IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8796

KARL HAMMOND,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Texas
(SA 92 CA 873)

(August 23, 1994)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

The facts in this habeas appeal show that the petitioner, Karl Hammond was sentenced to death after being convicted of murder in the course of aggravated sexual assault and burglary in Texas state court. Following affirmance of his conviction and sentence by the Texas Court of Criminal Appeals, 799 S.W. 2d 741 (Tex. Crim. App. 1990), Hammond filed a state petition for writ of habeas corpus,

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[*]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 Pursuant to that Rule, the court has determined that this opinion should not be published.

which was denied after an evidentiary hearing based on extensive findings. In this appeal from the federal district court, we reject Hammond's various claims for relief including his claims that he was improperly gagged during a portion of the trial, that he was denied his right to present a defense and testify, that the district court should have applied the cumulative error analysis and that he was denied effective assistance of counsel. We affirm.

I

We start with the grisly story of sub-human acts of mayhem, torture and murder that is so common in these death sentence appeals. On September 4, 1986, Donna Lynn Vetter, an FBI employee, was found beaten, raped, and murdered in her apartment. Ms. Vetter's eyes were swollen and discolored, her body was covered with blood, and she had stab wounds in her chest and both legs. The autopsy revealed at least three blows to her face and head and at least one strong blow or kick in the area of her vagina, as well as eight other stab wounds. Hammond's fingerprints, blood, and hair were found at the scene; his bloody palm print was also found inside the apartment on a window and on the probable murder weapon (which was hidden under a chair cushion).

After the state rested its case and the defense took a break to confer with their investigators, Hammond, in response to a request by his attorney, stated on the record that he agreed with

the decision not to put on proof of an alibi or any other defense.[1] The defense then rested its case without presenting any proof.

Before the jury was to be reconvened on the following trial day, the judge asked the parties if they had matters to be addressed outside the presence of the jury. The prosecutor did, and those matters were addressed. Hammond said nothing; however, after the jury was brought in, Hammond asked to "plead the First Amendment to my Constitutional rights," stating that the prosecutors were "judicial blackmailing" his defense by threatening to bring in his past records if he weakened their case.

Hammond and the jury were removed from the courtroom and, when he returned (without the jury), the judge told him to be quiet or he would be gagged. Hammond disregarded this admonition. Hammond said that he had witnesses ready to testify. The judge reminded him that he and his attorney had decided not to put on any proof. Hammond said that he would be quiet only if his witnesses were allowed to testify. The judge then requested the bailiffs to gag him. Next, Hammond's counsel objected. The judge again asked Hammond if he would sit and be quiet. Hammond did not respond.

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[1]Affidavits of the alibi witnesses were included in the trial court record for purposes of appeal. According to these statements, one witness stated that Hammond was at her house at 9:45 on the evening of the offense; Hammond's sister stated that Hammond was at home, 4 or 5 blocks from the offense, throughout the evening except for 30 minutes between 8:45 and 9:15; Hammond's brother stated the Hammond was at the sister's home at 7:00 but had gone to get cigarettes at 8:45; and another witness stated that she saw Hammond off and on from about dusk until an unspecified time in the parking lot of her apartment complex.

The judge then called the jury back into the courtroom, but did not gag Hammond. The judge read the charge, apparently without interruption by Hammond.

After the charge, however, Hammond said that he had a right to testify and he wanted his witnesses to testify. The jury and Hammond were again removed from the courtroom.[2] Hammond's attorney asked that Hammond be excluded from the courtroom for argument rather than gagged, but the judge said that he did not think he had a right to do that. Hammond was then gagged, but only during closing arguments before the jury. Following their deliberations, the jury found Hammond guilty. Before the beginning of the punishment phase of his trial, Hammond escaped from jail and was captured the following evening. At the punishment phase, Hammond's counsel also did not present any proof.[3]

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[2]After Hammond left the courtroom, but before the jury was removed, Hammond's sister stood up in the courtroom and said that Hammond was not getting a fair trial because "they" were not letting him testify. The jury was removed, and the sister was held in contempt.

