STATE OF LOUISIANA	*	**NO. 2002-KA-1700**
VERSUS	*	**COURT OF APPEAL**
ERRAN FLEMING AND KEVIN TRAINOR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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BAGNERIS, J., DISSENTS WITH REASONS

I respectfully dissent from the majority opinion for the following reasons;

On September 3, 1998, the defendants were charged by bill of indictment with first-degree murder in violation of La. R.S. 14:30. On July 11, 2001, the trial court quashed the indictment, finding: (1) that the defendants presented a prima facie case of discrimination in the selection of grand jury forepersons in violation of the due process and equal protection clauses of the United States Constitution's Fourteenth Amendment and the Louisiana Constitution's Article I, §§ 2 and 3; and (2) that former La.C.Cr.P. art. 413(C) was unconstitutional as a local or special law in violation of La. Const. Art. III, § 12. Vol. XII, p. 1692-1700.

The state appealed this ruling, asserting that the Louisiana Supreme

Court had jurisdiction pursuant to Article V, § 5(D)(1) of the Louisiana Constitution. The court, however, found that it lacked jurisdiction under Article V, § 5(D)(1), vacated the ruling of the trial court declaring La.C.Cr.P. art. 413(C) unconstitutional as a local or special law under La. Const. Art. III, § 12(a)(3), and transferred the case to this court for further proceedings as an appeal by both the state and the defendants on all other grounds properly raised in the Louisiana Supreme Court. *See* State v. Fleming, 2001-2799, p. 1, 5-6 (La. 6/21/02), 820 So.2d 467, 470. This appeal follows.

STATEMENT OF FACT

The following is adapted from the Louisiana Supreme Court's opinion in State v. Fleming, 2001-2799 (La. 6/21/02), 820 So.2d 467. On July 7, 1998, Kevin Wooldridge was murdered at his French Quarter residence during the course of an armed robbery. The defendants were subsequently arrested and indicted by an Orleans Parish Grand Jury for his murder. The defendants filed motions to quash the indictment, arguing that former La.C.Cr.P. art. 413(C), governing the selection of grand jurors in Orleans Parish, was unconstitutional.

In the State's Motion to Quash, the defendants asserted that La.C.Cr.P. art. 413(C) was unconstitutional on several grounds: (1) the

statute did not provide for random selection of grand jury forepersons in violation of their Fourteenth Amendment Due Process and Equal Protection rights; (2) the statute was unconstitutional as a local or special law in violation of La. Const. Art. III, § 12; and (3) the statute excluded felons from grand jury service in violation of state and/or federal constitutional rights. The trial court held several hearings on the matter. The most relevant evidence the trial court reviewed included the records of the makeup of Orleans Parish grand juries from 1987-2000, the testimony of the judge who presided over the grand jury that issued the indictment in this case, and the testimony of two expert witnesses. State v. Fleming, 2001-2799, p. 1-3 (La. 6/21/02), 820 So.2d 467, 469.

The following is a detailed summary of all witness testimony by hearing date. The first hearing on the motions to quash was held on August 4, 2000 for the purpose of determining the location of grand jury records from 1960 to the present and to introduce evidence of historical discrimination in the grand jury selection process. At this first hearing, the following witnesses testified: Josephine Windhorst, Edwin Lombard, Alfred Speer, Numa Bertel, Kevin Boesha, Greg Voigt, Roger Jordan, and Joseph Marcel. Josephine Windhorst, the Orleans Parish Jury Commissioner, testified that as Custodian of Jury Records in Orleans Parish she possessed

the names of all jurors who served on grand juries since 1986, with the exception of the then sitting grand jury. Her records, however, did not indicate the race of any of the grand jurors. Ms. Windhorst was later called to testify as the only witness at a hearing on March 16, 2001 regarding the procedure for selecting grand juries in Orleans Parish under former La. R.S. 413(C). She admitted that persons were excluded if they had served within five years. Ms. Windhorst also testified that if the potential grand juror thought he or she had a felony record, regardless of the date of conviction and without assurance that the charge was a felony or a conviction resulted, he or she would be excused. Edwin Lombard testified that as the Clerk of Criminal Court for Orleans Parish, he has no records related to the selection of grand jurors. Alfred Speer, Clerk of the Louisiana House of Representatives, testified regarding the legislative history of the amendments to La. C.Cr. P. art. 413, in particular section B, in response to a recent United States Supreme Court case disapproving of the grand jury foreperson selection process in Louisiana.

A number of former and current Orleans Parish prosecutors testified next. Numa Bertel, a former Orleans Parish prosecutor, testified that he could recall only one grand jury with more than one black member during the years 1967 or 1968 through 1973 when he worked with grand juries.

Kevin Boesha, a former Orleans Parish prosecutor, testified that he recalled the grand juries with whom he worked during the years 1984 through 1988 were composed of a mix of African-Americans and Caucasians. Next, Greg Voigt, an Orleans Parish prosecutor, testified that in response to a discovery request in a prior case, he had located transcripts in an offsite District Attorney storage warehouse that contained the names but not the races of grand jurors from 1957 through 1964.

Roger Jordan, an Orleans Parish prosecutor, testified that during the time he worked with grand juries, from 1991 through 1993 and 1996 through 1998, the procedure in the office was to keep a folder of notes on each grand jury while empanelled and to retain those notes for a couple of years thereafter before disposing of them. Mr. Jordan clarified that the notes were considered work product, not official records of the grand juries such as would be maintained by a custodian of records. Lastly, Joseph Marcel, a former Orleans Parish prosecutor, testified as to various personal observations during his time with the District Attorney's Office from 1967 to 1968, and he acknowledged that he had never assisted in any grand jury proceeding or selection.

The next hearing was held on March 30, 2001, with Judge Terry Q. Alarcon, Dr. Joel Devine, Shirley Dennis, Delays Brock, and Ernesta

Bastian testifying. The purpose of this hearing was to determine how the defendants' grand jury in the instant case was selected; to present statistical evidence of under representation of African-Americans and women over a significant period of time; and to present evidence regarding unlawfully excluded grand jurors. Judge Alarcon testified that he was the judge who selected the grand jury that indicted the defendants in the instant case, and he described the criteria he used. Although Judge Alarcon testified that the racial composition of the grand jury was not his main concern, he admitted that he was aware of and concerned with the racial and gender composition of the grand jury and attempted to match his conception of the demographics of Orleans Parish.

