6.5 Challenges to North Carolina Procedures for Jury Formation

A. North Carolina Procedures for Jury Formation

G.S. 9-1 through 9-7 describe the statutory requirements for compiling the lists of people for jury service. The provisions are as follows:

- G.S. 9-1 details the composition and funding mechanisms of the jury commission.
- G.S. 9-2 sets out the requirements for the preparation of the master jury list. It describes the timing of preparation; the acceptable sources from which the lists may be drawn, including the mandatory use of driver and voter lists; the mandatory size of the jury list; the random method that must be used to select jury panels; and the mandate that the procedures for preparing the master list be in writing and available for public inspection with the clerk of the court.
- G.S. 9-3 outlines the qualifications of prospective jurors. It provides that citizens of the state and residents of the county are qualified to serve as jurors if they have not served as jurors during the preceding two years, are over the age of 18, are physically and mentally competent, can understand the English language, and if they have been convicted of a felony, have had their citizenship rights restored.
- G.S. 9-4 describes how and where the jury list should be kept. It requires that the public be able to examine the alphabetized list of names of each juror, but provides that juror addresses are confidential and may not be discovered without an order of the court.
- G.S. 9-5 describes the procedure for drawing panels of jurors from the master jury list.
- G.S. 9-6 sets forth the reasons why a juror may be excused from jury duty. It mandates that chief district court judges publish procedures by which they or the court administrator will entertain and rule on applications to be excused from jury service. This section does not affect the discretionary authority judges have to excuse jurors at the beginning or during a session of court.
- G.S. 9-7 requires that the names of people summoned and their dates of service be noted on the master jury list and sets out a two-year period where those individuals cannot be called again for jury service. It also allows the clerk of court to assign duties to the court administrator.

See NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 13 (5th ed. 2013).

In a case decided before the U.S. Supreme Court clarified the standards applicable to jury formation equal protection challenges in *Castaneda v. Partida*, 430 U.S. 482 (1977), the North Carolina Supreme Court held that North Carolina's statutory procedure for selecting and drawing jurors for service is non-discriminatory. *State v. Cornell*, 281 N.C. 20, 37 (1972). The court determined that the jury formation statutes leave little room for exercising discretion, and thus serve as a system of jury selection that is not susceptible to abuse if followed. *Id.*; *see also Folston v. Allsbrook,* 691 F.2d 184, 186 (4th Cir. 1982)

(impartiality of North Carolina jury selection procedures dispelled any inference of discrimination arising from statistical disparity). In *State v. Hardy*, 293 N.C. 105, 116 (1977), the court concluded that, by following the statute and utilizing a race neutral selection procedure for selecting names from the list, the State was not in violation of a defendant's right to equal protection. *See also State v. Blakeney*, 352 N.C. 287 (2000) (observing that G.S. 9-2, which governs the selection of the jury pool, "has been expressly recognized as providing a system for objective selection of veniremen" (quotation omitted)).

These cases do not preclude the possibility that constitutional or statutory violations may occur in North Carolina's jury formation process, however. First, they only address the right to equal protection, not the right to a fair cross section of the community, which does not require a showing of discriminatory intent. *See, e.g.*, *State v. Price*, 301 N.C. 437, 445 (1980) (even if "the procedure followed by the . . . Jury Commission comport[s] with the statutory requirements for constituting a jury pool . . . that observation does not [end the inquiry]"). Second, a statutory or equal protection challenge might lie where the statutory process is not followed. Third, the leading North Carolina cases are over thirty years old, and North Carolina courts may find that the statutory plan should be reconsidered if it is consistently producing disparities. The following section describes violations that may arise at various stages of the jury formation process and how to raise them.

A. Mechanics of Challenging Jury Formation

Time to investigate claims. The North Carolina Supreme Court has held that a defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged exclusion of a racial group from the jury pool. *State v. Spencer,* 276 N.C. 535 (1970). Whether a defendant has been given a reasonable time and opportunity to investigate and produce evidence of racial discrimination in the drawing and selection of jurors depends on the facts of each case. *State v. Perry,* 248 N.C. 334 (1958). In rejecting a claim that a defendant's due process rights were violated when he was denied a continuance to investigate possible underrepresentation in the jury pool, the North Carolina Supreme Court provided the following guidance on what might constitute a reasonable time to investigate such claims:

> It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. The jury list from which petit jurors are selected is prepared biennially, G.S. 9-2, is a public record, G.S. 9-4, and the jury commissioners who possess knowledge of the sources from which the master jury list is compiled are local residents. G.S. 9-1. Persons who wish to be excused from jury duty must apply to the chief district judge, or another district judge designated by him, at a publicly announced time and place.

> 9-6(b). The record here shows that the names of the sixty jurors were publicly known for fifty-five days prior to the time the case was called for trial. This afforded defense counsel reasonable time and opportunity to inquire into the race of each juror, the composition of the jury box, the procedures for drawing the jury, the race and number of jurors not summoned by the sheriff and the reason therefor, the race and number of jurors excused, and the practices and procedures employed by the chief district judge when passing upon excuses. Failure to make such inquiry creates no constitutional right, in the name of Due Process, to additional time for such investigation simply because all jurors who reported for jury duty on the day defendant's case was called for trial were white. An automatic continuance for such inquiries, upon motion lodged for the first time when the case is called for trial, would fatally disrupt every session of court.
>
> Under the facts of this case defendant has not been deprived of a reasonable opportunity to investigate the "possibility" of systematic exclusion of blacks from the petit jury.

State v. Harbison, 293 N.C. 474, 481–82 (1977) (internal citation omitted). In light of this holding as well as the requirements for showing a violation in the jury formation process, defense attorneys should conduct factual investigations and seek discovery, discussed further below, well before their client's case is scheduled for trial.

Discovery. Because of the showing required to establish underrepresentation in the jury formation process, commentators and courts have recognized that a defendant's right to question whether a jury reflects a fair cross section of the community is "meaningless without an entitlement to discovery." *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 16. The same can be said of equal protection guarantees.

