

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: TERRY CAMPBELL Petitioner v. LOUISIANA

CASE NO: 96-1584 c.3

PLACE: Washington, D.C.

DATE: Tuesday, January 20, 1998

PAGES: 1-53

**REVISED**

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-1584, Terry Campbell v. Louisiana.

5 Mr. Burnes, we'll hear from you.

6 ORAL ARGUMENT OF DMITRY I. BURNES

7 ON BEHALF OF THE PETITIONER

8 MR. BURNES: Chief Justice, and may it please  
9 the Court:

10 Petitioner Terry Campbell has been improperly  
11 denied standing to raise the equal protection, due  
12 process, and Sixth Amendment fair cross-section objections  
13 to the grand jury which indicted him. Despite the  
14 acknowledged and undisputed de facto racial discrimination  
15 practiced against African Americans in Evangeline Parish,  
16 petitioner was denied the opportunity to object solely  
17 because he is white.

18 The case is about race, and the case is about  
19 racial discrimination. The case is about petitioner's  
20 equal protection, due process, and Sixth Amendment claims.

21 The case is not about gender, retroactive  
22 application to other cases, or overturning Hobby.

23 The facts in the case are simple and undisputed.  
24 Number 1, African Americans were not being selected as  
25 grand jury forepersons and number 2, petitioner was

1 prevented from objecting to number 1 solely because he is  
2 white.

3 QUESTION: Is it true that there's never been a  
4 nonwhite foreman in Evangeline County?

5 MR. BURNES: I would not know past the evidence  
6 presented to the trial court. For the period of evidence  
7 presented to the trial court there was never a black  
8 selected. I don't know historically, back through the  
9 Louisiana Purchase --

10 QUESTION: But you're saying from the years --  
11 what time frame are we talking about that there has been  
12 no nonwhite?

13 MR. BURNES: A 16-1/2 year time period during  
14 which generally there are supposed to be two grand juries  
15 selected each year. One year I believe there was only one  
16 grand jury selected, so it was a string of 35 consecutive  
17 white grand jury forepersons.

18 QUESTION: There's a difference in the way the  
19 foreperson is selected in New Orleans, is that right?

20 MR. BURNES: I believe there is, Your Honor.

21 QUESTION: Is the experience any different  
22 there?

23 MR. BURNES: I would not know that. I haven't  
24 looked into that, Your Honor.

25 QUESTION: So you don't know whether Evangeline

1 County is unique in Louisiana or represents the general  
2 way things are --

3 MR. BURNES: I would say, Your Honor, that there  
4 have been cases brought up in a lot of the parishes in  
5 Louisiana, in Sabine Parish, I believe in Lafayette Parish  
6 and Lake Charles. I don't have a list of exactly which  
7 parishes, but I know that this has been brought up in a  
8 lot of the parishes there.

9 QUESTION: This same issue?

10 MR. BURNES: The issue of nonselection of whites  
11 to the grand jury --

12 QUESTION: So apparently other parishes are  
13 doing the same thing.

14 MR. BURNES: To a greater or lesser extent, yes,  
15 sir. Yes, Your Honor.

16 QUESTION: Uh-huh. Let me ask you, since you're  
17 interrupted, how -- you make a fair-cross-section-of-the-  
18 jury claim with regard to the foreperson of the jury?

19 MR. BURNES: That is correct, Your Honor. Fair  
20 cross-section, Sixth Amendment fair cross-section claims,  
21 generally --

22 QUESTION: How would that work in connection  
23 with a single person, a foreperson? How would we apply a  
24 fair-cross-section theory to that? I guess you have a  
25 couple of other theories, equal protection and due

1 process, but it certainly isn't clear to me how a fair  
2 cross-section claim could be made out.

3 MR. BURNES: You're right, Your Honor, in prior  
4 courts -- in prior cases this Court has found problems in  
5 applying fair cross-section to a single person. The Court  
6 has concentrated on groups that the fair cross-section  
7 applies to.

8 QUESTION: Right, so -- but you're pursuing that  
9 claim, nonetheless.

10 MR. BURNES: Oh, yes, Your Honor, definitely.  
11 In fact, there are --

12 QUESTION: Well, would you like to justify it,  
13 since you're pursuing it?

14 MR. BURNES: Yes, Your Honor. In fact, there  
15 are two groups that the fair cross-section claim can be  
16 focused upon. One is a grand jury group as a whole. You  
17 have a grand jury where 11 of them are chose randomly and  
18 fairly, we would submit, and then the twelfth member is  
19 chosen unfairly, always chosen as a white person. That's  
20 going to distort that group. You don't have the fair  
21 cross-section in the grand jury itself.

22 But even more importantly, the -- if you look at  
23 the grand jury venire, the approximately 300 people called  
24 to court that day whose names are going to be drawn and  
25 placed on the grand jury, the judge gets to the point



1 where he selects the grand jury foreman, and you no longer  
2 have the representative cross-section sitting up there.  
3 You only have the white people sitting in the room that  
4 the judge selects from. That effective grand jury  
5 venire --

6 QUESTION: How does this work? There are 300  
7 people on the big venire that are called?

8 MR. BURNES: Your Honor, I'm not 100-percent  
9 sure about the number of 300. A large number of people  
10 are called, given summons to show up for jury duty.

11 QUESTION: And the judge selects someone from  
12 that large number to be the foreperson of the grand jury.

13 MR. BURNES: That is correct, Your Honor.

14 QUESTION: And then subsequently the other  
15 members of the grand jury are selected at random by a  
16 clerk or something of that sort.

17 MR. BURNES: Your Honor, that's the way the  
18 Louisiana Code of Criminal Procedure Article 413 reads.  
19 The judge -- I don't know that the code article  
20 specifically means that he has to make his selection  
21 before the other ones are chosen.

22 When I looked through the minutes for the past  
23 16-1/2 years, generally they seemed to indicate that the  
24 12 -- the 11 were drawn at random and then the judge  
25 selected someone else sitting in there, and again

1 occasionally minutes are entered very loosely or just from  
2 a form, so I don't know if that does mean he was first or  
3 second on that.

4 QUESTION: What does the foreperson of a grand  
5 jury do in Louisiana?

6 MR. BURNES: Your Honor, that is pointed out in  
7 the State's brief at page 26. The statutory provisions  
8 provide that the foreman shall preside over all hearings,  
9 may delegate duties to other grand jurors, and may  
10 determine rules or procedures.

11 This basically means that he leads the  
12 discussions, he decides when to vote, how to vote, and  
13 what to vote on.

14 QUESTION: Can he cast a vote himself?

15 MR. BURNES: Oh, yes, he does. He is one of the  
16 12 voting members of the grand jury, and that is --

17 QUESTION: And that was left out of the State's  
18 description of his powers at page 26.

19 MR. BURNES: I don't think the State was trying  
20 to mislead. I think the State was at that point in 26  
21 attempting to show some of the other powers of the grand  
22 jury for --

23 QUESTION: Well, it said it's ministerial,  
24 because he has some duties that might be called  
25 ministerial, but he's also a vote -- or she is also a

1 voting member.

2 MR. BURNES: And that I believe is the very  
3 important fact in here.

4 Petitioner Campbell takes the position that  
5 this -- this Court has had previous cases saying you  
6 cannot pick a grand jury unfairly. Here, one voting  
7 member of the grand jury is picked unfairly.

