

Chapter 9: Grand Jury Proceedings

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The grand jury in North Carolina is charged with determining probable cause in all felony cases and all misdemeanor cases in which original jurisdiction over the case lies in the superior court (primarily, misdemeanors joined with felonies). Unless the defendant waives his or her right to indictment, the State must obtain an indictment for all criminal prosecutions within the superior court's original jurisdiction. The right to indictment cannot be waived by a non-capital defendant who is not represented by counsel or by a capital defendant. *See* G.S. 15A-642(b).

Because its proceedings are secret and because the grand jury has a great deal of discretion, challenging grand jury actions is difficult. However, the grand jury is not immune from review. Broadly speaking, a criminal defendant may object to an indictment returned by the grand jury on two grounds:

- the jury was illegally constituted, or
- significant procedural irregularities tainted the grand jury proceedings

In either case the indictment must be dismissed. Both types of challenges are discussed in further detail below.

Practice note: All objections to the grand jury’s composition or actions must be raised before arraignment, or they may be considered waived. *See* G.S. 15A-952(b)(4), 15A-955; *State v. Lynch*, 300 N.C. 534 (1980). Also, the defendant waives arraignment unless he or she files a timely written request for arraignment with the clerk of court. If arraignment is waived, certain pretrial motions, including challenges to grand jury proceedings, must be filed with 21 days of the return of the indictment. *See* G.S. 15A-941(d), 15A-952(c).

Section 9.1 below reviews the qualifications and selection process for grand jurors and the foreperson of the grand jury. Section 9.2 discusses potential challenges to the composition of the grand jury and to the method for selecting a foreperson. Section 9.3 addresses the procedures to be followed by the grand jury, and Section 9.4 covers errors in grand jury procedure that may result in a defective indictment. Section 9.5 discusses provisions for special grand juries that may be convened in certain drug cases. Section 9.6 lists additional references on the grand jury.

9.1 Composition of Grand Jury

A. Selecting Grand Jurors

There is a three-step process for selecting grand jurors. The first step is for the jury commission for each county, either annually or biannually, to construct a list of potential jurors to be used for both grand and trial (petit) juries. (Each county has a jury commission composed of three members who serve two-year terms; one member is appointed by the board of county commissioners, the second by the senior resident superior court judge, and the third by the clerk of superior court. *See* G.S. 9-1.) G.S. 9-2 dictates how the list must be constructed. There are two important requirements in this first step: (i) to ensure adequate representation of minorities, the jury list must be drawn from voter registration lists, drivers’ license lists, and other reliable sources; and (ii) the process of creating the jury list must be random. The State Board of Elections and the Division of Motor Vehicles create a merged “raw” list of registered voters and licensed drivers and provide it to the jury commission of each county. *See* G.S. 20-43.4; G.S. 163-82.11. The jury commission may supplement the list using any other reliable source, but in practice no counties do so. From this raw list, the jury commission creates the master jury list by removing deceased or disqualified persons (*see infra* § 9.1B regarding qualifications of jurors) and then randomly selecting the number of names needed. *See*

G.S. 9-2(e). “Random” is defined in G.S. 9-2(h) as a method of selection that results in each name on a list having an equal opportunity to be selected. *See generally* JAMES C. DRENNAN & MIRIAM S. SAXON, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS 11–13 (School of Government, 4th ed. 2007) [hereinafter DRENNAN & SAXON].

Second, the clerk of superior court or the assistant or deputy clerk selects from the master jury list those to be summoned for jury duty by the sheriff (sometimes called the jury array or venire). This selection process must also be random. *See* G.S. 9-5 (describing procedure for drawing names).

Third, from the list of those summoned for jury duty, the clerk must randomly select the names of eighteen people to serve as grand jurors. *See* G.S. 15A-622(b). Generally, those selected serve twelve-month terms, with nine members rotating off the panel every six months. *See id.* (senior resident judge also may fix term of service at six rather than twelve months).

B. Qualifications of Individual Grand Jurors

Statutory requirements. The qualifications for grand jurors are the same as for all jurors. G.S. 9-3 states that jurors must: (i) be citizens of North Carolina; (ii) be residents of the county in which they will serve; (iii) be eighteen years or older; (iv) be physically and mentally competent; (v) be able to hear and understand the English language; and (vi) not have been convicted of a felony or, if convicted, have had their citizenship restored. In addition, a person may not serve as a juror more than once every two years. *See also infra* 2 NORTH CAROLINA DEFENDER MANUAL § 23.2A (discussing grounds for disqualification of petit jurors).

Dismissing or excusing grand jurors. In preparing the jury list, the jury commission screens out potential jurors who do not meet the statutory requirements. *See generally* DRENNAN & SAXON at 14–16 (describing procedure).