Courts interpreting the fair cross-section guarantees of the Sixth Amendment have generally held that there is no threshold showing required to obtain discovery about the jury formation process when preparing a fair cross-section claim. *See, e.g.*, *Mobley v. United States*, 379 F.2d 768, 772 (5th Cir. 1967) (trial court erred by denying defendant's motion for discovery on claim of racial discrimination in formation of grand and petit jury); *State v. Ciba-Geigy Corp.*, 573 A.2d 944, 950 (N.J. Super. Ct. App. Div. 1990) ("It would be virtually impossible for defendants who are endeavoring to ascertain if a successful attack on the grand jury selection process can be advanced if the facts necessary to prove a defect in the selection process are withheld."). *But see People v. Jackson*, 920 P.2d 1254, 1268 (Cal. 1996) (defendant entitled to discovery concerning jury formation process "upon a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion"). The Jury Selection and Service Act of 1968 (JSSA), 28 U.S.C. §§ 1861–1878, a federal statute that guarantees grand and trial juries composed of a randomly selected fair cross section of the community, includes a right to discovery. The

U.S. Supreme Court has interpreted the JSSA as providing "essentially an unqualified right to inspect" jury selection materials, and has held that this right is based not only on the statutory language, but also on the law's "overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community,'" a purpose inherent in the Sixth Amendment fair cross-section guarantee as well. *Test v. United States*, 420 U.S. 28, 30 (1975) (quoting 28 U.S.C. § 1861); *see* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 16.

The Missouri Supreme Court, although finding that a fair cross-section claimant's discovery rights were not guaranteed by either the federal JSSA or Missouri state statutes, recognized that a state court defendant's Sixth Amendment fair cross-section right "would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980) (upholding defendant's request for jury list data on constitutional grounds); *see also Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1268 (Mass. 2003) ("The right to a trial before a jury representing a fair cross section of the community is a critical constitutional protection and should be scrupulously honored by providing defendants with reasonable access to accurate information concerning the race and ethnicity of prospective jurors."). *See* Discovery Motion – Fair Cross Section Claim in the Race Materials Bank at www.ncids.org (select "Training and Resources").

Type of information to seek in discovery. Discovery requests should be tied to the specific showing necessary to support the claims you intend to raise. For example, in the case of a fair cross-section claim, a defendant may want to seek:

- demographic information concerning the groups allegedly underrepresented, at each stage of the jury formation process;
- where such information is unavailable or not collected, information from which demographic data can be obtained, such as jury questionnaires and, in some cases, opportunities to send additional questionnaires to past jurors to collect demographic data; *see* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION Dec. 2013, at 14, 20 (noting that "when a jury selection system has failed to collect the relevant demographic data, courts typically order the disclosure of information from which racial, ethnic, and gender data can be gleaned" and collecting cases in which courts issued such orders);
- master jury lists;
- data reflecting excusals, deferrals, or disqualifications occurring at any stage in the jury formation process;
- data reflecting the process by which jury commissioners determine whether a person's name should be removed from the master jury list because he or she does not speak English, is not a citizen, or is a felon whose rights have not been restored;
- data concerning the summoning process;
- data reflecting the procedures for responding to undeliverable summonses;

- depositions of jury commissioners or others involved in the jury formation process. *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION Dec. 2013, at 14, 20 (noting that courts have ordered "jury system administrators to participate in depositions designed to improve the defendant's understanding of the jury selection system" and collecting cases).

For more information on seeking discovery in fair cross-section cases, see Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION Dec. 2013, at 14, 20.

Gathering evidence of underrepresentation. Defendants cannot wait until the potential jurors enter the courtroom to begin collecting evidence relevant to an underrepresentation claim. A viable fair cross-section claim may exist, for example, where a master jury list has been assembled using a process that systematically underrepresents a distinctive group regardless of whether the particular venire for a given case is representative. Additionally, evidence of a historical pattern of underrepresentation typically must be produced by defendants raising fair cross section claims. Defendants often will not have time to conduct such research immediately before trial, as North Carolina courts have denied continuances for the purposes of investigating claims of underrepresentation where there was a reasonable opportunity to do so before trial. *See, e.g.*, *Harbison,* 293 N.C. 474, 481–82. Thus, in addition to seeking discovery, it is important, alone or in partnership with other defenders, to investigate the racial composition of jury panels in your county over an extended period of time to lay the groundwork for a successful claim. In some cases, counsel may be able to obtain records from the clerk of superior court regarding the demographic information of past jurors and juror panelists. *See, e.g.*, *State v. Cofield*, 320 N.C. 297 (1987) (defendant "introduced a report prepared by Mr. R.J. White, Northampton County's Clerk of Superior Court, listing all who had served as grand jury foreman since 1960 by name, race, and sex"). To prepare for jury selection, attorneys can check the list of jurors on a defendant's jury panel in the clerk's office approximately one week before trial. Attorneys can review that list to ensure that there are no obvious violations of the randomness requirement (e.g., not all people have last names beginning with the same letters), and may try to discover the race of the people listed on the jury panel by searching on the Board of Election's website or on LexisNexis peoplefinder.

Where it appears that either (1) proper jury formation procedures have not been followed, or (2) racial minorities are consistently underrepresented on the jury panels in the county, attorneys should be prepared to document the problems observed and put that documentation in the record. For example, if you rarely observe Black jurors on jury panels in a county with a sizable Black population, you may consider working with an investigator or other defense attorneys to take notes of the number of jurors reporting for service along with their gender, ethnicity, and race (to the extent that such information can be gathered from observation). If the evidence collected through informal observation over a sustained period of time (for example, six months) suggests that a distinctive racial group or groups is not represented fairly in comparison to county census data, this

evidence may provide support for a challenge to the composition of the jury pool. Informal data collection methods may be particularly useful in this context since "[t]ypically only the court and the jury selection system have access to information about . . . preliminary stages of the selection process." *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 15. The observed disparities may indicate the need to seek discovery in an individual case and/or constitute evidence supporting a constitutional or statutory challenge. *See supra* § 6.5A, North Carolina Procedures for Jury Formation; *see also infra* § 6.6, Beyond Litigation: Efforts to Ensure Representative Juries (discussing analysis of jury formation in North Carolina judicial district 15B). Trial attorneys should develop a practice of asking the trial court to have panel members state their race on the record to ensure the reliability of the evidence. *See State v. Mitchell*, 321 N.C. 650, 656 (1988) (inappropriate for court reporter to note the race of the jurors based on his or her perception; "if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence"); *see* Motion for Court Reporter to Note Race of All Jurors Examined for Selection in the Race Materials Bank at www.ncids.org (select "Training and Resources").

Expert assistance in substantiating claims of underrepresentation. A statistical showing is generally required to demonstrate underrepresentation. When you believe that data available through discovery or investigation may support a claim of underrepresentation, consider seeking funds to hire an expert in statistics to analyze data relevant to your anticipated claims. An expert qualified to perform such an analysis will usually be a university statistics professor, or a PhD candidate with at least a Master's level knowledge of statistics. *See, e.g.,* Website of Professor Joseph B. Kadane, STAT.CMU.EDU (last visited Sept. 2, 2014) (expert witness in at least two successful fair cross-section cases).

