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Why the Injection of Race in Saldano v. State Constitutes Fundamental Error

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WHY THE INJECTION OF RACE IN *SALDANO V. STATE* CONSTITUTES FUNDAMENTAL ERROR

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Now, of course, all of these reasons that they give are excuses, pure and simple; they are not truthful statements; at the root it is simply race prejudice, and the prejudices of superiority which we find every-

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where in the world . . . . There is no excuse for this. No person can place it upon a scientific basis; it is a question of feeling.[1]

Clarence Darrow

I. INTRODUCTION

An enlightened society knows that race should not determine the quality of justice a person receives. Certainly, an enlightened criminal justice system would not allow race to determine a person's fate. However, the Texas criminal justice system, sanctioned by its highest appellate court for criminal matters, allows a person's race to be considered as a factor in determining whether that person should receive the death penalty.[2]

On September 15, 1999, the Texas Court of Criminal Appeals[3] issued an unpublished opinion[4] in the case of *Victor Hugo Saldano v. The State of Texas*.[5] In *Saldano*, the court upheld the imposition of the death penalty where the jury heard testimony from an expert witness who stated that a person's race is a factor that should be considered by a jury in

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1. CLARENCE DARROW, VERDICTS OUT OF COURT 70 (1963).

2. *See* Saldano v. State, 70 S.W.3d 873 (Tex. Crim. App. 2002) (refusing to review issue because no objection was made at trial); Garcia v. State, 57 S.W.3d 436, 440-41 (Tex. Crim. App. 2001) (holding defense attorney was not ineffective for eliciting testimony from expert that race is a factor in determining future dangerousness). *But see* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(a)(2) (Vernon Supp. 2001) (providing for the prohibition of the State's use of race in capital sentencing proceedings).

3. The Texas Court of Criminal Appeals is the highest state court in Texas deciding criminal cases. TEX. CONST. art. V, § 3.

4. Pursuant to Texas Rule of Appellate Procedure 77.2, the Court of Criminal Appeals of Texas may decide not to publish any opinion if a majority of the justices so decide. TEX. R. APP. P. 77.2. Interestingly, the Supreme Court of Texas, which is the highest court in Texas handling civil cases, has no such option. *See* TEX. R. APP. P. 63. Intermediate appellate courts, which handle both criminal and civil cases, have the option to publish or not publish their opinions. TEX. R. APP. P. 47.3. In deciding whether or not to publish, the intermediate appellate courts are required to screen opinions prior to being handed down, in order to decide whether they meet the criteria required for publication. *Id.* The intermediate appellate court may only publish an opinion if it:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
(b) involves a legal issue of continuing public interest;
(c) criticizes existing law;
(d) or resolves an apparent conflict of authority.

TEX. R. APP. P. 47.4. The Court of Criminal Appeals of Texas has no such screening requirement in deciding whether or not to publish its opinion. *See generally* David M. Gunn, *"Unpublished Opinions Shall not be Cited as Authority:" The Emerging Contours of Texas Rule of Appellate Procedure 90(I)*, 24 ST. MARY'S L. REV. 115, 118 (1992) (distinguishing publication rules of Supreme Court of Texas and intermediate appellate courts).

5. Saldano v. State, No. 72,556 (Tex. Crim. App. Sept. 15, 1999), *vacated by* 530 U.S. 1212 (2000).

deciding whether a person will be sentenced to death.[6] To some people, the *Saldano* case represents just another death penalty sentence affirmed by Texas' highest criminal appellate court. To others, it represents a disturbing step backward to a time when the color of a person's skin could determine his or her fate.[7]

Saldano exemplifies a disturbing trend in Texas jurisprudence. The case, which the Court of Criminal Appeals chose not to publish, did not generate any media attention and managed to fly under the radar until June 2000. It was then that the United States Supreme Court reversed the case[8] after Texas Attorney General John Cornyn took the extraordinary step of confessing error as the State's legal representative.[9] However, on remand from the Supreme Court, the Texas Court of Criminal Appeals again affirmed Mr. Saldano's death sentence.[10] Most perplexing is how, in today's society, the case managed to go unnoticed for as long as it did and, moreover, that a case of this nature would even be upheld by the State's highest criminal appeals court in light of the issues and historical precedent involved.

This article will examine the history of the use of a person's race in the legal system, particularly in criminal cases, and detail how the Texas Court of Criminal Appeals' decision in *Saldano I* and *II* represents a radical departure from historical precedent concerning the prohibition the use of race in determining a person's fate.

II. *SALDANO V. STATE*

Victor Hugo Saldano, a citizen of Argentina, was charged with capital murder in Texas and the State sought the death penalty.[11] Mr. Saldano

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6. *Id.*

7. *See* Rick Casey, *Supremes Overrule Texas Lynch Mob*, SAN ANTONIO EXPRESS-NEWS, June 7, 2000, at 3A, *available at* 2000 WL 27525299.

8. Saldano v. Texas, 530 U.S. 1212 (2000).

9. *Id.*; *see* Mark Hansen, *Deadly Race Cards?*, 86 A.B.A. J. 18 (Sept. 2000); Bruce Hight, *Who Should Speak for Texas? DAs Ask Cornyn, Prosecutors Divided over Bill to Give Attorney General Top Role in Supreme Court Cases*, AUSTIN AMERICAN-STATESMAN, Mar. 21, 2001, at A1, *available at* 2001 WL 4577297; George Kuempel, *Cornyn, Court in Rare Clash: Debate over Death-Sentence Testimony Called Unprecedented*, DALLAS MORNING NEWS, Jan. 31, 2001, at 1A, *available at* 2001 WL 11658636.

10. Saldano v. State, 70 S.W. 3d 873 (Tex. Crim. App. 2002). Hereinafter, the 1999 opinion will be referred to as *Saldano*, and the 2002 opinion will be referred to as *Saldano II*.

11. Saldano v. State, No. 72,556, slip op. at 1 (Tex. Crim. App. Sept. 15, 1999), *vacated by* 530 U.S. 1212.

was accused of kidnapping Paul King from a grocery store parking lot.[12] The evidence showed that Mr. Saldano and an accomplice took Mr. King to a secluded country road where Mr. Saldano forced Mr. King into the woods and shot him five times.[13] The evidence also showed that Mr. Saldano stole Mr. King's watch and wallet.[14] After hearing the evidence, a jury in Collin County, Texas convicted Mr. Saldano of capital murder in July 1996.[15]

A punishment hearing was held to determine if Mr. Saldano should receive the death penalty.[16] At this hearing, the jury was asked to decide, beyond a reasonable doubt, "whether there is a probability that [Mr. Saldano] would commit criminal acts of violence that would constitute a continuing threat to society."[17] The State's evidence, admitted at the

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12. *Id.*, slip op. at 7. An accusation was also made against an alleged accomplice. *Id. See* Max B. Baker, *Cornyn at Odds Over 7 Death Row Cases*, FORT WORTH STAR-TELEGRAM, Feb. 1, 2001, at 9.

13. *Saldano*, No. 72,556, slip op. at 7 (Tex. Crim. App. Sept. 15, 1999).

14. *Id.*

15. *Id.*, slip op. at 1.

16. *Id.* Had the State of Texas not sought the death penalty, a punishment hearing would not have been held because a defendant convicted of capital murder where the death penalty is not sought is subject to a mandatory life sentence. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 1 (Vernon Supp. 2001). The stated facts would certainly subject Mr. Saldano to the possible imposition of the death penalty under Texas law. *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994). In Texas, a murder committed in the course of committing kidnapping or robbery subjects a defendant to the possible imposition of the death penalty. *Id.* Here, Mr. Saldano was convicted of the murder of Mr. King in the course of Mr. Saldano's commission of the kidnapping and robbery of Mr. King. *See Saldano*, No. 72,556, slip op. at 7 (Tex. Crim. App. Sept. 15, 1999).

17. *Saldano*, No. 72,556, slip op. at 6-7 (Tex. Crim. App. Sept. 15, 1999) (quoting Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987)). *See also* TEX. CODE CRIM. PROC. ANN. art. 37.071 §§ 2 (b)(1), (c) (Vernon Supp. 2001). This is often referred to as "future dangerousness." Steve Lash, *Texas Death Case Set Aside; U.S. Supreme Court Sees Possible Racial Bias*, HOUS. CHRON., Jun. 6, 2000, at A1. In proving that capital murder defendants will constitute a future danger to society, the State is allowed to introduce into evidence at the punishment phase any matter relevant to sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.071 § (2)(a) (Vernon Supp. 2001). This evidence may include:

(1) the circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;
(2) the calculated nature of the defendant's acts;
(3) the forethought and deliberateness exhibited by the crime's execution;
(4) the existence of a prior criminal record, and the severity of the prior crimes;
(5) the defendant's age and personal circumstances at the time of the offense;
(6) whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
(7) psychiatric evidence; and,
(8) character evidence.

See Keeton, 724 S.W.2d at 61.

hearing to support the issue of future dangerousness, elevated matters to a new level in Texas. The State called Dr. Walter Quijano, a licensed clinical psychologist,[18] to testify as to Mr. Saldano's "future dangerousness."[19] Dr. Quijano testified to twenty-four factors that he felt would merit a death sentence.[20] Inappropriately, one of the twenty-four factors Dr. Quijano referred to was Mr. Saldano's race.[21] Specifically, Dr. Quijano testified that various studies[22] indicate that the number of African Americans and Hispanics in Texas prisons is disproportionate to their percentage in the general population.[23] He further testified that because

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18. *See* Baker, *supra* note 12, at 9 (characterizing Dr. Quijano as a "clinical psychologist"); Garcia v. State, 57 S.W.3d 436, 438, WL 1167494, at *1 (Tex. Crim. App. 2001) (characterizing Dr. Quijano as a "clinical psychologist); *but see Saldano*, No. 72,556, slip op. at 8 (Tex. Crim. App. Sept. 15, 1999) (characterizing Dr. Quijano as a "psychiatrist").

19. *Saldano*, No. 72,556, slip op. at 5 (Tex. Crim. App. Sept. 15, 1999). One has to question how Dr. Quijano's race-based testimony was admissible under Rule 702 of the Texas Rules of Evidence, which governs the admission of expert testimony. *See* TEX. R. EVID. 702. Before expert testimony is admitted, the trial court must determine if such testimony is relevant and reliable enough to aid the jury in understanding the evidence or determining an issue of fact. Mata v. State, 46 S.W.3d 902, 908 (Tex. Crim. App. 2001); Kelly v. State, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992); *see* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 599 (1993). The inquiry under Federal Rule of Evidence 702 is essentially one of relevancy. In determining if the expert testimony is sufficiently reliable, the trial court must determine that the expert's testimony is based on scientific knowledge derived from sound scientific methods. *Daubert*, 509 U.S. at 590. Further, the party seeking to admit the testimony of an expert must prove that the expert is sufficiently qualified to testify on the proposed subject. Gregory v. State, 56 S.W.3d 164, 178 (Tex. App.-Houston [14th Dist.] 2001, pet. ref'd). The trial court must also determine if the proposed testimony will unduly prejudice the defendant or is otherwise inadmissible under Rule 403 of the Texas Rules of Evidence. *Kelly*, 824 S.W.2d at 573; TEX. R. EVID. 403.

20. *Saldano*, No. 72,556, slip op. at 10 (Tex. Crim. App. Sept. 15, 1999). Bryan Stevenson of the Equal Justice Initiative in Montgomery, Alabama referred to the evidence introduced in Saldano's trial as "junk science." *See* Julie Blasé, *Texas Fight Takes on Race and Death Penalty: Seven Men on Death Row May Be There In Part Because of Race, Attorney General Says,* CHRISTIAN SCIENCE MONITOR, Mar. 22, 2001. "Every analysis shows that people of color don't use drugs more than white people. Yet at each stage of the [criminal process, people of color loom larger . . . . it says a lot about the way we arrest, prosecute, and convict based on race." *Id.*

21. *Saldano,* No. 72,556, slip op. at 9-10.

22. Dr. Quijano testified that he had reviewed studies and statistics from the Texas Department of Criminal Justice and the "Bureau of Justice" although he was unable to recall the specific "details and mechanics of the studies." Texas v. Saldano, Cause No. 199-80049-96, 199th Judicial District Court, Collin County, Texas, Reporter's Record, Vol. 20, at 115 (on file with author).

23. *Saldano*, No. 72,556, slip op. at 9 (Tex. Crim. App. Sept. 15, 1999). At Victor Hugo Saldano's trial, Dr. Quijano testified on direct examination by the prosecutor as follows:

Q. Okay. What is the fourth category?

A. The fourth category is race.
Q. Well, let's talk about that. In this age of political correctness, that somehow it is an item that we tend to gloss over. But, empirically, there is a statistical analysis of it. Is that correct?
A. Yes. This is one of those unfortunate realities also that blacks and Hispanics are over-represented in the criminal justice system.
Q. And there may be social problems for that; we don't know. But that doesn't alter the fact that, statistically, that's a reality of life.
A. The race itself may not explain the over-representation, so there are other subrealities that may have to be considered. But statistically speaking, 40 percent of inmates in the prison system are black, about 20 percent are - - about 30 percent are white, and about 20 percent are Hispanics. So there's much over-representation.
Q. In the category – categorization of races, how is an Argentinean fitted?
A. That – he would be considered a Hispanic.

