

PLEAS & PLEA NEGOTIATIONS IN SUPERIOR COURT

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- I. **Introduction.** Disposition by guilty plea plays a significant role in the administration of criminal justice in the North Carolina court system. In the superior courts, the majority of criminal cases are disposed of by guilty plea. See Statistical and Operational Summary of the Judicial Branch of Government, North Carolina Trial Courts FY 2013-14 at 5 (reporting that in 2013-14, 2,732 superior court criminal cases were disposed of by jury trial and 78,693 cases were disposed of by guilty plea).

Pleas and plea negotiations must comply with constitutional requirements. Additionally, North Carolina statutory law provides procedures for taking pleas and conducting plea negotiations. Case law adds to this body of law. This section summarizes that law.

For a discussion of the admissibility of pleas and plea negotiations at trial see, [Criminal Evidence: Pleas and Plea Discussions](#) in this Benchbook.

For a discussion of *Harbison* claims—allegations that defense counsel made an unconsented-to admission of guilt at trial—see [Ineffective Assistance of Counsel](#) in this Benchbook.

- II. **Types of Pleas.** A defendant may plead not guilty, guilty, or no contest to a criminal charge. G.S. 15A-1011(a). There is no such thing as a plea of “innocent.” *State v. Maske*, 358 N.C. 40, 61 (2004).

A. **Not Guilty.**

1. **Effect.** By pleading not guilty, a defendant requires the State to prove, beyond a reasonable doubt, every element of the charged offense. *Id.* at 61.
2. **Defendant May Not Be Penalized for Not Guilty Plea.** A defendant has a constitutional right to plead not guilty, *id.* at 61; *State v. Larry*, 345 N.C. 497, 524 (1997); *State v. Kemmerlin*, 356 N.C. 446, 482 (2002), and may not be punished for exercising that right. *Maske*, 358 N.C. at 61; *State v. Boone*, 293 N.C. 702, 712-13 (1977). Thus, the fact that a defendant pleaded not guilty may not be considered by the sentencing judge. *Compare Boone*, 293 N.C. at 712-13 (remanding for resentencing where the record revealed that the sentence was induced in part by the defendant’s exercise of his right to plead not guilty), *State v. Cannon*, 326 N.C. 37, 38-39 (1990) (“[w]here it can reasonably be inferred . . . that the sentence was imposed . . . in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant’s constitutional right to trial by jury has been abridged, and a new sentencing hearing must result”; after the possibility of a negotiated plea was discussed and the defendants demanded a jury trial, the judge told counsel “in no uncertain terms,” that if convicted, the defendants would receive the maximum sentence), *State v. Peterson*, 154 N.C. App. 515, 518 (2002) (judge improperly considered the defendant’s exercise of his right to a trial by jury; at sentencing the judge stated that the defendant “tried to be a con artist with the jury,” “rolled the dice in a high stakes game with the jury,” “[he] lost that gamble”, and that “any rational person would never have rolled the dice and asked for a jury trial with such overwhelming evidence”), *and State v. Pavone*, 104 N.C. App. 442, 446 (1991) (trial judge improperly considered the defendant’s failure to accept a plea and exercise her right to a jury trial; at sentencing the trial judge noted that plea discussions were not productive and said, “you must understand that having moved through the jury process and having been

convicted, it is a matter in which you are in a different posture”), *with* State v. Johnson, 320 N.C. 746, 753 (1987) (trial court made no statement indicating that the defendant’s exercise of the right to a jury trial was considered), *and* State v. Gant, 161 N.C. App. 265, 272 (2003) (although disapproving of the trial court’s reference to the defendant’s failure to enter a plea agreement, holding that the judge’s comments show that the defendant was not punished more severely because he exercised his right to a jury trial).

B. Guilty.

A plea of guilty is a confession that the defendant did the acts in question and “is itself a conviction” in that “nothing remains but to give judgment and determine punishment.” *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). By pleading guilty, a defendant not only relieves the State of its burden to prove every element of the offense but also waives several constitutional rights. *Id.* at 243; *see also* State v. Pait, 81 N.C. App. 286, 289 (1986). Those waived rights include the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers. *Boykin*, 395 U.S. at 243.

A defendant may plead guilty to a capital charge. *See* Section IV.H., below. A guilty plea may be “straight up”—that is, made without any agreement with the prosecutor—or it may be pursuant to a plea agreement in which the prosecution has offered the defendant some benefit in exchange for pleading guilty. *See* Section III below (plea bargaining). One reason a defendant might plead guilty “straight up,” is the belief that accepting responsibility may lead to milder punishment. *See* State v. McClure, 280 N.C. 288, 294 (1972).

1. Effect.

A valid guilty plea acts as a conviction of the offense charged and serves as an admission of all of the facts alleged in the charging document. *Boykin*, 395 U.S. at 242 (1969); State v. Thompson, 314 N.C. 618, 623-24 (1985).

2. Alford Pleas.

Under *North Carolina v. Alford*, 400 U.S. 25 (1970), a defendant may plead guilty while factually maintaining innocence, provided that the record contains “strong evidence of actual guilt.” *Id.* at 37 (“[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”); *see also* State v. McClure, 280 N.C. 288, 291-94 (1972) (trial judge properly accepted plea although defendant did not expressly admit guilt); State v. Canady, 153 N.C. App. 455, 457-58 (2002) (*Alford* plea requires “strong evidence” of guilt, which was present in this case). Such pleas are known as *Alford* pleas.

a. Effect. An *Alford* plea carries all of the consequences of a guilty plea. State v. Alston, 139 N.C. App. 787, 792 (2000).

Because an *Alford* plea “indicates a reluctance to take full responsibility” for the criminal conduct at issue it may “merit[] against finding” the mitigating sentencing factor that the defendant accepted responsibility for his or her conduct. State v. Meynardie,

172 N.C. App. 127, 133-34 (2005), *aff'd and remanded*, 361 N.C. 416 (2007).

Although it is generally stated that *Alford* pleas estop the defendant from denying guilt in later civil proceedings, jurisdictions differ on that issue. Jeff Welty, [Alford Pleas](#), NC CRIM. LAW BLOG (April 13, 2010) (citing cases). The North Carolina courts have not yet decided this issue. *Id.*

Maintaining innocence pursuant to an *Alford* plea does not excuse a defendant's failure to participate in a sex offender rehabilitation program ordered as a condition of probation and requiring an acknowledgment of guilt. *Alston*, 139 N.C. App. at 794.

- b. Discretion to Accept or Reject.** Is a judge required to accept a knowing and voluntary *Alford* plea when there is strong evidence of guilt? In *Alford*, the Court indicated that a defendant has no constitutional right to have a plea accepted:

Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, although the States may by statute or otherwise confer such a right.

Alford, 400 U.S. at 38 n.11 (citation omitted). The *Alford* Court went on to note that “[l]ikewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence”. *Id.*

As matter of state law, the North Carolina appellate courts do not appear to have addressed this issue. Although the North Carolina General Statutes both limit and afford the trial court discretion with respect to other aspects of plea procedure, *compare, e.g.*, G.S. 15A-1023(c) (providing that when there is a plea arrangement relating to disposition of charges in which the prosecutor has not agreed to make any recommendation as to sentence, the judge “must” accept the plea if it is knowing and voluntary and there is an adequate factual basis), *with* G.S. 15A-1011(b) (a defendant may plead no contest only if the trial judge consents), the statutes are silent on this issue.

- C. No Contest.** A judge may accept a no contest plea—also called a plea of *nolo contendere*—if there is a factual basis for the plea. G.S. 15A-1022(d); see Section IV.E. below (discussing factual basis). A no contest plea is one “by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.” *Alford*, 400 U.S. at 35. Basically: the defendant agrees not to contest the charge. See *State v. Cooper*, 238 N.C. 241, 243 (1953). “Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and

accept the sentence.” *State v. McClure*, 280 N.C. 288, 293 (1972) (quoting *North Carolina v. Alford*, 400 U.S. 25 (1970)).

1. **Effect.** A no contest plea is “tantamount to a plea of guilty.” *Cooper*, 238 N.C. at 243; *see also Holden*, 321 N.C. at 162. Although a no contest plea is not an admission of guilt and may not be used in another case to prove that the defendant *committed* the crime to which he or she pled no contest, evidence of such a plea may be used to prove that a defendant was *convicted* of the pleaded-to offense. *State v. Holden*, 321 N.C. 125, 161-62 (1987); *State v. Outlaw*, 326 N.C. 467, 469 (1990). Thus, a past conviction resulting from a no contest plea
 - may be admitted under evidence Rule 609(a) for purposes of impeachment, *Outlaw*, 326 N.C. at 469; *see generally* [Rule 609: Impeachment by Evidence of Conviction of a Crime](#) in this Benchbook;
 - constitutes a conviction for purposes the G.S. 15A-2000(e)(3) capital aggravating circumstance (defendant was previously convicted of a felony involving the use or threat of violence), *Holden*, 321 N.C. at 161-62; and
 - may be used as one of the three prior felony convictions required to support a habitual felon charge, *State v. Jones*, 151 N.C. App. 317, 329 (2002); *but see* *State v. Petty*, 100 N.C. App. 465, 468 (1990) (no contest plea entered before 1975 (effective date of amendments to G.S. 15A-1022) may not be used to adjudicate habitual felon status).

The main benefit of a no contest plea is that, unlike a guilty plea, it may not be used in a subsequent civil action to prove that the defendant committed the offense at issue. *Wayne R. LAFAYE ET AL.*, 5 CRIMINAL PROCEDURE §21.4(a), at 793 (3d ed. 2007) [hereinafter *CRIMINAL PROCEDURE*].

2. **Advisement by Judge.** When taking a no contest plea, the trial judge must inform the defendant that after the defendant’s no contest plea, he or she will be treated as guilty whether or not guilt is admitted. G.S. 15A-1022(d); *see also* *State v. May*, 159 N.C. App. 159, 166 (2003) (judge sufficiently explained consequences of the no contest plea).
 3. **Consent Required.**
A defendant may plead no contest only if the prosecutor and presiding judge consent. G.S. 15A-1011(b). Few standards exist to guide the judge in the exercise of discretion as to whether to accept a no contest plea. *See* 5 CRIMINAL PROCEDURE § 21.4(a), at 796-97.
- D. Conditional Plea.** North Carolina law allows a defendant to enter a guilty plea while reserving the right to appeal an adverse ruling on a motion to suppress. The requirements to preserve such an appeal are discussed in Section VII.B.1.c., below.
- E. Plea To Aggravating Factors & Prior Record Level Points.** Under *Blakely v. Washington*, 542 U.S. 296 (2004), unless pleaded to by a defendant, any fact other than a prior conviction that increases punishment beyond the prescribed statutory maximum must be proved to the jury beyond a reasonable doubt. After

Blakely, the North Carolina statutes were amended to allow for guilty pleas to aggravating factors and prior record level points under G.S. 15A-1340.14(b)(7) (offense committed while the defendant was on probation, parole, or post-release supervision, serving a sentence of imprisonment, or on escape from a correctional institution while serving a sentence of imprisonment). G.S. 15A-1022.1; see *also* *State v. Khan*, 366 N.C. 448, 455 (2013) (plea that included aggravating factor was proper).

