
23.4 The Plea Procedure

Once the parties have reached a negotiated plea settlement, the defendant must tender his or her plea of guilty (or no contest) in open court. G.S. 15A-1011(a). Before accepting the plea, the trial judge must be convinced of two things. First, the judge must be convinced that the plea is the informed choice of the defendant and, in so doing, must be aware of the conditions of any plea agreement. Second, the judge must ensure that there is a factual basis for the plea.

If the plea arrangement includes a sentencing recommendation, the trial judge must decide whether he or she will approve the recommendation before accepting the defendant's plea. The trial judge's responsibilities in accepting a plea are discussed below.

A. Recordation Requirement

A verbatim transcript must be made of any proceeding in which a defendant enters a guilty or no contest plea in superior court. The record of the proceeding must include the judge's statutorily required inquiries to the defendant, defense counsel, and the prosecutor, as well as all responses. If there is a written transcript of plea, this transcript must be made part of the record. If not, the terms of any plea bargain must be set forth orally on the record. G.S. 15A-1026.

If a defendant pleads guilty or no contest to an H or I felony in district court pursuant to G.S. 7A-272, this proceeding also must be recorded. G.S. 7A-191.1.

B. Judge's Duty to Ensure Informed Choice

Constitutional requirements. For a plea of guilty to be valid under the Fourteenth Amendment, the record must affirmatively show that the plea was the "knowing and

voluntary" choice of the defendant. *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969).

A plea is "knowing and voluntary" only if the defendant is made fully aware of the direct consequences of pleading guilty, including the actual value of any sentencing commitments. *Brady v. United States*, 397 U.S. 742 (1970); *State v. Bozeman*, 115 N.C. App. 658 (1994) (quoting *Brady*). Direct consequences are those that have a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Bozeman*, 115 N.C. App. 658, 661 (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973)). There may also be significant "collateral" consequences about which a defendant must be informed. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356 (2010) (concluding that defense counsel has an obligation to advise noncitizen clients about immigration consequences, whether characterized as direct or collateral). For further discussion of direct and collateral consequences, see *supra* § 23.3D, Informing Client of Consequences of Plea Bargain.

Length of sentence. Before accepting a guilty or no contest plea, the trial judge must inform the defendant of the mandatory minimum sentence, if any. G.S. 15A-1022(a)(6). The N.C. Court of Appeals has held that a mandatory minimum sentence is a "direct consequence" that must be revealed to the defendant. *See State v. Bozeman*, 115 N.C. App. 658 (1994) (finding error but harmless where defendant was not informed of the mandatory minimum sentence of seven years prescribed by the legislature for trafficking offenses). However, G.S. 15A-1022((a)(6) has been narrowly interpreted by the Court of Appeals to apply only where the legislature has set specific mandatory minimum sentences outside of the structured sentencing scheme. *See, e.g., State v. Perry*, ___ N.C. ___, 798 S.E.2d 814 (2017) (unpublished) (holding that G.S. 15A-1022(a)(6) does not require trial judges to inform defendants of the minimum term of imprisonment they face based on the applicable sentencing range specified in the structured sentencing grid for the particular offense); *State v. Vaughn*, 237 N.C. App. 100 (2014) (unpublished) (to same effect).

Trial judges must always reveal the maximum possible sentence to which a defendant is exposed. *See* G.S. 15A-1022((a)(6); *see also State v. Reynolds*, 218 N.C. App. 433 (2012) (defendant's conviction vacated where trial judge erroneously informed him that the maximum sentence he would receive as a result of his guilty plea was three months shorter than the correct corresponding maximum sentence that he actually received). However, the trial judge does not have to specifically tailor his or her explanation of the maximum possible sentence to fit a particular defendant's projected prior record level. When advising a defendant of the maximum sentence, it is acceptable for the trial judge to inform him or her of the theoretical maximum sentence that any defendant could receive. *Vaughn*, 237 N.C. App. 100.

Additional periods of imprisonment that result from a defendant's guilty plea to habitual offender status are also considered "direct consequences." *State v. McNeil*, 158 N.C. App. 96 (2003).