A superior court judge has authority to dismiss a grand juror if the judge finds that the juror does not meet the above qualifications, is incapable of performing his or her duties, or is guilty of misconduct. *See* G.S. 15A-622(c) (so stating; also authorizing judge to dismiss entire grand jury upon finding that jurors have not been selected in accordance with law or that grand jury is illegally constituted); *see also State v. Oxendine*, 303 N.C. 235 (1981) (individuals with a pecuniary interest in the outcome of a case should not serve on the grand jury). In addition, district and superior court judges have the authority to excuse jurors for hardship. *See* G.S. 9-6; G.S. 15A-622(d); *see also infra* 2 NORTH CAROLINA DEFENDER MANUAL § 23.2B (discussing authority of judge to excuse jurors).

There is no statutory authorization for the jury commission, sheriff, or any other authority to screen out potential jurors on the basis of the jurors’ moral character or position in the community. Such a practice could result in a racially unrepresentative grand jury, providing potential grounds for challenging a grand jury indictment. *See infra* § 9.2.

Age as excuse. The court in its discretion may excuse a person 72 years of age or older from service as a juror. *See* G.S. 9-6.1 (people 72 or older may request exemption by mail without appearing in court; district court rules on requests); *State v. Elliot*, 360 N.C. 400 (2006) (trial court may rule on request by person over 65 [now 72] to be excused from jury service). Advanced age does not automatically excuse a person from serving as a grand juror, however. Older citizens called as grand jurors may serve unless they suffer from a physical or mental disability that prevents them from fulfilling their duties as a juror. *See State v. Elliott, supra* (juror may be excused because of his or her age if the court determines that service would be a compelling personal hardship); *State v. Rogers*, 355 N.C. 420 (2002) (“excusing prospective jurors present in the courtroom who are over the age of sixty-five [now seventy-two] must reflect a genuine exercise of judicial discretion”); *DRENNAN & SAXON* at 16 & n.5 (“it is improper to strike names from the master jury list solely on the basis of age, without a case-by-case consideration as to an elderly person’s physical or mental competence”; decision to excuse juror on account of age should ordinarily be made by court, not by jury commission). If your county has a practice of automatically exempting every person over 72 from service on grand juries, such a practice may provide grounds to challenge the indictment. *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that Louisiana practice of automatically excluding women from jury service unless they filed letter expressing desire to be included was unconstitutional).

C. Effect of Improper Selection Procedures

Generally. A defendant is entitled to learn the identity of the grand jurors who issued the indictment. *See generally* G.S. 15A-955 (court may dismiss indictment if it finds there is ground to challenge the array); *State v. Dellinger*, 308 N.C. 288 (1983) (information about grand jury other than content of its deliberations is matter of public record); *State v. Kirkland*, 119 N.C. App. 185 (1995) (defendant moved to compel disclosure of jury records in support of motion to quash indictment on ground that grand jury, grand jury foreman, and petit jury were unlawfully selected on basis of race; trial court did not err in denying defendant’s motions where motion to quash was untimely), *aff’d per curiam*, 342 N.C. 891 (1995); *see also* G.S. 132-1 (public records law). In limited circumstances, a defendant may move to dismiss an indictment on the ground that either the grand jury as a whole was illegally constituted or individual grand jurors were unqualified.

Improper exclusion of jurors. If a qualified group, such as African-Americans or women, has been systematically excluded in either the drawing of the list of jurors or the selecting of jurors from the list, a defendant may challenge the composition of the grand jury as a whole. *See* G.S. 15A-955, 15A-1211; *State v. Vaughn*, 296 N.C. 167(1978) (indictment may be dismissed if grand jury selection process was corrupt or discriminatory). For further discussion of this type of challenge, *see infra* 9.2.

Improper inclusion of jurors. An individual may be qualified to serve as a grand juror even though he or she might be subject to a challenge for cause as a petit juror under G.S.

15A-1212. *See, e.g., State v. Oxendine*, 303 N.C. 235 (1981) (not error for brother of murder victim to serve on indicting grand jury).

However, if the grand jury contains members who do not meet the requirements of G.S. 9-3, the indictment may be dismissed. *See State v. Vaughn, supra*. The grand jury also should not contain members with a pecuniary interest in the outcome of a case, and the inclusion of such an interested person may be grounds for dismissal of an indictment. *See State v. Oxendine, supra*.

