**Pleas and Plea Negotiations in North Carolina Superior Court**

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**Contents**



## 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 a guilty plea rather than by jury trial. In 2002-03, a total of 2,887 superior court

criminal cases were disposed of by jury trial.[1] In that same time period, 69,649 cases were disposed of by guilty plea.[2]

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 by the prosecutor can take many forms, such as allowing a plea on a lesser charge, agreeing to dismiss charges or not to bring other charges, agreeing as to sentence, or promising to recommend a particular sentence. The incentives for a defendant 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. [3] The incentives for the prosecution are varied but no doubt include judicial economy, as plea bargaining allows the prosecution to quickly dispose of a large number of cases.[4] The United States Supreme Court has noted that disposition by plea negotiations is a "highly desirable" part 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.[5]

Pleas and plea negotiations must comply with constitutional requirements. Additionally, North Carolina statutory law provides procedures for taking pleas and conducting plea

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1. *See* Statistical and Operational Summary of the Judicial Branch of Government, North Carolina Courts FY 2002-03 at 46.
2. *See id.*
3. *See, e.g.,* State v. McClure, 280 N.C. 288, 294 (1972) (speculating as to defendant's motives for pleading guilty); Brady v. United States, 397 U.S. 742, 752 (1970) (advantages of pleading guilty for the defendant).
4. *See, e.g., Brady,* 397 U.S. 752 (listing advantages for the State).
5. Santobello v. New York, 404 U.S. 257, 261 (1971).

negotiations. Case law adds to this body of law. This bulletin summarizes the constitutional, statutory, and case law regarding pleas and plea negotiations in superior court.

## II. Types of Pleas

A defendant may plead not guilty, guilty, or no contest to a criminal charge.[6] There is no such thing as a plea of "innocent."[7] The decision to plead guilty must be made by the defendant.[8]

By pleading not guilty, a defendant requires the state to prove, beyond a reasonable doubt, every element of the charged offense.[9] A defendant has a constitutional right to plead not guilty,[10] and may not be punished for exercising that right.[11] Thus, the fact that a defendant pleaded not guilty may not be considered by the sentencing judge.[12]

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6. *See* G.S. 15A-1011(a); *see also* State v. Maske, 358 N.C. 40, 61 (2004).
7. *See Maske,* 358 N.C. at 61
8. *See* State v. Harbison, 315 N.C. 175, 180 (1985) ("A plea decision must be made exclusively by the defendant."); State v. Perez, 135 N.C. App. 543, 547 (1999) ("a decision to make a concession of guilt as a trial strategy is, like a guilty plea, a decision which may only be made by the defendant").
9. *See Maske,* 358 N.C. at 61.
10. *See id.* at 61; State v. Larry, 345 N.C. 497, 524 (1997); State v. Kemmerlin, 356 N.C. 446, 482 (2002).
11. *See Maske,* 358 N.C. at 61*;* State v. Boone, 293 N.C. 702, 713 (1977).
12. *Compare Boone,* 293 N.C. at 712-13 (remanding for resentencing where record revealed that sentence imposed was induced in part by defendant's exercise of his right to plead not guilty); *and* State v. Cannon, 326 N.C. 37, 38-39 (1990) ("[w]here it can be reasonably inferred from the language of the trial judge that the sentence was imposed at least 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, they would receive the maximum sentence); *and* State v. Peterson, 154 N.C. App. 515, 518 (2002) (while sentencing defendant, trial judge improperly considered defendant's decision to exercise his right to a trial by jury; at sentencing judge stated defendant "tried to be a con artist with the jury", defendant "rolled the dice in a high stakes game with the jury, and it's very apparent that [he] lost that gamble", and that the evidence of guilt was "such 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) (can be reasonably inferred that trial court improperly considered defendant's failure to accept a plea and exercise of her right to a jury trial when sentencing her; when imposing sentence, trial judge noted that plea discussions were not productive and continued, in part: "I understand and appreciate that, but 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 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 trial court's reference to the defendant's failure to enter a plea agreement, holding that judge's comments did not support the conclusion that

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 indictment or other criminal process.[13] 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.[14] Those waived rights include the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers.[15] A defendant may plead guilty to a capital charge.[16]

Under *North Carolina v. Alford*,[17] a defendant may plead guilty while factually maintaining innocence, provided that the record contains "strong evidence of actual guilt."[18] Such pleas are known as *Alford* pleas and have been upheld in North Carolina.[19] An *Alford* plea carries all of the consequences of a guilty plea.[20]

One issue that has arisen regarding *Alford* pleas is whether a defendant who enters such a plea can be required, as a condition of probation, to participate in a sex offender rehabilitation program that requires an acknowledgment of guilt. It was argued that maintaining innocence

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defendant was more severely punished because he exercised his constitutional right to a jury trial), *review denied,* 358 N.C. 157 (2004).

13. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did the various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."); State v. Thompson, 314 N.C. 618, 623-24 (1985); State v. McCree, 160 N.C. App. 200, 203 (2003).

14. *See Boykin,* 395 U.S. 238 at 243; *see also* State v. Pait, 81 N.C. App. 286, 289 (1986).

15. *See Boykin,* 395 U.S. at 243.

16. *See* G.S. 15A-2001; *see infra* p. 25.

17. 400 U.S. 25 (1970).

18. *See id.* at 37 ("[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilty 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. Canady, 153 N.C. App. 455, 457-58 (2002) (*Alford* plea requires "strong evidence" of guilt).

19. *See, e.g.,* State v. McClure, 280 N.C. 288, 291-94 (1972) (under *Alford,* trial judge properly accepted plea of guilty to second-degree murder although defendant did not expressly admit guilt); *Canady*, 153 N.C. App. 455 (*Alford* plea to indecent liberties).

20. *See* State v. Alston, 139 N.C. App. 787, 792 (2000) (an *Alford* plea constitutes a guilty plea in the same way that a plea of no contest is a guilty plea).

pursuant to an *Alford* plea should be viewed as a lawful excuse for not having completed the rehabilitation program. In *State v. Alston,*[21] the North Carolina Court of Appeals rejected that argument. The court reasoned that the defendant's claim of innocence was applicable only to the plea itself and did not extend to future proceedings.[22]

Another issue that has arisen regarding *Alford* pleas is whether a judge is required to accept a knowing and voluntary *Alford* plea, provided there is strong evidence of guilt. Although this issue has not been addressed by the North Carolina General Assembly or the North Carolina courts, a footnote in *Alford* suggests that that a judge is not required to accept such a plea. That footnote states:

> 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.[23]

Other jurisdictions have held that the trial judge has discretion whether or not to accept an *Alford* plea.[24]

A no contest plea—also called a plea of *nolo contendere*—is similar to an *Alford* plea. In a no contest plea, the defendant does not acknowledge guilt but agrees not to contest the charge.[25] Although the statute authorizes no contest pleas,[26] a defendant may plead no contest

21. 139 N.C. App. 787 (2000).
22. *See id.* at 794.
23. *See Alford,* 400 U.S. at 38 n.11 (citation omitted) (noting that "[l]ikewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence").
24. *See, e.g.,* Commonwealth v. Gendraw, 774 N.E.2d 167, 174 (Mass. 2002) (no constitutional right to have an *Alford* plea accepted); State v. Cotton, 621 S.W.2d 296, 300-01 (Mo. Ct. App. 1981) (same).
25. *See* Black's Law Dictionary 945 (5th ed. 1979) (defining *nolo contendere*).
26. *See* G.S. 15A-1011(a).

only if the prosecutor and presiding judge consent.[27] Few standards exist to guide the judge in the exercise of discretion as to whether to accept a no contest plea.[28]

A no contest plea later may be used to prove that a defendant was convicted of the pleaded-to offense.[29] Thus, evidence of past convictions resulting from a no contest plea may be admitted under evidence Rule 609(a)[30] for purposes of impeachment.[31] Also, a no contest plea is a conviction for purposes of considering prior convictions as an aggravating factor in a capital case under G.S. 15A-2000(e).[32]

When taking a no contest plea, the trial judge must inform the defendant that if he or she pleads no contest, he or she will be treated as guilty whether or not guilt is admitted.[33] The main benefit of a no contest plea is that it does not constitute an admission of guilt in civil proceedings.[34]

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 relevant statutory law and requirements to preserve such an appeal are discussed below.[35] Finally, 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.[36]

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27. *See* G.S. 15A-1011(b).
28. *See* LAFAVE, ISRAEL & KING, 5 CRIMINAL PROCEDURE § 21.4(a) at p.154-55 (2nd ed. 1999) [hereinafter CRIMINAL PROCEDURE].
29. *See* State v. Outlaw, 326 N.C. 467 (1990); State v. Holden 321 N.C. 125 (1987).
30. *See* G.S. 8C-1 R. 609(a).
31. *See Outlaw,* 326 N.C. 467 (noting that while a prosecutor could ask whether a defendant was convicted of a crime to which he pled no contest, it would be improper to ask whether the defendant had pled no contest).
32. *See Holden,* 321 N.C. 161-62 ("The question presented in this case is not whether the no contest plea may be used to prove the aggravating circumstance but whether proof of the no contest plea and final judgment entered thereon constitute a conviction within the meaning of the statute. We hold it is a conviction within the statute's meaning and was properly found as an aggravating circumstance.").
33. *See* G.S. 15A-1022(d); *see also* State v. May, 159 N.C. App. 159, 166 (2003) (by following statutory procedure, judge sufficiently explained consequences of the no contest plea).
34. *See* FODOR & RUBIN, 2 N.C. DEFENDER MANUAL p. 10 (Institute of Government 2002).
35. *See infra* p. 35.
36. *See* G.S. 15A-941(a).

