Chapter 9
Grand Jury Proceedings

The grand jury in North Carolina is charged with determining probable cause in all felony cases and all misdemeanor cases in which original jurisdiction over the case lies in the superior court (misdemeanors joined with felonies or initiated by presentment). Unless the defendant waives his or her right to indictment, the State must obtain an indictment for all criminal prosecutions within the superior court's original jurisdiction. The right to indictment cannot be waived by a

capital defendant or by a non-capital defendant who is not represented by counsel. *See* G.S. 15A-642(b).

Because its proceedings are secret and because the grand jury has a great deal of discretion, challenging grand jury actions is difficult. However, the grand jury is not immune from review. Broadly speaking, a criminal defendant may object to an indictment returned by the grand jury on two grounds:

- the jury was illegally constituted; or
- significant procedural irregularities tainted the grand jury proceedings.

In either case the indictment must be dismissed. Both types of challenges are discussed in further detail below.

Practice note: All objections to the grand jury's composition or actions must be raised before arraignment, or they may be considered waived. *See* G.S. 15A-952(b)(4), (e); G.S. 15A-955; *State v. Lynch*, 300 N.C. 534 (1980). 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).

Section 9.1 reviews the qualifications and selection process for grand jurors and the foreperson of the grand jury. Section 9.2 discusses potential challenges to the composition of the grand jury and to the method for selecting a foreperson. Section 9.3 addresses the procedures to be followed by the grand jury, and Section 9.4 covers errors in grand jury procedure that may result in a defective indictment. Section 9.5 discusses provisions for special investigative grand juries that may be convened in certain specific types of cases. Section 9.6 lists additional references on the grand jury.

For additional information on grand jury challenges, particularly regarding issues of race, see RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 6.5, Challenges to North Carolina Procedures for Jury Formation (Sept. 2014).

9.1 Composition of Grand Jury

A. Selecting Grand Jurors

There is a three-step process for selecting grand jurors. The first step is for the jury commission for each county, either annually or biannually, to construct a list of potential jurors to be used for both grand and trial (petit) juries. (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.) G.S. 9-2 dictates how the list must be constructed. There are two important requirements in this first step: (i) to ensure adequate representation of minorities, the jury list must be drawn

from voter registration lists, drivers' license lists, and other reliable sources; and (ii) the process of creating the jury 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 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 in practice no counties do so. From this raw list, the jury commission creates the master jury list by removing disqualified individuals (*see infra* § 9.1B, Qualifications of Individual Grand Jurors) 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. *See also* G.S. 9-2(i) (describing permissible random selection procedure); *see generally* JAMES C. DRENNAN & MIRIAM S. SAXON, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS 11–13 (UNC School of Government, 4th ed. 2007) [hereinafter DRENNAN & SAXON].

Second, the clerk of superior court or the assistant or deputy clerk prepares a list of names from the master jury list of those to be summoned by the sheriff for jury duty (sometimes called the jury array or venire). This selection process must also be random. *See* G.S. 9-5. The duties of the clerk of court may be performed by a trial court administrator. G.S. 9-7.1.

Third, from the list of those summoned for jury duty, the clerk must randomly select the names of eighteen people to serve as grand jurors. *See* G.S. 15A-622(b). Generally, those selected serve twelve-month terms, with nine members rotating off the panel every six months. *See id.* (senior resident judge also may fix term of service at six rather than twelve months).

The procedures described above were modernized in 2012 to reflect advances in electronic data management. *See* 2012 N.C. Sess. Laws Ch. 180 (S 133) (effective July 12, 2012). In 2017, Chapter 163 of the General Statutes, the source of election law, was repealed and replaced with Chapter 163A; however, in 2018, the changes were reversed and Chapter 163 was restored. A conversion chart showing the correlation between statutes in Chapter 163 and Chapter 163A during this brief period can be found on the General Assembly's website.

