04/03/02 “See News Release 028 for any concurrences and/or dissents.”

SUPREME COURT OF LOUISIANA

No. 95-KA-1489

STATE OF LOUISIANA

VERSUS

RICKY LANGLEY

Johnson, J., concurs and assigns reasons

This court is faced with the moral and legal implications of 49 years of discrimination in the selection of grand jury forepersons in Calcasieu Parish. How do we certify that the Louisiana judicial system is fundamentally fair, where there is compelling evidence of racial and gender discrimination?

It is well settled since *Campbell v. Louisiana*, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998) that a white male has standing to raise the issue of racial and gender discrimination in selection of the grand jury foreperson. Mr. Langley, in fact, presented compelling proof that a total of 49 grand juries which sat in Calcasieu Parish from March 12, 1972 to June 23, 1994 discriminated against blacks and women in the selection of grand jury forepersons.

The evidence showed the probability of randomly selecting only 3 African Americans out of 49 as grand jury foreperson was 1 in 392, since African Americans made up 21.6% of the grand jury pool. Women comprised 52.4% of the pool of grand jurors randomly selected since 1975, but were selected foreperson only 12 times out of 43, a statistical probability of 1 in 1502.[1]

Having concluded that we must set aside Mr. Langley’s conviction of first degree murder and death sentence, I would go even further and conclude that the

[1]Prior to 1975, women were excluded from jury service.

entire work of this illegally constituted grand jury must be set aside.

This special grand jury convened on April 5, 1991, and sat until March of 1992. It had no black members and a white male as foreperson. During this time, the grand jury returned 300 true bills. How can we deny relief to others indicted by this same illegal grand jury? Prior to 1999, the district judge selected all grand jury forepersons. After *Campbell*, the Louisiana legislature amended La. C.Cr.P. art. 413 to remove the power of selection from the trial judge in favor of random selection. A state cannot subject a defendant to indictment by a grand jury that has been selected in a discriminatory manner. To do so violates the defendant's equal protection rights under the Fourteenth Amendment. *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 83 (1972).

How has this Court responded to claims by defendants that their rights were violated under the Fourteenth Amendment Due Process Clause? We have systematically denied relief to these defendants by relying on La. C.Cr. P. art. 841, which requires a defendant to move before trial to quash the indictment. We have held that failure to so move, results in waiver of any claims of discrimination in the selection of grand jury foreperson. Federal equal protection claims arising out of the selection and composition of grand juries in Louisiana have remained subject to this state's settled procedural rule that a defendant must assert the challenge in a motion to quash filed before trial. *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976). See *State v. Deloche*, 96-1901 (La. 11/22/96), 684 So.2d 349 ("Counsel must assert the equal protection claim in a pre-trial motion to quash or waive any complaint in that regard"); *State v. Dillard*, 320 So.2d 116,120 (La. 1975) (failure to file motion to quash before trial waives any challenge to the grand jury); *State v. White*, 193 La. 775, 786, 192 So.2d 345, 348

(1938) (same); *cf. State v. Lindsey* 94-1559 (La. 3/17/95), 651 So.2d 264 (court denies writs when even capital convict failed to raise before trial issue of discrimination in grand jury foreman selection process).

The inequitable result of this procedural bar is shown in the following scenario: Where two defendants, both aggrieved by the violation of their constitutional right to be indicted by a legally constituted grand jury, one defendant is entitled to have his conviction overturned because his counsel timely filed a motion to quash, while the other defendant is not afforded such relief due to the ineffective assistance of his counsel in failing to timely file the motion to quash. Thus, a defendant's remedy against a violation of his constitutional right is contingent upon the effectiveness of his counsel. In some cases, we have attributed the failure to file the motion to quash, that in any case would likely lead only to re-indictment, to "trial strategy." See *State v. Hoffman*, 98-3118 (la. 4/11/00), 768 So.2d 542, 577 (counsel's decisions as to which motions to file form a part of trial strategy); *State v. Smith*, 94-0621 (La. App. 4 Cir. 12/15/94); 647 So.2d 1321, *rev'd on other grounds*, 95-0061 (La. 7/2/96); 676 So.2d 1078.

What a cruel irony! Mr. Langley, a white male, has been afforded relief because his counsel timely filed a motion to quash the illegally constituted indictment based on racial and gender discrimination, while many African Americans who were indicted by this same illegally constituted grand jury remain incarcerated, and some perhaps sit on death row. Louisiana has an adult prison population that is 76% African American.[2] Many of these criminal defendants, too numerous to detail in this document, were indicted by grand juries that were illegally

[2]Statistic derived from a Demographic Profiles of the Adult Correctional Population (January 1, 2002), prepared by Office of Management & Finance Information Services, Louisiana Department of Public Safety and Corrections.

constituted because of racial and gender discrimination in the selection of grand jury forepersons. They will not have the benefit of *Campbell* and *Langley* because of the ineffective assistance of their counsel in failing to timely file a pre-trial motion to quash their indictments.

Discrimination in the selection of grand jurors is a "grave constitutional trespass" and it "undermines the structural integrity of the criminal tribunal itself." *State v. Cain*, 99,2173 (La. App. 1 Cir. 10/26/99), 763 So.2d 1 citing *Vasquez v. Hillery*, 474 U.S. 254, 262 & 263-64, 106 S.Ct. 617, 623, 88 L.Ed.2d 598 (1986). If a defendant proves systematic exclusion of blacks from the grand jury, the remedy is reversal of the conviction. The error is not subject to harmless error review. *Vasquez v. Hillery*, 474 U.S. at 263-64, 106 S.Ct. at 623. See also *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999); *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Thus, the indictments from the 49 unconstitutionally constituted grand juries in this case mandates automatic reversals, not subject to the harmless error analysis and certainly should not be subordinate to a procedural law of this state.

In light of our holding that the grand juries did discriminate, we cannot treat any indictment returned by them as valid. Therefore, the only remedy for this intentional discrimination is to vacate all the convictions and quash the indictments returned by these unconstitutionally constituted grand juries.