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

ON APPEAL
FROM THE FOURTEENTH JUDICIAL DISTRICT COURT,
PARISH OF CALCASIEU

WEIMER, Justice concurs and assigns reasons.

Constrained by controlling precedent of the United States Supreme Court to reluctantly concur in the result reached by the majority, I write separately to express disagreement with the remedy imposed by the United States Supreme Court for discrimination in the selection of the foreperson for the grand jury that indicted Langley. Following **Vasquez v. Hillery**, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) and **Rose v. Mitchell**, 443 U.S. 545, 99 S.Ct. 2993, 611 L.Ed.2d 739 (1979), the majority is obligated to find that the remedy for intentional discrimination in the selection and composition of grand juries is to vacate the conviction and quash the indictment returned by the unconstitutionally constituted grand jury. While this is clearly the result mandated by the United States Supreme Court, whose rulings on federal constitutional principles we are bound to follow, I am of the opinion that the remedy in this case imposes a greater societal injustice than the ill it is designed to ameliorate. Recognizing that discrimination at any stage of a criminal proceeding is odious and cannot under any circumstances be condoned, I nevertheless believe that the heavy societal cost entailed in the reversal of Langley's conviction is unjustified in this instance, especially considering (1) that Langley fails to demonstrate that he suffered any prejudice as a result of the improperly constituted grand jury and (2) that

the practice of discrimination in the selection of grand jury forepersons in Calcasieu Parish (and indeed in the entire State of Louisiana) has been eradicated by virtue of the amendment of La.C.Cr.P. art. 413, eroding the deterrent effect of the drastic corrective measures imposed.

Adhering to what I recognize to be the minority view in the United States Supreme Court on this issue, I would nevertheless urge the adoption of the harmless-error rule for claims of grand jury discrimination. The Supreme Court has thus far refused to adopt such a rule on the finding that "[s]election of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." **Rose v. Mitchell**, 443 U.S. at 555-556; 99 S.Ct. at 3000. However, as Justice Powell points out in his dissent in **Vasquez v. Hillery**, the Court has never adequately explained why grand jury discrimination "affects the 'integrity of the judicial process' to a greater extent than the deprivation of equally vital constitutional rights, nor why it is exempt from a prejudice requirement while other constitutional errors are not." 474 U.S. at 271; 106 S.Ct. at 627. Indeed, every constitutional error may be said to raise questions as to the "appearance of justice" and the "integrity of the judicial process." As Justice Powell notes:

> Grand jury discrimination is a serious violation of our constitutional order, but so also are the deprivations of rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to which we have applied harmless-error analysis or an analogous prejudice requirement. Moreover, grand jury discrimination occurs *prior* to trial, while the asserted constitutional violations in most of the [cases applying harmless-error analysis] occurred *during* trial.

Vasquez v. Hillary, 474 U.S. at 271; 106 S.Ct. at 627. There does not seem to be a coherent rationale for the Supreme Court's disparate handling of claims of grand jury discrimination other than the societal goal of eradicating discrimination. However,

there must be means of vindicating this important interest short of reversing a defendant's otherwise constitutionally valid conviction. Clearly, there is little doubt that a member of the venire who was discriminatorily excluded from grand jury service would be dismayed to learn that the defendant used his or her constitutional rights as a means to overturn this defendant's conviction.

I am convinced that there was no intentional discrimination from the standpoint anyone was purposely excluded based on race or gender. Thus, the statistics which reflect an under representation of certain segments of society were not the result of intentional bias, but rather a function of judges choosing people they believed were qualified because they knew the person. Although the net result may be a statistical under representation based on race and gender, purposeful intentional bias and prejudice has not been established.

In the instant case, Langley makes no allegation that the composition of his trial jury was affected by the discrimination in the selection of the foreperson of his grand jury. The properly constituted trial jury's verdict of guilty beyond a reasonable doubt could thus in no way be seen to have been affected by the composition of the grand jury. Given the lack of prejudice in fact suffered by Langley, the remedy imposed — reversal of his conviction — seems disproportionate to the ill it seeks to cure, especially considering that the legislature has seen fit to amend the procedure for selecting grand jury forepersons to remove the constitutional infirmity, negating the deterrent effect such a prophylactic measure would serve. Therefore, if writing on a clean slate, I would apply a harmless-error analysis to affirm Langley's conviction and sentence. However, being bound by the decisions of the U.S. Supreme Court, I am forced to concur.