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UNITED STATES OF AMERICA “A skunk in the jury box”

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A US national is arrested abroad. He is not informed of his right to contact his embassy. He is charged with capital murder and brought to trial. The prosecution seeks to bolster its case for a death sentence by introducing an expert witness who testifies that the defendant's nationality is a reason to fear that he will commit further acts of criminal violence if allowed to live. The witness bases his theory on the fact that US nationals are disproportionately represented among the world's prison population, pointing to the almost two million people incarcerated in the USA. The accused is sentenced to death.

The US Government is outraged. Not only was its citizen denied his consular rights in violation of international law, but the jury was encouraged to vote for execution on the basis of the defendant's nationality, a clear violation of the international prohibition on discrimination, whether it be on the grounds of racial, ethnic or national origin. The US Government demands that the death sentence be overturned.

The above case is invented. The case of Victor Saldaño is not.

Victor Saldaño, an Argentine national, was arrested in 1995 in Texas, USA. He was not informed of his rights upon arrest to contact his consulate. He was charged with capital murder. At the trial, the state obtained a conviction, and the proceedings moved into a separate sentencing phase. In Texas, a death sentence can only be passed if the jury finds that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” – so-called “future dangerousness”. At Victor Saldaño's sentencing, the prosecution presented a psychologist who testified that “because [Saldaño] is Hispanic, this is a factor weighing in favour of future dangerousness”. This expert witness said that he based his theory on the fact that “Hispanics are over-represented in prison compared with their percentage of the general population”. In his closing argument for execution, the prosecutor also added a xenophobic note when he referred to Victor Saldaño as having “invaded our country”. The jury voted for death. The Texas Court of Criminal Appeals affirmed the verdict in 1999. The Government of Argentina has called for commutation of its national's death sentence.

The Attorney General of Texas has taken a principled stand. In 2000, he “confessed error” in the US Supreme Court; that is, he admitted that the introduction of race as a factor for determining future dangerousness violated Victor Saldaño's right to equal treatment before the law. On 5 June 2000, the Supreme Court – which in 1986 had pointed out 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 to remain undetected” – sent the case back to the Texas Court of Criminal Appeals in order for the state court to give the case “further consideration in light of the confession of error”.

Shockingly, on 13 March 2002, the Court of Criminal Appeals again upheld the death sentence. Two judges dissented. One wrote: “The analogy of a skunk in the jury box is instructive. Racial prejudice can sneak into the jury box...”. He said that it did not matter that the prosecution had not specifically emphasized the psychologist’s prejudicial testimony in its closing argument: “A skunk whether hurled or merely tossed into the jury box still fouls the air... If a skunk is allowed into the jury box, nothing will remove its stench. I cannot condone a decision to impose the death penalty when I am uncertain whether racial prejudice was a component of that decision”.

The case is now in the federal courts. In May 2002, Texas Attorney General John Cornyn once again confessed error. He has asked a US District Court either to require the trial court to impose a life sentence, or to conduct a new sentencing hearing. The Collin County District Attorney – whose office was responsible for the original prosecution – is seeking to have the death sentence upheld. Victor Saldaño remains on death row.

It is time for executive intervention. Texas Governor Rick Perry should make it clear that his state will not tolerate discrimination in the criminal justice system. He should call on the Collin County prosecutor to follow Attorney General Cornyn’s example and confess error, in line with the United Nations Guidelines on the Role of Prosecutors which require such officials to avoid all discrimination of any kind. The Governor should also ask the Board of Pardons and Paroles to examine the case with a view to recommending commutation of Victor Saldaño’s death sentence.

But the federal government, too, should make a public intervention and call on all officials involved in the case to uphold the USA’s international obligations. The state has violated a number of treaties ratified by the United States – the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination both prohibit discrimination on racial, ethnic or national origin; and the Vienna Convention on Consular Relations requires that arrested foreign nationals be informed promptly upon arrest of their right to contact their embassy.

In 1996, the year of Victor Saldaño’s trial, the US Government told Amnesty International that, while it supports the death penalty, it is nevertheless “unalterably opposed to its application in an unfair manner, particularly if that unfairness is grounded in racial or other discrimination”. Six years on, President George Bush said in his State of the Union address that “America will always stand firm for the non-negotiable demands of human dignity”, one of which is the right to “equal justice”. The Saldaño case provides an opportunity for the US government to prove that it means what it says.

The whiff of the skunk still lingers. It is time for a breath of fresh air.

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