UNITED STATES COURT OF APPEALS

for the Fifth Circuit

No. 94-10152
No. 94-10298
Summary Calendar

CHRISTOPHER CASTILLO,
RALPH CASTIOLLO

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director,
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92 CV 1123 H & 3:92 CV 1834 D)

March 22, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[1]

Ralph and Christopher Castillo challenge the district court's dismissal of their habeas petitions. We affirm.

I.

Ralph and Christopher Castillo were tried jointly in Texas

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[1] Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

state court and found guilty of engaging in organized criminal activity. **See** Tex. Penal Code Ann. § 71.02(a)(5) (West 1989). Both were sentenced to a term of 65-years imprisonment and fined $100,000. The Tenth District Court of Appeals and the Texas Court of Criminal Appeals subsequently affirmed the convictions. **Castillo v. State**, 818 S.W.2d 803, 804 (Tex. Crim. App. 1991) (en banc) (**Castillo II**); **Castillo v. State**, No. 10-88-081-CR (Tex. App.--Waco, Aug. 10, 1989) (**Castillo I**).

Petitioners filed separate petitions for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254. Christopher asserted several grounds for relief, which are listed in the margin.[2] In his petition, Ralph asserted the same grounds for relief, except issues eight and nine. The district judge adopted the magistrate judge's recommendation that both petitions be denied. Christopher and Ralph each timely appealed, and this

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[2]Christopher complained that:

1. the evidence was insufficient to sustain the conviction;
2. the trial court improperly admitted extraneous offense evidence;
3. the trial court improperly admitted evidence obtained from illegal wiretaps;
4. the prosecutor's argument improperly commented on the defendant's failure to testify;
5. the prosecutor improperly elicited testimony commenting on the defendant's failure to testify;
6. the trial court improperly admitted testimony of a probation officer concerning the defendant's eligibility for parole;
7. the prosecutor's argument improperly encouraged the jury to apply the parole laws;
8. the trial court improperly admitted evidence seized from an illegal search of the Castillos' home;
9. the trial court improperly limited voir dire.

court granted both a certificate of probable cause (CPC) to appeal. The two cases have been consolidated on appeal to this court.

II.

A.

The petitioners argue first that the evidence presented at trial was insufficient to support their convictions for engaging in organized criminal activity. Insufficiency of the evidence can support a claim for federal habeas relief only where the evidence, viewed in the light most favorable to the prosecution, is such that no rational jury could have found the essential elements of the crime beyond a reasonable doubt. **Peters v. Whitley**, 942 F.2d 937, 941 (5th Cir. 1991), **cert. denied**, 502 U.S. 1113 (1992) (citing **Jackson v. Virginia**, 443 U.S. 307, 319 (1979)). A state appellate court's determination that the evidence was sufficient is entitled to great deference. **Porretto v. Stalder**, 834 F.2d 461, 467 (5th Cir. 1987).

The substantive law of Texas defines the elements of the crime that must be proved. **Young v. Guste**, 849 F.2d 970, 972 (5th Cir. 1988). Texas courts have interpreted Texas Penal Code Ann. § 71.02(a) to require proof of the following elements:

> (1) the commission or conspiracy to commit,
> (2) one or more of the offenses enumerated in the statute,[3]
> (3) with the specific intent of participating in a group of at least five persons; and
> (4) an agreement by the defendant to participate in the offense and the performance of an overt act in furtherance

[3] The enumerated crime was distribution of a controlled substance. **See** Tex. Penal Code Ann. § 71.02(a)(5).

of that agreement.

See Renfro v. State, 827 S.W.2d 532, 534 (Tex. App.--Houston (1st Dist.) 1992, writ ref'd).

The Tenth District Court of Appeals made detailed background findings relevant to the Castillos' state habeas petitions.[4] The court also focused on the activities of the petitioners:

> Ralph was also arrested at the ranch during the raid. Ralph's and Christopher's phone calls on April 9 pertained to drug transactions involving large amounts of money. There was a correlation between the numbers used in their conversations and the numbers in the notebooks, ledgers, and records seized at the Castillo ranch. These notebooks, ledgers, and records also contained details of drug transactions involving large amounts of money, which correlated with the weight and value of some of the marihuana seized at the ranch. Ralph's name appeared in the records seized at the ranch, indicating that he had been involved in drug transactions with his family.

