**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 93-3637

(Summary Calendar)

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DONALD R. LEONARD,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
LA State Penitentiary and
RICHARD P. IEYOUB, Attorney
General, State of Louisiana,

Respondents-Appellees.

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Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93-1601-H)

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(April 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Donald R. Leonard, proceeding pro se, appeals the district court's denial of his petition for habeas corpus relief under 28 U.S.C. § 2254 (1988). For the reasons set forth below, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

On February 5, 1978, Leonard committed aggravated rape. The victim and her young son were walking home from a Mardi Gras parade in New Orleans when Leonard, brandishing a broken beer bottle, threatened the victim with her life, forced her into a secluded area and to disrobe, and then raped her in the presence of her son. At some point, Leonard also cut the victim with the broken bottle. Before fleeing, Leonard stole three one dollar bills from the victim, one of which had two small holes burnt into it. Shortly after the police were notified of the attack, officer Stanley Brown arrested Leonard because he matched the description given by the victim. The victim later identified Leonard in a line-up.

At trial, officer Brown testified that Leonard, when arrested, possessed a one dollar bill with two small holes burnt into it. Additionally, the victim and her son identified Leonard as the rapist. The state also introduced pictures taken of the victim's wounds and a medical examination form completed by Dr. Norris Crump, the deputy coroner who examined the victim. The jury found Leonard guilty of aggravated rape, and he was sentenced to life imprisonment. The Louisiana Supreme Court affirmed Leonard's conviction and sentence in an unpublished opinion. After exhausting his state habeas remedies, Leonard filed a petition for habeas relief in the federal district court, pursuant to 28 U.S.C. § 2254. The district court denied the petition and granted a certificate of probable cause.

## II

Leonard first contends that the "reasonable doubt" jury instruction given by the trial court was constitutionally defective under *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), in that it could have been interpreted by a reasonable juror to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. However, Leonard's conviction became final in 1979 and he did not make a contemporaneous objection to the instruction as given by the trial court. Thus, Leonard asks that we apply *Cage* retroactively. The law is well-settled in this Circuit that *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), does not permit the retroactive application of *Cage*. *See Skelton v. Whitley*, 950 F.2d 1037, 1043-46 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 102, 121 L. Ed. 2d 61 (1992). Consequently, we must reject Leonard's *Cage* claim.

## III

Leonard next argues that the trial court erroneously admitted testimony and documentary evidence pertaining to Dr. Crump's examination of the victim after the rape.[1] Leonard submits that

[1] Dr. Crump, at the time of Leonard's trial, was no longer employed by the New Orleans Coroner's Office and had moved to Mississippi without leaving a forwarding address. Therefore, Dr. William Bradley, who worked with Crump in the Coroner's Office during the relevant time period, testified that the medical form filled out by Dr. Crump concerning his examination of the victim was a form used and kept by employees of the Coroner's Office in the ordinary course of business. Dr. Bradley further testified regarding the nature of the victim's injuries, as noted on the form. Officer Patricia Childress, who accompanied the victim to the Coroner's Office, authenticated several photographs of the

because Dr. Crump did not testify, the examination form and any testimony relating to it constituted hearsay and the trial court deprived him of his constitutional rights to confront and cross-examine witnesses by admitting the hearsay. We need not reach these questions, however, because we conclude that the alleged error is harmless. *See United States v. Bentley*, 875 F.2d 1114, 1117-18 (5th Cir. 1989) (holding that admission of medical records constituted harmless error; refusing to reach the question whether their admission deprived the defendant of his Sixth Amendment right to confront witnesses against him).

"[C]onstitutional error may be deemed harmless when it is found to be harmless beyond a reasonable doubt." *Id.* at 1117; *see Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L. Ed. 2d 705 (1967). Such an error is harmless where

> after reviewing the facts of the case, the evidence adduced at trial, and the impact the constitutional violations had on the trial process, the evidence unrelated to the alleged constitutional violation "remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt."

*Bentley*, 875 F.2d at 1117 (quoting *Germany v. Estelle*, 639 F.2d 1301, 1303 (5th Cir. 1981) (citation omitted)). "This rule has been applied to cases where evidence was admitted in violation of the constitutional right to confront witnesses." *Id.* (citing cases).

In this case, other evidence of Leonard's guilt leaves us with no doubt that any claimed error involving his right to confront

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victim's injuries.

witnesses was harmless. At trial, both the victim and her son identified Leonard as the rapist. Additionally, the victim identified Leonard as the rapist at a pre-trial line-up. Moreover, when he was arrested, Leonard matched the description of the rapist given by the victim[2] and had in his possession the distinctively marked one dollar bill, which officers Brown and Pamela Cobb testified that Leonard attempted to eat after being advised of his *Miranda* rights.[3] Seminal fluid and Type A blood))the victim's blood type))were found on both the victim's and Leonard's clothing. Furthermore, the state thoroughly impeached Leonard's testimony regarding his whereabouts on the night of the rape. Finally, the challenged evidence did not provide any substantive proof of Leonard's guilt, but rather indicated only that Crump had examined the victim, discovered multiple bruises, and obtained a vaginal smear in order to determine if secretions were present in the victim's vagina. Consequently, based upon the overwhelming untainted evidence of Leonard's guilt, and the peripheral impact of the challenged evidence, we hold that the trial court's admission of the evidence in question was harmless beyond a reasonable

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[2] Leonard was wearing a green security guard uniform, was missing several front teeth, and was approximately the same age, height, and weight of the rapist.

[3] Leonard, who testified at trial, denied attempting to devour the dollar bill.

doubt.[4] *See Bentley*, 875 F.2d at 1117-18; *Germany*, 639 F.2d at 1303.

**IV**

Leonard's final contention is that the trial court denied him due process of law by erroneously allowing officer Brown to testify regarding "other crimes"))here, Leonard robbing the victim and having in his possession at the time of arrest the distinctively marked one dollar bill. To demonstrate a due process violation, Leonard first must demonstrate the district court's ruling to be error under Louisiana law. *See Robinson v. Whitley*, 2 F.3d 562, 566 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1197 (1994). Leonard has failed to make this initial showing.

Although Louisiana law generally prohibits the admission of "other crimes" evidence, such evidence is admissible when it forms part of the *res gestae* of the charged offense. *Id.*; *see* La. Rev. Stat. Ann. § 15:447 (West 1981). "To constitute *res gestae* the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous action." La. Rev. Stat. Ann. § 15:448. The district court correctly held that evidence concerning the theft of money from the victim was part of the *res*

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[4] Similarly, to the extent Leonard seeks relief due to an erroneous state evidentiary ruling, he has not shown that the challenged evidence was a "crucial, critical, or highly significant factor in the context of the entire trial." *Thomas v. Lynaugh*, 812 F.2d 225, 230 (5th Cir.), *cert. denied*, 484 U.S. 842, 108 S. Ct. 132, 98 L. Ed. 2d 89 (1987). Accordingly, Leonard has failed to raise an error of constitutional magnitude and is not entitled to relief.

*gestae*. The theft occurred during or immediately after the rape and thus was part of the same continuous criminal transaction. *See Robinson*, 2 F.3d at 566-67; *Edwards v. Butler*, 882 F.2d 160, 164-65 (5th Cir. 1989). Accordingly, we conclude that Leonard's due process claim is without merit. *Robinson*, 2 F.3d at 567.

**V**

For the foregoing reasons, we AFFIRM the judgment of the district court denying the petition for habeas corpus relief.