UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30098
Summary Calendar

WILLIAM ROY JOHANSON,

Respondent-Appellee/
Cross-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Petitioner-Appellant/
Cross-Appellee.

Appeals from the United States District Court
For the Eastern District of Louisiana
(CA-93-1314-D)

(September 7, 1994)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:[*]

William Roy Johanson, a Louisiana state prisoner convicted of

aggravated rape in 1974, was granted federal habeas corpus relief.

The state appealed; Johanson cross-appealed the rejection of his

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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should not be published.

unsuccessful habeas claims. Because of an intervening *en banc* decision which overruled the then-controlling precedent applied by the district court, we reverse the grant of habeas relief and otherwise affirm the district court.

Background

In 1973 Johanson raped a 10-year-old girl who identified him both in a photo spread and in a physical lineup. Johanson, who is deaf, was arrested and interrogated after receiving a **Miranda** warning in sign language and an additional oral warning when Johanson's father told police that Johanson could read lips. Johanson nodded assent when asked if he had committed the crime.

The first conviction was reversed on direct appeal and Johanson was tried a second time by a jury selected from a venire from which women were excluded under a Louisiana provision subsequently held unconstitutional by the Supreme Court. The jury returned a guilty verdict and Johanson was sentenced to life imprisonment. His efforts on direct appeal and for state collateral relief were unsuccessful and the instant federal petition followed.

Johanson's federal habeas petition contends that: (1) his jury was unconstitutionally empaneled; (2) he was convicted through the use of an illegally obtained confession; (3) the trial judge's instruction on reasonable doubt was erroneous; and (4) he was denied a complete trial transcript. The district court granted relief on the first claim, noting with reservations our then-binding decision in **Leichman v. Secretary, Louisiana Dept. of**

Corrections.[1]   **Leichman** permitted collateral relief from a conviction which did not become final until after the Supreme Court decision in **Taylor v. Louisiana**[2] invalidated the law under which Johanson's jury was empaneled. The district court denied relief on the remaining claims.

<u>Analysis</u>

Our intervening decision in **Wilkerson v. Whitley**[3] overruled **Leichman**, holding that in cases such as that presented by Johanson we may not give retroactive application to either the rule of **Taylor** nor current retroactivity rubrics. **Wilkerson** mandates that the judgment of the district court, based on our now-repudiated **Leichman** decision, must be reversed.

We find no merit in any of the other asserted bases for habeas relief. Johanson first asserts that his confession was obtained without appropriate notice. The record belies this claim. A sign language expert was instructed by the interviewing detective to communicate the **Miranda** caution. Upon being informed by Johanson's father of his son's ability to lip read, the detective read the warning to him. Both the sign expert and the detective were satisfied that Johanson understood the warning. Thereafter Johanson was questioned and nodded his assent when asked whether he had raped the 10-year-old girl. The district court found, based on these facts, that the requisites of **Miranda** were met. We agree.

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[1]939 F.2d 315 (5th Cir. 1991).

[2]419 U.S. 522 (1975).

[3]_____ F.3d _____ (5th Cir. July 27, 1994) (*en banc*).

Johanson next maintains that the prosecution failed to give prior notice of its intent to use his confession at trial as required by La. Code Crim. Proc. art. 768. This contention fails for two reasons: it is not supported by the facts,[4] and it is not a constitutional issue cognizable in federal habeas.[5]

Johanson also contends that the trial court's reasonable doubt instruction violated the teachings of **Cage v. Louisiana**[6] and **Sullivan v. Louisiana**[7] by instructing that a guilty verdict required "moral certainty" and that a reasonable doubt would have to be a "grave" doubt. **Cage** and its progeny state a new rule which is not to be applied retroactively, thus affording Johanson no surcease.[8]

Finally, Johanson claims constitutional error because the court reporter failed to transcribe closing arguments. This challenge does not rise to constitutional proportions.[9]

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[4]The district court found: "The record clearly reflects that on September 24, 1973, in accordance with Art. 768 of the Louisiana Code of Criminal Procedure, the prosecution gave notice of its intent to use and introduce statements of defendant." Johanson has not carried his burden of demonstrating that this finding is clearly erroneous.

[5]**Springer v. Coleman**, 998 F.2d 320 (5th Cir. 1993).

[6]498 U.S. 39 (1990).

[7]113 S.Ct. 2078 (1993).

[8]**Skelton v. Whitley**, 950 F.2d 1037 (5th Cir.), cert. denied, 113 S.Ct. 102 (1992).

[9]See **Woods v. Butler**, 847 F.2d 1163 (5th Cir.), cert. denied, 488 U.S. 970 (1988) (burden on prisoner to demonstrate particularized need for the requested transcript). Johanson has not pointed to any issue requiring a transcript of the closing arguments.

The judgment of the district court granting habeas relief on the jury issue is REVERSED; in all other respects the judgment of the district court is AFFIRMED.