Dr. Joel Devine was called as an expert in sociological statistics to present statistical evidence of under representation of African-Americans and women over a significant period of time. During both voir dire and examination, the state

attempted to discredit Dr. Devine on methodology because he did not collect the data that he interpreted in his testimony. Dr. Devine, and the defense, clarified that he has previously been accepted as an expert in sociological statistics and that interpretation of presented data was the accepted methodology. In addition, the trial court confirmed with Dr. Devine that he

had no reason to doubt the credibility of the data presented and confirmed with the defense that the raw data was contained in the record.

Dr. Devine testified based on a chart prepared by the defense regarding the percentage of time judges in Orleans Parish selected grand jury forepersons of their own race and gender and the resulting overrepresentation of white males. The raw data for the chart consisted of the Orleans Parish grand jury records from 1987-2000, which the defendants had obtained from the Orleans Parish Criminal District Courts, the Jury Commissioner of Orleans Parish Criminal Court, and the Registrar of Voters in Orleans Parish. The defendants aggregated the records and compiled charts for each grand jury term during the thirteen-year period the records covered, each of which contained the name, race, and gender of each grand juror who served in Orleans Parish during that term. The racial identities of 85 grand jurors, including 6 forepersons, were not ascertained.

The chart about which Dr. Devine testified was verbally described as follows: in column one, the race of the judge selecting the grand jury foreperson: in column two, the race of the selected grand jury foreperson; in column three, a percentage based on the raw numbers from column two; in column four, data regarding registered voters in Orleans Parish as representative of the general population of Orleans Parish called for grand

jury duty; and in column five, a percentage known as the “departure from the expected,” which is, simply, a difference of the percentage observed relative to the registered voter tally presented. This type of quantitative data summarizing the raw data, sometimes accompanied by photocopies of the raw data, is typical of the material Dr. Devine has testified from as an expert witness in sociological statistics.

Dr. Devine then testified regarding the methodology (used in this and two other such hearings in which he was qualified as an expert witness) and the results of his analysis. First, he testified that he found the distribution of the grand jury pool closely approximated the distribution of registered voters in Orleans Parish based on his review of statistical information for registered voters, for each person summoned for grand jury duty, and for each selected grand juror. Next, Dr. Devine testified about how the numbers are analyzed. Certain data are known and provide a certain population or characteristic (the population parameter), and in some cases, the actual distribution is not fully known, requiring certain assumptions to be employed. In either case, he ascertains whether certain observed patterns fit the question being asked with respect to either the known population parameter or certain assumed sampling distribution properties. The result is referred to as the departure from the expected. The methodology then

continues with the statistician evaluating the result to determine if it is the result of chance. The accepted numerical indicator of a result being the product of chance is .05 or one in twenty. .

Dr. Devine went on to describe the chi square formula as a statistical tool used on categorical or nominal data to examine an observed versus an expected distribution. In the instant case, Dr. Devine used the chi square formula to compare the race of grand jury forepersons and the selecting judges in Orleans Parish from 1987-2000. Dr. Devine also explained the Fisher Exact test as the chi square variation that is employed in a two by two contingency table where one has two different variables and each of those variables has two states or conditions, hence two by two. Dr. Devine then testified regarding his analysis of the figures, which were derived from the evidence in the record and provided by the defense on the chart. First, he explained that "absolute disparity," a column heading on the chart, means "absolute difference", in the sense of subtracting one number from another without standardizing the number.

In the instant case, the chart reflects 54% African-American registered voters but only 26% African-American forepersons selected by Caucasian judges, resulting in an absolute disparity of –28% (54% minus 26%) or a 28% under representation. The term "comparative disparity"

was then described as the proportion of the group eliminated from grand jury service versus the expected result. The result of the comparative disparity under representation analysis was over 50%. As for discrimination based on gender, Dr. Devine testified that he made his calculation based on given data that male judges selected male forepersons on sixteen grand juries and women on only nine grand juries; and that males account for 43% of registered voters and women account for 57% of registered voters in Orleans Parish. The result was an absolute disparity of 21% fewer females than expected. The comparative disparity under representation would then be 37% for women. A calculation could not be made regarding gender based on the selections of female judges because the total number of forepersons selected was too small to be statistically significant.

As for his application of the data in the instant case to the chi square test, Dr. Devine testified that he utilized a simplifying assumption of a 50% African American and 50% Caucasian grand jury pool, as opposed to the purported actual figures of 54% and 44% respectively. This assumption rendered Dr. Devine's figures more conservative than if he had used the actual percentages. Vol. IV, p. 534. Dr. Devine also concluded, based on a result of 0.2253 on the Fisher Exact Test, that the probability of the overrepresentation of white persons as grand jury forepersons being a

function of chance was one in fifty.

On cross-examination, Dr. Devine admitted that his analysis was only as good as the data presented. . Dr. Devine clarified that the assumptions he used were intrinsic to the process, not a whim of the statistician. The percentage of registered voters was clarified as an average over the thirteen year time period, to make the figures more conservative. . Regarding the grand jury that indicted the defendants in the instant case, Dr. Devine stated that the end result of seven African-Americans and five Caucasians would be more consistent with his expectations based on the population dynamic. On redirect, Dr Devine concluded that the statistical composition of the indicting grand jury in the instant case reflected as closely as possible the percentages of African-Americans and Caucasians on the voter rolls. Exhibits were then entered into evidence. . The state reiterated that it previously stipulated to the authenticity of the raw data from which the chart was comprised, but objected to the chart itself. . Prior to the start of the hearing, the state stipulated to the “criminal jury records in Orleans Parish”, the records from “the registrar of voters”, and “certain criminal court records” but not those from Judge Alarcon. The state objected to the records for all other purposes and to the chart itself, as no testimony was offered regarding how it was composed.