## III. Plea Bargaining

### A. Generally

Although G.S. 15A-1021 allows the prosecution and the defense to negotiate a plea, the defendant has no constitutional right to engage in plea bargaining.[37] A prosecutor has broad discretion to decide whether to engage in plea negotiations with a defendant and what plea will be offered.[38] 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."[39]

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, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence.[40] Restitution or reparation may be part of the plea arrangement.[41] It is not a violation of due process for a prosecutor to legitimately threaten a defendant, during the course of plea negotiations, with institution of more serious charges if the defendant does not plead guilty.[42] If the defendant declines to plead guilty, no constitutional violation occurs when the prosecutor carries out that threat.[43] Although a prosecutor's offer of leniency to a person other than the

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37. *See* Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain.").
38. *See* State v. Woodson, 287 N.C. 578, 594 (1975) (prosecutor had full authority to negotiate with and accept pleas from two co-defendants but not others), *reversed on other grounds,* 428 U.S. 280 (1976).
39. *See Woodson,* 287 N.C. at 595 (no constitutional infirmity in prosecutor's selection, no abuse of discretion and no arbitrary classification) (quotation omitted); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (selectivity in enforcement is not a constitutional violation so long as the selection was not deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification).
40. *See* G.S. 15A-1021(a).
41. *See* G.S. 15A-1021(d).
42. *See Bordenkircher*, 434 U.S. at 365.
43. *See id* (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, 381-84 (1982) (presumption of vindictiveness did not apply; after defendant requested a jury trial on misdemeanor charges, he was indicted for a felony).

defendant has withstood a due process challenge in North Carolina,[44] the United States Supreme Court has indicated that offers of more lenient or adverse treatment of a third party might require a heightened level of scrutiny.[45] Other jurisdictions have applied the same scrutiny to "package" pleas offered to multiple defendants, reasoning that such pleas may place additional pressure on the participants to go along with the deal.[46]

Although North Carolina has not dealt with the issue, courts in other jurisdictions are split on whether the right to appeal may be waived as part of a negotiated plea.[47] A number of courts, including the Fourth Circuit, have held that waiver of the right to appeal can be part of a plea bargain.[48] Others conclude that this right is non-negotiable.[49] The Fourth Circuit also has held that a defendant may waive the right to collaterally attack a plea.[50]

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44. *See* State v. Summerford, 65 N.C. App. 519, 521-22 (1983) (prosecutor offered to dismiss charges against wife if husband plead guilty).
45. *See Bordenkircher*, 434 U.S. at 364 n.8 (indicating that 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"). Some lower courts have applied the Court's cautionary note when the third party has a close relationship with the defendant. *See* Harman v. Mohn, 683 F.2d 834, 837-38 (4th Cir. 1982) (as part of plea bargain, prosecutor agreed to dismiss indictment against defendant's wife, among other things; finding that prosecutor observed "the high standard of good faith required in this type of plea bargain" and that the judge carefully examined it).
46. *See, e.g.,* United States v. Caro, 997 F.2d 657 (9th Cir. 1993) (package plea requires "more careful examination" of voluntariness); United States v. Clements, 992 F.2d 417 (2d Cir. 1993). A "package" plea comes about when a prosecutor fears that once he or she allows a defendant to plead guilty, the defendant will then testify on behalf of a co-defendant. To protect against this, the prosecutor may offer a plea agreement under which both defendants must agree to the bargain before any will be allowed to benefit from it.
47. *See* CRIMINAL PROCEDURE, *supra* n. 28 at § 21.2(b) p.46.
48. *See* United States v. Davis, 954 F.2d 182, 185-86 (4th Cir. 1992) (waiver of appellate rights as to other convictions). Other decisions by the Fourth Circuit have recognized that there is a "narrow class of claims" that have been found to survive a general waiver of appellate rights. *See* United States v. LeMaster, 403 F.3d 216, 220 n.2 (4th Cir. 2005) (noting sentence based on impermissible factor such as race and allegation that defendant had been completely deprived of counsel during sentencing).
49. *See* CRIMINAL PROCEDURE, *supra* n. 28 at § 21.2(b) p. 46-47.
50. *See LeMaster*, 403 F.3d at 220. 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.

If the defendant is represented by counsel, the defendant need not be present during the plea negotiation discussions.[51] The trial judge may participate in the discussions.[52] Once a plea arrangement has been rejected by the court, the arrangement is no longer available for defendant to accept, unless the prosecutor agrees to negotiate another plea arrangement.[53]

**B. *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.[54] Also, In *State v. Fox,*[55] the North Carolina Court of Appeals held that if a felony charge is reduced to a misdemeanor charge 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.

**C. Plea Arrangements Relating to Sentence**

If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular 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.[56] 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.[57] If

51. *See* G.S. 15A-1021(a).
52. *See id.*
53. *See* State v. Daniels, 164 N.C. App. 558, 561-62 (2004), *review denied,* 359 N.C. 71 (2004).
54. *See* G.S. 7A-271(b); G.S. 15A-1431(b).
55. 34 N.C. App. 576 (1977).
56. *See* G.S. 15A-1021(c).
57. *See id.*

the judge agrees with the disposition, the judge may change his or her mind if the judge later learns of information inconsistent with the representations made.[58]

Regardless of whether the parties have consulted with the judge before the plea, G.S. 15A-1023(a) provides that if the parties 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. Before accepting the plea, the judge must advise the parties whether he or she approves the arrangement and will dispose of the case accordingly.[59] 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 plea arrangement.[60] The judge must tell the parties why he or she rejected the arrangement and give them a chance to modify it.[61] However, the state is not required to modify the agreement.[62] 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.[63] As noted above, even if the judge previously indicated that he or she agreed with the proposed disposition, the judge may change positions if he or she learns of information inconsistent with the representations made earlier.[64]

If the judge rejects the plea arrangement, the defendant is entitled to a continuance until the next session of court.[65] Although failure to grant a motion for a continuance requires

58. *See id.*
59. *See* G.S. 15A-1023(b).
60. *See id.*
61. *See id.; see, e.g.,* State v. Santiago, 148 N.C. App. 62, 68 (2001) (judge rejected arrangement, expressing concern that it would only subject the defendant to a maximum of an additional year and half in prison).
62. *See* State v. Bailey, 145 N.C. App. 13, 21 (2001).
63. *See* State v. Martin, 77 N.C. App. 61, 65 (1985).
64. *See* G.S. 15A-1021(c).
65. *See* G.S. 15A-1023(b).

reversal,[66] the court is not required to order a continuance on its own motion.[67] No statutory right to a continuance attaches when a judge denies a defendant's request to plead guilty under a plea arrangement that has already been rejected and thus is null and void.[68]

There is no constitutional right to have a guilty plea accepted[69] and a decision by a judge rejecting a plea arrangement is not subject to appeal.[70]

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 tell the defendant that a different sentence will be imposed and that the defendant may withdraw the plea.[71] Although failure to follow the statutory procedure has been held to be reversible error,[72] a defendant's lack of diligence in asserting such a failure may waive the right to challenge the plea.[73] 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.[74] It also has held

66. *See* State v. Tyndall, 55 N.C. App. 57, 63 (1981) (granting new trial where trial judge denied defendant's motion for a continuance after judge rejected plea arrangement; defendant has an "absolute right" to continuance in these circumstances).
67. *See Martin*, 77 N.C. App. at 65.
68. *See Daniels*, 164 N.C. App. at 562 (defendant could not resurrect a plea agreement that had already been rejected).
69. *See* State v. Collins, 300 N.C. 142, 148 (1980); State v. Wallace, 345 N.C. 462, 465 (1997).
70. *See* G.S. 15A-1023(b)*; see also Santiago*, 148 N.C. App. at 68 (rejecting defendant's argument that the trial court erred in rejecting his plea agreement, citing G.S. 15A-1023(b)).
71. G.S. 15A-1024; *see also* State v. Puckett, 299 N.C. 727, 730-31 (1980) (reversing the trial court for failure to comply with G.S. 15A-1024); State v. Rhodes, 163 N.C. App. 191, 194-95 (2004) (same).
72. *See, e.g., Puckett,* 299 N.C. at 730-31; *Rhodes,* 163 N.C. App. at 194-95.
73. *See* State v. Rush, 158 N.C. App. 738, 741 (2003) (holding that because defendant failed to file a motion to withdraw her guilty plea, failed to give oral or written notice of appeal within ten days after the judgment was entered, 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).
74. *See* State v. Wall, __ N.C. App. __ (Dec. 7, 2004) (defendant received a sentence of 133-169 months imprisonment when plea agreement specified 151-191 months).

that like a sentencing, a resentencing triggers application of G.S. 15A-1024.[75] Upon withdrawal, the defendant is entitled to a continuance until the next session of court.[76]

### D. Arrangements Pertaining 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.[77] The judge must accept the plea if it is knowing and voluntary and there is a factual basis for it.[78]

### E. Enforcing a Plea Agreement

Two issues arise with regard to enforcing a plea agreement. The first is whether the defendant or the state may back out of a plea agreement before the plea is accepted by the court. The second is how to handle a breach of an agreement after the plea has been accepted. Both issues are discussed below.