North Carolina courts have granted requests for funds for a statistician to analyze jury data where adequately supported. *Compare State v Moore*, 100 N.C. App. 217 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds*, 329 N.C. 245 (1991), *with State v. Massey*, 316 N.C. 558 (1986) (finding defendant did not make adequate showing to warrant funds for statistician). *See also Isaacs v. State*, 386 S.E.2d 316, 324 (Ga. 1989) ("in an appropriate case, based upon a sufficient showing of need, the denial of funds for expert assistance might violate due process"). For a further discussion of requesting funds for expert assistance, see 1 NORTH CAROLINA DEFENDER MANUAL § 5.3 (Applying for Funding) (2d ed. 2013).

Defense attorneys should work with their experts to identify the information needed to assess whether the underrepresentation occurred by chance. The expert can start by accessing the county's master jury list, which is available to the public in the clerk of superior court's office, along with the procedures used to assemble it. This list does not include the race or ethnic background of potential jurors. For this reason, the expert may have to independently research the race of those listed on the master jury list, for

example, by searching public databases containing voter registration data. North Carolina records the race and ethnicity of all registered voters, and voter registration information is available in electronic databases such as Lexis. *See* G.S. 163-82.4. Additionally, the defendant may file a discovery motion to obtain background information from the clerk of court. *See* "Type of information to seek in discovery," above, in this subsection B.

Once the expert has gathered information about the racial composition of the jury pool, the procedures used to gather jurors, and the racial composition of the county (using census data reflecting the voting age population), the expert should attempt to determine the stages of the jury selection process at which underrepresentation may be occurring. *See supra* "Does persistent underrepresentation alone constitute systematic exclusion?" in § 6.3F, Third Prong of a Fair Cross-Section Claim: Systematic Exclusion (discussing possible requirement to identify systematic cause of underrepresentation).

Timing and procedure for challenges to grand jury. In the grand jury context, challenges to the propriety of a grand jury 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 in the form of a motion to dismiss. *See* G.S. 15A-952(b)(4); G.S. 15A-955; *State v. Cofield,* 320 N.C. 297 (1987); *State v. Miller*, 339 N.C. 663 (1995) (motion challenging selection of grand jury foreperson is waived if not made by arraignment). If the defendant pleads guilty, he waives the right to challenge discrimination in grand jury composition. *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).

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). Where the motion is not filed within the statutory deadlines, courts have discretion to grant relief from waiver. *See* G.S. 15A-952(e). *See State v. Wilson,* 57 N.C. App 444 (1982).

Remedy for constitutional violation in grand jury. "[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986); *see also State v. Moore,* 329 N.C. 245, 246–48 (1991) (noting that when art. I, sec. 26 is violated, "[t]he integrity of the judicial system is at issue, and a harmless error analysis under these circumstances is inapposite"). The Supreme Court has reasoned that, because discrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of our judicial system and society as a whole, reversal is the only appropriate remedy at the appellate level. *Vasquez*, 474 U.S. 254, 261–62. If the motion to dismiss succeeds at the trial level and the indictment is dismissed, the State is free to reindict. *See State v. Pigott*, 331 N.C. 199 (1992).

Timing and procedure for challenges to jury panel. A challenge to the jury panel (the group of potential jurors from which jurors for a particular trial may be drawn) must be made in accordance with G.S. 15A-1211(c). The challenge must be made on the ground that the panel members were not selected or drawn according to law, and should take the form of a written motion to discharge the trial panel. *Id.* Be sure the record reveals the race of each panel member. *State v. Mitchell*, 321 N.C. 650, 656 (1988) (inappropriate for court reporter to note the race of the jurors based on his or her perception; "if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence"); *see* Motion for Court Reporter to Note Race of All Jurors Examined for Selection in the Race Materials Bank at www.ncids.org (select "Training and Resources"). If the challenge to the panel is sustained, the judge must discharge the panel. G.S. 15A-1211(c).

The motion to discharge the panel must specify the facts constituting the ground of challenge, and it must be made and decided before any juror is examined. *Id.* Failure to follow these steps may constitute a waiver of the claim. *See State v. Smith*, 359 N.C. 199 (2005) (defendant failed to preserve his challenge to the randomness of the jury where he did not comply with G.S. 15A-1211(c)); *State v. Johnson*, 161 N.C. App. 68, 75 (2003) (although a trial judge's failure to follow a statutory mandate usually preserves an error without an objection, the defendant waived appellate review because he failed to follow the procedures outlined in G.S. 15A-1211(c) for challenging a jury panel). The requirements of G.S. 15A-1211(c) may apply to statutory violations only, but to minimize the risk of waiver, counsel should follow them when raising constitutional challenges as well. *See generally* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 15 ("Constitutional fair cross-section claims, however, are not required to meet the . . . timeliness requirements of state statutes. Instead, courts generally require constitutional challenges to the selection of the petit jury to be raised *before trial*, pursuant to Federal Rule of Criminal Procedure 12(b) or the state equivalent." (emphasis in original) (footnote omitted)).

Preserving denial of challenges to the trial jury panel. If a challenge to the trial jury panel is denied, the issue must be properly preserved or the appellate court may find waiver. To obtain relief on appeal for some violations, the defendant also may need to show prejudice by exhausting all of his or her peremptory challenges. The cases do not always distinguish clearly between the requirements for preserving error and for showing prejudice.

To preserve a challenge to the jury panel based on the right to a fair and impartial jury under the state and federal constitutions, you must object and state the constitutional basis for the objection. Failure to challenge the jury panel on constitutional grounds at the trial level will waive review of the constitutional issue on appeal. *See State v. Tirado*, 358 N.C. 551, 571 (2004); *State v. Wiley*, 355 N.C. 592, 606 (2005).

To preserve a statutory challenge to a jury panel for appellate review, counsel must follow the mandates of G.S. 15A-1211(c). *See State v. Johnson*, 161 N.C. App. 68

(2003). This statute requires that challenges to the panel:

1. be made on the ground that the jurors were not lawfully selected or drawn;
2. be in writing;
3. specify the facts supporting the ground for the challenge; and
4. be made and decided before the examination of any juror.

G.S. 15A-1211(c).

If you consent to the jury procedures used by the trial judge, appellate review of the issue will be waived. *See, e.g.*, *State v. Meyer*, 353 N.C. 92 (2000) (not only did defendant never object to the jury selection process or follow the statutory procedures for challenging the jury panel, he expressly approved of the reassignment of a prospective juror; court concluded that defendant failed to preserve the issue for appellate review).