D. Selection of Grand Jury Foreperson

The foreperson of the grand jury presides over grand jury sessions, swears witnesses, administers oaths, and keeps a record of the disposition of each case, usually by indicating on an indictment whether it was returned as a “true bill.” *See* G.S. 15A-623, 15A-644(a)(5). The presiding judge appoints the grand jury foreperson. *See* G.S. 15A-622(e). To make the selection, the court may personally interview grand jurors. *See* JAMES C. DRENNAN, HANDBOOK FOR GRAND JURORS 3 (Administrative Office of the Courts, 1988). The court also may accept the recommendation of the grand jury members. *See State v. Phillips*, 328 N.C. 1 (1991) (upholding selection of grand jury foreperson based on nomination of grand jury members). Unless removed from the grand jury by the superior court judge, the foreperson serves for the duration of his or her grand jury term.

9.2 Challenges to Grand Jury Composition or Selection of Foreperson

A. Equal Protection Challenges to Grand Jury Composition

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, §§ 19 and 26, of the North Carolina Constitution protect against jury selection procedures that intentionally exclude members of an identifiable class from jury service. *See Castaneda v. Partida*, 430 U.S. 482 (1977) (equal protection clause protections apply to selection of grand jury array); *State v. Hardy*, 293 N.C. 105 (1977) (exclusion of women, African-Americans, and 18 to 21 year-olds challenged under equal protection clause); *State v. Wright*, 274 N.C. 380 (1968) (exclusion of African-Americans challenged); *State v. Yoes*, 271 N.C. 616 (1967) (same); *see also Peters v. Kiff*, 407 U.S. 493, 502 (1972) (“a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner in violation of the Constitution and laws of the United States”).

If an indictment is returned by a grand jury that was unlawfully constituted because members of a suspect class were intentionally excluded, the indictment is void and the superior court has no jurisdiction to enter judgment against the defendant. *See State v. Hardy, supra*; *State v. Ray*, 274 N.C. 556 (1968). The particular defendant alleging racial discrimination in the jury selection process need not belong to the class that is the subject

of alleged discrimination—that is, a white defendant has standing to challenge the exclusion of blacks from jury service. *See Campbell v. Louisiana*, 523 U.S. 392 (1998); *Ford v. Kentucky*, 469 U.S. 984 (1984).

The defendant carries the burden of proving intentional discrimination. *See State v. Ray, supra*. To show that an equal protection violation has occurred, the defendant must first establish a prima facie case of discrimination against a particular group by showing that the jury selection procedure resulted in substantial under-representation of that group. The burden then shifts to the State to rebut the prima facie case by showing a race-neutral reason for the discrepancy. *See Castaneda v. Partida, supra*.

The Equal Protection line of cases does not give a defendant the right to proportionate representation of the demographic diversity of the county on the grand jury, or among the array or list from which the grand jury is selected (although the defendant may have a “fair cross-section” right, discussed below). Rather, he or she has a right to be indicted by a jury where no person was intentionally excluded on the basis of race or other suspect classification. *See State v. Wright*, 274 N.C. 380 (1968); *Cassell v. Texas*, 339 U.S. 282 (1950) (voiding indictment for intentional discrimination against African-Americans).

B. Fair Cross-Section Challenges to Grand Jury Composition

With respect to the selection of trial juries, the Sixth Amendment to the United States Constitution requires that the jury be drawn from a “representative cross-section” of the community. *See Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975). Proving a fair cross-section violation is similar to showing an equal protection violation. The defendant must prove that the representation of a distinctive group (such as African-Americans or Latinos) in the venire, or the list from which the venire was selected, was not fair and reasonable in relation to the number of such persons in the community. In addition, the defendant must show that the under-representation was due to a systematic exclusion of the group in the jury selection process. *See Duren v. Missouri, supra*. The primary difference between a fair cross-section case and an equal protection case is that to prove a fair cross-section violation, the defendant does not have to prove intentional discrimination by the State. Instead, the defendant need only show that the exclusion of the alleged class was “systematic” or an inevitable result of the selection procedure. *See id.*

The United States Supreme Court has not reached the question of whether the Sixth Amendment “fair cross-section” right applies to the selection of grand juries in state court. *See Campbell v. Louisiana*, 523 U.S. 392 (1998) (declining to reach issue). Although the Sixth Amendment right to jury trial has been incorporated into the Fourteenth Amendment and applies to the states, the Fifth Amendment right to grand jury indictment has not been; states are not required to use grand juries. However, a strong argument could be made that where a state chooses to use a grand jury to formally charge defendants, then the grand jury it uses must be fair and representative. *See generally Morgan v. Illinois*, 504 U.S. 719 (1992) (where a state chooses to rely upon jury sentencing, the sentencing jury must be fair and impartial). Thus, any challenge to the

fairness of a jury list or venire from which grand jurors are selected should be brought under the Equal Protection Clause, the Due Process Clause, and the Sixth Amendment “fair cross-section” requirement.