The next three witnesses testified regarding how they were excused from grand jury service based on their answers to the question on the grand juror summons regarding "legal trouble." Shirley Dennis, a black female who received a demand to appear for grand jury service two days before the March 30, 2001 hearing, testified that she answered "shoplifting" in response to a question regarding legal problems and was sent home without further investigation or explanation. The defense examined Ms. Dennis and determined that she was wrongly excluded: the incident occurred fifteen to twenty years ago; the amount in question was less than five hundred dollars; and there was no evidence of a conviction. Delays Brock, a black male, testified regarding his experience in 1998 in answering the question regarding "charges" and the notation that he had pending a charge for "stolen property" when he did not have any such charge pending and, in fact, had a prior firearms conviction that may have been a misdemeanor at the time. Lastly, Ernesta Bastian, a black female who was summoned for the Spring 1999 grand jury, testified that she was excused from grand jury service without further investigation or clarification when she admitted that she had had pled guilty to theft eleven or twelve years prior and was placed on probation for five years.

At the June 22, 2001 hearing, Dr. Silas Lee, a sociologist the trial

court appointed as its own expert, testified that the trial court asked him to evaluate the evidence and statistics presented by the defendants and report to the court on his statistical analysis. His written report concluded that judges are not immune from social categorization and discrimination.

DISCUSSION

STATE'S ASSIGNMENT OF ERROR NUMBER 1

The state first argues that the trial court erred in quashing the indictment against the defendants because the defendants did not suffer any constitutional injury, as the body of individuals comprising the grand jury that indicted them constituted a fair representation of the Orleans Parish community. That is, the selecting judge did not deny that he was conscious of the racial and gender makeup of the grand jury but consciousness of race was not used to exclude, but rather to include, to constitute a fair representation of qualified grand jurors in Orleans Parish. The state cites Brooks v. Beto, 366 F.2d 1, 27 (5th Cir. 1966) in support of its argument. The state claims that, as a result, there was no evidence of substantial under representation of a recognizable class or race presented to the trial court; and the trial court did not doubt that the selecting judge exercised his discretion in good faith and without abuse. The state argues that without injury, quashal was inappropriate.

The defendants argue that the fact that an African-American female was selected as the grand jury foreperson does not automatically dispose of the claim of discrimination. The issue, argue the defendants, is whether a prima facie case of discrimination was presented and whether the state failed to rebut the defendants' showing. This issue will be discussed below in the state's assignment of error number two.

The state's reliance on Brooks is misplaced, as the nuances of later cases limit its usefulness. In Brooks, the court held that purposeful inclusion of an African-American on a grand jury is permissible to remedy historic discrimination while assuring a fair community representation. Brooks, 366 F.2d 1, 28. Two years later in Goins v. Allgood, 391 F.2d 692 (5th Cir. 1968), the same court focused on the following cautionary words found in Brooks itself:

> Goins' present application for habeas corpus called attention to Collins v. Walker, 5 Cir. 1964, 335 F.2d 417. Under the Collins decision, it would have been unconstitutional for two Negroes to be chosen on the grand jury of twelve on the basis of their race. Collins was overruled in Brooks v. Beto, *supra*, **but Brooks left in full force the closely related principle that there must be no exclusion through a system of limited inclusion. *See* [Brooks,] 366 F.2d at 21. In the emphatic words of Brooks: 'The dual requirements making awareness of race inevitable must be met, but this must never, simply never, be done as the means of discrimination. It must never, simply never, be applied to secure proportional representation. It must never, simply never, be applied to secure a predetermined or fixed limitation.'**

Goins, 391 F.2d 692, 699 [emphasis added]. The state inappropriately has focused on the achievement of a fair representation of Orleans Parish in this particular grand jury, and the state's argument fails on the closely related principle that there must be no exclusion through a system of limited inclusion. The defendants are correct that the real issue is whether the evidence establishes a prima facie case of discrimination by a system that allows consciousness of race. The trial court made no findings regarding the indicting grand jury in the instant case, but it appears that the indictment could be quashed on the basis of exclusion through inclusion in light of Goins. The defendants raised this issue in the trial court and in their brief, and this court could affirm quashal of the indictment in the instant case on this ground alone in the interest of judicial economy. As a result, this court would not need to reach the issue of systematic exclusion over time.

The state's first argument can also be interpreted as a standing argument: without injury, these defendants' indictment should not have been quashed. The United States Supreme Court in Campbell v. Louisiana, 523 U.S. 392, 400, 118 S.Ct. 1419, 1424 (1998), held that a white criminal defendant had third party standing to raise an equal protection challenge to discrimination against African-Americans in the selection of his grand jury. The court concluded that "[r]egardless of his or her skin color, the accused

suffers a significant injury in fact when the composition of the grand jury is tainted by racial discrimination." Campbell, 523 U.S. 392, 398, 118 S.Ct. 1419, 1423. The grand jury is tainted because "the impartiality and discretion of the judge himself would be called into question." Campbell, 523 U.S. 392, 399, 118 S.Ct. 1419, 1424. As in Campbell, the defendants in the instant case allege that the composition of the grand jury was tainted because race was a factor in the selecting judge's composition of the grand jury. Inasmuch as the state appears to challenge the defendants' right to bring an equal protection claim of discrimination in the grand jury selection process under former La. C.Cr.P. 413(C), this claim is without merit.

STATE'S ASSIGNMENT OF ERROR NUMBER 2

The state next argues that the trial court erred in finding that the defendants established a prima facie case of discrimination in the selection of Orleans Parish grand jury forepersons from 1987-2000. To establish a prima facie case of discrimination in the selection of grand jurors and foremen, the defendants had to demonstrate:

> (1) That the group against whom discrimination is asserted is a distinct class, singled out for different treatment;
> (2) The degree of underrepresentation of the group in the total population to the proportion called to serve as foremen over a significant period of time; and
> (3) That the selection procedure is susceptible to abuse or is not racially neutral.

Johnson v. Puckett, 929 F.2d 1067 (5th Cir. 1991) and State v. Langley, 1995-1489, p. 23 (La. 4/3/02), 813 So.2d 356,371 (Langley III), *citing* Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed. 498 (1977). The three essentials for establishing a prima facie case of discrimination under the fourteenth amendment are the same whether it concerns discrimination in the selection of grand jury venires or discrimination in the selection of grand jury forepersons. Bryant v. Wainwright, 686 F.2d 1373, 1375 (11th Cir. 1982).

