

## **9.2 Challenges to Grand Jury Composition or Selection of Foreperson**

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## **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, sections 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 Hardy*, 293 N.C. 105; *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); *see also Ford v. Kentucky*, 469 U.S. 984 (1984) (Marshall, J., dissenting from denial of certiorari).

The defendant carries the burden of proving intentional discrimination. *See Ray*, 274 N.C. at 563. 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*, 430 U.S. 482 (1977).

Equal Protection cases do 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 likely has 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 based on race or other suspect classification. *See Cassell v. Texas*, 339 U.S. 282 (1950) (voiding indictment for intentional discrimination against African-Americans); *State v. Wright*, 274 N.C. 380 (1968).

For more information on Equal Protection challenges to the grand jury, see RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 6.4 Equal Protection Challenges (Sept. 2014).

### **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 (though distinct from) showing an equal protection violation. The defendant must show: (1) the existence of a “distinctive group” in the community; (2) that the distinctive group is not fairly or reasonably represented in the venire; and (3) that the underrepresentation of the group is due to systemic exclusion in the jury selection process. *See Duren*, 439 U.S. at 364. 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.* A single jury venire that fails to adequately represent a fair cross-section of the population will not constitute systemic exclusion; rather, the defendant must show that the process for selecting the venire will regularly produce a non-representative venire. *See, e.g., State v. Gettys*, 243 N.C. App. 590 (2015) (rejecting fair-cross challenge to county’s use of a computer program to select venire members where defendant failed to show systemic exclusion, even where distinctive groups are underrepresented in a given venire). For a further discussion of application of the fair cross-section requirement to trial juries, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.1A, Fair Cross-Section Requirement (July 2018) and RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 6.3, Fair Cross-Section Challenges (Sept. 2014).

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 can 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). There is also an argument that the right should be incorporated against the states as a fundamental right, essential to the scheme of American justice and ordered liberty. *See McDonald v. Chicago*, 561 U.S. 743, 784–85 (2010) (discussing incorporation and expressing doubt about the continued validity of selective incorporation, whereby only some rights from the Bill of Rights were incorporated against the states). 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, as well as article I, sections 19 and 26 of the North Carolina Constitution.

### C. Challenges to Selection of Grand Jury Foreperson

**Basis of challenge.** In *State v. Cofield*, 320 N.C. 297 (1987), the N.C. 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, sections 19 and 26, of the North Carolina Constitution (the “law of the land” clause, right to equal protection, and clause barring exclusion from jury service “on account of sex, race, color, religion, or national origin”). To challenge 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 even if a substantial number have been selected to serve as members of grand juries.

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); *Cofield*, 320 N.C. at 309.

**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), (c); G.S. 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). The defendant is entitled to arraignment only if 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 within 21 days of the return of the indictment. The trial court may grant relief from waiver of the motion in its discretion but is not required to do so. *See* G.S. 15A-941(d); G.S. 15A-952(c), (e).