Chapter 3
Probable Cause Hearings

G.S. 15A-606 and G.S. 15A-611 through G.S.15A-615 grant the defendant the right to a probable cause hearing (formerly called a preliminary hearing). Some judicial districts still hold probable cause hearings; many others do not. A probable cause hearing can have meaningful benefits for a criminal defendant. *See generally* Alyson Grine, *No Probable Cause?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 23, 2009) (discussing why probable cause is important stage of case and why many districts may not hold probable cause hearings). Whether or not a hearing takes place, however, counsel may gain some benefit from the probable cause stage of the case.

This chapter addresses probable cause hearings in adult prosecutions for criminal offenses. It does not discuss probable cause hearings in probation violation proceedings (*see* G.S. 15A-1345(c)), in post-release supervision violation proceedings (*see* G.S. 15A-1368.6), or in juvenile proceedings (*see* G.S. 7B-2202). *See also* NORTH CAROLINA JUVENILE DEFENDER MANUAL Ch. 9, Probable Cause and Transfer Hearings (UNC School of Government, 2017). For information on probable cause in the context of motions to suppress, see *infra* Ch. 14, Suppression Motions (2d ed. 2013).

3.1 Purpose of Hearing

A. Screening

At a probable cause hearing, the district court must review the evidence to determine whether the case should be bound over (that is, transferred) to superior court. If the district court finds no probable cause, it must dismiss. *See* G.S. 15A-612(a)(3); *State v. Hudson*, 295 N.C. 427, 430 (1978) (hearing supposed to ensure that "defendant will not be unjustifiably put to the trouble and expense of trial"). The screening value of probable cause hearings is somewhat diminished by provisions allowing the State to reinitiate prosecution after a finding of no probable cause—a finding of no probable cause and dismissal at the district court level does not prevent the State from subsequently seeking an indictment from the grand jury for the same offense. *See infra* § 3.6C, No Probable Cause.

B. Discovery and Impeachment

A probable cause hearing provides the opportunity for discovery and the development of impeachment evidence for use at trial. These may be the more important functions of the hearing because courts do not often dismiss for lack of probable cause.

Some cases have held that discovery is a legitimate purpose of a probable cause hearing. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (recognizing constitutional right to counsel at probable cause hearing because counsel can use hearing 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 to screen the case, not to provide discovery. Those cases still acknowledge that the hearing "may afford the opportunity for a defendant to discover the strengths and weaknesses of the State's case." *State v. Hudson*, 295 N.C. 427, 430 (1978). Thus,

questions that provide the defendant with discovery should be permissible as long as they also bear on the determination of probable cause.

3.2 Right to Hearing

A. Eligible Cases

A defendant has a statutory right, before indictment, to a probable cause hearing in district court in all cases within the original jurisdiction of the superior court. *See* G.S. 15A-601(a) (first appearance required for cases within original jurisdiction of superior court); G.S. 15A-606(a) (at first appearance, probable cause hearing must be scheduled unless it is waived). In addition to felony cases, the superior court has original jurisdiction over misdemeanors that are joined with a felony. *See* G.S. 7A-271(a)(3). Therefore, a defendant appears to have a statutory right to a probable cause hearing on felonies and joined misdemeanors.

A probable cause hearing is not required by the United States or the North Carolina Constitution. *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (due process does not require full probable cause hearing); *State v. Lester*, 294 N.C. 220 (1978) (no equal protection violation by practice of holding probable cause hearings for some defendants but not others); *State v. Foster*, 282 N.C. 189 (1972) (state constitution does not require probable cause hearing); *State v. Brunson,* 221 N.C. App. 614 (2012) (rejecting argument that denial of probable cause hearing deprived defendant of discovery and impeachment evidence in violation of his constitutional rights to due process and confrontation; defendant failed to show reasonable possibility that a different result would have been reached at trial had he been given a probable cause hearing). *But see State v. Freeland*, 667 P.2d 509 (Or. 1983) (en banc) (finding equal protection violation under Oregon state constitution for lack of consistent criteria in holding of hearings), *overruled by State v. Savastono*, 309 P.3d 1083 (Or. 2013) (en banc) (rejecting *Freeland* test for equal protection violation). If a probable cause hearing is held, however, constitutional protections apply. *See infra* § 3.2E, Right to Counsel.