Counsel also should be wary of expressing satisfaction with the jury once jury selection has concluded. *See State v. Bell*, 359 N.C. 1 (2004) (denying appellate review where defendant failed to follow the procedures set out in G.S. 15A-1211(c) and noting that defendant answered in the affirmative when asked if he approved of the panel).

For a detailed discussion of how to preserve jury challenges, see "Recommended approach" in 2 NORTH CAROLINA DEFENDER MANUAL § 25.1G (Preserving Denial of Challenges to the Panel) (2d ed. 2012).

C. Statutory Claims

In addition to constitutional challenges, defendants may raise claims that the jury formation process did not comply with North Carolina statutes. G.S. 9-1 through 9-7 describe the statutory requirements for juror selection and outline the procedures for preparing juror lists for grand and trial juries. *See supra* § 6.5A, North Carolina Procedures for Jury Formation. North Carolina appellate courts have held that evidence of a statutory violation alone is not a sufficient basis to sustain a challenge to the jury composition; the defendant must demonstrate "corrupt intent, discrimination, or irregularities which affect the actions of the jurors actually drawn and summoned." *State v. Vaughn*, 296 N.C. 167, 175 (1978) (internal citations omitted). The North Carolina Court of Appeals has suggested that a defendant must also demonstrate that a statutory irregularity affected the defendant. *See State v. Riggs,* 79 N.C. App 398 (1986). Statutory claims should always be raised alongside appropriate constitutional claims.

D. Challenges to Source Lists

Source lists defined. The earliest stage in the jury formation process at which disparities may arise is in the use of source lists. A source list is a list of names that county jury commissions use to compile the master jury list, which is a list compiled each odd-numbered year of all prospective jurors qualified to serve in the two years starting January 1 of the following year. *See* G.S. 9-2(a). (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.) Since the source lists "define[] the total population from which prospective jurors may be qualified and summonsed . . . the choice of source lists is an important policy decision for state courts insofar that it establishes the inclusiveness and the initial demographic characteristics of the potential jury pool." GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13 (2007).

Source lists in North Carolina. G.S. 9-2(b) identifies the source lists that may be used to compile a master jury list:

> In preparing the master list, the jury commission shall use the list of registered voters and persons with drivers license records supplied to the county by the Commissioner of Motor Vehicles pursuant to G.S. 20-43.4. The commission may use fewer than all the names from the list if it uses a random method of selection. The commission may use other sources of names deemed by it to be reliable.

North Carolina follows the trend of many other states that have begun mandating the use of drivers' lists as a supplement or replacement for voter registration lists because drivers' lists may be more representative of racial minorities than voter registration lists alone. Empirical research into this presumption has resulted in mixed conclusions. *See, e.g.*, Ronald Randall et al., *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71 (2008) (study of source lists in one Ohio county revealed that moving from voter registration lists to lists of licensed drivers decreased the representativeness of Black jurors but increased the representativeness of Hispanic jurors); GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007).

Most of the constitutional challenges to the source lists used to assemble jury pools in North Carolina were raised before the state legislature mandated the use of driver and voter lists in assembling the master jury list. While there were sound reasons to assume that the use of these two lists would draw from a wider cross-section of the community than the previous methods used to assemble juror lists (including property tax lists and the key-man system where "prominent" community members recommended jurors), there is little data available to verify whether this expectation has been borne out. In Nebraska, where juror names are also drawn from a combination of driver and voter lists, a committee examining the representativeness of the jury composition process concluded in 2008 that racial and ethnic minorities were still significantly underrepresented in the initial and eligible pools of jurors. *See* ELIZABETH M. NEELEY, NEBRASKA MINORITY JUSTICE COMMITTEE, REPRESENTATIVE JURIES: EXAMINING THE INITIAL AND ELIGIBLE POOLS OF JURORS (2008). In response to these disparities, the Committee explored whether additional source lists could improve the racial and ethnic diversity of the jury

lists. Ultimately, the committee recommended, and the State enacted, legislation mandating the addition of names of residents with state issued identification. Elizabeth Neeley, *Addressing Nonsystematic Factors Contributing to the Underrepresentation of Minorities as Jurors*, 47 CT. REV. 96, 98 (2011) (noting that racial minorities "comprise a much greater percentage of state-identification-card holders than of registered drivers"). North Carolina counties do not include "[i]ndividuals with state issued identification cards from the DMV . . . on the jury list unless they were a licensed, cancelled or suspended driver in the previous eight years." NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 5 (5th ed. 2013).

The process of creating the 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, with duplicates removed by the Commissioner of Motor Vehicles, 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 this practice happens rarely, if at all. *See* NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 5 (5th ed. 2013) ("In recent practice, no counties have elected to supplement the two required lists."). From this raw list, the jury commission creates the master jury list by removing deceased or disqualified people (*see* 1 NORTH CAROLINA DEFENDER MANUAL § 9.1B (Qualifications of Individual Grand Jurors) (2d ed. 2013)) 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.

Source lists in your county. You can discover the source lists used by the jury commission in your county by reviewing the procedure for preparing the master list. Pursuant to G.S. 9-2(j), the jury commission's procedure must be in writing, adopted by the jury commission, and kept available for public inspection in the office of the clerk of court.

Supplementing driver and voter lists with other sources of reliable names. Although it occurs infrequently, G.S. 9-2 allows the jury commission to use other sources of names that it deems to be reliable. North Carolina is among the minority of states that allows jury commissions to supplement mandated source lists with additional lists. *See* GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13 (2007), ("15 states and the District of Columbia permit local courts to supplement the required lists with additional lists").

If the jury commission is using a list other than the drivers' license or voter registration list, there may be grounds for objection. For example, North Carolina previously utilized tax lists to select jurors, but these lists have fallen out of favor as they may exclude low-income, minority, and female residents from jury service. *See* Kurt M. Sanders, *Balancing the Jury Pool*, 69 PA. B.A. Q. 133, 136 (1998) ("Reliance on . . . tax lists [has]

a disproportionate impact on economically disadvantaged groups who . . . do not pay taxes.”). *But see State v. Cornell*, 281 N.C. 20, 31 (1972) (in a case decided before the fair cross-section right was closely considered by the U.S. Supreme Court, court noted that “a jury list is not discriminatory or unlawful because it is drawn from the tax list of the county”).

Process for raising challenge to source list. Since the same source lists underlie the formation of the grand jury and the trial jury, unlawful source lists may taint both juries. For this reason, a defendant challenging the source lists relied on by the jury commission should always challenge the composition of both the grand jury and the trial jury.

