

Grand Jury Issues

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Whether you are a long time veteran of the bench or a newcomer, issues dealing with grand juries should cause us to stop in our tracks and carefully consider the appropriate course of action for two reasons: first, even the more prevalent problems are not topics we deal with every day, or even every month, and merit reflective consideration. Secondly, any taint or toxin of the grand jury can nullify hundreds of indictments, thus creating enormous problems in both individual court cases and a county's entire criminal court system.

Hopefully, this presentation will assist you in your work with grand jurors, and help to reduce and maybe avoid unnecessary stress and confusion.

Grand Jury: A Primer

The institution of the grand jury is a body with a long history, going back to our common law legal roots in England. The grand jury is the "portal of entry" into Superior Court. Having a neutral, independent group of citizens "filter" cases the government seeks to bring to court helps prevent oppression and abuse of process by those in power.

Article 31 of Chapter 15-A of the North Carolina General Statutes governs the creation, the function, and work of grand jury in North Carolina and Article 32 covers "Indictment(s) and Related Instruments."

"A grand jury is a body consisting of not less than 12 nor more than 18 persons, impaneled by a superior court and constituting a part of such court." N.C.G.S. 15A-621.

Typically, nine grand jurors are drawn each January, and nine more chosen in July, such that there are always 18 grand jurors serving at any one time.

The primary function of the grand jury is to act upon bills of indictment the District Attorney submits to it. It reviews evidence of crimes charged in bills of indictment. If at least twelve of the grand jurors find "probable cause" that the defendant committed the crime, the grand jury returns a "true bill of indictment." If not, it returns the indictment as not being a true bill. N.C.G.S. 15A-627. Less frequent tasks include issuing presentments on matters which have not been submitted by the District Attorney, inspecting the jail and other county offices or agencies, and reporting the results of the inspection. N.C.G.S. 15A-628. (A suggested format for the inspection of the jail is found in Appendix 6)

The Senior Resident Superior Court judge of the district may impanel a second grand jury in any county to serve concurrently with the first.” N.C.G.S. 15A-622(b). This has worked well in the more urban counties, with heavy caseloads.

Secrecy of all grand jury proceedings is imperative. N.C.G.S. 15A-623(e). The grand juror’s oath contains a “secrecy” pledge. Anyone disclosing information about grand juror proceedings (except to one’s attorney), may be held in contempt of court. N.C.G.S. 15A-623(g).

The Clerk of Court keeps a permanent record of all matters the grand jury returns. N.C.G.S. 15A-628. These minutes are matters of public record.

Each six months, a new grand jury foreperson is selected by the presiding Superior Court Judge. N.C.G.S. 15A-622(e). For years, many judges either picked someone at random, allowed the grand jury to “nominate” the foreperson, or asked the deputy sheriff serving as the grand jury officer for a suggestion as to the foreperson. All this changed with *State v. Cofield*, 320 N.C. 297, 357 SE2d 622 (1987), in which the North Carolina Supreme Court held that a finding of racial discrimination in the selection of the grand jury foreperson will nullify a defendant’s indictment and the resulting judgment and sentence. This was held to be a violation of the Equal Protection Clause of the United States Constitution. This is true regardless of whether the foreperson’s duties were merely ministerial, or whether the racial discrimination impacted the outcome of the grand jury proceedings. *State v. Cofield*, 320 N.C. 297, 357 SE2d 622 (1987).

Thus, for over 20 years, North Carolina courts have required the grand jury foreperson to be selected in a racially and also a gender-neutral basis. The most commonly used technique to insure this result is to employ a racially and gender-neutral questionnaire, filled out by all serving grand jury members and those in the pool from which the new grand jurors will be selected. (See Appendix 1). Following the selection, the presiding judge then enters an Order memorializing the manner of the grand jury foreperson’s selection (See Appendix 2). Your N.C. Criminal Bench Book for Superior Court Judges contains copies of other sample questionnaires and appointment Orders.