C. Challenges to Selection of Grand Jury Foreperson

Basis of challenge. In *State v. Cofield*, 320 N.C. 297 (1987), our Supreme Court held that even if the grand jury has been selected in a nondiscriminatory manner, racial discrimination in the selection of the grand jury foreperson violates Article I, §§ 19 and 26, of the North Carolina Constitution (the “law of the land” clause and the clause barring exclusion from jury service “on account of sex, race, color, religion, or national origin”). To attack the selection of the foreperson on state constitutional grounds, the defendant need not belong to the class that is the alleged subject of discrimination. *See State v. Moore*, 329 N.C. 245 (1991) (African-American defendant could challenge removal of white foreperson and replacement with African-American foreperson)). Moreover, under *Cofield*, the defendant need not show prejudice to his or her case to obtain relief. *See also State v. Montgomery*, 331 N.C. 559 (1992) (plurality opinion recognizes that *Cofield* does not require defendant to show prejudice).

Although it based its ruling on state constitutional provisions, the *Cofield* court also held that discrimination in the selection of a grand jury foreperson may violate the equal protection provisions of the federal constitution, but only if the defendant is a member of the excluded class. Since *Cofield*, the United States Supreme Court has held that any person may bring an equal protection challenge, not just members of the group allegedly discriminated against. *See, e.g., Campbell v. Louisiana*, 523 U.S. 392 (1998).

Required showing. *Cofield* held that the defendant establishes a *prima facie* case of racial discrimination in the selection of grand jury foreperson with evidence that

- the selection procedure was not racially neutral, or
- for a substantial period of time relatively few African-Americans have served as grand jury foremen.

If a defendant makes a *prima facie* showing, the burden shifts to the State to rebut the showing with evidence that the selection process was racially neutral. *See State v. Cofield*, 324 N.C. 452 (1989) (“*Cofield II*”) (racially neutral method of selecting grand jury foreperson is one in which all jurors are equally considered for foreperson).

D. Procedure for Challenging Grand Jury Composition or Selection of Foreperson

Motion to dismiss indictment. You may challenge the grand jury selection procedure, or the selection of grand jury foreperson, by moving to dismiss the indictment. *See State v. Cofield*, 320 N.C. 297 (1987); G.S. 15A-955 (defendant may move to dismiss indictment if there is ground to challenge grand jury array). If the motion succeeds, the indictment must be dismissed, although the State is free to reindict. *See State v. Pigott*, 331 N.C. 199 (1992); *State v. Cofield*, *supra*.

Timing of motion. Challenges to the propriety of an indictment, based either on discrimination in the selection of grand jurors or discrimination in the selection of the grand jury foreperson, must be made at or before arraignment. *See* G.S. 15A-952(b)(4), 15A-955; *State v. Miller*, 339 N.C. 663 (1995) (motion challenging selection of grand jury foreperson is waived if not made by arraignment); *State v. Newkirk*, 14 N.C. App. 53 (1972) (objections to composition of grand jury waived if not raised before plea entered); *see also State v. Green*, 329 N.C. 686 (1991) (plea of guilty constitutes waiver of challenge to selection of grand jury foreperson).

9.3 Grand Jury Procedures

A. Convening of Grand Jury

Sessions of the grand jury are convened by the superior court. While in recess, the grand jury may be reconvened by the court *sua sponte* or at the prosecutor's request. *See* G.S. 15A-622(g); *see also State v. Parker*, 119 N.C. App. 328 (1995) (oral application by prosecutor to have grand jury reconvened upheld where defendant failed to show prejudice from lack of written application to or written order of court).

B. Role of Grand Jury

Generally. The primary role of a grand jury is to review evidence of crimes charged in bills of indictment submitted by the prosecutor. If at least twelve of the eighteen members of the grand jury find "probable cause" that the defendant committed a crime, they must return the bill as a "true bill." The return of a true bill formally initiates a criminal prosecution against the named defendant and confers jurisdiction on the superior court to try the case. *See State v. Davis*, 66 N.C. App. 137 (1984) (jurisdiction attaches when indictment returned, even if indictment not served until later).

If twelve members of the grand jury do not concur in a finding of probable cause, the grand jury must return the submitted bill of indictment as not a true bill. *See* G.S. 15A-623(a), 15A-628. If the bill is returned as not a true bill the grand jury also may:

- return the bill with a request that the prosecutor resubmit another bill for a lesser included or related offense, or
- return the bill with an indication that the grand jury could not act because witnesses were unavailable.

See G.S. 15A-628(a)(2), (3).

Investigative function. The grand jury also may investigate offenses and determine whether to return a presentment. *See* G.S. 15A-628(a)(4). As a practical matter, the grand jury rarely does its own investigation, restricting its activities to the review of documents or receipt of testimony by witnesses suggested by the prosecutor. If the grand jury finds probable cause to believe that a crime has been committed, it may issue a presentment.