To challenge the composition of the jury based on the use of improper source lists, a defendant should file written motions to dismiss the grand jury indictment and quash the trial jury panel. *See supra* § 6.5B, Mechanics of Challenging Jury Formation. The motion to dismiss the grand jury’s indictment must be made at or before arraignment. *See* G.S. 15A-952(b)(4); G.S. 15A-955. The motion to quash the trial jury panel must be made and decided before any juror is examined. *See* G.S. 15A-1211(c)(4). Both motions should be made in writing, setting forth the facts constituting the grounds of challenge.

Required showing to challenge source list. Generally speaking, a single unrepresentative panel is not sufficient to show a violation of statutory or constitutional rights; however, a flaw in a single source list that produces underrepresentation may support a statutory or constitutional claim. Defendants challenging source lists should present any evidence that:

- the source list procedures laid out in G.S. 9-2(b) were not followed, resulting in either a statutory violation or fair cross-section violation for underrepresentation; or
- the jury commission relied on an unreliable or unrepresentative source of names in addition to the lists of drivers and registered voters mandated by statute (equal protection and/or fair cross-section violation).

If the county jury commission is relying on an additional source list beyond the voter and driver lists, defense attorneys should determine whether that source list is representative of the demographic composition of the community. This may require assistance from an expert in statistics. *See supra* “Expert assistance in substantiating claims of underrepresentation” in § 6.5B, Mechanics of Challenging Jury Formation.

Defense attorneys should compare the demographic composition of the source list to census data reflecting the population in the county as a whole to determine whether there is underrepresentation. While the jury commission’s alphabetized master list is public record (*see* G.S. 9-4), the source lists are not (*see* G.S. 20-43.1; G.S. 20-43.4). However, the source lists may be discoverable by order of the court. *See* G.S. 20-43.1(a) (requiring Division to disclose personal information from motor vehicle records in accordance with 18 U.S.C. § 2721(b)(4)); 18 U.S.C. § 2721(b)(4) (stating that personal information collected by a state Department of Motor Vehicles may be disclosed “in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local

court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court").

Equal protection challenge to source lists. Given our Supreme Court's holding that the statutory procedures governing jury formation are facially non-discriminatory (*see State v. Cornell,* 281 N.C. 20 (1972)), the most viable equal protection claim based on source lists in North Carolina would be one against the use of additional lists. *See also supra* § 6.5A, North Carolina Procedures for Jury Formation (discussing possible limitations of the *Cornell* court's holding). If the jury commission relies on additional source lists, the defendant can argue that the procedure in G.S. 9-2(b) allowing jury commissions to supplement driver and voter lists with additional lists deemed reliable is susceptible to abuse as it allows individual jury commissioners to exercise discretion in determining what additional source lists are reliable or representative. This evidence would support the third prong of the test laid out in *Castaneda v. Partida*, 430 U.S. 482 (1977), a procedure susceptible of abuse. The second prong of the test—underrepresentation of a distinctive group—would have to be shown with statistical evidence.

Source lists of drivers and voters are not public record (*see* G.S. 20-43.4), but if research suggests that the additional source lists are being used and do not fairly represent a distinctive group, the defendant should seek discovery of information about the additional source lists, including names and any demographic information. The defense attorney and the expert retained to challenge the additional source list should compare the rate at which the distinctive group appears in the voting age community from U.S. census data with the rate at which the group appears in the additional source list. Evidence that the distinctive group is underrepresented in the source list, especially where the absolute disparity is over 10%, would support the first two prongs of an equal protection claim. *See supra* § 6.4, Equal Protection Challenges.

Fair cross-section challenge to source lists. To support a fair-cross section challenge to source lists, the defendant must show that the representation of a distinctive group (such as African Americans or Latinos) in the source lists was not fair and reasonable in relation to the number of jury-eligible members of that group in the community. In a challenge to source lists, this can be done by comparing county census data to an analysis of the representation of the distinctive group in the additional challenged source lists.

In addition, the defendant must show that the underrepresentation was due to a systematic exclusion of the group. *See Duren v. Missouri*, 439 U.S. 357 (1979). In a challenge to source lists, systemic exclusion could be demonstrated by showing that the jury commission relied on a source list that itself inherently underrepresents the distinctive group. For example, a jury commission that uses membership lists from groups primarily consisting of a particular race, gender, or economic status would result in a systemic exclusion of other classes of people. *See, e.g.*, *People v. White*, 278 P.2d 9 (Cal. 1954) (holding that the jury commissioner's use of membership lists from clubs such as the Rotary Club, the Lion's Club, and certain women's groups tended to produce venires that were not representative of a cross-section of the community).

Defendants also may challenge source lists for grand juries. *See supra* “Application to grand jury” in § 6.3A, Applicability and Standing (discussing argument for applying fair cross-section guarantee to grand juries).

Defendants alleging that the source lists used to form the grand or trial jury did not reflect a fair cross section of the community should also raise claims based on article I, sections 24 and 26 of the North Carolina Constitution. *See supra* § 6.3A, Applicability and Standing (North Carolina courts use the same standards when reviewing fair cross-section claims raised pursuant to federal and state constitutional guarantees).

E. Challenges to the Master Jury List

After the sources are identified, the jury commission takes the names from the source lists, removes the names of deceased and disqualified people, and randomly selects the number of names needed to form the master jury list from which individual jury panels are drawn for specific trial proceedings. This procedure is governed by G.S. 9-2.

Challenges to master jury list based on North Carolina statutes. At least one court has recognized that “if [the master jury] list is not representative of a cross-section of the community, the process is constitutionally defective *ab initio*.” *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). As with other statutorily-based challenges to jury formation procedures, the defendant must demonstrate a statutory violation along with evidence of corrupt intent, systemic discrimination, or irregularities affecting the jurors. *State v. Vaughn*, 296 N.C. 167, 175 (1978) (internal citations omitted); *see also State v. Johnson*, 317 N.C. 343, 379 (1986).

“Irregularities” might result from a failure to use the required random selection method in assembling the master jury list. A random selection method is one “that results in each name on a list having an equal opportunity to be selected.” G.S. 9-2(h). When raising a statutory violation, a defendant should raise constitutional claims as well, as the court may view statutory irregularities as circumstantial evidence of discriminatory intent supporting an equal protection claim or systemic exclusion supporting a fair cross-section claim.