The Trial Court Administrator’s Office in my district, as well as others, submits a helpful handout to the grand jurors, entitled “Questions and Answers for Grand Jurors.” (Appendix 3). If your county is not dispensing such information, you may wish to consider giving the grand jurors such a resource.

The Administrative Office of the Courts has prepared an outstanding 22 page booklet, entitled “Handbook for Grand Jurors,” written by Professor James Drennan. It is a wonderful resource! Make sure each grand juror receives a copy of this valuable aid. (Appendix 4 is the cover to this booklet.)

More Frequent Grand Jury Issues

1. Judge's Role as Legal Advisor

Our Code of Judicial Conduct plainly provides that we judges are not to render legal advice as an attorney at law. Yet, the law does carve out one exception when we are able to render legal opinions: we are the “legal advisor” to the grand jury. N.C.G.S. 15A-624. Because we are otherwise forbidden from dispensing legal advice, and because the grand jury may rarely ask for legal guidance, a judge may not know of this unique role, or if he or she does, may have forgotten it.

Obviously, any legal advice should be given without editorial comment on fact or personalities, and in a neutral tone. It should *always* be on the record, in open court. The judge should never dispense legal advice in the grand jury room. Be prepared for some unusual questions. One of the few times I have been asked questions by the grand jury was when it was considering indictments in obscenity cases, and the foreperson asked me, “What *is* pornography?”

2. Order of Grand Jury Oaths

After selecting the grand jury foreperson, it would seem the logical procedure would be to ask the clerk to administer the grand jury oath to all grand jurors, and then to the foreperson. However, as a practical matter, it helps to swear the foreperson *first*, and then the grand jurors. This is because the oath the grand jurors take refers to the “*same oath* which your foreperson *has* taken” N.C.G.S. 11-11 (emphasis added). Obviously, if the foreperson has not yet taken the oath, the grand jurors cannot adopt it by reference.

So be sure to have the foreperson sworn first, and then the other grand jurors. (Appendix 5)

3. Grand Jury Instructions

We all know the grand jury charge we give is a long one (North Carolina Pattern Jury Instructions – Crim. 100-12). All eighteen grand jurors need to hear this, not just the new nine selected that day. There seems to be no reason a written copy of this can't be given to the jury foreperson after you give it orally, to use as a reminder and guide during the life of the grand jury. You may wish in your discretion to give each grand juror a copy as well. *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992) (citing *State v. Bass*, 53 N.C.App. 40, 45, 280 S.E.2d 7, 10 (1981)).

4. Presentments

N.C.G.S. 15A-628 provides that the grand jury “may investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment accusing a named person or named persons with one or more

criminal offenses it has found probable cause for the charges made.”
N.C.G.S. 15A-641 defines a presentment:

“A presentment is a written accusation by the grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.”

The grand jury may ask the presiding judge, “What is in a presentment? How is it worded?” As its legal advisor, a proper response, pursuant to N.C.G.S. 15A-644(c), would be that “A presentment must contain everything required of an indictment in subsection (a) except that the provisions of the subdivisions (a)(4) and (5) the signatures of the prosecutor and foreperson do not apply and the foreman must by his signature attest the concurrence of 12 or more grand jurors in the presentment.”

There is no AOC form for a presentment. Since everything in a presentment is in an indictment, you could give the grand jurors a blank indictment, indicating the two items on an indictment which are not required in a presentment, so it could draw its own presentment. When a grand jury asked me for a form, I made a copy of a blank presentment form from a North Carolina legal form book (Douglas Forms) and submitted it to the grand jury. (Copies of the blank indictment and the blank presentment are included as Appendices 8 and 9).

5. Investigative Grand Juries

You may have noticed that right behind the grand jury charge in the Pattern Jury Instructions is a charge for an investigative grand jury. (North Carolina Pattern Jury Instructions – Crim. 100.11- 100.12) It is highly unlikely that most of our current Superior Court judges have ever given that charge. If they have, it was probably many years ago.