Other consequences. North Carolina courts have held that a defendant's parole eligibility is not a "direct consequence" of a guilty plea. *State v. Daniels*, 114 N.C. App. 501 (1994). Although North Carolina courts have not yet determined whether post-release supervision is a "direct" or a "collateral" consequence of a conviction, it seems clear that it is a significant consequence and defendants should be advised about the term of post-release supervision associated with the client's particular sentence. *See 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); *see also* Jamie Markham, *Surprise Post-Release Supervision*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 11, 2015).

North Carolina courts have held that satellite-based monitoring is a "collateral consequence," not a "direct consequence," of a plea to an offense resulting in that consequence. *State v. Bare*, 197 N.C. App. 461 (2009).

Under this approach, the failure of the judge to advise the defendant of indirect or collateral consequences does not render a guilty plea invalid; however, the failure of defense counsel to advise the defendant of significant consequences, even those traditionally considered collateral, may constitute ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (requiring that counsel advise noncitizen clients about immigration consequences); *Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (declining to decide whether counsel's erroneous advice about parole eligibility may be considered constitutionally ineffective; erroneous advice was not prejudicial); *see also supra* § 23.3D, Informing Client of Consequences of Plea Bargain.

Statutory colloquy with defendant. Before accepting a plea of guilty, the trial judge has a statutory obligation to personally address the defendant and inform him or her of the following:

- the right to remain silent;
- the right to plead not guilty;
- that the defendant is waiving his or her right to a jury trial and right to confront witnesses;
- the maximum sentence the defendant may receive and any mandatory minimum sentence; and
- the possibility of deportation if he or she is not a citizen of the United States.

G.S. 15A-1022(a). In addition, the judge must

- determine that the defendant understands the nature of the charges; and
- ensure the defendant is satisfied with counsel.

Id. The judge must address the defendant in person and not only through counsel. *State v. Williams*, 65 N.C. App. 472 (1983) (error but harmless on unusual facts of case for judge to fail to address defendant in person; case put onus on defense counsel to object); *see*

also State v. Manning, ___ N.C. App. ___, 794 S.E.2d 559 (2016) (unpublished) (finding trial judge failed to comply with requirements of G.S. 15A-1022(a) to address defendant personally when he allowed defense counsel to respond to the inquiry regarding defendant's satisfaction with his counsel's performance).

Unless the defendant makes a specific inquiry or indicates that he or she does not understand the charges, the judge does not have to list the elements of the offense or explain the different theories of an offense. *Compare State v. Barts*, 321 N.C. 170 (1987) (where defendant stated he did not understand the two theories of murder to which he was pleading guilty, judge adequately explained them to him, including the elements of premeditated and deliberate murder and felony murder), *with State v. Smith*, 352 N.C. 531 (2000) (plea colloquy adequate despite judge's failure to explain theories of first-degree murder where defendant indicated he understood the nature of the charges and their elements).

Colloquy with counsel. In addition to the requirements of G.S. 15A-1022(a), the trial judge must inquire personally of the defendant, the prosecutor, and defense counsel regarding whether:

- the plea of guilty is the product of a plea bargain and, if so, what the conditions of the bargain are;
- there were any prior plea discussions;
- the defendant is entering the plea of his or her own free will; and
- anyone has promised or threatened the defendant to cause him or her to enter the plea.

See G.S. 15A-1022(b). "The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice." *Id.*; *see also State v. Salvetti*, 202 N.C. App. 18 (2010) (trial judge correctly determined that defendant was fully informed of the consequences of his choice to enter an *Alford* plea; no violation of G.S. 15A-1022(b)).

Requirement that full agreement be disclosed on record. Both parties to a plea agreement have an ethical obligation to disclose all material elements of the plea bargain to the court. *See* North Carolina State Bar Ethics Opinion RPC 152 (1993) (prosecutor may not knowingly conceal fact that he withdrew charge as part of plea agreement).

