

GRAND JURY: THE FOREPERSON

Jessica Smith, UNC School of Government (June 2012)

Contents

I. Selection of the Foreperson.....1
 A. Who Selects.....1
 B. When Selected.1
 C. Assistant Foreperson.....1
 D. Manner of Selection.....1
 E. Order Appointing Foreperson.....4
 F. Oath.....4
 II. Duties of the Foreperson5
 III. Removal of the Foreperson5

I. Selection of the Foreperson.

A. Who Selects. The presiding judge selects the foreperson. G.S. 15A-622(e); see also *State v. Cofield*, 320 N.C. 297, 301 (1987) (*Cofield I*).

B. When Selected. The presiding judge must appoint a foreperson:

- after impaneling a new grand jury and
- after impaneling nine new jurors.

G.S. 15A-622(e); see also *Cofield I*, 320 N.C. at 301.

C. Assistant Foreperson. The presiding judge may appoint another person to act as foreperson during any absence or disability of the foreperson. G.S. 15A-622(e). The statute is permissive on this issue and so appointment of an assistant is not required. *Id.* (“may appoint”).

D. Manner of Selection.

1. Must Be Racially Neutral. Selection of the foreperson (and the assistant) must be done in a racially neutral manner. Racial discrimination in the selection of the foreperson is unconstitutional under both the State and federal constitutions. *Cofield I*, 320 N.C. at 303, 308 (Article I, sections 19 and 26 of the North Carolina Constitution; equal protection clause of the Fourteenth Amendment to the federal constitution when the defendant is a member of the protected class); *State v. Robinson*, 327 N.C. 346, 361 (1990) (so stating the *Cofield* rule).

a. Race of Foreperson Irrelevant. The actual race of the chosen foreperson is irrelevant; the issue is whether that person was selected in a racially discriminatory manner. *State v. Moore*, 329 N.C. 245, 247 (1991) (applying Article I, section 26 of the North Carolina Constitution and rejecting the State’s argument that a black defendant had no standing to object to the replacement of a white foreperson with a black one).

b. All Grand Jurors Must be Considered. The selection process is not racially neutral unless all members of the grand jury are

considered. *State v. Cofield*, 324 N.C. 452, 461 (1989) (“A method of selecting a grand jury foreman that meets the racially neutral standard must ensure that all grand jurors are considered by the presiding judge for his selection . . .”) (*Cofield II*).

- c. **Judge May Consider Grand Jury’s Recommendation.** Courts have held that the foreperson was selected in a racially neutral manner when the trial judge followed a recommendation by the grand jury, provided that recommendation was made in a racially neutral way. *State v. Jefferies*, 333 N.C. 501, 508 (1993) (judge followed recommendation of the grand jury; evidence showed that as to the grand jury that returned a murder indictment, the grand jurors considered black and white members and the only qualification considered was earnestness and diligence; as to the grand jury that returned an assault indictment the grand jury selected the only person who volunteered for the job); *State v. Phillips*, 328 N.C. 1, 11 (1991) (judge appointed foreperson elected by the grand jurors).
- d. **Prima Facie Case.** A defendant can show racial discrimination in the selection of the grand jury foreperson either by showing either:
 - (1) that the selection procedure itself was not racially neutral, or
 - (2) that for a substantial period in the past relatively few blacks have served in the position of foreperson even though a substantial number have been selected to serve as members of grand juries.

Cofield I, 320 N.C. at 308-09; see also *Jefferies*, 333 N.C. at 506; *Phillips*, 328 N.C. at 11.

- i. **Procedure Not Racially Neutral.** In *State v. Moore*, 329 N.C. 245 (1991), the State essentially conceded that the selection procedure was not race neutral (and thus that the first prong of the showing was satisfied). *Moore* involved a situation where the trial judge, attempting to correct a historical custom in the county of failing to select black forepersons, removed a white foreperson and replaced him with a black one.
- ii. **Historical Evidence.** In *State v. Cofield*, 320 N.C. 297 (1987) (*Cofield I*), the North Carolina Supreme Court held that the defendant satisfied the second prong of the test. In that case the defendant showed that the racial composition of the county was approximately 61% black and 39% white and that the racial composition of the county’s grand juries generally reflected the racial composition of the county as a whole. A grand jury foreperson was either appointed or reappointed every six months, and in 18 years only one black person had been appointed grand jury foreperson. Although 50 appointments had been made and 33 persons had been appointed foreperson in the relevant time period, only one appointee was black. The court found this

sufficient evidence to make out a prima facie case of racial discrimination. *Id.* at 309.

