STATE OF LOUISIANA	*	**NO. 2005-K-0419**
VERSUS	*	**COURT OF APPEAL**
EVERETT OFFRAY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 371-740, SECTION "D"
HONORABLE FRANK A. MARULLO, JUDGE
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JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Max N. Tobias Jr., Judge Leon A. Cannizzaro Jr.)

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STATEMENT OF THE CASE

On September 1, 1994 the relator, Everett Offray, was indicted for first degree murder, a violation of La. R.S. 14:30. On September 7, 1994 he pleaded not guilty. On June 4, 1996 the jury found him guilty of second degree murder. On July 10, 1996 the trial court imposed a life sentence without benefit of probation, parole or suspension of sentence. This Court affirmed the relator's conviction and sentence. State v. Offray, 2000-0959 (La. App. 4 Cir. 9/26/01), 797 So.2d 764, writ denied, 2001-2859 (La. 8/30/02), 823 So.2d 940. On June 22, 2004 the relator through counsel filed an application for post conviction relief. On January 21, 2005 the trial court denied the motion as to the Dilosa issue, and the defense objected. Defense counsel filed a notice of intention to file for supervisory writs, and on February 1, 2005 the court set the return date for March 16, 2005. Although the trial court set the return date over thirty days from the date of the ruling and from the filing of the notice of intent, the defense filed the writ on March 16, 2005 in compliance with the trial court's order. The relator should not be penalized for the trial court's error. See State v. Khomais, 2000-2344 (La. 6/15/01), 793 So.2d 206. Therefore, we consider the writ.

STATEMENT OF THE FACTS

The facts were summarized in this Court's appeal opinion. The facts are not relevant to the issues involved in this writ relating to an application for post- conviction relief.

DISCUSSION

The defense raises four issues in the writ application: 1) the recent rulings of this Court contain material errors and reasoning; 2) the indictment is invalid because the system for selecting grand jury members in Orleans Parish is unconstitutional per se, or alternatively, susceptible to abuse so as to deny the relator his right to equal protection and due process of law by systemically excluding African-Americans from service on the grand jury; (3) the indictment is invalid because the grand jurors were selected pursuant to unconstitutional local laws, as held in State v. Dilosa, 2002-2222 (La. 6/27/03), 848 So.2d 546; and (4) the procedural bar of Deloch v. Whitley, 96-1901 (La. 11/22/96), 684 So.2d 349, cannot withstand judicial scrutiny.

CLAIM 1

The relator argues that this Court has erred in State v. Bradford, 2002-1452, p. 9 (La. App. 4 Cir. 4/23/03), 846 So.2d 880, 887, writ denied, 2003-1410 (La. 11/26/03), 860 So.2d 1133, which relied on Deloch for the proposition that the failure to file a pretrial motion to quash relating to the

selection and composition of grand juries in Louisiana constitutes a bar to relief. He argues that reliance on cases involving the waiver of rights during guilty pleas is ill-founded in cases, such as this one, where the defendant went to trial and was convicted of the crime. However, he never discounts the holding in Deloch: "*All* equal protection claims arising out of the selection or composition of grand juries in Louisiana remain subject to this state's procedural requirements." 684 So.2d at 349. (emphasis in original) Procedurally under La. C.Cr.P. art. 535, arguments relating to the selection or composition of grand juries must be raised by means of a pretrial motion to quash. The relator attempts to limit Deloch to equal protection claims, not due process claims. However, La. C.Cr.P. art. 533(1) provides that a motion to quash an indictment may be based on the ground that the "manner of selection of the general venire, the grand jury venire, or the grand jury was illegal…." That language appears to cover all claims challenging the manner of selection. The defense does not discount the settled line of jurisprudence based on Deloch's holding that the failure to file a pretrial motion to quash constitutes a bar to relief, including this Court's most recent opinion, State v. Washington, 2005-0035 (La. App. 4 Cir. 4/6/05), __ So.2d __, 2005 WL 896442. Although defense counsel attempts to distinguish cases involving guilty pleas, most of the cases, including Bradford and

Washington, involve convictions by a jury. For the reasons that follow we find these arguments lack merit.

CLAIMS 2, 3, and 4

In these three claims the relator argues that the indictment was invalid because the system for selecting grand jury members in Orleans Parish was unconstitutional per se, or alternatively, susceptible to abuse so as to deny him his right to equal protection and due process of law by systemically excluding African-Americans from service on the grand jury, that the indictment was invalid because the grand jurors were selected pursuant to unconstitutional local laws, and that the procedural bar of Deloch cannot withstand judicial scrutiny.

