IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-40329
Summary Calendar

MICHAEL CHARLES JOHNSON, Petitioner-Appellant,

versus

WAYNE SCOTT, Director, TDCJ Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(6:93-CV-40)

February 2, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM*:

Petitioner-Appellant Michael Charles Johnson ("Johnson"), an inmate of the Texas Department of Criminal Justice, Institutional Division, proceeding *pro se* and *in forma pauperis*, appeals the district court's order dismissing his § 2254 *habeas* petition with prejudice. We affirm.

I.

Johnson filed a petition for *habeas corpus pursuant to 28 U.S.C. § 2254* in federal district court. He was convicted in state

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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Pursuant to that Rule, the Court has determined that this opinion should not be published.

court in the State of Texas of delivery of a controlled substance and was sentenced to 99 years imprisonment. Johnson's conviction was affirmed on appeal and his applications for state *habeas* relief were denied.[1]

In his petition to the district court, Johnson argued that (1) the prosecutor improperly bolstered the State's witnesses' testimony during his closing argument; (2) the prosecutor engaged in an improper closing argument; (3) the trial judge erred by not responding to a jury note, and by not sharing the note with him and his counsel; and (4) his trial counsel was ineffective for leaving the courtroom during jury deliberations. The State argued that federal *habeas* review of Johnson's first two claims was precluded because Johnson procedurally defaulted those claims by failing to object at the time of trial.

Due to the ambiguity of the state district court's findings, the magistrate judge was unable to conclude that the state court plainly stated its reliance on a state procedural bar in denying Johnson's state application for writ of *habeas corpus*. Therefore, the magistrate judge found Johnson's first two claims were not procedurally barred. The magistrate judge further concluded that (1) the prosecutor's statements, although amounting to bolstering, were permissible because they were made in rebuttal to credibility assaults made by defense counsel; (2) the prosecutor's closing argument did not impermissibly refer to public sentiment; (3)

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[1] *See Johnson v. State*, 660 S.W.2d 536 (Tex. Crim. App. 1983).

Johnson could not support his jury-note argument because no record was made of what occurred when the note was delivered to the judge; and (4) trial counsel was not ineffective. The district court adopted the findings and conclusions of the magistrate judge and dismissed Johnson's petition with prejudice. The court subsequently entered an amended final judgment rejecting the magistrate judge's conclusion that the prosecutor did not engage in improper bolstering. The court concluded, however, that the prosecutor's error was not of constitutional magnitude because it did not render the trial fundamentally unfair. The court then issued a second order dismissing Johnson's petition with prejudice.

II.

Johnson first contends that he was denied a fair trial because the prosecutor improperly bolstered the testimony of the State's witnesses.[2] Absent cause and prejudice, or a demonstration that failure to consider the claim will result in a fundamental miscarriage of justice, we will not consider a state prisoner's federal *habeas* claim when a state court has declined to address the claims because the prisoner had failed to meet a state procedural requirement. *Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Cowart v. Hargett*, 16 F.3d 642, 644-45 (5th Cir.), cert. denied, ___U.S.___, 115 S.Ct. 227, 130 L.Ed.2d 153 (1994). "In these cases, the state judgment rests on

[2] Johnson argues that an evidentiary hearing is needed to resolve his claims. Because the record before us is adequate to dispose of Johnson's claims, we find he is not entitled to an evidentiary hearing. *See Joseph v. Butler*, 838 F.2d 786, 788 (5th Cir. 1988).

independent and adequate state procedural grounds." *Coleman*, 501 U.S. at 730. A federal court will presume that there is an independent and adequate state ground when the last reasoned opinion on the claim explicitly imposes a procedural default. *Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

The State contends that the last reasoned opinion of the state court contained an explicit finding of fact that Johnson failed to object to the alleged improper bolstering. The State argues that the court's finding reflects that the court clearly relied on a procedural bar.

The state court opinion contained a finding that Johnson did not object to one of the allegedly improper arguments made by the State. As noted by the magistrate judge, the finding does not amount to a plain statement that the court was relying on a state procedural bar. Nowhere in its opinion does the state court reference a procedural bar.