- e. **State's Rebuttal.** To rebut the defendant's prima facie case of racial discrimination, the State must show "both a racially neutral selection process and a racially neutral reason for the grand jury foreman's selection in [the particular] case." *Compare Cofield II*, 324 N.C. at 458-60 (State failed to rebut the defendant's prima facie showing), *with Jefferies*, 333 N.C. at 507-09 (State rebutted the prima facie case with evidence that the judge followed the recommendation of the sitting grand jury as to appointment of the foreperson for the new grand jury; as to the grand jury that returned a murder indictment, the grand jurors considered black and white members and the only qualification considered was earnestness and diligence; as to the grand jury that returned an assault indictment the grand jury selected the only person who volunteered for the job), *and Phillips*, 328 N.C. at 11 (State rebutted the defendant's prima facie case by showing that the foreperson was elected by the grand jurors and there was no evidence that their selection process was racially biased nor a suggestion that the grand jury acted in other than a racially neutral manner).
- f. **No Need to Show Impact on the Proceeding.** The defendant need not show that the discrimination affected the grand jury proceedings. As the North Carolina Supreme Court explained:

The question . . . is not whether discrimination in the foreman selection process affected the outcome of the grand jury proceedings; rather, the question is whether there was racial discrimination in the selection of this officer at all. . . . [R]acially motivated exclusion of blacks from a grand jury will, by itself, vitiate any indictment returned by the grand jury against a black defendant.

Cofield I, 320 N.C. at 304.

- g. **Remedy.** If the State is unable to rebut the defendant's prima facie showing of racial discrimination, the indictment must be quashed. *Cofield I*, 320 N.C. at 304; *State v. Moore*, 329 N.C. 245, 249 (1991) (quashing the indictment). If this occurs, the State may re-indict. *Cofield II*, 324 N.C. at 465 (citing *Cofield I*, 320 N.C. at 309).
- h. **Time for Motion.** A motion asserting racial discrimination in selection of the grand jury foreperson generally must be made at or before arraignment. *State v. Robinson*, 327 N.C. 346, 361 (1990) (defendant waived the claim by failing to timely move); G.S. 15A-952(b) (time for making pretrial motions); G.S. 15A-952(e) (court may grant relief from waiver).
2. **Non-Discrimination Generally.** Although the cases discussed in Section I.D.1 focus on racial discrimination, they are based in

constitutional provisions that protect against a broader range of discriminatory practices. Thus, selection of the grand jury foreperson should proceed in a non-discriminatory fashion with respect to gender, color, religion, and national origin, in addition to being non-discriminatory as to race. N.C. CONST. art. I, sec. 26 (“No person shall be excluded from jury service on account of sex, race, color, religion or national origin”); *Cofield I*, 320 N.C. at 302 (“The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice.”).

3. **Grand Jurors May be Questioned.** As part of the selection process, the trial judge may question the grand jurors orally or by way of written questionnaire. For sample questionnaires, see Appendix A. If a written questionnaire is used, the judge’s order appointing the grand jury foreperson, see Section I.E below, should include a directive that the clerk preserve under seal the completed questionnaires as part of the minutes and that they not be opened without a court order.
4. **Relevant Factors.** When selecting the foreperson, the trial judge may consider, among other things, the following:
 - leadership ability,
 - fairness,
 - the ability to follow instructions,
 - prior grand jury experience, and
 - education level.

Cofield II, 324 N.C. at 459 (expressly endorsing the first four factors as racially neutral selection criteria). As noted above, a judge may consider a recommendation by the grand jurors, provided that the recommendation was made in a racially neutral manner.

- E. **Order Appointing Foreperson.** The judge should enter a written order with respect to the appointment of the foreperson. The order should outline the procedure employed and the factors considered in the appointment. If a written grand jury questionnaire was used, the judge’s order should include a directive that the clerk preserve the completed questionnaires as part of the minutes under seal and that they not be opened without a court order. For sample orders appointing the grand jury foreperson see Appendix B.
- F. **Oath.** The grand jury foreperson must be sworn using the following oath:

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave anyone unrepresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

G.S. 11-11; see also G.S. 15A-622(f) (specifying use of this oath).

II. Duties of the Foreperson. The foreperson:

- presides over all hearings, G.S. 15A-623(b), including keeping order, letting every interested grand jury members have an opportunity to question witnesses and participate in decisions, and calling witnesses according to the district attorney's list, James C. Drennan, STATE OF N.C. HANDBOOK FOR GRAND JURORS 4 (N.C. Admin. Office of the Courts 1988) [hereinafter HANDBOOK];
- administers oaths or affirmations to all witnesses, G.S. 15A-623(b), interpreters, *id.* at -623(d) (must take an oath that he or she will keep secret all matters), and law enforcement officers who are present because they are holding a witness in custody, *id.* (same);
- may excuse individual jurors from attending particular sessions of the grand jury, except that the foreperson may not excuse more than two jurors for any one session, G.S. 15A-622(d);
- requests that the prosecutor call a witness when the grand jury wishes to hear from a person not listed in the indictment, G.S. 15A-626(b); HANDBOOK, *supra* at p. 7;
- informs the prosecutor when a witness has asserted the privilege against self-incrimination, G.S. 15A-1053(b);
- indicates on each bill of indictment or presentment the witness(es) sworn and examined before the grand jury, G.S. 15A-623(c);
- returns bills of indictment submitted by the prosecutor, whether found to be a true bill or not, to the presiding judge in open court, G.S. 15A-628(c);
- returns presentments to the presiding judge in open court; *id.*;
- signs indictments, attesting the concurrence of 12 or more grand jurors in the finding of a true bill of indictment, G.S. 15A-644(a)(5), or in the presentment, G.S. 15A-644(c); and
- ensures that the grand jury complies with its duty to inspect the jail and other county offices or agencies. HANDBOOK, *supra* at p. 4; *see generally* G.S. 15A-628(a)(5) (grand jury's duty to inspect jails and county offices or agencies).