B. Effect of Indictment

The North Carolina courts have held that once the State obtains an indictment, the district court loses jurisdiction of the case and can no longer hold a probable cause hearing. Therefore, the State can avoid a probable cause hearing by obtaining an indictment first. *See State v. Lester*, 294 N.C. 220 (1978) (probable cause hearing not prerequisite to indictment); *see also State v. Hudson*, 295 N.C. 427, 431 ("it is well settled that there is no necessity for a preliminary hearing after a grand jury returns a bill of indictment"). Similarly, a probable cause hearing may not be held if an information is filed on waiver of indictment. *See* G.S. 15A-611(d).

The defendant has limited remedies if the State obtains an indictment before a probable cause hearing occurs. Two possibilities raised in other cases are as follows:

- In an older case, the superior court gave defense counsel an opportunity to examine the State's witnesses after indictment as a remedy for the State's failure to proceed with a preliminary hearing. *See State v. Foster*, 282 N.C. 189 (1972) (defendant was present at each of five scheduled preliminary hearings; first four hearings were continued on State's motion and over defendant's objection, and at fifth hearing district court dismissed case with leave to refile); *see also Coleman v. Burnett*, 477 F.2d 1187 (D.C. Cir. 1973) (suggesting that post-indictment remedies, such as depositions of prosecution witnesses, may be ordered).
- A conviction may be vacated if the defendant shows that the failure to hold a probable cause hearing prejudiced the presentation of his or her defense. This burden is difficult to meet and requires the defendant to show a reasonable possibility of a different result at trial without the error. *See, e.g., State v. Wiggins*, 334 N.C. 18 (1993) (defendant not prejudiced by lack of hearing where defendant was in custody, defendant made two written motions for a hearing, and four months elapsed between the first appearance and indictment).

C. Scheduling Requirements

Time limits. The district court generally must schedule a probable cause hearing for between five and fifteen working days from the date of the defendant's first appearance in district court. *See* G.S. 15A-606(d) (hearing may be sooner than five working days if parties consent and later than fifteen working days if no session of district court is scheduled within that time). Unless the defendant waives the right to a probable cause hearing, the court may grant a continuance only on a showing of good cause and may grant a continuance requested within 48 hours of the hearing only on a showing of extraordinary cause. *See* G.S. 15A-606(f).

Remedies. Although the statutory time limits appear to be strict, enforcement is problematic. Possible remedies are as follows:

- Counsel may request dismissal of the charges if the State is not ready to proceed. Generally, however, the State may reinitiate the charges later. *See* G.S. 15A-612(b); *State v. Coffer*, 54 N.C. App. 78 (1981) (State's taking of voluntary dismissal at probable cause hearing did not bar later indictment). Such a result may harm an out-of-custody defendant, who may have to post an additional bond on rearrest.
- Instead of moving for dismissal, counsel may move that an in-custody defendant be released or that an out-of-custody defendant be discharged from any bail requirement or other release conditions. *See* 18 U.S.C. 3060(d) (requiring this remedy in federal court if government does not proceed to probable cause hearing or indict defendant within statutory time limits); *see also* G.S. 15A-534(e) (district court may modify pretrial release order before probable cause hearing or waiver of hearing).
- If a hearing does not occur within the statutory time limits, an in-custody defendant may challenge continued detention by petitioning the superior court for a writ of habeas corpus. The superior court may hold a hearing to determine the legality of the restraint (*see State v. Harrington*, 283 N.C. 527 (1973)) or may order the defendant released from custody unless a prompt probable cause hearing is held. *See State v.*

Foster, 282 N.C. 189, 196 (1972) (suggesting this possibility before indictment); *see also* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 14.2(g), at 351-52(4th ed. 2015) (defendant held in custody beyond time limit for bindover hearing may obtain release through writ of habeas corpus). The cited cases suggest that a defendant may file a habeas corpus petition even after the State obtains an indictment, but the potential relief is unclear in those circumstances.