If the defendant admits the aggravating factor or factors but pleads not guilty to the felony, a jury must be empaneled to dispose of the felony; if the defendant pleads guilty to the felony but contests the aggravating factor or factors, a jury must be empaneled to determine if the aggravating factor or factors exist. G.S. 15A-1340.16(a2), (a3).

Procedures for taking pleas to aggravating factors and to the G.S. 15A-1340.14(b)(7) prior record level point are discussed in Section IV.D.5. below.

- F. Plea to Habitual Status.** A defendant may plead guilty or no contest to a habitual offender status, such as habitual felon, violent habitual felon, habitual breaking and entering, or armed habitual felon. See, e.g., *State v. Szucs*, 207 N.C. App. 694, 701-02 (2010) (plea to habitual felon was valid); *State v. Jones*, 151 N.C. App. 317, 330 (2002) (no contest plea to habitual felon). A stipulation to the required prior convictions is insufficient; the trial court must take a plea to the habitual status. *State v. Gilmore*, 142 N.C. App. 465, 471 (2001) (stipulation insufficient “in the absence of an inquiry by the trial court to establish a record of a guilty plea”); *State v. Edwards*, 150 N.C. App. 544, 549–50 (2002) (following *Gilmore*). *But see* *State v. Williams*, 133 N.C. App. 326, 330 (1999) (stipulation to habitual felon status was sufficient when the trial court continued by posing questions to the defendant that “establish[ed] a record of her plea of guilty”). See *generally* Section IV. below (Taking a Plea).
- G. Failure to Plead; Waiver of Arraignment.** If the defendant fails to plead, the court must record that fact and the defendant must be tried as if he or she had pled not guilty. G.S. 15A-941(a).
- If the defendant fails to file a written request for arraignment, the court will enter a plea of not guilty on the defendant’s behalf. G.S. 15A-941(d).

- III. Plea Bargaining.** Some guilty pleas are entered pursuant to a plea bargain with the prosecutor whereby the defendant agrees to plead guilty in exchange for some consideration by the State. The consideration offered can take many forms, such as allowing a plea on a lesser charge, agreeing to dismiss charges or not to bring other charges, or promising to recommend a particular sentence. The defendant’s incentives to plea bargain include, among other things, limiting his or her exposure to punishment, controlling the nature of the conviction ultimately entered, and avoiding a criminal trial. See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970). The incentives for the prosecution are varied but no doubt include judicial economy, as plea bargaining allows for quick disposition of a large number of cases. See, e.g., *id.* at 752. The United States Supreme Court has noted that disposition by plea negotiation is a “highly desirable” part of the criminal justice system in that

[i]t leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the

public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by, shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971).

A. No Right to Bargaining. Although G.S. 15A-1021(a) allows the prosecution and the defense to negotiate a plea, the defendant has no constitutional right to engage in plea bargaining. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). A prosecutor has broad discretion to decide whether to engage in plea negotiations with a defendant and what plea will be offered. See *State v. Woodson*, 287 N.C. 578, 594-95 (1975) (prosecutor had full authority to negotiate with and accept pleas from two co-defendants but not others), *rev'd on other grounds*, 428 U.S. 280 (1976). To challenge that discretion as unconstitutionally selective, a defendant must prove that the prosecutor's decision was "deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification." *Id.* at 595 (quotation omitted) (no constitutional infirmity in prosecutor's selection, no abuse of discretion and no arbitrary classification); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (selectivity in enforcement does not violate the constitution so long as it is not deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification).

B. Scope of Negotiations.

1. **Generally.** Plea negotiations may include discussion of the possibility that in exchange for the defendant's guilty or no contest plea, the prosecutor will not charge, will dismiss, will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. G.S. 15A-1021(a). Restitution or reparation may be part of the plea arrangement. G.S. 15A-1021(c). The prosecution may condition a plea offer on the defendant providing information to the prosecution, *Woodson*, 287 N.C. at 593 ("state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not" (quotation omitted)), *rev'd on other grounds*, 428 U.S. 280 (U.S. 1976), or on truthful testimony by the defendant in criminal proceedings. G.S. 15A-1054(a).

It is not a violation of due process for a prosecutor to legitimately threaten a defendant during plea negotiations with institution of more serious charges if the defendant does not plead guilty. See *Bordenkircher*, 434 U.S. at 365. And if the defendant declines to plead guilty, no constitutional violation occurs when the prosecutor carries out that threat. See *id.* at 360, 365 (distinguishing a case where the prosecutor without notice brings more serious charges after the defendant insists on pleading not guilty); see also *United States v. Goodwin*, 457 U.S. 368, 380-84 (1982) (presumption of vindictiveness did not apply; after defendant requested a jury trial on misdemeanor charges, he was indicted for a felony).

2. **Leniency for Third Parties.** Although a prosecutor's offer of leniency to a person other than the defendant has withstood a due process challenge in North Carolina, see *State v. Summerford*, 65 N.C. App. 519, 521-22

(1983) (prosecutor offered to dismiss charges against wife in exchange for husband's guilty plea); see also *State v. Salvetti*, 202 N.C. App. 18, 31-32 (2010) (prosecutor did not use improper pressure when he made the defendant's wife's plea deal contingent on the defendant's guilty plea), the United States Supreme Court has indicated that offers of more lenient or adverse treatment of a third party might require heightened scrutiny. See *Bordenkircher*, 434 U.S. at 364 n.8 (such an offer "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider"). Applying the Court's cautionary note some jurisdictions have approved plea deals offering leniency for third parties. See, e.g., *Harman v. Mohn*, 683 F.2d 834, 837-38 (4th Cir. 1982) (as part of plea bargain, the prosecutor agreed to dismiss an indictment against the defendant's wife; the prosecutor observed "the high standard of good faith required in this type of plea bargain" and the judge carefully examined it).

3. **"Package" Pleas.** In a "package" plea all defendants must agree to the bargain before any will be allowed to benefit from it. As has been observed:

Consistent with the package nature of the agreement, defendants' fates are often bound together: If one defendant backs out, the deal's off for everybody. This may well place additional pressure on each of the participants to go along with the deal despite misgivings they might have.

United States v. Caro, 997 F.2d 657, 658-59 (9th Cir. 1993) (footnote omitted). Relying on authority from other jurisdictions, the North Carolina Court of Appeals has rejected the argument that package pleas are per se involuntary. *State v. Salvetti*, 202 N.C. App. 18, 31-32 (2010) (going on to hold that the prosecutor's offer to give the defendant's wife a plea deal if the defendant pleaded guilty did not constitute improper pressure). Although other jurisdictions also have approved of package pleas, see, e.g., *United States v. Morrow*, 914 F.2d 608, 613-14 (4th Cir. 1990); *United States v. Clements*, 992 F.2d 417, 419 (2d Cir. 1993), some have required the trial court to be informed of the package nature of the plea so that it can engage in a "more careful" examination of voluntariness. *Caro*, 997 F.2d at 660. *But see Clements*, 992 F.2d at 419-20 (although the "preferred practice" is to advise the court of the condition, the government's failure to inform the trial court of the package nature of the plea did not mean that the trial court abused its discretion by denying a motion to withdraw the plea where the plea was otherwise voluntary).

4. **Appeal & Related Waivers.** Although no North Carolina courts have dealt with the issue in a published case, courts in other jurisdictions are split on whether the right to appeal may be waived as part of a negotiated plea. See 5 CRIMINAL PROCEDURE § 21.2(b), at 581-87. A number of courts, including the Fourth Circuit, have held that waiver of the right to appeal may be part of a plea bargain. See *United States v. Davis*, 954 F.2d 182, 185-86 (4th Cir. 1992); *State v. LeMaster*, 403 F.3d 216, 220 (4th Cir. 2005) (so noting). Other Fourth Circuit decisions have recognized that there is a "narrow class of claims" that have been found to survive a

general waiver of appellate rights. See *LeMaster*, 403 F.3d at 220 n.2 (noting for example a claim that a sentence was based on an impermissible factor, such as race, and an allegation that the defendant had been completely deprived of counsel during sentencing). Others conclude that this right is non-negotiable. See 5 CRIMINAL PROCEDURE § 21.2(b), at 583.

A number of federal circuit courts, including the Fourth Circuit, have held that a defendant may waive the right to collaterally attack a plea. *LeMaster*, 403 F.3d at 220 (citing cases). In the North Carolina state courts, the procedural device for a collateral attack is a motion for appropriate relief. See G.S. 15A-1411 through -1422; see generally [Motions for Appropriate Relief](#) in this Benchbook.

5. Limits on Prosecutorial Conduct. The Official Commentary to G.S. 15A-1021 suggests that during plea bargaining a prosecutor may not seek to induce a plea of guilty or no contest by:

- Charging or threatening to charge the defendant with a crime not supported by the facts believed by the prosecutor to be provable.
- Charging or threatening to charge the defendant with a crime not ordinarily charged in the jurisdiction for the conduct at issue.
- Threatening the defendant that if he or she pleads not guilty, his or her sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.

See *State v. Salvetti*, 202 N.C. App. 18, 32 (2010) (finding that none of these forms of pressure were applied). Additionally, State Bar Ethics opinions provide that during plea bargaining, the prosecutor may not:

- Use or threaten to use the prosecutor's statutory calendaring power to coerce a defendant to plead guilty. NC DEFENDER MANUAL (TRIAL) Ch. 23 at 23-10 (citing North Carolina State Bar Ethics Opinion RPC 243 (1997) (unethical for prosecutor to threaten that if the defendant does not accept the plea bargain, the prosecutor will make the defendant sit in the courtroom all week and then place the defendant's case "on the calendar every Monday morning for weeks to come"), available at www.ncbar.gov/ethics/).
- Offer more advantageous pleas to the defendant in exchange for a donation to a specified charitable organization. *Id.* (citing N.C. State Bar Ethics Opinion RPC 204 (1995) (prosecutors could not ethically offer special treatment to offenders who were charged with violating traffic laws or minor criminal offenses in exchange for their donation to the local school board), available at www.ncbar.gov/ethics/).
- Agree to refrain from informing the court of the defendant's prior record. *Id.* at 23-11.