B. Qualifications of Individual Grand Jurors

Statutory requirements. The qualifications for grand jurors are the same as for all jurors. G.S. 9-3 states that jurors must: (i) be citizens of North Carolina; (ii) be residents of the county in which they will serve; (iii) be eighteen years or older; (iv) be physically and mentally competent; (v) be able to understand the English language (effective July 1, 2011, G.S. 9-3 was amended to repeal the requirement that prospective jurors be able to hear the English language); and (vi) not have been convicted of a felony or, if convicted, have had their citizenship restored (under G.S. 13-1, citizenship rights, including the right to serve on a jury, are automatically restored upon the unconditional discharge of an inmate, probationer, or parolee from his or her sentence. In addition, a person may not serve as a juror more than once every two years. G.S. 9-3; G.S. 9-7. *See also* 2 NORTH

CAROLINA DEFENDER MANUAL § 25.2A, Statutory Qualifications (July 2018) (discussing grounds for disqualification of petit jurors). G.S. 15A-622(j), G.S. 9-3, and G.S. 9-7 provide that a person who serves a full term of service as a grand juror is exempt from service as a juror or grand juror for six years.

Dismissing or excusing grand jurors. In preparing the jury list, the jury commission screens out potential jurors who do not meet the statutory requirements. *See generally* DRENNAN & SAXON at 14–16 (describing procedure).

A superior court judge has authority to dismiss a grand juror if the judge finds that the juror does not meet the above qualifications, is incapable of performing his or her duties, or is guilty of misconduct. *See* G.S. 15A-622(c) (so stating; also authorizing judge to dismiss entire grand jury upon finding that jurors have not been selected in accordance with law or that grand jury is illegally constituted); *see also State v. Oxendine*, 303 N.C. 235 (1981) (individuals with a pecuniary interest in the outcome of a case should not serve on the grand jury), *superseded by statute in part on other grounds as stated in State v. Covington*, 315 N.C. 352 (1986).

In addition, district and superior court judges have the authority to excuse jurors for hardship. *See* G.S. 9-6; G.S. 15A-622(d); *see also* 2 NORTH CAROLINA DEFENDER MANUAL § 25.2B, Hardship Excuses (July 2018) (discussing authority of judge to excuse jurors). Under G.S. 9-6(b), a district court judge may delegate to a trial court administrator the duty of reviewing and passing on applications for excuses from jury service. Clerks are not authorized to determine excuses, deferrals, or exemptions from jury service.

There is no statutory authorization for the jury commission, sheriff, or any other authority to screen out potential jurors on the basis of the jurors' moral character or position in the community. Such a practice could result in a racially unrepresentative grand jury, providing potential grounds for challenging a grand jury indictment. *See infra* § 9.2, Challenges to Grand Jury Composition or Selection of Foreperson.

Age as excuse. The court in its discretion may excuse a person 72 years of age or older from service as a juror. *See* G.S. 9-6.1(a) (people 72 or older may request exemption by mail without appearing in court; district court rules on requests); *State v. Elliot*, 360 N.C. 400 (2006) (trial court may rule on request by person over 65 [now 72] to be excused from jury service). Advanced age does not automatically excuse a person from serving as a grand juror, however. Older citizens called as grand jurors may serve unless they suffer from a physical or mental disability that prevents them from fulfilling their duties as a juror. *See Elliott*, 360 N.C. at 408 (juror may be excused because of his or her age if the court determines that service would be a compelling personal hardship); *State v. Rogers*, 355 N.C. 420, 448 (2002) ("excusing prospective jurors present in the courtroom who are over the age of sixty-five [now seventy-two] must reflect a genuine exercise of judicial discretion"); DRENNAN & SAXON at 16 & n.5 ("it is improper to strike names from the master jury list solely on the basis of age, without a case-by-case consideration as to an elderly person's physical or mental competence"; decision to excuse juror on account of

age should ordinarily be made by court, not by jury commission). If your county has a practice of automatically exempting every person over 72 from service on grand juries, such a practice may provide grounds to challenge the indictment. *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that Louisiana practice of automatically excluding women from jury service unless they filed letter expressing desire to be included was unconstitutional). For a further discussion of this issue, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.2A, Statutory Qualifications (July 2018) (discussing impact of senior citizen status).

Disability. A person with a disability that could interfere with the person's ability to serve as a juror may request to be excused, deferred, or exempted from jury duty without appearing in court by mailing a signed request to the district court. G.S. 9-6.1(b).

C. Effect of Improper Selection Procedures

Generally. 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. Dellinger*, 308 N.C. 288 (1983) (information about grand jury, other than content of its deliberations, is matter of public record); *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).

