

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-2319

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CARLOS SANTANA,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director,  
Texas Department of Criminal Justice,  
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA H 87 2024)

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(November 23, 1992)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:\*

Carlos Santana, convicted of capital murder for which the death penalty was assessed, appeals the denial of his petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The district court has denied Santana's motion to proceed in forma pauperis (IFP) and his application for certificate of probable cause (CPC). We deny the CPC and the motion to proceed IFP.

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\* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Santana was convicted of the capital murder of Olivero Flores, a driver for the Purolator Armored Company, during the course of a robbery. The details of the murder are set forth in the opinion on Santana's direct appeal of his conviction. See Santana v. State, 714 S.W.2d 1 (Tex. Crim. App. 1986). No petition for certiorari was filed. Santana's one application for state habeas corpus relief was denied without written order by the Texas Court of Criminal Appeals in 1987. See Ex parte Santana, Application No. 11,912-03. Later in 1987, the federal district court granted a stay of execution pending its consideration of Santana's petition for writ of habeas corpus. In 1990, that court denied habeas relief and dismissed the petition; on March 18, 1992, the court denied a motion to alter or amend the judgment, and on May 11, 1992, the court denied CPC.

II.

In order to obtain CPC, Santana must make a substantial showing of the denial of a federal right. See Fed. R. App. P. 22(b); Barefoot v. Estelle, 463 U.S. 880, 893 (1983). By this he must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are `adequate to deserve encouragement to proceed further.'" Barefoot, id. at 893 n.4 (brackets in Barefoot, citation omitted). We conclude that under this standard, Santana is entitled to no relief. He raises seven issues that we

consider seriatim.

### III.

Santana claims that he was deprived of due process of law by the trial court's refusal to give a requested instruction on the lesser-included offense of murder and its refusal to allow voir dire on lesser-included offenses. Santana claims that the evidence would have allowed the jury to acquit him of capital murder and find him guilty of felony murder, the difference being in regard to the culpable mental state.

Our task is to "determine whether, under the law as set out by the state court, `a rational juror, given all the facts, could have acquitted [Santana] of capital murder and convicted him of a lesser included offense.'" Hill v. Black, 932 F.2d 369, 374 (5th Cir. 1991) (citing Cordova v. Lynaugh, 838 F.2d 764, 767 (5th Cir. 1988)). Because Santana's claim "turns on an application of state law rather than federal law, this court must give deference to the articulation by the state's highest court of how the state law applies to the facts of the case." Hill, id.

A person commits felony murder when, during the commission of another felony, he "commits . . . an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code Ann. § 19.02(a)(3). As it is relevant to the instant case, a person commits capital murder when he intentionally causes the death of an individual while in the course of committing certain enumerated felonies. Id. § 19.03(a)(2). Santana asserts that the jury could

have found that, although he intended to commit robbery, he did not intend to murder.

As the Texas Court of Criminal Appeals determined, however, the evidence does not raise the issue of a lesser-included offense. Shortly before the robbery, Santana and his accomplice, James Meanes, went to a shooting range and practiced firing Santana's pistol and shotgun. At the robbery, Santana and Meanes confronted Flores, ordered him to halt, and immediately fired two shots, whereupon Flores fell dead, his gun still in its holster. Santana and Flores then fired at least twenty shots at the armored car, in which Flores's partner, Dorothy Wright, still sat.

Under these facts, nothing suggests the possibility that Santana intended only to rob and not to kill. Hence, there is no requirement that the trial court allow voir dire on lesser-included offenses or give a jury instruction to that effect.

#### IV.

Santana claims that he was denied his constitutional right to a verdict based upon individualized consideration of his own culpability because the jury, over objection, was told that it could apply the Texas law of parties during the punishment phase. Santana claims that the state argued at the punishment phase that the law of parties applied to the answers to the punishment questions and that the jury could consider Meanes's actions in deciding Santana's punishment, in violation of Enmund v. Florida, 458 U.S. 782 (1982). As Santana points out, the Court in Enmund

held that a state may not impose the death sentence on a defendant unless it is proven that he personally killed, intended to kill, or contemplated that lethal force be used. Id. at 798.