Reporters Record, *supra* note 22, at 75-76. Not only did Mr. Saldano's trial defense attorney not object to Dr. Quijano's testimony, he elicited even more of it on cross-examination:

Q. Now, one of the factors – one of your other statistical factors you mentioned was the factor of race. Is that right?
A. Yes.
Q. Okay. And you – you pointed out a fact that's probably pretty well-known to everybody; that blacks and Hispanics are over-represented in the United States prison population.
A. Yes.
Q. And, basically, what we mean by that is, if African-American people make up about 16 percent of the population, but 40 percent of the people in prison are African-American people, then we can say, Well, if the population in prison corresponded to the free population, then there should only be 16 percent African-American people in prison, so that fact that there's only 40 shows that they're over-represented. Right?
A. Yes.
Q. And the same is true of Hispanic people.
A. Yes.
Q. Now, what race is an Hispanic person?
A. What, now?
Q. What race is an Hispanic person?
A. The Hispanic person is Caucasian.
Q. Okay. So why isn't he – why aren't – I mean, so – and white people are Caucasians, aren't they?
A. Yes.
Q. So in your category, you said blacks, Hispanics, and white, and you – let's see it was blacks are 40 percent, Hispanics are 20 percent, whites are 30 percent. Right?
A. Mm-hmm. Yes.
Q. But if whites are Caucasians and Hispanics are Caucasians, how come we're counting them separately?
A. Because we are engaged now in a word game. The race here is not used in an anthropological sense. It is simply to explain that blacks, Hispanic heritage, and white people is commonly known, those are the dissolution of criminals. That I did not intend to portray a anthropological sense, distinguishing between types of Caucasians and, you know,—I'm just saying, Hispanic-background people, generally referred to as Spanish-speaking people, are over-represented, and the statistics show that.

Mr. Saldano is a Spanish speaker, he is classified as "Hispanic" for the purposes of these studies.[24] *A fortiori*, Mr. Saldano's race could be considered a factor weighing in favor of a finding of future dangerousness since there are a disproportionate percentage of Hispanics in prison com-

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Q. Okay. But Spanish – I mean, Hispanics are people who speak Spanish.
A. Yes.
Q. Or come – or come from a cultural background where people speak Spanish. Is that right?
A. Yes.
Q. But those folks come from all kinds of racial backgrounds, don't they?
A. Yes.
Q. I mean, a person from Madrid, would we call him an Hispanic?
A. If he was in the United States, yes.
Q. All right. And a person from Madrid might very well have as fair a skin as an Irishman and have blonde hair, mightn't he?
A. Yes.

. . . .

Q. . . . Now, the Hispanics that have been considered in coming up with these statistical factors are the Hispanics that are in American prisons. Is that correct?
A. Or American criminal justice system.
Q. All right. And do you think it would be fair to say that the overwhelming majority of those Hispanics would be Mexican people?
A. In this part of the country, yes. In the East Coast, Puerto Ricans.
Q. Okay. And, I mean, Mexico had a large population of Indian people at the time of the Spanish Conquest. Is that right?
A. Yes.
Q. All right. And so many Mexican people today are mixtures in their blood lines of Spanish people with Indians.
A. Yes.
Q. All right. Isn't it pretty risky to base a statistical factor on, you know – we're going to identify everyone who comes from a particular culture as being a member of that racial group. I mean, I understand, we're not talking – but that's the term you used.
A. Yes.
Q. And yet the racial group that we're using to conduct the statistics does not consist of all Spanish-speaking people; it consists mostly of a mixture of Indian and Spanish blood from Mexico. I mean, that's not really a – that doesn't make a whole lot of scientific sense, does it?
A. It makes sense to me. I don't know if it makes sense to you. Hispanics means, generally, Spanish-speaking people in the United States, and that can be a mixture of Puerto Ricans, Cubans, Mexicans, South Americans. For some strange reason, they're over-represented in the criminal justice system. Now, how much weight you want to put into that, that is the open question. But I'm reporting the statistics as they are published.

The State of Texas v. Victor Hugo Saldano, Cause, No. 199-80049-96, 199th Judicial District Court, Collin County, Texas, Reporter's Record, Vol. 20, pp. 127-132 (on file with author).

24. *See Saldano*, No. 72,556, slip op. at 9 (Tex. Crim. App. Sept. 15, 1999). Dr. Quijano equated Hispanics with people who spoke Spanish. *See* Reporters Record, *supra* note 22.

pared to the general population.[25] Mr. Saldano's defense attorney failed to object to the admission of Dr. Quijano's testimony.[26] The jury found that Mr. Saldano would be a future danger to society, and he was sentenced to death.[27]

Mr. Saldano appealed his conviction and death sentence,[28] arguing, *inter alia*, that it was impermissible for the State to allow the jury to consider race in determining whether the death penalty should be imposed.[29] On September 15, 1999, the Court of Criminal Appeals issued an unpublished opinion on the case.[30] The majority opinion devoted a mere three paragraphs to the use of race in determining future dangerousness and held that the failure of Mr. Saldano's defense attorney to object to the testimony of Dr. Quijano failed to preserve the error for review.[31] The majority rejected Mr. Saldano's request to consider the interjection of race into the case as fundamental error under Rule 103(d) of the Texas Rules of Criminal Evidence.[32]

Mr. Saldano appealed the Court of Criminal Appeals' decision to the United States Supreme Court, asking the Supreme Court to consider whether race is a permissible basis upon which the State can seek the death penalty.[33] In a remarkable response to Mr. Saldano's request, the

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25. *Saldano*, No. 72,556, slip op. at 9 (Tex. Crim. App. Sept. 15, 1999).

26. *Id.*, slip op. at 10. The defense attorney, David Haynes, in an interview with the Dallas Morning News after the Supreme Court remanded the case, appears to now understand the impropriety of allowing such testimony, stating, "I can see how it might be offensive to the Constitution." Curtis Howell, *Execution Sentence Is Tossed; High Court Faults Use of Collin Killer's Race*, DALLAS MORNING NEWS, Jun. 6, 2000, at 25A.

27. *Saldano*, No. 72,556, slip op. at 1 (Tex. Crim. App. Sept. 15, 1999).

28. All Texas capital murder convictions in which the death penalty is imposed are appealed directly to the Court of Criminal Appeals of Texas and are not first reviewed at the intermediate appellate court level. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(h) (Vernon Supp. 2001).

29. *Saldano*, No. 72,556, slip op. at 9-10 (Tex. Crim. App. Sept. 15, 1999).

30. *See id.* Justice Holland did not participate in the decision. *Id.*, slip op. at 1. Justice Cheryl Johnson concurred in affirming the judgment of conviction but dissented to the affirming of the death sentence imposed. *Id.* Judge Tom Price dissented. *Id.*

31. *Id.*, slip op. at 10.

32. *Id.*; TEX. R. EVID. 103(d). For a discussion of the fundamental error rule, see Hulen D. Wendorff et al., Texas Rules of Evidence Manual I-52-54 (4th ed. 1997).

33. *See* Jane Elliot, *Cornyn Vows to Fight for Inmate; AG Pushes for New Sentencing Hearing*, HOUS. CHRON., Mar. 1, 2001, at A1. Stanley Schneider, Saldano's appellate attorney, urged the Supreme Court to vacate the death sentence, calling it "fundamentally unfair for the prosecution to use racial and ethnic stereotypes in order to obtain the death penalty." Lash, *supra* note 17; *see also* Roger Hernandez, *The Effect of Ethnicity on Sentencing*, DALLAS MORNING NEWS, June 21, 2000, at 17A (stating imposition of death penalty should not be based on ethnicity, but only on individual behavior).

Attorney General for the State of Texas, John Cornyn,[34] confessed error on behalf of the State.[35] The Attorney General stated in his response:

> Despite the fact that sufficient proper evidence was submitted to the jury to justify the finding of Saldano's future dangerousness, the infusion of race as a factor for the jury to weigh in making its determination violated his constitutional right to be sentenced without regard to the color of his skin.[36]

On June 5, 2000, the United States Supreme Court issued its opinion vacating the judgment of the Court of Criminal Appeals of Texas, and remanded it "for further consideration in light of the confession of error by the Solicitor General of Texas."[37] The Court of Criminal Appeals then set Mr. Saldano's case for rehearing and permitted supplemental briefing regarding the issue of race and future dangerousness.[38] Oral argument was held on February 28, 2001.[39] Race and future dangerousness

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34. The Republican Texas Attorney General identified several other death penalty cases in which Dr. Quijano testified concerning race as a factor to be weighed in determining a defendant's future dangerousness. *See* Elliot, *supra* note 33, at A19; Casey, *supra* note 7, at 3A; *see also* Press Release, John Cornyn, Office of the Attorney General, State of Texas (June 9, 2000) (on file with author).

35. Saldano v. Texas, 530 U.S. 1212 (2000). Apparently the Attorney General's confession of error was not agreed to by the Collin County District Attorney. *See* Kuempel, *supra*, note 9 at 1A. The article reported on the clash between the Attorney General and the District Attorney. *Id.* In fact, the Court of Criminal Appeals questioned the Attorney General's authority to confess error on behalf of the State of Texas and ordered all parties to brief the issue of the Attorney General's authority. *Id.* Interestingly, the court ordered the briefing on this issue just one day after the general election was held. *See* Mary Alice Robbins, *Court Questions AG's Authority; CCA Wants Briefs on Cornyn's Right to Represent State in Criminal Cases at U.S. Supreme Court*, TEXAS LAWYER, Nov. 13, 2000, at 1. The order was issued November 8th. *Id.* The Court of Criminal Appeals issued its opinion in *Saldano II* one day after the 2002 primary elections, affirming Mr. Saldano's death sentence and holding that the Texas Attorney General may represent the State in criminal matters before the United States Supreme Court, but only if asked to do so by the district attorney's office which tried the case. *See* Saldano v. State, 70 S.W.3d 873 (Tex. Crim. App. 2002).

36. Casey, *supra* note 7.

37. Saldano v. Texas, 530 U.S. 1212 (2000).

38. *See* Mary Alice Robbins, *AG Argues Race Shouldn't Be Factor in Death Sentence; CCA Asked to Grant New Sentencing Hearing for Argentine*, TEXAS LAWYER, Mar. 5, 2001, at 1. Robbins reported on oral arguments heard after the Supreme Court remand. *Id.* In addition to the Attorney General's brief and that of Saldano, an Amicus Curiae brief was filed by the League of United Latin American Citizens, the National Council of La Raza, the National Association of Criminal Defense Lawyers, the Texas Catholic Conference, the Mexican American Legal Defense and Education Fund, Inc., and the Mexican American Bar Association. *Id.*

39. *Id.*

as well as the Attorney General's authority to represent Texas in criminal cases before the United States Supreme Court were at issue.[40]

On March 13, 2002, the Court of Criminal Appeals issued its opinion in *Saldano II*.[41] The court first addressed the authority of the Texas Attorney General to confess error before the Supreme Court. The court noted that Texas statutory law requires a district attorney to request assistance from the Attorney General's office before the Attorney General is empowered to represent the State before the Supreme Court in certiorari proceedings.[42] The court held that the district attorney's acquiescence in allowing the Attorney General to respond on behalf of the State to Mr. Saldano's petition for writ of certiorari was an implied request for assistance, and, therefore, the Attorney General was permitted to confess error in Mr. Saldano's case before the Supreme Court.[43]

However, the court held the Attorney General's confession of error did not require the court to "blindly" overrule *Saldano*.[44] Specifically, the court stated that the issue to which the Attorney General confessed error was not one which had been presented to or decided by the Texas courts previously, because, as the court held in *Saldano*, no objection was made to Dr. Quijano's testimony at trial, and, therefore, no issue was preserved for appellate review.[45]

The court then attempted to justify their determination that, absent an objection, the interjection of race in determining the defendant's future dangerousness was not the type of error which warranted reversal of the case. The court opined that the complained of error was merely an evidentiary matter requiring an objection to preserve it for appellate review.[46] The court also stated that most errors of constitutional dimension

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40. *See id.*

41. Saldano v. State, 70 S.W.3d 873 (Tex. Crim. App. 2002). All nine justices joined in Part I of the opinion and seven justices joined in Part II. *Id.* at 875. Justices Price and Johnson dissented from Part II. *Id.* at 891. A concurring opinion was filed by Justice Keller, in which Justices Keasler, Hervey and Cochran joined. *Id.* at 891-92.

42. *Id.* at 880.

43. *Id.* at 883-84. All nine justices joined in this portion of the opinion. *Id.* at 875.

44. *Id.* at 884. In fact, the Texas Court of Criminal Appeals stated it did not base its decision in *Saldano I* on federal law but based it on a state procedural rule, *i.e.*, the requirement of an objection to preserve the issue for appellate review. *Id.* The error presented in Saldano's petition to the United States Supreme Court involved federal constitutional claims under the Fourteenth Amendment. *Id.* at 891. The Court of Criminal Appeals stated no such federal constitutional claim was presented to or ruled on by them previously and, therefore, the remand of the case by the Supreme Court for clarification of the basis of the holding was not surprising to them. *Id.*

45. *Id.* at 891.

46. *Id.* at 886-87.

require an objection to be preserved for appellate review.[47] Further, the court opined that even if the State had offered Dr. Quijano's testimony solely for the purpose of appealing to racial prejudices, Mr. Saldano's defense attorney was still required to object to the admission of this evidence in order to preserve the error for appellate review.[48]

In an attempt to further bolster its holding that the admission of race-based evidence did not warrant reversal of Mr. Saldano's death sentence, the court stated that the defense attorney's failure to object to the introduction of Dr. Quijano's testimony did not constitute ineffective assistance of counsel.[49] On this basis, and despite the confession of error by

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47. *Id.* at 887. The Court stated the error complained of was not within one of the two categories of error which may be reviewed on appeal when an objection is not lodged at trial. *Id.* at 889. These two types of error as identified by the Texas Court of Criminal Appeals are the denial of a right which requires a waiver and absolute requirements. *See* Marin v. State, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993). Absolute requirements include the requirement of a court to have jurisdiction over the subject matter and person, the requirement that proceedings be held at the county seat, the requirements that the statute not be an *ex post facto* prohibition and not violate the Separation of Powers provision of the Texas Constitution, and that a trial judge's comments may not impinge on the defendant's right to a presumption of innocence. *See also Saldano*, 70 S.W.3d at 888 (citing *Marin*, 851 S.W.2d at 279 (jurisdictional and separation of powers requirements), Stine v. State, 908 S.W.2d 429 (Tex. Crim. App. 1995) (court at county seat requirement), Ieppert v. State, 908 S.W.2d 217 (Tex. Crim. App. 1995) (*ex post facto* prohibition), Blue v. State, 41 S.W.3d 129 (Tex. Crim. App. 2000) (plurality opinion recognizing judge's comments on presumption of innocence as fundamental error)). The opinion in *Saldano II* never cites to Texas Rule of Evidence 103(d), which allows the courts to address "fundamental errors affecting substantial rights although they were not brought to the attention of the court." *See generally* TEX. R. EVID. 103(d). However, they do cite to Federal Rule of Criminal Procedure 52(b) which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52 (b); *Saldano*, 70 S.W. 3d at 889.

