3.4 Whether to Have Hearing

Should defense counsel press for a probable cause hearing? The answer depends on several factors, which vary with the nature of the case and local judicial and prosecutorial practices. Some considerations are discussed below.

A. Reasons for Hearing

Dismissal of case. In cases in which the State's evidence is marginal, a judge may be willing to dismiss for lack of probable cause. The prosecutor also may want a probable cause hearing so that the onus for dismissing the case will be on the judge rather than on the prosecutor. Because the State can still seek to indict a defendant after a district court determination that no probable cause exists, a dismissal at the probable cause hearing stage may not provide a final resolution of the prosecution unless the State is seeking to have the court dismiss the matter or realizes the weakness of the case during the hearing.

Trial preparation. A probable cause hearing may provide counsel with an opportunity to obtain discovery, develop impeachment material for trial, and observe the demeanor of witnesses. The extent of this opportunity depends on how the presiding judge conducts the hearing—for example, whether the judge requires the State to establish probable cause through witnesses with personal knowledge (rather than through the investigating officer) and whether the court allows defense counsel sufficient latitude on cross-examination. For a further discussion of hearing procedures, including grounds for limiting hearsay evidence by the State, assuring the defendant's right to cross-examination, and recording the proceedings, see *infra* § 3.5, Hearing Procedures.

Other benefits. A probable cause hearing may give the defendant and prosecutor a more realistic view of the case and encourage a plea agreement. The court also may be willing to lower the defendant's bond after learning about weaknesses in the State's case. As a matter of client relations, client respect and rapport may be improved as a result of defense counsel litigating zealously at this stage.

B. Reasons against Hearing

Concessions for waiver or continuance. The prosecutor may be willing to make some concessions if the defendant waives, or does not oppose a continuance of, a probable cause hearing. Before revisions to the discovery statutes in 2004, one of the principal benefits of waiving was to obtain open-file discovery in districts in which prosecutors did

not voluntarily provide it. Now that the statutes require open-file discovery (*see infra* § 4.1A, Statutory Right to Open-File Discovery (2d ed. 2013)), the potential benefits of waiving are not as great. *See also infra* "Waiver" in § 3.4C, Impact of *Crawford* (discussing possible drawback of expressly waiving probable cause hearing). Still, there may be some value in waiving or at least not opposing a continuance of a probable cause hearing. For example, the prosecutor may agree to provide discovery earlier than statutorily required, stipulate to a bond reduction, or agree to a misdemeanor plea. Once the case is in superior court, which occurs if the defendant waives the probable cause hearing (*see* G.S. 15A-606(c)), the defendant may file a motion in superior court to compel discovery. *See* G.S. 15A-902(c) (motion for discovery must be heard by superior court judge).

Continuing the probable cause hearing also may benefit the defendant without a specific concession. Until the prosecution obtains an indictment or the defendant waives the probable cause hearing, the case does not move to superior court. Keeping the matter in district court may benefit the client—for example, the prosecutor may be more likely to extend a misdemeanor plea offer in district court while he or she may feel wedded to the felony charge once an indictment has issued. Further, the passage of time may allow for additional investigation of the case or an opportunity for the defendant to complete steps in mitigation. Depending on local practice, it may be possible to arrange to have a probable cause hearing date continued without the attendance of the defendant.

Difficulty of obtaining hearing. In some judicial districts, the defendant may not have a realistic chance of getting a probable cause hearing. In those circumstances, the defendant may fare better by not opposing the continuance of the probable cause hearing in exchange for some concession.

Potential drawbacks of hearing. On occasion, a probable cause hearing may harm a defendant's case. For example, it may alert the prosecutor to additional charges. Also, if a witness from a probable cause hearing is unavailable at trial, the State may argue that the defendant had an adequate opportunity to cross-examine the witness at the probable cause hearing and therefore the Confrontation Clause does not bar the State from introducing the witness's testimony or other out-of-court statements. *See infra* § 3.4C, Impact of *Crawford*. Generally, however, the opportunity to test the State's evidence outweighs the potential drawbacks of having a hearing.

C. Impact of *Crawford*

This section discusses the admissibility of statements at trial when the defendant has had an opportunity to cross-examine a witness at a probable cause hearing. For a discussion of the applicability of the Confrontation Clause to the admissibility of statements at a probable cause hearing, see *infra* § 3.5B, Rules of Evidence.

Prior opportunity for cross-examination. In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court held that the Confrontation Clause of the U.S. Constitution bars the State from introducing a witness's testimonial statements except in

certain circumstances. One permissible circumstance is when the witness who made the statement is unavailable for trial *and* the defendant had a prior motive and opportunity to cross-examine the witness concerning the statement. A probable cause hearing may afford the defendant a prior motive and opportunity to cross-examine an unavailable witness. In *State v. Ross*, 216 N.C. App. 337 (2011), the victim of a home invasion and shooting was unavailable to testify at trial because she had moved to Mexico, and the State introduced the victim's testimony from the probable cause hearing. The Court of Appeals found that the defendant had an adequate opportunity at the probable cause hearing to cross-examine the victim and that *Crawford* was not violated. The *Ross* Court found it significant that the defendant was represented by an attorney at the probable cause hearing, the same attorney acted as one of his trial lawyers, the attorney cross-examined the victim at the probable cause hearing, and the defendant had the same motive to cross-examine at trial. The court rejected the defendant's argument that the prior opportunity to cross-examine was inadequate because the defendant had not had an opportunity to review all of the discovery at the time of the hearing. *See also State v. Rollins*, 226 N.C. App. 129 (2013) (no violation of the defendant's confrontation rights occurred in murder case when the defendant had a chance at the defendant's plea hearing to cross-examine a State's witness who testified to the factual basis for the plea, the defendant successfully appealed the denial of his suppression motion following his guilty plea, the trial court found the witness was unavailable at trial when the witness claimed no recollection of any of the events or her prior testimony at the plea hearing, and the trial court admitted the witness's testimony from the plea hearing at trial; court rejected defendant's argument that he had no motive to cross-examine the witness at the plea hearing).

