

Published by the  
Institute of Government,  
The University  
of North Carolina  
at Chapel Hill

No. 91/03  
June 1991  
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# Administration of Justice Memorandum

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JUL 29 1991

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## North Carolina Courts' Scrutiny of Grand Jury Foreperson Selection for Racial Discrimination

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In *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293 (1991), the North Carolina Supreme Court upheld, as free of constitutionally impermissible race discrimination, a procedure to select a grand jury foreperson.<sup>1</sup> This memorandum reviews North Carolina appellate courts' pre-*Phillips* treatment of claims of race discrimination in such selection and discusses the procedure found acceptable in *Phillips*.<sup>2</sup> It also suggests that it is unclear whether *Phillips*

- provides a valid procedure for future selections of grand jury forepersons, or
- simply provides one standard to help determine if past selections were free of discrimination.

### The *Cofield I* Ruling: Establishing the Parameters of Judicial Inquiry

The North Carolina Supreme Court, in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) (hereinafter *Cofield I*), held that a defendant established prima facie evidence of race discrimination in selection of the grand jury foreperson who presided when the defendant was indicted. Prima facie evidence entitles the defendant to a presumption that race discrimination was present, though the state may try to rebut that evidence.

### Prima Facie Evidence of Race Discrimination

The *Cofield I* court described two methods by which a defendant may establish prima facie evidence of race discrimination in grand jury foreperson selection:

*Method I.* The defendant may show that the process of selecting the foreperson was not race neutral. The court's opinion did not discuss specifically how to make such a showing.

*Method II.* The defendant may show that "for a substantial period in the past" few blacks<sup>3</sup> have served as forepersons even though a "substantial number" of blacks have been selected to serve as grand jury members.<sup>4</sup>

A defendant must satisfy only one of these methods to establish prima facie evidence of discrimination.<sup>5</sup> But neither method is satisfied by a defense attorney's bare assertions, based only on personal belief or observation, that race discrimination took place in a grand jury foreperson's selection.<sup>6</sup>

By either method, a defendant may establish a prima facie claim without showing that the alleged discrimination was so strong as to affect the integrity of resulting indictments or that the foreperson had more than a merely ministerial role in the indictment process.<sup>7</sup>

*Cofield's* claim succeeded because he presented statistical information satisfying prima facie evidence method II. *Cofield's* data, based upon the testimony and records of the superior court clerk, traced historic grand jury makeup in Northhampton County, where the defendant was indicted. At the time of the indictment in 1984, blacks made up 61 percent of the county's population; the remaining 39 percent were white. Grand jury composition since 1968 reflected similar racial makeup. Records of fifty foreperson appointments since 1960 showed that thirty-three different people served, but only one foreperson was black. The court

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ruled that this was sufficient statistical evidence for a prima facie case of race discrimination.<sup>8</sup>

The *Cofield I* standards for establishing prima facie evidence of discrimination are based exclusively upon equal protection rights provided by Article I, sections 19<sup>9</sup> and 26<sup>10</sup> of the North Carolina Constitution.<sup>11</sup> In finding the state constitution applicable, the supreme court stressed the importance of a grand jury foreperson selection process free of racial discrimination:

"Discrimination in the selection of grand jury foremen is no less wrong, and no less contrary to the letter and spirit of our constitution, than discrimination in the selection of jurors generally. . . . As the titular head of the grand jury, the foreman is first among equals, both in the eyes of his fellow jurors and in the eyes of the public. Because the foreman is thus set apart, it is as important to ensure racial neutrality in the selection of this officer as it is to avoid racial discrimination in the selection of grand and petit jurors generally."<sup>12</sup>

#### State's Rebuttal to Defendant's Prima Facie Evidence

The state may attempt to rebut prima facie evidence of discrimination with evidence of its own, showing that the selection of the foreperson in question "was in fact racially neutral"—that is, the state did not racially discriminate in making this particular selection.<sup>13</sup> The state is not required, however, to rebut a defendant's evidence showing a long-term pattern of discrimination, in compliance with method II described above, with its own evidence showing an absence of such a pattern.

If a court finds the state's rebuttal sufficient, the defendant's discrimination claim fails. However, if the court finds the state's rebuttal insufficient, verdicts and judgments against the defendant must be set aside. If a defendant has not yet been tried, the state may dismiss charges against the defendant based upon evidence of an unconstitutionally selected grand jury foreperson. In either instance the state retains power to reindict the defendant with a validly selected grand jury and foreperson.<sup>14</sup>

#### Ensuring Racial Neutrality in Selecting a Grand Jury Foreperson

The North Carolina Supreme Court has described two ways, and the North Carolina Court of Appeals a third, by which the state may respond to a defendant's claim of race discrimination in the selection of a grand jury foreperson:

- In *State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989) (hereinafter *Cofield II*), the supreme court ruled that when a superior court judge selects the foreperson, the judge must consider all grand jury members.