The fact that the state court reached the merits of Johnson's argument does not preclude a finding of a procedural bar.[3] However, as noted by the magistrate judge, the state court's conclusion of law in which it rejected Johnson's argument on its merits is at odds with the State's assertion that the state court expressly and unambiguously relied on a state procedural bar. Therefore, we find that the district court did not err by

[3] *See Sawyers v. Collins*, 986 F.2d 1493, 1499 (5th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 2405, 124 L.Ed.2d 300 (1993).

concluding that Johnson's first argument was not procedurally barred.

Johnson next complains of the following statement by the prosecutor:

> If it has come to the state of affairs, as [Defense Counsel] would have you believe, that we must question a man who has nine years of experience, a man whose testimony was unimpeached, there were some weak suggestions, some little innuendos that Defense Counsel would cast some aspersion on this man's character and background. But do you not think realistically, Ladies and Gentlemen of the Jury, if any evidence of any question in Agent Green's background existed that this man would be derelict in his duty to his client not to present it from this witness stand, ... That evidence doesn't exist. . . . There is no doubt based on reason in this cause. The State of Texas has no reason on God's earth to present to you perjured testimony to ship this man to prison in this case because that's where he is going.

Johnson argues that the prosecutor's remarks amounted to an assertion that the two narcotics agents who testified for the State were telling the truth. Therefore, it was an impermissible attempt to bolster their testimony. He also argues that, in its amended judgment, the district court conceded to error by the prosecutor and concluded that the prosecutor's remarks were improper.

It is not necessary to reach the propriety of the challenged remarks if the remarks did not render Johnson's trial fundamentally unfair.[4] *See Bagley v. Collins*, 1 F.3d 378, 380 (5th Cir. 1993) (*habeas* petition challenging prosecutor's reference to extraneous

[4] Thus, it is also unnecessary for to determine whether Johnson's failure to amend his notice of appeal after the district court's amended judgment precludes his argument that the remarks were improper. *See* FED. R. APP. P. 4(a)(4). The amended judgment altered the original judgment only by finding that the challenged remarks were improper.

evidence); *United States v. Cantu*, 876 F.2d 1134, 1138 (5th Cir. 1989) (direct appeal challenging alleged bolstering). Thus, issue is whether the allegedly improper remarks were so prejudicial that Johnson's trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment.[5] The prosecutor's remarks will exceed constitutional limitations only in the most egregious cases.[6] The statement must have been "a crucial, critical, and highly significant factor in the jury's determination of guilt."[7]

Johnson argues that the prosecutor's bolstering affected his trial because if the jury had been allowed to view the contradictions in the two agents' testimony and use simple logic in examining the evidence before them the verdict may have been different. To prevail in this argument, Johnson must show that the evidence against him was so insubstantial that, but for the prosecutor's remarks, no conviction would have occurred.[8] Johnson has failed to meet this burden. Despite the alleged inconsistencies in their testimony, the jury was entitled to credit the testimony of the narcotics agents and find Johnson guilty.[9]

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[5] *See Ortega v. McCotter*, 808 F.2d 406, 410 (5th Cir. 1987).

[6] *Id.*

[7] *Id.* at 410-11.

[8] *See Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*, 484 U.S. 873, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987).

[9] *See United States v. Casel*, 995 F.2d 1299, 1304 (5th Cir. 1993) (witness's testimony will be found "incredible" as a matter

The prosecutor's remarks do not justify setting aside Johnson's conviction.

Johnson also argues that he was denied due process because the prosecutor repeatedly interjected community pressure and public opinion in his closing argument. He complains of the following remarks:

> [Johnson] has filed no application for probation. We are talking about prison time. And I have no interest at the bar of justice in seeing an innocent man go to prison. . . . The people ask you in due integrity.

He argues that these remarks were included solely to induce the jury to convict him upon public sentiment.[10] He further argues that the state court erroneously failed to instruct the jury to disregard the prosecutor's remarks.

Although a prosecutor may include in his closing argument a plea for law enforcement, he may not plead for conviction based on community expectations.[11] We have declined to interpret a prosecutor's remarks as an improper appeal to public sentiment when the prosecutor does not say that the wishes of the community mandated a particular result.[12]

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of law only if it is factually impossible), *cert. denied*, ___U.S.___, 114 S.Ct. 1308, 127 L.Ed.2d 659 (1994).

