 (Fla. 4th DCA 1982) rely solely on the proposition that when a testifying defendant accurately states the number of his prior offenses, he may not be asked about the nature of the prior convictions. Both cases mention this principle. However, Bain goes on to explain the underlying rationale for this principle.

> Harold Cleveland Bain was tried by jury on charges of (1) murder in the first degree and (2) attempted murder in the first degree. He claimed self defense and took the stand in his own behalf. During direct examination, Bain had testified that he informed the victims that he did not want any trouble because he was on life-time parole. On cross, the prosecutor asked Bain, "[w]hat crime were you on life-time parole for?" Defense counsel objected but on proffer of the answer out of the jury's presence the objection was overruled. Upon the jury's return, Bain's answer then disclosed to them his prior conviction for murder. His timely motion for mistrial was denied, the only error he asserts on appeal from conviction on both offenses. We reverse.
>
> The prosecution's question introduced evidence of the specific offense for which appellant had been convicted. It was not relevant to any issue.[1] The matter elicited

by the improper question served only to establish the appellant's criminal propensity.

[1] Appellee contends that since Bain testified as to his state of mind, i.e., concern for the consequences of a violation of life-time parole, the nature of the crime for which he was on parole was relevant to his state of mind. We think that argument is not sound.

422 So. 2d at 962. The State's argument that the underlying offense is admissible as to motive here is equally unsound.

Appellee makes no serious attempt to distinguish Taylor, supra; outlined above. Taylor outlines the general rule that in a case of witness tampering, the underlying charge is generally not admissible. See 23 Fla. Jur. 2d, Section 182. The same rationale applies here. The nature of the underlying offense is also irrelevant. Appellee's attempt to distinguish Garron v. State, 528 So. 2d 353 (Fla. 1998) is misplaced. In Garron, the State was attempting to admit evidence that the defendant had engaged in sexual misconduct with his stepdaughter two years earlier as evidence of motive. (The precise rationale argued here.) This Court rejected this argument.

> The next issue raised by appellant involves the admission of certain "similar fact" evidence pursuant to Florida Evidence Code, section 90.404(2), Florida Statutes (1981), and Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). The evidence admitted includes the testimony of Linda Garron that appellant had previously engaged in sexual misconduct with his two stepdaughters. This activity took place more than two years prior to the killings. The state claims that the evidence is relevant to show appellant's motive for killing his wife and stepdaughter in that he was attempting to prevent his wife from taking the stepdaughters away to avoid his improper advances.
>
> Any analysis of the admissibility of similar fact evidence must necessarily begin with a close reading of

section 90.404(2)(a), Florida Statutes (1981). The statute reads:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

§ 90.404(2)(a) (emphasis added). See e.g. Fed.R.Evid. 404(b).

In closely examining similar fact evidence, one critical issue of concern is whether the evidence is being used to prove any relevant issue besides character. Here, the state's theory is that the evidence of the alleged misconduct is relevant to appellant's motive for the murders. The focal point of analysis is whether there is actually any similarity between the alleged misconduct and the crime for which appellant stands trial. That is, does the "similar" fact bear any logical resemblance to the charged crime. The state claims that Linda Garron's testimony that prior to the shootings the appellant touched her thigh sufficiently establishes the requisite connection between the prior bad acts and the present crime. We believe that this "connection" is far too tenuous to support the admission of the similar fact evidence. Even if there were similarities between the events, they are in no way relevant to show motive.

In Williams, the similar fact evidence involved evidence that the defendant, who was charged with rape, had previously committed the same act in precisely the same manner. Williams had hidden in the back seat of the victim's car, waited for the victim to return, and raped her. The state produced a witness who testified that Williams had waited in her car and committed the identical act in the same parking lot at about the same hour as the attack on the victim. This Court allowed the evidence to be admitted under the theory that it showed Williams' plan or pattern of operation. In this case, however, the alleged sexual misconduct in no way resembles the act for which appellant was convicted. Moreover, the prior acts are far too remote in time to support any allegation that they could have provided appellant with a motive for the killings.

