
23.3 Preparing the Plea Agreement

A. Client's Right to Enter Plea

Generally. The recommended and required procedures for plea agreements come from several sources: North Carolina case law, statutes, and rules of professional conduct; performance guidelines adopted by the N.C. Commission on Indigent Defense Services (Appendix A of this manual); and the ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993). These sources are cited throughout this chapter.

The decision as to what plea to enter is ultimately the client's. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-5.2 (quoted with approval in *State v. Ali*, 329 N.C. 394 (1991)); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(c) (3d ed. 1999) ("Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.").

Counsel's duties. An attorney has a duty to explore alternatives to trial, including the possibility of a plea bargain. The progress of negotiations and all plea offers ***must be communicated to the client.*** *See Missouri v. Frye*, 566 U.S. 134 (2012) (finding counsel ineffective for allowing a plea offer by prosecution to expire without advising defendant of offer or allowing him to consider it); *State v. Simmons*, 65 N.C. App. 294, 300 (1983) ("[A] failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances."); N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.4, Comment [2] (2003); Appendix A, *infra*, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 6.1(b) The Plea Negotiation Process and the Duties of Counsel (Nov. 2004). The ABA's ethical guidelines require an attorney to investigate the facts of the case as well as controlling law before recommending any plea to his or her client. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-6.1; ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(b). After receiving discovery, and adequately investigating the facts and any possible defenses, it is perfectly ethical and often appropriate for an attorney to attempt to persuade a client to

accept a plea bargain that the attorney believes is in the client's best interest. Ultimately, however, it must be the client who makes the final decision. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 6.3(b) The Decision to Enter a Plea of Guilty (Nov. 2004). ***No plea offer should be accepted or rejected by counsel without the client's express authorization.***

Early pleas. Sometimes a client may wish to accept responsibility and plead guilty as charged early in the process, before discovery or your investigation. Often this is an unwise course, as the client is making a critically important decision without full information. The more serious the charge, the more risky an early plea may be. If the motivation for the early plea is to obtain release from jail, you may want to persuade your client to seek a bond reduction rather than plead early. If a client decides to enter an early guilty plea, and you have advised the client to wait until after discovery was complete to enter his or her plea, you may want to document the file to reflect your advice.

Defendants incapable of proceeding. A client who lacks the capacity to proceed under G.S. 15A-1001 cannot enter a knowing and voluntary plea. Incapacity means the client, for reason of mental illness or defect, is unable to:

- understand the nature of the proceedings against him or her;
- comprehend his or her own situation in reference to the proceedings; or
- rationally assist in his or her defense.

See G.S. 15A-1001(a); *see also State v. LeGrande*, 346 N.C. 718, 730 (1997) (the N.C. statutory test for capacity to proceed is essentially the same as the constitutional test).

The standard for incapacity to plead is the same as the standard for incapacity to proceed to trial. *See Godinez v. Moran*, 509 U.S. 389 (1993) (competence to stand trial is same as competence to plead guilty). If you suspect that your client is incapable of proceeding, you should seek a mental health evaluation and a capacity hearing pursuant to G.S. 15A-1002. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 3.2 Client's Competence and Capacity to Proceed (Nov. 2004).

For a further discussion of incapacity to proceed, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 2, Capacity to Proceed (2d ed. 2013); *see also* Ripley Rand, *Guilty Pleas and Related Proceedings Involving Defendants with Mental Health Issues: Best Practices* (Superior Court Judges Conference, Fall 2008).

Mentally disabled defendants. A mentally impaired defendant, if not incapable of proceeding under G.S. 15A-1001, may enter a valid plea of guilty. North Carolina's Rules of Professional Conduct and the ABA Standards state that, to the extent possible, an attorney should seek to maintain a normal attorney-client relationship with a mentally impaired client and give him or her the same control over the case as a fully functional

adult. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14 (2003) (client under diminished capacity); *see generally* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-5.2 (3d ed. 1993) (control and direction of case). This means that a client with a mental illness or mental disability should be given the choice of how to plead. However, it is the attorney's responsibility to investigate all possible defenses to a crime before recommending a plea of guilty, including, of course, all defenses based on the client's mental state. *See generally* David A. Green, *"I'm Ok-You're Ok": Educating Lawyers to "Maintain a Normal Client-Lawyer Relationship" with a Client with a Mental Disability*, 28 J. LEGAL PROF. 65 (2003–04).