#### 1. Backing Out of an Agreement

The state may withdraw from a plea agreement at any time before actual entry of the plea or before there is an act of detrimental reliance by the defendant.[79] A defendant is free to withdraw from a plea agreement before entry of the plea, regardless of any prejudice to the prosecution.[80] 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

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75. *See id.*
76. *See* G.S. 15A-1024.
77. *See* G.S. 15A-1023(c).
78. *See id.*; State v. Melton, 307 N.C. 370, 377 (1983) (judge required to accept plea when there was a factual basis and plea was voluntary).
79. *See* State v. Collins, 300 N.C. 142, 148-49 (1980); *see also* State v. Hudson, 331 N.C. 122, 146-49 (1992); State v. Marlow, 334 N.C. 273, 279-81 (1993); *see also* State v. Johnson, 126 N.C. App. 271 (1997).
80. *See Collins,* 300 N.C. at 149.

> pleading. Thus, the prosecutor agrees to perform if and when defendant performs but has no right to compel defendant's performance. Similarly, the prosecutor may rescind his offer of a proposed plea arrangement before defendant consummates the contract by pleading guilty or takes other action constituting detrimental reliance upon the agreement.[81]

Few published cases have addressed the issue of what constitutes detrimental reliance. In *State v. Hudson,*[82] the North Carolina Supreme Court considered a defendant's claim that because he had detrimentally relied on a plea agreement as to sentence, the prosecutor should have been prohibited from withdrawing from the agreement. In that case, negotiations resulted in an offer for defendant to plead guilty to two counts of second-degree murder and receive two consecutive fifty-year sentences. The defendant accepted the offer on June 20, 1986, and on August 1, 1986, the prosecutor withdrew it. Trial began on February 9, 1987. On appeal, the defendant argued that the state should not have been allowed to back out of the plea agreement because he had relied on the plea agreement and "ceased pursuit of [the] case" until December 1986. The court rejected this argument, noting that a plea agreement as to sentence must have judicial approval before it is enforceable. As the court put it: "[T]he understanding between defendant and the state, if any, not having been approved by the trial judge, was merely executory and of no effect as a matter of law." Thus, it concluded, any reliance on the agreement by the defendant was unreasonable.

In *State v. Marlow*,[83] the court again rejected a claim that a plea agreement should have been enforced because of detrimental reliance. In that case, the defendant argued that he detrimentally relied on a plea agreement by submitting to a polygraph examination. The North Carolina Supreme Court rejected that argument, noting that during the examination, the defendant was "inconclusive on the questions directed to him" about whether he was the shooter

81. *Id.*
82. 331 N.C. 122 (1992).
83. 334 N.C. 273, 279-81 (1993).

and that "[t]he State argue[d] that at no point did it intend to use the results of the polygraph examination against defendant or as part of the proposed agreement."

**2. Breach of the Agreement**

Once the plea is entered, the parties are bound by the plea agreement. Thus, failure to comply with the terms of the agreement will constitute a breach. Common prosecutorial breaches include breaking a promise to take no position on sentencing[84] and breaking a promise to recommend a particular sentence.[85]

The North Carolina Court of Appeals has concluded that 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."[86] Stated another way, "taking no position" means "making no attempt to influence the decision of the sentencing judge."[87] A breach of a promise to take no position on sentencing will not be excused because it was inadvertent,[88] or because it possibly did not influence the

84. *See* Santobello v. New York, 404 U.S. 257 (1971) (prosecutor breached promise by recommending a sentence); State v. Rodriguez, 111 N.C. App. 141, 146 (1993) (prosecutor breached promise to take no position on sentencing by noting for the trial court certain available non-statutory aggravating factors).
85. *See, e.g.,* United States v. McQueen, 108 F.3d 64 (4th Cir. 1997) (prosecutor breached promise to recommend that defendant receive a sentence of no more than 63 months and an adjustment for acceptance of responsibility). Of course, other types of prosecutorial breaches occur. *See* State v. Blackwell, 135 N.C. App. 729 (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).
86. *See Rodriguez,* 111 N.C. App. at 145-46.
87. *See id* at 146.
88. *See Santobello,* 404 U.S. at 262.

sentencing judge.[89] A promise to recommend a sentence does not require the prosecutor to advocate for the sentence or to explain the reasons for the recommendation.[90]

Although less common, some cases deal with allegations of breach by defendants. In one such case, the United States Supreme Court held that a defendant who had pleaded guilty to second-degree murder breached his plea agreement by not testifying at his accomplices' retrial.[91]

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.[92] 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."[93] 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."[94] Thus, ambiguities will be construed against the state.

Once the plea is accepted, the defendant has a right to enforce of the provisions of the plea agreement. In *Santobello v. New York,*[95] the United States Supreme Court held that a defendant may not be held to a plea bargain when the prosecution breaches. In this circumstance, the remedy will be either specific performance or allowing the defendant to withdraw the plea.[96] The court should consider the following factors when deciding between these remedies:

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89. *See Rodriguez,* 111 N.C. App. 147 (rejecting State's argument that it was not in breach of promise to take no position on sentencing because none of the non-statutory aggravating factors suggested by the district attorney at sentencing 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).
90. *See* United States v. Benchimol, 471 U.S. 453 (1985).
91. *See* Ricketts v. Adamson, 483 U.S. 1 (1987).
92. *See Blackwell*, 135 N.C. App. at 731.
93. *See id*.
94. *See id.* (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)).
95. 404 U.S. 257 (1971).
96. *See Santobello*, 404 U.S. at 262-63; *Blackwell,* 135 N.C. App. at 729; *Rodriguez*, 111 N.C. App. 141.

- 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.[97]

Some North Carolina cases have ordered specific performance as a remedy for a breach by the prosecution.[98] Others have ordered rescission.[99] Still others, noting that trial court is in the best position to determine the appropriate remedy, have remanded for the trial court to determine whether rescission or specific performance is required.[100]

When specific performance is ordered, a different judge should conduct the sentencing.[101] Also, a defendant is not entitled to specific performance when the plea agreement contains terms that violate statutory law. In such a circumstance, the defendant should be allowed to withdraw the plea.[102]

## III. Plea Procedure

### A. Plea Must Be Intelligent And Voluntary

Due process requires that a guilty plea must be intelligent and voluntary.[103] By pleading guilty, a defendant is waiving important constitutional rights.[104] Such a waiver must be made

97. *See Blackwell*, 135 N.C. App. at 732-33.
98. *See Rodriguez,* 111 N.C. App. 141 (prosecutor breached promise to take no position on sentencing; ordering new sentencing hearing at which the state was to take no position on sentencing; sentencing hearing to be conducted before a different trial judge).
99. *See* State v. Isom, 119 N.C. App. 225 (1995).
100. *See Blackwell,* 135 N.C. App. 729; *see also Santobello,* 404 U.S. at 263 (remanding for trial court to determine relief; noting that trial court is in a "better position" to determine appropriate relief).
101. *See Santobello,* 404 U.S. at 263.
102. *See* State v. Wall, 348 N.C. 671, 676 (1998).
103. *See* Boykin v. Alabama*,* 395 U.S. 238 (1969); *see also* State v. Bozeman, 115 N.C. App. 658, 661 (1994) (plea must be "made voluntarily, intelligently, and understandingly"); State v. McNeill, 158 N.C. App. 96, 103 (2003) (same). The terms "knowing and voluntary" and "intelligent and voluntary" are used interchangeably to describe the standard. *See Boykin,* 395 U.S. 238.
104. *See Boykin,* 395 U.S. at 243.

freely and with a full understanding of the significance and consequences of the action.[105] The requirement that a plea be a "voluntary expression of [the defendant's] own choice"[106] requires that it not have resulted from, for example, actual or threatened physical harm or overbearing mental coercion.[107]

For a plea to be made intelligently, the defendant must understand the nature of the charges,[108] their "critical element[s]"[109] and the consequences of the plea.[110] The requirement that the defendant understand the consequences of the plea has been interpreted to mean that a defendant must be informed of direct consequences of plea but not of collateral consequences.[111] 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.'"[112] In practice, this broad test has resulted in considerable variations in the jurisdictions over what is direct and what is