It is undisputed that no charge was given to the jury, at the punishment phase, regarding the law of parties. That is, the jury was neither told that the law of parties applied nor that it did not apply. In Texas, the law is that since the first special issue "clearly focuses the jury's attention on the individual defendant by asking if "the conduct of the defendant" was committed deliberately and with the expectation that death would result," it includes the required Enmund finding, so no further instruction is needed. Cuevas v. State, 742 S.W.2d 331, 351 (Tex. Crim. App. 1987) (citation omitted), cert. denied, 485 U.S. 1015 (1988).

When a habeas court reviews an Enmund claim, it must examine the entire state record to decide whether the requisite factual finding as to the defendant's responsibility has been made. Cabana v. Bullock, 474 U.S. 376, 387-88 (1986). Such a finding is presumed correct. Here, the district court found that the state courts had made a factual determination of his personal culpability, so Santana is entitled to no relief, the Texas Court of Criminal Appeals having upheld the factual determination of his individual culpability.

While the jury was told at the guilt-innocence phase that the law of parties applied, it was given no such instruction at the punishment phase. Moreover, the wording of the first special issue amply focuses upon the individual conduct of the defendant who is

being tried.

Santana lamely relies upon certain comments of the prosecutor at the penalty phase. For example, the prosecutor stated, "What evidence do we have to assist you in that regard? All the evidence that was put before in the case in chief, the planning, the acts of Carlos Santana, the actions of James Ronald Meanes . . . ." The prosecutor also stated, "Once you have found a Defendant guilty of being a party to capital murder, as the facts in this case indicate, the answer to question one can only be yes." This was in the context, however, of the prosecutor's focus on the language of the first special issue, which, at the time of the murder in question, was "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result." Tex. Code Crim. Proc. Ann. art. 37.071(b).

Thus, the prosecutor stated, "I don't believe you are going to have any problem with Question Number 1 or Question Number 2, specifically question number 1 regarding whether or not the act of Carlos Santana was deliberate in causing the death of Olivero Flores . . . ." Additionally, when the prosecutor mentioned Meanes's actions, it was said only in summarizing all the evidence that was adduced at the guilt-innocence phase of trial. And, in finally asking the jury for an affirmative answer to the first interrogatory, the prosecutor emphasized that the jury must find beyond a reasonable doubt that Santana's conduct amounted to a deliberate act.

Reading the prosecutor's comments as a whole, it is plain that his argument "pinpointed to the jury for its determination [the issue] whether [the defendant] himself deliberately participated in conduct that contemplated the murder by his accomplice . . . of the victim." Skillern v. Estelle, 720 F.2d 839, 849 (5th Cir. 1983), cert. denied, 469 U.S. 873 (1984). There is no reasonable basis on which to conclude that the jury thought it was under an instruction to apply the Texas law of parties at the punishment phase, and the wording of the first interrogatory indicated to the jury that it was Santana's conduct alone that was at issue. The prosecutor's comments did not taint this inquiry, so Santana's issue regarding the law of parties is without merit.

v.

Santana asserts that the district court should have conducted an evidentiary hearing regarding his claim of ineffective assistance of counsel during trial. Most specifically, Santana argues that a hearing was required on Santana's claim that his counsel failed to investigate or present appropriate mitigating evidence at the sentencing phase.

In particular, Santana questions his attorney's failure to present mitigating evidence from Santana's wife. Santana claims that his counsel should have advanced funds to Santana's wife so that she could travel from California to testify. Santana argues that he was prejudiced by the failure of his wife to testify and that the jury was

prevented from hearing the humanizing and powerful testimony of a loved spouse who could portray the love between petitioner and his children and family and the human value and worth of the individual whose life they would vote to spare or condemn. They were prevented from hearing testimony about petitioner's upbringing of poverty and abuse.