The U.S. Supreme Court has not addressed whether a probable cause hearing provides an adequate prior motive and opportunity for cross-examination. In a pre-*Crawford* case, the U.S. Supreme Court suggested that such testimony would be admissible if: (1) the statement was made under oath; (2) the defendant was represented by counsel at the hearing; (3) the defendant had motive and opportunity to cross-examine the witness about the statement at the hearing; and (4) the hearing was conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. *California v. Green*, 399 U.S. 149, 165 (1970); *see also See* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later*, at 31 (Apr. 2005) (summarizing cases)

An *unrecorded* probable cause hearing may not qualify as a prior opportunity for cross-examination under *Crawford*. *See State v. Miller*, ___ N.C. App. ___, 801 S.E.2d 696 (2017) (finding that it could not determine that defendant had a prior motive and opportunity for cross-examination for testimonial witness statements made at an unrecorded district court trial), *review granted*, ___ N.C. ___, 802 S.E.2d 731 (2017).

Ross also found that the Confrontation Clause did not bar the State from introducing at trial statements made by the witness before the probable cause hearing for the purpose of corroborating the witness's testimony from the probable cause hearing (at which the defendant had an adequate motive and opportunity for cross-examination). The statements of the unavailable witness made before the probable cause hearing in *Ross*

were substantially similar to the probable cause testimony of the witness, and the defendant failed to identify any issues not raised in the cross-examination at the probable cause hearing that he would have raised at trial. For additional discussion of *Ross*, see Jessica Smith, *Court Holds that Probable Cause Hearing Provides a Prior Opportunity to Cross Examine*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 7, 2011). While not discussed in *Ross*, under Rule 806 of the North Carolina Rules of Evidence, an attack on the hearsay declarant's credibility is required before hearsay may be used for coorborative purposes.

Notwithstanding the result in *Ross*, counsel has a number of arguments to distinguish the decision and resist the admission of testimonial statements of an unavailable witness. Among other things, although North Carolina's statutes give the defendant the right to cross-examine at a probable cause hearing (*see infra* § 3.5C, Cross-Examination), as a practical matter judges may limit cross-examination. If the judge does not allow counsel to cross-examine the witness on issues that counsel would have explored at trial, counsel may be able to distinguish *Ross.* If counsel can identify topics that were not explored at the probable cause hearing—perhaps because discovery revealed significant additional evidence—counsel can argue that the opportunity to cross-examine at the probable cause hearing was inadequate. The defendant can likewise argue that cross-examination was inadequate if the State seeks an indictment on different charges following the probable cause hearing, as the motive to cross-examine may be affected by the choice of charges. *Ross* also can be distinguished if the defendant was not represented at the probable cause hearing or was represented by an attorney who did not act as trial counsel. If the witness made testimonial statements after the probable cause hearing, the defendant obviously would have had no opportunity to cross-examine the witness about those statements and, at the least, those should be inadmissible. If testimonial statements were made before a probable cause hearing but not admitted at the hearing, the defendant may not have had a prior motive and opportunity to cross-examine the witness on those statements. If the trial judge holds that there is no *Crawford* violation, the testimony from the probable cause hearing or the witness's out-of-court statements still must satisfy North Carolina's Rules of Evidence, including applicable hearsay exceptions. *See, e.g.*, N.C. R. EVID. 804(b)(1) (criteria for admission of former testimony as exception to hearsay rules).

Waiver. An additional issue is whether waiving a probable cause hearing would allow admission at trial of an unavailable witness's testimonial statements. Waiver of the right to confrontation, like the waiver of other constitutional rights, must be knowing, voluntary, and intelligent. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009); Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/02, at 21 (UNC School of Government, Apr. 2010). It seems unlikely that the courts would hold that waiver of a probable cause hearing constitutes a knowing, voluntary, and intelligent waiver of the right to confront witnesses, whom the State may or may not have called at a probable cause hearing. If forgoing a probable cause hearing would allow the State to introduce at trial the statement of any unavailable witness who could have testified at the hearing, the constitutional requirements announced in *Crawford* would be "effectively eliminate[d]." *Belvin v. State*, 922 So. 2d 1046, 1053 (Fla. App. 2006) (citation omitted)

(in a state that permits pretrial depositions, court rejects State's argument that not requesting a deposition allows admission at trial of statements of unavailable witness who was not deposed); *see also Melendez-Diaz*, 557 U.S. at 324–25 (rejecting argument that a Confrontation Clause objection is waived if the defendant fails to call or subpoena a witness); *Glasser v. U.S.*, 315 U.S. 60 at 71 (1942) ("To preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights.").