

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3465
Summary Calendar

ROBERT COSSICH,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary, and
ATTORNEY GENERAL STATE OF LOUISIANA,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-92-4121-G)

(April 5, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Robert Cossich appeals the dismissal of his petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Concluding that Cossich has not exhausted his state remedies, we vacate and remand.

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Cossich, charged with two other defendants with first-degree murder, was found guilty of second-degree murder and sentenced to life imprisonment. See State v. Fleming, 574 So. 2d 486, 488 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 1313 (La. 1992). Before the affirmance of Cossich's conviction and sentence, see Fleming, id. at 497, the Supreme Court held that a jury instruction defining "reasonable doubt" that included the phrase "grave uncertainty," "actual substantial doubt," or "moral certainty" violated the Due Process Clause. See Cage v. Louisiana, 498 U.S. 39, 40-41 (1990) (per curiam). Cossich did not raise such an issue in the state court of appeal.

In his attorney-briefed application for writ to the Louisiana Supreme Court, Cossich added, as his sixth assignment of error, the issue of error from the jury instruction on reasonable doubt that used the phrase "grave uncertainty." In his application, Cossich asserted that error was preserved by timely objection made by his codefendant. A review of the record, however, reveals that counsel for the codefendant, Mr. Johnson, lodged a general objection to the jury charge but no specific objection to the instruction given on reasonable doubt. Cossich requested a specific jury instruction on reasonable doubt, which was denied by the trial court.

Without pursuing state post-conviction relief, Cossich filed a habeas petition in federal district court, raising issues found in his application to the Louisiana Supreme Court. In response to his application, the state objected to Cossich's failure to exhaust

state remedies. The state utilized the arguments found in Cossich's brief to the Louisiana Supreme Court in order to address the merits of his habeas claims.

Cossich moved for voluntary dismissal of his petition for failure to exhaust his state remedies but withdrew the motion at a status conference held before the magistrate judge. In response, the state reasserted its objection that Cossich had failed to exhaust his state remedies as to the Cage jury-instruction issue because it was not fairly and adequately presented to the state courts and because Cossich may have a colorable claim on this issue.

The district court overruled the state's exhaustion objection, noting that the state acknowledged that the jury-instruction claim was included in Cossich's application for writs to the Louisiana Supreme Court and that the denial of the writs did not mention denial on procedural grounds. In addition, the district court noted that a federal court need not return a claim to state court for exhaustion if such action would be a "futile gesture," and such would be the case here, as the Louisiana Supreme Court has held that Cage is not applied retroactively. Id. at 10-11; see State ex rel. Taylor v. Whitley, 606 So. 2d 1292, 1300 (La. 1992), cert. denied, 113 S. Ct. 2935 (1993).

The district court addressed the merits of each claim, concluded that each lacked merit, and dismissed Cossich's petition with prejudice. The district court issued a certificate of probable cause ("CPC") for Cossich to appeal, distinguishing those

issues raised in Cossich's habeas petition worthy of CPC from those lacking merit. Among the issues listed as lacking merit is the issue Cossich raises on appeal to this court.

II.

The state argues that Cossich failed to exhaust sufficiently his state remedies on his jury-instruction claim, the only issue he raises on appeal. "It is well settled that a habeas petition must be dismissed if any issue has not been exhausted in the state courts." Thomas v. Collins, 919 F.2d 333, 334 (5th Cir. 1990), cert. denied, 111 S. Ct. 2862 (1991). "If the petitioner did not fairly present the substance of his claim[] to the state courts . . . , the petition must be dismissed . . . so that the state court may have a fair opportunity to determine" the claim. Dispensa v. Lynaugh, 847 F.2d 211, 217-18 (5th Cir. 1988).

In initially raising the Cage jury-instruction issue in his petition for review to the Louisiana Supreme Court, Cossich asserted, without citing to the record, that error was preserved by his codefendant's timely objection. A review of the record, however, indicates that error was preserved by Cossich's request for a jury instruction, which request did not contain the offending phrases found in Cage. See Cage, 498 U.S. at 40. Further, because the issue was not argued to the state court of appeal, it is possible that the issue was not properly presented in the application to the state supreme court. See LA. SUP. CT. R. X § 1.

The Supreme Court has "held that raising a claim for the first

and only time in a petition for discretionary review does not satisfy the exhaustion requirements of 28 U.S.C. § 2254." Myers v. Collins, 919 F.2d 1074, 1075 (5th Cir. 1990) (citing Castille v. Peoples, 489 U.S. 346, 351 (1989)). Therefore, Cossich's jury-instruction claim has not been fairly and adequately presented to the state courts. Cf. id. at 1077 (noting the propriety of the federal habeas petition because petitioner presented claim and obtained ruling on the merits from the intermediate state appellate court before seeking review from state's highest court).

The district court, in denying the state's exhaustion objection, noted that the non-retroactivity of Cage would make Cossich's return to state court a "futile gesture." Retroactive application is not applicable to Cossich's case, however, as the direct appeal of his conviction was pending when Cage was decided. See State v. Smith, 600 So. 2d 1319, 1326 n.5 (La. 1992) ("There is no question of retroactive application of the Supreme Court's decision since this case was pending on direct appeal at the time the opinion was rendered."). Further, it appears that the state courts may conclude that Cossich's jury-instruction claim has merit. See State v. Harrison, 609 So. 2d 789, 789-90 (La. 1992) (reversing conviction because reasonable doubt instruction contained the phrase "grave uncertainty," one of the three offending phrases found in Cage); see also Sullivan v. Louisiana, 113 S. Ct. 2078, 2081-82 (1993) (holding that a Cage error is not amenable to harmless error analysis).

III.

In summary, the district court erred in overruling the exhaustion objection and addressing the merits of Cossich's petition. See Rose v. Lundy, 455 U.S. 509, 522 (1982). Therefore, we VACATE and REMAND for dismissal without prejudice for failure to exhaust state remedies. See Deters v. Collins, 985 F.2d 789, 797 (5th Cir. 1993).