Equal protection or fair cross-section challenge to the master jury list. Where disparities in jury panels exist and suggest possible constitutional violations in the construction of the master jury list, the defense attorney should work with an expert to examine the composition of the list. *See supra* “Expert assistance in substantiating claims of underrepresentation” in § 6.5B, Mechanics of Challenging Jury Formation. The expert can start by accessing the county’s master jury list, which is available to the public in the Clerk of Court’s office, along with the procedures used to assemble it. However, this list does not include the race or ethnic background of potential jurors. For this reason, the expert will either have to independently research the race of those listed on the master jury list, by searching voter registration data or other public databases, or the defendant will have to file a discovery motion seeking background information sufficient to support the defendant’s constitutional claim. *See supra* “Expert assistance in substantiating

claims of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation; *see also* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 20. ("[W]hen a jury selection system has failed to collect the relevant demographic data, courts typically order the disclosure of information from which racial, ethnic, and gender data can be gleaned."); Discovery Motion – Fair Cross Section Claim in the Race Materials Bank at www.ncids.org (select "Training and Resources"). The North Carolina Supreme Court has held that, even if juror commissioners can guess the race of potential jurors from their home addresses, that alone is not enough to raise an inference of intentional discrimination. *State v. Cornell*, 281 N.C. 20, 34–35 (1972).

Required showing and procedure. The master jury list is used for both grand and trial juries. For this reason, if there is a flaw in the compilation of the master jury list, the defendant should raise challenges to both the grand and the trial jury. To challenge the use of an improper master jury list, a defendant should file written motions to dismiss the grand jury's indictment and quash the trial jury panel. *See supra* § 6.5B, Mechanics of Challenging Jury Formation. The motion to dismiss the grand jury's indictment must be made at or before arraignment. *See* G.S. 15A-952(b)(4). The motion to quash the trial jury panel should be made before any juror is examined. *See* G.S. 15A-1211(c)(4). Both motions should be made in writing, setting forth the facts constituting the grounds of challenge.

F. Challenges to the Exclusion of Qualified Jurors from the Jury List

A defendant may object to the master jury list if he or she can show that the list excludes qualified jurors who should appear on the list. Under G.S. 9-3, qualified jurors include residents of the county who have not served as a juror during the past two years (six years for grand jury service) and are eighteen or older, mentally and physically competent, citizens of the State, able to understand English, and, if ever convicted of a felony, have had their citizenship rights restored. When a person convicted of a felony completes his or her sentence, including any period of probation or parole or other required actions such as community service or restitution payments, his or her citizenship rights are automatically restored pursuant to statute. *See* G.S. 13-1; G.S. 13-2. However, jury commissioners may face practical challenges in ensuring that felons whose citizenship rights have been restored are not excluded from the master jury list. *See, e.g.*, NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 8 n.11 (5th ed. 2013) (noting that jury commissioners may request a list of convicted felons from the Administrative Office of the Courts, but warning that "extreme caution" should be exercised in using such lists to remove names from the master jury list since neither the clerks nor the Administrative Office of the Courts are notified when a felon's rights are restored).

English language requirement. The requirement that jurors be able to "hear and understand the English language" has been challenged as a violation of article I, section 26 of the North Carolina Constitution, which prohibits exclusion from jury service based on national origin, and as a violation of the equal protection guarantee found in article I,

section 19 of the North Carolina Constitution. *State v. Smith*, 352 N.C. 531 (2000). The North Carolina Supreme Court has rejected this argument, holding that differences in ethnicity or national origin do not preclude English comprehension and concluding that the provision does not violate due process or equal protection guarantees. *Id.* Other courts that have considered this challenge have also rejected it. *See People v. Eubanks*, 266 P.3d 301 (Cal. 2011).

However, jury commissioners must apply the English language requirement properly. If you observe, for example, underrepresentation of native Spanish-speakers on jury panels in your judicial district, check the jury commissioners' procedures to find out how they are determining whether potential jurors listed on the merged lists speak and understand English, and whether potential jurors have been improperly disqualified because they have Hispanic-sounding names. *See* NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 7–8 (5th ed. 2013) (noting that jury commissioners shall remove non-English speakers from the jury list, but manual does not provide standards by which this determination is to be made).

Administrative practices that may remove qualified jurors from jury lists. Certain methods to remove unqualified or inaccurate names from the master jury list or jury panels could present constitutional concerns. For example, in Santa Barbara County, California, the court routinely removed from the master jury list individuals who had failed to appear for jury service in the past, with the intention of following up with these individuals in the future. When a defendant raised a challenge claiming that Latinos were underrepresented in the jury pool, the court discovered that a disproportionate number of individuals whose names were removed from the master jury list for this reason had Latino last names. National Center for State Courts, *Jury Managers Toolbox: Characteristics of an Effective Master Jury List*, NCSC CENTER FOR JURY STUDIES (2009).

In Wayne County, Michigan, potential jurors who had not responded to a questionnaire were removed from the master jury list indefinitely. As it turned out, the vast majority of those removed from the jury list for this reason were residents of Detroit, a city whose residents are 80% African American. *Id.* at 4–5.

In Washington, D.C., individuals convicted of felonies have the right to serve on a jury ten years after the completion of their sentence. The administrative method used to ensure that these individuals were returned to the juror lists was flawed and kept felons off the jury list longer than the statute allowed, resulting in the improper removal of qualified jurors. *Id*. at 5.

Uncovering evidence of the exclusion of qualified jurors. The examples listed above illustrate the importance of obtaining your county jury commission's procedures for removing unqualified jurors from the master juror list and ensuring that names previously removed from the juror list are not permanently removed. Such policies may then be analyzed for any potentially disparate effect on distinctive groups. For example, how do

jury commissioners determine whether a person should be removed from the master jury list because the person doesn't speak English, is not a citizen, or is a felon whose rights have not been restored? These procedures should be available in the Clerk or Court's office or through discovery.

If, in reviewing the jury commission's procedures, you uncover evidence suggesting that a technique used to remove unqualified jurors from the master jury list results in the underrepresentation of a distinctive group from jury service, you may challenge that technique as a violation of the defendant's fair cross-section and equal protection rights. *See supra* § 6.3, Fair Cross-Section Challenges; § 6.4, Equal Protection Challenges.

G. Challenges to the Selection of the Grand Jury

Raising challenges to the composition of the grand jury presents unique challenges because the grand jury operates in secret and sometimes issues an indictment before counsel is appointed. The information below is designed to help assemble evidence about the selection of the grand jury and determine whether any challenges are warranted.