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[4] The Court of Criminal Appeals summarized these findings as follows:

> Officers seized 1,500 pounds of marijuana and $600,000 at the Castillo ranch on April 14. A large amount of the cash, $109,000, was found in Josephine Castillo's car. Ysidro and Josephine Castillo, Sr. owned the ranch. Jose Morones was arrested when officers seized 1,398 pounds of marijuana in a storage shed behind his house. Morones had the key to the shed in his pocket. Cindy Mitchell was arrested at the scene after officers found scales used to weigh marijuana and marijuana in her house. She said that the scales and marihuana belonged to her husband, Jimmy, and that the marihuana came from Morones' house. The Mitchells' house and Morones' house were adjacent to each other and located across the road from Ysidro, Sr.'s residence. Morones and the Mitchells rented their houses from Ysidro, Sr. Gilberto Salinas was arrested at the ranch while in possession of a "weigh list," which corresponded to the weight of the boxes of marijuana seized in the raid. He had just delivered the marijuana to the ranch. An informant implicated Freddie Castillo and others in the delivery of marihuana. Reymundo Rios and Flavio Quintanilla were also arrested in vehicles used to transport the marijuana.

Castillo I, slip op. at 53-55. Because neither petitioner has challenged these factual findings, we presume them to be correct for purposes of federal habeas review. **See Sumner v. Mata**, 449 U.S. 539, 544-52 (1981).

The petitioners contend that the evidence at trial was insufficient to prove the fourth element--an agreement among all the co-conspirators and an overt act in furtherance of that agreement. Although the evidence was largely circumstantial, under Texas law, the elements of a conspiracy charge "may be inferred from the `development and collocation of circumstances.'" **United States v. Lentz**, 823 F.2d 867, 868 (5th Cir.) (quoting **United States v. Vergara**, 687 F.2d 57, 61 (5th Cir. 1982)), **cert. denied**, 484 U.S. 957 (1987). Contrary to the assertion of the petitioners, the evidence need not show that they conspired independently with every member of the combination. **See Castillo I**, slip op. at 55; Tex. Penal Code Ann. § 71.01(a) (West 1989).

Viewed in the light most favorable to the Government, a rational jury could have found from this evidence that Christopher and Ralph Castillo conspired with each other and the other individuals involved in the Castillo family marijuana distribution enterprise. A rational jury could have further found from the recorded telephone conversations between Ralph and Christopher that they undertook the overt act of accounting for the drug transactions.

B.

The petitioners next assert two Fourth Amendment claims (issues 3 and 8). First, both Ralph and Christopher argue that their convictions were based primarily on evidence obtained from illegal wiretaps. Second, Christopher argues that other evidence was introduced which had been seized during an illegal search of the Castillo ranch.[5] We are precluded from reviewing Fourth Amendment claims in a federal habeas corpus proceeding if the petitioner was provided a full and fair opportunity to present the claims in state court proceedings. **Stone v. Powell**, 428 U.S. 465, 482 (1976).

The Castillos each had a full opportunity to argue these claims in a pretrial hearing on a motion to suppress. The issues were again fully litigated both on direct appeal and in the petition for discretionary review. The Castillos have also not suggested that any state process systematically prevented actual litigation of Fourth Amendment claims. **Williams v. Brown**, 609 F.2d 216, 220 (5th Cir. 1980). Thus, we need not consider the Fourth Amendment claims.

C.

The district court did not address the merits of several of the petitioners' other contentions because the Tenth District Court of Appeals determined that these claims were procedurally barred because the Castillos failed to preserve error. The principle of procedural bar applies when the last reasoned state court opinion

[5] Although Ralph raises this point of error on appeal, he failed to raise it before the district court.

addressing the claim explicitly denies relief on the ground of procedural default. **Ylst v. Nunnemaker**, 501 U.S. 797, 797-801 (1991). The principle applies even if the state court finds a procedural default but addresses the merits in the alternative. **Sawyers v. Collins**, 986 F.2d 1493, 1499 (5th Cir.), **cert. denied**, 113 S. Ct. 2405 (1993). This court may only consider the merits of those claims if the petitioner either shows cause and prejudice for the procedural default or that a failure to review the claim would result in a complete miscarriage of justice. **Young v. Herring**, 938 F.2d 543, 546 (5th Cir. 1991) (en banc), **cert. denied**, 112 S. Ct. 1485 (1992).

1. Christopher Castillo

The Tenth District Court of Appeals determined that Christopher had not personally objected to testimony that he had not paid his taxes (issue 2), testimony that he was part of a large-scale drug operation (issue 2), testimony that he was not a suitable candidate for probation (issue 6), the limitation of voir dire (issue 9), and the prosecutor's argument concerning the availability of parole (issue 7).