Mental impairments may create grounds for moving to suppress confessions or searches or may negate elements of the crime. They also may make it more difficult for a client to make a genuinely voluntary and informed choice to plead guilty.

If the attorney believes that a client is too impaired to make informed choices in his or her best interest, the attorney may move to have the client's capacity assessed or may seek the appointment of a guardian ad litem. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14(b) (2003).

Counsel also may seek the appointment of a mental health expert to assist in communicating with the defendant and exploring possible defenses. Such motions may and should be made ex parte to the court in noncapital cases. *See State v. Ballard*, 333 N.C. 515 (1993) (motion for psychological expert may be made ex parte). If your client has been arrested for a felony but not yet indicted, and jurisdiction over the case lies in district court, the district court may hear motions for expert assistance. For a further discussion of obtaining experts, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5, Experts and Other Assistance (2d ed. 2013).

Juvenile clients. Ethical guidelines provide that an attorney should seek to give a juvenile client the same control over his or her case as an adult. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.14 (2003); *see also* N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR APPOINTED COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS AT THE TRIAL LEVEL, Guideline 2.1 Role of Defense Counsel (Dec. 2007). An attorney may not disclose confidential information regarding the juvenile's case to his or her parents without the client's consent. Such confidential information includes plea offers and the progress of plea negotiations. North Carolina State Bar, 98 Formal Ethics Opinion 18 (1999).

For a discussion of representing juveniles in plea negotiations, see DAVID W. ANDREWS & JOHN RUBIN, NORTH CAROLINA JUVENILE DEFENDER MANUAL § 12.3, Negotiating an Admission (2017). For a discussion of juvenile clients who may be incapable of proceeding, see Chapter 7 (Capacity to Proceed) of that manual.

B. Types of Pleas

A defendant may plead

- guilty;
- not guilty; or
- no contest (if the prosecutor and the judge consent).

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

Guilty plea. "A valid guilty plea acts as a conviction of the offense charged [and] serves as an admission of all the facts alleged in the indictment or other criminal process." *State v. Thompson*, 314 N.C. 618, 623–24 (1985). A guilty plea "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

No contest plea. A "no contest" plea is a plea in which the defendant does not acknowledge guilt but agrees not to contest the charge. *See State v. Cooper*, 238 N.C. 241 (1953). "Implicit in a plea of no contest is the recognition that although the defendant is unwilling to expressly admit guilt, he is faced with 'grim alternatives' and is willing to waive his trial and accept the sentence." *State v. Chery*, 203 N.C. App. 310, 314 (2010). This type of plea may be entered only with the prosecutor's and court's permission. G.S. 15A-1011(b). When accepting a plea of no contest, the judge must advise the defendant that he or she will be treated as guilty whether or not guilt is admitted. G.S. 15A-1022(d).

For criminal law purposes, a conviction based on a "no contest" plea carries all of the consequences of a conviction based on a plea of guilty. *State v. Outlaw*, 326 N.C. 467 (1990) (witness may be impeached under N.C. Evidence Rule 609 on basis of "no contest" plea); *State v. Jackson*, 128 N.C. App. 626 (1998) ("no contest" plea entered after 1975 may be used as prior conviction under habitual felon statutes). *But cf. State v. Petty*, 100 N.C. App. 465 (1990) ("no contest" convictions entered before 1975 may not be used to adjudicate habitual felon status). The principal benefit of a "no contest" plea is that it does not constitute an admission of guilt in civil proceedings. *See* Michael G. Okun & John Rubin, *Employment Consequences of a Criminal Conviction in North Carolina*, POPULAR GOV'T, Winter 1998, at 13.

