

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30442

THOMAS LEE WARD,

Petitioner-Appellant,

versus

BURL CAIN, Acting Warden, Louisiana
State Penitentiary, Angola,
Louisiana,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(May 15, 1995)

On Application for Certificate of Probable
Cause and Motion for Stay

Before POLITZ, Chief Judge, GARWOOD and SMITH, Circuit Judges:

PER CURIAM:

Scheduled for execution between midnight and 3:00 a.m. on May 16, 1995, Thomas Lee Ward seeks a certificate of probable cause to appeal the denial of his petition for habeas corpus and a stay of his execution. Binding precedent precludes debate among jurists of reason about a dispositive issue and we must therefore deny the application for CPC and a stay.

We do not repeat the factual background and procedural posture of this case but refer to prior opinions.¹ In the petition at bar, Ward's third,² the sole claim is that his jury was given the identical reasonable doubt instruction that the Supreme Court held to be constitutionally infirm in **Cage v. Louisiana**.³ Assuming for today's disposition that **Cage** is retroactive,⁴ the dispositive issue is whether Ward has shown cause and prejudice, or alternatively, a fundamental miscarriage of justice which would satisfy the requirements of Rule 9(b) of the Rules Governing Section 2254 Cases.⁵

In **James v. Cain**⁶ we very recently rejected the assertion of cause for not raising a **Cage** claim in earlier petitions, finding

¹**State v. Ward**, 483 So.2d 578 (La.), cert. denied, 479 U.S. 871 (1986); **Ward v. Whitley**, 21 F.3d 1355 (5th Cir. 1994), cert. denied, 115 S.Ct. 1257 (1995).

²The first petition was dismissed for failure to exhaust state remedies and the second was denied.

³498 U.S. 39 (1990). The only difference between the two charges is clerical. **Cage** was decided while Ward's second habeas petition was pending appeal. He unsuccessfully pursued relief under **Cage** through the Louisiana state court system while we stayed our proceedings. He sought remand to the district court to amend his petition to add a **Cage** claim. That motion was denied.

⁴See **Sullivan v. Louisiana**, 113 S.Ct. 2078, 124 L.Ed. 2d 182 (1993); **Adams v. Aiken**, 41 F.3d 175 (4th Cir. 1994), petition for cert. filed (Apr. 7, 1995) (No. 94-8786); **Nutter v. White**, 39 F.3d 1154 (11th Cir. 1994). But see **Skelton v. Whitley**, 950 F.2d 1037 (5th Cir.), cert. denied, 113 S.Ct. 102 (1992).

⁵See **Schlup v. Delo**, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995). Ward raised this issue in his petition and the state moved to dismiss the petition under Rule 9(b).

⁶____ F.3d ____, 1995 WL 225184 (No. 95-30354) (Apr. 17, 1995) (slip op. at 3462).

that the claim reasonably was available since the early 1980s. The effect of **James** is to relegate Ward's efforts to avoid the limitation of Rule 9(b) to the fundamental-miscarriage-of-justice exception. As defined by the Supreme Court, that exception is confined to cases of actual innocence, where the petitioner shows, as a factual matter, that he did not commit the crime of conviction.⁷ Ward has made no showing that it is more likely than not that no reasonable juror would have found him guilty if given a correct instruction.⁸ Accordingly, under controlling precedent we may not find a miscarriage of justice.

The application for a certificate of probable cause and the motion for a stay are DENIED.

POLITZ, Chief Judge, concurring:

I fully concur with the foregoing, adding that I share the concern voiced by the district court that a person may be executed when there effectively appears, in the words of Justice Scalia, to be "no jury verdict of guilty-beyond-a-reasonable-doubt." **Sullivan v. Louisiana**, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182, 189 (1993). With respect to the holding of **James v. Cain**, 1995 WL 225184 (No. 95-30354) (Apr. 17, 1995), regarding the availability of a **Cage** claim, I am mindful of the Louisiana Supreme Court's observation

⁷**Schlup; McCleskey v. Zant**, 499 U.S. 467 (1991). In **Sawyer v. Whitley**, 112 S.Ct. 2514, 120 L.Ed. 2d 269 (1992), the Court applied the miscarriage of justice exception to a petitioner who claimed to be actually innocent of the death penalty.

⁸See **Schlup**.

that the prevailing view during the 1980s was to reject challenges to reasonable doubt instructions. **State ex rel. Taylor v. Whitley**, 606 So.2d 1292 (La. 1992), cert. denied, 113 S.Ct. 2935 (1993).