The concurrence of at least twelve grand jurors is required for the issuance of a presentment. *See* G.S. 15A-623(a), 15A-628(a)(4). A presentment is *not* a criminal pleading and does not charge a crime or confer jurisdiction on the court to hear a case. Rather, a presentment is a written accusation by the grand jury charging a defendant with one or more crimes. It is submitted to the prosecutor, who then is required under G.S. 15A-641(c) to investigate the allegations and submit a bill of indictment to the grand jury if appropriate. A misdemeanor prosecution that is not joined to a related felony may not be initiated in superior court except by presentment. *See* G.S. 7A-271(a)(2); *State v. Petersilie*, 334 N.C. 169 (1993) (noting superior court jurisdiction over misdemeanor charges initiated by presentment).

For a discussion of investigative grand juries in drug cases, which are governed by different procedures, *see infra* § 9.5.

C. Proceedings before Grand Jury

Secrecy of proceedings. Grand jury proceedings are secret. *See* G.S. 15A-623(e) through (g). The oath taken by grand jurors includes a pledge of secrecy. *See* G.S. 11-11; *State v. Jones*, 85 N.C. App. 56 (1987) (“nature and character of the evidence presented to the grand jury” is secret). A defendant has no right to review the grand jury proceedings or have a judge do so. *See State v. Griffin*, 136 N.C. App. 531 (2000) (trial court not required to conduct in camera review of grand jury members and witnesses to determine validity of indictments). Nor may the defendant cross-examine at trial a grand jury witness about that witness’ grand jury testimony. *See State v. Phillips*, 297 N.C. 600 (1979); *State v. Blanton*, 227 N.C. 517 (1947).

To protect the secrecy of grand jury proceedings, attendance at grand jury sessions is highly restricted. For example, the prosecutor may not be present. Generally only the testifying witness is present, although an interpreter (if needed) or police officer (if a witness is in custody) also may be present, provided that the person takes an oath of secrecy. *See* G.S. 15A-623(d). A person disclosing information about grand jury proceedings (other than to one’s attorney) may be found in contempt of court. *See* G.S. 15A-623(g).

Proceedings not recorded. Transcripts generally are not made of witnesses’ testimony before the grand jury; the sole exception is special drug trafficking grand juries. *See infra* § 9.5. Thus, the defendant has no right to a transcript of grand jury proceedings. *See State v. Porter*, 303 N.C. 680 (1981).

Clerk’s minutes. Although there is no record of grand jury deliberations, the clerk of court keeps minutes recording indictments, which must be returned in open court. *See infra* § 9.3E. If counsel identifies a defect on the face of an indictment, he or she should obtain the clerk’s minutes to determine whether the indictment was properly returned as a true bill in open court. The clerk’s minutes are a public record and should be available from the clerk’s office. Courts have denied defense motions to dismiss indictments based on technical or syntactical errors, *provided* that the clerk’s records indicate that the

indictment was in fact returned in open court as a true bill. *See State v. Childs*, 269 N.C. 307 (1971) (return in open court ascertained by reference to court records); *State v. Midyette*, 45 N.C. App. 87 (1980) (no error in indictment even though foreperson failed to mark returned bill as “true bill” where clerk’s minutes showed return of true bill).

D. Grand Jury Witnesses

Selection of witnesses. The grand jury must hear from witnesses to determine probable cause. *See* G.S. 15A-623(b), (c). The prosecutor ordinarily selects the witnesses who will testify before the grand jury and lists them on the bill submitted to the grand jury. *See* G.S. 15A-626(b); *State v. McLain*, 64 N.C. App. 571 (1983) (foreperson should call witnesses from among those listed on indictment, but need not call all of the listed witnesses). Frequently the only witness called will be the law enforcement officer who investigated the case. The foreperson swears witnesses who testify before the grand jury and should indicate on each bill who was sworn and examined. *See* G.S. 15A-623(b), (c).

If a person wants to testify before the grand jury, he or she must apply to either the prosecutor or a superior court judge, and the prosecutor or judge may allow the testimony in his or her discretion. *See* G.S. 15A-626(d). If the grand jury wants the testimony of an individual not listed on the bill, the grand jury foreperson requests that the prosecutor add the name to the list. The decision of whether to add the person to the witness list is within the prosecutor’s discretion. *See* G.S. 15A-626(b).

Competence of witnesses. Witnesses before the grand jury must be qualified and competent. The court may dismiss an indictment if “all of the witnesses before the grand jury on the bill of indictment were incompetent to testify.” *See* G.S. 15A-955(3); *see also infra* § 9.4D (discussing competence of witnesses as ground for challenging indictment).

