IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50422
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NORMAN WAGNER,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-93-CR-200(2)

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(November 17, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:[*]

Wagner asserts that in his oral objection to the trial court he "demonstrated a sufficiently great disparity between the representation of a group in the population and its representation on the jury panel such as to make out a prima facie case." He contends that the district court erred in overruling his objection because "there ha[d] been a substantial failure to comply with the provisions of 28 U.S.C. Sec. 1867(d)." Section 1867(d) states in relevant part:

(d) Upon motion filed under subsection (a), (b),

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

> or (c) of this section, *containing a sworn statement of facts*, which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion . . . any . . . relevant evidence. . . . If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title. (emphasis added).

Wagner has failed to comply with the provisions of § 1867(d). First, any objection to the jury selection process must be made in a written motion to the court, and the motion must contain a sworn statement of facts concerning the alleged defect. See United States v. Kennedy, 548 F.2d 608, 613 (5th Cir.), cert. denied, 434 U.S. 865 (1977)(holding that appellant could not avail himself of the statute's remedies because "[h]is counsel objected to the presence of volunteers on the jury panel *only by oral objection at the outset of the voir dire*. . . . [and because he] omitted to accompany his motion with the required sworn statement." (emphasis added)). Second, the only relief available under § 1867 is a stay in the proceedings to allow the court to correct any established defects in the selection process. See Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 209 (5th Cir. 1992). "[T]he statute does not contemplate that a new trial could be granted for a violation of the act `since the only remedy provided is a stay in the proceedings until a jury can be selected in conformity with the statute.'" Id. (citation omitted). Wagner's request for a reversal of his conviction cannot succeed under § 1867.

Although a statutory challenge is not available to Wagner for the reasons outlined above, his attack on the jury selection process is also a constitutional challenge. Wagner contends that the jury selection process in the San Antonio division of the Western District of Texas violated his Sixth Amendment right to a jury composed of a fair cross-section of the community because the jury venire from which his jury was selected contained no Black members. In order to establish a prima facie violation of the Sixth Amendment's fair-cross-section requirement, Wagner must show

> (1) that 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.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). Wagner satisfies the first prong under Duren, since Blacks as a race are sufficiently distinct so that "if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." Taylor v. Louisiana, 419 U.S. 522, 531, 95 S. Ct. 692, 42 L. Ed. 2d. 690 (1975). Wagner fails, however, to establish that Blacks are not represented in venires in proportion to their percentage of the population in the San Antonio division. Wagner points out only the undisputed fact that there were no Blacks in the pool from which his jury was selected. He alleged but did not put into evidence statistics placing San Antonio's Black population at

approximately 7% of its total, but he did not allege what percentage of the San Antonio division's venires were made up of Blacks. Although he asked the court to "take judicial notice" of the percentage of Blacks in Bexar County, the court took judicial notice only that there were no Blacks on the panel. Moreover, Wagner made no showing that Blacks were systematically excluded from the jury selection process. See Atwell v. Blackburn, 800 F.2d 502, 505-06 (5th Cir. 1986), cert. denied, 480 U.S. 920 (1987). Wagner has thus failed to establish his prima facie case of a Sixth Amendment fair-cross-section violation. Wagner's conviction is therefore AFFIRMED.