***Alford* plea.** In *North Carolina v. Alford*, 400 U.S. 25 (1970), the U.S. Supreme Court held that a defendant can factually maintain his innocence but at the same time plead guilty. The trial judge may accept a plea of guilty if there is sufficient evidence of guilt, even if the defendant does not admit guilt. *See State v. McClure*, 280 N.C. 288 (1972). Like a "no contest" plea, a conviction based on an *Alford* plea carries all of the consequences of a conviction based on a guilty plea. "'There is nothing inherent in the nature of an *Alford* plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction.'" *State v. Alston*, 139 N.C. App. 787, 793 (2000) (quoting *State ex rel. Warren v. Schwarz*, 579 N.W.2d 698, 707

(Wis. 1998) (citation omitted) (internal quotation marks omitted)) (defendant who entered *Alford* plea could still be required as a condition of probation to participate in sex offenders' rehabilitation program where program mandated him to acknowledge guilt). Although there is no statutory requirement that the prosecutor consent to an *Alford* plea, as a practical matter obtaining consent may be necessary as the prosecutor could withdraw the plea offer if dissatisfied with the defendant's unwillingness to concede guilt.

For further discussion of this topic, including whether an *Alford* plea constitutes an admission for later civil proceedings, see Jeff Welty, *Alford Pleas*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 13, 2010).

Conditional plea. Under G.S. 15A-979(b), a defendant may plead guilty in superior court on the condition that he or she retains the right to appeal the denial of a suppression motion filed pursuant to G.S. 15A-974, whether based on a constitutional violation or substantial statutory violation. If the appeal is successful, the plea is vacated.

To preserve the right to appeal the trial court's denial of the motion to suppress, the defendant must explicitly notify the State and the court of his or her intention to appeal before the plea is entered. *See State v. Brown*, 142 N.C. App. 491 (2001); *State v. McBride*, 120 N.C. App. 623 (1995), *aff'd per curiam*, 344 N.C. 623 (1996). Both the written transcript of plea and the verbatim transcript of the in-court plea colloquy should include an explicit statement that the defendant's right to appeal the denial of a suppression motion is preserved.

Giving notice of appeal from the final judgment ***after*** the plea has been entered is necessary to invoke appellate jurisdiction but, without a separate notice of intent to appeal before entry of the plea, it will not suffice to preserve the issue of the denial of the motion to suppress. *See State v. Tew*, 326 N.C. 732 (1990); *Brown*, 142 N.C. App. 491; *McBride*, 120 N.C. App. 623. For more on this procedure, see *infra* § 23.6B, Appeal from Superior Court. *See also* 1 NORTH CAROLINA DEFENDER MANUAL § 14.7, Appeal of Suppression Motions (2d ed. 2013).

While G.S. 15A-979 explicitly gives the defendant the right to appeal from the denial of a suppression motion, a defendant who has entered a plea of guilty otherwise has a very limited right to appellate review. *See State v. Pimental*, 153 N.C. App. 69, 73 (2002) ("[A] defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea."). If your client wants to appeal from a ruling on a pretrial motion other than a motion to suppress, you will ordinarily have to try the case to completion to preserve that right. For further discussion of a defendant's limited right to appeal from a guilty plea in superior court, see *infra* § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court.

C. Plea Bargaining

"A prosecutor has broad discretion to decide whether to engage in plea negotiations with a defendant and what plea will be offered." Jessica Smith, *Pleas and Plea Negotiations in North Carolina Superior Court* at 7, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, June 2015). The exercise of this discretion will not be found to be unconstitutionally infirm unless the defendant can prove that the prosecutor's decision was "'deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification.'" *Id.* (quoting *State v. Woodson*, 287 N.C. 578, 595 (1975), *rev'd on other grounds*, 428 U.S. 280 (1976) (citation omitted) (internal quotation marks omitted)).

A valid plea bargain may include:

- an agreement by the prosecutor to dismiss or reduce charges;
- an agreement by the prosecutor not to charge an additional or more serious crime so long as the evidence supports the prosecution of that crime;
- specific sentencing arrangements;
- an agreement by the prosecutor not to recommend a sentence within the aggravated range;
- an agreement by the prosecutor not to oppose probation or other community or intermediate sentence;
- an agreement by the defendant to pay restitution, including the agreement to pay for rehabilitative treatment for the victim;
- an agreement by the defendant to testify truthfully for the prosecution against a co-defendant in a related case or in another case;
- an agreement by the defendant not to appeal or not to seek post-conviction relief (except that the defendant may not waive his or her right to assert prosecutorial misconduct or ineffective assistance of counsel as grounds for relief. North Carolina State Bar Ethics Opinion RPC 129 (1993)). *But cf.* Jessica Smith, *Pleas and Plea Negotiations in North Carolina Superior Court* at 8–9, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, June 2015) (finding that the North Carolina appellate courts have not specifically dealt with the issue of waiving the right to appeal in a published case, that the federal Fourth Circuit Court of Appeals has allowed the procedure, and that other jurisdictions are split on the issue).