E. Return of Indictments

Required signatures/markings. Where a bill is returned as a “true bill” the prosecutor should sign the bill of indictment, although the statute states that the prosecutor’s failure to sign is not a fatal defect. *See* G.S. 15A-644(a)(4). The foreperson is directed by G.S. 15A-644(a)(5) to sign the indictment, indicating that at least twelve grand jurors agreed in the finding of probable cause. However, failure to do so will not invalidate an otherwise valid indictment. *See State v. Midyette*, 45 N.C. App. 87 (1980) (court minutes showed indictment returned as true bill).

Return in open court. Although grand jury deliberations and voting are secret, the bill of indictment must be returned in open court. *See* G.S. 15A-628(c), (d). The defendant may be present when the bill is returned, although there is no absolute right to presence. *See State v. Childs*, 269 N.C. 307 (1967) (court upholds denial of defendant’s motion to quash indictment alleging that neither he nor his counsel were present in court when indictment returned).

Notice to defendant. Under G.S. 15A-630, an unrepresented defendant is entitled to notice of the return of a true bill. If the defendant is represented by counsel, G.S. 15A-630 does not apply. *See State v. Ginn*, 59 N.C. App. 363 (1982) (if defendant is represented by counsel, neither counsel nor defendant is entitled to notice of return of indictment under G.S. 15A-630); *but cf.* G.S. 15A-941(d) (upon return of indictment, court must immediately cause notice of 21-day time limit for requesting arraignment to be given to defendant and counsel). G.S. 15A-630 also provides that notice is not required if the court orders the indictment sealed.

Release of defendant if no true bill returned. If the grand jury returns a bill as not a true bill, the judge must immediately order the defendant released from custody or other conditions of pretrial release. However, if the finding of no true bill is accompanied by a request for submission of a lesser included offense, the court may defer release for “a reasonable period,” not to extend beyond that session of superior court, to allow the prosecutor to bring new charges. *See* G.S. 15A-629.

Sealed indictments. Under G.S. 15A-623(f), the court may order an indictment sealed and kept secret until the defendant is arrested or brought before the court.

9.4 Challenges to Grand Jury Procedures

A. Technical Defects

Generally, courts have been unwilling to quash indictments for minor irregularities in procedure. For example, the failure of the bailiff to recite “Oyez, Oyez, Oyez” at the opening of the session of court where a bill of indictment is returned does not invalidate the bill. *See State v. Taylor*, 311 N.C. 266 (1984); *see also State v. Avant*, 202 N.C. 680 (1932) (no error in failure of grand jury foreperson to endorse bill of indictment); *State v. Hall*, 131 N.C. App. 427 (1998) (foreperson’s failure to mark “True Bill” or “Not a True Bill” on face of indictments did not render indictments invalid where indictments were signed and indicated charges against defendant), *aff’d per curiam*, 350 N.C. 303 (1999); *State v. Parker*, 119 N.C. App. 328 (1995) (although statute calls for written application, oral application by district attorney to reconvene grand jury not error); *State v. Midyette*, 45 N.C. App. 87 (1980) (failure of grand jury foreperson to sign indictment did not invalidate it as long as clerk’s minutes showed that true bill was returned); *State v. Reep*, 12 N.C. App. 125 (1971) (indictment not invalid, although not returned through acting foreperson of grand jury but rather through another officer of court).

Practice note: G.S. 15A-955 requires dismissal of an indictment if there is evidence that twelve grand jurors did not agree to return a true bill. The face of the returned indictment, supplemented if necessary by the clerk’s minutes, should be checked to ensure that the proper number of grand jurors concurred in returning the bill.

B. Challenging Finding of Probable Cause

A finding of probable cause must be based on a determination that “the crime named in the bill under consideration has probably been committed and that there is probable cause to believe that the defendant committed that crime.” JAMES C. DRENNAN, HANDBOOK FOR GRAND JURORS at 5 (Administrative Office of the Courts, 1988). It is very difficult to obtain meaningful review of the probable cause finding because of the secrecy of grand jury proceedings and lack of recordation.

C. Short-Form Indictments

The grand jury’s only information on the elements of an offense, or the definition of the crime that allegedly occurred, is the information on the bill of indictment submitted by the prosecutor. The grand jury may ask legal advice from the court, but there is no statutory requirement that the court instruct the jury on the legal definition of the crime it is considering. *See* G.S. 15A-624; *State v. Treadwell*, 99 N.C. App. 769 (1990) (court not required to define crime of “disseminating obscenity” to grand jury).