Discrimination in the selection of the grand jury. To establish a claim of discrimination in violation of the state and federal guarantees of equal protection in the selection of grand jurors, defendants must show that a recognizable, distinct class or group has been discriminated against; that the procedures employed for the selection of jurors has resulted in substantial underrepresentation of the race or identifiable group for a significant period of time; and that the selection procedure is susceptible of abuse or is not racially neutral. *Castaneda v. Partida,* 430 U.S. 482 (1977); *see also State v. Foddrell*, 291 N.C. 546, 554, (1977) ("defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few [Black people] have served on the juries of the county notwithstanding a substantial [Black] population therein, or both"; cited with approval in *State v. Cofield*, 320 N.C. 297 (1987)). The same type of evidence may be used to support a fair cross-section claim based on the selection of grand jurors.

Improper grand jury selection procedures. 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. 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 (1996); *see also* G.S. 132-1 (public records law). A defendant may move to dismiss an indictment if the grand jury as a whole was illegally constituted or individual grand jurors were unqualified. 1 NORTH CAROLINA DEFENDER MANUAL Ch. 9 (Grand Jury Proceedings) (2d ed. 2013).

H. Challenges to the Selection of the Grand Jury Foreperson

The courts may quash an indictment if there was discrimination in the selection of the grand jury foreperson. In North Carolina, the presiding judge selects the grand jury foreperson. G.S. 15A-622(e); *see also State v. Cofield*, 320 N.C. 297, 301 (1987). The North Carolina Supreme Court has stated that racial discrimination in the selection of grand jury foremen violates article I, section 26 of the North Carolina Constitution, irrespective of whether there was discrimination in selection of the grand jury itself. *See State v. Cofield,* 320 N.C. 297, 303 (1987); *see also State v. Miller,* 339 N.C. 663 (1995); *State v. Pigott*, 331 N.C. 199 (1992); *State v. Robinson*, 327 N.C. 346 (1990). Discrimination in the selection of a grand jury foreperson also violates the Equal Protection Clause of the Fourteenth Amendment. *Cofield*, 320 N.C. 297, 306 (identifying and agreeing with federal courts reaching this conclusion). Therefore, if the defendant can make a sufficient showing of racial discrimination in the foreman selection process, the conviction must be overturned. *Id.* at 308.

The defendant is entitled to discover the identities of the members of his or her grand jury, including the identity of the foreperson. *See* G.S. 15A-955, G.S. 132-1; *see also supra* § 6.5G, Challenges to the Selection of the Grand Jury. To make out a prima facie case of an equal protection violation, the defendant must show either that:

- the selection process was not racially neutral, or
- that for a substantial period in the past, relatively few members of the distinctive class have served as forepersons on grand juries, although a substantial number have served on grand juries.

Cofield, 320 N.C. 297, 308; *see also State v. Jefferies*, 333 N.C. 501, 506; *State v. Phillips*, 328 N.C. 1, 11. If this showing is made, the indictment must be dismissed unless the State can rebut the prima facie case by showing that the foreperson in this particular case was chosen in a racially neutral manner. *Cofield*, 320 N.C. 297, 308. *See also Chin v. Runnels*, 343 F. Supp. 2d 891 (N.D. Cal. 2004) (petitioner made out prima facie case of race discrimination in selection of grand jury foreperson based on exclusion of Chinese-Americans from such positions, but state court's finding that the State had rebutted the prima facie case was not an unreasonable application of clearly established federal law).

Racially neutral selection method. To meet the racially neutral standard, the method of selecting a grand jury foreperson must ensure that all grand jurors were considered by the presiding judge and that the selection was made on a racially neutral basis. *See State v. Cofield,* 324 N.C. 452, 461 (1989) (*Cofield II*). The focus is on whether the process used to select the foreperson was influenced by race; neither the race of the foreperson nor the race of the defendant determines the viability of the claim. *See State v. Moore,* 329 N.C. 245, 246–48 (1991) (applying article I, section 26 of the North Carolina Constitution and rejecting the State's argument that a Black defendant had no standing to object to the replacement of a White foreperson with a Black one). Where a district court judge, on the suggestion of the prosecutor, removed a White foreperson and replaced him with a Black foreperson in order to correct for the "historical custom in Rutherford County of failing to

appoint black persons as foremen," the North Carolina Supreme Court found that selecting a particular foreman on the basis of his race was unconstitutional even if intended to remedy past discrimination. *Id*.

What constitutes consideration of race by the judge may sometimes be at issue. For example, former North Carolina Supreme Court Justice Mitchell repeatedly questioned whether the consideration of each member equally is racially neutral, and he suggested a random selection method to eliminate the potential for racial bias. *Cofield*, 324 N.C. 452, 465–66 (Mitchell, J., concurring) (*Cofield II*), *State v. Jefferies,* 333 N.C. 501, 513 (1993) (Mitchell, J., dissenting).

If the defendant makes out a prima facie case that the selection method was not racially neutral, the burden shifts to the State to explain the discrepancy. The court then determines whether the practice was race neutral. For example, the N.C. Supreme Court held that the State had rebutted a prima facie case when the foreperson chosen was the first person to volunteer for the position. *See Jefferies*, 333 N.C. 501.

Evidence of past discrimination. In *State v. Cofield*, 320 N.C. 297 (1987), the defendant made out a prima facie case of racial discrimination with historical evidence showing that the racial composition of the county was approximately 61% Black and 39% White, and that the racial composition of the county's grand juries, on average, reflected the county as a whole. In an 18 year-period, only one Black person had been appointed grand jury foreperson, although 50 appointments had been made and 33 different people had been appointed.

I. Challenges to Jury Panel Selection Procedures

Assembling the Jury Panel. Once the appropriate lists are merged into the master jury list, G.S. 9-5 outlines the process for preparing the list of jurors necessary for the jury panels for a particular session of court. The process requires a clerk to prepare or obtain a computer generated, randomized list of names of individuals who will be prospective grand jurors or petit jurors for a particular session.

Defendants may challenge panel selections that are not conducted randomly. For example, if only jurors with a name starting with the same letter were chosen, this may result in underrepresentation of certain racial groups. Defense counsel should be able to check the list of jurors on a defendant's jury panel in the clerk's office approximately one week before the case goes to trial. While demographic information will not be included on the list, defense counsel can look at voting registration records to determine the race of the potential jurors. *See also supra* "Expert assistance in substantiating claims of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation. Additionally, defense attorneys should be alert to lists that do not look random. For example, in a small town, if a large number of the last names on the jury panel begin with the same letter, that may be evidence that the selection was not random.

