

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30580  
Summary Calendar

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JOHN BOUDREAUX, JR.,

Petitioner-Appellant,

versus

BURL CAIN, Acting Warden,  
Louisiana 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-94-2264-I)

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(May 31, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:\*

John Boudreaux, Jr. was convicted for armed robbery, and is presently incarcerated at the Louisiana State Penitentiary. Boudreaux appeals the dismissal of his second petition for a writ of habeas corpus pursuant to Rule 9(b) of the Rules Governing Section 2254 proceedings. This court has granted Boudreaux's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

application for a certificate of probable cause to appeal whether a federal court may still review an attack on the constitutionality of the jury instruction at his trial. Specifically, Boudreaux asserts that Cage v. Louisiana, 489 U.S. 39 (1990), can be applied retroactively and thus invalidates his conviction.

We conclude, however, that the district court properly dismissed Boudreaux's petition and could not consider either the merits of his Cage claim or the Teague-implications of Sullivan v. Louisiana, 113 S. Ct. 2078 (1993). "[A] serial habeas petition must be dismissed as an abuse of the writ unless the petitioner has demonstrated 'cause' for not raising the point in a prior federal habeas petition and 'prejudice' if the court fails to consider the new point." Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992). To establish cause, the petitioner must show that an external impediment prevented him from raising the claim initially. McCleskey v. Zant, 499 U.S. 467, 497 (1991).

Although Cage was not decided until after Boudreaux's first habeas petition was filed in 1983,<sup>1</sup> this court has held that a failure to raise a claim in an earlier habeas petition may not be excused for cause "if the claim was reasonably available" at the time of the earlier petition. Selvage v. Collins, 975 F.2d 131, 133 (5th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993). Thus, "an omission of a claim [in an earlier habeas petition] may be excused for cause only if the question was so novel that it lacked

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<sup>1</sup> Actually, Boudreaux has filed three prior habeas petitions. Only one of those, the first, attacked the conviction which is at issue in this case.

a reasonable basis in existing law." Id. at 135 (emphasis added). In James v. Cain, \_\_\_\_ F.3d \_\_\_\_, \_\_\_\_ (5th Cir. 1995), this court held that Cage-type challenges to jury instructions have had a reasonable basis in existing law at least since 1982. ("Because it is clear that claims of defective 'reasonable doubt' instructions have been percolating in the Louisiana courts at least since 1982, there is no excuse for [his] failure to allege the definitional defect in his prior 1983, 1984, or 1989 habeas petitions.") Accordingly, Boudreaux, like any other petitioner who filed a habeas petition post-1982 without raising a Cage-claim, is foreclosed from now raising it.

For these reasons, the district court's dismissal of the petition is AFFIRMED.