6. **Terms Contrary to Law.** A plea agreement term that is contrary to law is unenforceable. *State v. Wall*, 348 N.C. 671, 676 (1998) (court could not enforce plea agreement term that the sentence for the pleaded-to offenses would run concurrently to a sentence already being served when the law required that the sentences run consecutively). A plea agreement that contains such a term violates that law. *State v. Demaio*, 216 N.C. App. 558, 565 (2011) (plea agreement sought to preserve the right to appeal adverse rulings on motions to dismiss and in limine when no right to appeal those rulings existed); *State v. White*, 213 N.C. App. 181, 187-88 (2011) (plea agreement that attempted to preserve the defendant's right to appeal an adverse ruling on his motion to dismiss a felon in possession charge on grounds that the statute was unconstitutional as applied must be vacated); *State v. Smith*, 193 N.C. App. 739, 742-43 (2008) (similar). When this is the case, the defendant is entitled to withdraw the plea. *Wall*, 348 N.C. at 676; *Demaio*, 216 N.C. App. at 565. The defendant then can opt to go to trial on the original charges or try to renegotiate a plea agreement that does not violate the law. See, e.g., *Demaio*, 216 N.C. App. at 565.

There is however one caveat to this rule. If the defendant is told that the particular term is likely to be unenforceable, its inclusion does not necessarily invalidate the plea. *State v. Tinney*, ___ N.C. App. ___, 748 S.E.2d 730, 733-37 (2013) (the defendant's plea was valid even though the plea agreement contained an unenforceable provision preserving his right to appeal the transfer of his juvenile case to superior court; distinguishing cases holding that the inclusion of an invalid provision renders a plea agreement unenforceable, the court noted that here the trial court told the defendant that the provision was, in all probability, unenforceable and the defendant nevertheless elected to proceed with his guilty plea). Notwithstanding this authority, the best practice is to require the parties to present a plea agreement without any unenforceable terms.

- C. **Judge May Participate in Discussions.** A trial judge may participate in plea negotiation discussions. G.S. 15A-1021(a).
- D. **Defendant's Presence.** If represented by counsel, the defendant need not be present during plea negotiation discussions. *Id.*
- E. **Judge's Authority to Accept or Reject Arrangement.** A judge must accept a plea arrangement in which the prosecutor has not agreed to make any recommendations as to sentence, if the plea is the product of informed choice and it is supported by a factual basis. G.S. 15A-1023(c). However, the defendant has no right to have a plea arrangement as to sentencing accepted by the court. G.S. 15A-1023(b) ("Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly."); see also *State v. Wallace*, 345 N.C. 462, 465 (1997) ("A plea agreement involving a sentence recommendation by the State must first have judicial approval before it can be effective; it is merely an executory agreement until approved by the court."); *State v. Collins*, 300 N.C. 142-149 (1980) (a plea agreement containing a recommended sentence requires judicial

approval). As discussed in Section III.F., below, even when a judge initially approves a plea arrangement as to sentence, the judge may withdraw consent upon learning of information that is inconsistent with the representations made when approval was given.

F. Agreement Regarding Sentence.

1. **“Pre-Approval” by Judge.** If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a sentence, they may, with the judge’s permission, advise the judge of the terms of the arrangement and the reasons for it before the plea is made. G.S. 15A-1021(c). Because the statute uses the permissive “may,” the judge is not required to engage in this discussion.

If the judge agrees to consider the arrangement, the judge may indicate to the parties whether he or she will concur in the proposed disposition. G.S. 15A-1021(c). If the judge agrees with the disposition, the judge may change his or her mind upon later learning of information inconsistent with the representations made. *Id.* This procedure allows the parties to get the judge’s reaction to the proposed sentence; if the judge reacts negatively, the parties may resume negotiations and bring a revised arrangement back to the judge. Official Commentary to G.S. 15A-1021.

2. **Agreement Must Be Disclosed at Time of Plea.** Regardless of whether the parties have consulted with the judge before the plea, if they have agreed on a plea arrangement in which the prosecutor will recommend a particular sentence, they must disclose the substance of their agreement to the judge when the plea is taken. G.S. 15A-1023(a).
3. **Judge Must Notify Parties of Acceptance/Rejection.** Before accepting the plea, the judge must advise the parties whether he or she approves the arrangement and will dispose of the case accordingly. G.S. 15A-1023(b).
4. **When Judge Rejects Arrangement.**
 - a. **Must Notify Parties & Give Opportunity to Modify.** If the judge rejects the arrangement, the judge must inform the parties, refuse to accept the plea, and advise the defendant personally that neither the State nor the defendant is bound by the arrangement. *Id.* The judge must tell the parties why he or she rejected the arrangement and give them a chance to modify it. *Id.*; see, e.g., *State v. Santiago*, 148 N.C. App. 62, 68 (2001) (judge rejected arrangement because of concern regarding sentence). However, the State is not required to modify the agreement. *State v. Bailey*, 145 N.C. App. 13, 21 (2001). As noted in Section III.F.1. above, even if the judge previously indicated that he or she agreed with the proposed disposition, the judge may change positions upon learning of information inconsistent with earlier made representations. See G.S. 15A-1021(c).
 - b. **Rejection Must Be Noted in Record.** When the trial judge rejects a plea arrangement as to sentence in open court at the time of the plea, the judge must order that the rejection be noted on the plea transcript and that the transcript be made a part of the record. G.S. 15A-1023(b).

- c. **No Appeal.** A judge's decision rejecting a plea arrangement is not subject to appeal. See G.S. 15A-1023(b); see also *Santiago*, 148 N.C. App. at 68.
- d. **Right to Continuance.** If the judge rejects the plea arrangement, the defendant is entitled to a continuance until the next session of court. G.S. 15A-1023(b). Although failure to grant a motion for a continuance is reversible error, see *State v. Tyndall*, 55 N.C. App. 57, 62-63 (1981) ("absolute right" to continuance), the court is not required to order a continuance on its own motion. *State v. Martin*, 77 N.C. App. 61, 65 (1985).

No right to a continuance attaches when a judge denies a defendant's request to plead guilty under a plea arrangement that already has been rejected and thus is null and void. *State v. Daniels*, 164 N.C. App. 558, 562 (defendant cannot resurrect a plea agreement that had been rejected by the trial court).

- 5. **If Sentence Does Not Conform to Agreement.** If at the time of sentencing, the judge decides to impose a sentence other than that provided for in a plea arrangement, the judge must inform the defendant that a different sentence will be imposed and that the defendant may withdraw the plea. G.S. 15A-1024; compare *State v. Puckett*, 299 N.C. 727, 730-31 (1980) (reversing the trial court for failure to comply with G.S. 15A-1024), and *State v. Rhodes*, 163 N.C. App. 191, 194-95 (2004) (same), with *State v. Blount*, 209 N.C. App. 340, 346 (2011) (no violation of G.S. 15A-1024 where plea agreement did not require sentencing in the mitigated range but only that the State "shall not object to punishment in the mitigated range").

Although failure to follow this procedure has been held to be reversible error, see, e.g., *Puckett*, 299 N.C. at 730-31; *Rhodes*, 163 N.C. App. at 194-95, a defendant's lack of diligence in asserting such a failure may waive the right to challenge the plea. See *State v. Rush*, 158 N.C. App. 738, 740-41 (2003) (where the defendant failed to file a motion to withdraw her guilty plea, failed to give notice of appeal within ten days after judgment, and failed to petition for writ of certiorari, she waived challenge to the judgment, which imposed a sentence other than that included in the plea arrangement; issue was not raised until probation was revoked).

The North Carolina Court of Appeals has interpreted the statutory terms "other than provided for in a plea arrangement" to include a sentence that is lighter than the one agreed to in the plea agreement. *State v. Wall*, 167 N.C. App. 312, 316-17 (2004) (after a successful motion for appropriate relief challenging his initial sentence, the defendant was resentenced to 133-169 months imprisonment; because the plea agreement specified 151-191 months he should have been allowed to withdraw his plea). It also has held that like a sentencing, a resentencing triggers application of G.S. 15A-1024. See *id.*

Upon withdrawal, the defendant is entitled to a continuance until the next session of court. See G.S. 15A-1024.

- G. **Arrangements Relating to Charges Only.** If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance

of the arrangement must be disclosed to the judge at the time of the plea. G.S. 15A-1023(c). As noted in Section III.E. above, the judge must accept the plea if it is knowing, voluntary and intelligent and there is a factual basis for it.

- H. Effect of Court's Rejection of Plea Arrangement.** Once a plea arrangement has been rejected by the court, the arrangement is no longer available for the defendant to accept. *State v. Daniels*, 164 N.C. App. 558, 561-62 (2004).
- I. De Novo Trial in Superior Court.** If a defendant pleads guilty to a misdemeanor in district court pursuant to a plea arrangement in which misdemeanor charges were dismissed, reduced, or modified and then appeals for a trial *de novo* in superior court, the superior court has jurisdiction to try all of the misdemeanor charges that existed before entry of the plea. G.S. 7A-271(b); G.S. 15A-1431(b). If a felony charge is reduced to a misdemeanor in district court pursuant to a plea arrangement and the defendant appeals for trial *de novo* in superior court, the State may indict the defendant on the original felony and the defendant may be tried for that offense. *State v. Fox*, 34 N.C. App. 576, 579 (1977).
- J. Backing Out of an Agreement.**
- 1. When State May Back Out.** The State may withdraw from a plea agreement any time before entry of the plea or before there is an act of detrimental reliance by the defendant. *State v. Collins*, 300 N.C. 142, 148-49 (1980); *State v. Hudson*, 331 N.C. 122, 146-49 (1992) (following *Collins*; rejecting the defendant's argument that suspending trial preparation constituted detrimental reliance in a case where plea agreement contained sentence recommendation that had not yet been approved by trial judge); *State v. Marlow*, 334 N.C. 273, 279-81 (1993) (following *Collins*; rejecting the defendant's argument that submitting to a polygraph constituted detrimental reliance); *State v. Johnson*, 126 N.C. App. 271 (1997) (following *Collins* and *Marlow*).
 - 2. When Defendant May Back Out.** A defendant may withdraw from a plea agreement before entry of the plea, regardless of any prejudice to the prosecution. *Collins*, 300 N.C. at 149. The North Carolina Supreme Court has explained:

[P]lea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading. Thus, the prosecutor agrees to perform if and when defendant performs but has no right to compel defendant's performance.