48. *Saldano*, 70 S.W.3d at 887 n.58 (citing Brooks v. State, 990 S.W.2d 278, 286 (Tex. Crim. App.), *cert denied*, 528 U.S. 956 (1999)). The court relied on *Brooks v. State* for the proposition that an objection is required to preserve an error relating to the introduction of testimony which would appeal to racial prejudices of the jury. *Id.* In *Brooks*, a death penalty case, the defendant was an African American. *See Brooks*, 990 S.W.2d at 286. During the punishment phase the State introduced the testimony of a white man concerning the "negative influence" the defendant had on his daughter. *Id.* at 286 n.3. The defense attorney did not object. On appeal Brooks claimed this testimony was impermissible because it appealed to racial prejudices. *Id.* at 286. Without any elaboration or analysis, the Court of Criminal Appeals simply held the issue had not been preserved for appellate review because no objection was made at the trial court. *Id.*

49. *Saldano*, 70 S.W.3d at 886. Despite the lack of evidence as to the defense attorney's reasons for not objecting, the Court supplied two reasons of its own: the defense attorney was attempting to

> (1) place before the jury all the factors it might use against appellant, either properly or improperly, in its assessment of future dangerousness, and (2) persuade the jury that, despite all those negative factors, appellant would not be a future danger if im-

the Attorney General, the court effectively declined to reach the merits of deciding the propriety of the introduction of race as a factor to be considered by the jury in determining a defendant's future dangerousness.[50] Consequently, the court affirmed the imposition of Mr. Saldano's death sentence, with only two judges dissenting.[51]

Justice Johnson filed a dissenting opinion addressing the failure of the majority to review the merits of the claimed error.[52] She stated that the race or ethnicity of a defendant is an impermissible basis upon which a determination of guilt or punishment may be assessed.[53] Further, she recognized that it is impossible to measure the effect on the jury when the factor of race is introduced at trial.[54] She stated she would remand for a new sentence because a defendant has a right to be punished for "what he did, not who he is."[55]

Justice Price also filed a dissenting opinion stating the introduction of Dr. Quijano's testimony was fundamental error.[56] He emphasized that punishment decisions in death penalty cases are uniquely susceptible to the infusion of racial prejudice due to the subjective and individualized nature of capital sentencing proceedings.[57] Justice Price argued that a defendant has a right to be sentenced free from any racial prejudice and that a defendant does not waive his right to complain of a racially-infused sentencing proceeding because of a failure to object at trial.[58] Justice Price stated he could not join with the majority in this case because he

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prisoned for life because the system's procedures and techniques would control or eliminate his tendency toward violence.

Id. The court stated that Mr. Saldano did not raise this issue in his application for writ of habeas corpus he had filed earlier and upon which they had already ruled. *Id.* The court deduced that the failure to include such a claim must mean that the trial attorney made a conscious choice not to object to Dr. Quijano's testimony, thereby making the failure to object a trial strategy. *Id. See also* Garcia v. State, 57 S.W.3d 436 (Tex. Crim. App. 2001) (holding by a unanimous judgment in a similar case, that an objection to race-based evidence is required).

50. *Saldano*, 70 S.W.3d at 891.

51. *Id.* at 893.

52. *Id.* (Johnson, J., concurring and dissenting). Justice Johnson concurred in the majority's holding that the Attorney General was permitted to represent the State in this case before the Supreme Court. *Id.*

53. *Id.* (Johnson, J. dissenting).

54. *Id.* at 894. Justice Johnson cites no authority for her opinion.

55. *Id.*

56. *Id.* at 892. (Price, J. dissenting) ("I would hold that the admission of this evidence was fundamental error, which should be reviewed even in the absence of a trial objection.").

57. *Id.* at 893.

58. *Id.* at 892.

was uncertain if racial prejudice was a factor in the jury's decision to impose the death sentence.[59]

Chief Justice Keller chided the dissenters, in a concurring opinion to the majority, for their lack of legal analysis in support of their opinions.[60] She stated that the dissenters are doing a "disservice to counsel for appellant, who put forward and ably argued a proposed legal basis for granting relief."[61] She further argued that the majority opinion explains why Saldano's arguments must fail and that the dissenters had offered no legal reasons as to the incorrectness of the majority's holding.[62]

The majority opinion, however, does not provide the analysis Justice Keller suggests. The opinion wholly fails to mention, much less analyze, why the error complained of cannot be reviewed under Texas Rule of Evidence 103(d), which allows courts to review unobjected to errors affecting a defendant's substantial rights.[63] Nor does the majority opinion provide any real analysis as to why it should not be an absolute requirement that capital proceedings be free from any racial taint. As can be seen by the cases presented below, the Court of Criminal Appeals appears to have simply refused to recognize the fundamental nature of the error committed in the trial and punishment of Mr. Saldano.

III. How the Interjection of Race at Trial Has Been Treated in the Past

The majority opinion in *Saldano II* does not even cite to Rule 103(d) of the Texas Rules of Evidence, which allows courts to review unobjected to errors which affect a defendant's substantial rights.[64] Nor does the majority opinion provide any real analysis explaining why it should not be an absolute requirement that capital sentencing proceedings be free from any type of racism. In the opinion issued by the Court of Criminal Appeals in *Saldano II*, the court apparently ignored historical precedent in affirming the use of race as a permissible factor in deciding a person's future dangerousness.

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59. *Id.* at 893.

60. *Id.* at 891-92 (Keller, P.J. concurring). One commentator has called Judge Keller's concurring opinion "a snippy response to the dissenters . . . ." Rick Casey, *Texas' Worst Court Slaps Cornyn, Upholds Nazi-like Quackery*, San Antonio Express News, Mar. 22, 2002, at 3A.

61. *Saldano*, 70 S.W.3d at 891-92 (Keller, P.J. concurring).

62. *Id.* at 892.

63. Tex. R. Evid. 103(d).

64. *Id.*

A. *Texas Cases Concerning the Use of Race at Trial*

In Texas, the interjection of the issue of race into trial has traditionally been greatly discouraged. This has been particularly pertinent in two areas: preventing the prosecutor's appeal to racial prejudice in the argument to the jury, and discouraging the use of race to impugn a witness' credibility or to show bias in favor of the defendant. In most cases, the appellate courts have strongly discouraged the use of appeals to racial prejudice or racial stereotypes.[65]

1. The Treatment of the Use of Race at Trial by the Texas Court of Criminal Appeals

Generally, there is little chance of success on appeal from a criminal conviction and sentence unless an objection is first lodged in the trial court, thereby ensuring preservation of error.[66] Even if a proper, sustainable objection is made and the trial judge overrules it, in order to have the case reversed, a defendant must have somehow been harmed by the error.[67] As evidenced by its past decisions, the Texas Court of Criminal Appeals has been more willing to find the defendant was harmed by the interjection of race into a trial.[68] The court's general reasoning for reversing the error is due to the recognition that no curative instruction to disregard the racial remarks of the prosecutor can erase the taint placed in the jury's mind.[69]

In the 1925 case of *Derrick v. State*,[70] a white woman was tried and convicted for aiding in the rape of her twelve-year old maid. Derrick called her mother to testify on her behalf. During the cross-examination by the State, the prosecutor, in an obvious attempt to demean the defen-

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65. Tex. Employer's Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856, 859-60 (1954) (stating it is unethical for attorneys to use race in arguments or in cross-examination and judges have a duty to prevent such use); Moss v. Sanger, 75 Tex. 321, 12 S.W. 619, 620 (1889) (stating the trial court would have rebuked and punished the attorney who made race-based remarks if the attorney's remarks were understood). *See generally*, Debra T. Landis, Annotation, *Prosecutor's Appeal in Criminal Case to Racial, National, or Religious Prejudice as Grounds for Mistrial, New Trial, Reversal, or Vacation of Sentences – Modern Cases*, 70 A.L.R. 4th 664 (1989).

66. *See* TEX. R. APP. P. 33.1. In *Saldano II* the Court of Criminal Appeals pointed out that there are very few types of errors which will result in a reversal of the conviction where the defendant did not first raise an objection at the trial level. *See Saldano*, 70 S.W.3d at 888.

67. TEX. R. APP. P. 44.2(a).

68. Dinklage v. State, 185 S.W.2d 573 (Tex. Crim. App. 1945); Hatton v. State, 125 Tex. Crim. 55, 66 S.W.2d 331, 333 (1933); Derrick v. State, 272 S.W. 458 (Tex. Crim. App. 1925).

69. *Dinklage*, 185 S.W.2d 573; *Hatton*, 66 S.W.2d at 333; *Derrick*, 272 S.W. 458.

70. 272 S.W. 458 (1925).

dant, questioned her about a prostitution charge levied against her daughter after being caught in bed with a "Negro" man.[71] The defense attorney objected and the trial court sustained the objection.[72] The Court of Criminal Appeals recognized that no jury instruction to disregard the question could remove this innuendo from the jury's mind, stating, "[I]t was utterly impossible for the court to destroy the virus that was spread by the very asking of the question."[73] In holding that reversible error occurred, the court stated, "the very asking of it was so repulsive to every idea of a fair trial."[74]

A few years after *Derrick*, in *Blocker v. State*,[75] an African-American tenant farmer was on trial for the murder of a white man.[76] During the trial, witnesses testified the deceased had started the altercation by slapping Blocker, who then stabbed the deceased.[77] In jury argument, the prosecutor stated that when the deceased slapped Blocker, it "was an effort on his part to keep this [N]egro in his place, and Southern gentlemen will not condemn him for it."[78] The defense attorney requested an instruction for the jury to disregard the prosecutor's comment, and the trial judge gave such an instruction.[79] Nonetheless, the prosecutor also stated,

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71. *Id.* The prosecution's evidence was that Derrick held a knife to the victim while Derrick's husband had intercourse with her. *Id.* at 458-59.

72. *Id.* at 459.

73. *Id.*

74. *Id. See also* Resendez v. State, 50 S.W.3d 84, 85-86 (Tex. App.—Waco 2001, no pet.). The failure of the defense to object to the prosecutor's questions regarding the white female defendant's having sex with black men waived error on appeal. *Id.* The Waco Court of Appeals has reluctantly held that a defendant's failure to object to questioning by the State, which was similar to that in *Derrick*, did not preserve the issue for review on appeal. *Id.* at 86 (citing Brooks v. State, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999)). The court in *Brooks* held that the complaint regarding the State's appeal to racial prejudice was not preserved for appeal absent objection. *Id.* Ms. Resendez was charged with murdering her husband. *Id.* at 85. She contended that the killing was in self-defense because her husband had attempted to rape her. *Id.* The prosecutor in *Resendez* asked the defendant several questions regarding her having had sexual relations with both a white and a black man. *Id.* at 85-86. The Waco Court noted this issue was not one of first impression and was therefore obliged to follow the Court of Criminal Appeals' precedent. *Id.* at 86 (citing *Brooks*, 990 S.W.2d at 286). A dissenting opinion was filed by Justice Bill Vance. *Id.* at 86 (Vance, J., dissenting). In his dissent, Justice Vance stated that the Waco Court should work towards eradicating racial prejudice. *Id.* Further, Justice Vance opined that "[t]he right to a trial free of racial prejudice is . . . a fundamental, systemic requirement of the criminal justice system" which does not require an objection to be preserved and is not subject to a harmless error analysis. *Id.*

75. 112 Tex. Crim. 275, 16 S.W.2d 253 (1929).

76. *Id.*

77. *Id.* at 253. The altercation started over the deceased taking offense at Mr. Blocker referring to an older African-American man as "Mister." *Id.*

78. *Id.* at 254.

79. *Id.*

"I have lived in this country all my life and I do not have to tell twelve Southern men what to do in the case."[80] The Court of Criminal Appeals recognized these statements as being "veiled and covert appeal[s] to race prejudice."[81] Citing the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,[82] the court recognized that if equal protection of the law is to mean anything, a conviction of a person based on a remark appealing to racial prejudice cannot stand.[83]

As in *Blocker*, the Court of Criminal Appeals found reversible error in *Hatton v. State*,[84] where once again the prosecutor appealed to race prejudice in seeking a conviction for murder. The prosecutor asked a witness whether Mr. Hatton, an African American, had been previously charged with insulting two white women in another county.[85] Despite the defense attorney's objection and the trial court's instructions to the jury to disregard the question, the prosecutor brought up the matter again, this time by asking the defendant if he had insulted two white women.[86] The defense again objected and the trial court once again sustained the objection. Despite both these objections being sustained, the prosecutor argued in his closing argument that if the defendant "was acquitted he would again be insulting white women . . . ."[87] Again the defense attorney objected and the court instructed the jury to disregard the remarks.[88] At the appellate level, the court recognized these remarks as appeals to racial prejudice in violation of the defendant's right to a fair and impartial trial.[89] In reversing the conviction, the court also recognized that the harmful effects of the remarks could not be erased from the jury's mind simply by the trial judge's instructions.[90]

In yet another case, *Dinklage v. State*,[91] the Court of Criminal Appeals recognized that one cannot "unring the bell" after the prosecution makes

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80. *Id.* There is no indication in the opinion as to whether an objection was made to this statement. *Id.*

81. *Id.*

82. *See* U.S. CONST. amend. XIV ("no State shall . . . deny to any person . . . the equal protection of the laws").