[3]During the punishment phase, the government presented proof that Hammond raped fellow prisoners on two occasions and had committed three other rapes as well as other crimes in September 1984.

II

A

Hammond first complains that he was improperly gagged for a portion of his trial, thus, violating his right to due process and rendering the trial fundamentally unfair.[4]

In Marquez v. Collins, 11 F.3d 1241 (5th Cir. 1994), we held that "the threats to a fair trial posed by visible restraints are sufficiently large and sufficiently likely that due process secures to the defendant a right to contest their necessity." 11 F.3d at 1244. Restraints may, however, be necessary "to preserve the dignity of the trial and to secure the safety of its participants." 11 F.3d at 1244. The trial judge is given "considerable discretion" and "it is not a question of whether, looking back, lesser restraints might have been adequate, although that is relevant. Rather, it is a question of whether it was reasonable to conclude at the time that the restraint was necessary." 11 F.3d at 1244.

With these principles in sharp focus, we look first to the question whether the trial court abused its discretion in gagging Hammond. Hammond argues that his conduct was not sufficiently disruptive to warrant gagging. His argument lacks predicate support in the record. At the time Hammond was gagged, he had jumped to his feet and disrupted the proceedings on two occasions in front of the jury. The court had fairly warned Hammond. He

[4]Hammond only complains of the gagging during closing arguments. He does not challenge the trial court's decision to gag him during the punishment phase of the trial after his escape and subsequent capture.

had, however, continued to disobey and to disregard the court's instructions to be quiet. He defied the reasonable and patient efforts of the court and continued to shout accusations and resist efforts to place him under control. Under these circumstances, it is clear that the trial court was justified in taking some action to control Hammond and prevent him from "abort[ing] a trial and frustrat[ing] the process of justice by his own acts." Estelle v. Williams, 425 U.S. 501, 505 n.2 (1976).

Furthermore, it is clear that the trial court adequately considered less prejudicial, alternative methods of controlling Hammond.[5] When Hammond first became disruptive, the trial court attempted to control him by talking to him outside the presence of the jury on two separate occasions. On each occasion, Hammond apparently seemed to be controlled but became disruptive again as soon as the jury was returned to the courtroom. Further, even after the trial court determined that physical restraint was

[5]Hammond argues, citing Spain v. Rushen, 883 F.2d 712 (9th Cir. 1989), that the district court did not exercise its discretion at all because it concluded that it did not have the option to remove Hammond from the courtroom. In Spain, the trial judge indicated that he did not understand that the defendant could be removed from the courtroom but the similarity stops there. As the Ninth Circuit stated, the trial judge "believed the solution was to be found between the two extremes of total restraint and total freedom from shackles." 883 F.2d at 726. The Spain trial court chose total restraint, controlling the defendant with twenty-five pounds of chains for nine to ten hours each day, through a seventeen-month trial. Such is not the case here, where the court attempted alternatives to gagging, never resorted to shackling, and restrained Hammond for only a brief period of time.

necessary, it limited the restraint to gagging, while instructing the bailiffs only to be prepared to cuff him if he continued to be disruptive. The gagging was apparently sufficient and the court took no further action to restrain Hammond.[6]

Hammond does not argue that no action should have been taken, only that other action should have been taken--specifically, exclusion from the courtroom. We have no doubt, however, that if the trial court had exercised its discretion in a different way and had excluded Hammond, we would now be considering the argument that the court abused its discretion because Hammond should have been gagged--certainly he should not have been excluded from the courtroom, the argument would go, during the crucial final arguments. Moreover, we seriously question any argument that we can categorically determine the relative prejudice of gagging as opposed to exclusion or to any other method of restraint. We must, however, "do the best [we] can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." Estelle v. Williams, 425 U.S. 501, 504 (1976).