See generally G.S. 15A-1021; *see also* G.S. 15A-1054 (charge reductions and sentencing concessions permissible in exchange for truthful testimony); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (finding no violation of due process where prosecutor legitimately threatened defendant with reindictment on a more serious charge if defendant did not accept plea offer; more serious charge was fully supported by the evidence in the prosecutor's possession at the time the plea offer was made and defendant was fully informed of the consequences of his decision to plead not guilty).

Limitations on prosecutors. A prosecutor may not seek to induce a defendant to plead guilty or no contest by:

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

G.S. 15A-1021 Official Commentary. Additionally, a prosecutor may not use or threaten to use his or her statutory calendaring power to coerce a defendant to plead guilty. *See* North Carolina State Bar Ethics Opinion RPC 243 (1997) (unethical for prosecutor to threaten that if the defendant does not accept the plea bargain, the prosecutor will make the defendant sit in the courtroom all week and then place the defendant's case "on the calendar every Monday morning for weeks to come").

Plea bargains may not include payment provisions except for payment of attorney's fees and court costs, restitution to the victim, and fines. For example, the prosecutor may not offer more advantageous pleas to defendants willing to make charitable contributions to designated organizations. *See* North Carolina State Bar Ethics Opinion RPC 204 (1995) (finding that prosecutors could not ethically offer special treatment to offenders who were charged with violating traffic laws or minor criminal offenses in exchange for their donation to the local school board).

The prosecutor may not agree to refrain from disclosing the defendant's prior record. Although a defense attorney has no affirmative obligation to inform the court of the defendant's prior record, the parties may not agree to withhold the information from the court. G.S. 15A-1340.14(f) requires the prosecutor in felony cases to make all feasible efforts to obtain and present to the court the offender's full record. This statute implies that the prosecutor may not agree to withhold information about the defendant's record as a condition of a plea bargain. The statute only applies to felony sentencing. Arguably, Rule 3.3 of the N.C. State Bar Revised Rules of Professional Conduct, imposing the duty of candor toward the tribunal, would preclude a prosecutor in a misdemeanor case from concealing or misrepresenting information about the defendant's record, although the prosecutor would not have the duty to search for the defendant's record as in felony cases.

A plea bargain may not include conditions that are otherwise barred by law. Where a plea agreement contains an invalid condition that violates the law, the judgment will be vacated and the defendant will be placed back in the position that he or she was in before the guilty plea. *See, e.g.*, *State v. Wall*, 348 N.C. 671 (1998) (vacating judgments that ran concurrently pursuant to the plea agreement where the law required that consecutive sentences be imposed); *State v. White*, 213 N.C. App. 181 (2011) (defendant pled guilty pursuant to a plea arrangement that purported to preserve his right to appeal from the

denial of his pretrial motion to dismiss; court held that the plea agreement violated the law and the plea must be vacated because defendant had no right to appeal from the denial of that motion); *see also Hamilton v. Freeman*, 147 N.C. App. 195 (2001) (Department of Correction may not unilaterally alter illegal sentencing agreement contained in plea bargain; proper remedy is for Department to notify court to vacate plea).

Where essential and fundamental terms of the plea agreement are unfulfillable because they violate the law, the entire agreement must be set aside. *See State v. Anderson*, 244 N.C. App. 777 (2016) (unpublished) (vacating plea agreement and judgments where State and defendant mistakenly believed that the offense was a Class E felony when it was a Class F felony and defendant pled guilty to a harsher sentence than was allowed under the statute). A defendant cannot "disavow the portions of the plea agreement that [are] unfavorable but yet retain the portion that is favorable." *State v. Rico*, 218 N.C. App. 109, 122 (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327 (2012) (setting aside guilty plea to a lesser included offense of first-degree murder where plea agreement contained an illegal condition that defendant receive an aggravated sentence based on the aggravating factor that a deadly weapon was used in the offense; aggravating factor inappropriate because the use of a deadly weapon was necessary to prove an element of the offense).