105. *See 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.").
106. *Brady,* 397 U.S. at 748.
107. *See id.*
108. *See Brady,* 397 U.S. at 756. *But see* State v. Brooks, 105 N.C. App. 413, 419 (1992) (plea to two counts of conspiracy was not involuntary because it was later determined that evidence supported only one count; however, court arrested judgment on one count on grounds of insufficient factual basis).
109. *See* Henderson v. Morgan, 426 U.S. 637, 647 n.18 (1976) (assuming that every element of the charge need not be described but concluding that "intent is such a critical element of the offense of second-degree murder that notice of that element is required" for a plea to be voluntary); *see also* State v. Barts, 321 N.C. 170, 174-76 (1987) (defendant knowingly and voluntarily entered plea of guilty as to both felony-murder and premeditation and deliberation theories of first degree murder; trial judge adequately explained the two theories and defendant's responses indicated that he understood the nature of the plea and its possible consequences).
110. *See Brady,* 397 U.S. at 755; *Bozeman,* 115 N.C. App. at 661 (quoting *Brady*).
111. *See 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 ( emphasis added)).
112. *See Bozeman,* 115 N.C. App. at 661 (quoting Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973)).

collateral.[113] In North Carolina, the Court of Appeals has said that the test "should not be applied in a technical, ritualistic manner."[114]

The North Carolina courts have held or indicated that the following are direct consequences of a plea: the maximum sentence;[115] the mandatory minimum sentence;[116] and an additional term of imprisonment associated with habitual offender status.[117] In *State v. Smith,*[118] the defendant plead guilty to first degree murder and several felonies. On appeal, he argued that the judge had not fully informed him of the direct consequences of his plea. Specifically, he argued that he was not told that because he was pleading guilty to first-degree murder based on theories of premeditation and deliberation as well as felony-murder, his pleas to the felonies other than murder would establish aggravating circumstances at the sentencing phase on the murder plea. The North Carolina Supreme Court rejected this argument, stating:

> Nothing is automatic or predicable about how a sentencing jury may weigh these aggravating circumstances or whether countervailing mitigating circumstances will be offered or how they will be weighed. . . . [T]he "direct [sentencing] consequences" of defendant's guilty plea to the murder, even on both theories, cannot be definitely or immediately gauged by the judge, beyond predicting a minimum sentence of life imprisonment without parole and a maximum sentence of death, as the court here did.[119]

Courts in other jurisdictions have held the following consequences to be collateral:

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113. *See* CRIMINAL PROCEDURE *supra* n. 28 at sec. 21.4(c) p. 167-73.
114. *See* State v. Richardson, 61 N.C. App. 284, 289 (1983).
115. *See* State v. Smith, 352 N.C. 531, 550 (2000).
116. *See Bozeman,* 115 N.C. App. at 661; *Smith,* 352 N.C. at 550. *But see* State v. Brooks, 105 N.C. App. 413, 419 (1992) (no prejudicial error occurred when judge mistakenly informed defendant that applicable mandatory minimum was twenty-eight years; in fact, that the correct mandatory minimum was fourteen years). Of course, G.S. 15A-1022(a) requires the judge to inform the defendant of both the applicable maximum and mandatory minimum sentences.
117. *See* State v. McNeill, 158 N.C. App. 96, 104 (2003). Also, *State v. Morganherring,* 350 N.C. 701, 719 (1999), can be read as indicating that if, 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.
118. 352 N.C. 531 (2000).
119. *Id.* at 551.

- Enhancing effect on future sentences by operation of career offender law;[120]
- Use of the conviction as an aggravating circumstance in sentencing for an unrelated pending charge;[121] and
- Civil implications, such as suspension of a driver's license.[122]

The rule that a plea must be intelligently made does not mean that a plea will be vulnerable to attack if it later turns out that the defendant did not correctly assess all of the relevant factors.[123] As the United States Supreme Court has stated: "A defendant is not entitled to withdraw his 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."[124]

G.S. 15A-1022(a) is designed to effectuate the constitutional requirement that a plea be intelligent and voluntary.[125] It 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;

120. *See, e.g.,* United States v. Salmon, 944 F.2d 1106, 1130 (3rd Cir. 1991).
121. *See, e.g.,* King v. Dutton, 17 F.3d 151, 154 (6th Cir. 1994).
122. *See, e.g.,* Moore v. Hinton, 513 F.2d 781, 782-83 (5th Cir. 1975) (citing other cases involving civil implications of a guilty plea).
123. *See Brady,* 397 U.S. at 757.
124. *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.
125. *See Bozeman*, 115 N.C. App. at 661 ([The statute] is based upon constitutional principles enunciated in [*Boykin*] and its progeny."); Official Commentary to G.S. 15A-1022. Notwithstanding this state statute, "[t]he question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." *Boykin,* 395 U.S. at 243.

- 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; and
- 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.

Although G.S. 15A-1022 does not require the trial court to inquire of the defendant whether he or she is in fact guilty,[126] the transcript of plea form does include a question to that effect.[127]

Reflecting the constitutional standards for an 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." In North Carolina, there is case law holding that a judge's comments impermissibly imposed such pressure, rendering the plea involuntary.[128]

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126. *See* State v. Bolinger, 320 N.C. 596, 603 (1987).
127. *See* AOC-CR-300 (Rev. 2/2000) (Question 12(a) states: (*if applicable*) Are you in fact guilty?").
128 *See* State v. Pait, 81 N.C. App. 286, 287-90 (1986) (plea was not knowing and voluntary; when defendant attempted to plead not guilty, the judge became visibly agitated and said in what appeared to be an angry voice that he was tired of "frivolous pleas;" the judge then asked 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 defendant and return with an "honest plea"); State v. Benfield, 264 N.C. 75, 76-77 (1965) (after judge told the defendant's counsel that he thought the jury would convict and that if it did so, "he felt inclined to give [defendant] a long sentence[,]" the defendant changed his plea to guilty; defendant's plea was involuntary); *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 defendants wanted a jury trial; the judge then stated that if defendants were convicted, they would receive the maximum sentence; defendants went to trial and were convicted; the appellate court noted that had 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 defendant wished to plead guilty; although the judge told defendant that he would give "consideration for someone pleading guilty", the judge also stated that he was not promising defendant anything or threatening him in any way, and made it clear that if defendant did not want to plead guilty that the hearing before the jury would proceed; the trial judge appointed a lawyer to represent defendant and defendant conferred with the

Finally, 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 have 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. Thus, it is not enough that the transcript of plea form is completed.[129] In fact, in *State v. Hendricks,*[130] the North Carolina Court of Appeals held that the 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. The *Hendricks* court stated: "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."[131]

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.

**B. Factual Basis**

G.S. 15A-1022(c) provides that the judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea.[132] This determination may be based upon information including but not limited to:

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attorney before he accepted the guilty plea; distinguishing *Benfield, Cannon,* and *Pait* and holding that plea was voluntary).

129. The Transcript of Plea form number is AOC-CR-300. It is available on-line at: http://www.nccourts.org/Forms/Documents/839.pdf.

130. 138 N.C. App. 668 (2000).

131. *See id.* at 670.

132. *See* State v. Sinclair, 301 N.C. 193, 197-99 (1980); State v. Dickens, 299 N.C. 76, 79 (1980); *see also* State v. Weathers, 339 N.C. 441, 453 (1994) (insufficient factual basis for plea to willful failure 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[133]

The statute "does not require the trial judge to elicit evidence from each, any, or all of enumerated sources."[134] Rather the judge may consider any information properly brought to his or her attention in determining whether there is factual basis for the plea.[135] However, whatever information the judge does consider must appear in record, so that appellate court can determine whether plea has been properly accepted.[136] 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."[137] 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 provide "strong" evidence of guilt.[138]

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appear when State's witness testified that defendant was present when his case was called and no one testified that he was absent).

133. *See* G.S. 15A-1022(b).

134. *See* State v. Barts, 321 N.C. 170, 177 (1987); State v. Adkins, 349 N.C. 62, 96 (1998); *Sinclair,* 301 N.C. at 198; *Dickens,* 301 N.C. at 79.

135. *See Barts,* 321 N.C. at 177; *Adkins,* 349 N.C. at 96; *Sinclair,* 301 N.C. at 198; *Dickens,* 299 N.C. at 79.

136. *See Barts,* 321 N.C. at 177; *Adkins,* 349 N.C. at 96; *Sinclair,* 301 N.C. at 198.