- In *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293 (1991), the supreme court ruled that a grand jury may nominate, by "racially neutral" means, a foreperson for the judge to appoint. The scope of this ruling is still unclear because the phrase "racially neutral" is unclear.
- In *State v. Moore*, 100 N.C. App. 217, 395 S.E.2d 434 (1990), the court of appeals ruled that when a black defendant claims race discrimination in the selection of a white foreperson who presided over the defendant's indictment, the state may respond by appointing a black foreperson and having the grand jury consider the charges again. This ruling may be used only in response to claims of discrimination in foreperson selections made before *Cofield II*'s certification (June 28, 1989).

Each of these rulings is discussed in detail in the rest of this memorandum.

#### The *Cofield II* Ruling: Superior Court Judge Must Consider All Grand Jurors

*Cofield I* remanded *Cofield*'s claim to the trial court for the state's rebuttal. The trial court found that the state had chosen the foreperson by a race-neutral process. The claim then returned to the North Carolina Supreme Court, which, in *Cofield II*, rejected the trial court's ruling.

The trial court record showed that before appointing the foreperson who oversaw *Cofield*'s indictment, the presiding judge consulted with the sheriff, the district attorney, and the clerk of court, as he normally would do. The sheriff knew one of the grand jurors, Mr. Regan. Regan was characterized as highly educated, as very dependable, and as having had a job requiring great responsibility. Additionally he had served on the grand jury for the past six months. The sheriff and clerk of court agreed that Regan would be the best choice for grand jury foreperson and recommended him to the judge. After a short conversation with Regan, the judge appointed him as grand jury foreperson.<sup>15</sup>

The supreme court rejected as not supported by the facts the trial court's finding that the above process had been race neutral.<sup>16</sup> It ruled that Regan's selection was improper because the process did not allow all the eligible grand jurors to be considered for the foreperson position.<sup>17</sup> The sheriff knew personally only one grand juror—Regan—while none of the other consulted officials knew anyone on the grand jury panel. Because only that grand juror, who was white, was considered for recommendation, "it is obvious that all black grand jurors" and all other white grand jurors were excluded from consideration.<sup>18</sup> Consequently the process was not race neutral. According to the court, this selection specifically violated Article I, sections 19 and 26 of the North Carolina Constitution.

The supreme court so ruled despite the presence of two factors favorable to a finding of race neutrality in the selection. The supreme court stated that the criteria normally used by the judge to select grand jury forepersons—"leadership abilities, fairness, the ability to follow instructions and preferably some grand jury experience"<sup>19</sup>—did not reflect racism. Additionally, the supreme court noted that "there was not the slightest hint of racial motivation" in the judge's foreperson selection in this instance.<sup>20</sup>

It is unclear whether the *Cofield II* majority intended a conscious comparison of each juror's ability to serve as foreperson or simply a process in which every juror is assured a chance to be selected. In his concurrence, Justice Mitchell said that if the majority's statement that "all grand jurors must be considered" meant that a selection process must consciously weigh and compare each juror's qualifications, he did not agree. Justice Mitchell suggested instead that a random selection would constitute a race-neutral process—that is, the presiding judge could draw a name from a container holding all the jurors' names.<sup>21</sup> Such a process would assure every grand jury member an "equal opportunity to serve as foreperson," rather than assure that all grand jury members would be consciously evaluated and considered.<sup>22</sup> The majority noted that it did not consider or decide whether such a random selection process would meet the requirement that all grand jury members be considered for appointment.<sup>23</sup>

Since the court's subsequent *Phillips* decision, it is not clear whether the *Cofield II* ruling will apply to a selection process by which the grand jury nominates a foreperson for the superior court judge to appoint. It is at least clear that when a judge selects a foreperson without calling on the grand jury for a nomination, the judge must consider all grand jurors. It is important to note that the court limited the impact of the *Cofield II* holding to "cases in which the indicting grand jury's foreman is selected after the certification date" of the *Cofield II* opinion (June 28, 1989).<sup>24</sup>

#### **The Phillips Ruling: Grand Jury May Nominate Foreperson by Racially Neutral Means**

The North Carolina Supreme Court added yet another wrinkle to defining a race-neutral process for selecting a grand jury foreperson in *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293 (1991). In that case, the grand jury had elected one of its members as nominee for foreperson, and the judge appointed that nominee. The supreme court ruled that the selection was race neutral. However, as discussed below, this decision may have limited applicability.