Santana claims that other witnesses who could have offered mitigating evidence were not called, as well. Santana also argues that his counsel was ineffective

for not filing pre-trial and other motions; for failing to interview prosecution witnesses; for visiting petitioner in jail only once before trial; for failing to object to the prosecutor's voir dire questions on the law of party; for not objecting when the trial court failed to apply the law of parties to the facts of the case; for failing to object to the charge on the law of parties, since the indictment did not allege that he was guilty as a party; for failing to contact material witnesses to testify about the alleged escape attempt; for failing to request an instruction at the punishment phase of trial on mitigating evidence; and for going to trial relying solely on the prosecutor's file.

To prevail on a claim of ineffective assistance, Santana must meet the test of Strickland v. Washington, 466 U.S. 668, 687 (1984):

First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

In reviewing such a claim, our "scrutiny of counsel's performance must be highly deferential." Id. at 689. In order to satisfy the prejudice prong, the defendant must show that "there is a reason-



able probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

There is no reasonable basis on which to conclude that the testimony of Santana's wife would have made a difference. The evidence of violence in the murder incident, coupled with the state's evidence at the punishment phase that included the testimony of Santana's ex-wife and a police officer that Santana had a bad reputation for being peaceful and law-abiding, coupled with Santana's involvement in an attempted escape from jail, indicate that the evidence of his violent nature was overwhelming.

Regarding Santana's argument that his attorney should have called certain jail inmates to indicate that Santana was not involved in the attempted jail escape, the fact is that his attorney did call two prisoners to testify in his behalf, so any other testimony would have been merely cumulative. See Brogdon v. Blackburn, 790 F.2d 1164, 1168-69 (5th Cir. 1986) (per curiam), cert. denied, 481 U.S. 1042 (1987). Lastly, Santana's counsel forcefully attacked the credibility of the state's principal witness on the matter of planned escape.

There is no showing, viewing counsel's performance as a whole, that he failed to discharge his duties as a reasonably competent attorney on Santana's behalf. The claim of ineffective assistance is meritless.

## VI.

Santana avers that the use of evidence of unadjudicated crimes

at the penalty phase denied him a fair trial, due process, and equal protection of the laws. He notes that at the punishment phase, the state offered evidence of unadjudicated extraneous offenses allegedly committed by Santana, including testimony of Susan Hoban that her car, used in the robbery, had been stolen; testimony implicating Santana in an alleged aborted escape attempt from jail; and testimony linking Santana and others to weapons found in the jail. The trial court denied Santana's request for a limiting instruction in the punishment phase to the effect that the jury could consider the extraneous offenses only if they believed Santana had committed those offenses beyond a reasonable doubt.

In his brief, however, Santana acknowledges that "this Court has condoned the practice of admitting unadjudicated extraneous crime evidence in capital cases" (citing Williams v. Lynaugh, 814 F.2d 205 (5th Cir.), cert. denied, 484 U.S. 935 (1987)). Santana requests that we reconsider this policy. It is well established, however, that one panel of this court cannot overrule another. Moreover, to adopt Santana's proposed rule would violate Teague v. Lane, 489 U.S. 288, 299-310 (1989), to the effect that new constitutional rules will not be announced on federal habeas review and retroactively applied except in two exceptional circumstances not present here. Accordingly, we decline to consider Santana's request.

## VII.

Santana claims that the trial court's refusal to allow him to

call a prosecutor as a witness and to cross-examine James Martin fully in the punishment phase denied him his rights of confrontation, cross-examination, compulsory process, fundamental fairness, and due process of law. As to the first point, Santana claims that it was error for the trial court to refuse to allow him to call prosecutor Mike Wilkinson to elicit testimony that Santana had not been indicted for the escape attempt. Santana also was not allowed to cross-examine Martin, a key prosecution witness to the escape scheme, regarding the use of firearms. Santana claims that these matters constituted relevant mitigating evidence that he should have been allowed to present.

The requested testimony from the prosecutor appears to be only tangential, as the proposed testimony would not have constituted either a denial that Santana had attempted to escape or an explanation of the details of the incident. And, Santana was allowed to present other testimony to the effect that he was not involved in the escape attempt. As Santana was given )) and utilized )) the opportunity to deny the truth of the state's evidence in this regard, he was not denied a constitutional right.