- A conviction may be vacated if the defendant shows that the failure to comply with statutory time limits prejudiced the presentation of his or her defense. This is a difficult burden to meet. *See State v. Siler*, 292 N.C. 543 (1977) (defendant's statutory rights were not violated where the trial court allowed the State's two motions to continue the probable cause hearing, resulting in a two-week delay); *State v. Rotenberry*, 54 N.C. App. 504 (1981) (defendant not prejudiced by two-day delay).

D. Demand for Hearing

The statutes do not require that the defendant file a formal demand for a probable cause hearing; however, in judicial districts that typically do not hold probable cause hearings, counsel may need to do so. A demand puts the court and prosecutor on notice that counsel wants to depart from the norm. The demand does not need to meet any particular requirements as to form; a signed motion filed with the court and served on the State that cites the probable cause statutes and requests a hearing should suffice. However, a prosecutor who is determined to avoid a probable cause hearing may do so by dismissing the case and later seeking a grand jury indictment.

E. Right to Counsel

An indigent defendant has both a statutory right and constitutional right under the Sixth Amendment to counsel at a probable cause hearing. *See* G.S. 7A-451(b)(4); G.S. 15A-611(c); *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (probable cause hearing is "critical stage" of proceedings for appointment-of-counsel purposes; although hearing is not constitutionally required, defendant has constitutional right to counsel if one is held); *State v. Cradle*, 281 N.C. 198 (1972) (recognizing that failure to appoint counsel at probable cause hearing must be reviewed under harmless-beyond-reasonable-doubt standard, but finding no error); *see also Moore v. Illinois*, 434 U.S. 220 (1977) (Sixth Amendment violated by identification of defendant at preliminary hearing in absence of counsel).

3.3 Waiver of Hearing

A. Restrictions on Waiver

Some statutory safeguards exist to protect against early, uncounseled waivers of probable cause hearings. A defendant represented by counsel, or who desires to be represented by counsel, may not waive a probable cause hearing before the scheduled hearing date without the written consent of the defendant and counsel. *See* G.S. 15A-606(a).

B. Effect of Waiver

Bindover. Upon waiver of a probable cause hearing, the district court must bind the defendant over to superior court for further proceedings. *See* G.S. 15A-606(c). The State still must seek an indictment after bindover unless the defendant consents to a bill of information—an indictment or bill of information is required to confer jurisdiction on the superior court. *See* G.S. 15A-627(a) (requiring indictment after bindover); G.S. 15A-923(a) (allowing bill of information only on waiver of indictment).

Discovery deadlines. Waiver of the probable cause hearing triggers the deadlines for requesting statutory discovery. (A request for voluntary discovery is ordinarily a prerequisite to a later motion to compel statutory discovery. *See infra* § 4.2D, Requests for Discovery (2d ed. 2013). A defendant represented by counsel before waiver of the probable cause hearing has ten working days after waiver to request voluntary discovery. *See* G.S. 15A-902(d). If a represented defendant is indicted or consents to a bill of information before a probable cause hearing is held or waived, the ten working days runs from notice of the indictment or consent to the information. *Id*.

Practice note: Because the deadlines for requesting statutory discovery are relatively early, counsel should set up a system for automatically generating and serving statutory discovery requests in every case. Constitutional discovery, while not subject to the timeline for statutory discovery, may and should be requested within requests for statutory discovery.

Other effects. The waiver of a probable cause hearing is not admissible in evidence. *See* G.S. 15A-606(b); *see also State v. Hairston*, 280 N.C. 220, 227 (1972) ("The preliminary hearing may be waived [under prior G.S. 15-85], in which case the defendant is bound over to the superior court to await grand jury action without forfeiting any right or defense available to him.").