8 Petitioner Campbell has equal -- has raised  
9 equal protection --

10 QUESTION: Is that different, then, from the  
11 situation in the Hobby case that we had?

12 MR. BURNES: In the Hobby case --

13 QUESTION: Where the Court said the grand jury  
14 foreman in that case had a ministerial role?

15 MR. BURNES: The basic difference is, in the  
16 Hobby case a grand jury, the entire grand jury is selected  
17 in a fair manner and then that one person, the grand jury  
18 foreman, is given the job of doing the clerk duties for  
19 the grand jury, but the point is that whole grand jury was  
20 chosen in a fair manner.

21 QUESTION: But in Hobby how was the foreman  
22 chosen?

23 MR. BURNES: I believe he was chosen by the  
24 judge, Your Honor.

25 QUESTION: Why is that different? Why is that

1 different from your case?

2 MR. BURNES: It's different because the judge is  
3 looking at the grand jury, the entire grand jury panel who  
4 was chosen in a fair fashion.

5 In Louisiana, 11/12ths of the grand jury is  
6 chosen in a fair fashion and then the grand jury foreman  
7 is chosen not from the panel but from the venire sitting  
8 out there, and that choice is made in a discriminatory  
9 fashion. That choice is always made for a white grand  
10 jury foreperson.

11 QUESTION: But in Hobby it was the same  
12 objection, wasn't it? The foreman or foreperson was  
13 always white.

14 MR. BURNES: The objection -- yes, the objection  
15 was that the foreperson was always white. The objection  
16 here is that the foreperson was always white, but here  
17 it's that the voting member was chosen in a discriminatory  
18 manner to sit on the grand jury. In Hobby, there was no  
19 voting member chosen in a discriminatory fashion to sit on  
20 the grand jury.

21 QUESTION: But a choice was just made in a  
22 discriminatory fashion by people already chosen. I mean,  
23 the discrimination is still there.

24 MR. BURNES: Oh, there is a discrimination and  
25 at that point you would look to -- and Hobby focused on



1 what is the harm that is going to come from this. I don't  
2 think Hobby said there was never -- the opinion in Hobby  
3 said there was never any discrimination. It said there  
4 was. But then when you stop and you look, you don't find  
5 a due process harm involved there.

6 QUESTION: Well, Hobby focused on the remedy.

7 MR. BURNES: On the remedy.

8 QUESTION: And what do we have to look at here,  
9 just standing? We're not concerned here today with  
10 remedy --

11 MR. BURNES: Well, we would --

12 QUESTION: -- but just standing?

13 MR. BURNES: We would submit that remedy is  
14 implicated and that standing is implicated. Standing was  
15 the issues cited, or the questions presented in the writ  
16 for petition. However, this Court's rules do say that all  
17 questions fairly subsumed are also included and here we  
18 have -- if we were sitting now before the trial and it  
19 hadn't gone forward, this case -- this Court would  
20 probably only be looking at standing, but the case has  
21 gone forward. Petitioner Campbell has been convicted and  
22 sentenced to a life sentence, simply because of the time  
23 delays of getting through the courts, so now --

24 QUESTION: Well, I thought that all -- of the  
25 questions in the petition refer to whether your client has

1 standing to raise the equal protection claim, the due  
2 process claim, and the fair cross-section claim. It  
3 didn't occur to me that you intended to ask us to apply a  
4 remedy.

5 MR. BURNES: Your Honor, the questions do --

6 QUESTION: Other than to rule on the standing  
7 claim.

8 MR. BURNES: Your Honor, we do need to have  
9 rulings from this Court on standing. Once this Court does  
10 rule on standing the question is, then what?

11 QUESTION: Send it back, I assume.

12 MR. BURNES: Well, Your Honor, that's --

13 QUESTION: If we were to determine there was  
14 standing on some or all of these matters.

15 MR. BURNES: Your Honor, that is one option open  
16 to this Court. Another --

17 QUESTION: Mr. Burnes, going back from Peters v.  
18 Kiff on, in any case where this Court allowed someone to  
19 challenge as discriminatory the selection of the petit  
20 jury or the grand jury, in any one of those cases, has the  
21 result ever been anything other than the conviction got  
22 set aside?

23 MR. BURNES: Well, of course, the Hobby case,  
24 Your Honor, the conviction was not set aside. In Rose v.  
25 Mitchell, a leading case in this area, the petitioner,

1 this Court held that the petitioner failed to prove his  
2 prima facie case and did not set aside the conviction, so  
3 there are cases, there are times when this Court may find  
4 standing, may find a right, may even find a remedy --

5 QUESTION: Might -- conceivably in this case if  
6 standing were recognized the Court could say, but you  
7 haven't shown that there was, in fact, discrimination in  
8 the selection of the --

9 MR. BURNES: Conceivably the Court could take  
10 that opinion. However, the facts here are very clear.  
11 They've never been disputed. There are multiple places in  
12 the record where the judge repeatedly says, we all know  
13 what happened here. We all know blacks haven't been  
14 chosen.

15 At the actual hearing on the motion to quash the  
16 judge allowed Mr. Campbell's then-attorney to present a  
17 prima facie case. He then turned to the State and said,  
18 now let's here from you, what do you have to say to it,  
19 basically.

20 The State then only argued on standing, never  
21 made any rebuttal with respect to that prima facie case,  
22 even --

23 QUESTION: Mr. Burnes, if you wanted to bring  
24 that issue here you're obligated to put it in your  
25 question presented, I think, as Justice O'Connor has

1 pointed out. You have three subdivisions and every one of  
2 them is limited to standing.

3 MR. BURNES: And again, Your Honor, those -- the  
4 questions do raise the issue of standing, which has been a  
5 roadblock in this case. This Court also has rules that  
6 any question is fairly derived -- and I don't remember the  
7 exact statement, fairly derived from those questions,  
8 subsumed --

9 QUESTION: Fairly subsumed, I think. I think  
10 that means that the general -- that the language of the  
11 question includes something that perhaps is lesser, or --  
12 but it seems to me standing and remedy are two very  
13 distinct things.

14 MR. BURNES: Your Honor is correct, standing and  
15 remedy are distinct. In this case, Mr. Campbell has been  
16 denied the standing on the equal protection claims, on the  
17 due process and Sixth Amendment fair cross-section claims.

18 This Court, if it rules that Mr. Campbell has  
19 standing on any or all of those, it is then faced with the  
20 question, does it go forward and say what the remedy in  
21 this case is, or does it not.

22 We believe that this case in the record shows  
23 that there has been evidence put on for the prima facie  
24 case. The State's been offered a chance to rebut and has  
25 not. We believe the case at this point is just turning on



1 the remedy then.

2 I would like to make it clear that Mr. Campbell  
3 has raised equal protection claims. There's the bare,  
4 straightforward claim. Why can I, Terry Campbell, a white  
5 man, be indicted by this illegal grand jury when a black  
6 man cannot? That's the dominant feature of this case, and  
7 that's how it's really been viewed by most of Louisiana  
8 courts.

9 QUESTION: Now, in this case your client raised  
10 this -- these claims all along --

11 MR. BURNES: Yes.

12 QUESTION: -- in the proceedings below.  
13 There's no problem of waiver or anything of that kind.  
14 These have been preserved, I take it.