Unless contrary to law, rulings of the trial court in pretrial matters are generally shown great deference absent a clear showing of an abuse of discretion. State v. Prudholm, 446 So.2d 729 (La.1984); State v. Walters, 408 So.2d 1337 (La.1982). Accordingly, the standard of review is whether there is a clear showing that the trial court abused its discretion in making its findings that the defendants established a prima facie case of purposeful discrimination, and that the state failed to rebut that presumption. The mechanics of this standard of review of a trial court's order quashing an indictment for discrimination against African-Americans and women in the selection of the grand jury foreperson was recently outlined as follows:

> Our analysis requires not only the consideration of significant absolute disparities but also other criteria such as the number of years involved, the size of the sampling, and the number of the class in the general population, in order to obtain the most accurate and complete picture of the disparity in the context of

the totality of the circumstances.

State v. Kennedy, 02-214, 10, (La. App. 5 Cir. 06/26/02), 823 So.2d 411, 417.

In its order quashing the indictment against the defendants, the trial court properly first found African-Americans and women to be identifiable groups capable of being singled out for disparate treatment. State v. Langley, 1995-1489, p. 23 (La. 04/03/02), 813 So. 2d 356, 371. The court next summarized the statistical evidence presented and made the following findings, in pertinent part:

> The statistical data revealed between 1987 and 2000, white judges selected whites as forepersons 74% of the time and blacks as forepersons 26% of the time, even though whites comprised an average of 44% of the registered voters in Orleans Parish and blacks comprised an average of 58% of the registered voters in Orleans Parish. Thus whites were over-represented as forepersons by 30% and **blacks were underrepresented by 32%**.
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> * * *
>
> White judges selected blacks as forepersons 26% of the time while blacks comprised an average of 58% of the registered voters in Orleans Parish.
>
> **Black judges selected blacks as forepersons 83% of the time** and whites as forepersons 17% of the time.
>
> Male judges selected males as forepersons 64% of the time even though males only comprised an average of 43% of registered voters in Orleans Parish. Male judges selected females as forepersons 36% of the time even though females comprised an average of 57% of the registered voters in Orleans Parish.

Thus, **female forepersons were underrepresented by 21**%.

Third, the trial court found that although Judge Alarcon acted in good faith in the selection of this jury, the former La. C.Cr.P. art. 413(C) "is devoid of an objective race/gender neutral selection criteria, and is pregnant with the opportunity to foster racial/gender discrimination." Thus, the third prong of the Johnson analysis was satisfied, as "a judge could well select an all white, all black, all male, or all female grand jury/foreperson."

Once a defendant establishes a prima facie case of discrimination, the burden shifts to the state to show that the pattern of under representation proved was the result of a racially neutral selection procedure. Guice v. Fortenberry, 722 F.2d 276, 280 (5th Cir. 1982) (Guice II). The state offered no evidence, and the trial court found that the state "failed to rebut by evidence an objective, racially neutral criteria which is not subject to abuse, was used in the selection process."

Direct Evidence

The defendant may prove discriminatory intent or purpose either by proving it directly from the intention of jury selectors or inferentially through evidence of systematic exclusion over a significant period of time. Akins v. Texas, 325 U.S. 398, 403-404, 65 S. Ct. 1276, 1279, 89 L.Ed. 1692 (1945). The state argues that the testimony of the selecting judge was not

sufficient direct evidence of discriminatory animus, as it was merely an admission of inclusion of African-Americans to avoid discrimination. Inclusion of a race or gender to avoid discrimination, the state argues, is not sufficient to show an equal protection violation in the selection of a grand jury. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966).

The defendants argue that the testimony of the selecting judge that he was conscious of race during the grand jury selection process was direct evidence of discriminatory animus. Judge Alarcon admitted that he actively took race and gender into account in selecting the grand jury that indicted the defendants and indulged in a kind of quota system because he felt he knew the demographics of Orleans Parish:

> I was aware and I was concerned that the African-American population, as well as male and female, as best as I could, be represented on this Grand Jury. It was not a scientific undertaking. I basically looked for a balance on the Grand Jury that represented, in my humble opinion, with Orleans Parish demographic representatives.

The voter registration population (i.e., the jury pool) at the time the defendants' grand jury was selected was 59 per cent African-American, and Judge Alarcon selected seven out of twelve black grand jurors, which would be 58.3 per cent of the grand jury. As Dr. Devine agreed, this "would be as close as you could get to it in terms of handpicking the 12 jurors . . .. "It's a simple mathematical operation, one could not get closer." The hand

selection of a grand jury by quota is not a virtue, conclude the defendants, but a fundamental flaw in the system. Judge Alarcon acted with good intentions, but the system is susceptible to abuse because it is a race conscious selection process. Although in the context of race based admissions to law school, the Fifth Circuit has held that any consideration of race or ethnicity for the purpose of achieving diversity is not a compelling interest under the Fourteenth Amendment. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996), *citing* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 115 S.Ct. 2097, 2112-2113, 132 L.Ed.2d 158 (1995) (holding that all governmental racial classifications must be analyzed by reviewing court under strict scrutiny and are constitutional only if narrowly tailored to further compelling governmental interests) and Richmond v. Croson, 488 U.S. 469, 493, 493 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989) (warning that classifications based on race carry danger of stigmatic harm and should be reserved for remedial settings).

The defendants are correct that discriminatory animus may be shown by the direct admission that race was a consideration in the selection of a grand jury or grand jury foreman, even if that consciousness resulted in inclusion of African-Americans: "An accused is entitled to have charges against him considered by a jury in the selection of which there has been

neither inclusion nor exclusion because of race." Holland v. Illinois, 493 U.S. 474, 510-511, 110 S.Ct. 803, 823, 107 L.Ed.2d 905 (1990), *citing* Ex parte Virginia, 100 U.S. 339, 345, 25 L.Ed. 676 (1880); Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880); Cassell v. State of Texas, 339 U.S. 282, 287, 70 S.Ct. 629, 632 (1950). The trial court, however, quashed the indictment based on the statistical data, not on selecting judge's admission of consciousness of race and gender.