83. *Blocker*, 16 S.W.2d at 254. The Court of Criminal Appeals further stated that the defendant is to be tried according to the requisites of the law, not traditions of the South. *Id.*

84. 125 Tex. Crim. 55, 66 S.W.2d 331.

85. *Id.* at 333 (1933).

86. *Id.* The prosecutor alleged Mr. Hatton had asked the girls to get in his car and had offered them gum. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. 185 S.W.2d 573 (Tex. Crim. App. 1945).

improper remarks.[92] In *Dinklage*, which took place during World War II, the defendant, a Texas citizen of German heritage, was on trial for murder.[93] During closing argument, the prosecutor argued that the witnesses for the State were more believable than the defendant, stating in a loud and vehement tone that the defendant "wants you to believe the story of that Hun and his wife."[94] The trial judge sustained the defense attorney's objection to the remark.[95] Although the trial court instructed the jury to disregard the prosecutor's statement, the prosecutor interjected, turning towards Mr. Dinklage and strongly stating, "He is a German."[96] The court found the judge's instruction to the jury insufficient to undo the harmful effect of the remarks,[97] especially since the prosecutor continued with the remarks at the same time the judge was giving the instruction.[98] The court reversed, finding the prosecutor's remarks to be serious error which resulted in the denial of a fair trial for Mr. Dinklage.[99]

Derrick, Blocker, Hatton, and *Dinklage* illustrate that the Texas Court of Criminal Appeals has long recognized that once the jury is exposed to a racial remark, the harmful effect of that remark cannot be removed through the use of a curative instruction to disregard the remark. The court in these cases found that the taint from the mere asking of a question or the making of a remark is so great that no jury instruction can correct the error. Yet, in Mr. Saldano's case, a majority of the court failed to recognize the incurable effect on the jury that is caused by the introduction of the defendant's race as an indicator of his propensity to commit future crimes.[100]

Akin to the notion that a person is more dangerous because members of his race are over-represented in the prison population is the notion that members of certain minorities are willing to lie for one another. In *Allison v. State*,[101] the Court of Criminal Appeals found reversible error

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92. *Id.*

93. *Id.* at 574-75.

94. *Id.* at 574. The prosecutor placed emphasis on the term "Hun." *Id.*

95. *Id.*

96. *Id.* The word "Hun" refers to a "German" or a person with a barbarous or cruel disposition. *Id.* at 575.

97. *Id.* at 575. The appellate record showed that one prosecution witness was in a United States Army soldier's uniform, that the United States was involved in a war against the German government, and that no evidence had been presented as to Mr. Dinklage's ancestry. *Id.* at 574.

98. *Id.* at 575.

99. *Id.* at 576. The court recognized that Texas is "a melting pot of many nationalities, races, creeds and colors." *Id.*

100. *See* Saldano v. State, 70 S.W.3d 873, 893 (Tex. Crim. App. 2002) (Johnson, J., dissenting) (stating it is not possible to determine effect on jury).

101. 157 Tex. Crim. 200, 248 S.W.2d 147 (1952).

where a prosecutor argued that defense witnesses of the same race as the defendant would be unbelievable.[102] In *Allison*, the defendant, an African American, was prosecuted for the rape of a white woman.[103] Mr. Allison presented several witnesses to testify regarding his alibi. The prosecutor asked three of the witnesses if they were of the same race as the defendant, which they were.[104] In his argument to the jury, the prosecutor stated he was not criticizing Mr. Allison for presenting witnesses of the same race as him, but he just wanted the jury to "know for the purpose of the record they try to help their own race."[105] Although the defense attorney objected,[106] the trial judge refused to instruct the jury to disregard the prosecutor's statement.[107] The appellate court found the prosecutor's argument objectionable and reversed the conviction.[108] In support of its reasoning, the court stated the prosecution "sought to condemn as a class all testimony coming from members of the colored race."[109] This is precisely what the State of Texas did in Mr. Saldano's case when it presented testimony that Hispanics are more dangerous to society. It was not merely a remark which appealed to racial prejudice, but the actual introduction of race as a valid reason to sentence an individual to death.

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102. *Id.*

103. *Id.*

104. *Id.* at 148.

105. *Id.* at 147.

106. The defense attorney stated that the argument was not supported by the record, constituted unsworn testimony of the district attorney, and was an appeal to racial prejudice." *Id.*

107. *Id.* at 148.

108. In support of its holding, the Court of Criminal Appeals detailed objectionable statements from other jurisdictions in which the prosecutor alleged members of certain races or classes were unbelievable. *Id.* The Texas court cited a case from the United States Court of Appeals for the Tenth Circuit wherein it reversed a conviction based on the prosecutor's statement "that he did not care how many Jews the defendant brought here to testify . . . ." Skuy v. United States, 261 F. 316, 320 (10th Cir. 1919). The Texas Court also cited with approval a case from the United States Court of Appeals for the Ninth Circuit in which the prosecutor stated, "These men are Italians . . . . It is a matter of everyday knowledge that the majority of people in King County running stills are of the same nationality . . . ." Fontanello v. United States, 19 F.2d 921 (9th Cir. 1927). In addition, it is important to note that appeals to racial prejudice are not solely the tactic of the prosecution. For an example of the infusion of race into trial by the defense, see York v. State, 57 Tex. Crim. 484, 123 S.W. 1112 (1909).

109. *Allison*, 248 S.W.2d at 148.

2. The Treatment of the Use of Race at Trial by the Civil Courts of Appeal in Texas

The civil appellate courts in Texas have long recognized that the appeal to racial prejudice by either party should not be allowed at trial.[110] Unlike the Texas Court of Criminal Appeals, the Texas civil appellate courts, including the Supreme Court of Texas, have recognized that appeals to racial prejudice constitute reversible error even if no objection is made at trial.[111]

As early as 1889, the Supreme Court of Texas recognized that appeals to racial prejudice should not be tolerated at trial.[112] In the closing argument of *Moss v. Sanger*, the attorney for the Sangers referred to the fact that Moss, his family, and his business associates were Jewish, stating:

> This entire business is a concocted scheme from beginning to end; a deliberate scheme to swindle and defraud, gotten up by a Jew, a Dutchman, and a lawyer. Who are the parties at interest? A. Moss; his wife, Rose Moss; his mother Mary Moss; his clerk, D. Golden; and then, B. Freiberg, the old he-Jew of all, who, no doubt planned the whole thing. All Jews, or Dutch Jews, and that is worse. Will an honest jury of Ellis county let these people, (pointing at A. Moss, Golden, and Raphael,) whose every thought is how to cheat and swindle, perpetrate this infamous and outrageous fraud?[113]

The jury rendered a general verdict in favor of Sanger.[114] The Texas Supreme Court reversed the judgment, reasoning that the jury may have been influenced by the argument and that counsel for Sanger had intended his argument to have an influence, stating "it was the arraignment of a race not on trial" and stating the trial judge should have punished Sanger's attorney.[115] Dr. Quijano's testimony concerning Mr. Saldano's future dangerousness should be properly recognized as an equally unac-

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110. Tex. Employers' Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856 (1954).

111. Tex. Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 863 (Tex. App.—San Antonio 1990, writ. denied); Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 840 (Tex. 1979).

112. Moss v. Sanger, 75 Tex. 321, 12 S.W. 619 (1889).

113. *Id.*

114. *Id.*

115. The Court, in showing its disapproval of these remarks, made the following comments:

> It was an inflammatory appeal to a prejudice, no doubt, conceived by counsel who made it to exist, and intended to influence the jury. It was the arraignment of a race not on trial. Cases ought to be tried in a court of justice upon the facts prove; and whether a party be a Jew or gentile, white or black, is a matter of indifference. The course pursued in this case was one that no court of justice ought for a moment to tolerate; and it certainly must be true that the judge who tried this cause did not fully

ceptable arraignment of an entire race and the Texas Court of Criminal Appeals should have told the State the use of such testimony was improper.

The Supreme Court of Texas, in *Texas Employers' Insurance Association v. Haywood*,[116] reiterated that it is a judge's duty to disallow arguments which appeal to racial prejudice during a trial.[117] At trial, Haywood's counsel, in an attempt to belittle the testimony of two African-American witnesses, stated that he *"wouldn't fly a couple of those yellow nigs in here and expect the jury to believe that kind of stuff."*[118] The court countered:

> A jury of white men cannot be called on to determine the credibility of witnesses on the theory that the Caucasian race has a monopoly on the virtues of truth and veracity and people of other races, by virtue of their color, are inbred with dishonesty and perjury without implanting in the minds of the jurors the deepest and most eradicable type of prejudice.[119]

The court also indicated that because a curative instruction could not erase the injection of prejudice, no objection was necessary to preserve error for appellate review.[120] The court emphasized lawyers' ethical obligations to refrain from interjecting race into a trial and also emphasized the trial judge's duty to correct a lawyer when such a transgression oc-

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understand the language of counsel, or he would not have permitted it,— would have rebuked it, and ought to have punished its author.

Id.

116. 153 Tex. 242, 266 S.W. 2d 856 (1954).

117. Tex. Employer's Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856, 859 (1954). Haywood was suing for workmen's compensation for a neck injury. *Id.* at 857.

118. *Id.* (emphasis in original). The insurance company called two African-American witnesses to testify in rebuttal of Haywood's testimony. *Id.* During closing argument, Haywood's counsel implied that the two witnesses were unbelievable because they were African Americans, stating that the insurance company should have called white witnesses so the jury would know that they were telling the truth. *Id.* at 858.

119. *Id.*

120. *Id.* at 858. The Supreme Court of Texas stated that the test to be applied in determining whether a case should be reversed because of improper jury argument is:

> [W]hether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the court, or both, could not eliminate the probability that it resulted in an improper verdict.

Id. The court based this test on Rules 434 and 503 of the Texas Rules of Civil Procedure which were then in effect. *Id.* It appears that because of these rules the Supreme Court was moving away from an automatic reversal for cases in which the jury argument appealed to race prejudice and would require some showing that an improper verdict was the result of the prejudicial jury argument before reversible error would be found.

curs.[121] These duties to ensure a trial free from the taint of racist remarks are not addressed by the Texas Court of Criminal Appeals in *Saldano II.*

The appellate court case of *Texas Employers' Insurance Association v. Guerrero*[122] is of the utmost significance because the San Antonio Court of Appeals acknowledged that it is a judge's duty to ensure a trial is free from racial prejudice.[123] The record revealed that, along with Guerrero, his attorney, and his treating doctor, eleven of the jurors had Spanish surnames.[124] During closing argument, Guerrero's attorney quoted from a well-known author,[125] stating, "Things that unite us far exceed those things that divide us."[126] He further stated, "There is a time to be united. Right now is a time to be united . . . But by golly there comes a time when we have got to stick together as a community."[127] The insurance company's attorney made an incomplete objection and no ruling was obtained from the trial court.[128] On appeal, the San Antonio court discussed at length whether or not an objection was necessary in order for the case to be reversed on this point and decided no objection was necessary. The court based its reasoning on the Supreme Court of Texas' opinion in *Standard Fire Insurance Company v. Reese*[129] that jury arguments appealing to racial prejudice are an exception to the rule requiring an objection because such arguments are by their very nature incurable.[130]

The court further stated that the determination of harmfulness of the argument did not turn on whether it was an explicit or subtle appeal to ethnic unity, as the mere appeal to race or ethnicity is forbidden.[131] Additionally, a jury must not be allowed to reward or penalize a party on such a basis.[132] Based on this reasoning and the long history in Texas civil

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121. *Id.* at 859-60.

122. 800 S.W.2d 859 (Tex. App.—San Antonio 1990, writ denied). Guerrero was suing for worker's compensation benefits for an injury he received when he fell from a farm tractor. *Id.*

123. *Id.* at 867-68. The opinion quoted the rule requiring judges to police jury argument. *Id.* at 867 (quoting Rule 269 of the Texas Rules of Civil of Procedure). This rule has not changed since its adoption in 1892. *See id.* It is still the rule today. *See* TEX. R. CIV. P. 269(g) (stating "court will not be required to wait for objections to be made when the rules as to arguments are violated . . . .").

124. *Guerrero*, 800 S.W.2d at 862.

125. The author's name was Octavio Paz. *Id.*

126. *Id.* (emphasis deleted).

127. *Id.* (emphasis deleted).

128. *Id.* at 865 n.6. The insurance company's attorney stated, "Your Honor, this is getting a little inflammatory in asking the jury to take that position" and was then interrupted. *Id.* at 862.

129. 584 S.W.2d 835 (Tex. 1979).

130. *Guerrero*, 800 S.W.2d at 863.

131. *Id.* at 865.

132. *Id.*

cases condemning appeals to racial prejudice,[133] the court held the remarks by counsel urging ethnic unity was reversible error.[134]

Guerrero provides a significant example of civil courts' recognition that the interjection of race into a trial results in incurable harm subjecting the case to automatic reversal even if no objection is made. This provides a stark contrast to *Saldano II*, where the Texas Court of Criminal Appeals held an objection necessary to preserve error when race is interjected into trial. *Guerrero* is also significant in that it distinguishes between types of improper jury argument which require an objection and arguments appealing to racial prejudice that do not require an objection to preserve the error for appellate review.[135] The *Guerrero* court understood the distinction between jury arguments that appeal to racism and cause incurable harm and those which do not. The court in *Saldano II* failed to recognize the distinction between evidentiary matters that invite and even condone racism and those evidentiary matters that do not relate to race. Under the holding of *Saldano II*, it appears that defendants in civil disputes over money have more protection from racially tainted proceedings than do criminal defendants in death penalty cases.