15 MR. BURNES: That's correct, Your Honor, and I  
16 haven't had a chance to say it yet, but the equal  
17 protection claim has that bare naive claim I just  
18 mentioned and also has the more sophisticated third party  
19 standing. If you look in the appendix --

20 QUESTION: I'm sorry, I didn't understand what  
21 you -- has the bare what claim?

22 MR. BURNES: The bare, or naive equal protection  
23 claim. Why can I, a white man, be indicted by this  
24 illegal grand jury? That's just a straightforward equal  
25 protection claim. Why does a black man have protection

1 from being indicted by this unconstitutionally selected  
2 grand jury but I, a white man, don't have protection from  
3 being indicted by this --

4 QUESTION: Are you also raising -- urging that  
5 the -- Campbell has standing to raise the denial of equal  
6 protection to the nonwhite who might have been selected?

7 MR. BURNES: That is correct, Your Honor. That  
8 is the second part, the more sophisticated equal  
9 protection claim that comes under the Powers third party  
10 standing, that Mr. Campbell is in a position to adequately  
11 put forth their rights, all of the analysis that was in  
12 the Powers case, that he has a relationship with the  
13 excluded jurors, so --

14 QUESTION: The first equal protection question  
15 is sort of -- I mean, it's a very strange assertion of  
16 equal protection. Why isn't a perfectly valid answer to  
17 that that, well, a black man could object to this -- to  
18 this grand jury, but a black man couldn't have objected to  
19 a grand jury in which the foreman was always a black?  
20 That's perfectly fair.

21 MR. BURNES: In the --

22 QUESTION: It's almost game-playing to say that  
23 this is an equal protection violation. It's just a  
24 standing question, simple -- simply put. Does he have  
25 standing or not?

1 MR. BURNES: It is a standing question, Your  
2 Honor, and that's the way the trial court and the supreme  
3 court of the State of Louisiana have ruled, is that  
4 Mr. Campbell did not have standing to raise --

5 QUESTION: Right, and it would be perfectly  
6 equal protection if Louisiana rules a black man has  
7 standing to challenge the exclusion of blacks, and a white  
8 man has standing to challenge the exclusion of whites, and  
9 neither one has a standing to challenge the opposite.  
10 What's unequal about that?

11 MR. BURNES: Well, the cases in the past, Your  
12 Honor, have held that, for instance in Batson, on a  
13 preemptory challenge, it doesn't matter whether the  
14 defendant is black or white. They can object -- they have  
15 a standing to object to the discrimination question.

16 QUESTION: That's right. It was ruled as a  
17 standing question. It wasn't dressed up as an equal  
18 protection claim. I don't understand -- I don't  
19 understand your equal protection claim, that's all.

20 MR. BURNES: Your Honor, I'm --

21 QUESTION: The standing question is right or  
22 wrong. It doesn't become right or wrong because there's a  
23 denial of equal protection involved if you come out the  
24 other way.

25 MR. BURNES: Perhaps the reason I'm arguing this

1 way is because the trial courts and the supreme court of  
2 the State of Louisiana have couched their rulings in terms  
3 of the fact that Mr. Campbell, you are a white man accused  
4 of killing a white man, therefore you don't have standing  
5 to raise this claim or that claim or the other claim,  
6 and --

7 QUESTION: That's either right or wrong.

8 MR. BURNES: That -- and I believe in this case  
9 Mr. Campbell has a right to raise the equal protection  
10 claim.

11 Part of the reason I'm arguing this way is also  
12 that the State's brief has attacked whether there's  
13 Article III standing. I believe in this bare claim that  
14 there's Article III standing, there's an injury, there's  
15 causation, there's redressability.

16 In the sophisticated -- what I call the  
17 sophisticated equal protection claim there is the third  
18 party standing and the due process, I think there's  
19 Article III standing. In the Sixth Amendment claim  
20 there's Article III standing.

21 That is why I'm explaining the claims somewhat,  
22 is to show how they fit within the standing requirements  
23 of Article III and the exceptions for third party standing  
24 as in Powers.

25 Your Honors, I'd also like to direct your



1 attention, if I could, to the State's brief. The State in  
2 its brief does agree in some forms with the petitioner  
3 Campbell's claims on all three grounds.

4 With respect to the equal protection ground, at  
5 page 22, note 9, the State of Louisiana recognizes this  
6 Court's decision that if discrimination in the selection  
7 of the grand jury itself occurs, the proper remedy is  
8 reversal of the subsequent conviction, and that's what  
9 happened here. There was discrimination in the selection  
10 of the grand jury itself. Grand juror number 12 was  
11 chosen in a discriminatory manner.

12 With respect to the due process claim on page 26  
13 and note 12, in Guice 2 the Fifth Circuit noted that  
14 because the foreman in Louisiana is selected from the  
15 venire rather from the grand jury itself, any  
16 discrimination in the selection of a foreman necessarily  
17 taints the composition of the grand jury as well. Only 11  
18 of its 12 members were chosen at random. If that is so,  
19 the petitioner may obtain relief by challenging the  
20 composition of the grand jury, and this he has failed to  
21 do.

22 But, in fact, that is what Mr. Campbell has been  
23 doing from the beginning. He's been saying that this  
24 twelfth member of the grand jury was chosen in a  
25 discriminatory manner, has always been chosen white.

1           And on page 30, under the B heading with respect  
2     to the Sixth Amendment argument, the State writes, if this  
3     Court decides that the Sixth Amendment itself is  
4     implicated regardless of whether the judicial body at  
5     issue is the grand jury or just the grand jury foreman,  
6     then the State concedes that under Holland v. Illinois  
7     petitioner has standing to assert a Sixth Amendment  
8     challenge.

9           It's the law, the Constitution and its  
10    amendments and the prior decisions of this Court, that  
11    have forced the State to make concessions on these issues.  
12    In the dissent by Justice Scalia, to which Chief Justice  
13    Rehnquist joined in the case of Powers v. Ohio, there's a  
14    statement.

15           It would be absurd to -- and this is at page  
16    1379 in the Supreme Court Recorder 111. It would be  
17    absurd to suppose that a black juror has a right not to be  
18    discriminated against through peremptory strike in the  
19    trial of a black defendant but not in the trial of a white  
20    defendant. However, this is the absurd position the State  
21    has taken. An African American prospective grand juror  
22    has a right not to be discriminated against in the  
23    selection of the grand jury foreperson in cases involving  
24    black defendants but not in cases involving white  
25    defendants.

1           In its conclusion to its brief in page 34 the  
2   State says, Louisiana in no way condones race  
3   discrimination in the administration of criminal justice  
4   in any corner. However, the State's presence here today  
5   shows otherwise. This Court has the opportunity and has  
6   the power to correct the racial discrimination in the  
7   administration of criminal justice which is currently  
8   accepted in and by the State of Louisiana.

9           If there are no further questions, I'd reserve  
10   the balance of my time.

11           QUESTION: Very well, Mr. Burnes.

12           General Ieyoub, we'll hear from you.

13           ORAL ARGUMENT OF RICHARD P. IEYOUNG

14           ON BEHALF OF THE RESPONDENT

15           GENERAL IEYOUNG: Mr. Chief Justice, and may it  
16   please the Court:

17           First of all, Your Honors, I would like to  
18   correct some of the statements made by counsel for  
19   petitioner. He seems to indicate that there is wholesale  
20   discrimination around the State of Louisiana as to the  
21   selection of grand jury foremen.

22           There's never been any proof of this. In fact,  
23   I know from personal knowledge that there have been black  
24   foremen of grand juries throughout the State of  
25   Louisiana --

1 QUESTION: But then it's not a problem. I mean,  
2 he just wants to have standing so he can make the claim.  
3 Then you'd prove it out, right?

