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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

No. 00-5001
00-5002

FILED
JUN 29 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JESSY CARLOS SAN MIGUEL,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

REPLY BRIEF OF PETITIONER

The Attorney General's attempt to defuse the obvious effect of the two areas of attorney comment that we have complained about – the prosecutor's argument about "the border" and the defense lawyer's questions eliciting testimony about machismo in Mexican-American culture – fizzles.

In guilt-phase closing argument, the prosecutor argued, in reference to language used in a commercial about Mexican food, "On this side of the border is all law abiding citizens. On this side of the border is those that cross that border sometimes and commit crimes." 26 DR 4180. The Attorney General argues that this reference is to the border between right and wrong rather than the border between the United States and Mexico. This argument turns a blind eye to reality. The use of the phrase in the commercial, which the prosecutor referenced, was plainly a reference to the border between Mexico and the United States – that is, "run to the border," for

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food from Mexico. Fears of Mexican citizens coming into the United States to prey on law-abiding U.S. citizens was the clear and unmistakable message of the prosecutor's argument.

Having raised the stereotyped fear of Mexicans preying on Americans, the prosecutor set a trap for the unwitting defense counsel. In his effort thereafter to mitigate his client's violence in the penalty phase, defense counsel emphasized the very stereotypes that the prosecutor's argument had evoked – the machismo of Mexican and Mexican-American culture, which is a part of the fear of "rampaging illegal Mexicans." Clearly this was a cultural stereotype, but in the circumstances of this case, it was unambiguously connected to Mexican-Americans, not just men in general.

Accordingly, the claim presented by Mr. San Miguel has merit.

MANDY WELCH
630 Castle Court, Suite A
Houston, Texas 77002
(713) 523-2299
(713) 523-3833 (fax)

Member of the Supreme Court Bar

Counsel of Record for Mr. Graham

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NO. 00-5002

IN THE SUPREME COURT OF
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SUPREME COURT, U.S.

JESSY CARLOS SAN MIGUEL
Petitioner

VS.

THE STATE OF TEXAS
Respondent

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

CAPITAL CASE
EXECUTION SCHEDULED FOR JUNE 29, 2000

Danalynn Recer
Texas Bar No. 00792935
636 Baronne St.
New Orleans, LA 70113
Tel. (504)558-9867
Fax (504) 558-0378

Mandy Welch*
Texas Bar No. 21125380
Burr and Welch
1630 Castle Court, Suite A
Houston, TX 77002
Tel. (713) 523-2299
Fax. (713) 523-3833

COUNSEL FOR JESSY SAN MIGUEL

*Counsel of Record

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 35,262-02

EX PARTE JESSY CARLOS SAN MIGUEL

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS FROM DALLAS COUNTY

The order was entered per curiam.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Art. 11.071, Sec. 5, V.A.C.C.P.

On June 26, 1991, applicant was convicted of the offense of capital murder. The jury answered the special issue submitted pursuant to Art. 37.071, V.A.C.C.P., and the trial court, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. San Miguel v. State, 864 S.W.2d 493 (Tex.Cr.App. 1993). The trial court has scheduled applicant's execution to take place on June 29, 2000.

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In the instant cause, applicant presents a single allegation challenging the validity of his conviction and resulting sentence. We have reviewed the application and find it fails to satisfy the requirements to Art. 11.071, Sec. 5(a), V.A.C.C.P. Accordingly, the application is dismissed as an abuse of the writ.

IT IS SO ORDERED THIS THE 27TH DAY OF JUNE, 2000.

En banc
Do Not Publish
Keller and Womack, JJ., not participating

REPRODUCED AT THE NATIONAL ARCHIVES

No. 99-8119

In the

Supreme Court of the United States

VICTOR HUGO SALDANO,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Texas, files this response to Victor Hugo Saldano's petition for writ of certiorari and agrees that, under the record in this case, the prosecution's introduction of race during the penalty phase as a factor for determining "future dangerousness" constituted a violation of Saldano's rights to equal protection and due process. Accordingly, Texas asks the Court to grant the petition, vacate the trial court's imposition of sentence on Saldano, and remand the case to the trial court with instructions that Saldano receive a new sentencing hearing in which race is not considered.[1]