The defendants were originally indicted for murder and felony child abuse in August, 1987. In September, 1987, the defendants, relying upon *Cofield I*, alleged that racial discrimination prejudiced foreperson selection for the grand jury that indicted them. The defendants filed a motion to

dismiss the August indictments. The presiding judge consequently removed the foreperson, asking the grand jury "to retire to the jury room and nominate" a new foreperson. The judge told the jury, "You may nominate any one of your members, including [the just-removed foreperson]."<sup>25</sup> The grand jury nominated the individual who had just been removed as foreperson. After the judge, in his discretion, reappointed the foreperson, the grand jury returned true bills of indictment against the defendants on October 6, 1987. Defendants appealed, claiming that the second selection was constitutionally impermissible.

The defendants made out a prima facie case of discrimination by showing that between 1960 and 1987, only one black had served as a grand jury foreperson in Bladen County. The state rebutted by presenting evidence that the judge presiding over the second grand jury foreperson selection found as fact that the foreperson was "selected by being elected from the members of the Grand Jury sitting on said Grand Jury." That judge also concluded that "the method used in selecting the Grand Jury foreperson who presided over the Grand Jury which returned the Bill of Indictment in this cause was . . . racially neutral."<sup>26</sup>

The North Carolina Supreme Court found "no reason to disturb" either the finding or the legal conclusion.<sup>27</sup> According to the court, evidence supported the judge's finding that the foreperson was selected by jury election, and that finding of fact supported the conclusion that the selection process was race neutral. That the record did not show precisely the process by which the grand jury nominated their foreperson did not harm the selection's validity—according to the supreme court, this particular process of requesting a grand jury to choose a foreperson was racially neutral on its face. No evidence showed that the grand jury acted in "other than a racially neutral manner," and this was favorable to the state.<sup>28</sup>

#### **Uncertain: Whether Phillips Changes Cofield II's Impact**

In *Phillips* the court made no reference to the constitutional standards it pronounced in *Cofield II* for a judge's valid selection of a grand jury foreperson. Nor does *Phillips* explicitly say that when a grand jury nominates a foreperson it must consider all grand jurors in its selection.

*Phillips* thus may be interpreted in any of four different ways. Absent any statement by the court, it is difficult to say which interpretation is appropriate.

*First interpretation.* The supreme court considered, though it did not say so, that *Cofield II* was inapplicable to the facts of *Phillips*. The selection of the foreperson for the grand jury that validly indicted the defendants occurred over a year before *Cofield II*'s certification date (June 28, 1989).<sup>29</sup> As already noted, the court limited *Cofield II*'s applicability to grand jury forepersons selected after that date. Thus, the



*Phillips* selection occurred at a past time when the state did not have to prove that all jurors had been considered in any grand jury foreperson's selection.

Under this interpretation the *Phillips* ruling does not mark a departure from *Cofield II* as a guide for future foreperson selections. A superior court judge choosing to appoint a foreperson nominated by grand jurors must assure that the nomination process considers all jurors, as required by *Cofield II*. The *Phillips* ruling, by this reading, could be used only to validate the selection of certain past grand jury forepersons.

*Second interpretation.* The supreme court assumed, without saying so, that the grand jurors in *Phillips* had adhered to the *Cofield II* requirement that all jurors be considered; the judge had, after all, directed them to choose "any one" of their panel. It is to this the court referred when ruling that the selection of the *Phillips* foreperson was "racially neutral." Again this interpretation would not mark a significant change from *Cofield II*: either a judge or a grand jury, in the future, would have to consider all jurors when selecting or nominating a foreperson.

*Third interpretation.* *Phillips* established two standards for acceptable foreperson selection: one to use when the grand jury nominates a candidate for appointment by the judge, and one to use when the judge appoints a foreperson without asking the grand jury for a nomination. In the latter instance, all jurors must be considered; in the former, that might not be necessary. *Phillips* requires only that the nomination process be "racially neutral."

*Phillips* provides little guidance as to what qualities meet that requirement. The supreme court seems to be saying that the nomination process itself is racially neutral. It is certainly possible for a grand jury to nominate a foreperson by a process that does not consider all jurors as candidates.

For example, a grand jury retires to consider a nomination as requested by a judge. A juror who previously served on the grand jury volunteers to be foreperson. The grand jury elects and nominates the volunteer without considering all the jurors. When jury members return to the courtroom, informing the judge that they have elected a juror for the judge's consideration, the judge appoints the nominee as foreperson. The selection would likely be valid under this interpretation of *Phillips*. Unlike the first two interpretations above, this would mark a change from *Cofield II*.

