9.4 Challenges to Grand Jury Procedures

A. Technical Defects

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

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

B. Challenging Finding of Probable Cause

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

C. Short-Form Indictments

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

For three crimes—first-degree murder, first-degree rape, and first-degree sex offense—the typical form indictments do not list all of the elements of the offense. *See* G.S. 15-144 (murder); G.S. 15-144.1 (rape); G.S. 15-144.2 (sex offense). These short-form indictments fail to list the elements that increase the level of the offense from second to

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

North Carolina decisions recognize that a short-form indictment may still be inadequate if it omits or misstates the statutorily required short-form language. *See* Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03, at 16–18, 29–32 (UNC School of Government, July 2008) (discussing cases), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aojb0803_000.pdf.

D. Challenges to Evidence on which Grand Jury Relied

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

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

A witness who perjures himself or herself before the grand jury is not competent. *See State v. Minter*, 111 N.C. App. 40 (1993) (witness before drug trafficking grand jury admitted at trial that he perjured himself before the grand jury; court holds that although

this might render him "incompetent," dismissal was not required because defendant failed to establish what other evidence had been presented to the grand jury). Because of the secrecy of grand jury proceedings, perjury before the grand jury may be difficult to prove. *See State v. Phillips*, 297 N.C. 600 (1979) (defendant should not have been permitted to cross-examine witness about admitted "inaccuracies" in his grand jury testimony).

The defendant's spouse may be a disqualified witness if the spouse is testifying about "confidential communications" within the marriage. *See generally State v. Hammonds*, 141 N.C. App. 152 (2000) (spouses incompetent to testify against one another in criminal proceeding if substance of testimony concerns confidential communication between marriage partners during marriage), *aff'd per curiam*, 354 N.C. 353 (2001).

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

E. Timing of Motion to Quash

Motions to dismiss an indictment for defects in grand jury proceedings are subject to the time limits of G.S. 15A-952 and G.S. 15A-955; thus, they are waived if not made at or before arraignment. *See State v. Phillips*, 297 N.C. 600 (1979) (defendant waives right to challenge indictment based on grand jury defects by failing to make motion until conclusion of evidence; court notes that trial court may waive time limits in its discretion); *State v. Perry*, 69 N.C. App. 477 (1984) (motion to dismiss indictment based on grand jury defects waived unless made at or before arraignment); *State v. Ellis*, 32 N.C. App. 226 (1977) (motion challenging indictment for failure of foreperson to attest to concurrence of twelve or more grand jurors was subject to time limits of G.S. 15A-955). 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. *See* G.S. 15A-941(d); G.S. 15A-952(c).