The investigative grand jury was designed to be the state counterpart to the federal grand jury, which meets over a period of time, interviews witnesses, and issues indictments. The State Legislature created it in 1985, and during the time between 1987 and 1993, state investigative grand juries were created all across the state. Most of the time, they considered evidence of drug activity.

Investigative grand juries fell out of favor for several reasons. First, they were very labor intensive, such that a lot of District Attorneys became disenchanted with them. Moreover, in many cases, the defendants who were indicted were later indicted in federal court, which had more resources, smaller caseloads, and harsher sentences. Typically, the State prosecutions were then dismissed. The

investment of grand jury time and energy in the State's prosecutions seemed wasted.

North Carolina Senior Deputy Attorney General James Coman says that he has not had an inquiry about an investigative grand jury in approximately ten years. The Legislature amended the statute to provide that the Attorney General, rather than the local District Attorney, can supervise an investigative grand jury to alleviate extra work on the District Attorneys. However, the Attorney General Coman says his office has never had a single request for one. Attorney General Coman also said that as a practical matter, wiretaps have replaced the work of the investigative grand jury in drug cases. He also said that there has been some consideration of implementing investigative grand juries in the future in State public corruption cases, but that for whatever reason, there has been no real concerted effort to use them for this purpose.

6. College Students

The first term in January in which the new grand jury is chosen typically contains lots of college students, whose jury service for the Fall was deferred until that week to accommodate their school schedule. Similarly, the July term as well contains numerous college students.

It clearly would be a difficult undertaking for college students attending a school several hundred miles from their home to miss classes a full day for a year, and incur considerable travel expense. By the same token, other grand jurors with regular scheduling conflicts may resent college students getting an "easier pass" than they do.

I personally tend to be lenient in excusing college and university students from grand jury service, but it is obviously a matter of judicial discretion. No matter how you handle the situation, it is good to be aware of the fact that this issue will likely come up, and consider how you will deal with it.

7. Removing or Replacing Grand Jurors

During a grand juror's twelve month tenure, it is not unusual for situations to arise in which a grand juror seeks to be relieved of his or her duties. Such would be the case if a grand juror moves out of the county, gains new employment with a heavy travel schedule, or is encountering a severe personal hardship. N.C.G.S. 15A-622(d) allows the Court to excuse a grand juror, either on the juror's motion or the Court's own volition. There may also be situations where the Court seeks to remove a grand juror for excessive absences or conduct which amounts to contempt of court, such as refusing to participate in deliberations or refusing to follow the instructions of the foreperson. In such situations, a Show Cause Order may be issued to the grand juror, and the Court would hear the matter.

In any event, it is important to document the removal and replacement of a grand juror, to note that it was for a “good cause,” and to have this Order filed with the Office of the Clerk of Superior Court. (Appendix 7)

8. Work Schedule

Although the grand jury instruction refers to the fact that the grand jury will meet “from day to day” until its business is completed, typically most grand juries prefer to complete their business on the first day of the term. While this is understandable, it can also create some difficult situations for Court personnel, witnesses and others should the grand jury seek to work into the night to finish its business.

I am aware that this occurred recently in one county. The grand jury was working madly during lunch, and took no recess for the grand jurors to refresh themselves. The presiding judge, acting upon his inherent power, instructed the grand jury that it would take a fifteen minute break every morning and afternoon, would take recess for lunch, and would recess at 5:00 p.m., if its business had not been completed for the day. The judge entered a written Order to that effect. You may wish to enter an Order to this effect at the beginning of each six month period.

9. Grand Jury Panel and Selection of Names

The law expressly provides that parties may challenge the panel from which the grand jury is drawn under the procedure set forth in N.C.G.S. 15A-1211. Moreover, a party may challenge the composition of a particular grand jury. N.C.G.S. 15A-622(b) explicitly states that “To empanel a new grand juror, the presiding judge must direct that the names of all persons returned as jurors be separately placed in a container.” If you do not so instruct the clerk to do this on the record, be sure to state on the record that it has already been done at your direction.