137. *Sinclair,* 301 N.C. at 198. *Compare Sinclair,* 301 N.C. at 199 (a defendant's bare admission of guilt or plea of no contest provides an insufficient factual basis for a plea), *with Adkins,* 349 N.C. at 96-97 (a prosecutor's summary of the evidence, along with medical evidence provided a sufficient factual basis); *and Barts,* 321 N.C. at 176-77 (a prosecutor's summary of evidence to which the defendant stipulated was enough); *and* State v. May*,* 159 N.C. App. 159, 165-66 (2003) (sufficient basis where State recited the facts and defendant stipulated to the existence of a factual basis); *and Dickens*, 299 N.C. at 82 (sufficient basis because of fact that defendant had been convicted in district court and his statement that he was "in fact" guilty).

138. *See supra* pp. 4-5 (discussing *Alford* pleas).

### C. Plea To Other Offenses

A judge may not accept a plea to an offense that has not been charged or to an offense that is not a lesser included of a charged offense.[139] Of course, problems in this regard can be avoided by the filing of an information charging the offense, as provided in G.S. 15A-644(b). Additionally, a judge should not accept a plea to a lesser included offense over the State's objection.[140] If a judge takes a plea to a lesser included offense in spite of the State's objection, double jeopardy will not bar the state from trying the defendant for the greater offense.[141]

G.S. 15A-1011(c) provides that 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. However, a defendant may not plead to crimes charged in another prosecutorial district unless the district attorney of that district consents in writing.[142] 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.[143] 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.[144] 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

139. *See* In Re Fuller, 345 N.C. 157, 160-61 (1996); State v. Bennett, 271 N.C. 423, 425 (1967) ("Obviously, a defendant, called upon to plead to an indictment cannot plead guilty to an offense which the indictment does not charge him with having committed."); *see also* State v. Neville, 108 N.C. App. 330, 332-33 (1992) (plea to uttering a forged instrument could not stand where indictment charged forgery; court lacked jurisdiction to enter the plea).
140. *See* State v. Brown, 101 N.C. App. 71, 80 (1990) ("The State has every right to attempt to convict a defendant of the crimes charged.").
141. *See* Ohio v. Johnson, 467 U.S. 493 (1984).
142. *See* G.S. 15A-1011(c).
143. *See id.*
144. *See id.*

district and superior courts, as set out in G.S. 7A-272(c).[145] The Official Commentary indicates that this provision achieves economies to the state by "wrapping up all charges against a defendant at once." It also indicates that 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."

**D. In Open Court; Record Required**

As a general rule, a plea may be received "only from the defendant himself in open court."[146] Exceptions apply when, for example, the defendant is a corporation, in which case it may be entered by counsel or a corporate officer.[147] G.S. 15A-1011(d) provides that a defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his behalf, in certain circumstances.[148]

When the defendant has pleaded guilty, the record must demonstrate that the plea was knowingly and voluntarily made.[149] In *Boykin v. Alabama,* the United States Supreme Court stated that a waiver of constitutional rights would not be presumed from a silent record.[150] 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

145. *See id.* G.S. 7A-272(c) provides the district court with jurisdiction to take guilty or no contest pleas to Class H and Class I felonies, in certain circumstances.
146. *See* G.S. 15A-1011(a).
147. *See id.* (listing other exceptions).
148. G.S. 15A-1011(e) provides that if the judge permits this procedure, the parties may offer evidence, with right of cross-examination of witnesses, and the other procedures, including the right of the prosecutor to dismiss the charges, shall be the same as in any other criminal case, except for the absence of defendant.
149. *See* Brady v. United States, 397 U.S. 742, 747 n.4 (1970) ("The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily"); *see supra* pp. 16-21 (discussing the requirement that a plea be intelligent and voluntary).
150. Boykin v. Alabama, 395 U.S. 238, 243 (1969); *see also* State v. Allen, 164 N.C. App. 665, 669-70 (2004).

is sustained, it must appear affirmatively that it was entered voluntarily and understandingly.[151]

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.[152] 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.[153] The Administrative Office of the Courts' Transcript of Plea Form[154] helps to create the record of the plea.[155] Strict compliance with the requirements for a record helps to protect pleas from collateral attack.[156]

**E. Capital Cases**

Under prior law, the only way a defendant could plea guilty to first-degree murder and through a plea agreement with the state be sentenced to life imprisonment was if the state had no evidence of aggravating circumstances.[157] Under current law, a defendant may plead guilty to first-degree murder and the state may agree to accept a sentence of life imprisonment, even if

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151. 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"). *But see infra* pp. 43-44 (discussing the presumption of regularity that applies when a defendant collaterally attacks a conviction as invalid under *Boykin*).
152. *See* G.S. 15A-1026.
153. *See id.*
154. AOC-CR-300 (available on line at http://www.nccourts.org/Forms/Documents/839.pdf).
155. *But see supra* p. 21 (noting that the court must address the defendant personally and that a completed form alone does not satisfy this requirement).
156. *See 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). *See generally infra* pp. 36-42 (discussing implications of an ambiguous record when a plea is challenged).
157. *See* FARB, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 23 (2d ed. 2004).

evidence of an aggravating circumstance exists.[158] For the procedural rules governing sentencing in a capital case in which there has been a guilty plea, see G.S. 15A-2001(c).

**F. Counsel.**

The Sixth Amendment guarantees a right to counsel for all defendants who face incarceration.[159] The right to counsel attaches at or after the initiation of adversary proceedings, whether by formal charge, preliminary hearing, indictment, information, or arraignment.[160] Once the Sixth Amendment right to counsel attaches, it extends to "critical stages of the proceedings."[161] Because plea bargaining and plea proceedings are critical stages, a defendant has a right to counsel at these stages.[162] 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 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.[163] The Official Commentary to G.S. 15A-1012(b) indicates that the purpose of this delay is to give a "cooling off" time to the defendant who may during a period of emotional stress decide to waive both counsel and plea guilty.

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).

158. *See* G.S. 15A-2001(b).
159. *See* Iowa v. Tovar, 541 U.S. 77, 80 (2004).
160. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972).
161. *See Tovar,* 541 U.S. at 80-81.
162. *See id.* at 81 (entry of guilty plea); State v. Detter, 298 N.C. 604, 619 (1979).
163. *See* G.S. 15A-1012(b).

### G. Competency

A judge may not accept a plea from a defendant who is not competent.[164] The standard for incapacity to plead is the same as incapacity to proceed to trial.[165] 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,"[166] is whether the defendant has sufficiently 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.[167] The United States Supreme Court has noted that a judge is not required to make a competency determination every time it takes a guilty plea.[168] 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."[169]

Difficult questions as to competency can arise when the defendant is taking prescribed medications, or not taking medications as prescribed. In that regard, the Transcript of Plea Form[170] includes the following questions: "4(a). Are you now under the influence of alcohol, drugs, narcotics, medicines, pills or any other intoxicants? 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

164. *See* G.S. 15A-1001(a) (no proceedings when defendant lacks capacity to proceed).
165. *See* Godinez v. Moran, 509 U.S. 389 (1993).
166. State v. LeGrande, 346 N.C. 718, 724 (1997).
167. *See Godinez*, 509 U.S. 389.
168. *See id.* at 401 n.13.
169. *Id.*
170. *See* AOC-CR-300 Rev. 2/2000.

be required. One North Carolina trial judge reports that when a defendant indicates that he or she is taking prescription medications, the judge follows-up with the following series of questions:

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?[171]

The importance of an inquiry of this nature is highlighted by cases in which a defendant later asserts he or she was incompetent at the time of the plea.[172]

### H. Sentencing

If the sentence is not part of a negotiated plea agreement, sentencing after a guilty plea is conducted no differently from sentencing after a jury verdict of guilt. The applicable procedure when a plea agreement pertains to sentence is discussed above.[173] For the sentencing procedures that apply in a capital case in which there has been a guilty plea, see G.S. 15A-2001(c). The United States Supreme Court's ruling in *Blakely v. Washington,*[174] applies regardless of whether the plea is pursuant to a negotiated plea agreement. For a discussion on *Blakely's* applicability to

171. This list of questions was provided by Senior Resident Superior Court Judge Forrest Donald Bridges, Judicial District 27B.
172. *See* State v. Ager, 152 N.C. App. 577, 583-84 (2002) (rejecting defendant's claim that he was not competent at the time of the plea; defendant had failed to take one of his prescribed medications, Prozac, for two weeks before entry of the plea; rejecting claim that the medications defendant was taking at the time caused mental confusion), *affirmed,* 357 N.C. 154 (2003).
173. *See supra* pp. 9-12.
174. 124 S. Ct. 2531 (2004).

guilty pleas, see Robert L. Farb, *Blakely v. Washington* and Its Impact on North Carolina Sentencing Laws (July 9, 2004) (available on-line at http://www.iog.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf).

And finally, if a defendant admits to a prior record level and agrees to a specified sentencing range as part of a plea agreement, the defendant cannot later challenge the prior record level.[175] However, a stipulation to minimum and maximum terms of imprisonment as part of an agreement without an accompanying stipulation to the prior record level does not relieve the state of its burden to prove the prior record level, and a sentence can be invalidated on this basis.[176]

### I. 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 in the sections that follow. 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.