Attorneys also should be aware of possible glitches in computer-generated lists. Courts in other jurisdictions have overturned convictions based on glitches in computer operated jury systems. For example, problems in the application of a computer system resulted in the exclusion of 4,364 people from jury service and caused the Indiana Supreme Court to reverse a death sentence and mandate a new penalty phase of a murder trial. *See Azania v. State,* 778 N.E.2d 1253 (Ind. 2002). The computer error in *Azania* produced racial disparities as it excluded a portion of the jury pool that contained three-fourths of the African American population in the county. Counsel discovered the glitch after noticing the racial disparity between the jury venire and the surrounding community.

Last, defense attorneys should be alert to disparities that may result from policies and practices used to evaluate applications for excusal from jury service. For example, if excusals are routinely granted for low-wage workers or stay-at-home moms, a distinctive group may be underrepresented on jury panels as a result. Attorneys investigating such claims should obtain records of the procedures promulgated by the chief district court judge for reviewing applications for excuses from jury service pursuant to G.S. 9-6(b), as well as the list of all people excused by the judge pursuant to G.S. 9-6. *See* G.S. 9-6(e) ("[T]he clerk shall keep a record of excuses separate from the master jury list.").

Prejudice. The procedure for calling jurors to the jury box from the jury panel is governed by G.S. 15A-1214(a). The N.C. Supreme Court has held that a defendant must show prejudice from a randomness violation resulting from a deviation from the procedures set out in G.S. 15A-1214(a). *State v. Thompson*, 359 N.C. 77 (2004). It is not clear what evidence would suffice to demonstrate prejudice. In *State v. Golphin*, 352 N.C. 364 (2000), the N.C. Supreme Court found that even if a violation of the statutory requirement of randomness occurred, the defendants failed to show prejudice because they did not exhaust their peremptory challenges, which the court considered to be evidence of the defendants' satisfaction with the seated jury. *See also State v. Tirado*, 358 N.C. 551 (2004) (even assuming that G.S. 15A-1214(a) was violated by the placing of a hearing-impaired prospective juror into the last panel, defendants could show no prejudice where they did not show that they were forced to accept an undesirable juror and, in fact, consented to her excusal). In light of these cases, trial counsel should exhaust peremptories to show prejudice and object to the last seated juror (which should be done outside the presence of the jury). Counsel should also state on the record how the violation will affect the jury and prejudice the defendant.

For a detailed discussion of how to preserve challenges to jury panel selection errors, see "Recommended approach" in 2 NORTH CAROLINA DEFENDER MANUAL § 25.1G (Preserving Denial of Challenges to the Panel) (2d ed. 2012).

J. Challenges to Supplemental Juror Selection Procedures

At times, the court may order the sheriff to summon additional jurors beyond those included on the master jury list. *See* G.S. 9-11. This type of juror is "selected infrequently and only to provide a source from which to fill the unexpected needs of the court." *See State v. White*, 6 N.C. App. 425, 428 (1969). These practices have the potential to result

in discrimination. There is no set method proscribed by statute or case law for the selection of supplemental jurors. *Id*. Instead, the sheriff may use his or her discretion in determining the method of selection of supplemental jurors, limited only by the mandate that he or she "must act with entire impartiality." *Id.* (citation omitted); *see also State v. Nolen*, 144 N.C. App. 172, 180 (2001) (finding that G.S. 9-11, on its face, did not violate the right to an impartial jury, and finding no error where sheriff selected supplemental jurors by contacting people in the county that he and his senior staff members "knew that [jury duty] wouldn't cause a financial hardship for"). However, as noted by the court in *White*, it obviously "would be possible for a sheriff, sent out to execute . . . an order of the court [to summon supplemental jurors], to discriminate in the selection of persons to be summoned." *White*, 6 N.C. App. 425, 427 (quotation omitted); *see also Russell v. Wyrick*, 736 F.2d 462 (8th Cir. 1984) (noting dangers of allowing sheriffs to select jurors, e.g., a sheriff might choose jurors favorable to the prosecution or jurors with whom the sheriff is acquainted).

Challenges to the selection of the supplemental jurors are sustainable if "there is partiality or misconduct in the Sheriff, or some irregularity in making out the list." *State v. Dixon*, 215 N.C. 438, 440 (1939) (quotation omitted); *see also Bass v. State*, 368 So.2d 447, 449 (Fla. Dist. Ct. App. 1979) (reversing defendant's conviction and holding that "[t]he choice of a special venire from an all-Caucasian church body, or from one's Caucasian friends, is a systematic, if unintended, exclusion of blacks"; the selection of supplemental jurors "must be administered in such a way as not to exclude identifiable segments of the populace systematically"). The North Carolina Court of Appeals has rejected a facial constitutional challenge to G.S. 9-11; counsel should therefore challenge the statute as applied. *See State v. Nolen*, 144 N.C. App 172 (2001).

Practice note: If the supplemental jurors selected by the sheriff do not represent a fair cross section of the community, consider moving to discharge the jurors. You may need a continuance to obtain statistical information to support your claim of a fair cross-section violation. If your motion to discharge the jurors is denied, you need to exhaust your peremptory challenges to preserve the issue for appellate review. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 25.1G (Preserving Denial of Challenges to the Panel) (2d ed. 2012); *see also State v. Wilson*, 313 N.C. 516 (1985) (defendant could not complain about judge's order requiring sheriff to recruit supplemental jurors where defendant failed to exhaust his last peremptory challenge to remove twelfth juror, who was one of the supplemental jurors); *State v. Shaw*, 284 N.C. 366, 369 (1973) (no error in trial judge's denial of defendant's motion to allow defense counsel or his representative to be present during the summoning of the jury by the sheriff; defendant failed to challenge array or "offer any proof that the Sheriff violated the trust placed in him as an elected official"), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

Constitutional challenges to supplemental jurors. Counsel may raise a constitutional challenge if the use of supplemental jurors results in underrepresentation of a distinctive group in the community. For purposes of an equal protection violation, defense attorneys should argue that the discretion afforded sheriffs in selecting supplemental jurors constitutes "a selection procedure that is susceptible of abuse." *Castaneda v. Partida*, 430

U.S. 482, 494 (1977). For purposes of a fair cross-section claim, defense attorneys should present evidence that the supplemental jurors resulted in a panel that was not fair or reasonable in relation to the demographic composition of the community, and that the State did not have a “significant interest” that could only be achieved by the sheriff’s selection of supplemental jurors. This showing should not be difficult, since the State could have summoned supplemental jurors from the master jury list. *See* G.S. 9-11(b).

For a further discussion of supplemental jurors, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.1E (Supplemental Jurors) (2d ed. 2012).