N.C.G.S. 15A-622(b) then provides that “The clerk must draw out the names of 18 persons to serve as grand jurors.”

In some counties, deputy clerks have already drawn the names before you request that the names be called, and prepared a grand jury seating chart with these juror’s names. To assure full compliance with the statute, and reduce any challenge to the manner of selection, it is a good idea to confer with the clerk before court is convened, so that the clerk can actually be seen drawing the grand juror’s names from the container. This will reduce the likelihood of a challenge to the composition of the grand jury based on an improper method of selection.

10. Lack of Signatures

N.C.G.S. 15A-644(a)(4) provides that the prosecutor should sign the bill of true indictment if it is returned as a “true bill.” However, the statute states that the District Attorney’s failure to do so is not a fatal defect.

Similarly, the law requires the grand jury foreperson to sign the indictment, which affirms that at least twelve of the grand jurors agreed in the finding of probable cause. Nevertheless, the failure of the foreperson to sign the true bill does not invalidate an otherwise valid indictment. *State v. Midyette*, 45N.C. App. 87 (1980) (Court minutes showed indictment returned as a true bill).

11. Request to Seal an Indictment

On occasion, the District Attorney may request that you seal an indictment for any number of reasons. N.C.G.S. 15A-623(f) gives you the authority to order that an indictment be sealed and kept secret until the defendant is arrested and brought before the court.

More Unusual Grand Jury Issues

Error in Recognizing Grand Jury Action

A recent case history in New Hanover County highlights how critically important it is that everyone accurately understand a grand jury's actions.

A New Hanover Sheriff's Deputy shot and killed the son of a Raleigh attorney in a raid of a house in Wilmington. The case was highly publicized. The indictment the District Attorney submitted to the grand jury against the deputy sheriff was returned as "no true bill." However, court officials and the press misread the form returned by the grand jury, and announced the deputy had been indicted. When the grand jury foreperson heard this on the news, he immediately reported to the Court that the Defendant had not been indicted. The resulting publicity gave rise to speculation about improper contact with the grand jury after its finding, and whether it was attempting to "undo" what it had already done. A summary of stories about this case detailing the history of the grand jury's action is found in Appendix 12.

New Hanover court officials have now devised an excellent way of preventing misinterpretation of a grand jury's decision not to return a true bill of indictment. The Clerk of Court now puts a big red stamp on no true bills of indictment that reads "NOT A TRUE BILL GRAND JURY A." (Appendix 9) This not only reduces the likelihood that an official, the public, or the press might misread or misinterpret the grand jury's action, but flags the need to contact the jail if a defendant who has not been indicted is in custody.

The District Attorney announced he would resubmit the bill of indictment to the grand jury. Senior Resident Superior Court Judge Alan Cobb wisely sought to have a judge from elsewhere in the state brought in to preside over the session of court in which the grand jury would report its decision about indictment. Judge Michael Beale was assigned to that session of court. Seeking someone other than a local judge is a good idea in highly publicized cases with exotic issues.

Defendant and Victim's Family Requesting to Testify Before a Grand Jury

The New Hanover case also raised a novel issue concerning whether a Defendant or someone not *subpoenaed* by the District Attorney as a witness before the grand jury can *testify* before the grand jury.

As we know, page five of our Grand Jury Instruction states, "The person accused in a bill of indictment is never called to be questioned by the grand jury." Certainly, State law prohibits the state from compelling any defendant to appear before the grand jury.

However, in this New Hanover County case, when the District Attorney decided to resubmit the bill to the grand jury, the defendant *voluntarily requested* to appear before the grand jury. His attorneys argued N.C.G.S. 15A-626(d) to Judge Michael Beale in support of this motion. This statute reads:

"Any person not called as a witness who desires to testify before the grand jury concerning a criminal matter which may properly be considered by the grand jury must apply to the district attorney or to a superior court judge. The judge or the district attorney in his discretion may call the witness to appear before the grand jury." Thus, we have discretionary power to allow someone who wishes to testify before the grand jury to do so.