#### 1. Withdrawal Before Sentencing

Before sentencing, a court should allow a defendant to withdraw a guilty plea for any "fair and just" reason.[177] 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

175. *See* State v. Hamby, 129 N.C. App. 366, 369-70 (1998); *see also* State v. Alexander, __ N.C. App. __ (Nov. 16, 2004), *writ of supersedeas allowed,* 359 N.C. 282 (2004).
176. *See Alexander,* __ N.C. App. __ (ordering a new sentencing hearing).
177. 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.

with liberality."[178] 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.[179]

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."[180]

If the defendant makes the required showing, the state may refute it with "evidence of concrete prejudice" to its case by reason of the withdrawal.[181] Lack of prejudice to the state does not, in an of itself constitute a fair and just reason for withdrawal.[182] 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."[183] Examples of substantial prejudice include:

- destruction of important physical evidence;
- death of an important witness; and
- that the defendant's codefendant have already been tried in a lengthy trial.[184]

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178. *Handy,* 326 N.C. at 537; *Meyer,* 330 N.C. at 742-43.
179. *See Handy*, 326 N.C. at 539; *see also Ager,* 152 N.C. App. at 579 (quoting *Handy*); State v. Marshburn, 109 N.C. App. 105, 108 (1993) (same).
180. *Marshburn,* 109 N.C. App. at 109. *Compare Marshburn,* 109 N.C. App. at 109 (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) (defendant had a "basic misunderstanding of the guilty plea process"). The *Marshburn* court declined to decide what effect an active misrepresentation by the state as to collateral consequences would have on the right to withdraw a plea. *See Marshburn,* 109 N.C. App. at 109 n.1.
181. *See Handy,* 326 N.C. at 539; *see also Meyer,* 300 N.C. at 743; *Marshburn,* 109 N.C. App. at 108.
182. *See Ager*, 152 N.C. App. at 584.
183. *Meyer,* 330 N.C. at 744; *see also Ager,* 152 N.C. App. at 584.
184. *See Marshburn,* 109 N.C. App. at 108.

When reviewing a trial court's decision to deny a motion to withdraw, the appellate court will conduct an "independent review of the record."[185] Thus, the appellate court must determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw the plea.[186] North Carolina appellate cases applying the fair and just standard are summarized below.

*Fair and Just Reason*

*State v. Handy*, 326 N.C. 532 (1990) (fair and just reason existed; defendant asserted innocence, sought to withdraw less than twenty-four hours after the plea and said he felt pressured to plead guilty; state made no argument that it would be substantially prejudiced by a plea withdrawal).

*State v. Deal*, 99 N.C. App. 456 (1990) (defendant had a basic misunderstanding of what the result of his guilty plea would be, and this misunderstanding constituted "fair and just reason" to permit him to withdraw his plea; defendant had low intellectual abilities and misunderstood the plea process; defendant did not attempt to revoke his plea for over four months; state did not argue prejudice).

*No Fair and Just Reason*

*State v. Meyer*, 330 N.C. 738 (1992) (no fair and just reason; only reason cited by defendant was changed circumstances due to extensive media coverage generated by his escape from custody; defendant did not assert legal innocence; State's case was exceptionally strong; defendant did not argue he lacked competent counsel or that he misunderstood the consequences of the plea, that it was entered in haste or that he was confused or coerced; motion to withdraw was made more than three and one-half months after he pleaded guilty and after his first sentencing proceeding was cut short by his escape).

*State v. Ager*, 152 N.C. App. 577 (2002) (trial judge did not err in denying defendant's motion to withdraw his guilty plea in murder case; defendant did not assert legal innocence; based upon defendant's admission and an eyewitness account, the State's case was not "weak" as alleged by defendant; motion to withdraw was filed twenty months after entry of plea; defendant's claim of ineffective assistance of counsel was without merit; defendant was competent at the time of the plea; defendant's plea was not made hastily; although state indicated that withdrawal would cause no prejudice other than the ordinary prejudice caused by a two-year delay between the offense and trial, the

185. *See id; Ager,* 152 N.C. App. at 579.
186. *See Marshburn,* 109 N.C. App. at 108.

defendant failed to show a fair and just reason for withdrawal), *affirmed,* 357 N.C. 154 (2003).

*State v. Davis*, 150 N.C. App. 205 (2002) (no fair and just reason for withdrawal; in motion to withdraw filed seven days after the plea, defendant asserted that he thought he was pleading to driving while impaired, not second-degree murder; record showed that defendant was not confused; defendant was represented by counsel and there was no evidence of haste or coercion; 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 (1996) (no fair and just reason; in withdrawal motion made almost five weeks after plea, defendant argued that he always felt that he was not guilty, the evidence was insufficient to convict, he believed in his right to jury trial and wished to exercise that right, and that his lawyer persuaded him to enter the plea; 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 defendant to accept the guilty plea and at the motion hearing; defendant indicated that he was satisfied with his lawyer; finally, the evidence against defendant was "strong").

*State v. Marshburn*, 109 N.C. App. 105 (1993) (no fair and just reason in case where defendant argued that when he entered his plea, he did not know whether he was guilty or not and that he entered it with the understanding 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 eight months after the plea and defendant did not claim that lacked the full benefit of counsel; defendant did not assert innocence and the asserted misunderstanding related only to the effects of his plea on an unrelated case).

### 2. Withdrawal Motion Made After Sentencing

*State v. Handy*,[187] has been interpreted to have held that once sentencing has occurred, a plea may be withdrawn only to avoid manifest injustice.[188] This standard is applied in other states.[189] Several reasons have been articulated to explain why a stricter standard is applied to 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 a tactical mistake and

187. 326 N.C. 532 (1990).
188. *See* State v. Russell, 153 N.C. App. 508, 509 (2002); State v. Suites, 109 N.C. App. 373, 375 (1993).
189. *See* CRIMINAL PROCEDURE *supra* n. 28 at § 21.5(a) p. 195.

wish to have it set aside.[190] 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.[191] 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.[192]

Only a few North Carolina appellate cases have had occasion to apply this standard.[193] 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: (1) when the defendant was denied effective assistance of counsel; (2) when the plea was not entered or ratified by the defendant or a person authorized to act in his or her behalf; or (3) when the plea was involuntary.[194]

**V. Challenging a Plea**

For a discussion of *Boykin* and the use of invalid guilty pleas, see Robert Farb, *Boykin v. Alabama* and Use of Invalid Guilty Pleas (June 2004) (available on line at http://www.iog.unc.edu/programs/crimlaw/boykin.pdf), a discussion of ineffective assistance of counsel claims relating to guilty pleas, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES (School of Government, UNC-Chapel Hill 2003), and a discussion of claims that may be asserted in a motion for appropriate relief, see

190. *See Handy,* 326 N.C. at 537.
191. *See id.*
192. *See id.*
193. *Compare Suites,* 107 N.C. App. 373 (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 Russell,* 153 N.C. App. 508 (rejecting defendant's argument that manifest injustice existed because he was not fully informed, at the time of his plea, of the sentencing consequences; trial court was not required to inform defendant that the sentence could be made to run at the expiration of sentences defendant was serving for unrelated convictions; record showed that plea was knowing and voluntary where defendant signed a Transcript of Plea and the trial court made a careful inquiry).
194. *See* CRIMINAL PROCEDURE *supra* n. 28 at sec. 21.5 pp.198-99 (listing other fact patterns).

Jessica Smith, Motions for Appropriate Relief: Grounds That May Be Asserted and Timing Rules for Asserting Them, AOJB 2004/01 (School of Government, UNC-Chapel Hill 2004).

**A. Claims Precluded By the Plea**

As a general rule, a defendant who voluntarily and intelligently enters an unconditional guilty plea waives all defects in the proceeding, including constitutional defects, that occurred before entry of the plea.[195] Excepted from this rule are claims challenging "the power of the State" to bring the defendant into court to answer the charge.[196] Under this exception, a defendant who has pleaded guilty would not be barred from asserting, for example, a jurisdictional defect in the proceedings.[197] The full scope of the "power of the State" exception, however, is not entirely clear.[198]

The only other claims that survive an unconditional guilty plea are those that allege a defect in the plea—such as *Boykin* claim asserting that the plea was not voluntary and intelligent[199]—and claims specifically preserved by statute. As to this latter category, G.S. 15A-1444 provides that a defendant who pleads guilty or no contest has a right to appeal certain issues regarding the sentence, a plea withdrawal, and a suppression ruling. Defendants who are not entitled as a matter of right to appellate review may obtain review by writ of certiorari.[200]