4 MR. IEYOUB: That's correct.

5 QUESTION: And you'd say there wasn't, and he'd  
6 say there was, so we'd have an argument.

7 MR. IEYOUB: That's correct, Your Honor.

8 Also, insofar as the selection of the foreman is  
9 concerned in Louisiana, the judge does not select from the  
10 large grand jury venire, the general venire of 300  
11 persons.

12 What happens is that a grand jury venire is  
13 brought into the courtroom. It can be as few as 20 and as  
14 many as 100, but the grand jury venire is brought into the  
15 courtroom, the judge selects the foreman from the grand  
16 jury venire after that venire has been shown to satisfy  
17 the general qualifications to serve as grand jurors and  
18 then the other 11 are chosen.

19 It takes 9 out of 12 to reach an indictment, so  
20 the fact that the grand jury foreman is necessarily a  
21 voting member of the grand jury does not necessarily  
22 portend that his responsibility should not be classified  
23 as merely ministerial.

24 QUESTION: General Ieyoub, you don't dispute, do  
25 you the figures that were presented that for the last 16



1 years there's never been a nonwhite grand jury foreperson  
2 in Evangeline County?

3 MR. IEYOUB: No, Your Honor. That was  
4 stipulated to by the State.

5 QUESTION: So it wouldn't matter what went on in  
6 other counties. Except for -- there's a curiosity in  
7 Louisiana law, and I'm sure you can tell me why this is  
8 so. It doesn't work that way in New Orleans. In New  
9 Orleans, the foreperson is selected from the group of 12  
10 instead of separately. Why is that so?

11 MR. IEYOUB: Your Honor, Orleans Parish is  
12 treated differently throughout Louisiana law. Nobody  
13 knows why, except for the fact that those people in  
14 Orleans Parish think that they're different from the rest  
15 of the State, but in fact there -- throughout Louisiana  
16 law there are exceptions for Orleans Parish. I can't give  
17 Your Honor a reason.

18 QUESTION: But you wouldn't have this problem if  
19 you did it throughout the State the way they do it in that  
20 parish.

21 MR. IEYOUB: Well, Your Honor, in Orleans Parish  
22 the judge does choose the foreman and then the judge also  
23 selects the other 11.

24 QUESTION: But --

25 MR. IEYOUB: That's how I understand it done in

1 Orleans Parish.

2 Now, in other places, other than Orleans Parish,  
3 the judge will select the grand jury foreman and then the  
4 other 11 are randomly selected out of the box and that's  
5 the way it's done in --

6 QUESTION: Maybe I remember the statute wrong.  
7 I thought the others were selected in New Orleans just  
8 like they are in Evangeline, and it was only the  
9 foreperson that --

10 MR. IEYOUB: No, Your Honor, I don't think that  
11 that's the case. In Evangeline Parish, of course, as I've  
12 stated the judge selects from the grand jury venire, and  
13 then the 11 are chosen randomly, the other 11 grand  
14 jurors.

15 QUESTION: So you're saying in New Orleans  
16 there's no random selection at all.

17 MR. IEYOUB: It doesn't appear that way, Your  
18 Honor. Basically --

19 QUESTION: I just have one other quick thing  
20 that you had in your brief. It says that -- when you  
21 say -- you said it was -- the grand jury foreman's role is  
22 ministerial, but it says in your brief that the grand jury  
23 may determine rules of procedure. What does that mean,  
24 may determine rules of procedure? If you have the power  
25 to determine rules of procedure, that's an enormously

1 important power. I mean, can -- what does that involve?

2 MR. IEYOUB: Your Honor, what I think that  
3 involves is basically ensuring that the proceedings go  
4 through in a very orderly way, not setting forth specific,  
5 distinct rules of procedure.

6 The grand jury foreman, as stated by the  
7 Louisiana supreme court, the Louisiana supreme court has  
8 interpreted Louisiana law to mean that the grand jury  
9 foreman's duties are, in fact, ministerial and --

10 QUESTION: Well, is the foreman a voting member  
11 of the grand jury?

12 MR. IEYOUB: Yes, Your Honor, the foreman is a  
13 voting member of the grand jury.

14 QUESTION: And has some power to set procedure.

15 MR. IEYOUB: Has some power to set the  
16 procedure, but there is also a codal article in the  
17 Louisiana Code of Criminal Procedure that states that any  
18 of the other grand jurors may rule him into court if they  
19 disagree with what he's doing relative to the procedure  
20 that takes place in the grand jury, which is some  
21 indication that his power is no greater than the other.

22 QUESTION: Well, Mr. --

23 QUESTION: That still doesn't his power is just  
24 ministerial, unless you were to say that his power as  
25 foreman is ministerial but he has every bit as much power

1 as any other grand juror in voting on indictments. That's  
2 correct, isn't it?

3 MR. IEYOUB: That's correct, Your -- Mr. Chief  
4 Justice. That is correct.

5 QUESTION: And in Vasquez v. Hillery this Court  
6 referred to the grave constitutional trespass that occurs  
7 when jurors of a particular race are intentionally  
8 excluded from the grand jury, so if the proof is that in  
9 the case of one member of the grand jury that blacks are  
10 always excluded from this foreperson selection, then why  
11 doesn't that fit under Vasquez v. Hillery? Why isn't  
12 there standing to raise that on the part of this  
13 petitioner?

14 MR. IEYOUB: Your Honor, in Vasquez v. Hillery  
15 the petitioner, as I understand it, was a member of the  
16 excluded class. In this case, there is no Article III  
17 standing as to equal protection.

18 QUESTION: In the case of Powers, when the issue  
19 was with respect to a trial jury we didn't think that  
20 mattered. Would there be a different rule on a grand  
21 jury?

22 MR. IEYOUB: Your Honor, insofar as Powers is  
23 concerned, I would point out to the Court that Powers  
24 granted third party standing, not personal standing under  
25 Article III insofar as equal protection goes.



1 QUESTION: Well, I guess that's an argument  
2 here, too.

3 MR. IEYOUB: That's correct, Your Honor.

4 QUESTION: Do you concede that at least the  
5 petitioner has third party standing under Powers?

6 MR. IEYOUB: No, Your Honor, not in any sense  
7 and the reason I don't is because, in finding that the  
8 petitioner in Powers satisfied the three criteria  
9 necessary for third party standing, that is, injury in  
10 fact, relationship to the third party, and hindrance to  
11 the third party itself being able to bring an action, the  
12 Court placed strong emphasis on the importance of the voir  
13 dire phase of the trial and the adverse impact that  
14 discrimination during voir dire -- the voir dire stage  
15 would have on the fairness of the trial itself.

16 In finding injury in fact, this Court pointed  
17 out that when there's discrimination during the voir dire  
18 stage by the use of peremptory challenges the  
19 discrimination is in the body that's going to decide guilt  
20 or innocence. That's not true insofar as the grand jury  
21 is concerned. The discrimination takes place during the  
22 trial itself. Obviously, grand jury proceedings are long  
23 before --

24 QUESTION: That's why I referred you to the  
25 Vasquez v. Hillery description of the grave constitutional

1 injury that occurs on a grand jury situation.

2 MR. IEYOUB: I agree with you Your Honor, and I  
3 think the cases relative to -- there's no question that  
4 there are grave consequences for discrimination, racial  
5 discrimination on grand juries. Most of the cases have  
6 been whenever the petitioner has attacked the entire grand  
7 jury venire.