A defendant may not plead guilty to an offense that is not the same offense or a lesser included offense of the crime for which he or she was indicted. *See, e.g., State v. Craig*, 21 N.C. App. 51 (1974) (defendant charged with DUI could not plead to reckless driving as that was not a lesser included offense); *State v. Cassada*, 6 N.C. App. 629 (1969) (defendant indicted for larceny could not plead guilty to receiving stolen goods, where that offense was not lesser included offense of larceny); *see also In re Fuller*, 345 N.C. 157, 160–61 (1996) (district court judge erred by soliciting and accepting a guilty plea to exceeding a safe speed when defendant was charged with passing a stopped school bus because it is "not within the trial judge's province to negotiate a plea or enter judgment on a plea to a charge which is not a lesser included offense of the charge at issue").

If you want to construct a plea bargain that includes pleading guilty to a related but unindicted offense, the prosecutor should dismiss the indictment with prejudice and seek a superseding indictment or prepare an information. On an appeal from district court, the prosecutor must prepare an information. A defendant charged with a noncapital offense may waive indictment and proceed on an information. In district court, the prosecutor should file a statement of charges. *See* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 8, Criminal Pleadings (2d ed. 2013).

"Package deals" and benefits to third parties. In "package deal" pleas, the prosecutor offers some type of benefit or detriment to the defendant and third parties in order to persuade the defendant or a group of defendants to plead guilty. *See United States v. Mezcual-Cruz*, 387 F.3d 1 (1st Cir. 2004) (upholding guilty pleas of two brothers that were made as part of a package or "wired" deal that was contingent on all six co-defendants pleading guilty). These types of plea deals are not impermissible but, because

of their coercive nature, should be scrutinized carefully by the court to ensure that the defendant's guilty plea is voluntarily made. *See id.* at 8 (prosecutor must inform court that the plea is a package deal, and court's "ensuing colloquy should show sensitivity to the issue of voluntariness" in light of the pressures inherent in those pleas); *United States v. Morrow*, 914 F.2d 608, 613 (4th Cir. 1990) (plea bargain involving leniency for third person can pose greater danger of inducing false or involuntary guilty plea because it "'skew[s] the assessment of the risks a defendant must consider'" (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 365 n.8 (1978))); *see also State v. Salvetti*¸ 202 N.C. App. 18 (2010) (holding that the prosecutor did not use improper pressure when he made the defendant's wife's plea deal contingent on the defendant's plea of guilty; implicitly holding that package plea deals are not involuntary per se in North Carolina); *State v. Summerford*, 65 N.C. App. 519 (1983) (plea offer in which prosecutor offered to dismiss charges against wife if husband pled guilty was proper).

Pleas of guilty in capital murder cases. Although evidence of an aggravating circumstance may exist, the State may agree not to seek the death penalty against a defendant in exchange for the defendant's plea of guilty to first-degree murder. G.S. 15A-2001(b).

Substantial assistance in drug cases. G.S. 90-95(h)(5), governing drug trafficking offenses, states that the court may reduce the minimum sentence for trafficking or impose a suspended sentence if the court finds that the defendant "provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals." Case law interpreting this section gives trial judges discretion in determining what constitutes "substantial assistance." *See also State v. Wells*, 104 N.C. App. 274 (1991) (whether trial judge finds that defendant's aid amounts to "substantial assistance" is discretionary); *State v. Perkerol*, 77 N.C. App. 292 (1985) (defendant has no right to lesser sentence even if he provides what he considers to be substantial assistance in identification of accomplices); *State v. Myers*, 61 N.C. App. 554 (1983) (no abuse of discretion for failing to find "substantial assistance" where defendant's proffered information was not new and defendant did not assist in prosecution).