1. The jury's finding of Saldano's guilt is neither raised nor affected by this petition.

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STATEMENT OF THE CASE

I. Saldano's Crime

In 1996, the Petitioner, Victor Hugo Saldano, was convicted of capital murder in Collin County, Texas, for the murder of Paul Green.[2] The evidence presented at trial showed that Saldano and an accomplice used a handgun to kidnap Mr. Green, a forty-six year old man, from a grocery store parking lot.[3] The kidnaping occurred at 10:00 on a Saturday morning in the presence of witnesses.[4] Neither Saldano nor his accomplice knew Mr. Green, and the crime appears to have been random.[5]

Mr. Green was forced into his car by Saldano, and while a gun was held to his head by the accomplice, Mr. Green was taken to a secluded spot on a country road.[6] Saldano forced Mr. Green into the woods while the accomplice waited at the car.[7] Once in the woods, Saldano fatally shot Mr. Green five times, including once in the head at point-blank range.[8] Saldano stole Mr. Green's wallet and watch.[9]

Saldano and his accomplice drove Mr. Green's car back toward town before abandoning it on the side of the highway.[10] A short time thereafter, Saldano and his

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2. Pet. App. at 1.
3. Pet. App. at 7.
4. Pet. App. at 7.
5. 21 SF at 280. (Under the former Texas Rules in effect at the time of Saldano's trial, the "Statement of Facts" was the name used for the court reporter's recording of testimony which is more commonly known as the "transcript." Reference to the multi-volume Statement of Facts will be made as "__SF at __".)
6. Pet. App. at 7.
7. Pet. App. at 7.
8. Pet. App. at 7; 14 SF at 233.
9. Pet. App. at 7.
10. Pet. App. at 8.

PLEASE NOTE: The name of the victim in this document should be listed as **PAUL KING** (not Paul Green).

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accomplice were taken into custody.[11] Prior to his trial, Saldamo told the jailer that he had shot Mr. Green four times, and then once in the head just to make sure he was dead.[12] Saldano said he felt nothing when he shot Mr. Green.[13]

II. The Admittance of Race as a Factor in Determining Future Dangerousness

In the penalty phase of Saldano's trial, the jury was charged with answering two questions regarding Saldano.[14] First, the jury was charged with finding beyond a reasonable doubt the probability that Saldano would commit criminal acts of violence that would constitute a continuing threat to society.[15] The jury was instructed that the burden of proving this "future dangerousness" lay solely on the prosecution.[16] Second, if the jury answered yes to the first question, the jury was instructed to answer whether, considering all of the evidence, including the circumstances of the offense, Saldano's character and background, and Saldano's personal moral culpability, there was a sufficient mitigating circumstance or circumstances to warrant the imposition of a life sentence rather than the death sentence.[17]

The jury was presented with more than enough evidence to warrant its finding of "future dangerousness." In fact, the Texas Court of Criminal Appeals previously ruled that

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11. Pet. App. at 8.
12. Pet. App. at 8.
13. Pet. App. at 9.
14. TR at 125. (Under the former Texas Rules in effect at the time of Saldano's trial, the "Transcript" was the name used for all pleadings and other court documents upon which the trial occurred. Reference to the transcript will be made as "TR at __".)
15. TR at 125.
16. TR at 120.
17. TR at 126.

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ARGUMENT

The sole issue raised by Saldano is whether the Texas Court of Criminal Appeals erred in upholding his death sentence, despite the improper introduction of testimony inviting the use of race as a factor in determining future dangerousness, due to his counsel's failure to object. Because the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process, Texas confesses error and agrees that Saldano is entitled to a new sentencing hearing. *See Zant v. Stephens*, 462 U.S. 862, 886 (1983).

The Court has previously upheld the consideration of "future dangerousness" in the penalty phase of a capital trial. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994). In fact, the Court has recognized that "a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Id.* However, the Court has held, in dicta, that race cannot be an aggravating factor in determining the death penalty. *Zant*, 462 U.S., at 886. Other courts have made similar observations. *California v. Bacigalupo*, 862 P.2d 808, 820 (Cal. 1993); *Horton v. Georgia*, 295 S.E.2d 281, 285 (Ga. 1982).

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 442 U.S. 545, 555 (1979). A defendant is "entitled to have his punishment assessed by a jury based upon consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions,