IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30104
Conference Calendar

CHARLES E. SMITH,

Petitioner-Appellant,

versus

RICHARD L. STALDER, Secretary of Corrections 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
USDC No. CA-93-3703-E

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(September 23, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Charles E. Smith appeals the dismissal of his habeas corpus petition as an abuse of the writ. This Court reviews dismissals pursuant to Rule 9(b), RULES GOVERNING SECTION 2254 CASES IN THE U.S. DISTRICT COURTS, under the abuse-of-discretion standard. *See Saahir v. Collins*, 956 F.2d 115, 120 (5th Cir. 1992). "To excuse his failure to raise [a] claim earlier, [a habeas petitioner] must show cause for failing to raise it and prejudice therefrom

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

as those concepts have been defined in [the Supreme Court's] procedural default decisions." *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). Even if a petitioner fails to show cause and prejudice, "federal courts [must] entertain successive petitions when a petitioner supplements a constitutional claim with a `colorable showing of factual innocence.'" *Id*. at 495 (citation omitted). The alleged violation must have caused the conviction of an innocent person. *See id*. at 502.

Assuming that Smith showed cause, he cannot show prejudice as required by *McCleskey*. A habeas petitioner must show prejudice to obtain relief for failure of the state to provide him with a complete transcript for appeal. *United States v. Margetis*, 975 F.2d 1175, 1177 (5th Cir. 1992)(motion for relief pursuant to 28 U.S.C. § 2255); *Harris v. Estelle*, 583 F.2d 775, 777 (5th Cir. 1978)(alternative reconstruction of record satisfactory); *McCoy v. Collins*, No. 93-8527, p. 3 (5th Cir. May 3, 1994)(unpublished; copy attached).

Smith has not shown prejudice resulting from his appellate attorney's failure to obtain the entire transcript. First, *Cage v. Louisiana*, 498 U.S. 39, 40-41, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), the earliest authority supporting his theory regarding the "reasonable doubt" instruction, is not applicable retroactively. *Skelton v. Whitley*, 950 F.2d 1037, 1043 (5th Cir.), *cert. denied*, 113 S. Ct. 102 (1992). Smith was tried in 1968. He may not rely on *Cage* to obtain habeas relief based on the "reasonable doubt" instruction. *Id*. Second, Smith raises

his voir dire contention for the first time on appeal. This Court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Review of Smith's voir dire would require this Court to make factual determinations. This Court therefore need not consider Smith's voir dire contention.

Smith does not contend on appeal that he is actually innocent of killing his victim. He thus has abandoned any such contention. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993)(issues not briefed are abandoned). Because Smith can show no prejudice resulting from lack of a complete transcript and because he has waived any actual-innocence contention, the district judge's dismissal under Rule 9(b) was not an abuse of discretion.

Finally, Smith asserts that *McCleskey* cannot be applied retroactively. Smith's contention lacks a basis in fact. He filed his habeas petition in December 1993, long after the Supreme Court issued its opinion in *McCleskey*. The district court therefore did not apply *McCleskey* retroactively.

AFFIRMED.