Regarding the cross-examination of Martin, Santana attempted to impeach Martin's testimony by inquiring into Martin's use of firearms during robberies. The trial court did not permit Santana's attorney to ask Martin whether Martin had ever used a weapon. Instead, the attorney was allowed to have Martin read two indictments currently pending against him, charging him with two counts of aggravated robbery and alleging that a deadly weapon was

used.

Thus, Santana was permitted to inquire amply into the pending charges against Martin, without delving into the details in such a way that Martin would be required to incriminate himself. Given the wide latitude accorded a trial judge in determining the scope of cross-examination and other evidentiary matters, Santana certainly has shown no constitutional violation.

#### VIII.

Santana claims that it was error to charge Santana with shooting Flores when the state had no evidence to support that allegation. Santana claims that, since it cannot be known with certainty whether Santana or Meanes fired the shot that killed Flores, the state "had no evidence to support the most awful indictment that can be made." Thus, Santana argues obliquely that "[p]erhaps Confucius was too idealistic to argue that in politics all things should be called by their proper names. But surely in law nothing else is acceptable."

Our consideration of this argument is procedurally barred by Santana's failure to move to quash the indictment prior to trial. In Texas, a defendant waives the right to challenge non-jurisdictional defects in the indictment by failing to move to quash the indictment before trial. Dennis v. State, 647 S.W.2d 275, 278 (Tex. Crim. App. 1983). The state trial court recommended denying relief on the merits of this issue and also because of Santana's failure to object timely. When a state court declines to reach the

merits of a claim because of the defendant's failure to comply with a state procedural rule, federal courts will not address the issue in habeas proceedings absent a showing of cause and prejudice. Harris v. Reed, 489 U.S. 255, 262 (1989). Santana has shown no cause for his failure to move to quash the indictment under these circumstances.

Moreover, the sufficiency of a state indictment is not a matter for federal habeas relief unless the indictment is so defective that the convicting court had no jurisdiction. Uresti v. Lynaugh, 821 F.2d 1099, 1102 (5th Cir. 1987). When the indictment sets forth the elements of the offense, fairly informs of the charge, and is sufficiently clear to allow the defendant to plead a conviction in bar of a subsequent prosecution for the same offense, there is no jurisdictional defect. Alexander v. McCotter, 775 F.2d 595, 599 (5th Cir. 1985). The instant indictment meets these requirements. Moreover, Texas law allows each party to an offense to be charged with the commission of the crime, without a requirement that the state notify the defendant that it is relying upon the law of the parties. See Tex. Pen. Code Ann. § 7.01(b), (c). In summary, there is no constitutional error in the indictment.

#### IX.

As his final issue on appeal, Santana argues that sentence of death was imposed in violation of the Eighth and Fourteenth Amendments in that the jury was unable fully to consider all

mitigating evidence at the punishment phase. In addition to asserting ineffective assistance on this point, Santana again urges error in the introduction of evidence of unadjudicated crimes and that the jury was not instructed that it should weigh all mitigating circumstances to achieve a reasoned moral response to Santana's background, character, and crime, upon which to base an individualized assessment of the death penalty.

Santana acknowledges, however, that he introduced no mitigating evidence at the punishment phase. Recently, we have held that "[a] defendant cannot claim factors exist in his case which are not covered by the Texas special issues unless he has offered proof of those factors at trial. To demonstrate that the trial court committed constitutional error in conducting his trial a defendant must afford that court the right to consider and rule on such proof." Wilkerson v. Collins, 950 F.2d 1054, 1061 (5th Cir. 1992), petition for cert. filed (Mar. 18, 1992) (No. 91-7669). Thus, Santana is not entitled, under these circumstances, to argue that the Texas sentencing statute is unconstitutionally narrow.

X.

In summary, Santana has failed to demonstrate that the issues he presents are debatable among jurists of reason under the test set forth in Barefoot v. Estelle. Thus, under that test, the questions he presents are not adequate to deserve encouragement to proceed further. Accordingly, the application for CPC and motion to proceed IFP are DENIED.