**9.3 Grand Jury Procedures**

A. Convening of Grand Jury
B. Primary Role of Grand Jury
C. Investigative Function and Presentments
D. Proceedings before Grand Jury
E. Grand Jury Witnesses
F. Return of Indictments

---

## 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. Primary 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); G.S. 15A-628(a)(2). 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), (a)(3).

When an indictment is returned marked as not a true bill, the State is permitted to seek a new indictment before a different grand jury, if it so chooses. *See In re Superior Court Order*, 70 N.C. App. 63 (1984) (noting no prohibition under G.S. 15A-629 to

resubmission, but recognizing potential burdensomeness of process), *rev'd in part on other grounds*, 315 N.C. 378 (1986).

### C. Investigative Function and Presentments

**Presentments.** 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 to initiate an investigation and issue a presentment. *See* G.S. 15A-623(a); G.S. 15A-628(a)(4). A grand jury may initiate an investigation on the request of the presiding or convening judge or the prosecutor. G.S. 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. *See, e.g.*, *State v. Thomas*, 236 N.C. 454 (1952); *State v. Morris*, 104 N.C. 837 (1889). 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). Recently, prosecutors have obtained presentments for misdemeanors not joined with felonies more frequently. This practice was in response to *State v. Turner*, 250 N.C. App. 776 (2016), *rev'd*, 371 N.C. 427 (2018), where the Court of Appeals held that a presentment or indictment was required to toll the former statute of limitations in G.S. 15-1. The use of presentments increased, particularly in driving while impaired cases, in an effort to toll the statute of limitations. *Turner* was overruled in *State v. Curtis*, 371 N.C. 355 (2018), and G.S. 15-1 was amended. For more information on *Turner, Curtis,* and the statute of limitations, see *supra* § 7.1A, Statute of Limitations for Misdemeanors.

Presentments are also sometimes sought by the State in order to bypass the district court process. The practice has renewed questions about the proper role and use of presentments. In *State v. Baker*, ___ N.C. App. ___, 822 S.E.2d 902 (2018), the Court of Appeals ruled that the simultaneous submission of an indictment and presentment to the grand jury (and subsequent simultaneous return of both documents by the grand jury) was improper and both were invalid. The court held that under the plain language of G.S. 15A-641(c), the prosecutor is required to investigate the allegations in a presentment issued by a grand jury, then file the presentment with the court. Only after such investigation and filing may an indictment be sought. The prosecutor's simultaneous submission of a presentment and indictment to the grand jury "improperly circumvented" the district court's jurisdiction over misdemeanors. *Id*. at 903. Further, putting the defendant "to answer" in superior court without a proper presentment and indictment

violated the defendant's rights under article 1, section 22 of the North Carolina Constitution requiring appropriate charging instruments. *Id.* at 907.

It is unclear how much time must pass between the presentment and indictment (and how rigorous the prosecution's investigation must be). *Baker* stated only that "some duration of time" must pass between the presentment and indictment for "sufficient" investigation. *Baker* at 906; *see also State v. Birdsong*, 325 N.C. 418 (1989) (indictment was valid where a two-week time period passed between presentment and indictment); *State v. Gunter*, 111 N.C. App. 621 (1993) (valid indictment where one month passed between presentment and indictment). *Baker* recognized that the grand jury may receive information from other people in the presentment process, including the prosecutor, but the prosecutor must review the allegations in the presentment and submit an indictment separately. Where the prosecutor fails to file the presentment before seeking the indictment or fails to conduct an investigation following the issuance of the presentment, defenders should challenge the presentment and indictment as void under *Baker*.

---

***Practice note:*** According to the Administrative Office of the Courts, presentments should be filed as a registration ("R" type case) in the civil division of the Clerk of Court's office. The document should not be filed as a criminal case. *See* Rule 16.1, B.16, and Rule 9.1, comment G, *The Rules of Recordkeeping, Criminal District and Superior; Miscellaneous and Registrations* (Administrative Office of the Courts, 2015).

---

If a misdemeanor case initially begins in district court through the usual charging process, such as by a citation as in *Baker*, the remedy for an invalid presentment and indictment is not dismissal but remand to the district court. In *Baker*, the citation that originally charged the offense was never dismissed, despite the issuance of a presentment and indictment. Presumably, the existence of the district court pleading there tolled the statute of limitations, allowing the State to move forward with the prosecution in district court upon remand without regard to timing. Where the district court pleading is dismissed (or is never filed), it is unlikely that the statute of limitations is tolled by an invalid presentment and indictment; but, the State may be able to refile within the time limits in G.S. 15-1. For more information on the statute of limitations in misdemeanor cases, see *supra* § 7.1, Statutory Protections against Delayed Prosecution.

*Baker* involved one set of circumstances rendering a presentment invalid, but the court's reasoning suggests the possibility of closer scrutiny of the use of presentments. The court reviewed the historical reasons for presentments and compared them to indictments. The submission of an indictment by the prosecution, as a public authority, signifies the State's decision to pursue criminal proceedings. In contrast, a presentment is a mechanism for the members of the grand jury to direct the prosecutor to investigate and potentially bring charges. A prosecutor's simultaneous submission of a presentment and indictment violates this scheme. Other challenges to the process may be possible.