In limited circumstances, a defendant may move to dismiss an indictment on the ground that either the grand jury as a whole was illegally constituted or individual grand jurors were unqualified. While mere "technical and insubstantial violations of the statutes regulating jury selection procedure" are not "sufficient to vitiate a jury list or afford a challenge to the array" (*State v. Massey*, 316 N.C. 558, 570 (1986)), a defendant is entitled to have a bill of indictment quashed if he or she can show that

- the jury list was compiled with a corrupt intent;
- there was systematic discrimination in the compilation of the list; or
- irregularities in the compilation of the list affected the actions of the jurors actually drawn and summoned,

State v. Johnson, 317 N.C. 343, 379 (1986).

Improper exclusion of jurors. If a qualified group, such as African-Americans or women, has been systematically excluded in either the drawing of the list of jurors or the selecting of jurors from the list, a defendant may challenge the composition of the grand jury as a whole. *See* G.S. 15A-955; G.S. 15A-1211; *State v. Vaughn*, 296 N.C. 167 (1978) (indictment may be dismissed if grand jury selection process was corrupt or discriminatory). For further discussion of this type of challenge, see *infra* § 9.2, Challenges to Grand Jury Composition or Selection of Foreperson. *See also* RAISING

ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 6.5G, Challenges to the Selection of the Grand Jury (Sept. 2014).

Improper inclusion of jurors. An individual may be qualified to serve as a grand juror even though he or she might be subject to a challenge for cause as a petit juror under G.S. 15A-1212. *See, e.g., State v. Oxendine*, 303 N.C. 235 (1981) (not error for brother of murder victim to serve on indicting grand jury), *superseded by statute in part on other grounds as stated in State v. Covington*, 315 N.C. 352 (1986).

However, if the grand jury contains members who do not meet the requirements of G.S. 9-3, the indictment may be dismissed. *See State v. Vaughn*, 296 N.C. 167 (1978). The grand jury also should not contain members with a pecuniary interest in the outcome of the case, and the inclusion of such an interested person may be grounds for dismissal of an indictment. *See Oxendine*, 303 N.C. at 245.

D. Selection of Grand Jury Foreperson

The foreperson of the grand jury presides over grand jury sessions, swears witnesses, administers oaths, and keeps a record of the disposition of each case, usually by indicating on an indictment whether it was returned as a "true bill." *See* G.S. 15A-623; G.S. 15A-644(a)(5). The presiding judge appoints the grand jury foreperson. *See* G.S. 15A-622(e). To make the selection, the court may personally interview grand jurors. *See* THE GRAND JUROR HANDBOOK at 4 (Administrative Office of the Courts, June 2019). The court also may accept the recommendation of the grand jury members. *See State v. Phillips*, 328 N.C. 1 (1991) (upholding selection of grand jury foreperson based on nomination of grand jury members). Unless removed from the grand jury by the superior court judge, the foreperson serves for the duration of his or her grand jury term.

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).

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 *supra* § 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.

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." THE GRAND JUROR HANDBOOK at 5 (Administrative Office of the Courts, June 2019). 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 clearly 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(b), at 289–97 (4th ed. 2015). 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).

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). Other privileged communications between privilege-holders may likewise be disqualified witnesses.

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).

9.5 Special Investigative Grand Juries

Special grand juries can be convened in North Carolina to investigate drug trafficking offenses under G.S. 15A-622(h). In 2013, subsection (i) was added to that statute, authorizing 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). The procedures in G.S 15A-622(h) for investigative grand juries for drug trafficking also govern the investigative grand juries for human trafficking, involuntary servitude, and sexual servitude. The procedures 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. The record created of this type of grand jury proceeding may explain its seemingly rare use in the state.

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), or conspiracy to commit either offense;
- 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.

Procedures. 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.

For more about the procedures governing the functioning of drug trafficking and other special investigative grand juries, see G.S. 15A-623(h).

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 investigative grand jury testimony for substantive purposes at trial in limited circumstances. *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 & the Confrontation Clause* at 11 & n. 57, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (July 2018) (grand jury testimony is testimonial and must meet one of *Crawford* exceptions to be admissible at trial).

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). In a rare case, the State still may be able to offer investigative 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 State v. Minter*, 111 N.C. App. 40, 47 (1993) (State could use investigative grand jury testimony to impeach testimony of recalcitrant witness under "extraordinary facts of the case" after the witness denied his earlier sworn statements to the grand jury). *But see supra* "Secrecy of proceedings" in § 9.3D, Proceedings before Grand Jury (discussing limits on use of testimony before regular grand jury).

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 special investigative 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 investigative 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 (2d ed. 2013).

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.

9.6 References

THE GRAND JUROR HANDBOOK (Administrative Office of the Courts, June 2019)

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