> As such, the only possible issue for which this evidence could be used is to prove character and propensity. As the statute states, these issues are not valid grounds for the admission of similar fact evidence. A danger of unfair prejudice arises if alleged acts of sexual misconduct are put before the jury when such evidence is not relevant to prove a material issue. This danger renders the evidence inadmissible. Here, the inflammatory effect of this type of evidence played a role in the conviction of appellant.

528 So. 2d at 357-8 (footnote omitted).

The admission of this evidence was clearly harmful. Collateral offense evidence is "presumed harmful error". Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). Improper evidence of an attempted sexual assault on a minor is a highly inflammatory accusation. Garron; Taylor. In the present case, the State's entire case was circumstantial and could by no means be considered overwhelming. Reversal for a new trial is required.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING NON-RESPONSIVE OPINION TESTIMONY AS TO THE INTENT OF THE PERPETRATOR.

Appellee is correct that the objection in this case was that the answer was non-responsive. However, it is clear that the objection should have been sustained on this ground. The following colloquy took place:

> Q What did you see next?
>
> A Well, while John was waiting to get – he was driving. While he is waiting to get back onto U.S. 27 to go south, I looked out the back window and I saw – I didn't know who it was. But I saw this person kind of sitting up, like they are – like if you were laying down and you are sitting yourself up....
>
> So I saw that out of the back passenger window. And then as we were getting ready to get in line next to – you know, get in between traffic, like waiting for no cars to come, is when I saw this car in front of us run over whoever that was that was there trying to get up. And that surprised me. It shocked me. And I – I said, you know, "They ran over them." And the car that ran over that person continued. And again, traffic is still going, so that the car got off of – out of traffic and ran over this person and then got back in traffic. And that is what was shocking, because the other cars didn't blow – or they didn't have to swerve or stop. And to me that – that made it that it wasn't an accident, that it was intentional, because – and I am only using myself as an example –
>
> DEFENSE COUNSEL: I object as non-responsive.
>
> PROSECUTOR: I asked her what happened next....
>
> THE COURT: I am going to allow it.

XIX2074-6.

The testimony was clearly non-responsive. The question asked for a factual narrative and the answer included improper opinion.

Appellee is correct that this Court has allowed lay opinion as to mental condition. However, this Court has placed strict limits on such testimony in terms of opportunity of the layperson to observe the defendant's mental condition. Garron v. State, 528 So. 2d 353, 356-7 (Fla. 1988). Additionally, the Florida courts have limited the nature of such testimony. Hansen v. State, 585 So. 2d 1056 (Fla. 1st DCA 1991). In Hansen, the Court held that it was proper to exclude lay testimony of the defendant's wife as to whether he "knew the consequences of his actions" at the time of the offense. Id. at 1058. The Court stated:

> We cannot agree that lay testimony on the ultimate fact of whether a defendant can distinguish right from wrong is an appropriate means for a witness to convey "what he has perceived" to the jury.

585 So. 2d 1058-9.

The opinion testimony at issue here fails under both Garron and Hansen. Here, the witness claimed to have briefly seen a car traveling down a highway at night. She could not identify the car or the driver. This is clearly insufficient opportunity to comment on the intent of the driver, pursuant to Garron. Additionally, the statement that it was intentional and not an accident is the type of improper lay opinion on the ultimate issue condemned in Hansen. This Court's recent opinion in Thorp v. State, 777 So. 2d 385 (Fla. 2000) demonstrates the impropriety of this type of opinion testimony. In Thorp, a witness was allowed to give his opinion as what the defendant meant when he said he "did a hooker". Id. at 394-6. This found this testimony to be reversible error. The admission of the evidence in this case was harmful error. Assuming arguendo, that this Court finds the error to be harmless as to guilt, it is harmful as to penalty.

POINT V

THE TRIAL COURT ERRED IN ADMITTING INFLAMMATORY PHOTOGRAPHS.

Appellee asserts that the photograph showing the deceased's bare buttocks was admissible "because it showed that Keinya's body was transported 15 miles south from U.S. 27 to the Holiday park area" AB47. However, the photo at issue did nothing to show the distance of the body from the original scene. Indeed, there was an aerial photo admitted, without objection, which actually was probative of this issue XIII1072-4. Additionally, Mr. Jobes was allowed to testify, without objection, as to the location where he found the body XIII1068,1073. The inflammatory photographs improperly inject a sexual element in the case, that is not supported by the evidence. This was highly prejudicial as to both guilt and penalty.

