

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30478
Summary Calendar

MAJOR DAVIS,

Petitioner-Appellant,

versus

BURL CAIN, Warden, La. State Penitentiary
AND RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-2578-H)

(June 5, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Major Davis was convicted of armed robbery, and was sentenced to seventy years imprisonment without the benefit of parole. Last year, Davis filed a habeas petition attacking the constitutionality of the "reasonable doubt" instruction given the jury at his trial in 1987. He had previously raised this Cage v.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Louisiana, 495 U.S. 39 (1990), claim on appeal to the state court. The Fourth Circuit, however, refused to address the merits of the issue and denied relief on a procedural bar rooted in Davis's failure to object at trial. State v. Davis, 596 So.2d 358 (La. App. 4th Cir. 1990) ("Since Cage, this Court has held that a Cage objection may not be raised on appeal unless a contemporaneous objection to the charge was made at trial.") (citation omitted). The Louisiana Supreme Court denied a writ of review. State v. Davis, 604 So.2d 965 (La. 1992) (writ denied).

The federal district court, after considering interesting issues like the retroactivity of Cage after Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), and the continued validity of Cage after Boyde v. California, 110 S. Ct. 1190 (1990), and Victor v. Nebraska, 114 S. Ct. 1239 (1994), ultimately dismissed the petition. Although the district court relied upon a controversial aspect of Toney v. Cain, No. 93-9607 (5th Cir. May 20, 1994), as one of the two alternative grounds for his decision, a later decision of this court simplifies the analysis necessary to affirm this conclusion.¹

I.

Davis concedes that he did not object at trial, and that the state courts actually relied on this procedural default. Nevertheless, he argues that the Louisiana state courts do not

¹ Despite the reformulation of Cage-claims in Sullivan v. Louisiana, this court has not yet departed from its pre-Sullivan decision in Skelton v. Whitley, 950 F.2d 1037, 1041-42 (5th Cir. 1992), cert. denied, 113 S. Ct. 102 (1992), that Cage is non-retroactive for Teague purposes. But see Adams v. Aiken, 41 F.2d 175, 177-79 (4th Cir. 1994); Nutter v. White, 39 F.3d 1154, 1156-58 (11th Cir. 1994).

regularly enforce this contemporaneous objection rule. To prevent federal habeas review, a state procedural bar "must be independent of the merits of the federal claim and adequate in the sense of not being unconstitutional, or arbitrary, or pretextual." Young v. Herring, 938 F.2d 543, 548 n.5 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1485 (1992) (internal quotations and citation omitted). But a state procedural ground will not bar consideration of the merits of an issue if the bar is not "strictly or regularly followed." Wilcher v. Hargett, 978 F.2d 872, 879 (5th Cir. 1992), cert. denied, 114 S. Ct. 96 (1993) (internal quotations and citation omitted). This exception is of little avail to Davis because Toney specifically held that a Cage-claim may be procedurally defaulted if the state court relied upon the procedural default. Slip. Op. at 4-6.

Hence Davis needs to show "cause" and "prejudice" to escape the procedural default in state court. Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991). The "cause" prong of this hurdle dictates that Davis establish that the "legal basis for [this] claim was not reasonably available to counsel." McCleskey v. Zaut, 499 U.S. 489, 493-94 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). In James v. Cain, ____ F.3d ____, ____ (5th Cir. 1995), however, this court precluded the possibility of "cause" for a failure to object at trial in 1987 because Cage-claims have been "reasonably available" at least since 1982.

For this reason, alone, we **AFFIRM** the dismissal of Davis's petition, and thus have no need to consider the

implications of the Supreme Court's post-Cage pronouncements on the vitality of Cage v. Louisiana itself.