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G&S Vol. 10, No. 11, March 18, 2002

Case Name: Victor Hugo Saldano v. The State of Texas

- OFFENSE: Capital Murder - Death Sentence
- COUNTY: Collin
- C.C.A. CASE No. 72,556
- DATE OF OPINION: March 13, 2002
- JUDGE: Womack, J.
- DISPOSITION: Conviction and Sentence Affirmed
- LAWYERS: Stanley Schneider, Tom Moran, David Haynes, Katherine Jordan, Warren Yarbrough, Fernando Tovar, Daniel Hinde (Appellant); Tom O'Connell (State); Matthew Paul (SPA); Greg Coleman (AG)

G/S 330.01 Prosecutorial Tactics / Authority to Act (Authority of Attorney General to Confess Error): This is the famous case in which AG John Cornyn "admitted error" at the U.S. Supreme Court. The conviction and sentence were originally affirmed in an unpublished decision in September of 1999. Habeas corpus relief was also denied in an unpublished opinion. After General Cornyn admitted error, the Supreme Court remanded the case to the Court of Criminal Appeals so it could be reconsidered in light of the General's confession. Saldano v. Texas, 530 U.S. 1212 (2000)(memorandum opinion). The Court directed the parties, and invited the Attorney General, to brief and argue the issue of the Attorney General's authority to confess error for the State in a certiorari proceeding in a criminal case before the Supreme Court.

Holding: The authority to represent the State in criminal cases in certiorari proceedings in the Supreme Court of the United States is in the district attorney or county attorney who had the authority to prosecute the case in the courts of Texas, and the attorney general is authorized to provide assistance to such an attorney at the request of that attorney or when such an attorney appoints an assistant attorney general as an assistant prosecutor or attorney pro tem under article 402.028 of the Government Code. While the District Attorney did not expressly request such assistance, his silence in the face of a long practice whereby the attorney general has undertaken to respond to such petitions when the county or district attorney does not, should be construed as an implied request for such assistance in this case. We therefore conclude that the representation of the State by the Attorney General in this case was authorized by law.

Notes: Judge Johnson concurred. In a footnote in his opinion dissenting to Part II of the opinion, Judge Price opined that it may be unnecessary to address these issues "in light of our decision in Mitchell v. State, No. 1485-00, January 30, 2002 (see Greenwood & Schulman, (see G&S, Vol. 10, No. 5; February 4, 2002). In Mitchell, we did not address the merits of a point the State had conceded in an earlier proceeding.

Comments: (David A. Schulman) There has long been dissatisfaction with the manner in which the AG's office treated the district and county attorneys in this State, at least in connection with who would represent the State at the Supreme Court. I am certain that this will make the local prosecutors happy even as it makes the AG's office nervous.

G/S 332 Prosecutorial Misconduct / Improper Questions (Suggesting Race is Factor in Determining Future Dangerousness): The controversy in this case arose out of the testimony of the State's psychiatric expert, Dr. Walter Quijano. When testifying at trial about statistical, "identifying markers" which help "experts" determine whether there is a probability that a defendant will present a future threat, said that, in his opinion, one of the factors that is associated with a defendant's future dangerousness was his race or ethnicity, because "This is one of those unfortunate realities also that blacks and Hispanics are over-represented in the criminal justice system." After General Cornyn admitted error, the Supreme Court remanded the case to the Court of Criminal Appeals so it could be reconsidered in light of the General's confession.

Holding: A confession of error by the prosecutor in a criminal case is important, but not conclusive, in deciding an appeal. Assessing the effect of the State's confession of error in this case is made more difficult because the error that was confessed concerns a claim that has not been properly presented to, or decided by, this Court. The question that Appellant presented to the Supreme Court ("whether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty") is not one this Court considered in our earlier opinion. We held that the question was not before us because Appellant made no objection to the testimony of which he complained on appeal. [Nevertheless] Our rules require defendants to object at trial in order to preserve an error for review on appeal. Because Appellant did not object to the admission of the testimony of which he now complains, the question he seeks to present has not been preserved for review on appeal. We conclude that the State's confession of error in the Supreme Court is contrary to our state's procedural law for presenting a claim on appeal, as well as the Supreme Court's enforcement of such procedural law when it is presented with equal-protection claims. If any decision of any court in this country would support another conclusion, the appellant, the Attorney General and other amici, and the dissenting opinion have not informed us of it. Under that law a decision on the admissibility of evidence that there is a correlation between ethnicity and recidivism cannot be reached, and we express no view on that issue.

Notes: Judge Keller filed a concurring opinion in which she noted that Appellant's counsel on appeal "put forward and ably argued a proposed legal basis for granting relief." She argued that the dissenters "do a disservice to counsel for appellant." Judge Johnson filed a dissenting opinion in which she argued that "race or ethnicity should [never] be a consideration, in any degree, in the assessment of punishment." Judge Price delivered a separate dissenting opinion in which he categorized Quijano's testimony as the proverbial "skunk in the jury box." He argued that " It is our job to be sure that racial prejudice is not, in any way, a component of the jury's decision to impose the death penalty," and that Rule 103(d), Tex.R.Evid. "provides a vehicle by which we can review fundamental error."

Comments: (David A. Schulman) Clearly, on original submission, the Court decided this on an "independent state law basis," that of a procedural default. Nevertheless, the Supreme Court ultimately accepted certiorari. Our courts have, in essence, held that there is no such thing as "fundamental" error and that, if no objection is made, any error is generally waived. Given that the Supreme Court's remand directed the Court to reconsider its prior holding "in light of the confession of error . . .," I believe that it would have been more prudent to determine the merits of the claim then hold that they were nevertheless procedurally defaulted. Whether Dr. Quijano's testimony was the skunk in the jury box Judge Prices argues it is has yet to be decided, and that, I fear, is what the Supremes wanted the Court to decide.