POINT VI

THE TRIAL COURT ERRED IN DENYING MR. ANDERSON'S MOTION FOR MISTRIAL DURING CLOSING ARGUMENT.

Appellee's analysis of this issue is contrary to that employed by this Court. Appellee attempts to sub-divide this issue by first arguing that the preserved improper argument does not require a mistrial and then arguing that the unobjected to arguments do not rise to the level of fundamental error AB53-67. The correct analysis is to consider the preserved and unpreserved arguments in determining the harmfulness of the error.

> Although Whitton did not object to the first two alleged comments on Whitton's post-arrest silence, he argues that the cumulative impact of all three comments requires reversal. We agree that we must consider all three comments in our harmless error analysis because the harmless error test requires an examination of the entire record.

Whitton v. State, 649 So. 2d 861, 864-5 (Fla. 1994).

This Court recently rejected the precise rationale put forward by the State in this case.

> The State argues that because defense counsel failed to object to several of the prosecutor's guilt and penalty phase statements he is barred from raising the issue on appeal. We disagree. When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.

Ruiz v. State, 743 So. 2d 1, 7 (Fla. 1999).

POINT VIII

THE STATE'S PENALTY ARGUMENT WAS FUNDAMENTAL ERROR.

Appellee's argument on this issue is fundamentally flawed in three respects. (1) It advances a theory of "anticipatory rebuttal" which has no support in law. Bolin v. State, 736 So. 2d 1160, 1166 (Fla. 1999); Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986). (2) It fails to consider the prejudice of these improper arguments when combined with the preserved guilt phase arguments described in Point VI of the Initial Brief. Ruiz v. State, 743 So. 2d 1, 7 (Fla. 1999). (3) It attempts to parcel out each improper comment, rather than considering them as a totality. Brooks v. State, 762 So. 2d 879, 905 (Fla. 2000); Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998). When the totality of the improper comments are considered, the argument in this case clearly rises to the level of reversible error; even fundamental error. King v. State, 623 So. 2d 486, 489-90 (Fla. 1993).

Appellee attempts to argue that the prosecutor was justified in bringing up Danny Rollins, Ted Bundy, Jeffrey Dahmer, and John Gacy in anticipation of a possible defense argument that the death penalty is limited to such notorious cases AB70. This Court has condemned this theory of "anticipatory rebuttal". Bolin, Fitzpatrick. The idea of "anticipatory rebuttal" is contrary to accepted legal practice. If a party genuinely fears that opposing counsel is going to misstate the law, the answer is to file a motion in limine. It is not to try to preemptively make an improper argument. Additionally, the prosecutor's own statements show that this was not his true motive. He stated:

> But sometimes defense attorneys like to take it a step further. I doubt that you will hear it here, but they like to take a step further and they say that is only for the Dahmers and of the person, Danny Rollins, who killed all those people up in north Florida, or the Ted Bundys of the world.

XXXII3153-54 (emphasis supplied). The prosecutor explicitly stated that he did not think would be made. Thus, Appellee is reduced to justifying "anticipatory rebuttal" of an argument that probably will not be made. This strains credulity. The prosecutor's true purpose was to link Mr. Anderson to notorious serial killers. He explicitly likened Mr. Anderson to Danny Rollins.

> You see, in this case one of the aggravators is that that man over there, Charles Anderson, has been convicted of a felony involving violence or a threat of violence. He's been convicted eleven times of that type of crime. But that is only one aggravator.
>
> Danny Rollins killed and killed and killed. But that is only one aggravator. Do you see how that applies? You look at aggravators, you weigh them against the mitigators and then you come – you come to a well reasoned decision.

XXXII3154. There is no reason to bring up such notorious killers, either in the guise of "anticipatory rebuttal" or in discussing an aggravator.

Appellee never considers the improper penalty arguments in combination with the improper guilt phase arguments outlined in Point VI of the Initial Brief. This Court has specifically held that the preserved and unpreserved comments must be considered.