For three crimes—first-degree murder, first-degree rape, and first-degree sex offense—the typical form indictments do not list all of the elements of the offense. *See* G.S. 15-144 (murder); G.S. 15-144.1 (rape); G.S. 15-144.2 (sex offense). These short-form indictments fail to list the elements that increase the level of the offense from second to first-degree, such as premeditation and deliberation in the case of murder. Where a true bill of indictment is returned for one of the above listed crimes, there typically is no record evidence that the grand jury considered evidence, or found probable cause to believe, that the omitted elements existed. The North Carolina Supreme Court has upheld short-form indictments, however, against challenges that the grand jury did not find all the elements of the offense alleged. *See State v. Hunt*, 357 N.C. 257 (2003) (court upholds short-form indictment for murder, holding for various reasons that offense was exempt from requirement that all elements be alleged in charging instrument), *cert. denied*, 539 U.S. 985 (2003); *State v. Wallace*, 351 N.C. 481, 503–08 (2000) (upholding short-form indictments for murder, rape, and sexual offense), *cert. denied*, 531 U.S. 1018 (2000); *Hartman v. Lee*, 283 F.3d 190 (4th Cir. 2002) (in habeas corpus proceeding, Fourth Circuit finds that North Carolina Supreme Court’s rejection of challenge to short-form murder indictment was not contrary to or an unreasonable application of clearly established federal law; Fifth Amendment right to grand jury, which requires that grand juries find all elements of offense alleged, does not apply to states, and under Sixth Amendment short-form indictment was sufficient to inform defendant of charge against him), *cert. denied*, 537 U.S. 1114 (2003); *see also generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.3(a), at 250–55 (3d ed. 2007). The issue has not been specifically decided by the U.S. Supreme Court.

North Carolina decisions recognize that a short-form indictment may still be inadequate if it omits or misstates the statutorily required short-form language. *See* Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION

OF JUSTICE BULLETIN No. 2008/03, at 16–18, 29–32 (July 2008) (discussing cases), at www.sog.unc.edu/programs/crimlaw/documents/aojb0803_000.pdf.

D. Challenges to Evidence on which Grand Jury Relied

When an indictment is based entirely on the testimony of witnesses who were disqualified, or entirely on evidence that is incompetent, then a timely motion to quash or dismiss the indictment must be granted. *See State v. Moore*, 204 N.C. 545 (1933); *State v. Ivey*, 100 N.C. 539 (1888) (indictment invalid if based solely on testimony of one incompetent witness); G.S. 15A-955(3). However, if *any* of the grand jury witnesses were qualified or *any* of the evidence was competent, then the indictment is valid. *See State v. Moore, supra*; *accord State v. Levy*, 200 N.C. 586 (1931).

There is little case law about what constitutes a disqualified witness or incompetent evidence. Grand jury evidence need not be admissible under the North Carolina Rules of Evidence; hearsay is allowable. Thus, the investigating officer may be a grand jury witness. *See State v. Beam*, 70 N.C. App. 181 (1984) (SBI agent who had only hearsay knowledge of crime could testify before grand jury); *accord State v. Cade*, 268 N.C. 438 (1966).

A witness who perjures himself or herself before the grand jury is not competent. *See State v. Minter*, 111 N.C. App. 40 (1993) (witness before drug trafficking grand jury admitted at trial that he perjured himself before the grand jury; court holds that although this might render him “incompetent,” dismissal was not required because defendant failed to establish what other evidence had been presented to the grand jury). Because of the secrecy of grand jury proceedings, perjury before the grand jury may be difficult to prove. *See State v. Phillips*, 297 N.C. 600 (1979) (defendant should not have been permitted to cross-examine witness about admitted “inaccuracies” in his grand jury testimony).

The defendant’s spouse may be a disqualified witness if the spouse is testifying about “confidential communications” within the marriage. *See generally State v. Hammonds*, 141 N.C. App. 152 (2000) (spouses incompetent to testify against one another in criminal proceeding if substance of testimony concerns confidential communication between marriage partners during marriage).

At the very least, the grand jury must hear some evidence and may not rely on the memory or personal knowledge of the members. *See State v. Ivey*, 100 N.C. 539 (1888) (new bill charging same offense as previous bill invalid where grand jury acted on new bill without hearing new evidence).

E. Timing of Motion to Quash

Motions to dismiss an indictment for defects in grand jury proceedings are subject to the time limits of G.S. 15A-952 and 15A-955; thus, they are waived if not made at or before arraignment. *See State v. Phillips*, 297 N.C. 600 (1979) (defendant waives right to

challenge indictment based on grand jury defects by failing to make motion until conclusion of evidence; court notes that trial court may waive time limits in its discretion); *State v. Perry*, 69 N.C. App. 477 (1984) (motion to dismiss indictment based on grand jury defects waived unless made at or before arraignment); *State v. Ellis*, 32 N.C. App. 226 (1977) (motion challenging indictment for failure of foreperson to attest to concurrence of twelve or more grand jurors was subject to time limits of G.S. 15A-955).

9.5 Drug Trafficking Grand Jury

Special grand juries can be convened in North Carolina to investigate drug trafficking. Drug trafficking grand juries are governed by procedures that differ somewhat from those of conventional grand juries.

