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**IN THE SUPREME COURT OF FLORIDA**

MICHAEL MORDENTI,  
Appellant,

vs.

Case No. 78,753

STATE OF FLORIDA,  
Appellee.

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

REPLY BRIEF OF APPELLANT

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*What Makes Juries Listen*, Hamlin, Sonya, pp. 27-8 (Harcourt Brace, 1985) (emphasis added) . . . . . 4

## ARGUMENT

### ISSUE I

The propriety of the trial court's failure to remove one of the prosecutors, the two of whom were married to one another, from the trial of this matter before a jury, is an issue of first impression. It was error, one of prejudicial advantage for the state, especially given the facts of this case, to permit a married pair of attorneys to prosecute Mordenti. This error directly and substantially impacted upon the verdict rendered by the jury.

The prejudice inherent to prosecuting Mordenti by a married team which, without saying a word, was more credible and more trustworthy because of their marital status than the defense team, should be apparent on its face. The appellee pretends that the appellant's argument cannot possibly have merit and hardly bothers to address it ("[t]his is truly one of the least significant contentions to grace this Honorable Court"), merely because it is a novel circumstance that has never been challenged before. Granted that it is extraordinary for a prosecutor's office to permit married attorneys to co-chair a trial, especially under such circumstances as these, nevertheless, that unusual authorization here should not ensure that such behavior will withstand appellate scrutiny when it does occur!

The credibility of the lawyers trying a case is of paramount importance to the jury, and attorneys are well-aware of this fact. As one manual explains:

Most cases can be argued, and decided, on the theme of credibility. Who had the most credible witnesses? **Which attorney won the inevitable attorney credibility contest?** Establish

credibility at voir dire and maintain it throughout trial to final argument. As you present your client's case to the jury, opposing counsel will be presenting his or her client's case. It is the jury's job to decide which version of the facts is more credible.

It is essential that you establish the highest credibility with the jury, because a communication made to the jury by an attorney with low credibility will be viewed as being more biased and unfair in presentation than the same communication made by an attorney with high credibility. The more credible you are, the more likely jurors will believe your story, and the more likely you will have a positive effect in motivating them to act for your benefit.

\* \* \*

[Voir dire] is an excellent time to establish rapport with jurors, since their attention is on you as you inquire about their background. It is the perfect opportunity to let jurors know that they can trust you and rely on you.

*The Trial Lawyer's Book: Preparing and Winning Cases*, Purver, Young, Davis, and Kerper, pp. 182-84 (Lawyers Cooperative Publishing, 1990) (emphasis added). So how does the lawyer establish his or her credibility?

What you say in trial, what your evidence is, and what your arguments are all seem to add up to the ingredients for successful persuasion. However, the truth is that your persuasion success in jury trial is primarily a matter of how jurors think of you **as a person**. ... The advocate is the persuasion equation.

Thus, it is vital that you build your credibility with jurors and that you do so by design rather than by happenstance. Lawyers who plan ahead and are able to secure from a jury that elusive item we loosely call "credibility" ...end up with consistently favorable verdicts.... Every great trial lawyer ... has been able to achieve a persuasive impact in court in direct relation to his or her ability

to relate in a personal and positive way to individual jurors.

*The Persuasion Edge; Winning Psychological Strategies and Tactics for Lawyers*, Crawford, Dr. Richard J., p. 19 (Professional Education Systems, Inc., 1989) (emphasis added).

The question is how can the attorney relate in a personal and positive way to individual jurors?

Jurors bring a set of stereotypes about you to the courtroom,....

What do you think their images of lawyers are? Manipulative, not to be trusted, shifty, crafty, sly, a hired gun, insincere, dry, stuffy, rich? Jurors imagine your lives as being glamorous, trouble-free, martini-quaffing, party-going, golf-filled, with weekends at some expensive retreat and a Porsche purring at the curb.

Is it all true? Yet, what in the trial can let you tell them that it's not? What can you do to cut down the distance their stereotypes can create between you and them?

\* \* \*

You want their trust; belief; attention; concentration; understanding; agreement. You want to persuade them. **But that would require that the jury see someone with whom they can identify, someone with a set of standards and ethics like theirs, whose version of truth and justice, good behavior and honesty is like their own.**

*What Makes Juries Listen*, Hamlin, Sonya, pp. 27-8 (Harcourt Brace, 1985) (emphasis added). The prosecutors achieved that purpose by first drawing and then recalling the jurors' attention to the fact, completely irrelevant to the issues involved in trial, that they were married to each other, **on five separate occasions.**

The performance challenged here is similar to, but many times more prejudicial than the more familiar conduct of the prosecutor, who once was married, but is now divorced, and who wears his wedding ring during trial because it enhances his credibility with the jury. Yet this Court may take judicial notice that such attorneys, who take advantage of this imaginative augmentation of their believability, exist in every jurisdiction in the country.

The conduct permitted below can also be compared to that of the defense attorney who, competently and without apparent difficulty, tries a personal injury case from his wheelchair. When the plaintiff has been rendered a paraplegic due to the defendant's negligence, and the issue is her damages, no court would suffer such obviously prejudicial conduct. Yet the behavior here is worse, because the behavior in question, as discussed above, also served to establish the prosecutors' credibility with the jury. Many of the jurors were themselves married (see, e.g., R46, 77-9, 127, 248), and were therefore able personally to identify with the prosecutors, and thus also with the victim, who was denied the benefit of such a harmonious marriage, allegedly due to the defendant's actions. The infringement upon the defendant's due process rights was therefore dual.