8 Peters v. Kiff was such a case, where the entire  
9 venire was attacked. Rose v. Mitchell did involve  
10 attacking discrimination as to the foreman, but the  
11 petitioner in that particular case was a member of the  
12 excluded class.

13 QUESTION: It was also pre-Powers the Court made  
14 that statement, so --

15 MR. IEYOUB: That's correct, Your Honor, but  
16 again, I think that Powers should not be extended to cover  
17 this case.

18 QUESTION: But to this extent, why are they just  
19 the same. One of the points made in Powers was that the  
20 person who was excluded from being on the jury in one  
21 case, yes, the grand jury, that is -- was a most unlikely  
22 challenger, so you have to have this kind of surrogate  
23 standing because the person who was excluded, either from  
24 being on a petit jury or from serving here as the  
25 foreperson, that you -- that would be something that you

1 can't imagine, walking into court, that somebody says, oh,  
2 I could have been the foreperson so I'm going to sue, I'm  
3 going to spend my resources suing for that.

4 MR. IEYOUB: Your Honor, in Powers the Court, in  
5 speaking of the third criteria, that is, hindrance to the  
6 party excluded itself from bringing the action stated  
7 that, as you said, Your Honor, that it would be very  
8 difficult for an individual juror excluded during the voir  
9 dire to bring -- such actions are very rare.

10 Secondly, it's very difficult for the individual  
11 juror to prove that there would be discrimination against  
12 him or her recurring in the voir dire stage. That doesn't  
13 hold true in this particular case.

14 I think the Court pointed out in Powers that  
15 discrimination with the use of peremptory exceptions as to  
16 individual jurors is different from when you have a  
17 systematic exclusion by clerks, by jury commissioners, by  
18 judges -- there have been numerous actions brought by  
19 individual blacks alleging that there has been  
20 discrimination on -- discrimination as to the selection of  
21 the foreman in the grand jury. There seems to be no  
22 hindrance.

23 Terry Campbell is a very poor champion of third  
24 party rights in this particular case.

25 QUESTION: But how is that any different from,

1 say, Taylor v. Louisiana, where Taylor was certainly --  
2 Taylor was complaining that there were no women in the  
3 jury, and he was a man who raped a woman in front of her  
4 child and still he had standing to assert that claim.

5 MR. IEYOUB: Taylor v. Louisiana?

6 QUESTION: Yes.

7 MR. IEYOUB: Again, Your Honor, I would suggest  
8 in Taylor, Taylor made a valid due process claim that the  
9 entire grand jury venire, that in that entire venire there  
10 had been an exclusion, systematic exclusion of women. As  
11 such, that particular grand jury did not represent the  
12 varieties of human experience and the qualities of  
13 human --

14 QUESTION: No, but now you're going to the  
15 substance of the claim rather than the issue of standing.

16 MR. IEYOUB: Well, Your Honor --

17 QUESTION: Taking you at your argument here,  
18 would it be your position that if the State were to say,  
19 we will -- in fact, we'll announce this, that we will in  
20 fact discriminatorily exclude blacks from 1/12th of all  
21 grand jury positions, one of the 12 positions will always  
22 go to a white, that in fact that would not support a claim  
23 with respect to the invalid composition of the jury?

24 MR. IEYOUB: Your Honor, as to equal protection,  
25 as to an equal protection claim --



1 QUESTION: Well, no, I'm responding to your  
2 argument and your argument, if I understood it correctly,  
3 was that somehow we can respond to standing here by saying  
4 that there is no claim with respect to the composition of  
5 the grand jury as a whole.

6 If I misunderstood your argument, tell me, but I  
7 thought that's what you were arguing and so I want to see  
8 how far you will go with that and I'm saying, I'm asking  
9 you, if the State announced right up front, we are going  
10 to discriminate with respect to 1/12th of the positions on  
11 every grand jury, would that, in fact, be insufficient to  
12 support a claim with respect to the invalid composition of  
13 the jury and, on your argument, insufficient to result in  
14 standing for anybody?

15 MR. IEYOUB: Your Honor, I would -- if the  
16 claim -- if there is a claim that due process has been  
17 violated with the court's announcement that there's  
18 discrimination as to 1/12th of the grand jury, that being  
19 the grand jury foreman, then I think that we have to do an  
20 analysis as to whether or not discrimination as to that  
21 one person is so significant that it has an appreciable  
22 impact on the administration of criminal justice.

23 QUESTION: Then the answer to my question is no,  
24 that alone would not --

25 MR. IEYOUB: That's --

1 QUESTION: -- \*support a claim.

2 MR. IEYOUB: That's correct.

3 QUESTION: But why wouldn't it? I mean, why  
4 isn't there -- you say that a white person has standing to  
5 say the grand jury that indicted me was too white. That's  
6 right. You concede that.

7 MR. IEYOUB: That a white person --

8 QUESTION: A white person can say there weren't  
9 enough black people on the grand jury that indicted me.

10 MR. IEYOUB: Yes, Your Honor.

11 QUESTION: You concede that.

12 MR. IEYOUB: Yes, I concede that.

13 QUESTION: All right. Now, somebody says, fine,  
14 that's my claim. My claim is, if even one position was  
15 always white, then there were not enough black people on  
16 the grand jury that indicted me, so how could a person  
17 have standing to make the first argument but not have  
18 standing to make the second argument --

19 MR. IEYOUB: Well, Your Honor --

20 QUESTION: -- since the second argument is the  
21 first argument?

22 MR. IEYOUB: Hobby v. United States felt -- of  
23 course, Hobby was remedied, there's no question about  
24 that, but in Hobby v. United States the Court, or this  
25 Court found that if there is discrimination as to one

1 individual, who in fact maintains a ministerial position  
2 and the rest of the grand jury as a whole meets the  
3 representational requirements or values of due process,  
4 then that -- there has not been a violation of due --

5 QUESTION: So then you would win on the merits.

6 MR. IEYOUB: We would win on the merits.

7 QUESTION: But why would the person not have  
8 standing to argue that systematically discriminating in  
9 one position --

10 MR. IEYOUB: Well --

11 QUESTION: -- creates as bad a grand jury from  
12 the point of view of the Constitution, or nearly as bad as  
13 discriminating in eight or nine or ten or three or four?  
14 I would like to make the argument that constitutionally  
15 speaking those things are equivalent, or just about as  
16 bad, or wrong in any event. Can't he at least make that  
17 argument?

18 MR. IEYOUB: No, Your Honor. First of all, the  
19 individual has to show an injury in fact. That injury has  
20 to be palpable. It has to be distinct. It can't be  
21 hypothetical or analytical.

22 QUESTION: Mr. Attorney General, why didn't  
23 Hobby answer the standing question? There you had a white  
24 defendant who complained about the very same thing.

25 MR. IEYOUB: Your Honor, the Court, or this

1 Court did not speak of standing in Hobby.

2 QUESTION: I know, but that's a threshold issue.  
3 Nobody questioned standing in Hobby.

4 MR. IEYOUB: That's correct, Your Honor.

5 QUESTION: And of course, in Hobby there was --  
6 the foreman was chosen from among the 12 who had already  
7 been picked in a satisfactory cross-section.

8 MR. IEYOUB: That's correct, Your Honor.

9 QUESTION: So why isn't Hobby the answer to the  
10 standing issue in this case and that's the end of the  
11 case?

12 MR. IEYOUB: We have different circumstances in  
13 this case than existed in Hobby, Your Honor and let me  
14 explain. First of all --

15 QUESTION: And they're relevant to the standing  
16 issue?

17 MR. IEYOUB: Relevant to the standing issue.  
18 First of all, injury in fact. In this case, for instance,  
19 Campbell's injury in fact, Mr. Campbell has not suffered  
20 an injury in fact. He has not suffered a palpable,  
21 distinct injury and I think Hobby shows that.