Id.

IV. Taking a Plea.

A. Defendant's Decision. Because a plea of guilty or no contest involves a waiver of constitutional rights, "[a] plea decision must be made exclusively by the defendant." *State v. Harbison*, 315 N.C. 175, 180 (1985); *State v. Perez*, 135 N.C. App. 543, 547 (1999).

B. Defendant's Presence.

A superior court judge may receive a plea of not guilty, guilty, or no contest only from "the defendant himself," G.S. 15A-1011(a), except when:

- The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer.
- There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945 (providing that a represented defendant who wishes to plead not guilty may waive arraignment prior to the date arraignment is calendared by filing a written plea signed by the defendant and counsel).
- The case involves a misdemeanor and there is a written waiver of appearance submitted with the approval of the presiding judge.
- The defendant executes a waiver of appearance and plea of not guilty as provided in G.S. 15A-1011(d). Under G.S. 15A-1011(d) a defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his or her behalf when:
 - (1) the defendant agrees in writing to waive the right to testify and the right to face his or her accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case;
 - (2) the defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and
 - (3) the judge allows the absence of the defendant because of distance, infirmity or other good cause.

G.S. 15A-1011(a).

C. Plea Arrangement Relating to Sentence. For a discussion of plea procedure when the parties' agreement relates to the sentence, see Section III.F. above.

D. Must Be Knowing, Voluntary & Intelligent. Due process requires that a guilty plea must be knowing, voluntary and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); see also *State v. Harbison*, 315 N.C. 175, 180 (1985); *State v. McClure*, 280 N.C. 288, 293 (1972). By pleading guilty, a defendant waives important constitutional rights. *Boykin*, 395 U.S. at 243. Such a waiver must be made freely and with a full understanding of the significance and consequences of the action. *Id.* at 243-44 ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."); *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the

relevant circumstances and likely consequences.”). A plea that is not knowing, voluntary and intelligent is void. *Boykin*, 395 U.S. at 243 n.5.

1. **Voluntary.** The requirement that a plea be a “voluntary expression of [the defendant’s] own choice,” *Brady*, 397 U.S. at 748, requires that it not have resulted from, for example, actual or threatened physical harm or overbearing mental coercion. *Id.* at 750; see also *State v. Santos*, 210 N.C. App. 448, 451-52 (2011) (rejecting the defendant’s argument that his guilty plea was the result of unreasonable and excessive pressure by the State and the trial court; although the defendant asserted that the trial court pressured him to accept the plea during a 15 minute recess, denying him time needed to reflect, the plea offer was made days earlier and the trial judge engaged in an extensive colloquy with the defendant ensuring that the plea was knowing and voluntary); *State v. Salvetti*, 202 N.C. App. 18, 32 (2010) (the prosecutor’s offer of a package deal in which the defendant’s wife would get a plea deal if the defendant pleaded guilty did not constitute improper pressure). The constitutional requirement that a plea be voluntary is reflected in the statutory requirement that “[n]o person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.” G.S. 15A-1021(b).

In North Carolina, a judge’s comments have been held to have impermissibly imposed such pressure, rendering the plea involuntary. See *State v. Benfield*, 264 N.C. 75, 76-77 (1965) (after the judge told defenses counsel that he thought the jury would convict and that if it did so, “he felt inclined to give [the defendant] a long sentence[,]” the defendant, knowing that a co-defendant who pleaded guilty got a suspended sentence, changed his plea to guilty); *State v. Pait*, 81 N.C. App. 286, 287-90 (1986) (when the defendant attempted to plead not guilty, the judge became visibly agitated and said angrily that he was tired of “frivolous pleas;” the judge asked the defendant whether he had made an incriminating statement to the police and when the defendant replied that he did, the judge directed counsel to confer with the defendant and return with an “honest plea”); see also *State v. Cannon*, 326 N.C. 37, 38-40 (1990) (when the trial court asked about the possibility of a negotiated plea, counsel advised that the defendants wanted a jury trial; the judge then stated that if the defendants were convicted, they would receive the maximum sentence; the defendants went to trial and were convicted; the appellate court noted that had the defendants pled guilty after they heard the judge’s remarks, “serious constitutional questions would have arisen as to the voluntariness of the pleas”). *But see State v. King*, 158 N.C. App. 60, 67-70 (2003) (the trial judge explained the habitual felon phase of the trial to the *pro se* defendant and inquired as to whether the defendant wished to plead guilty; although the judge told the defendant that he would give “consideration for someone pleading guilty”, the judge also stated that he was not promising the defendant anything or threatening him in any way, and made it clear that if the defendant did not want to plead guilty that the hearing before the jury would proceed; the trial judge appointed a lawyer to represent the defendant and the defendant conferred with the attorney before he accepted the guilty plea; distinguishing *Benfield*, *Cannon*, and *Pait* and holding that plea was voluntary).

The fact that a plea was entered to avoid a severe penalty, such as the death penalty, does not render it involuntary. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Brady v. United States*, 397 U.S. 742, 755 (1970).

2. **Knowing & Intelligent.** For a plea to be made intelligently, the defendant must understand the nature of the charges, *Brady*, 397 U.S. at 756, their “critical element[s],” *compare Henderson v. Morgan*, 426 U.S. 637, 647 n.18 (1976) (plea was invalid where record showed that a critical element was not explained to the defendant), *with State v. Barts*, 321 N.C. 170, 174-76 (1987) (the defendant knowingly entered a plea of guilty as to both felony-murder and premeditation and deliberation theories of first degree murder; trial judge adequately explained both theories and the defendant's responses indicated that he understood the nature of the plea and its possible consequences), and the consequences of the plea. See *Brady*, 397 U.S. at 755; *State v. Bozeman*, 115 N.C. App. 658, 661 (quoting *Brady*); *State v. Collins*, 221 N.C. App. 604, 608-09 (2012) (the court rejected the defendant's argument that the trial court did not adequately explain that judgment may be entered on his plea to assault on a handicapped person if he did not successfully complete probation on other charges).

With respect to the requirement that the defendant understand the charges, the Supreme Court has observed:

Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson, 426 U.S. at 647.

The requirement that the defendant understand the consequences of the plea has been interpreted to mean that the defendant must be informed of direct consequences of plea but not of collateral consequences. *Bozeman*, 115 N.C. App. at 661 (“Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be ‘entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court.’” (quoting *Brady*, 397 U.S. at 755)); *State v. Reynolds*, 218 N.C. App. 433, 434-38 (2012) (plea was invalid where trial court misinformed the defendant regarding a direct consequence; the trial court told the defendant that the maximum possible sentence was 168 months in prison when the maximum sentence (and the term imposed) was 171 months).

- a. **Direct Consequences.** Direct consequences have been broadly defined “as those which have a ‘definite, immediate and largely automatic effect on the range of the defendant’s punishment.’” *Bozeman*, 115 N.C. App. at 661 (quoting *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir. 1973)). The

North Carolina courts have held or indicated that the following are direct consequences of a plea:

- The maximum sentence. See *State v. Smith*, 352 N.C. 531, 550 (2000); *Reynolds*, 218 N.C. App. at 434-38 (plea invalid where the trial court misinformed the defendant that the maximum sentence was 168 months when in fact it was 171 months and that period was imposed); see generally G.S. 15A-1022(a)(6) (judge must inform the defendant of the maximum sentence). *But see* *State v. Szucs*, 207 N.C. App. 694, 701-02 (2010) (plea to habitual felon was valid where the trial court told the defendant that the plea would elevate punishment for the underlying offenses from Class H to Class C but did not inform him of the minimum and maximum sentences associated with habitual felon status); *State v. Salvetti*, 202 N.C. App. 18, 27-28 (2010) (the defendant was not prejudiced by the trial judge's failure to comply with G.S. 15A-1022 and inform him of the maximum possible sentence even where the Transcript of Plea form understated the maximum punishment).
- The mandatory minimum sentence; see *Bozeman*, 115 N.C. App. at 661-62 (drug trafficking case); *Smith*, 352 N.C. at 550; see generally G.S. 15A-1022(a)(6) (judge must inform the defendant of mandatory minimum sentence). *But see* *State v. Brooks*, 105 N.C. App. 413, 419 (1992) (no prejudicial error occurred when judge mistakenly informed the defendant that applicable mandatory minimum was 28 years).
- An additional term of imprisonment associated with habitual offender status. *State v. McNeill*, 158 N.C. App. 96, 104 (2003) (but finding failure to so inform the defendant was harmless beyond a reasonable doubt).

Also, *State v. Morganherring*, 350 N.C. 701, 719 (1999), can be read as indicating that if, as a result of a guilty plea to a felony the defendant would "in all likelihood" be convicted of felony-murder, the murder conviction is a direct consequence of the felony plea.

b. Collateral Consequences. The North Carolina courts have held the following to be collateral consequences that need not be addressed in the judge's colloquy with the defendant:

- The fact that pleaded-to felonies may establish aggravating circumstances at the penalty phase following the defendant's plea to first-degree murder. *State v. Smith*, 352 N.C. 531, 551 (2000) ("Nothing is automatic or predictable about how a sentencing jury may weigh these aggravating circumstances or whether countervailing mitigating circumstances will be offered or how they will be weighed.").

- Sex offender satellite-based monitoring. *State v. Bare*, 197 N.C. App. 461, 478-80 (2009).
- Parole eligibility. *State v. Daniels*, 114 N.C. App. 501, 502-03 (1994).

c. Defendant's Mistake. The rule that a plea must be intelligently made does not mean that it will be vulnerable to attack if it later turns out that the defendant did not correctly assess all of the relevant factors. See *Brady*, 397 U.S. at 757. As the United States Supreme Court has stated: "A defendant is not entitled to withdraw [a] plea merely because he [or she] discovers long after the plea has been accepted that his [or her] calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* If, however, the defendant was misinformed by counsel or not informed at all by counsel, the defendant may wish to pursue an ineffective assistance of counsel claim. For a discussion of mutual mistakes of law and their impact on the plea, see Section VI.B. below. For a discussion of ineffective assistance claims, see [Ineffective Assistance of Counsel](#) in this Benchbook.

3. No Right to Modify. If the plea is rejected on grounds that it is not free and voluntary, failure to provide an opportunity to modify has been held not to be error. *State v. Martin*, 77 N.C. App. 61, 65 (1985).

4. Colloquy. G.S. 15A-1022(a) is designed to effectuate the constitutional requirement that a guilty plea be knowing, voluntary and intelligent. See, e.g., *Bozeman*, 115 N.C. App. at 661; Official Commentary to G.S. 15A-1022. The statute does not apply when the defendant pleads not guilty. *State v. Ruffin*, ___ N.C. App. ___, 754 S.E.2d 685, 689 (2014).

