3.5 Hearing Procedures

A. Standard for Probable Cause

At a probable cause hearing, the court must resolve two issues:

- whether probable cause exists to believe that the charged offense was committed, and
- whether probable cause exists to believe that the defendant committed the offense. *See* G.S. 15A-611(b); *State v. Hudson*, 295 N.C. 427 (1978).

What is the standard of "probable cause" at a probable cause hearing? The North Carolina courts do not appear to have addressed the question. Some commentators suggest that the standard is higher than for a lawful arrest—that it is closer to the prima facie evidence requirement for submission of an offense to the jury. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 14.3(a), at 360-61 (4th ed. 2015) (probable cause standard for arrest tolerates greater uncertainty in evidence because of need for police to take immediate action; however, defendant arguably should not be bound over for trial if evidence would not permit jury to convict).

B. Rules of Evidence

Hearsay. G.S. 15A-611(b) requires the State to establish probable cause either by nonhearsay evidence or by evidence that satisfies an exception to the hearsay rule. The two exceptions to this requirement are for:

- reports by technical experts (G.S. 15A-611(b)(1)), and
- limited categories of hearsay, such as ownership of property or lack of consent to entry, if there is "no serious contest" (G.S. 15A-611(b)(2)).

Although some judges may allow considerable hearsay, the statute actually restricts its use. According to the official commentary to G.S. 15A-611, although the statute does not force the State to bring all its witnesses to the probable cause hearing, it was intended to prevent the State "from holding back a truly key witness, for example, the victim in a rape case." Defense counsel may not want to object to hearsay evidence, however, if it provides useful discovery.

Rule 1101(b) of the North Carolina Rules of Evidence states that the rules of evidence, other than with respect to privileges, do not apply to probable cause hearings. While this rule may permit evidence to come in that would not be admissible at trial, G.S. 15A-611(b) still requires sufficient nonhearsay evidence (or evidence within a hearsay exception) to establish probable cause.

Confrontation Clause. Although North Carolina law restricts the use of out-of-court statements at probable cause hearings that do not satisfy hearsay rules, the Confrontation Clause likely does not apply at this stage of the proceedings and may not bar on constitutional grounds out-of-court statements that would be inadmissible at trial. *See Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010) (holding that Confrontation Clause does not apply to preliminary hearing and categorizing it as a trial right); *Sheriff v. Witzenburg*, 145 P.3d 1002 (Nev. 2006) (same); *see also State v. Call*, 349 N.C. 382 (1998) (declining in pre-*Crawford* case to extend defendant's confrontation rights to pretrial hearings). *But see U.S. v. Greene*, 670 F.2d 1148 (D.C. Cir. 1981) (finding a confrontation right at suppression hearing under former test). For additional cases, see Jessica Smith, *Does Crawford Apply in Pretrial Proceedings?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 31, 2015).

Illegally-obtained evidence. G.S. 15A-611 provides that the judge is not required to exclude illegally-obtained evidence at a probable cause hearing, but a judge may do so. *See* G.S. 15A-611 Official Commentary (judge may want to exclude evidence and "wash out at an early stage a case doomed to be lost in any event").

Sequestration. The court may sequester witnesses as necessary. *See* G.S. 15A-611 Official Commentary. Sequestration should normally be requested as a matter of course to protect the defendant's right to a fair hearing and to ensure that witness testimony is the product of independent recollection.

C. Cross-Examination

Right to cross-examine. G.S. 15A-611(a)(4) grants the defendant the right to cross-examine witnesses at a probable cause hearing. Some older cases suggest in dicta that a judge may cut off cross-examination once the State has presented sufficient evidence to establish probable cause. *See Adams v. Illinois*, 405 U.S. 278, 282 (1972) (under Illinois procedure, judge may "terminate the preliminary hearing once probable cause is established"); *State v. Cradle*, 281 N.C. 198 (1972) (citing *Adams*). But the current statute, adopted after the above-cited cases, specifically rejects such a practice. The drafters of the statute considered a proposal that would have allowed a judge to terminate the hearing once he or she had heard sufficient evidence to establish probable cause. The General Assembly deleted the proposal out of concern that judges might "cut proceedings too short." G.S. 15A-611 Official Commentary. While a judge is entitled to impose reasonable limits on cross-examination, defense counsel should argue against constrictive limits on the statutory right to conduct a full cross-examination. To the extent cross-examination is unduly limited, a record should be made to document the scope of the disallowed cross-examination. In the event the witness is later unavailable and the State

seeks to use the prior testimony from the hearing at trial, defense counsel may be able to rebut any argument that the defendant had a prior motive and opportunity to cross-examine the witness.

Practice suggestions. Because the judge may not allow counsel a great deal of latitude at a probable cause hearing, counsel ordinarily should structure cross-examination to bring out the most important information first. Sample probable-cause questions for different kinds of cases appear at the end of this chapter. Cross-examination may vary depending on counsel's goals at the probable cause hearing.

- If counsel believes that the court may dismiss for lack of probable cause, counsel may want to limit cross-examination. Extensive cross-examination could lead the witness to reveal information that supplies probable cause.
- If the principal goal is to obtain additional information, counsel should use open-ended questions to get the witness to provide expansive answers. Counsel should use follow-up questions to exhaust the witness's recollection. (For example: Did x make any statements? Did x make any other statements?) The benefits of open-ended questions at this stage generally outweigh the risks of educating the prosecutor or perpetuating testimony for use at trial. Because judges may be unreceptive to use of the hearing for discovery purposes, counsel should be prepared to explain how questions relate to the issue of probable cause.
- To pin a witness down for future impeachment, counsel may want to use more traditional cross-examination questions (close-ended questions calling for a yes or no answer). Aggressive cross-examination has its risks as it may cause the witness to clam up at the hearing, refuse to be interviewed later, or harden his or her desire for prosecution. The questions also may alert the witness or prosecution to problem areas that can be fixed before trial.

D. Calling Witnesses

G.S. 15A-611(a)(3) grants the defendant the right to testify at the probable cause hearing and call other witnesses, but counsel should rarely call the defendant or other defense witnesses. Statements made by the defendant at a probable cause hearing may be used against the defendant at trial for impeachment, further investigation, or other purposes. Potential defense witnesses ordinarily should not be present at the probable cause hearing because the prosecution may ask that they take the stand. Counsel may want to consider subpoenaing key State witnesses if they are unwilling to be interviewed.

E. Recording

Counsel should request that the probable cause hearing be recorded and that the recording be transcribed if the case is going to proceed to trial. *See also infra* § 5.8B, Transcripts (2d ed. 2013) (discussing indigent defendant's right to transcript of prior proceedings). Most district court courtrooms now have digital recording equipment; counsel should verify that the courtroom in which the hearing will be held has functional recording equipment. An indigent defendant may be entitled to funds from the court to procure a

court reporter for the hearing. If the courtroom does not have recording equipment and the court will not provide a court reporter, counsel should bring a tape recorder to record the probable cause hearing, which may help impeach a witness at trial or support a claim of error on appeal. (Counsel may want to bring a tape recorder even if the proceedings are recorded so that counsel can easily review the testimony when preparing for trial.) Defense counsel should notify the court and request permission if counsel is seeking to record the proceeding.