D. Informing Client of Consequences of Plea Bargain

Effective assistance of counsel. Under the Sixth Amendment to the U.S. Constitution, a defendant is entitled to the effective assistance of counsel during plea negotiations. *See McMann v. Richardson*, 397 U.S. 759 (1970). Advising a client whether to enter a guilty plea is generally subject to the two-part test for ineffective assistance of counsel from *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, counsel is ineffective if (1) the representation falls below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Where a defendant shows that his or her attorney's ineffective advice led to the improvident acceptance of a guilty plea, the second part of the *Strickland* inquiry focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Where a defendant shows that his or her

attorney's ineffective advice led to the improvident rejection of a plea offer, the inquiry focuses on whether "there is a reasonable probability the plea offer would have been presented to the court . . ., that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 566 U.S. 156, 164 (2012) (remanding for determination of appropriate remedy).

Resolution of claims of ineffective-assistance of counsel are fact-specific and are beyond the scope of this manual. The discussion below focuses primarily on professional standards for advising clients about entering a guilty plea. In evaluating claims of ineffective assistance, the courts have recognized that "these standards may be valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

National standards. The Compendium of Standards for Indigent Defense Systems is a compilation of national and state guidelines on the defense function. Many of the listed guidelines provide that, where applicable, defense attorneys should discuss the following issues with their clients regarding guilty pleas:

- Nature of the charges. The client should understand the crime he or she is pleading guilty to having done.
- Rights that are waived by pleading guilty, including any waiver of appellate or post-conviction rights.
- Maximum sentence, including any habitual offender or other sentencing enhancements.
- Mandatory minimum sentence.
- Sex offender registration requirements.
- Possibility of forfeiture of assets.
- Whether a sentence for future offenses may be enhanced on the basis of the current conviction.
- Effects on immigration status (discussed further below).
- Whether the court may impose costs, including attorneys' fees and court costs.
- Loss of, or restrictions on, drivers' license or professional license.

See 2 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, Section H. Disposition Without Trial (2000).

North Carolina guidelines. The guidelines for defense services adopted by the North Carolina Commission on Indigent Defense Services (Appendix A of this manual) contain similar provisions on advising clients about entering into a guilty plea. The principal difference is that the North Carolina guidelines divide the potential consequences of a plea into two categories.

For most of the consequences listed above (with the exception of immigration consequences), the North Carolina guidelines recommend that counsel "be fully aware of,

and fully advise the client." Appendix A, *infra*, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 6.2(b) The Contents of the Negotiations (Nov. 2004) (also recommending that counsel advise the client about earned time credits and the availability of any diversion or rehabilitation programs).

For "other potential collateral consequences," the North Carolina guidelines take a more modest approach, recommending that counsel "discuss" them with the client. *Id.* The other consequences include:

- motor vehicle or other licensing;
- parental rights;
- possession of firearms;
- voting rights;
- employment;
- military and government service considerations; and
- potential for exposure to or impact on any federal charges.

Practice note: The North Carolina guidelines include immigration consequences in this second category of consequences. However, in light of the decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), discussed next, counsel ***must*** consult with noncitizen clients about the immigration consequences of a criminal conviction.

Direct and collateral consequences. The courts have sometimes distinguished between direct and collateral consequences in assessing counsel's obligation to advise clients about the impact of a criminal conviction. *See, e.g.*, *State v. Goforth*, 130 N.C. App. 603, 605 (1998) (noting that, "[g]enerally, an attorney is not required to advise his [or her] client of the myriad 'collateral consequences' of pleading guilty"); *see generally* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence and Misinformation in the Guilty Plea Process*, 95 Iowa L. Rev. 119 (2009). Direct consequences are those that have a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *State v. Bozeman*, 115 N.C. App. 658, 661 (1994) (citation omitted) (holding that a mandatory minimum sentence is a direct consequence that must be revealed to a defendant). However, in *Padilla v. Kentucky*, 559 U.S. 356 (2012), the U.S. Supreme Court made it plain that the distinction between direct and collateral consequences does not clearly delineate defense counsel's duty to inform his or her client regarding the consequences of a guilty plea. In refusing to apply that distinction to immigration consequences, the *Padilla* Court noted that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'" *Id*. at 365; *see also United States v. Chaidez*, 568 U.S. 342, 352–-53 (2013) (noting that the Court "breach[ed] the previously chink-free wall between direct and collateral consequences" when it held that the Sixth Amendment test for ineffective assistance of counsel set out in *Strickland v. Washington* applied to Padilla's claim).