G.S. 15A-1022(a) provides that except when the defendant is a corporation or in misdemeanor cases where there is a waiver of appearance, a superior court judge must address the defendant "personally" and:

- Inform him or her of the right to remain silent and that any statement the defendant makes may be used against him or her.
- Determine that the defendant understands the nature of the charge.
- Inform the defendant that he or she has a right to plead not guilty.
- Inform the defendant that by his or her plea the defendant waives the right to trial by jury and to be confronted by the witnesses against him or her.
- Determine that the defendant, if represented by counsel, is satisfied with counsel's representation.
- Inform the defendant of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.
- Inform the defendant that if he or she is not a citizen, a plea of guilty or no contest may result in deportation, the exclusion from

admission to this country, or the denial of naturalization under federal law.

G.S. 15A-1022(a). Although G.S. 15A-1022 does not require the trial court to inquire of the defendant whether he or she is in fact guilty, see *State v. Bolinger*, 320 N.C. 596, 603 (1987), the Transcript of Plea form includes a question to that effect. See AOC-CR-300 (Rev. 3/15) (Question 14(a) states: "Are you in fact guilty?"). As discussed in Section II.B.2. above, a plea may be accepted even if the defendant does not admit guilt, and this possibility is reflected in the questions that follow on the Transcript of Plea. *Id.* at Question 14(c) (*Alford* pleas).

Although not constitutionally required or codified in the statutory plea procedure, the General Assembly has required the North Carolina Administrative Office of the Courts to include the following questions on the Transcript of Plea:

- Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?
- Do you understand that your plea of guilty may impact how biological evidence related to your case (for example blood, hair, skin tissue) will be preserved?

S.L. 2009-86, sec. 1-2. See generally G.S. 15A-268 (preservation of biological evidence); G.S. 15A-1444 (appeal; certiorari). See Section VII., below (discussing appeals after guilty pleas).

Reflecting the constitutional standards for a knowing, voluntary and intelligent plea discussed above, G.S. 15A-1022(b) provides that a guilty or no contest plea may not be accepted unless the judge determines that it is "a product of informed choice." Similarly reflecting the constitutional standards for voluntariness, G.S. 15A-1021(b) provides that "[n]o person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest" and G.S. 15A-1022(b) makes inquiry into improper pressure in violation of G.S. 15A-1021(b) a part of the judge's colloquy. Specifically, G.S. 15A-1022(b) requires the judge to inquire of the prosecutor, defense counsel, and the defendant "personally" to determine whether there were any prior plea discussions, whether the parties had entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b).

Both G.S. 15A-1022(a) and (b) require the judge to inquire "personally" of the defendant and others. It is not enough to simply accept a completed Transcript of Plea form (AOC-CR-300). *State v. Hendricks*, 138 N.C. App. 668, 670 (2000) (trial judge erred by failing to personally address the defendant, even though the transcript of plea form covered all the areas omitted by the trial judge; "our legislature's explicit reference to the trial judge addressing the defendant personally and informing him of his rights illustrates that reliance on the transcript of plea alone (with which the judge has no involvement in the first place) is insufficient to meet section 15A-1022's procedural requirements").

5. **Pleas to Aggravating Factors & Prior Record Level Points.** As noted in Section II.E., above, after *Blakely*, the North Carolina statutes were

amended to allow for guilty pleas to aggravating factors and a prior record level (PRL) point under G.S. 15A-1340.14(b)(7) (offense committed while the defendant was on probation, parole, or post-release supervision, serving a sentence of imprisonment, or on escape from a correctional institution while serving a sentence of imprisonment). Specifically, G.S. 15A-1022.1 provides that before accepting a plea of guilty or no contest to a felony, the trial judge must determine:

- whether the State intends to seek a sentence in the aggravated range and if so, which factors are at issue; and
- whether the State seeks a finding that a PRL point should be found under G.S. 15A-1340.14(b)(7).

If the State seeks a sentence in the aggravated range or a PRL point under G.S. 15A-1340.14(b)(7), the trial court also must determine whether the State has provided the required notice under G.S. 15A-1340.16(a6) or whether such notice has been waived. G.S. 15A-1022.1.

If the defendant admits to the existence of an aggravating factor or to a finding of a point under G.S. 15A-1340.14(b)(7), the trial judge must comply with the basic plea procedure in G.S. 15A-1022(a), see Section IV.D.4., above, and all of the regular procedures for handling guilty pleas apply, “unless the context clearly indicates that they are inappropriate.” G.S. 15A-1022.1(e). In addition to the basic plea procedures, the trial court must address the defendant “personally” and advise the defendant that he or she:

- is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
- has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

G.S. 15A-1022.1(b).

Before accepting an admission to an aggravating factor or a point under G.S. 15A-1340.14(b)(7), the trial court must determine that there is a factual basis for the admission and that the admission is the result of the defendant’s informed choice. G.S. 15A-1022.1(c). The trial court may base its determination on the same evidence considered with respect to the factual basis for the substantive offense, see Section IV.E. below, as well as any other appropriate information. G.S. 15A-1022.1(c).

In terms of timing, a defendant may admit to the existence of an aggravating factor or to the existence of a point under G.S. 15A-1340.14(b)(7) before or after the trial of the underlying felony. G.S. 15A-1022.1(d).

6. **Mass Pleas.** There do not appear to be any North Carolina cases testing the validity of “mass pleas,” in which the judge convenes defendants and advises them of their rights in a group setting. Regardless of whether such a procedure is valid or not, it may subject individual pleas to attack.

E. Factual Basis. A judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. G.S. 15A-1022(c); see *State v. Sinclair*, 301 N.C. 193, 197-99 (1980) (insufficient factual basis); *State v. Dickens*, 299 N.C. 76, 79 (1980) (sufficient factual basis). This determination may be based upon information including but not limited to:

- a statement of the facts by the prosecutor
- a written statement of the defendant
- an examination of the presentence report
- sworn testimony, which may include reliable hearsay
- a statement of facts by the defense counsel

G.S. 15A-1022(c).

The statute “does not require the trial judge to elicit evidence from each, any, or all of the enumerated sources.” *State v. Barts*, 321 N.C. 170, 177 (1987); see also *State v. Atkins*, 349 N.C. 62, 96 (1998); *Sinclair*, 301 N.C. at 198; *Dickens*, 299 N.C. at 79. Rather the judge may consider any information properly brought to his or her attention in determining whether there is a factual basis for the plea. *Barts*, 321 N.C. at 177; *Atkins*, 349 N.C. at 96; *Sinclair*, 301 N.C. at 198; *Dickens*, 299 N.C. at 79. However, whatever information the judge does consider must appear on the record so that an appellate court can determine whether the plea was properly accepted. *Barts*, 321 N.C. at 177; *Atkins*, 349 N.C. at 96; *Sinclair*, 301 N.C. at 198. At a minimum, “some substantive material independent of the plea itself [must] appear of record which tends to show that defendant is, in fact, guilty.” *Sinclair*, 301 N.C. at 199 (defendant’s bare admission of guilt or plea of no contest provides an insufficient factual basis for a plea). The statute does not set forth the applicable standard of proof that applies to the factual basis determination. However, when the plea is an *Alford* plea, the factual record must show “strong” evidence of guilt. See Section II.B.2., above (discussing *Alford* pleas).

F. Pleas to Uncharged & Other Offenses. A judge may not accept a plea to an offense that has not been charged if it is not a lesser included of a charged offense. See *In Re Fuller*, 345 N.C. 157, 160-61 (1996) (stating rule in the context of a judicial discipline issue); *State v. Bennett*, 271 N.C. 423, 425 (1967) (“a defendant . . . cannot plead guilty to an offense which the indictment does not charge”); *State v. Neville*, 108 N.C. App. 330, 332-33 (1992) (plea to uttering a forged instrument could not stand where the indictment charged forgery; court lacked jurisdiction to enter the plea). Of course, problems in this regard can be avoided by the filing of an information, as provided in G.S. 15A-644(b).

A judge should not accept a plea to a lesser included offense over the State’s objection. *State v. Brown*, 101 N.C. App. 71, 80-81 (1990) (“The State has every right to attempt to convict a defendant of the crimes charged.”). If a judge takes a plea to a lesser included offense over such an objection, double jeopardy does not bar the State from trying the defendant for the greater offense if that offense was pending at the time the plea was entered. *Ohio v. Johnson*, 467 U.S. 493, 494 (1984); see also *State v. Hamrick*, 110 N.C. App. 60, 66-67 (1993).

Upon entry of a plea of guilty or no contest, the defendant may request permission to enter a plea of guilty or no contest to other crimes with which he or

she is charged in the same or another prosecutorial district. G.S. 15A-1011(c). However, a defendant may not plead to crimes charged in another prosecutorial district unless the district attorney of that district consents in writing. *Id.* The prosecutor or his or her representative may appear in person or by filing an affidavit as to the nature of the evidence gathered as to these other crimes. *Id.* Entry of a plea in this way constitutes a waiver of venue. *Id.*

A superior court has jurisdiction to accept the plea even though the case otherwise may be within the exclusive original jurisdiction of the district court, provided there is an appropriate indictment or information. *Id.* A district court may accept pleas under G.S. 15A-1011(c) only in cases within the original jurisdiction of the district court and in cases within the concurrent jurisdiction of the district and superior courts, as set out in G.S. 7A- 272(c). *Id.* This procedure achieves economies to the State by “wrapping up all charges against a defendant at once.” Official Commentary to G.S. 15A-1011. The consent of the prosecutor in any other district in which other charges are pending is designed to cut down on “judge- or [prosecutor]- shopping.” *Id.*

- G. In Open Court; Record Required.** As a general rule, a plea may be received “only from the defendant himself in open court.” G.S. 15A-1011(a). For a discussion of when a plea may be received in the defendant’s absence, see Section IV.B. above.

When the defendant has pleaded guilty, the record must demonstrate that the plea was made knowingly, voluntarily and intelligently. *Brady v. United States*, 397 U.S. 742, 747 n.4 (1970) (“[T]he record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.”); see Section IV.D., above (discussing the requirement that a plea be knowing, voluntary and intelligent). In *Boykin v. Alabama*, the United States Supreme Court stated that a waiver of constitutional rights would not be presumed from a silent record. 395 U.S. 238, 243 (1969); see also *State v. Allen*, 164 N.C. App. 665, 669-70 (2004). The North Carolina Supreme Court has reiterated this requirement:

Boykin requires us to hold that a plea of guilty or a plea of Nolo contendere may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly. Hence, a plea of guilty or of Nolo contendere, unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated If the plea is sustained, it must appear affirmatively that it was entered voluntarily and understandingly.