A superior court judge who asks the grand jury panel to nominate a foreperson should strive to make that nomination resemble the *Phillips* nomination as closely as possible; the supreme court indicated that the *Phillips* nomination by election was race neutral "under the circumstances" of that case.<sup>30</sup> As already noted, what those circumstances are is not completely clear. A presiding judge could add safeguards to a foreperson selection by advising the

grand jurors that they must be race neutral in their selection, and by asking, after the jury has completed its nomination, whether a foreperson was selected by race-neutral means. Such steps may allow a judge to discover evidence that a grand jury has acted "in other than a racially neutral manner"—evidence that may invalidate a *Phillips*-type grand jury nomination. The judge would want to record any race-neutral qualities of the nomination.

*Fourth interpretation.* The most cautious reading of *Phillips* would be that it does have precedential value in guiding judges who choose to consult with grand juries in selecting a foreperson, yet *Cofield II*'s requirements must also guide the nomination. Under this interpretation, a judge may wish to instruct the grand jurors not only to remain race neutral in their nomination (to comply with *Phillips*) but also to consider all of their members for foreperson (as required by *Cofield II*). A judge may want to inquire of the grand jury members after their selection whether the foreperson was nominated pursuant to those instructions. A judge could then consider making factual findings and conclusions of law as to whether both the *Phillips* and *Cofield II* requirements were met.

#### **The Moore Ruling, a Limited Alternative: Replacing a White with a Black Foreperson**

A third adequate state response to a claim of race discrimination in grand jury foreperson selection was approved by the North Carolina Court of Appeals in *State v. Moore*, 100 N.C. App. 217, 395 S.E.2d 434 (1990), but this solution has only limited applicability. The *Moore* court held that a black defendant challenging grand jury foreperson selection on *Cofield I* grounds "cannot be heard to complain that his constitutional rights have been violated when the trial court purposefully selects a black foreperson in an effort to address affirmatively the defendant's allegation of race discrimination."<sup>31</sup> Such court action effectively rendered moot the black defendant's claim of racial discrimination.

In *Moore*, a grand jury with a white foreperson had originally indicted the defendant for murder. The district attorney informed a superior court judge of the *Cofield I* decision, of Moore's motion to quash his indictment based on that case, and of the fact that no black had ever served as grand jury foreperson in Rutherford County. Then the judge replaced the white foreperson with a black foreperson. The grand jury, with the black foreperson, returned a new indictment of murder against the defendant. The court of appeals explicitly said that Moore's facts placed it in a window between *Cofield I* and *Cofield II* so that *Cofield I* (foreperson selection must be racially neutral) applied, but *Cofield II* (all grand jurors must be considered) did not.<sup>32</sup> Because *Cofield II* is applicable only after its June 28, 1989, certification, its holding did not apply to *Moore*.<sup>33</sup>

A Moore-type selection made after the *Cofield II* ruling will likely be invalid if, in choosing the black foreperson, the presiding judge does not consider all grand jurors. The Moore remedy, then, is useful only to validate certain foreperson selections before *Cofield II*'s certification on June 28, 1989.

### Summary

*Cofield I* indicates that there are two ways by which a black defendant may establish a prima facie case of race discrimination in the selection of the foreperson of the grand jury which returned indictments against him or her. One is by presenting evidence of discrimination in the selection of the particular grand jury foreperson. Another is by showing a substantial historic lack of grand jury foreperson service by blacks in the county where the defendant was indicted, despite general participation by blacks as grand jurors.

*Cofield II* describes one certain way in which a superior court judge may select a grand jury foreperson so as to safeguard against later claims of racial discrimination. This approach is to show that the judge considered all prospective grand jurors when selecting the foreperson. In using this method, a judge should consider making factual findings and conclusions of law to the effect that all grand jurors were considered.

Some uncertainty surrounds the usefulness of a second selection approach, presented in *Phillips*. In this approach a judge may, in his or her discretion, appoint as foreperson an individual the grand jury nominated by race-neutral means. Judges may interpret the impact of *Phillips* in several different ways. A judge may interpret *Phillips* as having no impact on current foreperson selections because *Phillips* applies only to pre-*Cofield II* selections; such a judge should simply select forepersons by conforming to *Cofield II*'s requirement that all grand jurors be considered. Or a judge may interpret the *Phillips* decision as presenting an adequate alternative to *Cofield II*—an alternative requiring a race-neutral nomination, but not necessarily one in which all grand jurors were considered; such a judge should consider making findings of fact and conclusions of law that reflect the race-neutral character of the jury's nomination process.