Practice note: From a defense standpoint, the most significant difference between conventional and special drug trafficking grand juries is that a transcript is made of testimony before a drug trafficking grand jury and is subject to discovery.

Requirements. A drug trafficking grand jury is established as follows:

- the prosecutor files a petition alleging that there are violations of G.S. 90-95(h) (trafficking) or G.S. 90-95.1 (continuing criminal enterprise);
- the petition is approved by a committee of at least three members of the North Carolina Conference of District Attorneys, the Attorney General, and a panel of three judges appointed by the state supreme court; and
- a special grand jury then is convened by the superior court.

See G.S. 15A-622(h) for other procedural rules governing establishing a drug trafficking grand jury.

Procedures. *See* G.S. 15A-623(h) for procedures governing the functioning of drug trafficking grand juries. Generally, these grand juries have the powers and duties of a conventional grand jury, and in addition:

- the prosecutor is present,
- a transcript is made of the proceedings,
- the prosecutor may grant immunity to witnesses who testify before the grand jury, and
- the prosecutor may make selective disclosures of the proceedings to law enforcement officers as needed.

Admissibility of grand jury testimony at trial. G.S. 15A-623(h) provides that testimony elicited before a drug trafficking investigative jury may be used at trial to the extent it is relevant and admissible. This language suggests that the State may be able to offer grand jury testimony for substantive purposes at trial. *See State v. Minter*, 111 N.C.

App. 40 (1993) (noting this possibility). It will be the rare case, however, in which the testimony will meet the requirements for admission as substantive evidence.

First, grand jury testimony is “testimonial” under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. If the witness who appeared before the grand jury is unavailable for cross-examination at trial, his or her testimony is inadmissible against the defendant unless it satisfies one of the narrow exceptions described in *Crawford v. Washington*, 541 U.S. 36, 68 (2004). *See also* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* at 7 & n.45 (April 2005) (citing cases finding that grand jury testimony is testimonial and must meet one of *Crawford* exceptions to be admissible at trial), online at www.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf.

Second, even if admission of grand jury testimony complies with the Confrontation Clause, the State will be hard pressed to satisfy an applicable hearsay exception under North Carolina’s evidence rules. The State cannot meet the hearsay exception for former testimony because under that exception the party against whom the testimony is offered must have had the opportunity to examine the witness at the previous proceeding—that is, at the grand jury proceedings. *See* N.C. R. EVID. 804(b)(1); *see also* N.C. EVID. R. 801 commentary (North Carolina did not adopt Fed. R. Evid. 801(d)(1), which allows use of prior testimony in additional circumstances). The State still may be able to offer grand jury testimony for non-substantive purposes—for example, to impeach or corroborate a grand jury witness who does testify at trial (assuming the applicable rules on impeachment or corroboration are met). *See State v. Minter, supra* (State could use grand jury testimony to impeach testimony of recalcitrant witness).

If the State offers prior grand jury testimony of a witness who does not testify at trial, defense counsel should object on both Confrontation Clause and hearsay grounds.

Discovery of testimony. Unlike the procedures for conventional grand juries, a transcript is made of testimony taken before a drug trafficking grand jury. This transcript is subject to discovery. G.S. 15A-623(h)(2) provides that the superior court may order the record of the proceedings of a special drug trafficking grand jury disclosed to the defendant to protect the defendant’s constitutional rights or statutory rights to discovery pursuant to G.S. 15A-903. Even without a court order, the prosecutor may be required to turn over the record of the proceedings. Under G.S. 15A-623(h)(2), a transcript of the proceedings is made available to the prosecutor and, under the open-file discovery requirements in G.S. 15A-903, the defendant is entitled to the complete files of all prosecutorial and law enforcement agencies involved in the investigation or prosecution of the case. *See supra* Chapter 4, Discovery (revised version forthcoming).

Because the interplay between the grand jury and discovery provisions is not entirely clear, defense counsel should specifically request the record of the proceedings from the prosecutor and should follow up with a motion to the court.

9.6 References

JAMES C. DRENNAN & MIRIAM S. SAXON, *A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS* (School of Government, 4th ed. 2007)

JAMES C. DRENNAN, *HANDBOOK FOR GRAND JURORS* (Administrative Office of the Courts, 1988)

INVESTIGATIVE GRAND JURY MANUAL (North Carolina Conference of District Attorneys, Sept. 1992) (available from authors)

Thomas H. Thornburg, *North Carolina Courts' Scrutiny of Grand Jury Foreperson Selection for Racial Discrimination*, ADMINISTRATION OF JUSTICE MEMORANDUM 91/03 (Institute of Government, 1991) (with July 1991 addendum)