Christopher attempted to show cause by asserting that it was improper for the Tenth District Court of Appeals to find that he had not preserved error on the basis of failure to personally object because the trial court and co-counsel had agreed that the objections of one defendant would preserve error for all defendants. This argument is not valid for three of the alleged errors because the Tenth District Court of Appeals did not base its

holding on a failure to personally object.

As to the argument that the prosecutor elicited inadmissible extraneous offense evidence concerning Christopher's federal income-tax returns, the Tenth District Court of Appeals noted that there was an objection but that it was too general to preserve error because it "failed to point out . . . which extraneous offense was allegedly being introduced." The Court of Appeals likewise noted that objection were made to the testimony related to Christopher's suitability for probation and involvement in a large-scale drug operation, but were too general to preserve error.

With respect to the claims of improper limitation of voir dire and improper argument as to the availability of parole, however, the Tenth District Court of Appeals noted that another defendant had objected, but Christopher had not. Even if an agreement allowing a single defendant's objections to preserve error for all defendants constitutes adequate cause, we need not remand because these issues lack merit.

As to improper voir dire, Christopher asserts that he was denied a fair trial because the trial court refused to allow counsel to question the venire about various theories of punishment. Christopher makes no attempt to demonstrate how such a limitation violates the constitution. Moreover, the record reflects that the trial court merely sustained the government's objection that the theories of punishment were not in the penal code and never ruled that the defendants could not inquire about

the theories. In fact, the record reflects that defendant's counsel did raise these issues.

The record similarly does not support the claim that the prosecutor improperly injected the possibility of parole into his argument. Christopher bases this argument on the prosecutor's statement urging the jury not to give less than a 60-year sentence because a lesser sentence would "give them more than a 39-year gift." This statement refers to the maximum 99-year sentence, not the availability of parole.

2. Ralph Castillo

The Tenth District Court of Appeals found that Ralph was procedurally barred from arguing that the trial court improperly admitted testimony concerning his alleged involvement in a large-scale drug operation (issue 2) and testimony concerning his suitability for probation (issue 6). Ralph also attempted to show cause on the basis of the agreement allowing one defendant's objection to preserve error for all the defendants. Again, this argument is not valid for the probation issue because the Tenth District Court of Appeals did not base its holding on a failure to personally object, but rather held that the objection was made but was too general to preserve error.

With respect to the admissibility of testimony concerning large-scale drug involvement, however, the Tenth District Court of Appeals noted that another defendant had objected, but Ralph had not. Again, even if the merits of the claim should have been addressed on federal habeas review, we need not remand because the

argument has no merit. Even if the co-defendant's objection to the testimony had been applied to Ralph, the Tenth District Court of Appeals held that it was insufficient to preserve error.

D.

The remaining issues concern claims that the prosecution improperly commented on the petitioners' failure to testify at trial. The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify in a criminal case. **United States v. Wade**, 931 F.2d 300, 305 (5th Cir.), **cert. denied**, 502 U.S. 888 (1991). A statement by a prosecutor constitutes impermissible comment on the defendant's failure to testify only if it was intended to serve as such or if the jury would naturally and necessarily give that interpretation to the remarks. **Id.**

The petitioners argue that the prosecutor indirectly commented on their failure to testify by stating during closing argument: "You have the captain, Ysidro, Sr. then you have the lieutenants, Ralph, Chris, and Curley. And members of the jury I'll tell you the scary part about this is they don't think they have done anything wrong." (Issue 4). Our review of this statement persuades us that the prosecutor did not intend it to be a comment on the failure to testify, nor would a jury naturally construe it as such. Taken in context, the prosecutor plausibly was arguing that the Castillos did not feel that their drug-smuggling business was a crime, but rather felt that they were running a successful family business.

The petitioners also argue that the prosecutor improperly commented on the failure to testify by asking Deputy Sheriff James Jones, during the punishment phase of trial, whether the Castillos had exhibited any remorse while in jail. (Issue 5). The petitioners argue that they would have been the only ones who could have rebutted this testimony. Again, taken in context, the prosecutor did not intend the question to be a comment on the failure to testify. Rather, he asked the question on cross-examination to rebut Deputy Jones' favorable testimony on direct. Nor would a jury naturally interpret the question to be a comment on the failure to testify. Thus, this argument also fails.

AFFIRMED.