> The State argues that because defense counsel failed to object to several of the prosecutor's guilt and penalty phase statements he is barred from raising this issue on appeal. We disagree. When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised

> and the resulting convictions and sentences irreparably tainted.

Ruiz v. State, 743 So. 2d 1, 7 (Fla. 1999).

Appellee consistently attempts to parcel out the comments rather than consider the totality of the comments. The comments rise to the level of reversible error, even fundamental error when considered as a whole. In King, this Court found the State's penalty phase argument to constitute fundamental error. In her concurring opinion, Chief Justice Barkett outlined the types of argument found to constitute fundamental error.

> When a prosecutor tells jurors that they will be as evil as the defendant if they fail to vote in accordance with the State's view of the evidence, the error is fundamental and the defendant has been denied the right to a fair trial. See e.g. Grant v. State, 194 So. 2d 612, 613 (Fla. 1967) (finding a contemporaneous objection unnecessary to reverse after the State asked in its closing argument, "Do you want to give this man less than first-degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?"); Pait v. State, 112 So. 2d 380 (Fla. 1959) (despite lack of objection, comments of prosecutor that although the defendant had a right to appeal the jury's decision, the State was unable to do so, and that prosecutor and his staff considered the death penalty appropriate were reversible error); Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987) (finding fundamental error based on improper comments regarding defendant's use of the insanity defense in both opening statement and closing argument despite objections only to opening remarks); Meade v. State, 431 So. 2d 1031, 1031 (Fla. 4th DCA) (finding reversible error despite defense's failure to object immediately to prosecutor's argument: "There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the law of the State of Florida against murder: Thou shalt not kill."), review denied, 441 So. 2d 633 (Fla. 1983); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979) (finding fundamental error where prosecutor made numerous improper comments about, among other things, the heinousness of drug dealing and drug pushers; the danger of permitting the sale of heroin; the defendant personally; and slanderous attacks by defense lawyers against police officers), cert. denied, 386 So.

> 2d 642 (Fla. 1980); Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975) (finding that prosecutor's remark in closing, that five police officers could have testified about the statements attributed to defendant even though only one officer actually testified, was reversible error despite lack of objection), cert. denied, 333 So. 2d 465 (Fla. 1976).

623 So. 2d 489-90.

The prosecutor's improper arguments were varied and widespread. As previously noted, the prosecutor improperly raised the specter of many notorious serial killers. He then went on to explicitly compare the deceased to the great Scottish martyr, Sir William Wallace. The prosecutor first stated:

> And that is when this 18 year old – who would be comparable to William Braveheart, but only in that little home in Carol City – put her foot down and said "I am not going to take this anymore."

XXXII3173-74.

The prosecutor continued on this theme when it improperly attempted to expand the HAC aggravator to include events which occurred days before the homicide. He said: "Was it heinous when you finally said 'Let's call the police. Let me call the police.' Was it heinous when you refused to go to work because you were afraid of him the following day on Saturday?.... Tell me Brave Heart, was it?" XXXI3179-80.

Continuing in this vein, the State introduced the jury into the drama: "Was it cruel, Keinya? Tell me. Tell the jury." XXXII3182. It concluded with this dramatic apostrophe: "Tell me Brave Heart. Tell them." Id.

These were completely improper attempts to build sympathy with the deceased. Of course, the reference to Braveheart is to the 1995 movie Braveheart, which starred Mel Gibson and won 5 Academy

Awards, including Best Picture. This movie was the story of Sir William Wallace, who organized a rebellion a Scottish rebellion against English tyranny and was ultimately captured, hung, beheaded, and drawn and quartered. Appellee makes no serious attempt to defend the attempt to identify the deceased with this martyr. Indeed, none can be made.

The prosecutor then followed this up with the sort of "do your duty argument, which this Court condemned in Brooks v. State, 762 So. 2d 879 (Fla. 2000); Garron v. State, 528 So. 2d 353 (Fla. 1988); Urbin v. State, 714 So. 2d 411 (Fla. 1998). He stated:

> Hear how quiet it is in here now? It is the quiet of understanding, for you now know what it is that you must do.

XXXII3183-84.

He later made a similar argument.

> You will do the right thing and you will do it, because in this case it is exactly that. It is the right thing to do. The right thing to do.

XXXII3184.