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195. *See* State v. Reynolds, 298 N.C. 380, 395 (1979) (" '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 before the entry of the guilty plea' ") (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)). Rather than resting on a concept of waiver, the relevant case law rests on the concept of forfeiture e.g., that constitutional rights can be forfeited by entering a plea of guilty. *See* CRIMINAL PROCEDURE, *supra* n. 28 at sec. 21.6(a) p.225.
196. Blackledge v. Perry, 417 U.S. 21, 30 (1974); *Reynolds*, 298 N.C. at 395 (discussing *Perry*).
197. *See, e.g.,* State v. Neville, 108 N.C. App. 330, 333 (1992) (guilty plea does not waive a jurisdictional defect (citing State v. Stokes, 274 N.C. 409, 412 (1968)).
198. *See* CRIMINAL PROCEDURE, *supra* n. 28 at § 21.6(a) at p.225.
199. *See id.* at sec. 21.6(a) p.232 (defects that go directly to the plea itself are not forfeited). *See generally supra* pp. 16-21 (discussing requirement that guilty plea be knowing and voluntary).
200. *See* G.S. 15A-1444(a1), (e); *see, e.g.,* State v. Parks, 146 N.C. App. 568, 569 (2001) (allowing motion for writ of certiorari); State v. Rhodes, 163 N.C. App. 191, 193 (2004) (treating defendant's

As to the sentence, G.S. 15A-1444 provides that that a defendant may appeal:

- whether a felony sentence is supported by the evidence;[201]
- whether a felony or misdemeanor sentence results from an incorrect finding of the defendant's prior record level or prior conviction level;[202]
- whether a felony or misdemeanor sentence contains an unauthorized type of sentence disposition;[203] and
- whether a felony or misdemeanor sentence contains a term of imprisonment that is for an unauthorized duration.[204]

G.S. 15A-1444 also provides that a defendant has an appeal as of right when a trial court denies a motion to withdraw a guilty plea.[205] And finally, it provides that a defendant may appeal a ruling on a suppression motion.[206] In order to preserve the right to appeal a ruling denying a motion to suppress, the defendant must notify the state and the trial court during plea negotiations of his or her intention to appeal; this notice must be "specifically given."[207] If the defendant fails to provide the required notice, the right to appeal is waived by entry of the plea.[208] This rule has lead 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).[209]

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appeal as a petition for writ of certiorari and allowing the writ). *See generally* N.C. R. App. P. 21 (certiorari).

201. *See* G.S. 15A-1444(a1). This issue is appealable only if the minimum term of imprisonment does not fall within the presumptive range.

202. *See* G.S. 15A-1444(a2)(1).

203. *See* G.S. 15A-1444(a2)(2).

204. *See* G.S. 15A-1444(a2)(3).

205. *See* G.S. 15A-1444(e); *see also* State v. Handy, 326 N.C. 532, 535 (1990) ("Defendant may appeal as of right since the trial judge denied his motion to withdraw his plea of guilty.").

206. G.S. 15A-1444(e); *see also* G.S. 15A-979(b).

207. State v. Pimental, 153 N.C. App. 69, 74 (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).

208. *See, e.g., Reynolds*, 298 N.C. at 397 ("when a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute"); State v. Tew, 326 N.C. 732, 735 (1990) (citing *Reynolds*).

209. *See Pimental,* 153 N.C. App. at 76 (suggesting this language).

Finally, G.S. 15A-1027 provides that noncompliance with the procedures in Chapter 15A, Article 58 may not be the basis for review of a conviction after the appeal period for the conviction has expired. Before expiration of the appeal period, such a claim may be asserted in a petition for writ of certiorari.[210]

**B. Prejudice**

Neither a statutory violation nor a *Boykin* error will warrant reversal unless it is prejudicial. A *Boykin* error is a constitutional error and as such is presumed prejudicial unless the state demonstrates that it was harmless beyond a reasonable doubt.[211] Errors that are not constitutionally based will not warrant reversal unless the defendant proves prejudice.[212] This requires a showing that there is a reasonable possibility that, had the error not been committed, a different result would have been reached.[213] Violations of statutory provisions that are based on *Boykin*, such as G.S. 15A-1022(a)(6), will be treated as constitutional errors subject to harmless error review.[214]

**C. The Record**

**1. Ambiguous Versus Unambiguous Record**

When a defendant asserts a *Boykin* claim in a motion for appropriate relief, the likelihood of success often depends on the state of the record. If the record unambiguously reveals that the judge scrupulously followed proper plea procedures, the defendant faces a significant hurdle in

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210. *See Rhodes*, 163 N.C. App. at 193-94 ("it is permissible for this 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").
211. *See* G.S. 15A-1443(b); *see also* State v. Bozeman, 115 N.C. App. 658, 661 (1994); *see generally* Chapman v. California, 386 U.S. 18 (1967) (seminal decision on harmless error). Of course, certain structural errors fall outside of harmless error review and warrant automatic reversal. *See* Arizona v. Fulminante, 499 U.S. 279 (1991) (errors involving structural defects fall outside of harmless error analysis).
212. *See* G.S. 15A-1443(a); *see also Bozeman,* 115 N.C. App. at 661.
213. G.S.15A-1443(a); *see also Bozeman,* 115 N.C. App. at 661.
214. *See Bozeman,* 115 N.C. App. at 662.

asserting that contrary to his or her responses to the judge's questioning at the time of the plea, there was, for example, a secret plea agreement or that the defendant was not actually satisfied with counsel's performance. In such circumstances, the claim will usually be rejected without an evidentiary hearing. On the other hand, when the record is ambiguous as to whether the plea was knowing and voluntary, the defendant generally will be entitled to an evidentiary hearing. These rules stems from two North Carolina cases: *Blackledge v. Allison*,[215] decided by the United States Supreme Court, and *State v. Dickens*,[216] decided by the North Carolina Supreme Court. Before turning to a discussion of those cases, it should be noted that notwithstanding them, there are some situations in which an evidentiary hearing will be required, even if the record unambiguously reveals that the trial judge scrupulously followed all plea procedures. This will be the case when the claim alleges facts that would not appear in the record, such as a claim that, at the time of the plea, defense counsel had an undisclosed conflict of interest that affected his or her performance.

In *Blackledge*, the defendant pleaded guilty to attempted safe robbery in North Carolina state court, an offense that carried a minimum sentence of ten years and a maximum of life. The defendant's plea was taken before North Carolina's enactment in 1973 of a comprehensive set of procedures governing dispositions by guilty plea and plea agreement. Pursuant to the procedures then in effect, the judge read a set of questions from a printed form concerning the defendant's understanding of the charge, its consequences, and the voluntariness of his plea. The court clerk transcribed the defendant's responses on a copy of the form, which the defendant signed. Among the questions posed were the following: "Do you understand that upon your plea of guilty you could be imprisoned for as much as minimum [*sic*] of 10 years to life?" and "Has the Solicitor,

215. 431 U.S. 63 (1977).
216. 299 N.C. 76 (1980).

or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case?" The defendant answered the first question in the affirmative and the second in the negative. The record indicated that no inquiry was made of the prosecutor or defense counsel. The trial judge accepted the plea and sentenced the defendant to seventeen to twenty-one years in prison. Subsequently, the defendant filed a petition for writ of habeas corpus in federal court alleging that his lawyer told him that he had discussed the case with the judge and the solicitor and that if the defendant plead guilty, he would get a ten-year sentence. The defendant alleged that a third party witnessed his lawyer's statements and that his lawyer told him to answer the judge's questions so that his guilty plea would be accepted.

The federal district court rejected the defendant's petition, finding that the printed plea form "conclusively" showed that the defendant was "carefully examined" by the court before the plea was accepted and therefore "must stand."[217] The Fourth Circuit reversed and remanded for an evidentiary hearing, finding that the defendant's claim was not foreclosed by his responses at the plea proceedings. The United States Supreme Court affirmed. In an opinion written by Justice Stewart, the Court acknowledged that

> [T]he representations of the defendant, his lawyer, and the prosecutor at . . . a [plea] hearing, as well as any findings made by the judge accepting the plea, constitute a *formidable barrier* in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.[218]

217. 431 U.S. at 70.
218. *Id*. at 73–74 (emphasis added).