Defects in the manner in which the foreperson carries out these duties will not necessarily invalidate the charging instrument. *See, e.g.*, G.S. 15A-623(c) (failure to indicate witnesses sworn does not invalidate indictment; *State v. Reep*, 12 N.C. App. 125, 126 (1971) (fact that foreperson delivered the bill of indictment to the officer serving the grand jury, who then gave the indictment to the solicitor who then carried it into the courtroom did not invalidate the indictment); *see generally* Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMIN. OF JUSTICE BULL. NO. 2008/03, 15, UNC School of Government (July 2008), <http://shopping.netsuite.com/s.nl/c.433425/it./id.347/f> (discussing issues regarding completion of the indictment by the foreperson).

- ## III. Removal of the Foreperson.
- Unless removed for cause by a superior court judge, the foreperson serves until his or her successor is appointed and sworn. G.S. 15A-622(e). A foreperson may not be removed for racial reasons. *State v. Moore*, 329 N.C. 245, 246 (1991) (white foreperson was asked to resign so that a black grand juror could serve as foreperson; this was impermissible).

Appendix A: Sample Questionnaires for Selection of the Foreperson*Sample Questionnaire 1.*

Name:

Address:

Telephone Number:

Date of Birth:

Education:

(last grade/degree completed)

Occupation:

(present occupation or last occupation if not currently employed)

Prior grand jury service: Yes () Date: _____ No ()

Prior petit jury service: Yes () Date: _____ No ()

Other information:

Would you be willing to serve as grand jury foreperson?

Yes () No ()

Signature

Date

Sample Questionnaire 2

This sample questionnaire was provided by Superior Court Judge Donald Bridges.

The presiding judge is required to select a foreperson for the Grand Jury. Please complete this questionnaire. Your answers will be sealed and only can be opened by order of the Court.

1. Name (please print) _____; Age _____

2. Number of years completed in school. _____

3. Have you ever served on a Grand Jury before (including the past six months)?

Yes () No ()

4. Have you ever served as foreperson of a Grand Jury?

Yes () No ()

If so, when? _____

5. Have you ever been convicted of a criminal offense (other than minor traffic convictions)?

Yes () No ()

6. Where are you employed? _____

7. How long have you worked there? _____

8. What position do you hold and/or what are your work duties?

9. Do you supervise other employees at work? _____

10. List any professional, religious, or civic organizations to which you belong.

11. List any offices or positions of leadership you have held in the above organizations.

12. Whom do you recommend (including yourself) to be the foreperson of this Grand Jury?

13. If chosen, would you be willing to serve as foreperson for the next six months?

Yes () No ()

Signature

1. That the presiding Judge is required to appoint a member of the Grand Jury as foreperson;
2. That the presiding Judge chooses as well to appoint a member of the Grand Jury as alternate foreperson; and
3. That selection of both of these officers of the Grand Jury was made through a race- neutral procedure.

THEREFORE, the Court, in the exercise of its discretion, hereby appoints _____[name of person selected]___ as foreperson of the grand jury for _____ County and appoints _____[name of person selected]___ as alternate foreperson of the grand jury of _____ County.

The Court further ORDERS that the Clerk shall keep a copy of this Order with the permanent minutes of this Court.

It is further ORDERED that the Clerk shall place the eighteen (18) completed questionnaires in a sealed envelope, not to be opened except by Order of this Court; and that these be kept with the permanent minutes of this Court.

This the ___ day of _____, 20_____.

THE HONORABLE _____
Superior Court Judge Presiding

Sample Order 2.

This sample order was provided by Superior Court Judge Donald Bridges.

STATE OF NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON ORDER OF APPOINTMENT

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That ____ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, but that the court would entertain recommendations from the grand jury for the positions of foreperson and assistant foreperson. The grand jury also was informed by the court that, in making such recommendations, all members of the grand jury should be considered as possible candidates, that any recommendations should be based upon the leadership ability, fairness, education, prior grand jury experience and ability to follow instructions and that the persons recommended must be selected in a racially neutral manner. After receiving the recommendations of the grand jurors, the Court again inquired and was assured that the recommendations had been made in a racially neutral manner.

Considering the recommendations and other information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, _____ is a fit and proper person to serve as foreperson of this grand jury and _____ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints _____ as foreperson of the grand jury of this county, and _____ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order under seal with the permanent minutes of this Court.

This the ____ day of _____, 20 ____.

Superior Court Judge

© 2013 School of Government The University of North Carolina at Chapel Hill. This document may not be copied or posted online, nor transmitted, in printed or electronic form, without the written permission of the School of Government, except as allowed by fair use under United States copyright law. For questions about use of the document and permission for copying, contact the School of Government at sales@sog.unc.edu or call 919.966.4119.