Transcript of plea. The N.C. Administrative Office of the Courts has prepared a form for use in cases where the defendant is pleading guilty or no contest. *See* AOC Form AOC-CR-300, "Transcript of Plea" (May 2018).

C. Factual Basis for Plea

Generally. Once the judge has determined that a plea is a voluntary and knowing decision by the defendant, he or she must find that there is a sufficient factual basis for the plea of guilty or no contest. The following information may be relied on in finding a factual basis:

- a statement of the facts by the prosecutor;
- a defendant's written statement;
- a presentence report;
- sworn testimony, including reliable hearsay; and
- a statement of the facts by defense counsel.

G.S. 15A-1022(c). The judge may rely on any of the above sources. *See State v. Atkins*, 349 N.C. 62 (1998) (not all of above sources required in every case; the trial judge may consider any information properly brought to his or her attention in determining whether there is a factual basis for a plea of guilty or no contest); *see also Santobello v. New York*, 404 U.S. 257, 261 (1971) (under federal rules of criminal procedure, the factual basis for a guilty plea must appear "on the record").

Under G.S. 15A-1022(c), there must be an independent judicial determination that a sufficient factual basis exists before a trial judge can accept a guilty plea. *State v. Agnew*, 361 N.C. 333, 337 (2007) (finding that the trial judge erred in accepting defendant's plea where the judge relied solely on the indictment, the transcript of plea, and defense counsel's stipulation that there was a factual basis for the plea; taken together these "did not contain enough information for an independent judicial determination of defendant's actual guilt"). The statute "contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199 (1980) (holding that a transcript of plea, standing alone, cannot provide the factual basis for a plea). While the standard for finding a factual basis for a guilty plea is fairly lenient, the record must positively show the factual basis. *See State v. Weathers*, 339 N.C. 441 (1994) (factual basis for failure to appear charge not present when the only witness at the plea colloquy testified that defendant was present when case was called); *State v. Flint*, 199 N.C. App. 709 (2009) (guilty plea set aside where the record showed a factual basis for only forty-seven of the sixty-eight felony charges to which defendant pled guilty).

Practice note: In preparing to negotiate a plea bargain with the prosecutor, you should consider developing a factual basis for lesser included offenses. In a murder case, for instance, you may have to convince the prosecutor and the court that there is a legitimate factual basis for a manslaughter plea.

Multiple counts of same offense. Sometimes a defendant will be charged with multiple counts of the same offense when the evidence may support only one such offense. *See, e.g., State v. Jaynes*, 342 N.C. 249 (1995) (larceny or robbery of different objects from same person constitutes one larceny or robbery); *State v. Garris*, 191 N.C. App. 276 (2008) (simultaneous possession of multiple firearms by a convicted felon supports only one conviction); *State v. Rozier*, 69 N.C. App. 38 (1984) (evidence did not support a finding of two conspiracies where State failed to show the existence of two separate agreements to sell controlled substances to an undercover agent). For a defendant to plead guilty to multiple counts of the same offense, there must be a factual basis to support each individual count.

Practice note: A defendant who pleads guilty has a very limited right to appeal and is not statutorily entitled as a matter of right to appellate review of the contention that there was an insufficient factual basis to support his or her guilty plea. *See, e.g.*, *State v. Keller*, 198 N.C. App. 639 (2009); *see also infra* § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court. Further, a defendant usually waives any double jeopardy claim, including an objection to multiple punishment, by pleading guilty. *See, e.g.*, *State v. Harwood*, 228 N.C. App. 478 (2013) (holding that by pleading guilty, defendant waived his right to challenge his convictions of multiple counts of possession of a firearm by a felon on both direct appeal and in postconviction litigation); *State v. Hughes*, 136 N.C. App. 92 (1999) (defendant who pled guilty to offenses of accessing computers and obtaining property by false pretense waived multiple punishment defense and had no right to arrest of judgment on one offense); *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 13.4B, Motion to Dismiss on Double Jeopardy Grounds (2d ed. 2013) (discussing waiver of double jeopardy claims).