Statistical Evidence

The state argues that the defendants failed to provide sufficient evidence of systematic exclusion to establish a prima facie case of discrimination in the grand jury selection process. Systematic exclusion generally requires numerical evidence to demonstrate substantial under representation of a recognizable class over a significant period of time, within a system susceptible to abuse, that is not due to chance or accident. Castaneda, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280. The most common method employed to demonstrate substantial under representation compares the percentage of registered voters to the percentage of those individuals selected for service. Castaneda, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280. That is, a determination is made first of the percentage of the relevant general population composed of the particular group or class allegedly

singled out for discriminatory treatment. Bryant v. Wainwright, 686 F.2d 1373, 1377 (11th Cir.1982). A similar finding must then be made of the percentage of the same group or class represented in grand jury venires or the office of grand jury foreperson. Bryant, 686 F.2d 1373, 1377. Finally, the two figures are compared, and if the result reveals a significantly large disparity, then there arises a presumption of discrimination. Bryant, 686 F.2d 1373, 1377. As the court in Bryant cautioned, however, there is no magic formula that can be applied to every factual situation in resolving the question of discrimination:

> Exact mathematical standards have never been developed, nor should they be. Such a mechanical approach would be too rigid for the wide variety of circumstances and unique factual patterns of discrimination cases arising under the Equal Protection Clause. *See* Alexander v. Louisiana, 405 U.S. 625, 630, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). As a result, courts have addressed each case on an individual basis.

Bryant, 686 F.2d 1373, 1377. An exact proportion of the population is not mandated; rather, the Constitution requires only that the grand jury constitute a fair, representative body of the community from which it is selected. Akins, 325 U.S. 398, 403, 65 S. Ct. 1276, 1279. A system of selection that is susceptible to abuse, one in which discretion is provided, is not per se unconstitutional. Akins, 325 U.S. 398, 65 S. Ct. 1276.

Sufficiency of the Statistics

The state makes two arguments regarding the sufficiency of the statistics presented. First, the state alleges that the data presented to the court was incomplete. Second, the state alleges that the relevant data does not show substantial under representation of a recognizable class or race over a period of time. The state concludes that the missing data could prove that there was no disparity in the race and gender of forepersons when compared to the Orleans Parish voter registration population.

(1) Completeness and Accuracy of the Data

The state first argues that the trial court's findings were based on incomplete data purporting to indicate that judges tend to select members of their own race and gender more often as forepersons than persons of a different race or gender. From 1987-2000, 14 Caucasians and 11 African–Americans were forepersons; the race of the remaining 6 forepersons remains unknown. During the same time period, 15 males and 12 females were forepersons; the gender of 4 forepersons remains unknown. The state argues that the missing data could prove no disparity at all in the race and gender of the forepersons selected during the period 1987-2000 in Orleans Parish.

The state relies on Rose v. Mitchell, 99 U.S. 545, 99 S. Ct. 2993, 61 L.Ed.2d 739 (1979). In Rose, the court found insufficient the defendant's

proof of substantial under representation of African-American grand jury forepersons due to the lack of evidence of the total number of forepersons appointed during the relevant time period because the absence of evidence made it impossible to determine whether the lack of African-Americans was statistically significant enough to make a case of discrimination or whether it was due to chance or accident. Rose, 99 U.S. 545, 571, 99 S.Ct. 2993, 3008 (*citing* Castaneda). The evidence in Rose, however, contrasts sharply with that offered in the instant case. In Rose, the evidence consisted of the testimony of the trial judge, three jury commissioners, and three former grand jury foremen, none of which provided numerical information on the number of forepersons actually appointed, the race of each foreperson, or on the method used to select the forepersons. Rose, 99 U.S. 545, 570-571, 99 S.Ct. 2993, 3007-3008

In the instant case, the missing data was acknowledged and the issue addressed during the examination of Dr. Lee, the Court's appointed expert. Dr. Lee testified that missing data ("unknowns") is not unusual in statistical analysis, and while it should be noted, it is not a bar to meaningful conclusions. Numbers alone can be deceiving, Dr. Lee testified, and meaning is drawn from numbers when they are compared to other numbers: in this case, the meaning was drawn from a correlation of race and gender

between the selecting judges and the grand jury forepersons over a significant period of time. Therefore, we conclude that the trial court did not err in accepting the data as complete and accurate enough to draw meaningful conclusions.

(2) Showing of under representation

The state next argues that trial court compounded its error in relying on incomplete data when it found discrimination by correlating the race and gender of the selecting judges to the race and gender of those selected as grand jury forepersons during the period 1987-2000. The jurisprudential test for a prima facie case of discrimination, argues the state, focuses only on the race and gender of those individuals fulfilling the role of grand jury forepersons, rather than the selector of the foreperson.

As a preliminary matter, it should be noted that the state, in addition, questions the validity of the trial court findings:

> From this data, the court inexplicably concludes that Caucasians were over represented as forepersons by 30% and African-Americans underrepresented by 32%. No data is given on the total number of African-Americans and Caucasians appointed as forepersons during this period. In particular, the court does not consider the numbers of African-Americans appointed as forepersons by African-American judges. Without this total number, it is impossible to determine the degree of under representation, if any.

This argument does not have merit. The state correctly points out one

numerical error in the trial court's findings: the correct absolute disparity (under representation) of African-Americans as forepersons was 28% according to the testimony of Dr. Devine and the table incorporated into the defendants' brief. The state, however, is incorrect on another point: the trial court did consider the numbers of African-Americans appointed as forepersons by African-American judges and found that "Black judges selected blacks as forepersons 83% of the time and whites as forepersons 17% of the time."

As for the validity of the methodology used by the defense and the trial court to find under representation, the trial court's summary of the statistics was derived from the evidence presented by the defendants, the calculations performed by Drs. Devine and Lee, and reflects a methodology approved recently by the Louisiana Supreme Court:

> . . . [t] he combination of gross population statistics, voter registration rolls, and a profile of jurors who actually sat on grand juries that convened . . . . provided the district court with a reliable measure for computing on the basis of absolute disparities the degree of under-representation of women and African-Americans in the position of foreperson on grand juries in Calcasieu Parish and for drawing an inference of discriminatory intent therefrom."