22 QUESTION: Did Hobby suffer a palpable, distinct  
23 injury.

24 MR. IEYOUB: No. No, Your Honor, he did not.

25 QUESTION: So that -- the cases are alike in



1     that regard, then.

2             MR. IEYOUB: They're alike in that regard.  
3     Secondly, causation, as to causation there has -- the  
4     injury has to be fairly traceable to the conduct  
5     complained of, or the illegal injury. In this case, the  
6     State respectfully submits that in no way is the injury to  
7     petitioner fairly traceable to the fact that there might  
8     have been discrimination as to the grand jury foreman.

9             In fact, in this case the petitioner's grand  
10    jury had three blacks on the grand jury. He had six  
11    blacks on the petit jury that convicted him. He used five  
12    of his peremptory exceptions to knock off five blacks,  
13    where the State only used one peremptory exception. How  
14    can it be said that there's causation as to standing here?

15            And finally, redressability. It has to be  
16    shown --

17            QUESTION: Excuse me. You're assuming that the  
18    injury is the ultimate conviction, right?

19            MR. IEYOUB: Yes, Your Honor.

20            QUESTION: Well, I mean, if that's the criterion  
21    I suppose there's never any standing to challenge the  
22    grand jury.

23            MR. IEYOUB: Well --

24            QUESTION: I mean, no harm, no foul. The grand  
25    jury is only meant to determine whether there's probable

1 cause to bring you to trial and if they do indict, no  
2 matter how badly it's set up, even if you make up a grand  
3 jury, once you're tried by a petit jury and found guilty,  
4 you haven't been harmed, right?

5 MR. IEYOUB: Well, Your Honor, this Court has  
6 held that if, in fact, there's -- discrimination can be  
7 found --

8 QUESTION: In --

9 MR. IEYOUB: Racial discrimination --

10 QUESTION: In the grand jury.

11 MR. IEYOUB: In the grand jury, that is, if  
12 there is discrimination --

13 QUESTION: Right, which suggests that your  
14 argument is wrong.

15 MR. IEYOUB: No, Your Honor --

16 QUESTION: The harm is not the ultimate  
17 conviction.

18 MR. IEYOUB: Well --

19 QUESTION: There must be some other harm  
20 involved.

21 MR. IEYOUB: Even if we say that the harm is the  
22 fact that the individual was indicted, you must -- again,  
23 I will show that in order for an indictment to come down  
24 in Terry Campbell's case it just took 9 -- 9 out of the  
25 12. We don't know what the vote was in this grand jury,

1 whether or not the foreman actually voted for indictment  
2 or not, but in any event, I don't see how his injury is in  
3 any way fairly traceable to the alleged misconduct here,  
4 or any misconduct that might be alleged.

5 QUESTION: But if we're talking about the  
6 alleged injury being the conviction, then wouldn't that be  
7 true in all the cases where someone who was not a member  
8 of the class, whether it was racial or gender, is allowed  
9 to make the challenge?

10 The case that I brought up before, is it likely  
11 that women on the jury would have been more favorable to  
12 Taylor? He certainly didn't have to prove that, did he?

13 MR. IEYOUB: No, Your Honor. Now -- but insofar  
14 as due process is concerned, in addition to injury in fact  
15 and causation, there has to be redressability. That means  
16 that the petitioner must be -- there has to be -- it has  
17 to be likely that a favorable decision of the Court, that  
18 is, as to standing, would grant the relief that he's  
19 asking for and that would not the case, I don't think, in  
20 here, in light of Hobby v. United States.

21 If this Court would find, for instance, that he  
22 might have standing under the --

23 QUESTION: Well, may I interrupt you with this  
24 question, then. As I think all of our questions have  
25 indicated and you yourself agree, the difference between

1 Hobby and this case was that in Hobby the discrimination  
2 did not affect the composition of the grand jury. Here,  
3 it does. If there was discrimination here, it affected  
4 the composition of the grand jury. Isn't that the  
5 distinction between this case and Hobby?

6 MR. IEYOUB: Your Honor, you say that  
7 discrimination did not affect the Hobby -- in Hobby --

8 QUESTION: As I understand it, and you correct  
9 me if I'm wrong, in Hobby a grand jury was selected.

10 After that selection process, one person was designated to  
11 be the foreman. In this case, one person is designated to  
12 be the foreman and the claim is that that discriminatory  
13 designation determines the composition of one out of 12  
14 members of the grand jury.

15 Therefore, the discrimination here, if it is  
16 shown, affects the composition of the grand jury, who is  
17 one of the 12, whereas in Hobby it did not affect who was  
18 one of the 12, or whatever the number is. Isn't -- is  
19 that correct?

20 MR. IEYOUB: That's correct, Your Honor, but  
21 even if it affects the composition of the grand jury, we  
22 have to determine whether or not that particular effect  
23 violates due process values if he is making a claim under  
24 the Due Process Clause.

25 What I am saying is that the fact that there may



1 have been discrimination as to the foreman in this case in  
2 no way violates the due process values because we have  
3 stated, and I think the Louisiana supreme court in  
4 interpreting our law has stated, that basically the grand  
5 jury foreman's duties are ministerial.

6 In addition, Hobby --

7 QUESTION: Well, his duties as foreman may be  
8 ministerial. We can accept that for the sake of argument.  
9 His duty as a voting member of the grand jury isn't  
10 ministerial, is it?

11 MR. IEYOUB: No, Your Honor, but in Federal --  
12 in the Federal grand jury the foreman is also a voting  
13 member, if I'm not mistaken, so --

14 QUESTION: Let me suggest the point this way.  
15 As I understand the petitioner here, the argument really  
16 would be essentially the same if the person selected by  
17 this method of designation by the Court were not the  
18 foreman at all, were just one random member of the grand  
19 jury and therefore it seems to me, although it's -- it  
20 certainly makes it a harder case, if you will --

21 MR. IEYOUB: That's right.

22 QUESTION: -- in one sense if the grand jury  
23 is -- if the foreman's responsibilities are ministerial.  
24 It doesn't eliminate the case, because the composition is  
25 still affected.

1 MR. IEYOUB: The composition is affected, Your  
2 Honor, but how is it affected?

3 And let me point out that Hobby, in addition to  
4 talking --

5 QUESTION: Well, the claim is. It is affected  
6 in a discriminatory way in that 1/12th of every grand jury  
7 is going to be the result of a racial discrimination.  
8 That's what the claim is.

9 MR. IEYOUB: Well --

10 QUESTION: That's all that's affected.

11 MR. IEYOUB: Well, of course, the petitioner  
12 would have to prove a --

13 QUESTION: Right.

14 MR. IEYOUB: Right, would have to prove --

15 QUESTION: And that's why we have trials, but  
16 that doesn't go to -- the question is, how does it affect  
17 standing?

18 MR. IEYOUB: In addition, Your Honor, just  
19 speaking of the foreman and the ministerial  
20 responsibilities of the foreman in Hobby, the Court  
21 pointed out that if there is discrimination as to one  
22 individual -- in Hobby it happened to be the foreman, but  
23 that if there was discrimination as to one individual and  
24 the grand jury as a whole, the rest of the grand jury  
25 satisfied the representational requirements of due

1 process, then that would not be enough to find that there  
2 had been a violation of the petitioner's rights.