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133. *See id.* at 866 n.7 (listing cases condemning the use of race, ethnicity, national origin and religion in jury arguments).

134. *Id.* at 866-67. A dissent was filed in *Guerrero* arguing that subtle references to race in closing argument should be analyzed for their harmful effect. *Guerrero*, 800 S.W.2d at 869 (Biery, J., dissenting). The dissent argued that although an incurable jury argument need not be objected to in order to preserve the error for appellate review, the jury argument must be reviewed for its harmful effect to determine whether it is reversible error or not. *Id.* at 870. Relying on Texas Rule of Appellate Procedure 81(b)(1), which requires the appellate court to find the error which caused the rendition of an incorrect verdict before it can reverse the trial court, the dissent criticized the majority for using an automatic reversal rule for subtle arguments appealing to ethnic unity. *See id.* This was the rule in effect at the time. *See* TEX. R. APP. P. 81 (b)(1). Rule 81 dealt with the conditions under which the courts of appeal may reverse a trial court. *Id.* Specifically, Rule 81(b)(1) stated that "No judgment shall be reversed on appeal . . . unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case . . . ." TEX. R. APP. P. 81 (b)(1). Texas Rule of Appellate Procedure 44.1, which replaces Rule 81 (b)(1), does not contain the words "reasonably calculated to cause." *See* TEX. R. APP. P. 44.1. However, the commentary to the rule states that the omission of the phrase "reasonably calculated to cause" did not create a substantive change from the old rule. TEX. R. APP. P. 44 comment; *Guerrero*, 800 S.W.2d at 870 (Biery, J. Dissenting). The dissent discussed cases in which a harmless analysis was performed in determining whether a jury argument complained about should cause a reversal of the case. *See id.* at 869-70. The dissent opined that the subtle jury argument in this case was not improper and much less harmful. *Id.* at 871.

135. *Id.* at 863.

B. *Cases from Other Jurisdictions Concerning the Use of Race at Trial*

1. Cases from Other States Concerning the Use of Race at Trial

A short review of cases from other states concerning the issue of the use of race or ethnicity at trial is illustrative of the almost universal condemnation of the use of race in trials.[136]

In the New York State case of *People v. Thomas*,[137] the defendant, a black male, was charged with criminal possession of a weapon.[138] The defendant was walking in a predominantly Hispanic and African-American neighborhood when three white policemen confronted him.[139] The defendant reached for a gun, which was in the waistband of his pants.[140] The defendant testified that he had only temporarily and innocently possessed the gun, which he had just found in a nearby playground.[141] He stated that when three men approached him he believed they were muggers, not plainclothes policemen.[142]

The prosecutor, in an attempt to discredit the defendant's testimony that he thought they could be muggers, repeatedly referred to the race of the policemen in her cross-examination of the defendant.[143] Additionally, in closing argument the prosecutor stated:

> I would submit to you that if three white males jumped out of a green Plymouth Volarie [sic] in this neighborhood and ran up to you, you just might tend to think these are not muggers, these could be police officers.[144]

The defense made no objection to the questions nor to the jury argument.[145] The New York court stated that the apparent theme of the prosecutor's questions and jury argument concerning the police officers' race was "that a black man in a black neighborhood cannot conceivably be the

136. For a comprehensive review of the treatment of prosecutors' appeals to prejudice in criminal trials, see Landis, *supra* note 65 (listing cases and treatment by courts).

137. 514 N.Y.S.2d 91 (App. Div. 1987).

138. *Id.*

139. *Id.* at 92.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* The prosecutor made the following reference in her questioning of the defendant: "When you saw two white guys with badges hanging around their necks jump out of an unmarked car, is it your testimony that you thought they were muggers?"; "[What did you do when] you saw these two white police officers jump out of an unmarked car[?]"; "Has it happened before that three white guys in an unmarked police car pulled up to you and jumped out and jumped you and knocked you down to the ground[?]"; and, "Is it your testimony that you have been mugged by three white guys in this neighborhood?" *Id.*

144. *Id.*

145. *Id.* at 93.

victim of a crime committed by a white man."[146] The court reversed the conviction, reiterating what it had said years earlier:

> [t]he vice of such an argument is not only that it is predicated on a false and illogical premise, but more important it is divisive: it seeks to separate the racial origin of witnesses in the minds of the jury, and to encourage the weighing of [evidence] on the basis of racial similarity or dissimilarity of the witnesses. The argument offends the democratic and logical principle that race, creed or nationality, in themselves, provide no reasoning for believing or disbelieving a witness' testimony.[147]

The court reversed the case "in the interest of justice" even though no objection was made at trial.[148] Unlike the Texas Court of Criminal Appeals, the *Thomas* court recognized the fundamental nature of the right to have a trial free from prejudice and innuendo that divides people along racial lines.

The Pennsylvania case of *Commonwealth v. Tirado*[149] provides another example of the condemnation of the use of race at trial. In *Tirado,* the Puerto Rican defendant was convicted of murder.[150] Mr. Tirado claimed he shot the victim in self-defense.[151] The prosecution called a police officer of Puerto Rican origin to testify regarding the customs of Puerto Ricans, specifically the character trait of "machismo," which was supposedly a trait peculiar to Puerto Rican males.[152] When the defendant's attorney requested an offer of proof, the prosecutor stated that his theory of the case required him to show the defendant was acting out of a sense of "machismo" and a need to "save face."[153] Despite the obvious race implications, the trial court allowed the testimony.[154] The Pennsylvania Supreme Court reversed in recognition of the fact that the testimony vio-

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146. *Id.*

147. *Id.* (quoting People v. Hearns, 238 N.Y.S. 2d 173, 174 (App. Div. 1963).

148. *Id.* at 93.

149. 375 A.2d 336 (Pa. 1977).

150. *Id.* at 337.

151. *Id.* The prosecutor alleged the defendant had approached the deceased and his brother-in-law in a restaurant and asked the deceased to step outside. *Id.* The defendant testified that the deceased had come looking for him. He further testified that the night before the deceased had demanded the defendant give him a watch, gold chain and money, which the defendant refused to do. The defendant also testified that the deceased had vowed to "get him no matter what." *Id.*

152. *Id.*

153. *Id.* at 337-38. The prosecutor sought to show, by virtue of this alleged "machismo" character trait of Puerto Rican males, that the victim had refused to back down when the defendant displayed it and that the defendant had intended ". . . to shame the victim into backing down . . . ." *Id.*

154. *Id.*

lated the defendant's right to a fair trial. The court noted that at issue should be the individual motivations of the defendant and the deceased, not the alleged general motivations of Puerto Rican males.[155] In reversing the case, the court stated that:

> [a]bove all else people are individuals, and in a criminal prosecution we are concerned with what each individual did and why it was done in a particular situation. What other individuals of the same ethnic, racial, or religious background might have done in a similar situation is irrelevant. The introduction of this irrelevant material prejudiced appellant by casting him in the eyes of the jury as a member of a group with values allegedly alien to the rest of society, and therefore implying that it was more likely that he committed the crime charged.[156]

It appears the *Tirado* Court would recognize precisely the ills caused by the type of testimony elicited from Dr. Quijano in Mr. Saldano's case: It is simply irrelevant that there are more Hispanics in prison than in the general population. The Texas Court of Criminal Appeals has failed to recognize that the perceived characteristics a group of people may share should be irrelevant when the State is seeking to punish an *individual.*

Such stereotyping has also been condemned in Florida. In *Terrazas v. State,*[157] a Mexican American was tried for murder.[158] The State employed a revenge-killing theory, based on an alleged statement by Terrazas that he knew the deceased had previously robbed his family's home.[159] Based on this statement, the prosecutor offered the following in his opening argument:

> This is the United States, vigilante style justice will not be tolerated. And while you will hear that a lot of people involved in this case have a Mexico (sic) ethnic background, any style of justice common to those people, Mexican people and in Mexico, is not how the law works.[160]

The defense attorney immediately objected and subsequently moved for a mistrial, which was denied.[161] The appellate court reversed the case "because attempts to attribute criminal conduct to a defendant based on racial or ethnic background have been universally condemned by the

155. *Id.*

156. *Id.* (citing United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152 (2nd Cir. 1973)).

157. 696 So.2d 1309 (Fla. App. 2 Dist. 1997).

158. Terrazas v. State, 696 So.2d 1309, 1309 (Fla. App. 2 Dist. 1997).

159. *Id.*

160. *Id.* at 1310.

161. *Id.*

courts of [Florida]."[162] Although the court noted that such tactics constitute fundamental error, as evidenced by cases previously decided, in this instance they declined to reach the question since an objection and motion for mistrial had been made.[163]

The *Terrazas* court recognized, just as the *Tirado* court did, that it is impermissible to assign perceived characteristics of an ethnic group to any individual member of that group. Further, the *Terrazas* Court noted that even in the absence of an objection, the conviction would still have been reversed. The Texas Court of Criminal Appeals failed to see it is impermissible to punish a defendant because he is a member of a certain race, and that an objection should not be necessary, especially in death penalty proceedings.

However, a Nevada Supreme Court decision recognizes that the Eighth Amendment in death penalty proceedings requires a defendant receive a trial free from all racially prejudicial taint.[164] In *Dawson v. State*,[165] the defendant, an African American, was charged with the murder, kidnap-

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162. *Id.* (citing Perez v. State, 689 So.2d 306 (Fla. App. 3 Dist. 1997)); Reynolds v. State, 580 So.2d 254 (Fla. App. 1 Dist. 1991); George v. State, 539 So.2d 21 (Fla. App. 5. Dist. 1989); Salazar-Rodriguez v. State, 436 So. 2d 269 (Fla. App. 3. Dist. 1983)).

163. *Id.* The Terrazas court cited Perez v. State, 689 So.2d 306 (Fla. App.3 Dist. 1997), and Reynolds v. State, 580 So.2d 254 (Fla. App. 1 Dist. 1991) which both found fundamental error when the prosecution attempted to attribute the alleged traits of others to the defendants. In *Perez*, the defendant was charged with aggravated assault of a corrections officer as the result of a prison melee. *See Perez*, 689 So.2d at 306. No evidence was presented that the prison melee was based on any racial factors. *Id.* Nonetheless, the prosecutor argued that the defendant was involved in " . . . a war that's divided along racial lines." *Id.* at 307. The Florida court reversed the case despite the lack of an objection by the defense attorney. *Id.* at 308. In *Reynolds*, the defendant, a black man, was convicted of sexual battery of a white woman. *Reynolds*, 580 So.2d at 255. Reynolds' defense was consent. *Id.* The prosecutor made repeated references, from *voir dire* to closing argument, to both Reynolds' and the complainant's race and implied that a white woman would never consent to sexual relations with a black man. *Id.* at 255-56. No objections were made. *Id.* However, the Court found these statements to be fundamental error, based on case law from various jurisdictions finding similar conduct on the part of the prosecution to be fundamental error. *Id.* at 256-57. *See also* Miller v. State of North Carolina, 583 F.2d 701, 703-704 (4th Cir. 1978) (finding fundamental error where no objection lodged to improper jury argument); United States *ex. rel.* Haynes v. McKendrick, 350 F.Supp. 990, 998-1005 (S.D.N.Y. 1972), *aff'd*, 481 F.2d 152 (2nd Cir. 1973) (finding fundamental error where no objection lodged to improper jury argument); Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (finding fundamental error where no objection lodged to improper jury argument).

164. Dawson v. State, 734 P.2d 221, 222 (Nev. 1987). In so doing, the Court relied on Eighth Amendment jurisprudence which requires a unique and individualized determination of the punishment that a particular defendant deserves. *Id.* (citing Turner v. Murray, 476 U.S. 28 (1986) and Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985)).

165. *Id.*

ping and rape of a white woman.[166] During the guilt or innocence phase of the trial, evidence was admitted that the defendant had previously had a relationship with a white female.[167] In closing argument during the punishment phase, the prosecutor reiterated that the defendant had a "preference for white women."[168] The court recognized there was no legitimate purpose for referring to the defendant's sexual preference in the punishment phase of the trial, where it is determined whether the defendant will live or die.[169] The court held the prosecutor's argument was unfairly prejudicial and reversed.[170] The Nevada Court overturned Dawson's death sentence, but let stand the conviction, reasoning that

> [b]ecause of the delicate task which the trier of fact has in weighing the mitigating circumstances against the aggravating circumstances,

the kind and level of prejudice which might not require reversal of a conviction may be sufficient to require reversal of a death penalty.[171]

Unlike the Texas Court of Criminal Appeals, the Nevada court recognized that death penalty punishment proceedings are distinct from any other type of criminal trial proceeding. The Texas Court of Criminal Appeals in *Saldano II* failed to understand that difference when it held an objection to Dr. Quijano's race-based testimony was required to preserve the issue for appellate review. The court in *Saldano II* failed to recognize that allowing the jury's decision to be influenced by the introduction of Dr. Quijano's inflammatory race-based evidence constituted fundamental error. This ruling essentially equated the failure to object to the race-based evidence with the failure to object to any other type of inadmissible evidence which is unacceptable, particularly when it is applied to death penalty punishment proceedings.