Any form of physical restraint will undeniably cause some prejudice to the defendant. If the defendant is excluded, for

[6]Hammond's counsel advised the court that it would be less prejudicial to remove Hammond from the courtroom than to tie him up. The court said that Hammond would not be tied up if he did not try to take the gags off. Hammond's counsel was skeptical and stated, "Judge, you've seen how he's been acting," indicating that Hammond's own counsel recognized that some restraint was necessary to control him.

example, the jury will likely conclude that the absence is somehow incriminating. Furthermore, the excluded defendant is not able to confer with counsel. Here, the jury fully understood why Hammond was gagged.[7] Because he was in the courtroom, he could still observe his own trial and was not precluded from some--although limited--communications with his counsel through closing argument. Finally, our analysis on appeal is not dependent on the defendant's preference or on the choice we would have made if we were the trial judge. Instead, we focus on whether the restraint was reasonable at the time. Marquez, 11 F.3d at 1244. Under this analysis, we entertain no doubts but that there was no abuse of discretion.[8]

Because there was no abuse of discretion, we need not determine whether any error is of constitutional dimension and, if so, its effect; that inquiry "is triggered only after the reviewing court discovers that an error has been committed."[9] Lockhart v.

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[7]The jury saw Hammond's disruptive behavior; indeed, it only occurred when the jury was in the courtroom. As the Supreme Court stated in Estelle v. Williams, 425 U.S. 501, 507 (1976), "no prejudice can result from seeing that which is already known." We reject Hammond's argument that gagging sent a message to the jury that the judge thought Hammond was about to commit perjury.

[8]We decline to interpret the ABA Standards Relating to Administration of Criminal Justice, § 6-3.8 (1974), that "removal is preferable to gagging or shackling a disruptive defendant" as a hard and fast rule because we simply do not agree that removal is always preferable. The trial court must make that determination based on the particular circumstances before it.

[9]Our review is limited to constitutional errors and we "hold[] no supervisory power over state judicial proceedings and may intervene only to correct errors of constitutional

Fretwell, 113 S.Ct. 838 (1993). In the absence of any error, we affirm the district court on this point.

B

Hammond next argues that he was impermissibly denied his right to testify or call other defense witnesses. According to Hammond, he did not initially understand that he would be presenting no proof in the guilt-innocence phase of the trial, even though he explicitly acknowledged such an understanding on the record when questioned by the trial court. In the state habeas proceeding, Hammond's trial lawyer testified that Hammond said he "had been instructed by someone in the jail to do that performance in order to somehow or another protect his rights or create some kind of record, but that he still understood why we had not presented the evidence and agreed with us." Based on this testimony, the state court concluded that Hammond had not really wanted to testify or put on defense witnesses. Therefore, the state habeas court found

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dimensions." Springer v. Coleman, 998 F.2d 320 (5th Cir. 1993). In this case, the trial court was undeniably authorized to take some action to restrain Hammond, action that would deprive him--at least to some extent--of his constitutional rights of speech and due process. Any constitutional right to be free from restraint altogether was effectively waived by Hammond's own conduct. The only dispute presented in the facts of this case is a discretionary choice between gagging and exclusion, a matter that is indisputably within the sound discretion of the trial court. In the absence of a constitutional right to an express form of physical restraint, it is difficult to understand, when the trial court exercises its discretion within a range of reasonable choices, how a mere abuse of discretion rises to constitutional levels when the underlying constitutional right has been effectively waived.

that Hammond's effort to testify was not genuine but was a "calculated attempt to disrupt his trial." This finding is amply supported by the record and is therefore entitled to a presumption of correctness.[10] Loyd v. Smith, 899 F.2d 1416, 1425 (5th Cir. 1990). Under the circumstances of this case, the trial court did not transgress any constitutional rights of Hammond by denying his last minute and spurious request to testify. Hammond was competently represented by counsel, who had made a deliberate choice that it was in Hammond's best interest, and in the best interest of Hammond's case, that Hammond not testify and that no defense should be put on. They conferred with Hammond on this point, and Hammond explicitly agreed. The record before us, including the findings of the state habeas court that we are bound to respect, establishes that Hammond actually had no intention to testify nor to put on a defense. Furthermore, given that Hammond, even after his request to testify, continued to agree with his attorneys that he should not testify or put on a defense, we cannot say that Hammond would have rationally decided to do so even if he had been given the opportunity. These facts will simply not support the claim of the loss of a fundamental right.