[10] Johnson includes in his brief additional remarks which were not included in his argument to the district court. However, the remarks are similar in context to those that Johnson challenged in the district court. Therefore, the analysis above is pertinent to those remarks.

[11] *Whittington v. Estelle*, 704 F.2d 1418, 1423 (5th Cir.), *cert. denied*, 464 U.S. 983, 104 S.Ct. 428, 78 L.Ed.2d 361 (1983).

[12] *See id.*

The prosecutor's remarks did not state what "the people" asked of the jury in "due integrity." The remarks, when taken in context with the entire closing argument, including those challenged by Johnson for the first time on appeal, were merely a plea for law enforcement. Moreover, viewing the remarks in the context of the trial as a whole, they were not a crucial, critical, and highly significant factor upon which the jury based its verdict of guilty.[13]

Johnson next contends that he was denied a fair and impartial trial when the state court judge failed to respond to a note from the jury foreman, and failed to share the note with him and his counsel. The note that is the subject of Johnson's argument was sent during the punishment phase of the jury's deliberations. It read, "May the jury examine the prison record of Michael Charles Johnson, the defendant?".[14]

Johnson argues that, if he had been apprised of the note, he might have been able to convince the district court to withhold his prison record. However, he also argues that Texas law required that the state court provide the jury with the prison record and that jury communications be read in open court.

The record does not disclose how the state court judge responded to the note. As noted by the magistrate judge, Johnson's

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[13] *See Ortega*, 808 F.2d at 410-11.

[14] Johnson argues that the jury note asked, "If punishment of (20) years is assessed, how much will actually be served. How will he be able to pay a fine if unable to work? Does he get credit for time served." Nowhere in the record does such a note appear.

argument is unsupported by anything in the record. Johnson's argument suggests that the court did not comply with the jury's request; however, in the effective-assistance-of-counsel portion of his brief, he states that the pen packet is what got him a 99 year sentence.

Johnson's arguments based on the violation of Texas law are without merit because errors of state law are not cognizable in *habeas corpus* unless they infuse the trial with unfairness so as to deny the defendant due process of law.[15] Further, the state court's failure to present the jury note to Johnson and his counsel did not render Johnson's trial unfair within the meaning of the Fourteenth Amendment.[16]

The sentencing range for Johnson's offense was five to 99 years. Johnson's judgment of conviction does not provide that Johnson was subject to an enhanced penalty. The jury assessed the maximum punishment. Johnson's pen packet established, and defense counsel stipulated, that he had been previously convicted of burglary and subsequently had his probation revoked for possessing narcotics and firearms. The prosecutor informed the jury of Johnson's criminal record.

Because the pen packet contained only unsavory information, it is unreasonable to conclude that, if the jury was provided with the pen packet, they would have given Johnson a lesser sentence.

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[15] *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992), *cert. denied*, ___U.S.___, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993).

[16] *See Ortega*, 808 F.2d at 410-11.

Conversely, if the jury was denied the pen packet, the only logical consequence would have been a harsher sentence. Because Johnson was given the statutory maximum, the jury could not have assessed a harsher penalty. Thus, under either scenario, the state court's response to the jury note was not a crucial, critical, and highly significant factor in Johnson's sentence.[17]

Johnson next contends that his counsel was ineffective for leaving the court room during the jury's deliberations, thereby missing the opportunity to argue for or against compliance with the jury request for his prison records. To support this claim, Johnson must prove (1) that his counsel made errors that were so serious that they deprived him of his Sixth Amendment guarantee of the right to assistance of counsel and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. To show prejudice, the defendant must demonstrate that counsel's errors are so serious as to deprive him of a trial whose result is unfair or unreliable. *Lockhart v. Fretwell*, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

Johnson has provided no authority for his assertion that counsel was ineffective for failing to remain in the courtroom at

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[17] *See id.* at 410-11.

all times during the jury's deliberations. Further, Johnson's argument, that he was prejudiced because counsel missed the opportunity to argue either for or against the jury's request, is illogical and self-defeating. Johnson cannot argue that he would have been prejudiced by both the introduction and the exclusion of the pen packet. Accordingly, Johnson has not shown that he was prejudiced by counsel's alleged error.

III.

For the reasons articulated above, the district court's judgment dismissing Johnson's petition for *habeas corpus* is AFFIRMED.