Appellee attempts to rely on three cases to defend this sort of "do your duty argument." U.S. v. Barnett, 159 F.3d 637 (D.C. Cir. 1998); Adams v. U.S., 222 F.2d 45 (D.C. Cir 1955); U.S. v. Young, 470 U.S. 1 (1985). None of these cases control here. Barnett is an unpublished opinion which provides no guidance. Rule 28 of the Rules of D.C. Circuit Court of Appeals forbids citation of unpublished opinions, except in limited circumstances not applicable here. Adams involve a collateral attack, whereas the present case involves a direct appeal. Of course, courts have increased deference on collateral attack. Brecht v. Abrahamson, 507 U.S. 619 (1993); Teague v. Lane, 489 U.S. 288 (1989); Witt v.

State, 387 So. 2d 922 (Fla. 1980). In Young, described the prosecutor's comments as unethical. Id. at 14. However, the Court held that when the argument was directly responsive to improper argument from defense counsel and there was overwhelming evidence of guilt they did not rise to fundamental error. That is a very different situation from the present case, in which defense counsel had not even made his penalty phase argument, so the State's argument could not be responsive. Additionally, the jury's vote for death was only 8 to 4, so errors are more likely to be harmful. Omelus v. State, 584 So. 2d 563 (Fla. 1991).

He went on to say that Mr. Anderson's testimony sent a chill down his spine and made him "jump out of his suit" XXXII3170-1.

He went on to call Mr. Anderson a liar.

> "Is he the type of person that you would rely upon in your most important of affairs? I would suggest you go to the window and make sure it was raining, if he told you it was raining outside, before you went out and got your umbrella."

XXXII3177.

This argument echoes argument condemned in Ruiz, 743 So. 2d at 5-6.

> "Let me tell you one thing, if that guy were Pinocchio, his nose would be so big none of us would be able to fit in this courtroom on what he said [up] there."

He went on to express his personal opinion and align himself with the jury. "Baloney, Mr. Anderson. You said to that little girl 'Oh, it would hurt the family so don't tell'. We don't believe you. That is not true." XXXII3178. The first person plural either implied that the prosecutor and the jury should be as one in disbelieving Appellant.

In addition to comparing the deceased to a Scottish martyr, he went into an extended plea for sympathy for her and urged the jury to compare her to Mr. Anderson.

> He took away an 18 year old young lady who had just graduated from the Florida Bible Christian College. She had her whole life ahead of her. She did well academically. She excelled in athletics. She worked. She took care of the family. Not Charles Anderson. He was too busy out doing whatever he does.
>
> She was the one that was there changing diapers and bathing the children and putting them to bed; Charlene, and Devon, and Sierra. She was the one, because Edwina, in order to support the family, had to work all the time. Because he couldn't hold a job. He couldn't hold a job. That is what he took away.
>
> Does that mitigate against any of these, the elimination of the witness, the cold, calculated premeditated manner in which he killed her? ....

T3178-79.

These comments cumulatively constitute reversible error. Indeed, they constitute fundamental error. Reversal for a new penalty phase is required.

POINT XII

THE DEATH SENTENCE VIOLATES APPRENDI V. NEW JERSEY, ___ U.S. ___, 120 S.Ct. 2348 (2000).

Appellee's claim that this issue is not preserved is misplaced. Mr. Anderson filed a Motion for Statement of Aggravating Circumstances I134-138. He filed a Motion to declare Fla. Stat. 921.141 due to the fact that the jury's penalty recommendation is only by a bare majority I188-9. He filed a Motion For Statement of Particulars as to aggravating circumstances II202-3. Mr. Anderson filed a Motion to Declare 921.141 unconstitutional which contained a specific objection that the jury does not make findings of aggravating circumstances I146-7. Thus, all of the issues were raised in the lower court.

CONCLUSION

For the foregoing reasons, Mr. Anderson's conviction and sentence must be reversed.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

_____
RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MELANIE DALE, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this _____ day of August, 2001.

_____
Attorney for Charles Anderson

CERTIFICATION OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12-point Courier New type, a font that is not spaced proportionately.

_____

RICHARD B. GREENE
Assistant Public Defender
Florida Bar No. 265446