State v. Ford, 281 N.C. 62, 67-68 (1972); see also *State v. Wilkins*, 131 N.C. App. 220, 224 (1998) (plea must be knowing and voluntary and “the record must affirmatively show it on its face”).

Additionally, G.S. 15A-1026 requires a verbatim record of proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c). This record must include the judge’s advice to the defendant, and his or her inquiries of the defendant, defense counsel, and the prosecutor, and any responses. G.S. 15A-1026. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the

terms of the arrangement be stated for the record and that the assent of the defendant, defense counsel, and the prosecutor be recorded. *Id.* The Transcript of Plea form, AOC-CR-300, helps to create the record of the plea. *But see* Section IV.D.4., above (noting that the court must address the defendant personally and that a completed form alone does not satisfy this requirement). Strict compliance with the requirements for a record helps to protect pleas from collateral attack. *See Boykin*, 395 U.S. at 244 & n.7 (a record “forestalls the spin-off of collateral proceedings that seek to probe murky memories”); *Ford*, 281 N.C. at 68 (developing evidence that a plea was entered voluntarily and knowingly serves “generally to protect the plea and judgment from collateral attack in State post-conviction and federal *habeas corpus* proceedings”). As noted in Section III.F.4.b., if the judge rejects a plea agreement as to sentence, that rejection must be made a part of the record. G.S. 15A-1026; G.S. 15A-1023(b).

- H. Capital Cases.** A defendant may plead guilty to first-degree murder and the State may agree to accept a sentence of life imprisonment, even if evidence of an aggravating circumstance exists. *See* G.S. 15A-2001(b). For the procedural rules governing sentencing in a capital case in which there has been a guilty plea, *see* G.S. 15A-2001(c).
- I. Counsel.** Once the Sixth Amendment right to counsel attaches, *see generally* *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (the right attaches at the initial appearance after arrest or when the defendant is indicted or an information has been filed, whichever is earlier), it extends to “critical stages of the criminal process.” *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004). Because plea bargaining and plea proceedings are critical stages, a defendant has a right to counsel at these stages. *See id.* at 81 (entry of guilty plea); *State v. Detter*, 298 N.C. 604, 619 (1979). Thus, G.S. 15A-1012(a) provides that a defendant may not be called upon to plead until he or she has had an opportunity to retain counsel or, if he or she is eligible for assignment of counsel, until counsel has been assigned or waived.

For a discussion of the procedure for taking a waiver of counsel, *see* [Counsel Issues](#) in this Benchbook. For cases in the original jurisdiction of the superior court, a defendant who waives counsel may not plead within less than seven days following the date he or she was arrested or was otherwise informed of the charge. G.S. 15A-1012(b). The purpose of this delay is to give a “cooling off” time to the defendant who may during a period of emotional stress decide both to waive counsel and plead guilty.” Official Commentary to G.S. 15A-1012(b).

For a discussion of ineffective assistance of counsel claims related to guilty plea proceedings, *see* JESSICA SMITH, *INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES* (School of Government, UNC-Chapel Hill 2003).

- J. Competency.** A judge may not accept a plea from a defendant who is not competent. *Godinez v. Moran*, 509 U.S. 389, 396 (1993); G.S. 15A-1001(a). The standard for incapacity to plead is the same as incapacity to proceed to trial. *Moran*, 509 U.S. at 389-99. G.S. 15A-1001(a) provides that the standard for incapacity is “when by reason of mental illness or defect [the person] is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a

rational or reasonable manner.” The constitutional standard, which the North Carolina Supreme Court has said is “essentially the same,” *State v. LeGrande*, 346 N.C. 718, 724 (1997), is whether the defendant has “sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding” and whether the defendant has a “rational as well as factual understanding of the proceedings against him.” See *Moran*, 509 U.S. at 396 (internal quotation omitted). The United States Supreme Court has noted that a judge is not required to make a competency determination every time he or she takes a guilty plea. See *id.* at 401 n.13. Rather, it has said: “As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant’s competence.” *Id.*

Difficult questions as to competency can arise when the defendant is taking prescribed medications, or not taking medications as prescribed. The Transcript of Plea Form, see AOC-CR-300, includes the following questions:

- 4(a). Are you now under the influence of alcohol, drugs, narcotics, medicines, pills or any other substances?
- 4(b). When was the last time you used or consumed any such substance?”

When the answer to question 4(a) is yes, some follow-up will be required. If a defendant indicates that he or she is taking prescription medications, the judge may wish to follow-up with questions, such as:

1. What are your prescribed medications?
2. What is your prescribed dosage of each one?
3. How often are you supposed to take each medication?
4. For what problems are the medications prescribed?
5. Have you taken each of the medications as prescribed during the past 10 days?
6. When you are taking the medications as prescribed, do any of them cause any side effects, in particular, do they affect your ability to think clearly or communicate with other people?
7. Do you ever suffer any such problems when you do not take the medications as prescribed?
8. As you stand here today, are you able to think clearly? Are you able to understand clearly what I am saying to you? Are you able to express to me the things that you wish to say?
9. Is there anything else that I need to know about your medications or any physical or emotional difficulty?

The importance of such an inquiry is highlighted by cases in which defendants later assert incompetence at the time of their pleas on grounds that they failed to take prescribed medication, see, e.g., *State v. Ager*, 152 N.C. App. 577, 583-84 (2002) (rejecting the defendant’s claim that he was not competent at the time of the plea; the defendant failed to take one of his prescribed medications, Prozac, for two weeks before entry of the plea; rejecting claim that the defendant’s medications caused mental confusion), *affirmed per curiam*, 357 N.C. 154 (2003), or that the pleas were not knowing and voluntary.

K. Sentencing. If the sentence is not part of a negotiated plea agreement, sentencing after a guilty plea is conducted just like sentencing after a jury verdict of guilt. The applicable procedure when a plea agreement pertains to sentence is discussed in Section III.F., above. For a discussion of *Blakely v. Washington* and pleas to aggravating factors and prior record level points not involving prior convictions, see Section II.E., above. If the defendant pleads guilty only to the offense and contests an aggravating factor or prior record level point not involving a prior conviction, a jury must be empaneled to decide these issues. G.S. 15A-1340.16(a3), (a5). For sentencing procedures that apply in a capital case in which there has been a guilty plea, see G.S. 15A-2001(c).

If the plea is pursuant to a plea arrangement that includes restitution or reparation, G.S. 15A-1021(d) contains both guidance and requirements for the trial judge.

V. Withdrawal of a Plea. The standard for allowing withdrawal of a plea differs depending on whether a motion to withdraw is made before or after sentencing. Both standards are discussed below. Regardless of when the motion is made, if it is granted the relief will be the same: the case proceeds as if no plea was in place. This means that the parties are free to try to renegotiate, but are under no obligation to do so.

A. Before Sentencing. As discussed in Section III.F. above, if at the time of sentencing the judge decides to impose a sentence other than that provided for in a negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea. That scenario is the only one that creates a right to withdraw a plea prior to sentencing. However, the trial court may allow the defendant to withdraw a guilty plea prior to sentencing for any “fair and just” reason. *State v. Handy*, 326 N.C. 532, 539 (1990); see also *State v. Meyer*, 330 N.C. 738, 742 (1992); *Ager*, 152 N.C. App. at 579. While there is no right to withdraw a plea, motions to withdraw made before sentencing, and “especially at a very early stage of the proceedings, should be granted with liberality.” *Handy*, 326 N.C. at 537; *Meyer*, 330 N.C. at 742-43. Some of the factors to be considered in determining whether a fair and just reason exists include:

- whether the defendant has asserted legal innocence;
- the strength of the state's proffer of evidence;
- the length of time between entry of the guilty plea and the desire to change it;
- whether the defendant had competent counsel at all relevant times;
- whether the defendant understood the consequences of the plea; and
- whether the plea was entered in haste, under coercion or at the time when the defendant was confused.

Handy, 326 N.C. at 539; see also *Meyer*, 330 N.C. at 743 (quoting *Handy*); *Ager*, 152 N.C. App. at 579 (same); *State v. Marshburn*, 109 N.C. App. 105, 108 (1993) (same).

If the defendant asserts confusion or misunderstanding at the time of the plea, the “defendant must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter.” *Marshburn*, 109 N.C. App. at 109. Compare *Marshburn*, 109 N.C. App. at 109 (the defendant alleged misunderstanding about

the effect of his plea on an unrelated pending federal conviction), *with State v. Deal*, 99 N.C. App. 456, 464 (1990) (the defendant had a “basic misunderstanding of the guilty plea process”). The court of appeals has declined to decide what effect an active misrepresentation by the State as to collateral consequences would have on the right to withdraw a plea. *Marshburn*, 109 N.C. App. at 109 n.1.

Once the defendant makes the required showing, the State may refute it with “evidence of concrete prejudice” to its case by reason of the withdrawal. *Handy*, 326 N.C. at 539; *see also Meyer*, 330 N.C. at 743; *Marshburn*, 109 N.C. App. at 108. Lack of prejudice to the State does not, in and of itself constitute a fair and just reason for withdrawal. *Ager*, 152 N.C. App. at 584. Although the State may refute the defendant’s motion to withdraw with evidence of prejudice, it “need not even address this issue until the defendant has asserted a fair and just reason why he should be permitted to withdraw.” *Meyer*, 330 N.C. at 744; *see also Ager*, 152 N.C. App. at 584. Examples of concrete prejudice include:

- destruction of important physical evidence;
- death of an important witness; and
- that the defendant’s codefendant has already been tried in a lengthy trial.

See Marshburn, 109 N.C. App. at 108. North Carolina appellate cases applying the fair and just standard are summarized below.

Fair and Just Reason

State v. Handy, 326 N.C. 532, 539-42 (1990) (the defendant asserted innocence, tried to withdraw within 24 hours and said he felt pressured to plead guilty; the State did not argue substantial prejudice).

State v. Deal, 99 N.C. App. 456, 461-64 (1990) (the defendant had a basic misunderstanding of the implications of his guilty plea and had low intellectual abilities; although the withdrawal motion was not made for over 4 months the delay appears to have resulted from his problems with his attorney; the State did not argue prejudice).

No Fair and Just Reason

State v. Meyer, 330 N.C. 738, 743-45 (1992) (only reason offered for withdrawal motion made 3½ months after plea was changed circumstances due to extensive media coverage generated by the defendant’s escape from custody; the State’s case was strong; the defendant did not assert legal innocence or argue lack of competent counsel, that he misunderstood the consequences of the plea, that it was entered in haste or that he was confused or coerced).