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[10]As further support for this finding, we note that Hammond has never stated exactly what testimony he would have given or what proof, other than his alibi witnesses, he would have offered. The affidavits of the anticipated alibi witnesses were made exhibits to the trial record for purposes of appeal. Those affidavits are internally inconsistent and fail to constitute an alibi, that is, proof that Hammond was at another place during the time that the crime was committed.

A trial court's denial of a criminal defendant's genuine assertion of the right to testify or present a case might well be reversible error even in a habeas death case proceeding even with its narrow standard of review.[11] Indeed, Chief Justice Rehnquist suggested in a concurring opinion that the denial of the "opportunity to put on evidence and make argument to support [] claims of innocence" is a structural error requiring automatic reversal. Sullivan v. Louisiana, 113 S.Ct 2078, 2084 (1993) (Rehnquist, C.J., concurring). Given the facts of the case before us, however, we do not pass on that issue today.

C

Hammond's remaining arguments are likewise without merit. We are not required to apply the cumulative error theory in this case because Hammond's claims "never rose to the federal constitutional dimension necessary to warrant cumulative error analysis . . . [and he therefore] has presented nothing to cumulate." Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993).

Similarly, in connection with his claim of ineffective assistance of counsel in the punishment phase, Hammond cannot demonstrate the necessary deficient performance and prejudice.

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[11]We qualify this observation, however, by noting that the defendant's right to testify is not absolute, yielding at times to interests of order and fairness. United States v. Jones, 880 F.2d 55, 59 (8th Cir. 1989). Further, the reopening of a criminal case after the close of evidence rests within the sound discretion of the trial judge. United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985).

Strickland v. Washington, 466 U.S. 668 (1984). His trial counsel conducted an adequate investigation and the failure to uncover certain information[12] does not cause counsel's performance to fall below an objective level of reasonableness, particularly in the light of the state habeas court's finding that Hammond's "trial counsel fully investigated [Hammond's] background and history."[13] Hammond also fails to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. In the light of the government's proof of Hammond's forcible rape of another inmate, attacks he made on people around the time of the murder for which he was being tried, as well as the brutality of

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[12]According to Hammond's brief, this information included evidence that his father constantly beat his mother, abused his brothers, and raped and sexually abused his sisters (at least one time in front of Hammond) and that he was also beaten by his father and mother, many times in front of other people, causing his psychological trauma. When Hammond was nine, the father was beating the mother and an older brother shot and killed the father in the presence of Hammond and other family members. The brother then used a razor to mutilate the father's body. After this, Hammond began to have nightmares, hallucinations (primarily about "Ozzie" who directs Hammond to harm others) and to abuse drugs. There was also some proof that Hammond is borderline mentally retarded (IQ 77) and suffers from severe psycho-pathology as well as paranoia and post-traumatic stress disorder. Anti-psychotic drugs have reduced the delusions, but Hammond was unable to obtain those drugs at the time of the crime.

[13]The state habeas court specifically rejected the allegations of two of Hammond's family members that counsel failed to interview family members or investigate the case. These findings are supported by the record and are entitled to a presumption of correctness. Loyd v. Smith, 899 F.2d 1416, 1425 (5th Cir. 1990).

the murder in question, evidence of Hammond's low IQ and mental problems would unlikely have had any effect on the verdict of the jury.[14] See Andrews v. Collins, 21 F.3d 612, 621 (5th Cir. 1994).

III

For the foregoing reasons, the judgment is

A F F I R M E D.

[14]Indeed, the magistrate judge noted that the prosecutor testified that the evidence of Hammond's background would have been helpful to his efforts to obtain the death penalty. The parties do not address the effect of Penry on this argument, but neither Penry nor its progeny change our decision that Hammond's claim of ineffective assistance of counsel is without merit. See Motley v. Collins, 18 F.3d 1223 (5th Cir. 1994).