The UNC School of Government has created a searchable database, the Collateral Consequences Assessment Tool, or C-CAT for short, to assist attorneys, reentry professionals, affected individuals, and policymakers in understanding the impact of a criminal conviction in North Carolina. Additionally, the Criminal Justice Section of the American Bar Association has created the National Inventory of the Collateral Consequences of Conviction (NICCC), a searchable database collecting collateral consequences by state.

Advice about immigration and other significant "collateral" consequences. Because of the importance of immigration consequences and their close connection to the criminal process, the U.S. Supreme Court, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), concluded that defense counsel has an obligation to advise noncitizen clients about immigration consequences, whether characterized as direct or collateral. The *Padilla* court described a two-step approach. One, if the immigration consequences are clear—as they were in *Padilla*, where the defendant was facing virtually mandatory deportation if convicted—counsel must advise a noncitizen client of the consequences of conviction. In that instance, the failure to advise, as well as the giving of incorrect advice, falls below expected professional norms. Two, if the immigration consequences of a guilty plea are unclear, counsel at least must advise a noncitizen client that a conviction may carry adverse immigration consequences. North Carolina has recognized these requirements. *See State v. Nkiam*, 243 N.C. App. 777 (2015); John Rubin, *Padilla Comes to North Carolina*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 8, 2015).

Padilla is not retroactive and does not afford relief to a person whose conviction was final before *Padilla* was decided. *United States v. Chaidez*, 568 U.S. 342 (2013); *accord State v. Alshaif*, 219 N.C. App. 162 (2012) (finding that *Padilla* did not apply retroactively to defendant's case and upholding denial of motion for appropriate relief).

Practice note: As a practical matter, the two-step approach adopted in *Padilla* requires that counsel investigate a noncitizen's circumstances to determine whether potential immigration consequences are clear or unclear. Only then will counsel have sufficient information to satisfy the obligation of appropriately advising a noncitizen client. For a further discussion of counsel's obligations in negotiating pleas and advising clients about immigration consequences, see SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA Ch. 1, Obligations of Defense Counsel (2017).

The immigration consequences manual includes a detailed discussion of the immigration consequences of a conviction. It is not a substitute, however, for independent research and consultation with an immigration expert as needed.

The approach taken in *Padilla* may apply to other significant consequences of a conviction, whether characterized as direct or collateral. *See* Jessica Smith, *A Silver Lining for the Defense in* Chaidez?, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 13, 2013) (wondering whether *Padilla* "will spawn a new wave of post-conviction motions,

arguing that other collateral consequences—like immigration consequences--are not categorically excluded from Sixth Amendment protection").

For example, effective assistance of counsel may require the giving of advice about sex offender registration and monitoring requirements as a result of a criminal conviction. *See Bauder v. Dep't of Corr.*, 619 F.3d 1272 (11th Cir. 2010) (relying on *Padilla* and finding counsel's performance deficient based on counsel's incorrect advice about the potential for civil commitment as a result of the defendant's guilty plea to stalking of a minor). The North Carolina courts have held that sex offender registration and monitoring requirements are collateral matters for purposes of evaluating the taking of a guilty plea by a judge (*see infra* § 23.4B, Judge's Duty to Ensure Informed Choice), but they have not specifically addressed counsel's obligation post-*Padilla* to advise clients about these restrictions, which may last for life. The N.C. Court of Appeals has held that an ineffective assistance of counsel claim cannot be asserted in satellite-based monitoring cases because SBM is not a criminal punishment, *see e.g.*, *State v. Wagoner*, 199 N.C. App. 321 (2009), but this holding is not consistent with the approach taken in *Padilla*. The holding is also inconsistent with other cases that have upheld the right to the effective assistance of counsel in civil contexts where a defendant has a statutory right to counsel [as a defendant does in SBM cases under G.S. 7A-451(a)(18)]. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 12.7A, Cases in which Right Arises (2d ed. 2013).