3 QUESTION: How many would it take, 2 out of 12,  
4 3 out of 12, 4 out of 12? When do we cross the line, on  
5 your reading of Hobby?

6 MR. IEYOUB: Your Honor, I think that if in fact  
7 it can be shown that there is systematic exclusion of a  
8 number of individuals --

9 QUESTION: Well, how many? One is not enough.  
10 What's enough?

11 MR. IEYOUB: Your Honor, I would say that one is  
12 not enough.

13 QUESTION: All right. How many is enough?

14 MR. IEYOUB: We would have to take that on a  
15 case-by-case basis, Your Honor.

16 QUESTION: Well, you're not taking this on a  
17 case-by-case basis.

18 MR. IEYOUB: I would --

19 QUESTION: You're saying one, as a matter of  
20 law, is not enough. When do we get to the point at which,  
21 as a matter of law, it might be possible?

22 MR. IEYOUB: Whenever the petitioner makes the  
23 claim that the grand jury venire, the entire venire or a  
24 large part of the venire has been selected in a  
25 discriminatory way so that due process values have been

1 violated. In this particular --

2 QUESTION: Well, the claim here is not that the  
3 venire was discriminatorily chosen, but that individuals  
4 were discriminatorily chosen from the venire, so if your  
5 argument is correct there never would be standing to make  
6 a claim because there never would be a claim.

7 MR. IEYOUB: Your Honor, I don't think that  
8 there would be standing to make a claim, as I said  
9 earlier, if there's an allegation that only -- that there  
10 was discrimination as to the foreman of the grand jury, or  
11 any one of the other 12. I don't think that there would  
12 be standing to make that claim there.

13 QUESTION: Even though we found standing in  
14 Hobby. You want us to ignore that.

15 MR. IEYOUB: Yes, Your Honor, because I don't  
16 think --

17 QUESTION: Well, I don't see how we can or  
18 should.

19 MR. IEYOUB: Well, Your Honor, I don't think  
20 that the petitioner in this case, as I have argued, has  
21 really satisfied the criteria for Article III standing  
22 under Allen v. Wright.

23 QUESTION: If there were no Article III standing  
24 in Hobby, this Court would have had to say so on its own  
25 motion.



1 foreman. MR. IEYOUB: That's correct, Your Honor, but I  
2 don't know why the Court didn't address -- necessarily  
3 address standing in Hobby. They found that there was no  
4 violation of due process rights and we would argue that  
5 Hobby should hold here. Position number 4 was

6 always was. QUESTION: We said there was no remedy required  
7 in that. MR. IEYOUB: Yes, Your Honor.

8 MR. IEYOUB: Remedy, yes, Your Honor, no remedy.

9 The basic claim of the petitioner in this  
10 particular case has been that he has third party standing  
11 to assert the rights of a third party. That's his basic  
12 claim. That's his chief claim. His lawyer stood up at  
13 the motion to quash and argued, saying Terry's rights have  
14 not been violated. He is asserting the rights of the  
15 third party that has been excluded. Equal protection.

16 It has always been third party standing and we  
17 suggest that, under Powers v. Ohio, that he doesn't have  
18 third party standing. Powers v. Ohio granted third party  
19 standing because of the particular nature of the voir dire  
20 phase of the trial and the types of discrimination that  
21 took place at that time. White person has the standing if

22 it's 4, 5. That did not occur. How in the world can we  
23 say, with respect, Your Honors, that there is a bond of  
24 trust that is created between the petitioner and the third  
25 party whenever there's a selection of a grand jury by're

1 foreman. The defendant is not even present in court  
2 for -- as a practical matter. As long --

3 QUESTION: I guess it's the case, isn't it -- I  
4 mean, suppose a judge or the system deliberately excluded  
5 blacks from position number 4. Position number 4 was  
6 always white. That's illegal, isn't it?

7 MR. IEYOUB: Yes, Your Honor.

8 QUESTION: Pure racial discrimination.

9 MR. IEYOUB: Yes. Yes. Yes, Your Honor.

10 QUESTION: All right.

11 MR. IEYOUB: Yes.

12 QUESTION: So if it's -- they exclude blacks  
13 always from 5, 6, and 7 as well, then the white person has  
14 standing, in your view.

15 MR. IEYOUB: Not as to equal protection.

16 QUESTION: Well, 9, 10, 11 -- 4, 5, 6, 7, 8, 9,  
17 and 10. Now, does the white person have standing?

18 MR. IEYOUB: I think under due process the white  
19 person would --

20 QUESTION: Yes, all right. Now, what's your  
21 theory under which the white person has the standing if  
22 it's 4, 5, 6, 7, 8, 9, and 10 but it's not 1? They're  
23 both illegal.

24 MR. IEYOUB: That --

25 QUESTION: They're both grand juries, they're

1 both -- I mean, that's I think what people have been  
2 trying to get at. What would the theory of the thing be?

3 MR. IEYOUB: Well, the theory of it would be,  
4 Your Honor, that this has a significant impact, that  
5 there's more of a significant impact on the administration  
6 of criminal justice, that due process representational  
7 values are not satisfied in the second case.

8 But as in this case he does not have third party  
9 standing. He does not have -- he has not shown that he  
10 satisfies the criteria in Article III that is stated, that  
11 is, injury in fact, causation, and redressability.

12 QUESTION: General Ieyoub, may I ask you another  
13 question about how things work in Louisiana? In your  
14 brief on page 28 you said that the -- that the foreperson  
15 is presumably replaced every 6 months, as is the entire  
16 grand jury. Is there any reason why you -- it's only  
17 presumably? Is it -- does the --

18 MR. IEYOUB: No, Your Honor. I think that they  
19 are replaced.

20 Grand juries in Louisiana sit for not less than  
21 4 months nor more than 8, and when a grand jury is  
22 dispensed with, then the grand jury foreman changes.

23 QUESTION: So it's always -- they all change,  
24 including. There's no difference.

25 MR. IEYOUB: That's correct, Your Honor.

1 QUESTION: There's no carry-over, or -- I have no  
2 problem with MR. IEYOUB: That's correct, Your Honor, unlike  
3 Tennessee in the Rose case, where the grand juror, jury  
4 foreman could sit for 2 years, or as long as a judge was  
5 wanted him to sit.

6 But Your Honors, with all due respect, we feel  
7 that Petitioner Powers' conviction should be affirmed.  
8 This court is always adding stories to the temples of the  
9 constitutional law, but Your Honors, if the Court please,  
10 we urge Justice Jackson's caution and that is that the  
11 temples have a way of collapsing if one too many stories  
12 is added. I doubt, but to find whether there's reason to  
13 believe, Your Honors, we request that the conviction be  
14 affirmed. It, to have him tried.

15 QUESTION: Thank you, General Ieyoub. That. I  
16 mean, the Mr. Burnes, you have 8 minutes remaining.

17 REBUTTAL ARGUMENT OF DMITRY I. BURNES beyond a  
18 reasonable doubt ON BEHALF OF THE RESPONDENT fair about your

19 MR. BURNES: May it please the Court:

20 I would like to address a few of the points  
21 raised by General Ieyoub. A jury look at the evidence  
22 presented The injury here, the harm involved when you're  
23 looking at the claims which would fall under Article III  
24 standing, is the right not to be indicted by a citizens  
25 nonimpartial grand jury.