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.").

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.

3.6 Disposition after Hearing

A. Probable Cause as to Felony

If the district court judge finds probable cause as charged, or probable cause of a lesser offense within the original jurisdiction of the superior court, the judge must bind the defendant over to superior court. *See* G.S. 15A-612(a)(1). After bindover, the State still must seek an indictment of the defendant unless the defendant consents to the filing of a bill of information. *See* G.S. 15A-627(a); G.S. 15A-923(a). A finding of probable cause without an indictment or bill of information is not sufficient to confer jurisdiction on the superior court.

If the defendant is represented by counsel and probable cause is found as to a felony, the defendant has ten working days after the hearing to request voluntary statutory discovery. *See* G.S. 15A-902(d).

B. Probable Cause as to Misdemeanor

If the judge finds no probable cause as to the offense charged, but probable cause of a lesser-included misdemeanor, the judge may:

- set the case for trial in district court for between five and fifteen working days after the probable cause hearing (G.S. 15A-612(a)(2); G.S. 15A-613);
- accept a plea of guilty or no contest if the prosecutor consents (G.S. 15A-613); or
- proceed to try the misdemeanor immediately if both the prosecutor and defendant consent (G.S. 15A-613).

In the absence of a new pleading, the judge may not set the case for trial on an offense that is not a lesser-included offense of the charged offense. *See* G.S. 15A-612(a)(2). The prosecutor may prepare a statement of charges to charge a misdemeanor that is not a lesser-included offense of the charged offense. *See* G.S. 15A-922(a). The defendant ordinarily is entitled to three working days to prepare a defense following the filing of a statement of charges. G.S. 15A-922(b)(2).

C. No Probable Cause

If the judge finds no probable cause for the charged offense or any lesser-included offense, the judge must dismiss the case. *See* G.S. 15A-612(a)(3). Dismissal does not bar reinitiation of the prosecution. *See* G.S. 15A-612(b). Although not a common practice, the State may seek and obtain an indictment if it disagrees with the district court's probable cause decision. *See State v. Cradle*, 281 N.C. 198, 204 (1972). The State also may start the case again in district court through the issuance of a warrant or other process, although the commentary to G.S. 15A-612(b) suggests that the State should have new evidence before doing so.

D. Review of Pretrial Release Conditions

If the judge binds the case over to superior court or calendars the case for trial in district court, he or she must review the defendant's eligibility for pretrial release. *See* G.S. 15A-614. This is a helpful provision to have on hand because the State may argue, erroneously, that the district court no longer has jurisdiction and therefore cannot modify bond once it has found probable cause.

E. Testing for Sexually Transmitted Diseases

After a finding of probable cause for certain sex offenses, the victim, parent, or guardian of a minor victim may request that the defendant be tested for sexually transmitted diseases. *See* G.S. 15A-615(a). The results of these tests are not admissible in any criminal proceeding. *See* G.S. 15A-615(c). The defendant already may have been required to undergo tests for AIDS or Hepatitis B if a person was exposed, through nonsexual contact, to transmission by the defendant. *See* G.S. 15A-534.3 (authorizing detention of defendant for such tests at time of initial or first appearance).

Appendix 3-1
Sample Questions for Probable Cause and Preliminary Hearings*

These questions are not exhaustive, and are only a guide to help counsel think about what questions counsel should consider at the hearing. Counsel should make sure the answer to the question is complete. For example, if you ask an officer what the length of the incident was, and he answers 5 minutes, you can ask more detailed questions so that the officer is unlikely to change his answer later. "Officer, you say it was 5 minutes, could it have been longer/shorter than that?" "Well, how much longer/shorter?" "What makes you say that?" [Also consider whether your goal at the hearing is better achieved by the use of traditional cross-examination questions (closed, leading questions calling for a yes or no answer) or by the use of more open-ended questions].