2. The Federal Statute and Cases Concerning the Use of Race in Death Penalty Proceedings

Like state courts outside of Texas, federal courts condemn the use of racial remarks and purported evidence that a defendant shares certain alleged characteristics of a specific ethnic group of which he is a member. Significantly, the Congress of the United States has enacted a law prohibiting the use of race in death penalty proceedings. The Federal Death Penalty Act of 1994[172] prohibits the jury's consideration of both the de-

166. *Id.* at 221-22.
167. *Id.* at 222.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 224.
172. 18 U.S.C. §§ 3591-3598.

fendant's and victim's race or national origin as either an aggravating or mitigating factor in determining whether the defendant should be sentenced to death.[173]

In a case construing this federal statute, *United States v. Webster*,[174] the United States Court of Appeals for the Fifth Circuit held that the Federal Death Penalty Act of 1994 was not unconstitutional for prohibiting the use of a person's race as either a mitigating or aggravating factor.[175] The Fifth Circuit based this holding on the Equal Protection[176] and Due Process[177] clauses contained in the Bill of Rights.[178] The court opined that criminal trials constitute state action and, therefore, the action of the government in those trials is subject to strict scrutiny when the government uses race in its decision making.[179] The court stated that the government cannot ever meet the compelling government interest prong of the strict scrutiny test when race is a factor in capital sentencing considerations.[180] The court went further, stating that "the use of race in sentencing determinations is particularly invidious. 'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'"[181] The court spoke specifically to the use of race in death penalty cases, declaring it particularly offensive to the Constitution and quoting Justice Brennan's dissent in *McClesky v. Kemp*:[182]

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173. 18 U.S.C. § 3593(f). Section 3593(f) provides the following:

> Special precaution to ensure against discrimination. –In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victims may be.

Id.

174. 162 F.3d 308 (5th Cir.) *cert. denied*, 528 U.S. 829 (1999).

175. *Id.* at 355.

176. U.S. CONST. amend XIV.

177. U.S. CONST. amend. V.

178. *Webster*, 162 F.3d at 355.

179. *Id.*

180. *Id.*

181. *Id.* at 356 (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

182. 481 U.S. 270 (1987).

> Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with th[e] concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess.[183]

The court pointed out that "a long line of Supreme Court precedent admonishes that the guillotine must be as color-blind as is the Constitution."[184]

Although the *Webster* court did not hold that all alleged errors under the statute would be reviewed regardless of whether an objection was lodged,[185] the United States Supreme Court has stated that even errors not objected to will be reviewed under a plain error standard required by Federal Rule of Criminal Procedure 52(b).[186] Under the plain error standard of review, a federal death sentence will not be reversed "unless there has been (1) error, (2) that is plain, and (3) affects substantial rights."[187] Further, even if the alleged error satisfies these three prongs, the appellate court should only correct the error "if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'"[188]

Attorney General John Cornyn recognized that the introduction of race in Mr. Saldano's case met the federal plain error standard, stating in his response to Mr. Saldano's petition for writ of certiorari that "the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process . . . ."[189] Although the Texas Court of Criminal Appeals recognized in *Saldano II* that there are certain errors that can be reviewed despite the lack of an objection,[190] and even cited to Federal Rule of Criminal Procedure 52(b),[191] the court

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183. *Id.* at 336 (Brennan, J., dissenting); *Webster*, 162 F.3d at 356 (quoting *McCleskey*, 481 U.S. at 336 (Brennan J. dissenting)).

184. *Webster*, 162 F.3d at 356 (citing *McCleskey*, 481 U.S. at 292-93, Zant v. Stephens, 462 U.S. 862 (1983) and Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

185. Section 3595(c)(2)(A) requires an appellate court to review death sentences to determine whether the sentence "was imposed under the influence of passion, prejudice, or any other factor." 18 U.S.C. § 3595 (c)(2)(A).

186. Jones v. United States, 427 U.S. 373, 389 (1999); FED. R. CRIM. P. 52(b). Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Id.*

187. *Jones*, 527 U.S. at 389 (citing Johnson v. United States, 520 U.S. 461, 467 (1997) and United States v. Olano, 507 U.S. 725, 732 (1993)).

188. *Id.*, (citing *Olano*, 520 U.S. at 467) (alterations in original).

189. Response to Petition for Writ of Certioriari at 7, Saldano v. Texas, 530 U.S. 1212 (2000) (No. 99-8119) (on file with author).

190. Saldano v. State, 70 S.W.3d 873, 887-89 (Tex. Crim. App. 2002).

191. *Id.* at 887 n.58.

held that the use of race as a factor to weigh in determining whether Mr. Saldano should live or die was not such an error. In fact, the court wholly failed to mention or cite to the Texas counterpart to Rule 52(b)—Texas Rule of Evidence 103(d). Rule 103(d) provides that appellate courts may "tak[e] notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court."[192] Notably, in *Saldano I*, the Court of Criminal Appeals did mention Mr. Saldano's claim that it was fundamental error under Rule 103(d), although the court provided no analysis explaining why this was not such an error.[193] Since it appears Mr. Saldano will not be granted relief in Texas courts, he will have to rely on the federal courts. The federal courts, in construing state-imposed death sentences, have condemned the use of race or ethnicity in death penalty trials.

For example, in *Bains v. Cambra*,[194] the Ninth Circuit Court of Appeals granted a petitioner's writ of habeas corpus for a California murder conviction.[195] The defendant, Bains, an adherent of the Sikh faith, was charged with the capital murder of his sister's husband, after leaving her after two years of marriage. At trial the prosecution presented evidence to allege that adherents of the Sikh faith will murder the husband of a family member if that husband divorces his wife, in an attempt to seek revenge and "save face."[196] During closing argument, the prosecutor relied heavily on the testimony presented regarding the Sikh religion, "invit[ing] the jury to give in to their prejudices and to buy into various stereotypes."[197] The Ninth Circuit Court of Appeals stated that under federal law, the prosecutor's argument was a clear violation of the right to equal protection and due process.[198] Upon review of the lower court's application of harmless error analysis, the appellate court found that

192. TEX. R. EVID. 103(d).

193. Saldano v. State, No. 72,556, slip op. at 9 (Tex. Crim. App. Sept. 15, 1999), *vacated by* 530 U.S. 1212 (2000).

194. 204 F. 3d 964 (9th Cir.) *cert. denied*, 531 U.S. 1035 (2000).

195. *Id.* at 983.

196. *Id.* at 970. This evidence was admissible during the guilt or innocence phase of the trial for the purpose of showing motive or intent. *Id.* at 974.

197. *Id.* at 974. The prosecutor stated in closing argument: "If you do certain conduct with respect to a Sikh person's female family member, look out. You can expect violence." *Id.* at 975. He also stated that Sikhs are "unable to assimilate to and to abide by the laws of the United States." *Id.* The prosecutor also asked a sheriff's department employee who was testifying as an expert on Sikh religion and culture whether Sikh's had a greater potential for violence under certain circumstances. *Id.* at 980-81 (Canby, J., dissenting).

198. *Id.* at 974 (citing McCleskey v. Kemp, 481 U.S. 270, 309 n.30 (1987); Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975); Fontanello v. United States, 19 F.2d 921, 921-22 (9th Cir. 1927); United States v. Vue, 13 F.3d 1206, 1212-13 (8th Cir. 1994); United States v. Doe, 903 F.2d 16, 21-29 (D.C. Cir. 1990); United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 156-61 (2d Cir. 1973)).

there was sufficient evidence of Bains' guilt so that there were no "'grave doubt[s]' about whether the errors here had 'a substantial and injurious effect or influence in determining the jury's verdict.'"[199] Although the *Bains* Court did not reverse the case, it did condemn the prosecutor's statements, pointing out that the prosecutor's arguments were stereotypical of a particular group.[200] In a striking contrast to the *Bains* court, a majority of the Texas Court of Criminal Appeals in *Saldano II* did not even voice displeasure with the State's use of Dr. Quijano's testimony, much less condemn the use of such testimony.

Similarly, in a case before the Federal District Court sitting in Houston, Texas, *Guerra v. Collins,*[201] the interjection of race into a case was condemned, and the defendant's writ of habeas corpus petition granted, based on the cumulative effect of prosecutorial misconduct.[202] During *voir dire* the prosecutor informed jurors that the fact that Guerra was an illegal alien should be considered in determining whether Guerra should be sentenced to death.[203] The court held death penalty defendants are entitled to be judged on their own individual characteristics and not those alleged to be shared by a group of people.[204] The court further stated that statements as to race in jury argument were constitutionally impermissible because they appealed to prejudice based on ethnicity or national origin.[205]

The Texas Court of Criminal Appeals in *Saldano II* has ignored the impropriety of allowing the jury's decision to sentence Mr. Saldano to death to be influenced by the perceived dangerousness of Hispanics as a class. Although the federal courts and statutes provide that a person's race or ethnicity is irrelevant in death penalty proceedings, Texas' highest criminal court, in upholding Mr. Saldano's death sentence, has allowed race to be a relevant factor. Additionally, despite the federal courts' recognition that review of errors not objected to regarding the introduction of race into death penalty punishment proceedings is necessary, the Texas court has refused to examine the error under any standard of review.

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199. *Id.* at 977-78 (applying harmless error analysis standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 636-38 (1993)).

200. *Id.* at 975.

201. 916 F.Supp. 620 (S.D. Tex. 1995).

202. *Id.* at 637. The federal court held it was not barred from addressing the issue since the State court "found no waiver of error." *Id.*

203. *Id.* at 636.

204. *Id.* (citing Zant v. Stephens, 462 U.S. 862, 878-79 (1983)). Additionally, the court found the statements improper since there was no evidence that illegal aliens are predisposed to commit future criminal acts. *Id.* at 636.

205. *Id.*

C. *United States Supreme Court Cases Concerning Race*

Since the adoption of the Fourteenth Amendment to the Constitution, the United States Supreme Court has consistently condemned racial discrimination in the criminal justice system.[206] In the criminal arena, the United States Supreme Court has held that jurors may not be excluded from jury service based on their race,[207] and that a prosecutor may not base his charging decision on race.[208]

The Supreme Court has engaged in "unceasing efforts to eradicate racial discrimination"[209] in the criminal justice system since its 1879 decision of *Strauder v. West Virginia*.[210] In *Strauder*, the Court held a state law unconstitutional where the law provided that only white men could be jurors.[211] The Court ruled that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the purpose of which is the "protection of life and liberty against race or color prejudice."[212]

Since *Strauder*, the Court has ruled that racial discrimination has no part in the selection of jurors[213] or grand jurors.[214] In one such grand jury discrimination case, *Rose v. Mitchell*,[215] the United States Supreme Court held that a defendant's right to equal protection of the law is violated when a state racially discriminates in the selection of the grand jury

206. *See* McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) (listing cases forbidding the use of race in criminal justice system).

207. Batson v. Kentucky, 476 U.S. 79 (1969); Swain v. Alabama, 380 U.S. 202, (1965); *see, e.g., Batson*, 476 U.S. at 84 n.3 (listing cases holding equal protection violated when state deliberately denies juror participation based on race).

208. Vasquez v. Hillery, 474 U.S. 254 (1986); *see, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880); Neal v. Delaware, 103 U.S. 370, 396 (1881); Bush v. Kentucky, 107 U.S. 110 (1883); Gibson v. Mississippi, 162 U.S. 565 (1896); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Hernandez v. Texas, 347 U.S. 475 (1954); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 367 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972); Castaneda v. Partida, 430 U.S. 482 (1977); Rose v. Mitchell, 443 U.S. 545 (1979); *see also Castaneda*, 430 U.S. at 493 n.12 (listing cases where grand jury selection procedure held unconstitutional by Supreme Court).

209. *Batson*, 476 U.S. at 84.

210. *Strauder*, 100 U.S. 303.

211. *Id.* at 305.

212. *Id.* at 309.

213. *See, e.g., Batson*, 476 U.S. 79; *Swain*, 380 U.S. 202.

214. *See, e.g. Neal*, 103 U.S. at 396; *Bush* 107 U.S. 110; *Gibson*, 162 U.S. 565; *Carter*, 177 U.S. 442; *Rogers*, 192 U.S. 226; *Pierre*, 306 U.S. 354; *Smith*, 311 U.S. 128; *Hill*, 316 U.S. 400; *Cassell*, 339 U.S. 282; *Hernandez*, 347 U.S. 475; *Reece*, 350 U.S. 85; *Eubanks*, 356 U.S. 584; *Arnold*, 376 U.S. 773; *Alexander*, 405 U.S. 625; *Castaneda*, 430 U.S. 482; *Mitchell*, 443 U.S. 545; *Vasquez*, 474 U.S. 254.

215. 443 U.S. 545 (1979).

which indicts the defendant.[216] In *Mitchell*, the African-American defendants complained that the State of Tennessee had violated their equal protection rights by racially discriminating in the selection of the foreman of the grand jury.[217] Prior to reaching the question of whether Mitchell had proved his claim, the Supreme Court addressed whether a state court defendant should be allowed to challenge, on federal habeas review, the racial make-up of the grand jury that indicts him when he had been found guilty by a petit jury in a constitutionally fair trial.[218] In deciding that state defendants should still be allowed to complain about a racially discriminatory make-up, the Court stated that the societal costs enunciated by the dissent[219] "are outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice."[220] The majority reasoned that

> [d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. 'The injury is not limited to the defendant-there is injury to the jury system, to the law as an institution, to the community at large, and the democratic ideal reflected in the process of our courts.'[221]

The majority further recognized that racial discrimination still occurs in the criminal justice system, albeit in more subtle forms, yet "it is not less real or pernicious."[222] Based on this reasoning the majority of the Mitchell court refused to overturn its prior holdings requiring reversal when a

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216. *Id.* at 559.

217. *Id.* at 548.

218. *Id.* at 587. Basically the Court considered the question whether a defendant's constitutionally valid conviction by a petit jury should render moot his claims regarding the unconstitutional make-up of the grand jury. *Id.* at 582.

219. *See id.* at 578 (Stewart, J., dissenting) (stating there is "heavy societal cost entailed when valid criminal convictions are overturned").

220. *Id.* at 558.

221. *Id.* at 555-56 (citations omitted).