State v. Chery, 203 N.C. App. 310, 313-19 (2010) (that plea was a no contest or *Alford* plea did not establish an assertion of legal innocence for purposes of the analysis; although the defendant testified at a co-defendant’s trial that he did not agree to take part in the crime, his testimony was negated by his stipulation to the factual basis for his plea and argument for a mitigated sentence based on acceptance of

responsibility; the State's proffered factual basis was strong and the fact that a co-defendant was acquitted at trial was irrelevant to the analysis; the plea was knowing and voluntary; any alleged misrepresentation by the defendant's original retained counsel could not have affected the plea where the defendant was represented by new counsel at the time of the plea; although the defendant sought to withdraw his plea 9 days after its entry, he executed the plea transcript approximately 3½ months before the plea was entered and never wavered in this decision).

State v. Watkins, 195 N.C. App. 215, 225-28 (2009) (the defendant "waffled" about his plea after entering it but did not file a withdrawal motion for nearly 2 years; the defendant's equivocal statements regarding guilt were insufficient assertions of innocence; the State's forecast of evidence was not weak; the defendant had competent representation; there was no indication that the defendant misunderstood the consequences of his plea; there was no haste or coercion; and the State demonstrated that withdrawal would prejudice its case because all co-defendants had been sentenced and could not be relied upon to testify against the defendant).

State v. Ager, 152 N.C. App. 577, 582-85 (2002) (in a motion to withdraw made 20 months after entry of the plea, the defendant did not assert legal innocence; there was no ineffective assistance of counsel and the defendant was competent at the time of the plea; the plea was not made hastily; although the State indicated that withdrawal would cause no prejudice, the defendant failed to show a fair and just reason for withdrawal), *aff'd per curiam*, 357 N.C. 154 (2003).

State v. Davis, 150 N.C. App. 205, 206-08 (2002) (in a motion to withdraw filed 7 days after the plea, the defendant asserted that he thought he was pleading to driving while impaired, not second-degree murder; however, the record showed that the defendant was not confused, he was represented by counsel and there was no haste or coercion; the defendant's response "No, sir" to his attorney's question "Do you feel like you're guilty of second degree murder?" was not a concrete assertion of innocence; State's proffer of evidence was "significant").

State v. Graham, 122 N.C. App. 635, 636-38 (1996) (in a withdrawal motion made almost 5 weeks after the plea, the defendant's statement that he "always felt that he was not guilty" was not a concrete assertion of innocence; lawyer's notes reflected no conversation in which he coerced or persuaded the defendant to accept the guilty plea and at the motion hearing, the defendant indicated that he was satisfied with his lawyer; the evidence against the defendant was "strong").

State v. Marshburn, 109 N.C. App. 105, 108-09 (1993) (the defendant argued that when he entered his plea, he did not know whether he was guilty or not and that he thought that it would not count as a conviction in a pending federal case when in fact it was so considered; motion to withdraw was made some 8 months after the plea and the defendant did not claim that he lacked the full benefit of counsel; the defendant did not

assert innocence and the asserted misunderstanding related only to the effects of his plea on an unrelated case).

- B. After Sentencing.** As discussed in Section III.F.5. above, if at the time of sentencing the judge decides to impose a sentence other than that provided for in a negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea. See also *State v. Russell*, 153 N.C. App. 508, 509 (2002) (“[I]f a trial court enters a sentence inconsistent with the agreed plea, the defendant is entitled to withdraw his guilty plea as a matter of right.”). Although that scenario is the only one that creates a right to withdraw a plea after sentencing, the trial court may allow the defendant to withdraw a guilty plea after sentencing upon a showing of manifest injustice. *State v. Shropshire*, 210 N.C. App. 478, 481 (2011); *Russell*, 153 N.C. App. at 509; *State v. Suites*, 109 N.C. App. 373, 375 (1993). Several reasons explain the stricter standard for post-sentencing motions to withdraw than to similar pre-sentencing motions. First, once the sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and wish to have it set aside. *Handy*, 326 N.C. at 537. Second, by the time of sentencing, the prosecutor likely will have followed through on his or her promises, such as dismissing other charges, and it may be difficult to undo these actions. *Id.* And finally, the higher standard is supported by the policy of giving finality to criminal sentences which result from voluntary and properly counseled guilty pleas. *Id.*

Only a few North Carolina appellate cases have had occasion to apply this standard. Compare *Suites*, 109 N.C. App. at 376-79 (manifest injustice existed to allow withdrawal of guilty plea to accessory before the fact to second-degree murder when named principal was later acquitted of first-degree murder), with *Shropshire*, 210 N.C. App. at 481 (trial court did not err by denying the defendant’s motion to withdraw his guilty plea made after sentencing; the defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement); *State v. Salvetti*, 202 N.C. App. 18, 34-35 (2010) (trial court did not err in denying the defendant’s motion to withdraw, made after sentencing; the court reasoned, among other things, that the trial court had determined that counsel was not ineffective and that the State’s evidence was sufficient to support the conviction); *Russell*, 153 N.C. App. at 510 (rejecting the defendant’s argument that manifest injustice existed because he was not fully informed of the sentencing consequences; the trial court was not required to inform the defendant that the sentence could be made to run at the expiration of sentences he was serving for unrelated convictions; the record showed that the plea was knowing and voluntary where the defendant signed a Transcript of Plea form and the trial court made a careful inquiry). Most of those cases indicate that the factors considered in connection with a motion to withdraw made prior to sentencing apply equally to a motion to withdraw made after sentencing. *Shropshire*, 210 N.C. App. at 481; *Russell*, 153 N.C. App. at 509; *State v. Salvetti*, 202 N.C. App. 18, 34 (2010).

Although there is variation among jurisdictions, it is generally thought that the following types of fact patterns rise to the level of a manifest injustice:

- when the defendant was denied effective assistance of counsel

- when the plea was not entered or ratified by the defendant or a person authorized to act in his or her behalf; and
- when the plea was involuntary.

See 5 CRIMINAL PROCEDURE § 21.5(a), at 872 (listing other fact patterns).

VI. Enforcing a Plea Agreement.

A. Breach of Agreement.

Once the plea is entered, the parties are bound by the plea agreement and failure to comply with it constitutes a breach.

1. **Common Types of Breaches.** Common prosecutorial breaches include breaking a promise to take no position on sentencing, see *Santobello v. New York*, 404 U.S. 257, 259 (1971) (prosecutor breached by recommending a sentence); *State v. Rodriguez*, 111 N.C. App. 141, 146 (1993) (prosecutor breached by noting for the trial court certain available non-statutory aggravating factors), and breaking a promise to recommend a particular sentence. See, e.g., *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997) (prosecutor breached promise to recommend that the defendant receive a sentence of no more than 63 months and an adjustment for acceptance of responsibility). Of course, other types of prosecutorial breaches may occur. See *State v. Blackwell*, 135 N.C. App. 729, 730-32 (1999) (State breached promise not to use plead-to felony as a theory of first-degree murder under the felony-murder rule; although the State did not use the plead-to felony as the underlying felony, it used it derivatively to prove the underlying felonies).

A promise to take no position on sentencing means that the prosecutor is to make no comment to the sentencing judge, either orally or in writing, that “bears in any way upon the type or severity of the sentence to be imposed.” *Rodriguez*, 111 N.C. App. at 145-46. Stated another way, “taking no position” means “making no attempt to influence the decision of the sentencing judge.” *Id.* at 146. A breach of a promise to take no position on sentencing will not be excused on grounds that it was inadvertent, see *Santobello*, 404 U.S. at 262, or because it might not have influenced the sentencing judge. *Rodriguez*, 111 N.C. App. at 147 (rejecting the State’s argument that no breach occurred because none of the non-statutory aggravating factors suggested by the prosecutor were found by the judge); *Santobello*, 404 U.S. at 262-63 (prosecutor breached by recommending a sentence; remand required even though trial judge stated that prosecutor’s recommendation did not influence him). A promise to recommend a sentence does not require the prosecutor to advocate for the sentence or to explain the reasons for the recommendation. See *United States v. Benchimol*, 471 U.S. 453, 455-57 (1985).

Although less common, some cases deal with breach by defendants. See *Ricketts v. Adamson*, 483 U.S. 1, 4-5 (1987) (defendant breached by not testifying at his accomplices’ retrial).

2. **Ambiguities Construed Against the State.** Occasionally, ambiguity in the plea agreement complicates the determination of whether a breach has occurred. Although a plea agreement is a contract, it is not an ordinary commercial contract. *Blackwell*, 135 N.C. App. at 731. Because a guilty plea involves a waiver of constitutional rights, including the right to a

jury trial, "due process mandates strict adherence to any plea agreement." *Id.* This strict adherence "require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." *Id.* (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)); see also *State v. King*, 218 N.C. App. 384, 388 (2012) (quoting *Blackwell*). Thus, ambiguities are construed against the State.

3. Remedies after Breach. A defendant cannot be held to a plea bargain when the prosecution breaches. *Santobello v. New York*, 404 U.S. 257, 262 (1971). When such a breach occurs, the defendant's remedies are either specific performance or withdrawal of the plea. *Id.* at 262-63; *Blackwell*, 135 N.C. App. at 732. The court should consider the following factors when deciding between these remedies:

- who broke the bargain;
- whether the violation was deliberate or inadvertent;
- whether circumstances have changed between entry of the plea and the present time;
- whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate; and
- the defendant's wishes.

Blackwell, 135 N.C. App. at 732-33.

Some appellate decision have ordered specific performance as a remedy for a prosecution breach. See *State v. King*, 218 N.C. App. 384, 390-98 (2012) (where the defendant pleaded guilty pursuant to a plea agreement that called for, in part, the return of over \$6,000 in seized funds, the court ordered specific performance even though the exact funds at issue had been forfeited to federal authorities; rescission could not repair the harm to the defendant where he already had completed approximately nine months of probation and had complied with all the terms of the plea agreement, including payment of fines and costs); *Rodriguez*, 111 N.C. App. at 148 (where the prosecutor breached a promise to take no position on sentencing, the court ordered a new sentencing hearing at which the State was to take no position on sentencing). Others have ordered rescission. *State v. Isom*, 119 N.C. App. 225, 227-28 (1995) (rescission ordered where the plea agreement called for sentencing the defendant as a committed youthful offender but he did not qualify for that status based on his age). Still others, noting that trial court is in the best position to determine the appropriate remedy, have remanded for the trial court to choose between the two remedies. *Santobello*, 404 U.S. at 263; *Blackwell*, 135 N.C. App. at 732.