Langly III 1995-1489, p. 21, 813 So.2d 356, 370. Census data (gross population statistics) was presented to the trial court, although the voter registration rolls were selected as most reflective of the population qualified

for grand jury service. The record also includes detailed information on the grand jurors actually called as well as those actually selected for service. Therefore, the defendants provided the trial court with a reliable measure for computing on the basis of absolute disparities the degree of under representation of African-Americans and women as grand jury forepersons in Orleans Parish. The fact that the analysis was broken down by correlating the race and gender of the selecting judge and the forepersons selected does not disqualify the methodology, as there is no one magic formula for doing such calculations.

The question then becomes one of numbers: did the defendants show significant enough disparities? The Louisiana Fifth Circuit recently summarized the disparities that other courts have found and their significance:

> In Langley III [,] the absolute disparity [sufficient to establish a prima facie case of discrimination under Castaneda] from the percentage of grand jury members to the percentage of African-American forepersons ranged from 15.5% to 15.9%. With respect to women, the absolute disparity was 25.4%.
>
> * * *
>
> The court [in Bryant] reviewed various ranges as follows:
>
> > For example, in Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), the evidence established that in 1968 sixty percent of Taliaferro County, Georgia, was black, although the same class represented only thirty-seven percent of the grand jury. The Court had no difficulty in concluding that a disparity of twenty-three

> percentage points in any given year was too large to be explained by any reason other than discrimination. Turner v. Fouche, 396 U.S. at 359, 90 S.Ct. at 539. Likewise, in Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967), there was a significant disparity of over thirty points in the percentage of blacks in the general population of Mitchell County, Georgia, and the percentage of blacks on the county's grand and petit jury venires. In contrast, in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), a difference of only ten percentage points was not sufficient to establish a prima facie case of discrimination.
>
> * * *
>
> Thus, the significant disparities noted in Bryant range from 23% to 30%. *See also* Ramseur v. Beyer [983 F.2d 1215, 1232 (3rd Cir. 1992), *cert denied,* 508 U.S. 947, 113 S.Ct. 2433, 124 L.Ed.2d 653 (1993)] (14.1% is of borderline significance); United States v. Hawkins [661 F.2d 436, 442 (5th Cir.1981), *cert. denied,* 456 U.S. 991, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982)] (1.75% to 5.45% not significant).
>
> Langley III [2002 La. Lexis 965, pp. 42-43] noted the following significant range from 14.7% to 40.1%:
>
> > Compare Castaneda v. Partida, 430 U.S. at 495-96, 97 S.Ct. at 1280- 1281 ... (absolute disparity of 40.1%); Turner v. Fouche, *supra* [396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970)] (absolute disparity of 23%); Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967) (absolute disparity of 18%); Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967) (absolute disparity of 14.7%).

Kennedy, 02-214, p. 10-11, 823 So.2d 411, 417-418 (footnotes containing citations omitted and citations added to text). As for the outcome of the

Kennedy case itself, the defendant was found to have failed to establish a prima facie case of discrimination in the selection of grand jury forepersons in Jefferson Parish during the time period 1988-1998:

> In the present case, the absolute disparity for African-Americans selected as forepersons for the 10-year period ranges from 7.12% to--0.78%, a figure that is far below the 15.5% to 15.9% absolute disparity in Langley III. The figure is also far below the absolute disparities noted by the Langley III court in other cases that ranged from 14.7% to 40.1%. Regarding women serving as forepersons, the absolute disparity for the 10-year period ranges from 13.4% to 17.21%, absolute figures that fall partially within the Langley III range as significant.

Kennedy, 02-214, p. 9-10, 823 So.2d 411, 416 (footnote omitted).

In sum, absolute disparities significant enough for state and federal courts to find an equal protection violation for discrimination in the selection of grand juror forepersons range from 40.1% to 14.7%, with 14.1% borderline and 1.75% to 5.45% not significant. The trial court in the instant case found an absolute disparity of 32% for African-Americans, although that appears to be a typographical error based on the evidence supporting a figure of 28%, and 21% for women. Substantively, the results of the numerical analysis in the instant case are well within the parameters established in prior cases. Thus the trial court properly found that the defendants satisfied the second prong of the Johnson analysis.

The trial court's finding that the defendants satisfied the third prong of

the analysis takes on additional meaning given the state's argument that the correlation of the race and gender of the selecting judges to that of the grand jury foreperson was inappropriate.

> The third factor of the prima facie test, establishment that the selection process is susceptible to abuse, can also affect the gravity of the disparity. A selection process which can be easily maneuvered in a discriminatory fashion is more likely to give rise to a presumption of discrimination than a selection process which would be difficult, but not impossible, to manipulate. Thus, in Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972), the Court held that a disparity of only fourteen percentage points supported a prima facie case of discrimination, but emphasized the ease with which jury commissioners could have used their procedures for discrimination. The goal of this entire balancing process is, of course, to eliminate chance or inadvertence as a cause of the disparity; the statistical evidence must convince the court that discrimination is the only reasonable explanation.

Bryant, 686 F.2d 1373, 1377. The statistical analysis in the instant case intended to show and did show the ease with which the selecting judge could have used the process for discrimination, whether intentional or unintentional due to social conditioning. As the trial judge pointed out, the grand jury foreperson selection process in Orleans Parish, prior to the recent change, was ripe with possibility for discrimination.

STATE'S ASSIGNMENT OF ERROR NUMBER 3

Lastly, the state argues that the trial court erred in quashing the indictment against these defendants based on due process grounds

concerning the selection of Orleans Parish grand jury forepersons when the foreperson is selected from the ranks of already seated grand jurors, and the role of the foreperson in Louisiana is largely ministerial in nature. The state relies on Hobby v. U.S., 468 U.S. 339 (1984) in support of this argument. The defendants rely on Campbell, 523 U.S. 392, 400, 118 S.Ct. 1419, 1424 to argue that the role of grand jury foreperson in Louisiana is not ministerial and any discrimination in the selection of the foreperson must be treated as discrimination in the selection of the grand jury itself.

First it must be noted that the trial court in the instant case couched its legal and factual findings on equal protection grounds and did not make any specific findings of law or fact regarding the defendants' due process claim. The United States Supreme Court in Campbell noted:

> It is unnecessary here to discuss the nature and full extent of due process protection in the context of grand jury selection. That issue, to the extent it is still open based upon our earlier precedents, should be determined on the merits, assuming a court finds it necessary to reach the point in light of the concomitant equal protection claim.