Admission of facts resulting in "collateral" consequences. In some instances, the collateral consequences of a criminal conviction may depend on facts underlying the conviction, not the bare conviction itself. For example, for immigration purposes, a fraud or deceit offense involving a loss of more than $10,000 is treated as an aggravated felony, triggering the most severe immigration consequences. If the defendant admits those facts in pleading guilty or fails to contest the factual basis offered by the prosecutor in support of the plea, the entity responsible for administering the consequence may consider the fact as established.

Practice note: If during a plea colloquy in superior court, the prosecutor's factual proffer includes allegations that are broader than needed to establish the basis for the plea and that are disputed by the client, defense counsel should consider contesting them. If the prosecutor proffers the disputed allegations as part of the factual basis for the offense, counsel can state his or her disagreement with the particular allegations when asked by the judge to stipulate to the prosecutor's recitation of facts. Counsel does not necessarily need to present evidence or call witnesses. Defense counsel may need to discuss the matter with the prosecutor before the taking of the plea to be sure the prosecutor is willing to enter into the plea bargain under those circumstances. (In district court, plea proceedings are generally not recorded so it is not as critical for counsel to state the defendant's position.) Depending on the applicable law, the authority responsible for administering the collateral consequence may be able to go outside the record of the criminal proceedings to determine the circumstances of the offense; but, because the record of the criminal proceedings would indicate that the circumstances were disputed, the criminal case record should not be conclusive against the client. *See, e.g.*, SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA § 6.1C (Categorical Approach and Record of Conviction) (2017); Jamie Markham, *Petitions to Terminate Sex Offender Registration: Moir Tiers*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 5, 2017). To determine the best course for the client in plea proceedings, counsel will need to determine the collateral consequences of greatest significance to the client and determine the convictions and any related circumstances that trigger the consequences.

D. Judge's Sentencing Discretion

Sentencing provisions in plea agreements. Where the parties have agreed on a particular sentence as part of a plea agreement, the judge must be informed of the sentencing arrangement at the time that the plea is taken. G.S. 15A-1023(a). The judge must advise the parties whether he or she will approve the arrangement and sentence the defendant accordingly. G.S. 15A-1023(b). A plea bargain that has a sentencing recommendation by the State must be approved by the judge before it is enforceable. *See State v. Wallace*, 345 N.C. 462 (1997) (trial judge permitted to reject plea agreement to second-degree murder that included specific sentencing recommendation); *State v. Hudson*, 331 N.C. 122 (1992) (a prosecutor has no authority to bind the State to a particular sentence in a defendant's case until the trial judge has approved the proposed sentence); *State v. Santiago*, 148 N.C. App. 62 (2001) (a lack of judicial approval of a plea arrangement with a sentence recommendation renders the proposed agreement null and void). *But see infra* § 23.4F, State's Right to Rescind Plea Agreement (explaining that a defendant may enforce a plea agreement before a judge has accepted it if there has been detrimental reliance).

Sentencing recommendation rejected. If the judge does not approve the sentencing arrangement, he or she must

- inform the parties that he or she rejects the plea arrangement;
- refuse to accept the defendant's plea of guilty or no contest;
- advise the defendant personally that neither party is bound by the rejected plea arrangement;
- advise the parties of the reasons the arrangement was rejected; and
- give the parties an opportunity to modify the agreement accordingly.

G.S. 15A-1023(b). The judge's rejection must be noted on the plea transcript and made part of the record. *Id.*; *see also* G.S. 15A-1026.

When a plea arrangement is rejected, the defendant is entitled to a continuance until the next session of court. G.S. 15A-1023(b); *State v. Tyndall*, 55 N.C. App. 57 (1981); *see also State v. Martin*, 77 N.C. App. 61 (1985) (defendant must affirmatively ask for continuance). A defendant does not have the right to appeal from a trial judge's rejection of a plea arrangement with a sentence recommendation. G.S. 15A-1023(b); *see also State v. Santiago*, 148 N.C. App. 62 (2001).

