IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0196-16

RODNEY DIMITRIUS LAKE, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

YEARY, J., filed a concurring opinion in which NEWELL and KEEL, JJ., joined.

CONCURRING OPINION

I readily agree with the plurality that the error involved in this case—denial of the right to have counsel make a final summation in a community supervision revocation proceeding—is not structural, and is not likely to be found "structural" by the United States Supreme Court, for the reasons the plurality describes today. Because the error is of federal constitutional dimension, but not structural, it is subject to the harm analysis prescribed in Rule 44.2(a) of the Rules of Appellate Procedure, and the Court appropriately remands the cause to the court of appeals to conduct such a harm analysis. *See* TEX. R. APP. P. 44.2(a) ("If

the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse the judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment."). For these reasons, I endorse much of what the plurality says today and ultimately concur in the result.

I cannot join the plurality's opinion, however, because it persists in adhering to certain categorical language in *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997), that I believe may not have survived the enactment of Rule 44.2(a). Construing former Rule 81(b)(2), the Court declared in *Cain* that all error is subject to a harm analysis, with only a single exception: "certain federal constitutional errors labeled by the United States Supreme Court as 'structural[.]'" *Id*. Of course, Rule 81(b)(2) did not, on its face, recognize this exception.[1] Instead, applying to constitutional and non-constitutional error alike, Rule 81(b)(2) seemed on its face to subject all errors to a *Chapman*-type constitutional harm analysis,[2] requiring reversal of the conviction "unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or punishment." We recognized in *Cain* that we simply could not apply Rule 81(b)(2) literally, applying it to all

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[1] Former Rule 81(b)(2) read: "If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment." TEX. R. APP. P. 81(b)(2), 49 Tex. B.J. 581 (Tex. & Tex. Crim. App. 1986, amended 1997).

[2] *See Chapman v. California*, 386 U.S. 18, 24 (1967) (holding that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

manner of *federal constitutional* error, without violating the Supreme Court's doctrine of structural error—"that there are some [federal] constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error[.]" *Chapman v. California*, 386 U.S. 18, 23 (1967). *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (enumerating so-called "structural defects"—violations of federal constitutional prescripts held to be so "basic" to the reliable functioning of the criminal justice system that they are not subject to a harm analysis).

Effective September 1, 1997, however, Rule 81(b)(2) was replaced by Rule 44.2. For the first time, constitutional error and ordinary error were separated for purposes of prescribing the appropriate analyses for harm. On its face, Rule 44.2(b) sets out the appropriate harm analysis for non-constitutional errors, and admits of no exceptions whatsoever.[3] To this extent, it is consistent with *Cain*'s pronouncement with respect to Rule 81(b)(2), namely, that it applies categorically to *all* non-constitutional errors. Rule 44.2(a), by contrast, actually includes within its text an explicit limitation. It applies *Chapman*'s constitutional harm analysis, but only when the constitutional error "is subject to harmless error review" in the first place. This language more than suffices to accommodate the Supreme Court's doctrine of structural error.

In fact, the language of Rule 44.2(a) is sufficiently generalized that I feel compelled to question the Court's continued adherence to *Cain*. *See*, *e.g.*, *Schmutz v. State*, 440 S.W.3d

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[3] *See* TEX. R. APP. P. 44.2(b) ("Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

29, 38 (Tex. Crim. App. 2014) (holding that, even after the enactment of Rule 44.2, "[o]nly structural error requires reversal without any harm analysis"). Under Rule 44.2(a), who determines whether the constitutional error is "subject to harmless error review"? And according to what criteria? Nowhere on its face does the rule make it explicit that the *only* context in which it is inappropriate to conduct a harm analysis is when the error constitutes a federal constitutional violation that amounts to a structural defect. Indeed, Rule 44.2(a) does not employ the word "structural," and it is not limited to *federal* constitutional error. I am not inclined to straightjacket our construction of the rule as the plurality continues to do today, in derogation of this Court's authority to, for example, declare certain *state* constitutional violations to be immune to harm analysis, or perhaps even declare certain classes of federal constitutional violations to be so detrimental to the conduct of a fair trial as to be immune to harm analysis before the Supreme Court has spoken on the subject. It is not at all clear to me that Rule 44.2(a) should be read to deprive us of this authority in the same way that we read Rule 81(b)(2) to constrain us in *Cain*.

But this case does not involve a claim of state constitutional dimension, and because I agree that this particular federal constitutional defect is not structural, and that it ought to be "subject to harmless error review" within the meaning of Rule 44.2(a), I concur.

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