1           QUESTION: But look -- look -- I mean, I have no  
2 problem with your due process standing. I do have a  
3 problem on the merits of the due process claim, which is  
4 supposed to be an assertion that the conviction here was  
5 fundamentally unfair. - you know, it's a terrible thing to  
6 exclude pe Your client had a petit jury, fairly chosen --  
7 you made no claim that that wasn't fairly chosen -- which  
8 found your client guilty beyond a reasonable doubt of the  
9 crime alleged. but I don't see why your client has been  
10 convicted Now, the only function of the grand jury had a  
11 beforehand is not to find whether he's guilty beyond a  
12 reasonable doubt, but to find whether there's reason to  
13 believe, adequate reason to believe that he might have  
14 committed it, to have him tried. the grand jury look at  
15 the evidence Well, my goodness, we've gone beyond that. I  
16 mean, the game's over. A petit jury has said yeah,  
17 there's not only reason to believe, he is guilty beyond a  
18 reasonable doubt. me What is fundamentally unfair about your  
19 client's conviction? -- make his conviction fundamentally  
20 unfair? MR. BURNES: That he was denied the opportunity  
21 to have an impartial grand jury look at the evidence  
22 presented to that grand jury and say, we're only going to  
23 indict him for manslaughter, or we're not even going to  
24 indict him at all. That is a right that the citizens  
25 have. MR. BURNES: Your Honor, we aren't arguing that

1 QUESTION: But there could be no possible  
2 mistake a grand jury's having found there to be probable  
3 cause, given that a petit jury found beyond a reasonable  
4 doubt that he's guilty.

5 I mean, I -- you know, it's a terrible thing to  
6 exclude people like that, and maybe somebody had -- I'm  
7 sure a black grand juror who has been excluded could set  
8 it right, or the Justice Department could bring suit to  
9 set it right, but I don't see why your client has been  
10 convicted in a fundamentally unfair manner. He's had a  
11 petit jury that, fairly chosen, found him guilty beyond a  
12 reasonable doubt.

13 MR. BURNES: Mr. Campbell was convicted.  
14 However, he has the right to have the grand jury look at  
15 the evidence and say, we're only going to indict for  
16 manslaughter.

17 QUESTION: He has that right and there was an  
18 error made and somebody should correct that, but did that  
19 error deprive him of -- make his conviction fundamentally  
20 unfair?

21 It's only his conviction. I mean, if you're  
22 asking for something else, money damages or, you know,  
23 something different, maybe you've got a claim there, but  
24 your client's conviction was fundamentally unfair --

25 MR. BURNES: Your Honor, we aren't arguing that

1 the conviction was fundamentally unfair. We are arguing  
2 that he was denied his rights at that grand jury stage.

3 QUESTION: Well, in the Mechanic case in the  
4 Federal courts we held that even though a Federal grand  
5 jury does not conform to the requirements set up by  
6 Congress, nonetheless, if the person is convicted, the  
7 shortcomings of the grand jury are harmless error. Why  
8 doesn't the same thing follow in this situation insofar as  
9 your due process claim is concerned?

10 MR. BURNES: Your Honor, there's -- because the  
11 long line of cases from this Court which find that racial  
12 discrimination at the grand jury --

13 QUESTION: But those are not due process cases.

14 MR. BURNES: Well, with respect to the due  
15 process, I believe there is a due process harm there when,  
16 in order to be convicted and sentenced to a life sentence  
17 in Louisiana, the citizen has a right to the indictment by  
18 the grand jury and the grand jury here was not impartial,  
19 did not have -- he was not --

20 QUESTION: Well, when you say not impartial that  
21 suggests that some members of the grand jury were  
22 prejudiced against your client. Now, there's no evidence  
23 of that, is there?

24 MR. BURNES: Well, as --

25 QUESTION: Is there?

1 MR. BURNES: Your Honor, there is no evidence in  
2 the record of that and you can't see the evidence in the  
3 record of that and that's pointed out very clearly in the  
4 Vasquez v. Hillery case, where --

5 QUESTION: Which was an equal protection case.

6 MR. BURNES: Which says that you cannot  
7 determine --

8 QUESTION: You're just melding together the  
9 Equal Protection Clause of the Fourteenth Amendment and  
10 the Due Process Clause, it seems to me.

11 MR. BURNES: Well, Your Honor, the analysis, the  
12 argument right there that you cannot tell what the harm is  
13 because you're not allowed to look at those deliberations  
14 and look at those votes is equally as strong in the due  
15 process area as in the equal protection area.

16 QUESTION: You know, this seems to be sort of  
17 the gaming theory of criminal justice. Your client, with  
18 a different grand jury, might have been lucky enough to  
19 get a jury that didn't find sufficient cause to bring an  
20 indictment, might have been that lucky, although it's  
21 clear there was sufficient cause to bring an indictment.  
22 Indeed, he was found guilty beyond a reasonable doubt. I  
23 find it hard to find that a deprivation of fundamental  
24 fairness.

25 The only issue for the grand jury was whether



1     there was enough evidence here to bring the prosecution  
2     and that's been established by the conviction.  It's been  
3     established a fortiori.  It's been established 10 times  
4     over by conviction beyond a reasonable doubt.  I find it  
5     hard to see that your client's been deprived of  
6     fundamental fairness.

7             MR. BURNES:  Your Honor, that's where we would  
8     disagree with Your Honor, that --

9             QUESTION:  Does Peters v. Kiff help you?

10            MR. BURNES:  Peters v. Kiff, Your Honor, is a  
11     case involving I believe petit juries.

12            QUESTION:  And grand jury both, I think.

13            MR. BURNES:  And extended to grand juries.

14            Here, the harm is that he's not given a chance  
15     for the grand jury to say, you know, this defendant may or  
16     may not have done that, we're going to only find for  
17     manslaughter, and not subject him to that life sentence.

18            QUESTION:  Was there a majority opinion for the  
19     Court in Kiff?  I thought there was not.  I thought we  
20     really don't know what was --

21            MR. BURNES:  I don't recall, Your Honor.

22            QUESTION:  -- 3-3-3, as I recall.

23            MR. BURNES:  Okay.  Your Honor, I'd like to --  
24     Your Honors, I'd like to address a few more issues.

25            One is that General Ieyoub raised the point that

1 only 9 votes were needed by the grand jury again on that  
2 case that would seem to be urging an issue, urging a rule  
3 that we could discriminate on 3 out of the 12 grand jury  
4 members, still get 9 votes from the other ones and have a  
5 valid indictment. I don't believe that is a good rule.

6 General Ieyoub has also argued that the  
7 Louisiana supreme court has said that the grand jury  
8 foreman is ministerial, but you have to look at where the  
9 grand jury -- where the Louisiana supreme court said that.  
10 That was in this case which is under review here.

11 The problem here that there was systematic  
12 exclusion by the judge and that Petitioner Campbell has  
13 been denied standing to raise these claims. Whenever the  
14 State has argued against it they start going to the merits  
15 of the claims. They start saying how he's got to prove  
16 this or prove that with respect to due process, yet  
17 Petitioner Campbell isn't given an opportunity to prove  
18 whether there was a due process violation or an equal  
19 protection violation or a Sixth Amendment violation when  
20 he's not given standing to assert them.

21 If there's no other questions, I'd yield my  
22 time.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Burnes.  
24 The case is submitted.

25 (Whereupon, at 12:01 p.m., the case in the

1     above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

TERRY CAMPBELL Petitioner v. LOUISIANA  
CASE NO: 96-1584

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedirko-----

(REPORTER)