Even if the agreement had been previously disclosed to the judge and received his or her preliminary approval, the judge may change his or her mind and refuse to accept the agreement upon learning of information that is inconsistent with the prior representations. G.S. 15A-1021(c).

Sentencing recommendation initially approved, later rejected. Sometimes a judge will accept a plea entered pursuant to a plea arrangement containing a sentence recommendation and then, at the time of sentencing, change his or her mind and decide to

impose a sentence different from that specified in the plea arrangement. If this occurs, the judge must inform the defendant of that fact and give the defendant an opportunity to withdraw the plea of guilty. If the defendant decides to withdraw the guilty plea, he or she is entitled to a continuance until the next session of court. G.S. 15A-1024; *see also State v. Puckett*, 299 N.C. 727 (1980) (once the trial judge determined that he would not consolidate the defendant's five charges and run them concurrently with defendant's other sentences as contemplated by the plea arrangement, he should have followed the provisions of 15A-1024 and given defendant the opportunity to withdraw his plea); *State v. Carriker*, 180 N.C. App. 470 (2006) (allowing certiorari review of trial judge's failure to inform defendant of her right to withdraw her plea after judge deviated from the plea arrangement and added the requirement that defendant surrender her nursing license).

The mandates of G.S. 15A-1024 must be followed by the trial judge even if he or she intends to give a defendant a less severe sentence than was agreed to in the plea arrangement. *State v. Wall*, 167 N.C. App. 312, 316 (2004) ("[T]he Official Commentary accompanying [G.S. 15A-1024] actually indicates that a legislative committee considered and rejected the phrase 'more severe than' and instead amended the statute 'to apply if there is *any change at all* concerning the substance.'" (emphasis in original)).

Plea arrangements with no sentencing recommendation. If the parties reach a plea arrangement that does not involve the prosecutor's recommendation of a particular sentence, the judge must accept the plea when:

- it is the informed choice of the defendant; and
- there is a factual basis for the plea.

G.S. 15A-1023(c). For example, if the prosecutor agrees to accept a plea to a lesser offense than the one charged, and there is no sentencing provision included in the agreement, the judge must accept the plea when the above conditions apply. *See, e.g.*, *State v. Melton*, 307 N.C. 370, 377 (1983) (after determining that the defendant's guilty plea had been made voluntarily and that there was a factual basis for the plea, the trial judge was required by G.S. 15A-1023(c) to accept the plea to the lesser included offense of second degree murder; "however, the plea bargain did not limit the judge's opportunity to exercise his discretion in determining an appropriate sentence for the defendant").

E. Defendant's Right to Withdraw Plea

Before entry of plea. A defendant has the right to withdraw from a plea agreement at any time before he or she enters the plea. *See State v. Collins*, 300 N.C. 142, 148–49 (1980) (stating that defendants "are always free to withdraw from plea agreements prior to entry of their guilty plea regardless of any prejudice to the prosecution that may result from a breach" (citation omitted) (internal quotation marks omitted)); *see also* Jessica Smith, *Pleas and Plea Negotiations in North Carolina Superior Court*, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK, at 13 (UNC School of Government, June 2015) (reaching same conclusion). If the defendant has pled guilty but moves to withdraw his or her plea before being sentenced, he or she should be permitted to do so for any "fair and

just" reason. *State v. Handy*, 326 N.C. 532, 539 (1990) (defendant permitted to withdraw plea of guilty to murder, before sentencing hearing, where he stated that he had felt "pressured" to plead guilty); *State v. Deal*, 99 N.C. App. 456 (1990) (defendant with limited intelligence who misunderstood his plea bargain permitted to withdraw plea before sentencing). Although there is no absolute right to the withdrawal of a guilty plea, a motion to withdraw the plea that is made before a defendant is sentenced "should be granted with liberality." *Handy*¸ 326 N.C. 532, 537.

Factors that favor permitting the defendant to withdraw a guilty plea include:

- the defendant's assertion of innocence;
- weakness in the State's evidence;
- a short length of time between the entry of the guilty plea and the desire to change it;
- lack of competent counsel at all relevant times;
- the defendant's misunderstanding of the consequences of a guilty plea;
- hasty entry of the guilty plea; and
- confusion or coercion.

