**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 94-30337
Summary Calendar

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ELTON BURNETT,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, 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
(C.A. 93-3521 H)

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(January 5, 1995)

Before POLITZ, Chief Judge, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Elton Burnett, convicted of aggravated rape and sentenced to life imprisonment, appeals the denial of his petition for a writ of habeas corpus. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

## Background

In August 1985, Burnett raped and beat Romanda Williams in Kenner, Jefferson Parish, Louisiana. He was indicted for aggravated rape, found guilty by a jury, and sentenced to life imprisonment. His conviction was affirmed on direct appeal.[1] He filed applications for post-conviction relief, alleging that both his grand and petit juries were impaneled unconstitutionally, that the petit jury was charged improperly, and that he received ineffective assistance of counsel. This collateral relief was denied by the state court.[2]

The instant 28 U.S.C. § 2254 petition, urging the same grounds as advanced before the state court, was denied by the district court, which allowed Burnett to proceed *in forma pauperis* and granted a certificate of probable cause for appeal. Burnett timely appealed.

## Analysis

Burnett first claims that his sixth and fourteenth amendment rights to a jury selected from a fair cross-section of the community[3] were violated, maintaining that no African-Americans were included in the grand jury[4] and that his petit jury venire contained only one African-American.

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[1]**State v. Burnett**, 496 So.2d 1236 (La.App. 1986).

[2]See **State ex. rel. Burnett v. Whitley**, 623 So.2d 1293 (La. 1993).

[3]**Taylor v. Louisiana**, 419 U.S. 522 (1975).

[4]The record contains the affidavit of the foreman of the grand jury stating that two members were African-Americans.

In order to demonstrate a *prima facie* violation of the fair cross-section requirement, Burnett must establish that

> (1) the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.[5]

In support of this claim Burnett relies upon voter rolls reflecting the percentage of African-American voters in Jefferson Parish and the grand and petit jury venires during the relevant periods of his indictment and trial. The evidence Burnett offered fails to show, however, the racial composition of the panels. The record before us contains no evidence of the systematic exclusion of African-American jurors in Jefferson Parish, either in the selection of grand juries or petit jury venires.

Burnett next contends that the state trial judge erred in not instructing the jury on the sentences to be imposed for aggravated rape and forcible rape. The essence of the contention is that the court's failure to instruct the jury that a conviction for aggravated rape carried a mandatory life sentence denied him due process of law. This argument is without foundation. The record reflects that at the request of the defense the judge instructed the jury about the mandatory life sentence.[6]

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[5]**Duren v. Missouri**, 439 U.S. 357, 365 (1978).

[6]Burnett responds that the jury charge in the record was false. This issue was not presented to the district court and cannot now be raised on appeal. **Vernado v. Lynaugh**, 920 F.2d 320 (5th Cir. 1991).

Burnett further complains that the trial judge did not instruct the jury on responsive verdicts to the charge of aggravated rape. The record belies the validity of this contention.[7]

Burnett additionally asserts that his trial counsel was ineffective for failing either to object to the racial composition of the grand and petit juries or to request the proper jury instructions. In order to prevail on this claim Burnett must demonstrate that counsel's performance was "deficient" and "that the deficient performance prejudiced the defense."[8] He has not done so and this claim also lacks merit.

Burnett moves this court to issue a subpoena duces tecum to the state court clerk for the master lists of grand jurors and foremen from 1975 to 1985 and the original jury charges in his trial. The request for the master juror lists was never presented to the district court; we cannot expand the appellate record under these circumstances.[9] His request for the original jury charges was denied by the district court, and properly so, as the charge that was read to the jury during the trial was in the record. The motion for a subpoena duces tecum is DENIED.

Finally, Burnett moves this court for appointment of counsel.

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[7]Assuming *per arguendo* that the trial judge failed to instruct on responsive verdicts, that failure does not rise to the level of a constitutional violation cognizable under 28 U.S.C. § 2254. **Alexander v. McCotter**, 775 F.2d 595 (5th Cir. 1985).

[8]**Strickland v. Washington**, 466 U.S. 668, 687 (1984).

[9]**Kemlon Products & Development Co. v. United States**, 646 F.2d 223 (5th Cir.), cert. denied, 454 F.2d 863 (1981).

To qualify he must show that the "interests of justice" require appointment of counsel.[10] As Burnett's *pro se* brief "adequately highlights the issues and the pertinent facts in the record," and the appellate issues "are not particularly complex,"[11] no such appointment is warranted herein and this motion is DENIED.

Burnett's remaining claims are without merit. The judgment of the district court denying 28 U.S.C. § 2254 relief is AFFIRMED.

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[10]**Schwander v. Blackburn**, 750 F.2d 494, 502 (5th Cir. 1985).

[11]**Id.**