In *State v. Roberts*, 237 N.C. App. 551 (2014), the Court of Appeals rejected an equal protection challenge to the presentment process. There, the defendant argued that the State violated equal protection by choosing to prosecute him (a local criminal defense

attorney) by presentment for driving while impaired, while other similarly situated defendants were allowed to proceed through the regular district court process. Because the defendant was involved in the local criminal justice system, the local prosecutor and resident judge recused themselves from the case, and a special prosecutor and out-of-district judge were required for trial. Proceeding by presentment to avoid having to twice bring in an outside prosecutor and judge was a sufficient justification for the different treatment of the defendant in *Roberts*. The result may be different where there is no such justification of judicial economy, where the defendant is a member of a protected class (unlike the defendant in *Roberts*), or where a disparate pattern of treatment of different types of defendants can be shown.

Defenders might argue that a presentment is a violation of Due Process and an abuse of the prosecution's calendaring authority if the State uses the presentment process for a tactical advantage (such as forum shopping and not as a matter of judicial economy). The tactical initiation of a presentment by a prosecutor "to circumvent" district court jurisdiction also may violate article 1, section 22 of the North Carolina Constitution requiring a proper charging instrument in superior court. For more on a prosecutor's calendaring authority, see § 7.4, Prosecutor's Calendaring Authority.

**Other investigative functions.** For a discussion of investigative grand juries in drug and certain other cases, which are governed by different procedures, see *infra* § 9.5, Special Investigative Grand Juries.

### D. 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, 69 (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's grand jury testimony. *See State v. Phillips*, 297 N.C. 600 (1979); *State v. Blanton*, 227 N.C. 517 (1947). Presumably, this rule also applies to the State—the prosecution would appear to have no right to review grand jury testimony, nor to cross-examine any witness about testimony given at the grand jury. *But see State v. Minter*, 111 N.C. App. 40 (1993) (allowing the prosecution to impeach a hostile witness with grand jury testimony under the "extraordinary facts of the case" following his denial of earlier sworn remarks to the grand jury).

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 investigative grand juries. *See infra* § 9.5, Special Investigative Grand Juries. Thus, the defendant has no right to a transcript of grand jury proceedings. *See State v. Porter*, 303 N.C. 680 (1981). This process reinforces the rule regarding the secrecy of grand jury testimony—because there is no transcript of the proceedings before the grand jury, the specific testimony of any grand jury witness remains confidential.

**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* § 9.3F, Return of Indictments. 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 (1967) (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).

### E. 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 (including the defendant) 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, Challenges to Evidence on which Grand Jury Relied. Determining the

competency of grand jury witnesses will likely require independent investigation by the defense after the indictment has been returned. Because of the relatively short time frame in which the grand jury may be challenged, defenders should begin any such investigation immediately upon service of the indictment.

### F. 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. In an early case following enactment of G.S. Chapter 15A, the court of appeals held that if the defendant is represented by counsel, G.S. 15A-630 does not apply, and neither counsel nor the defendant is entitled to notice of return of indictment. *See State v. Ginn*, 59 N.C. App. 363 (1982). The court's interpretation of the notice requirement in G.S. 15A-630 seems strained, as the statutory language suggests that notice must be served on the defendant when not represented by counsel and be served on counsel when the defendant is represented. Further, because important deadlines run from service of notice of indictment, such as the time for the defense to request discovery, service would seem to be a necessary step. *See* G.S. 15A-902(d) (keying deadline for requesting discovery to service of indictment).

As a practical matter, in many districts counsel will receive notice when an indictment is returned. If counsel does not receive specific notice of indictment, counsel should still receive notice under G.S. 15A-941(d), which requires on return of indictment that the court "immediately cause notice of the 21-day time limit within which the defendant may request an arraignment to be mailed or otherwise given to the defendant *and* to the defendant's counsel" (emphasis added).

Notice under G.S. 15A-630 may be deferred for a reasonable period of time if the court orders an indictment sealed.

**Order for arrest.** If an indictment is returned for the same charges as an earlier arrest warrant in the case, an order for arrest should not be issued. In contrast, if a

prosecution is initiated by indictment or an indictment charges additional offenses, the court may issue an order for arrest and require new conditions of release. G.S. 15A-305(b)(1). An order for arrest should not issue on return of a habitual felon indictment alone because being a habitual felon is a status, not an additional offense. *See* Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07, at 19–20 (UNC School of Government, Aug. 2013) ; *see also supra* "In habitual felon cases" in § 1.9A, Modification of Pretrial Release Conditions (2d ed. 2013) (explaining why a habitual felon indictment alone does not authorize issuance of an order for arrest and setting of new pretrial release conditions).

**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.

If a grand jury declines to issue an indictment, a prosecutor is not prohibited from resubmitting the same information to a different grand jury on a new bill of indictment. *See In re Superior Court Order*, 70 N.C. App. 63 (1984) (noting no prohibition under G.S. 15A-629 to resubmission, but recognizing potential burdensomeness of process), *rev'd in part on other grounds*, 315 N.C. 378 (1986).

**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. In such a case, counsel should argue that the motions deadline for pre-arraignment motions in G.S. 15A-952(b) should be extended to begin running only once the defendant has received notice of the indictment.