Campbell, 523 U.S. 392, 401, 118 S.Ct. 1419, 1424-1425. Therefore, it may not be necessary to address this claim.

Substantively, the state's argument may have merit, although the question is a close one. First, Hobby is not controlling in this case. In Hobby, the grand jury foreperson was selected from a random panel to

perform strictly ministerial duties, and the Court held that "[g] iven the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness." Hobby, 468 U.S. 339, 345. The court acknowledged, however, that the role of the federal grand jury foreperson might significantly differ from the role of the grand jury foreperson appointed by individual states. Hobby, 468 U.S. 339, 342.

The United States Supreme Court in Campbell evaluated the application of Hobby to the Louisiana grand jury selection system that allowed the trial judge to subjectively select the grand jury foreperson:

> The Louisiana Supreme Court erred in reading Hobby to foreclose Campbell's standing to bring a due process challenge. [Campbell,] 661 So.2d, at 1324. In Hobby, we held discrimination in the selection of a federal grand jury foreperson did not infringe principles of fundamental fairness because the foreperson's duties were "ministerial." *See* Hobby, *supra,* at 345-346, 104 S.Ct., at 3096-3097. In this case, the Louisiana Supreme Court decided a Louisiana grand jury foreperson's duties were ministerial too, but then couched its decision in terms of Campbell's lack of standing to litigate a due process claim. [Campbell,] 661 So.2d, at 1324.
>
> **The Louisiana Supreme Court was wrong on both counts.** Its interpretation of Hobby is inconsistent with the implicit assumption of standing we have just noted and with our explicit reasoning in that case. In Hobby, a federal grand jury foreperson was selected from the existing grand jurors, so the decision to pick one grand juror over another, at least arguably, affected the defendant only if the foreperson was given some

> significant duties that he would not have had as a regular grand juror. *See* [Campbell] *supra,* at 1422. Against this background, the Court rejected the defendant's claim because the ministerial role of a federal grand jury foreperson "is not such a vital one that discrimination in the appointment of an individual to that post significantly invades" due process. Hobby, *supra,* at 346, 104 S.Ct., at 3097. **Campbell's challenge is different in kind and degree because it implicates the impermissible appointment of a member of the grand jury.** *See* [Campbell] *supra,* at 1422. **What concern Campbell is not the foreperson's performance of his duty to preside, but performance as a grand juror, namely voting to charge Campbell with second-degree murder.**
>
> The significance of this distinction was acknowledged by Hobby's discussion of a previous case, Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). In Rose, we assumed relief could be granted for a constitutional challenge to discrimination in the appointment of a state grand jury foreperson. *See* id., at 556, 99 S.Ct., at 3000. Hobby distinguished Rose in part because it involved Tennessee's grand jury system. Under the Tennessee law then in effect, 12 members of the grand jury were selected at random, and then the judge appointed a 13th member who also served as foreperson. *See* Hobby, 468 U.S., at 347, 104 S.Ct., at 3097-3098. As a result, Hobby pointed out discrimination in selection of the foreperson in Tennessee was much more serious than in the federal system because the former can affect the composition of the grand jury whereas the latter cannot: **"So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process."** *Id.,* at 348, 104 S.Ct., at 3098. **By its own terms, then, Hobby does not address a claim like Campbell's**.

Campbell, 523 U.S. 392, 401-403, 118 S.Ct. 1419, 1424-1425 (emphasis added). Likewise, the defendants' claim in the instant case differs from the

claim made in Hobby and is akin to that made in Campbell. The defendants here challenge the manner in which the grand jury and its foreperson are selected and specifically allege that the process distorts the composition of the grand jury.

As the Fifth Circuit recently pointed out, the Campbell decision was actually dictated by Hobby itself:

> The Hobby foreperson had been selected under North Carolina law from an already-impaneled grand jury and his or her further duties were merely "ministerial." In Campbell, however, Louisiana law specified that the foreperson be selected by the judge of the case from the grand jury venire *before* the remaining grand jurors were selected by lot and impaneled. Therefore, the foreperson was selected not merely to conduct ministerial duties, but was also selected to act as a voting member of the grand jury, a vote that directly impacted the defendant. **To the extent that such a selection was made discriminatorily, it ran afoul of the Hobby implied assumption of due process.** The Court's decision in Campbell was therefore dictated by its opinion in Hobby.

Peterson v. Cain, 302 F.3d 508, 514 -515 (5th Cir. 2002). Hobby was rooted in the fact that the grand jury was randomly selected and the foreperson was chosen from the properly constituted grand jury. In Campbell and the instant case, the forepersons were subjectively selected as voting members of the grand jury from the venire:

> Campbell provides that when the grand jury foreman is subjectively picked from the grand jury pool, and the rest of the grand jury is randomly selected, this method may shape the composition of the grand jury. We must then look to the racial makeup of the grand jury to see if the discriminatory selection

> of the foreman did adversely affect the racial makeup of the grand jury. That is, the method of selection of the grand jury foreperson is relevant only to the extent that it affects the racial composition of the entire grand jury.
>
> The Court also said that, under Louisiana's grand jury selection process (La.Code Crim.P. art. 413(B)), whereby eleven grand jurors are selected by lot but the foreman (who is the twelfth grand juror) is selected by the judge, a claim of discrimination in the selection of the grand jury foreman must be treated as a claim of discrimination in the selection of the grand jury itself. [Campbell,] 118 S.Ct. at 1422. As a result, the fact the role of the grand jury foreman is "ministerial" does not defeat a discriminatory selection claim under the version of article 413 which was in effect when relator's grand jury was selected. **The test is whether a properly constituted grand jury exists**. *Cf. Hobby v. United States,* 468 U.S. 339, 345-46, 104 S.Ct. 3093, 3097, 82 L.Ed.2d 260 (1984).

State ex rel. Roper v. Cain, 1999-2173, p. 2, (La. App. 1 Cir. 10/26/99), 763 So.2d 1, 2-3.