Fundamental error is an error for which this Court has the power to provide a remedy, even though the litigant receiving the remedy did not preserve the error by contemporaneous objection or by any other appropriate means. Even when the litigant has not technically retained the right to the remedy, this Court should provide relief when necessary to preserve the public's confidence and trust that:



1. the judicial system is fundamentally fair and can achieve justice for the public;
2. the judicial system will not deprive a litigant of a clear right because of the ineptitude of the litigant's attorney, the dishonesty of the opponent, or the inattention of the trial court; or
3. the judicial system is willing and capable of honoring the limits which the public has placed on its power or authority in the constitution and by statute.

When the charge, as here, was murder of another man's wife at the husband's behest, allowing a couple of manifestly happily-married prosecutors to co-chair the trial rises to a level which cannot be tolerated, despite that Mordenti's counsel ineptly failed to object to it. By ignoring so vital an error, the trial court suffered the prosecutors' marital status to become silent evidence in the trial, unspoken testimony of what a successful marriage (in which the partners work as a team) should be, in contrast to the direct evidence offered by Gail Mordenti of how unpleasant the marriage between the victim and her husband actually was. Further, it permitted, indeed, encouraged those jurors who were married to identify with the prosecutors, in circumstances analogous to a golden rule violation, and to more strongly (and emotionally) shun Mordenti because of the supposed actions for which he was tried.

When an issue reaches down into the very legality of the trial itself, to the extent that a verdict would not have been obtained without the assistance of the error alleged, as here, the appellate court must deem the error to be fundamental, and must consider it on appeal despite that it was not raised below. Gibson v. State, 194

So.2d 19 (Fla. 2d DCA 1967). Consider that the only direct evidence linking Mordenti to the crime committed here was that of his own ex-wife, who received complete immunity for her testimony. How could it be otherwise that the prosecutors' marital status, under these circumstances, served to inflame the emotions of the jury sufficiently that they found the defendant guilty despite the paucity of evidence connecting him to the crime?

The public's confidence in the criminal justice system is surely eroded by the appearance of impropriety presented in this case. Compare the fact that expressions of a lawyer of his personal opinion are not only in derogation of the Rules of Professional Conduct, but will not be condoned, to the extent that the Third and Fifth District Courts of Appeal have both ruled such impropriety to be fundamental error, reversing and remanding for a new trial, despite the lack of a contemporaneous objection. See Stokes v. Wet'N Wild, Inc. 523 So.2d at 182; S.H. Investment & Dev. Corp. v. Kincaid, 495 So.2d at 772; Borden, Inc. v. Young, 479 So.2d 851; Schreier v. Parker, 415 So.2d at 795. See also Albertson's Inc. v. Brady, 475 So.2d 986, 989 (Fla. 2d DCA 1985), rev. den., 486 So.2d 595 (Fla. 1986). The prosecutorial misconduct challenged here, although comparable, is far worse, and must be found fundamental error as well.

## ISSUE II

The trial court's failure to dismiss juror Haight when his inability to meaningfully consider the evidence became manifest, before the trial had even begun, was fundamental error. In fact, appellee does not significantly dispute that the court below should have replaced Mr. Haight, but instead chooses only to question the fundamental nature of the issue.

How was juror Haight to give the evidence adduced his entire attention, to which Mordenti was indisputably entitled, when he was not only exhausted from working until midnight each night before, but was also concentrating on his duties the night to come, when the court had released him for the evening? It cannot be disputed that he was incompetent to judge this matter, and should have been excused.

Further, that this error was fundamental cannot seriously be challenged. Mordenti was entitled to a hearing by twelve of his peers. It appears that he did not receive it. And the judicial system will not deprive a defendant of a clear right because of the ineptitude of the litigant's attorney, or the inattention of the trial court. Because this juror's concurrence was required for the jury's verdict of guilty, the trial court's failure to replace him, whether or not Mordenti's counsel had interposed an appropriate objection, deprived the appellant of his constitutional right to a trial before an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This was fundamental error. The public's perception of the judicial system as

fundamentally fair, one that can achieve justice for all litigants,  
is so crucial that it requires reversal and remand on this ground.

## ISSUE V

Appellee has conveniently misconstrued appellant's argument, and has neglected to respond to the reasoning of Sochor v. Florida, 504 U.S. ---, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), which held:

In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. See Clemons v. Mississippi, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. ---, ---, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," id., at ---, 112 S.Ct. at 1137, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving the death penalty," id., at ---, 112 S.Ct. at 1139. Even when other aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."

112 S.Ct. 2114, 2119. Employing an invalid aggravating factor in the weighing process contaminates the ultimate sentence, because in Florida the jury is the sentencer for Clemons purposes, or at the least one of the sentencer's constituent elements. The trial judge does not render independent judgment, but must accord deference to the jury's recommendation. See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Hence, error at the jury's penalty stage taints a death sentence, even when the trial judge's decision is otherwise error-free. Whether the jury did find and weigh the heinousness factor is irrelevant under these circumstances; the possibility that the jury weighed an invalid factor should be enough to require a cure.

In the instant case, there were but three aggravating factors (R1458), one of which was later determined by the trial court to be inapplicable. It was this very circumstance, that of allegedly especially heinous, atrocious, and cruel conduct on Mordenti's part, that was inordinately emphasized by the prosecution during the sentencing phase of the trial. (R1464-1469) How could the jury **not** have applied this factor, given the trial court's ruling that it could be argued? The death sentence here is tainted and must be reversed therefor.

**CONCLUSION**

Based upon the foregoing argument, as well as the argument of the Initial Brief, appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the court below.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert J. Landry, Assistant Attorney General, Suite 700, 2002 N. Lois Avenue, Tampa, Florida 33607 this 30th day of November, 1992.

Respectfully submitted,



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