

9.4 Probable Cause Hearing

- A. When Required
 - B. Waiver of Probable Cause Hearing
 - C. Time Limits
 - D. Hearing Procedures
 - E. Advocacy at Probable Cause Hearing
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9.4 Probable Cause Hearing

A. When Required

A probable cause hearing must be conducted in any proceeding in which a juvenile is alleged to have committed an offense that would be a felony if committed by an adult and the juvenile was 13 years of age or older at the time of the alleged offense. G.S. 7B-2202(a).

Although the statute requires a hearing if the criteria are met, in some districts a probable cause hearing is not routinely held unless the prosecution is moving for transfer to superior court. In other districts, probable cause hearings are held for all felony allegations. Counsel should consider the merits of requesting a probable cause hearing if one is not routinely scheduled within the statutory time limits. *See infra* § 9.4B, Waiver of Probable Cause Hearing. For instance, the court may dismiss the petition if the State has a weak case, or it may find probable cause for a lesser included offense only. If the court does not dismiss the petition, information obtained during the probable cause hearing may assist counsel in plea negotiations or in preparing for adjudication.

B. Waiver of Probable Cause Hearing

The juvenile, through counsel, may waive by written notice the right to a probable cause hearing. If the hearing is waived, the juvenile must stipulate to probable cause. G.S. 7B-2202(d). Counsel should consider several factors in advising the juvenile whether to waive the probable cause hearing. These factors are discussed below.

Reasons for the hearing.

- If the State's evidence is marginal, the court may be willing to dismiss for lack of probable cause or find probable cause for a lesser-included misdemeanor, which would preclude transfer of the case to superior court.
- A probable cause hearing may provide counsel with an opportunity to obtain discovery, observe the demeanor of witnesses, and develop impeachment material for the adjudicatory hearing.
- A probable cause hearing may give the juvenile and prosecutor a more realistic view of the case and encourage a plea agreement.

Reasons against the hearing.

- The prosecutor may be willing to make some concession in exchange for a waiver of the hearing, such as a favorable plea agreement either in juvenile or superior court or an agreement not to seek transfer.
- The court may decide to transfer the case to superior court on its own motion if the evidence presented at the probable cause hearing is sufficiently compelling.
- On occasion, a probable cause hearing may alert the prosecutor to additional charges.
- If a witness from a probable cause hearing is unavailable at the adjudicatory hearing, the State may argue that the juvenile had an adequate opportunity to cross-examine the witness at the probable cause hearing and, therefore, that the Confrontation Clause does not bar the State from introducing the witness's testimony or other out-of-court statements. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 3.4C, Impact of *Crawford* (2d ed. 2013).

Generally, the opportunity to test the State's evidence outweighs the potential drawbacks of having a hearing.

C. Time Limits

The probable cause hearing must be held within 15 days of the juvenile's first appearance. The court may continue the hearing for good cause. G.S. 7B-2202(a).

D. Hearing Procedures

Defender Manual. The North Carolina Defender Manual contains a chapter on probable cause hearings in criminal court that includes information generally applicable to juvenile court proceedings. *See* 1 NORTH CAROLINA DEFENDER MANUAL, Ch. 3, Probable Cause Hearings (2d ed. 2013).

Representation. The prosecutor must represent the State at a probable cause hearing. G.S. 7B-2202(b)(1); *cf.* G.S. 7B-2404 (prosecutor must represent State in contested delinquency proceedings, including probable cause). Counsel should object if the prosecutor is not present for the probable cause hearing.

The juvenile must be represented by counsel at the probable cause hearing. G.S. 7B-2202(b)(2).

Evidence and hearsay exceptions. Subject to limited exceptions, discussed below, the State must establish, by nonhearsay evidence or evidence within a hearsay exception, probable cause that the juvenile committed the charged offense. G.S. 7B-2202(c). Each witness must be under oath and subject to cross-examination. G.S. 7B-2202(b)(4).

In addition to the restriction on hearsay, other requirements of the North Carolina Rules of Evidence may apply at a probable cause hearing in juvenile cases. *See In re Ford*, 49 N.C. App. 680, 683 (1980) (observing that evidentiary questions at a probable cause

hearing “may well merit” the court’s attention in a juvenile delinquency appeal). Rule 1101(b) states that the Rules of Evidence do not apply at probable cause hearings “in criminal cases.” There is no comparable provision for probable cause hearings in juvenile cases. However, counsel may not want to object if the evidence provides useful discovery. Even if the rules of evidence are relaxed in juvenile cases and inadmissible evidence is permissible, the State still must establish probable cause by admissible evidence pursuant to G.S. 7B-2202(c).

There is a statutory exception to the hearsay rule at a probable cause hearing allowing the court to receive a report by a physicist, chemist, firearms identification expert, fingerprint technician, or expert or technician in another scientific, professional, or medical field. The report must contain the result of any examination, comparison, or test performed regarding the case. G.S. 7B- 2202(c)(1). “Reliable hearsay” as to value, ownership of property, possession of property by a person other than the juvenile, lack of consent of the owner, possessor, or custodian of property to the breaking and entering of the premises, chain of custody, and authenticity of signature is also admissible if there is “no serious contest.” G.S. 7B-2202(c)(2).