It is clear that even if the office of grand jury foreperson is ministerial, the analysis does not end. It is also clear that Hobby is not controlling, as the foreperson in Orleans Parish was not selected from a randomly selected grand jury and, as a result, there can be no implied assurance of due process. The only question is whether the analysis for a due process violation differs from that for an equal protection violation, such that the defendants' evidence regarding substantial under representation of grand jury forepersons is insufficient to show that the grand jury was improperly

constituted. The record contains the relevant data regarding the grand jury as a whole for the time period, but the defendants presented analysis regarding the selection of grand jury forepersons only. While this evidence is sufficient for an equal protection claim, the due process test articulated in State ex rel. Roper v. Cain, 1999-2173, p. 2, (La. App. 1 Cir. 10/26/99), 763 So.2d 1, 2-3, whether a properly constituted grand jury exists, may not be satisfied by the grand jury foreperson evidence alone. On the other hand, the defendants may be correct that the end result of the due process analysis in this case could be an analysis of the grand jury foreperson statistics, with the discriminatory selection of that one person distorting and tainting the entire grand jury. Accordingly, if this court reviews the due process claim, the state's argument on this issue may have merit.

TRAINOR'S ASSIGNMENT OF ERROR NUMBER 1

The defendant Trainor makes two assignments of error. Trainor first argues that the state waived its right to appeal the decision of the trial court by failing to call a single witness or present any evidence of a neutral non-discriminatory reason for the evidence presented. This argument is without merit. First, La. C.Cr.P. art. 912(B)(1) provides that the state may appeal judgments or rulings on a motion to quash an indictment or any count thereof.

Second, the defendant Trainor mischaracterizes the burden shifting in the instant case. The state vigorously objected at all hearings, and on cross-examination of Judge Alarcon, Dr. Devine, and Dr. Lee, the state attempted to bring forth a race neutral reason for the results of the selection process. The state asserts, and is correct, that the trial court reserved ruling on whether the defendants had established a prima facie case of discrimination until the written order quashing the indictment was rendered.

Lastly, after vacating the trial court's ruling that the former 413(C) was a special law, the Louisiana Supreme Court specifically allowed both the state and the defendants to appeal the trial court's order "all other grounds properly raised in this court." Fleming, 2001-2799, p. 5-6, 820 So. 2d 467, 470. Therefore, this argument is without merit.

TRAINOR'S ASSIGNMENT OF ERROR NUMBER 2

Trainor next argues that the trial court committed reversible error in limiting its decision to the period 1987 through 2000. The defendant Trainor offers as proof a case, Labat v. Bennett testimony of several former and then current assistant district attorneys in Orleans Parish. The Labat case, the defendant argues, proved that discrimination had taken place between 1936 and 1966 when only one African-American was selected to serve on the grand jury and that was the result of a mistake. Westlaw was

searched for the Labat case that the defendant referred in his brief was Labat v. Bennett, 365 F.2d 698, 727 (5th Cir. 1966) which he asserts proved discrimination between 1936 and 1966 in the Orleans Parish grand jury selection process:

> The outstanding fact is that in 1953 all white juries were invariably the rule in Orleans Parish. As Justice Black pointed out in his opinion in the first Labat-Poret case: 'Only once within the memory of people living in the parish had a colored person been selected as a grand juror. That juror, who happened to look like a white man, was selected under the mistaken idea that he was one.' 350 U.S. at 102, 76 S.Ct. at 165.

Labat,365 F.2d 698, 716. The Labat court was referring to the following, as it explained earlier in its opinion:

> The United States Supreme Court, on its first consideration of the case, also treated the motion to quash only as an attack on the grand jury. Labat v. State of Louisiana and Poret v. State of Louisiana, Reported with an sub nom.; Michel v. State of Louisiana, 1955, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83, 92, reh. denied 350 U.S. 955, 76 S.Ct. 340, 100 L.Ed. 831. In the majority opinion, the Court stated:
>
> > 'Neither (defendant) made may attack on the composition of the petit jury, but filed motions to quash their indictment claiming discrimination in the selection of the grand-jury panel.' 350 U.S. at 96, 76 S.Ct. at 162.

Labat, 365 F.2d 698, 705. The court in Labat actually held much more narrowly than the defendant asserts:

> We hold that the petitioners made out a prima facie case. In 1953 and for five years before, in the Parish of Orleans the method of selecting juries failed to meet the constitutional

> standards adopted by this Court and the Supreme Court. The record shows systematic exclusion of Negroes from the Orleans Parish jury system.

Labat v. Bennett, 365 F.2d 698, 727.

Even had the Labat case stood for the proposition the defendant Trainor claimed, this argument would still lack merit. The statistical evidence only covered the period 1987 through 2000. As more fully outlined above, the accepted method of showing discrimination in the selection of grand jury foreman depends on the use of statistics or the admission of the selector. In addition, the testimonial evidence urged by the defendant Trainer as proof of discrimination prior to this time period is akin to the very limited evidence presented in Rose and found to be woefully insufficient.

In addition, after vacating the trial court's ruling that the former 413 (C) was a special law, the Louisiana Supreme Court specifically allowed both the state and the defendants to appeal the trial court's order on "all other grounds properly raised in this court." Fleming, 2001-2799, p. 5-6, 820 So. 2d 467, 470. The "other grounds properly raised" were the equal protection and due process claims. The trial court did not make findings regarding the time period prior to 1987, but this issue, apparently, was not brought before the Louisiana Supreme Court. As this court's review was

limited by the Louisiana Supreme Court to "all other grounds properly raised in this court", the issue appears to be beyond this court's scope of review.

The state urges dismissal of Trainor's appeal, but this does not appear to be necessary, as the arguments lack merit.

CONCLUSION

For the reasons set forth above, I would affirm the trial court's quashal of the defendants' indictment, basing this court's decision solely on the selecting judge's admission of race consciousness in the selection of the grand jury and foreperson in the instant case. Even though the trial court did not base quashal on the admitted defect in the defendants' grand jury, remand does not appear necessary or in the interest of judicial economy, as the evidence that the trial court would consider to make that ruling is currently before this court.

Further, it should be noted that nothing in this opinion should be interpreted as preventing the state, in its discretion, from obtaining a superseding indictment to cure any potential or perceived defect in the present indictment.