222. *Id.* at 559.

defendant had shown racial discrimination in the selection of the grand jury that indicted him.[223]

In *Mitchell*, the Supreme Court recognized that there are some rights that are so fundamental as to justify vacating validly obtained convictions and that one of those rights is the right to have a trial free from racism. The Court also recognized that there are forms of racism that are subtle, yet remain highly injurious to society as a whole. The use by the State of Texas of Dr. Quijano's testimony stating that Hispanics are to be considered more dangerous because more Hispanics are in prison than in the general population appears to be such a form of racism. The Texas Court

223. *Id.* The Court then turned to the facts of Mitchell's case and found that Mitchell had presented insufficient evidence to establish a *prima facie* case of discrimination in the selection of forepersons, despite the State's concession that Mitchell had presented sufficient proof. *Id.* at 573. *Mitchell* illustrates that since the Supreme Court's opinion in *Strauder*, there has never been a question as to its enunciated principles that racial discrimination in the selection of jurors or grand jurors violates the Equal Protection Clause; rather, in the cases after *Strauder* the Court has been concerned with the question of whether the petitioner has carried the evidentiary burden necessary to prove purposeful discrimination by the State. *See Batson*, 476 U.S. at 89-90 (listing cases). One such case in which the Supreme Court again faced the issue of the evidentiary burden that must be borne by a defendant in a criminal case in alleging racial discrimination is *McCleskey*. *See, e.g.* McCleskey v. Kemp, 481 U.S. 279 (1987). The defendant in *McCleskey*, a black man, argued that racial considerations entered into the determination of his death sentence because the victim was a white man. *Id.* at 282-83. Specifically, McCleskey argued that Georgia's capital sentencing process violates the Eighth and Fourteenth Amendments because it is administered in a discriminatory manner based on race. *Id.* at 286. To prove this claim, McCleskey introduced a statistical study which allowed that black men were several more times as likely to receive the death penalty when the victim was white. *Id.* The Supreme Court, without disputing the statistics contained in the study, held that the defendant was required to show that the decision-makers in his individual case acted with a discriminatory purpose and the statistics McCleskey presented did not show this. *Id.* at 297. The Court reasoned that under equal protection analysis, McCleskey must show purposeful discrimination by the State which has a discriminatory effect on him. *Id.* at 293. Further, the Court stated, because each jury is unique, a general statistical pattern cannot be used to show discrimination in a specific case. *Id.* at 294. The Supreme Court then reasoned under Eighth Amendment jurisprudence that Georgia's capital sentencing statutes and process sufficiently narrow the class of individuals who may be subject to the death penalty and focus the sentencer's discretion on the individual characteristics of the crime and the defendant. *Id.* at 304-05. The Court stated the discretion allowed the decision-maker under Georgia law is guided by objective standards which protect the capital defendant from discriminatory application. *Id.* at 303-04. Significant to the Supreme Court's decision was the Georgia procedure requiring the trial judge to answer a questionnaire about whether racial prejudice influenced the trial and the review by the Georgia State Supreme Court of each death sentence to see if it was imposed because of an influence of any racial prejudice. *Id.* at 303. The Court reasoned that discrepancies are inherent in a judicial system which allows jury discretion to decline to impose a death sentence and that the constitutional requirements are met when the process has sufficient safeguards in place to minimize the influence of racial prejudice. *Id.* at 313.

of Criminal Appeals has apparently not come to this realization, as evidenced by its opinion in *Saldano II*, in which the Court failed to discuss the merits of the error of allowing a person's race to be a factor in determining his future dangerousness and failed even to condemn the use of such.

Although the Texas Court of Criminal Appeals did not seek to ensure that racism does not infect trials, the Supreme Court has consistently sought to ensure that racism, in any form, does not invade the criminal justice system and capital murder proceedings in particular. For example, the Supreme Court, in *Turner v. Murray*,[224] held that a capital defendant is entitled to *voir dire* the jury on racial bias whenever the defendant is charged with an interracial crime.[225] Prior to *Turner*, the Court held that the Constitution did not require *voir dire* questioning into racial prejudice of potential jurors simply because the defendant and alleged victim were of different races.[226] Rather, it was held that questioning of jurors regarding their personal racial prejudices was not constitutionally required unless the circumstances and specific facts involved in the charged crime created a significant probability that racial prejudice might play a part in the trial.[227] In *Turner*, however, the Supreme Court held that in capital murder prosecutions involving interracial violence the triai judge must allow questioning into the racial bias of potential jurors if requested by the defendant.[228] The Court held that capital cases require a different rule because the jury is required to make a unique and individualized determination that a defendant is deserving of death, and "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."[229] The Court explained its reasoning, stating that

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a

224. Turner v. Murray, 476 U.S. 28 (1986).
225. *Id.* at 36-37.
226. Ristaino v. Ross, 424 U.S. 589, 597 (1976)
227. *Id.*
228. *Turner*, 476 U.S. at 36-37.
229. *Id.* at 35.

juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[230]

The Court reiterated that different rules operate in death penalty cases, recognizing that "the qualitative difference of death from all other punishments, requires a correspondingly greater degree of scrutiny of the capital sentencing determination."[231]

Despite this United States Supreme Court death penalty jurisprudence, the Texas Court of Criminal Appeals, in *Saldano II*, fails to give Mr. Saldano's case any great scrutiny nor does it give any explanation as to why it is not an absolute requirement or a non-waiveable right to have a trial free from testimony stating a defendant's race may be considered in determining his future dangerousness.[232] Further, the Court of Criminal Appeals' refusal in *Saldano II* to recognize that the type of evidence put forth through the testimony of Dr. Quijano allows what the Supreme Court was worried about in *Turner*—that "racial prejudice [will] operate but remain undetected."[233]

Particularly relevant to *Saldano II* is another grand jury discrimination case, *Castaneda v. Partida*,[234] in which the Supreme Court reversed a Texas Court of Criminal Appeals' decision. At trial, Partida complained that Hidalgo County discriminated against Mexican Americans in selecting persons to serve on the grand jury.[235] As evidence of this discrimination, Partida presented records to the district court showing that although the county had a Mexican-American population with Spanish surnames of over 79.1%, only 39% of the persons serving as grand jurors had Spanish surnames.[236] Although the State introduced no evidence disputing these numbers, the trial court overruled Partida's motion for new trial which alleged discrimination in the selection of the grand jury which indicted him.[237] On appeal to the Texas Court of Criminal Appeals, the court questioned the statistics for not showing that all persons identified with Spanish surnames were qualified to serve as grand jurors, stating:

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230. *Id.* at 35-36.

231. *Id.*

232. *See* Marin v. State, 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993) (delineating categories of rights and stating "[r]ights which are waiveable only, as well as absolute systemic requirements and prohibitions, cannot be made subject to rules of procedural default . . . .").

233. *Turner*, 476 U.S. at 35.

234. 430 U.S. 482 (1977).

235. *Id.* at 483-85.

236. *Id.* at 486-87.

237. *Id.* at 488-89.

> How many of those listed in the census figures with Mexican-American names were not citizens of the state, but were so-called 'wetbacks' from the south side of the Rio Grande; how many were migrant workers and not residents of Hidalgo County; how many were illiterate and could not read and write; how many were not of sound mind and good moral character, how many had been convicted of a felony or were under indictment or legal accusation of theft or a felony; none of these facts appear in the record.[238]

The Texas Court of Criminal Appeals viewed the absence of this information as a failure by Partida to establish a *prima facie* case of discrimination. Additionally, the court determined discrimination could not have occurred because a majority of the elected positions in Hidalgo County were held by Mexican Americans and elected officials would not discriminate against those who voted for them.[239]

Once the case reached the United States Supreme Court, the holding of the Texas court was overturned. The Court held that through the presentation of statistics showing the great disparity, Partida had indeed presented a *prima facie* case of discrimination which the State of Texas was required to rebut.[240] The United States Supreme Court rejected the Texas Court of Criminal Appeals' reliance on the fact that a majority of the elected offices in Hidalgo County were held by Mexican Americans, the "governing majority" theory, to hold Partida had not proven discrimination in the selection of grand jurors.[241] The Supreme Court reiterated its rejection of the theory that persons of the same race will not discriminate against each other. The Supreme court also rejected the Texas court's reasons as to why more Mexican Americans did not serve on grand juries. Perhaps it was the use of the derogatory term "wet-back," which the Supreme Court felt necessary to quote in its opinion, that helped convince the Supreme Court that Mexican-American defendants in Texas are indeed discriminated against because of their ethnicity.

Although it has been nearly three decades since the Texas Court of Criminal Appeals referred to Mexican Americans as "wet-backs," the *Saldano II opinion* makes clear that the court still does not realize the seriousness of the problem presented by racism in the criminal justice system. This is particularly evident because the court, in *Saldano II,* will not admit that every person has the fundamental right to a trial free from racial prejudice of any sort, whether at trial or in the grand jury process.

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238. *Id.* at 498 (quoting Partida v. State, 506 S.W.2d 209, 211 (Tex. Crim. App. 1974), *overruled by* Castaneda v. Partida, 430 U.S. 482 (1977)).

239. *Partida,* 506 S.W.2d at 211.

240. *Castaneda,* 430 U.S. at 496-98.

241. *Id.* at 499.

IV. CRITICISM OF *SALDANO II*

A. *The Introduction of Race into Trial Has Long Been Discouraged by the Courts*

As has been demonstrated, courts have strongly discouraged references to race in both criminal and civil trials.[242] Most reported cases addressing racial references in trials have used language that is clear in its criticism: "[i]t was so repulsive to every idea of a fair trial as to cause us to have no hesitancy in holding it reversible error . . . . This sort of procedure will not be tolerated . . . .";[243] "It was an inflammatory appeal to prejudice . . . . It was the arraignment of a race not on trial . . . . The course pursued in this case was one that no court of justice ought for a moment to tolerate; and it certainly must be true that the judge who tried this case did not fully understand the language . . . or he would not have permitted it, - - would have rebuked, and ought to have punished its author;"[244] "Race and color are also a matter of indifference . . . . A jury of white men cannot be called on to determine the credibility of witnesses on the theory that the Caucasian race has a monopoly on the virtues of truth and veracity and people of other races, by virtue of their color, are inbred with dishonest and perjury without implanting in the minds of jurors the deepest and most ineradicable type of prejudice;"[245] "This 'us' against 'them' argument is also nothing more than an appeal to ethnic or national origin prejudice which is constitutionally impermissible;"[246] "The introduction of this irrelevant material prejudiced appellant by casting him in the eyes of the jury as a member of a group with values allegedly alien to the rest of society, and therefore implying that it was more likely that he committed the crime charged;"[247] "We reverse because attempts to attribute criminal conduct to a defendant based on racial or ethnic background have been uniformly condemned by the courts of this state. These tactics have been found to be fundamental error and reversal has occurred when there has been a failure to object and move for mistrial;"[248] "It was totally unnecessary and clearly contrary to the interests of the state in bringing convicted criminals to justice for the prosecutor to introduce this kind of hatred-engendering forensics. We cannot let the

242. *See* McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) (listing cases forbidding use of race in criminal justice system). *See generally* Landis, *supra* note 65.

243. Derrick v. State, 272 S.W. 458, 459 (Tex. Crim. App. 1925).

244. Moss v. Sanger, 75 Tex. 321, 12 S.W. 619, 620 (1889).

245. Texas Employer's Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 855, 859 (1954).

246. Guerra v. Collins, 916 F.Supp 620 (S.D. Tex. 1995).

247. Commonwealth v. Tirado, 375 A.2d 336, 338 (Pa. 1977).

248. Terrazas v. State, 696 So.2d 1309, 1310 (Fla. App. 2. Dist. 1997) (citations omitted).

death penalty stand under these circumstances;"[249] "To sentence an individual to death on the basis of a proceeding tainted by racial bias would violate the most basic values of our criminal justice system."[250]

In the case of Victor Hugo Saldano, however, the Texas Court of Criminal Appeals refused to discuss, much less discourage or condemn, the use of race in his death penalty punishment proceeding.[251] In fact, the court failed to admonish the State's attorney for using such evidence in a capital sentencing proceeding and did not point out the trial judge's duty to ensure Mr. Saldano's trial was free from racial taint.[252] Mr. Saldano's case did not involve a simple reference to race or prosecutorial argument regarding race, it involved the actual admission of race evidence, evidence the jury could take into the jury room and use in its deliberations. But because the defense attorney failed to object to the testimony, the court refused to consider the merits of Mr. Saldano's complaint about the introduction of race into his sentencing proceeding.[253]

B. *Hiding Behind the Contemporaneous Objection Rule*

The Court of Criminal Appeals shielded itself from having to discuss the impropriety of introducing Dr. Quijano's race-based testimony by holding that such a discussion was unnecessary because the issue had not been preserved for appellate review.[254] Had the attorney objected, the court would have been required to reverse Mr. Saldano's death sentence "unless the court determine[d] beyond a reasonable doubt that the error did not contribute to the . . . punishment."[255] There is no doubt that precedent would have required the reversal had an objection been made.[256] However, because no objection was made in Mr. Saldano's case, the Court of Criminal Appeals simply refused to address the issue.[257]

The court even failed to admonish the State for using such evidence. It is as if the court did not even recognize that the introduction of race, as a

249. Dawson v. State, 734 P.2d 221 (Nev. 1987).

250. Turner v. Murray, 476 U.S. 28, 43 (1986) (Brennan, J., concurring and dissenting).

251. Saldano v. State, 70 S.W. 3d 873 (Tex. Crim. App. 2002).

252. *See* Texas Employer's Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 855, 859-60 (1954) (stating trial judge has duty to ensure trial is free of racial taint).

253. *Saldano*, 70 S.W.3d at 890.

254. *Id.*

255. TEX. R. APP. P. 33.1(a), 44.2(a)

256. *See* Derrick v. State, 272 S.W. 458 (Tex. Crim. App. 1925) (objection made to racial remarks and case reversed); Hatton v. State, 125 Tex. Crim. 56, 66 S.W.2d 331 (1933) (objection made to racial remarks and case reversed); Dinklage v. State, 185 S.W.2d 573 (Tex. Crim. App. 1945) (objection made to racial remarks and case reversed).