The State objected to the Defendant's request. Judge Beale heard this motion in open court. Obviously, the grand jury was neither present nor knew of the issue being heard. After considering the unusual nature and history of this case, the fact that the highly competent defense counsel sought this grand jury appearance for the defendant, and that the defendant wanted to testify, Judge Beale ruled that the Defendant could testify before the grand jury. However, the judge on the record advised the defendant of his right not to so testify, and made findings of fact and conclusions of law as to the decision being freely, knowingly, intelligently and voluntarily made by the defendant.

Based on this ruling, the State then moved the court to allow the victim's father to give grand jury testimony, under N.C.G.S. 15A-626(d). Judge Beale conducted a detailed hearing in open court on this matter. The State argued that the victim's father would not be testifying about emotional issues, but rather about factual matters which would help the grand jury in its decision. Judge Beale received testimony from the father concerning those facts. The Court allowed the State's Motion, but gave strict instructions to the father to refrain from any testimony involving emotion, victim impact, or anything of that nature which might cause an indictment to be rendered out of sympathy, anger, or other inappropriate factors.

It may well be that other defendants and individuals begin to cite this statute in asking us to let them voluntarily appear before the grand jury. If so, it would benefit us all to be thinking about how we would procedurally deal with these requests.

Parties Requesting Jury Instructions to the Grand Jury

An additional 2009 case from New Hanover County presented yet another uncommon issue. The case involved the death of a police officer who was attempting to join other

officers in a high speed vehicle pursuit of the defendant, Anthony Pierce. In March of that year, the District Attorney requested that the Court give legal instructions to the grand jury with regard to this highly publicized, high-profile case.

The State not only moved the Court to instruct the grand jury on proximate cause, implied malice, foreseeability and double jeopardy; it also filed a brief in support of its motion. A copy of the brief and proposed jury instructions are included in Appendix 11.

The AOC assigned a judge from another section of the state to hear this motion, and preside over the term of court in which the grand jury would return its indictments. Again, this was a wise move. Judge Paul Gessner of Wake County held this session of court and heard the matter.

Judge Gessner decided against giving the grand jury the legal instructions the District Attorney requested, but left open the matter of whether he would give these instructions if the grand jury asked questions relating to these legal issues. The grand jury did not ask these questions.

The grand jury returned a “no true bill.” After the grand jury went home, it was discovered that they had not heard from all of the subpoenaed witnesses, as they are required to do before returning a “no true bill.” They were summoned to resume their deliberations the following day. Prior to hearing the additional witnesses, Judge Gessner gave them the appropriate instructions about their work and function from the pattern jury instructions. He did not give the instructions the District Attorney requested.

The grand jury heard the additional witnesses and subsequently indicted the defendant.

Following Defendant Pierce being indicted, the District Attorney released a three page statement to the media about the case and the grand jury action. There was a statement about the Court instructing the grand jury on the law, from which it could be inferred that the judge gave the State’s instructions. A copy of this press release is included in these materials as Appendix 10.

Subsequently, the Wilmington newspaper requested that the AOC, under the Freedom of Information Act, provide it with copies of all e-mails and correspondence between the Judge and the D.A. (of which there were none), and between the Judge and the AOC, going back the five years prior to the indictment. The AOC gave the press the copies, which were, of course, innocuous. Nevertheless, this shows that we are living in a much different world than were judges of previous generations. Be cautious about what you put in writing.

It may well be that once other District Attorneys learn of this case, that many more of us may receive requests from the State to charge the grand jury on the law. Similarly, the defense bar may soon follow suit and make such requests. Again, being aware of these kinds of issues will help us prepare how to deal with them.

Conclusion

The grand jury is an important cog in the wheel of our criminal justice system. Issues relating to its process and work affect the integrity and independence of the courts. While problems relating to the grand jury may be infrequent, they are always important, and deserve careful thought, time, and attention. Such is our charge. Justice requires no less.