The relator through counsel concedes that he did not file a pretrial motion to quash the indictment. Therefore, he has waived review of the issues involved in his second and third claims. In State v. Washington, 2005-0035 (La. App. 4 Cir. 4/6/05), __ So.2d __, 2005 WL 896442, this Court was faced with similar claims raised in an application for post conviction relief, which was denied by the trial court. This Court stated:

> In Deloch v. Whitley, 96-1901 (La.11/22/96), 684 So.2d 349, the Louisiana Supreme Court made clear that an equal protection claim based upon discriminatory selection of the grand jury foreman is barred if the defendant fails to file a pretrial

motion to quash saying:

> *All* equal protection claims arising out of the selection or composition of grand juries in Louisiana remain subject to this state's procedural requirements. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Counsel must assert the equal protection claim in a pre-trial motion to quash or waive any complaint in that regard. Francis, 425 U.S. at 539-542, 96 S.Ct. at 1710-11; State v. Lee, 340 So.2d 180, 182 (La.1976) (motion to quash is the appropriate vehicle for challenging the validity of a grand jury indictment, composition, or selection process); State v. Dillard, 320 So.2d 116, 120 (La.1975) (failure to file a motion to quash before trial waives any challenge to the grand jury); State v. White, 193 La. 775, 192 So. 345, 348 (1939) (same); cf., Johnson v. Puckett, 929 F.2d 1067, 1069 (5th Cir.1991) ("At his trial, Johnson, a black male, moved to quash the indictment because of racial discrimination in the selection of the grand jury foreman but the motion was denied."); Guice v. Fortenberry, 661 F.2d 496, 501, n. 7 (5th Cir.1981) (same), appeal after remand, 722 F.2d 276 (5th Cir.1984).

Id. at p. 5, quoting State v. Bradford, at p. 9, 846 So.2d at 887, which quoted Deloch v. Whitley, at pp. 1-2, 684 So.2d at 349.

In State v. Williams, 03-0091, pp. 2-3 (La. App. 4 Cir. 1/14/04), 866

So.2d 296, 298-299 (on rehearing), writ denied, 2004-0438 (La. 6/25/04), 876 So.2d 831, cert. denied, __ U.S. __, 125 S.Ct. 880 (2005), this Court held:

> The statute and codal provisions pertinent to this case were declared unconstitutional in Dilosa solely because they were local laws in violation of La. Const. art. III, § 12(A). However, the constitutional prohibition against local laws which underlies the Dilosa decision simply reflects a policy decision that legislative resources and attention should be concentrated upon matters of general interest and that purely local matters should be left to local governing authorities. Morial v. Smith & Wesson Corp., 2000-1132, p. 22 (La.App. 4 Cir. 4/3/01), 785 So.2d 1, 17; Kimball v. Allstate Ins., Co., 97-2885, p. 4 (La.4/14/98), 712 So.2d 46, 50. As such, the substantial rights of a criminal defendant are not affected per se solely because he is indicted by a grand jury selected pursuant to local laws passed by the Louisiana State legislature. Thus, although the trial court erred in denying defendant's motion to quash his grand jury indictment based on the unconstitutionality of the local laws at issue, there is no showing that the error affected his substantial rights. Accordingly, the error does not require reversal of defendant's conviction, sentence and indictment.

(footnote omitted). *See*, State v. Washington, 2005-0035, at pp. 5-6. See also State v. Mercadel, 2003-3015 (La. 5/25/04), 874 So.2d 829 (where the Supreme Court stated that a defendant, whose motion to quash alleged that the selection procedures in place after the 2001 amendments to the statutes

were still unconstitutional local laws, had no standing because he had failed to show that the statutes had a serious effect on his rights); State v. Newman, 2003-1721, pp. 14-15 (La. App. 4 Cir. 7/7/04), 879 So.2d 870, 878, writ denied, 2004-2050 (La. 1/7/05), 891 So.2d 668 (where this Court stated that none of the defendant's federal or state constitutional rights as a criminal defendant was affected by a grand jury being selected pursuant to laws that were unconstitutional solely because they were local laws).

The trial court properly denied the grand jury claims, which were not raised by pretrial motion to quash, pursuant to Washington and Deloch v. Whitley, 684 So.2d at 349, and pursuant to Washington, Williams, and Newman because the relator failed to show prejudice or that the statutes seriously affected substantial rights.

Relator next argues that Deloch cannot withstand judicial scrutiny as a procedural bar. However, Deloch v. Whitley, 684 So.2d at 349, is the latest pronouncement on this issue by the Louisiana Supreme Court; this Court is bound by its ruling. Recently, this Court relied upon Deloch and discounted relator's very similar arguments raised in his application for post-conviction relief that an invalid indictment is a jurisdictional defect which cannot be waived and may be raised even after conviction. State v. Washington, 2005-0035, at pp. 6-9. Relator's claim has no merit.

Relator's claims lack merit. The trial court properly denied relator post-conviction relief.

WRIT DENIED.