Perhaps the most cautious interpretation involves blending *Cofield II* requirements and *Phillips* requirements. Using this approach would require a judge to instruct the grand jurors to be both race neutral in their nomination and to consider all grand jurors in their selection. The judge should consider making findings of fact and conclusions of law that reflect these characteristics.

### Notes

1. N.C. GEN. STAT. § 15A-622(e) governs foreperson appointment.

2. While North Carolina's courts have described constitutional bars against race discrimination in grand jury foreperson selection, they have not provided procedural exceptions for such discrimination claims. See, e.g., *State v. Robinson*, 327 N.C. 346, 361, 395 S.E.2d 402 (1990), where the North Carolina Supreme Court ruled that the defendant waived his right to challenge alleged racial discrimination in grand jury foreperson selection when he did not make motions challenging any aspect of his indictment at or before trial [N.C. GEN. STAT. § 15A-952(b)(4)]. See also *State v. Colvin*, 92 N.C. App. 152, 155-56, 374 S.E.2d 126 (1988), cert. denied 324 N.C. 249, 377 S.E.2d 758 (1989), where the North Carolina Court of Appeals ruled that a claim of racial discrimination in grand jury foreperson selection must be timely made, whether it is a motion challenging bills under indictment under General Statutes Section 15A-952 (b) and (c), or it is a motion for a continuance under Section 15A-952 (b). The court indicated that it would not overrule a trial court judge's ruling on the timeliness of such a motion absent an abuse of discretion.

3. North Carolina's appellate court decisions addressing discrimination in grand jury foreperson selection deal only with black representation. Whether these decisions will extend to other minority groups is uncertain.

4. *Cofield I*, 320 N.C. at 308-9.

5. The North Carolina Supreme Court ruled, in *State v. Cofield*, 324 N.C. 452, 457, 379 S.E.2d 834 (1989), that statistical evidence used to establish a prima facie case of race discrimination "has little relevance in determining" whether the foreperson for a particular case was selected "as a result of racial discrimination."

6. *State v. McLaughlin*, 323 N.C. 68, 90, 372 S.E.2d 49 (1988), vacated and remanded for *McKoy* rehearing, 110 S. Ct. 1463 (1990). The defendant made motion to remand for *Cofield I* hearing based on defense counsel's assertion that he "believed" discrimination existed in the foreman's selection. Counsel based that belief on personal observation and conversations with county residents—the supreme court found this evidence inadequate for remand.

7. *Cofield I*, 320 N.C. at 304.

8. *Id.* at 309.

9. Section 19 provides, in part, that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."

10. Section 26 provides that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin."

11. *Cofield I*, 320 N.C. at 308. Despite its exclusive reliance upon state constitutional protections, the court noted that it would interpret the equal protection clause of the Fourteenth Amendment as providing similar protections. *Id.* at 305. The court also indicated some aspects of the scope of Fourteenth Amendment equal protection analysis it would apply. For example, the court said that it will confine its federal equal protection analysis to situations in which the defendant claiming an equal protection violation is a member of the allegedly excluded class. *Id.* at 306. The court announced no such standing limitation for claims based on state constitutional equal protection provisions.

12. *Id.* at 303.

13. *Id.* at 308-9.
14. *Id.* at 309.
15. *Cofield II*, 324 N.C. at 455-56.
16. *Id.* at 459.
17. *Id.* at 460.
18. *Id.*
19. *Id.* at 456.
20. *Cofield II*, 324 N.C. at 459-60.
21. *Id.* at 465.
22. *Id.* at 466.
23. *Id.* at 460, n.2.
24. *Id.* at 461. Date of certification is twenty days after the written opinion of the court has been filed with the clerk [Rule 32 (b), North Carolina Rules of Appellate Procedure].
25. *Phillips*, 328 N.C. at 10.
26. *Id.* at 11.

27. *Id.*
28. *Id.*

29. The *Cofield I* decision was filed July 7, 1987. The grand jury returned the original indictments against the Phillips on August 3, 1987. New indictments after selection of new grand jury foreperson by election were returned October 6, 1987. The *Cofield II* decision was filed June 8, 1989.

30. *Phillips*, 328 N.C. at 11.

31. *Moore*, 100 N.C. App. at 222.

32. The original *Moore* indictment with allegedly unconstitutionally selected foreperson was returned February 25, 1985. The *Cofield I* decision was filed July 7, 1987. The grand jury, with a new black foreperson, reindicted *Moore* on October 5, 1987. The *Cofield II* decision was filed June 8, 1989.

33. *Moore*, 100 N.C. App. at 222.

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