When specific performance requires a new sentencing hearing, a different judge should conduct that proceeding. See *Santobello*, 404 U.S. at 263; *Rodriguez*, 111 N.C. App. at 148.

A defendant is not entitled to specific performance when the plea agreement contains terms that violate statutory law; in these cases, rescission is the appropriate remedy. *State v. Wall*, 348 N.C. 671, 676

(1998); *Rodriguez*, 111 N.C. App. at 148. See generally Section III.B.6. (discussing that plea agreement terms that are contrary to law are unenforceable).

When the agreement is conditioned on some future action by the defendant—such as truthfully testifying in an accomplice's trial—it typically contains a provision indicating that the agreement is null and void upon breach. When that is the case and breach occurs, double jeopardy presents no bar to re-trying and convicting the defendant on the original greater charges. *Ricketts v. Adamson*, 483 U.S. 1, 11 (1987) (so holding).

- B. Mutual Mistake.** What if the parties enter into a plea agreement that is based on a mutual mistake of law? Where the mutual mistake improperly elevates the defendant's sentence the defendant is not entitled to repudiate only the problematic portion of the agreement. Because the "defendant cannot repudiate in part without repudiating the whole," such a scenario requires that the entire plea be set aside and the original charges be reinstated. *State v. Rico*, 366 N.C. 327 (2012) (for the reasons stated in the dissenting opinion below, reversing *State v. Rico*, 218 N.C. App. 109 (2012)). A similar result obtains when the mutual mistake illegally lessens the defendant's sentence. In such a scenario the defendant is not entitled to specific performance; rather, the defendant's remedy is to withdraw the plea and proceed to trial on the original charges. *Wall*, 348 N.C. at 676. See generally Section III.B.6. (discussing that plea agreement terms that are contrary to law are unenforceable).

VII. Appeal & Post-Conviction Challenges.

- A. Generally: Claims Waived By The Plea.** As a general rule, a defendant who knowingly, voluntarily and intelligently enters an unconditional guilty plea waives all defects in the proceeding, including constitutional defects, that occurred before entry of the plea. See *State v. Reynolds*, 298 N.C. 380, 395 (1979) (holding that the defendant's plea waived his fourth amendment claim asserted on appeal, the court stated: "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea") (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)); see also *State v. Harwood*, ___ N.C. App. ___, 746 S.E.2d 445, 451-52 (2013) (by pleading guilty to multiple counts of felon in possession, the defendant waived the right to challenge his convictions on double jeopardy grounds).

- 1. Exception: Claims Challenging Power of State to Prosecute.** A guilty plea does not waive a claim challenging "the power of the State to bring the defendant into court to answer the charge." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974); *Reynolds*, 298 N.C. at 395 (discussing *Perry*). Under this exception, a defendant who has pleaded guilty would not be barred from asserting, for example, a jurisdictional defect in the proceedings. See, e.g., *State v. Neville*, 108 N.C. App. 330, 333 (1992) (guilty plea to uttering a forged instrument did not waive appeal where the defendant was not indicted on that charge and never signed a waiver of a bill of indictment and thus issue was jurisdictional). The full scope of the "power of the State" exception, is not entirely clear. See 5 CRIMINAL PROCEDURE § 21.6(a), at 909-12.

2. **Exception: Defect in the Plea Itself.** Entry of a guilty plea does not preclude a defendant from later alleging a defect in the plea—such as a claim asserting that the plea was not knowing, voluntary and intelligent. See *State v. Tyson*, 189 N.C. App. 408, 416 (2008) (rule barring attack on a plea does not preclude a defendant from asserting that he or she was induced into not accepting a plea based on misrepresentations by the State); 5 CRIMINAL PROCEDURE § 21.6(a), at 920 (noting that the types of claims that survive a plea include ineffective assistance of counsel affecting the plea process and defects in the plea proceeding which make the plea “other than voluntary, knowing and intelligent”); see *generally* Section IV.D. above (discussing the requirement that a plea be knowing, voluntary and intelligent).
3. **Claim Preserved by Statute.** As discussed in the section immediately below, in North Carolina, statutory law expressly provides the defendant a right to appeal certain sentencing issues, a denial of a motion to withdraw the plea, and an adverse ruling on a motion to suppress.

B. Procedural Mechanisms For Review.

1. **Appeal.** A defendant who has entered a plea of guilty or no contest is not entitled to appellate review as a matter of right except when the appeal pertains to sentencing issues, the denial of a motion to withdraw the plea, and, in certain circumstance, an adverse ruling on a motion to suppress. G.S. 15A-1444; *State v. Santos*, 210 N.C. App. 448, 450 (2011). Thus, absent a motion to withdraw the plea, a defendant does not have an appeal as a matter of right to challenge a plea on grounds that it was not knowing, voluntary, and intelligent. *Santos*, 210 N.C. App. at 450. However, such a claim may be asserted in a petition for writ of certiorari, see Section VII.B.2. below, or in a motion for appropriate relief. See Section VII.B.3. below.
 - a. **Sentencing Errors.** A defendant who pleads guilty or no contest has a right to appeal certain issues regarding the sentence. G.S. 15A-1444(a1)-(a2). Specifically, a defendant may appeal:
 - Whether a felony sentence is supported by the evidence. G.S. 15A-1444(a1). This issue is appealable only if the minimum term of imprisonment does not fall within the presumptive range. *Id.*
 - Whether a felony or misdemeanor sentence results from an incorrect finding of the defendant's prior record level or prior conviction level. G.S. 15A-1444(a2)(1).
 - Whether a felony or misdemeanor sentence contains an unauthorized type of sentence disposition. G.S. 15A-1444(a2)(2).
 - Whether a felony or misdemeanor sentence contains a term of imprisonment that is for an unauthorized duration. G.S. 15A-1444(a2)(3).

Nevertheless, when the defendant enters into a plea agreement that includes an agreement as to sentencing, the defendant may be deemed to have waived the right to appeal the sentence. *State v. Hamby*, 129 N.C. App. 366, 369-70 (1998) (the defendant

waived her right to appeal her sentence by admitting in her plea agreement that she fell within Prior Record Level II and that the judge was authorized to sentence her to a minimum of 29 months and a maximum of 44 months and by agreeing that her sentence could be intermediate or active in the trial judge's discretion).

- b. **Denial of Motion to Withdraw Plea.** A defendant who pleads guilty or no contest has a right to appeal from a denial of a motion to withdraw a plea of guilty or no contest. G.S. 15A-1444(e); see, e.g., *State v. Handy*, 326 N.C. 532, 535 (1990).
- c. **Adverse Ruling on Suppression Motion.** A defendant who pleads guilty or no contest has a right to appeal from an adverse ruling on a suppression motion, in certain circumstances. G.S. 15A-1444(e); G.S. 15A-979(b). To preserve the right to appeal such a ruling, the defendant must notify the state and the trial court that he or she intends to appeal "before plea negotiations are finalized." *State v. Reynolds*, 298 N.C. 380, 397 (1979); see also *State v. McBride*, 120 N.C. App. 623, 625 (1995), *aff'd per curiam*, 344 N.C. 623 (1996). This seems to mean any time before the trial court accepts the plea. See *State v. Parker*, 183 N.C. App. 1, 6 (2007) ("[D]efendant preserved his right to appeal from the trial court's denial of the motion to suppress by expressly communicating his intent to appeal the denial to the trial court at the time he pleaded guilty"); *State v. Christie*, 96 N.C. App. 178, 179-80 (1989) (oral notice given in court when the plea was entered was sufficient). The notice must be "specifically given." *State v. Pimental*, 153 N.C. App. 69, 74-76 (2002) (statement in Transcript of Plea that "Defendant preserves his right to appeal any and all issues which are so appealable" was not specific enough); see also *State v. Brown*, 142 N.C. App. 491, 492-93 (2001) (a stipulation in the appellate record that the defendant intended to appeal the denial of a suppression motion was not sufficient to preserve the issue).

If the defendant fails to provide the required notice, the right to appeal is waived by entry of the plea. See, e.g., *Reynolds*, 298 N.C. at 397.

These rules have led to what has become known as the conditional plea: a guilty plea conditioned on the right to appeal a denial of a suppression motion pursuant to G.S. 15A-979(b).

- 2. **Certiorari.** Defendants who are not entitled to an appeal as a matter of right may obtain review by writ of certiorari. G.S. 15A-1444(a1) (defendant who has entered a plea of guilty or no contest to a felony may petition for review by way of certiorari of whether the sentence is supported by the evidence); G.S. 14A-1444(e) (defendant who has pleaded guilty or no contest and does not have a right to review under G.S. 15A-1444(a1), (a2) or G.S. 15A-979 may petition for review by way of writ of certiorari).
 - a. **Scope of the Appellate Division's Authority to Grant Writ.** Rule 21 of the North Carolina Rules of Appellate Procedure provides that in connection with review of trial court rulings, a writ of certiorari may be issued to permit review:

- when the right to prosecute an appeal has been lost by failure to take timely action,
- when no right of appeal from an interlocutory order exists, or
- for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

Citing the limited bases for certiorari review in Rule 21, the North Carolina Court of Appeals has denied petitions for writs of certiorari challenging guilty pleas. *State v. Pimental*, 153 N.C. App. 69, 77 (2002) (“In the instant case, defendant has not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review of an order of the trial court denying a motion for appropriate relief. Thus, this Court does not have the authority to issue a writ of certiorari.”).

However, that court has interpreted state supreme court case law as allowing certiorari review of claims that the trial court improperly accepted the plea, notwithstanding Rule 21. See, e.g., *State v. Demaio*, 216 N.C. App. 558, 562-64 (2011). See generally *State v. Rhodes*, 163 N.C. App. 191, 193-94 (2004) (distinguishing *Pimental* and similar decisions; interpreting supreme court case law and G.S. 15A-1027 as authorizing the court “to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of Article 58 were violated”). Note that G.S. 15A-1027 provides that “[n]oncompliance with the procedures of [Article 58 (guilty plea procedures in superior court)] may not be a basis for review of a conviction after the appeal period for the conviction has expired.”

- b. Transcript.** If an indigent defendant petitions the appellate division for a writ of certiorari, the trial court may, in its discretion, order the preparation of the record and transcript of the proceedings at the State’s expense. G.S. 15A-1444(e).
- 3. Motion for Appropriate Relief.** In certain circumstances a defendant may be able to challenge a plea through a post-conviction motion for appropriate relief. For detail on that procedure, see [Motions for Appropriate Relief](#) in this Benchbook.