Basic Identification Questions

Opportunity to observe – for each witness or complainant

1. Time, location and length of incident?
2. What was the lighting like? (Street lights? Where? Daylight?)
3. How long did each witness observe the incident and what drew its attention to scene?
4. How far was each witness from the scene?
5. Where was each witness standing in relation to assailant? (In front? To side? Behind?)
6. Were there any obstructions to the view?
7. Witness's physical condition: Tired? Drinking/drugs? Age? Eyesight?
8. Was offender wearing a mask? A hat?
9. Was there a prior relationship between any witness and defendant?
10. For each witness and each suspect, what was the description given to police: age, height, weight, eye color, complexion, hair, clothing, build, facial hair, distinguishing features?
11. Was there a lookout? When? What was the lookout description?

Identification Procedure

1. What procedure was used? (Show-up, line-up, photo spread, second sighting?)
2. When? Where?
3. What did each witness say?
4. Any non-identifications? Misidentifications?
5. Procedure done with all witnesses together? Separately?

*Reprinted from CRIMINAL PRACTICE INSTITUTE: PRACTICE MANUAL, Chapter 4 Appendix A (Public Defender Service for the District of Columbia, 2015).

Drug Cases

1. Did the lookout give a location for the suspect? Where was the suspect going?
2. What was recovered? Money? Pre-recorded money? Drugs? From defendant, ground or stash?
3. How many people were involved in transaction? What was defendant's role? Were other people around?
4. What was the time of arrest?
5. Identification questions, above.

Robbery

1. Was any property taken? From where? Was it recovered? From where/whom?
2. How was the property identified?
3. What was the number of victims?
4. What was the number of robbers?
5. How was the property taken? (Force? Snatch?)
6. Were any threats made?
7. What was the role of each robber?
8. What was said by each robber? To whom?
9. Were any weapons used?
10. Were any injuries sustained?
11. Identification questions, above.
12. Bias of witnesses?

UUV [unauthorized use of vehicle]

1. Driver or passenger?
2. How many people were in the car?
3. How long was the vehicle followed? Attempt to elude? How were vehicle occupants signaled about police presence?
4. Where was arrest made? What was the distance from car at the time of the arrest?
5. Was there any damage to car? What was the extent of the damage (or how was it damaged)? How visible was the damage? From what vantage point did police notice damage?
6. Were any keys in the ignition? Was there damage to steering column?
7. When was the car reported stolen? By whom?
8. Who talked to the owner? What did the owner say?
9. Were fingerprints removed from the automobile?
10. Was anything recovered from the car?
11. Identification questions, above.
12. Bias of witnesses?

Burglary

1. How were the premises entered?
2. Were any tools used? Recovered?
3. Were there any marks or damage to premises?
4. Was anyone inside premises?
5. Were there any witnesses? What did they see? How far were they from the scene?
6. Was property taken? What? Was it recovered?
7. Was the property identified? How? By whom? Basis for identifying?
8. Was property secreted by windows or doors? Any property found outside?
9. Identification questions, above.
10. Bias of witnesses?

Assault

1. Was the complainant injured? How did the injury occur? What is the nature of the injury? Was the complainant hospitalized?
2. Were any threats made?
3. Was there a prior relationship between defendant and complainant?
4. What was the cause of the altercation?
5. What did the complainant say? What did the offender say?
6. Were any weapons used? Were any weapons recovered from defendant or complainant?
7. Identification questions, above
8. Bias of witnesses

Sexual Offenses

1. What age is the victim?
2. Was there any hospital treatment? When?
3. What is the extent of the injuries? Where? How severe?
4. Lab test results?
5. Where did incident occur?
6. Was there a prior relationship between defendant and complainant?
7. What did assailant say? What did complainant say? Was there a struggle?
8. Was any weapon used?
9. Were any articles recovered from the scene?
10. When was the incident reported to police? Reported to anyone?
11. Circumstances of first report?
12. Identification questions, above.
13. Bias of witnesses?