The Court noted, however, that "the barrier of the plea . . . proceeding record, although imposing, is not invariably insurmountable."[219] The Court refused to adopt a per se rule that would prevent defendants from ever challenging the constitutionality of their guilty pleas.[220]

Assessing the defendant's allegations in the case before it, the Court concluded that when considered in light of the record of the plea, the allegations were not so "palpably incredible" or "patently frivolous or false" as to warrant summary dismissal.[221] The Court found it significant that in addition to alleging that his plea was induced by a broken promise, the defendant elaborated with specific factual allegations including the exact terms of the promise, when, where, and by whom it was made, and the identity of one witness to its communication.[222] Considering the record, the Court noted that no transcript of the plea was made, the only record of the proceeding was a standard form, there was no way of knowing whether the judge deviated from the text of the form, the record was silent as to what statements the defendant, his lawyer, or the prosecutor might have made regarding promised sentencing concessions, there was no record of the sentencing proceeding, the form questions did not inform the defendant that plea bargaining was a legitimate practice that could be freely disclosed, and neither lawyer was asked to disclose any agreement or promise that had been made.[223] Thus, the Court concluded, the process did nothing to dispel the defendant's belief that any bargain struck must remain a secret.[224]

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219. *Id.* at 74.
220. *See id.* at 75 ("the federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment").
221. *Id*. at 76 (quotation omitted).
222. *See id*. at 75–76.
223. *See id.* at 77.
224. *See id.*

Significantly, the Court noted that after the defendant's plea was taken, North Carolina revised its plea bargaining procedures "to prevent the very kind of problem" presented.[225] It noted that under the new procedures, plea bargaining is expressly legitimate and the judge must inform the defendant that courts have approved plea bargaining.[226] Also, specific inquiry about whether a plea bargain has been struck is made of the defendant, his or her counsel, and the prosecutor, and the proceeding is transcribed verbatim.[227] The Court went on to state:

> [A] petitioner challenging a plea given pursuant to procedures like those now mandated in North Carolina will necessarily b[e] asserting that not only his own transcribed responses, but those given by two lawyers, were untruthful. Especially as it becomes routine for prosecutors and defense lawyers to acknowledge that plea bargains have been made, *such a contention will entitle a petitioner to an evidentiary hearing only in the most extraordinary circumstances*.[228]

*Blackledge* was a federal case interpreting the standard for evidentiary hearings for writs of habeas corpus. Three years later, the North Carolina Supreme Court relied on *Blackledge* in *State v. Dickens.*[229] In *Dickens,* the defendant pleaded guilty to eight counts of issuing worthless checks. After accepting the defendant's pleas, the trial court entered judgment and sentenced the defendant to prison. Subsequently, the defendant moved for leave to withdraw his guilty pleas, asserting that he pleaded guilty on the understanding that a plea bargain had been made and that his punishment would be payment of a fine and restitution, not prison. The defendant acknowledged his statements to the contrary at the plea proceeding, but alleged that he was told to say that no one made him any promises inducing him to enter the plea. The trial court denied the defendant's motion, and the defendant appealed. The court of appeals affirmed. When the

225. *Id.* at 79.
226. *See id.*
227. *See id.*
228. *Id*. at 80 n.19 (emphasis added).
229. 299 N.C. 76 (1980).

case came to the North Carolina Supreme Court, the court treated the defendant's motion as a motion for appropriate relief.

Reviewing the record of the plea hearing, the North Carolina Supreme Court found it "deficient."[230] Specifically, the court noted that on the Transcript of Plea form (1) the defendant had not given written answers to two pertinent questions;[231] (2) the record did not indicate whether the defendant, his counsel, or the prosecutor ever stated, in response to mandatory inquiries from the court before the taking of the guilty pleas, that no plea bargains had been made or discussed with defendant; and (3) the record on appeal did not include a verbatim record of the plea proceedings. Given the deficient state of the record, the court concluded that a question of fact existed as to whether the defendant's guilty pleas were tendered under the misapprehension that a plea bargain had been made with respect to sentence, thus warranting an evidentiary hearing.

The court noted that North Carolina had recently revised its plea bargaining procedures. It observed that if the new procedures are followed, "only in a rare case will there be merit in a defendant's post-conviction claim that his plea of guilty was not knowingly and voluntarily made."[232] Citing *Blackledge*, it added: "in most cases reference to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion to withdraw a plea of guilty and will permit a trial judge to dispose of such motion without holding an evidentiary hearing."[233]

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230. *Id*. at 83.
231. Question 10 asked, in part: "Have you agreed to plead as part of a plea bargain?" Question 7 asked, in part: "Do you understand that upon your plea you could be imprisoned for a maximum of 2 years 4 months?"
232. *Dickens*, 299 N.C. at 84.
233. *Id.* (citing *Blackledge*, 431 U.S. at 80–81).

*Dickens* and *Blackledge* make clear that when the trial court follows proper plea procedures and the transcript of the plea proceeding is unambiguous, a defendant challenging the plea faces a formidable barrier, overcome in "only in the most extraordinary circumstances."[234] What circumstances qualify as "extraordinary" has yet to be addressed by the North Carolina appellate courts.[235] *Dickens* and *Blackledge* also make clear—and in fact illustrate—that when the transcript of the plea proceeding is ambiguous or otherwise "deficient,"[236] the "formidable barrier"[237] is removed.

Finally, the "presumption of verity" of a scrupulously prepared record has been applied even after the evidentiary hearing has been held. As the courts have noted in this context: "In cases where there is evidence that a defendant signs a plea transcript and the trial court makes a careful inquiry of the defendant regarding the plea, this has been held to be sufficient to demonstrate that the plea was entered into freely, understandingly, and voluntarily."[238]

**2. The Missing Record**

Sometimes defendants do not challenge their pleas until many years later. At this late date, the record might have been destroyed as part of normal record retention policies or can no

234. *Blackledge*, 431 U.S. at 80 n.19.
235. One federal court of appeals has indicated that in order to overcome the formidable barrier of an unambiguous plea transcript and obtain a hearing under 28 U.S.C. § 2255, there must be some independent indicia of the likely merit of a defendant's allegations, such as one or more affidavits from reliable third parties. *See* United States v. Cervantes, 132 F.3d 1106, 1110 (5th Cir. 1998) (district court did not err in dismissing 28 U.S.C. § 2255 motion without conducting an evidentiary hearing). *But see* State v. Hardison, 126 N.C. App. 52 (1997) (not citing or mentioning *Blackledge* or *Dickens* but holding that an evidentiary hearing was required on claim of secret plea agreement notwithstanding that there appeared to be no independent indicia of the likely merit of the claim).
236. *Dickens*, 299 N.C. at 83.
237. *Blackledge*, 431 U.S. at 74.
238. State v. Wilkins, 131 N.C. App. 220, 224 (1998) (appeal from adverse ruling on motion for appropriate relief rendered after evidentiary hearing); *see also* State v. Crain, 73 N.C. App. 269, 272 (1985) (same; defendant argued that his lawyer told him that he only would receive a seven-year sentence but transcript revealed that defendant was told he could receive a mandatory minimum of fourteen years per count of armed robbery).

longer be located. Although *Boykin* teaches that waiver will not be inferred from a silent record,[239] a special rule—the presumption of regularity—applies when the record is missing.

North Carolina recognizes a presumption that the acts of the court were properly done absent "ample evidence to the contrary."[240] This presumption is known as the presumption of regularity. In *Parke v. Raley*,[241] the United States Supreme Court held that the presumption of regularity may apply when a defendant collaterally attacks previous convictions as invalid under *Boykin.* Citing *Parke*, the North Carolina Court of Appeals in *State v. Bass,*[242] applied the presumption to a guilty plea challenged in a motion for appropriate relief on *Boykin* grounds.

In *Bass*, the defendant pled guilty to driving while impaired and received a suspended sentence. On the judgment, the trial judge noted that the defendant "freely, voluntarily, and understandingly pled guilty." The defendant then filed a motion for appropriate relief alleging that the initial driving while impaired conviction was invalid because he was deprived of his constitutional rights under *Boykin*. Specifically, the defendant argued that at the time he pleaded guilty, he was without counsel and that he was not informed of his rights against self-incrimination, to a jury trial, and to confront his accusers.

At the evidentiary hearing on the motion for appropriate relief, the defendant testified that although he did not recall being informed of his rights, he did not recall anything that the judge said on the day in question. Three attorneys who testified for the defendant said that they did not recall defendants being advised of their *Boykin* rights by the judge in question during 1991, the year the defendant pleaded guilty. However, none of the attorneys testified to being present when

239. *See supra* pp. 24-25.
240. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 64 at 200-203 (5th ed. 2004).
241. 506 U.S. 20 (1992) (case in which recidivism defendant attacked previous convictions as invalid under *Boykin;* refusing to "impart *Boykin's* presumption of invalidity into this very different context").
242. 133 N.C. App. 646 (1999).

the defendant entered his guilty plea. A transcript of the plea proceeding was not available. The trial court denied the defendant's motion for appropriate relief.

The defendant appealed, arguing that his conviction must be vacated because there was no evidence on the record that the judge advised him of his constitutional rights. The court of appeals concluded otherwise, finding that there was competent evidence to support the trial court's finding that the defendant had not met his burden of proof on his motion for appropriate relief. Citing *Parke*, the court held:

> A transcript is not available in this case and the only evidence presented to the trial court is based on the recollection of the defendant and the "habit" evidence presented by attorneys practicing at the time. Meanwhile, the trial court has before it a finding made by [the judge] that the defendant's plea was made voluntarily. The presumption of regularity applies . . . .[243]

Thus, under *Parke* and *Bass*, the presumption of regularity applies when a defendant collaterally attacks a prior conviction on *Boykin* grounds and a transcript of the plea proceeding is not available. Note, however, that *Parke* recognized that there might be circumstances in which it would be appropriate to "suspend the presumption of regularity," such as where the records is unavailable because of governmental misconduct.[244]

243. *Id.* 650.
244. *Parke,* 506 U.S. at 30.