Misadvice about "collateral" consequences. For less significant "collateral" consequences, attorneys still may be found ineffective for gross misadvice to a client about that consequence. *See State v. Goforth*, 130 N.C. App. 603 (1998) (advice of attorney who failed to accurately answer defendant's question about collateral consequence of plea was deficient).

Post-release supervision. Effective December 1, 2011, all people convicted of a felony who receive active sentences became subject to a mandatory term of post-release supervision. *See* G.S. 15A-1368.2. These terms can range from as little as nine months for Class F through I felons to as much as five years for sex offenders. North Carolina has not determined whether post-release supervision is a "direct consequence" of a guilty plea, but it seems clear that defense attorneys should be fully aware of and fully advise the client about the term of post-release supervision associated with the client's particular sentence. *Cf. People v. Catu*, 825 N.E.2d 1081 (N.Y. 2005) (holding that mandatory post-release supervision is a direct consequence of a criminal conviction and the failure of the trial judge to advise defendant of that consequence violated due process and required reversal of the conviction). The need to advise clients of this consequence is particularly important since G.S. 15A-1022 does not require a trial judge to advise the defendant about post-release supervision when accepting a guilty plea to a felony and the Judgment and Commitment form, AOC-CR-601, does not have a section that sets out the terms of post-release supervision for that defendant. *See also* Jamie Markham, *Surprise Post-Release Supervision*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 11, 2015).

E. Judge's Participation in Plea Discussions

Generally. G.S. 15A-1021(a) allows trial judges to participate in plea negotiations. *Compare* FED. R. CRIM. P. 11(c)(1) (prohibiting judicial involvement in plea discussions). If represented by counsel, the defendant does not have to be present during these negotiations. *Id.* The judge's participation can be advantageous, both as a means of persuading the defendant to accept a plea bargain and because the judge is going to have to approve any sentencing agreement reached.

Pre-plea approval. G.S. 15A-1021(c) authorizes parties who have reached an agreement as to sentence to advise the judge, before the entry of the plea and with the judge's permission, of the terms of that arrangement and the reasons that the arrangement was made. The judge may indicate to the parties whether he or she will concur in the proposed disposition. The judge may withdraw his or her concurrence if he or she later learns of information that is not consistent with the information given previously. G.S. 15A-1021(c).

No coercion permitted. Neither the judge nor the prosecutor may "bring improper pressure upon a defendant to induce a plea of guilty or no contest." G.S. 15A-1021(b); *see also Brady v. United States*, 397 U.S. 742, 750 (1970) ("the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant"); *State v. Benfield*, 264 N.C. 75 (1965) (statements made by the judge during defendant's jury trial to the effect the jury would likely convict and, if so, the judge felt inclined to give defendant a long sentence rendered defendant's subsequent guilty plea involuntary); *State v. Pait*, 81 N.C. App. 286 (1986) (judge who told defendant he was tired of frivolous not-guilty pleas coerced defendant into pleading guilty). *But see State v. Smalls*, 214 N.C. App. 562 (2011) (unpublished) (finding that trial judge's in-chambers conversation with counsel about his likely sentence if defendant pled guilty was expressly permitted by G.S. 15A-1021(a); it was "completely appropriate" under the circumstances for the judge to later place the substance of that conversation on the record, and the court found it did not coerce defendant's guilty plea).

Judge's role in sentencing on plea bargain. The judge's role in acting on a plea bargain differs significantly depending on whether the plea bargain does or does not contain an agreed-on sentence. If the parties have agreed on a sentence as part of a plea bargain, the judge must approve the sentence to accept the plea. If the judge does not approve the sentence, he or she is not required to accept the plea. G.S. 15A-1023(b). If a plea agreement contains no sentence provision, the judge must accept the plea upon determining that it is an informed choice of the defendant and there is a factual basis for the plea. G.S. 15A-1023(c). The sentence for the agreed-on offense is then within the judge's discretion.

For a further discussion of the judge's role based on the presence or absence of a sentencing provision in a plea agreement, see *infra* § 23.4D, Judge's Sentencing Discretion.