257. *Saldano*, 70 S.W.3d at 890.

permissible factor upon which to sentence a defendant to death, constituted racial discrimination. Attorney General John Cornyn recognized it as such, calling it "repugnant and offensive," and taking the extraordinary step of confessing error before the United States Supreme Court.[258]

Texas appellate courts have stated it is unethical for attorneys to appeal to race and that it is the duty of the judge to admonish attorneys for doing so.[259] The Court of Criminal Appeals did not tell the State in *Saldano II* that there was anything wrong with the prosecution's introduction of Dr. Quijano's testimony regarding the correlation between race and incarceration. This can only lead to a belief that it is permissible for the State to introduce this type of evidence and appropriate for defense counsel not to object to it.[260] The State did introduce this evidence in several other death penalty cases, with both Hispanic and African-American defendants.[261] Thankfully, the Texas Legislature has ensured it will not happen again. In direct response to the original opinion issued in *Saldano I,* the Legislature amended Texas Rule of Criminal Procedure article 37.071 by prohibiting the State's use of race as a factor the jury can consider in capital sentencing proceedings.[262] The Court of Criminal Appeals failed to tell the State the introduction of race was impermissible; the Texas Legislature had to do that. It appears the court felt that if a defense attorney did not lodge an objection to the unconstitutional interjection of race in the punishment proceeding, the court was not obliged to review such interjection.[263] Such a belief, however, presupposes that the defense attorney recognized the offensive nature of Dr. Quijano's testimony.[264]

More troublesome is the Court's implicit approval of not only the State's use of race as evidence of a capital defendant's future dangerousness, but the approval as "trial strategy" of a defense attorney's use of race in a capital sentencing proceeding.[265] The court in *Saldano II* cites

258. *See* Bob Richter, *District Attorneys, AG at Odds Over Legislation,* SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2001, at 10A.

259. *See* Tex. Employer's Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856, 859-60 (1954) (stating it is unethical for attorney to use race-based argument or cross-examination and duty of judge to prevent such use); Moss v. Sanger, 75 Tex. 321, 12 S.W. 619, 620 (Tex. 1889) (stating trial court would have rebuked and punished attorney who made race-based remarks if it had understood attorney's remarks).

260. *But see* TEX. CODE CRIM. P. ANN. art. 37.071 § 2(a)(2) (Vernon Supp. 2001) (now prohibiting State's use of race in capital sentencing proceeding).

261. Press Release, *supra* note 34 (listing other cases).

262. TEX. CODE CRIM. P. ANN. art. 37.071 § 2(a)(2) (Vernon Supp. 2001).

263. *See* Saldano v. State, 70 S.W.3d 873, 886 (Tex. Crim. App. 2002) (holding defense attorney's have had trial strategy reasons for not objecting).

264. *See* Howell, *supra* note 26.

265. *Saldano,* 70 S.W.3d at 886 n.49.

with approval the case of Garcia v. State,[266] in which the defense attorney for Garcia introduced Dr. Quijano's testimony regarding the same evidence as testified to in Mr. Saldano's trial. Garcia argued on appeal that this was ineffective assistance of counsel. The Court of Criminal Appeals found that the introduction by the defense counsel of Dr. Quijano's testimony was "trial strategy," and therefore did not represent ineffective assistance of counsel.[267] Ironically, even though both Justice Johnson and Justice Price dissented in *Saldano II*, they both joined in the unanimous judgment affirming Garcia's death sentence.

The court also held in *Saldano II* that the failure to object to the State's proffer of this evidence is not ineffective assistance of counsel.[268] These rulings by the Court of Criminal Appeals, apparently approving consideration of race by the jury in determining a defendant's future dangerousness, leave defendants in Mr. Saldano's position with no possible avenue of relief: the error is waived on appeal if it is not objected to at trial[269] and it is not ineffective assistance of counsel for the attorney to fail to object.[270]

C. *Court Should Have Recognized that the Introduction of Race in a Capital Sentencing Proceeding is Fundamental Error*

In *Saldano II*, the Court of Criminal Appeals failed to cite Rule 103(d) of the Texas Rules of Evidence regarding fundamental error, even though Mr. Saldano had requested relief under this rule in the original submission of the case.[271] The closest the majority came to addressing the rule was when it cited Rule 52(b) of the Federal Rules of Criminal Procedure,[272] which is the federal rule allowing courts to review errors not objected to which affect a defendant's substantial rights.[273] The court stated such errors are known as fundamental errors in Texas.[274] Under Rule 52(b) the federal courts may reverse cases in which the error not objected to was plain, affected the defendant's substantial rights, and the error was such that "it 'seriously affect[ed] the fairness, integrity, or public reputa-

266. 57 S.W.3d 436 (Tex. Crim. App. 2001).

267. *Id.* at 441.

268. *Saldano*, 70 S.W.3d at 886.

269. *Id.*; TEX. R. APP. P. 33.1.

270. *Cf. Garcia*, 57 S.W. at 440-41 (defense attorney's admission of race factor evidence not ineffective assistance of counsel).

271. *See* Saldano v. State, No. 72,556, slip op. at 10 (Tex. Crim. App. Sept. 15, 1999), *vacated by* 530 U.S. 1212 (2000).

272. *Saldano*, 70 S.W.3d at 887 n.58.

273. FED. R. CRIM. P. 52(b).

274. *Saldano*, 70 S.W.3d at 887.

tion of judicial proceedings.'"[275] Although the court cited Rule 52(b), it did not rely on it for its holding. Instead, the Court reiterated the categories of error,[276] and, without any meaningful analysis, held the error about which Mr. Saldano complained of to not be one of the two types that may be raised on appeal absent an objection at trial.[277] The court, even by way of analogy, did not explain why the use of race in Mr. Saldano's trial did not affect his substantial rights or "affect the fairness, integrity, or public reputation of judicial proceedings."[278] Since the court chose to take a different path than the other courts have historically chosen, one would think that the court would want to elaborate on its reasoning as to why this does not constitute fundamental error. Had the court analyzed the error meaningfully and studied how various courts have treated the interjection of race into trials, it would have realized that the interjection of race into Mr. Saldano's capital sentencing proceeding was fundamental error.

As set out above, courts have universally condemned the interjection of race into trials. Further, the United States Supreme Court has engaged in "unceasing efforts to eradicate racism" in the criminal justice system.[279] This is especially true in capital punishment proceedings where the Supreme Court has stated that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate .... 'The Court ... has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'"[280] When dealing with the issue of racial prejudice, people who have racially-biased beliefs that minorities are more violence prone might bring those beliefs into the deliberation process in deciding if the defendant is likely to be a danger in the future.[281] Herein lies the problem: Mr. Saldano's case allowed evidence into the proceeding that tends to confirm baseless prejudices already held in the minds of the jurors.[282] His case did not involve racial discrimination in choosing the jury[283] or grand jury;[284] rather, the admission of the race

275. Jones v. United States, 527 U.S. 373, 389 (1999).

276. *Saldano,* 70 S.W.3d at 887-89.

277. *Id.* at 889.

278. *See Jones,* 527 U.S. at 389 (establishing the standard).

279. Batson v. Kentucky, 476 U.S. 79, 84 (1969).

280. Turner v. Murray, 476 U.S. 28, 35 (1986) (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)). In *Turner,* the Supreme Court candidly discussed the issues of both overt and subtle racial attitudes which could influence a juror's decision in a case. *Id.*

281. *Id.* at 39.

282. *Cf.* at 35-36.

283. *See, e.g., Baston,* 476 U.S. 79.

284. *See, e.g.,* Vasquez v. Hillery, 474 U.S. 254 (1986).

factor testimony actually allowed evidence to be presented to the jury that could have served to confirm already held prejudices or that could sway a juror into believing the proposition that a particular ethnic group is somehow inferior.

As Attorney General John Cornyn stated, the use of race in Mr. Saldano's trial was "repugnant and offensive."[285] To punish a person because he was born into a particular ethnic group is indeed repugnant and offensive. Both Congress and the Texas Legislature agree on this point and have passed laws prohibiting the introduction or consideration of race in a capital sentencing proceeding.[286] Clearly, in light of the *Saldano II* decision, it is only the Texas Court of Criminal Appeals that fails to understand the error of using a person's race in deciding if he lives or dies.

Additionally problematic is the fact that the introduction of this race-based evidence creates divisiveness in society.[287] It is state-based race discrimination at its worst.[288] The Court of Criminal Appeals' tacit approval of the use of race as a factor in the future dangerousness determination sends the struggle for racial harmony back to its beginnings.

In the past, when race-based remarks were made at trial, the courts were quick to condemn it and to chastise those who introduced it.[289] The courts also recognized that a harmless error analysis was incapable of being applied to such trial errors because there was no way by which to gauge the harmful effects.[290] The United States Supreme Court recognizes that harmful effects cannot be determined when the error is in al-

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285. *See* Richter, *supra* note 258.

286. *See* 18 U.S.C. § 3593(f) (requiring jury instruction prohibiting consideration of race in reaching capital sentencing decision); TEX. CODE CRIM. P. ANN. art. 37.071, § 2(a)(2) (Vernon Supp. 2001) (prohibiting State's introduction of race as factor for jury to consider in determining future dangerousness).

287. *Cf.* Tex. Employer's Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 865 (Tex. App.—San Antonio 1990, writ denied) (stating race-based remarks are "an attack on the social glue that helps bind society together"); People v. Thomas, 514 N.Y.S.2d 91, 93 (App. Div. 1987) (stating vice of racial jury argument is divisiveness it creates).

288. *Cf.* United States v. Webster, 162 F.3d 308, 355-56 (5th Cir.), *cert. denied*, 528 U.S. 829 (1999) (stating race discrimination in justice system is "especially pernicious").

289. *See, e.g.*, Tex. Employer's Ins. Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856, 859-60 (1954) (stating it is unethical for attorney to use race-based argument or cross-examination and duty of judge to prevent such use); Moss v. Sanger, 75 Tex. 321, 12 S.W. 619, 620 (1889) (stating trial court would have rebuked and punished attorney who made race-based remarks if he had understood attorney's remarks).

290. *Guerrero*, 800 S.W.2d at 863. *Cf.* Rose v. Mitchell, 443 U.S. 545, 574 (1979) (holding error in discriminatory selection of grand jurors not subject to harm analysis); *see* Saldano v. State, 70 S.W.3d 873, 893 (Tex. Crim. App. 2002) (Johnson, J., dissenting) (stating impossible to measure effect on jury).

lowing the racially discriminatory selection of grand jurors,[291] or when the prosecutor uses racial discrimination in making his charging decision.[292] Likewise, the harmful effect cannot be gauged when a person's race is used to determine his future dangerousness and a curative instruction cannot remove the taint from the jurors' minds, thereby eliminating the need for an objection.[293] The court's inability to determine the harmful effect, the historical condemnation of the use of race in the justice system and laws passed preventing the use of race in capital sentencing proceedings, as well as society's recognition that racism will not be tolerated, dictate that it was fundamental error for the State to introduce the testimony of Dr. Quijano concerning race as a permissible aggravating factor upon which the jury was allowed to base its sentencing decision.

V. CONCLUSION

The Court of Criminal Appeals' failure to recognize the use of race in Mr. Saldano's trial as fundamental error suggests the court is of the opinion his punishment proceeding was fair. But how fair is it for the court to hide behind the contemporaneous objection rule, stating the error was waived by the defense attorney's failure to object, and then to tell Mr. Saldano that his lawyer's failure to object was not ineffective assistance of counsel?

Looking at *Saldano II* in light of historical precedent, it is apparent that something may be seriously wrong in the Texas Criminal Justice System, a system which allows the State to actually introduce such evidence in more than one case, a system in which more than one defense lawyer fails to object, a system in which not one, but several trial judges allow race-based evidence in, and a system in which the highest criminal appellate court refuses even to discuss the merits of the issue.

Racial appeals are not just wrong based on our belief system. They are irrelevant in these cases and, more importantly, are contrary to established legal principles—the very same established legal principles which our criminal justice system is built on. The historical legal trend throughout the nation has been towards eradicating racial prejudice from the criminal justice system. In some parts of Texas, courts appear to be less sensitive towards racial appeals in the courtroom. It seems odd that judges in Texas from the late 1800s were more enlightened in their intolerance of racial bias than is our present Court of Criminal Appeals. It

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291. *Mitchell*, 443 U.S. at 555-56.

292. United States v. Batchelder, 442 U.S. 114, 125, n.9 (1979).

293. Cf. Terrazas v. State, 696 So.2d 1309, 1310 (Fla. App. 2 Dist. 1997) (stating the use of race at trial fundamental error); *see Saldano*, 70 S.W. 3d at 893 (Johnson, J., dissenting) (stating impossible to measure effect).

seems as though *Saldano* would have been more understandable, but still incorrectly decided, had the opinion been delivered in the 1890s as opposed to the twenty-first century. Fortunately, any future use of testimony like that in Mr. Saldano's case will no longer be admissible in the sentencing portion of a death penalty case.

One has to wonder if the outcome of the case would have been different if the very same type of evidence were introduced relating to a white defendant in a court where the jury, judge, prosecutor and defense lawyer were African Americans or Hispanics, and would there be a greater outcry? Simply stated, if one were to find a "doctor" that testified to the propensity of violence as it related to a white man on trial for the murder of an individual of color, would the public be outraged at such a characterization of the white community? Of course the example is currently unrealistic. But were the roles reversed, would the result of these cases be different?

Based upon the historical precedent both within and outside the State of Texas, it would seem that race or ethnicity should not be used for any purpose at trial. As the Texas Supreme Court stated in *Moss v. Sanger*,[294] "Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or gentile, white or black is a matter of indifference."[295]

294. 75 Tex. 321, 12 S.W. 619 (1889).
295. *Id.* at 620.