

9.5 Drug Trafficking Grand Jury

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

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

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

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

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

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

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

Admissibility of grand jury testimony at trial. G.S. 15A-623(h) provides that testimony elicited before a drug trafficking investigative grand jury may be used at trial to the extent it is relevant and admissible. This language suggests that the State may be able to offer grand jury testimony for substantive purposes at trial. *See State v. Minter*, 111 N.C. App. 40 (1993) (noting this possibility). It will be the rare case, however, in which the testimony will meet the requirements for admission as substantive evidence.

First, grand jury testimony is “testimonial” under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. If the witness who appeared before the grand jury is unavailable for cross-examination at trial, his or her testimony is inadmissible against the defendant unless it satisfies one of the exceptions described in *Crawford v. Washington*, 541 U.S. 36, 68 (2004). *See also* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* at 7 & n.45 (UNC School of Government,

Apr. 2005) (citing cases finding that grand jury testimony is testimonial and must meet one of *Crawford* exceptions to be admissible at trial), available at <http://sogpubs.unc.edu/electronicversions/pdfs/crawford.pdf>.

Second, even if admission of grand jury testimony complies with the Confrontation Clause, the State will be hard pressed to satisfy an applicable hearsay exception under North Carolina's evidence rules. The State cannot meet the hearsay exception for former testimony because under that exception the party against whom the testimony is offered must have had the opportunity to examine the witness at the previous proceeding—that is, at the grand jury proceedings. *See* N.C. R. EVID. 804(b)(1); *see also* N.C. R. EVID. 801 Official Commentary (North Carolina did not adopt Fed. R. Evid. 801(d)(1), which allows use of prior testimony in additional circumstances). The State still may be able to offer grand jury testimony for non-substantive purposes—for example, to impeach or corroborate a grand jury witness who testifies at trial (assuming the applicable rules on impeachment or corroboration are met). *See Minter*, 111 N.C. App. 40 (State could use grand jury testimony to impeach testimony of recalcitrant witness).

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

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

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

Legislative note: Effective for offenses committed on or after October 1, 2013, S.L. 2013-368 (S 683) amends G.S. 15A-622(h) to authorize an investigative grand jury for the offenses in G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), and G.S. 14-43.13 (sexual servitude).