Counsel may object to hearsay that does not fall within an exception. Requiring the State to present non-hearsay evidence may provide an opportunity to evaluate the strength of the State’s evidence and could lead to a finding of no probable cause and dismissal of the petition.

Counsel must determine whether there is a benefit to presenting evidence at the probable cause hearing. Because the State’s burden of proof is relatively low, it is generally disadvantageous to present evidence, as it might establish probable cause or reveal the defense strategy for the adjudicatory hearing.

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 may 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 the Confrontation Clause does not apply to preliminary hearings); *State v. Lopez*, 314 P.3d 236, 239 (N.M. 2013) (same); *Sheriff v. Witzenburg*, 145 P.3d 1002, 1005 (Nev. 2006) (same). *But see Curry v. State*, 228 S.W.3d 292, 296–98 (Tex. App. 2007) (holding that the Confrontation Clause applies at pretrial suppression hearings).

Burden of proof. The State must show that there is “probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the juvenile committed it. . . .” G.S. 7B-2202(c). North Carolina courts have not defined the standard of probable cause for probable cause hearings in juvenile court. However, some commentators suggest that the standard for probable cause hearings in adult cases 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. LAFAYETTE ET AL., CRIMINAL PROCEDURE § 14.3(a), at 321-22 (3d ed. 2007) (probable cause standard for arrest

tolerates “considerable uncertainty” because of need for officers to take immediate action; however, standard for probable cause hearing “should require a higher and different degree of probability” than standard for arrest); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 22.03, at 517 (6th ed. 2015) (standard for probable cause hearing in a growing number of states requires prosecutor to present enough evidence to overcome directed verdict for defendant).

E. Advocacy at Probable Cause Hearing

Preparation. Counsel should prepare to challenge the State to meet its burden of proof and should move for dismissal if the State fails to present evidence of each element of the offense alleged and of identification of the juvenile as the perpetrator. Preparation for the hearing includes becoming familiar with the elements of each offense alleged as well as lesser included offenses. If advantageous to the juvenile, counsel should argue for a finding of probable cause for a lesser included offense. Counsel should also prepare case law or legal memoranda to support a motion to dismiss.

Cross-examination. Because the court may not allow counsel a great deal of latitude, cross-examination should be structured to elicit the most important information first. Sample probable cause questions appear at the end of this chapter. *See infra* Appendix 9-1: Sample Questions for Probable Cause and Preliminary Hearings.

Questions on cross-examination will vary depending on counsel’s goal for the hearing. If the desired result is dismissal for lack of probable cause, counsel may want to limit cross-examination, as extensive cross-examination could lead the witness to supply information that supports a finding of probable cause. Closed-ended questions, requiring a yes or no answer, typically provide counsel more control over the witness and are therefore desirable when counsel is seeking dismissal for lack of probable cause. Aggressive cross-examination can be risky, however, as it may cause the witness to refuse to cooperate later or harden his or her resolve for prosecution. Questions may also alert witnesses to problem areas in their testimony that can be addressed at the adjudicatory hearing.

Extensive cross-examination may be desirable where counsel’s goal is to elicit answers that can be used to impeach any inconsistent testimony by the witness at a subsequent hearing or to obtain additional information. Open-ended questions may elicit the most information, with follow-up questions as needed. Obtaining information has been recognized as a legitimate purpose of a probable cause hearing in criminal proceedings. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (recognizing constitutional right to counsel at probable cause hearing based on counsel’s ability to obtain discovery and develop impeachment evidence); *Vance v. North Carolina*, 432 F.2d 984, 988–89 (4th Cir. 1970) (to same effect). Other cases state that the purpose of a probable cause hearing is for the court to determine whether there is probable cause but still recognize that the opportunity for discovery is incidental to that purpose. *State v. Hudson*, 295 N.C. 427, 430 (1978); *cf. In re Bass*, 77 N.C. App. 110, 114 (1985) (stating that a probable cause hearing is not

conducted for the purpose of discovery). Counsel should therefore be prepared to explain how questions relate to the issue of probable cause.

Juvenile's evidence. Under G.S. 7B-2202(b)(3), the juvenile may testify and call other witnesses at the probable cause hearing. Presenting witnesses on the juvenile's behalf is not usually beneficial, however, as they may reveal the defense strategy for adjudication and may assist the State in meeting its burden of proving probable cause. Potential defense witnesses should ordinarily not be present at the probable cause hearing because the State could call them to testify. Counsel might want to subpoena witnesses for the prosecution if they are unwilling to be interviewed.

Record of the hearing. Counsel should ensure that the probable cause hearing is recorded as required pursuant to G.S. 7B-2410. This may aid in impeachment of a witness at the adjudicatory hearing or trial or support a claim of error on appeal. If the courtroom does not have recording equipment, counsel should request that a court reporter attend the hearing and take transcription notes. Counsel could also have an investigator or other person working on behalf of the juvenile be present to make notes of the testimony. That person could then be called to impeach a witness who subsequently gives inconsistent testimony. Finally, counsel could bring their own recording equipment to record the testimony at the hearing.