See State v. Meyer, 330 N.C. 738, 743 (1992) (relying on *Handy*, 326 N.C. 532, 539); *see also State v. Graham*, 122 N.C. App. 635, 637 (1996) (defendant who moved to withdraw guilty plea five weeks after entry and who made no "concrete assertion of innocence" not permitted to withdraw guilty plea). No one of the above factors is determinative, and the list is not exclusive. *State v. Chery*, 203 N.C. App. 310 (2010).

If the defendant establishes a fair and just reason for withdrawal of his or her plea, the State may refute the defendant's showing "by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *Handy*, 326 N.C. 532, 539. However, a lack of prejudice to the State without other grounds for withdrawal of a plea does not necessarily constitute a "fair and just reason" for withdrawal. *See Meyer*, 330 N.C. 738 (finding that *Handy* did not support the defendant's argument that because the State failed to show concrete evidence of prejudice to its case, the motion to withdraw the plea should have been granted).

After sentencing. After sentence is imposed, a defendant may withdraw his or her plea of guilty only "'to avoid manifest injustice.'" *State v. Handy*, 326 N.C. 532, 536 (1990) (quoting *State v. Olish*, 266 S.E.2d 134, 136 (W. Va. 1980)); *State v. Suites*, 109 N.C. App. 373 (1993). The courts have stated that the stricter standard that is applied to postsentence motions to withdraw "is warranted by the likelihood that, after sentencing, the defendant will view the plea bargain as a tactical mistake or that other portions of the plea bargain agreement already will have been performed by the prosecutor, such as the dismissal of additional charges." *Suites*, 109 N.C. App. 373, 376. The courts also have stated that this standard is warranted "by 'the settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea.'" *Id.* (citations omitted) (internal quotation marks omitted).

A motion to withdraw a plea that is made after sentencing is considered a motion for appropriate relief. *State v. Salvetti*, 202 N.C. App. 18 (2010). For a further discussion of motions for appropriate relief, see *infra* § 35.3, Motions for Appropriate Relief.

Additional resources. For further discussion of the withdrawal of guilty pleas, including a collection of cases applying the "fair and just" standard, see Jessica Smith, *Pleas and Plea Negotiations in Superior Court*, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK, at 16–18 (UNC School of Government, June 2015).

F. State's Right to Rescind Plea Agreement

Right to rescind before acceptance of plea. A prosecutor may withdraw from a plea agreement at any time until:

- entry of the plea by the defendant—that is, when the judge accepts the plea in open court; or
- there is an act of detrimental reliance by the defendant on the plea arrangement.

State v. Collins, 300 N.C. 142 (1980); *see also State v. Marlow*, 334 N.C. 273 (1993) (where two joined co-defendants were each offered a plea, the State was permitted to rescind offer when trial judge rejected plea agreement with one defendant and State considered pleas a "package deal"; taking polygraph not "detrimental reliance").

No right to rescind after acceptance of plea. Once a defendant's guilty plea is accepted by the court, the defendant has a constitutional right to enforcement of the plea's provisions. *Santobello v. New York*, 404 U.S. 257 (1971); *see also State v. Johnson*, 95 N.C. App. 757 (1989) (State obligated to abide by plea agreement when prosecutor did not move to vacate plea until after judge had accepted defendant's plea of guilty). If the State fails to fulfill promises made to the defendant during plea negotiations, the defendant's constitutional rights have been violated and he or she is entitled to relief. *See State v. Blackwell*, 135 N.C. App. 729 (1999), *remanded on other grounds*, 353 N.C. 259 (2000). For further discussion of breaches of the plea agreement by the State, see *infra* § 23.4J, Breach of Plea Agreement.

G. Defendant's Right to Plead to Other Crimes

On entry of a guilty plea, or after conviction on a plea of not guilty, a defendant may request permission of the court to enter pleas of guilty to any outstanding charges in the prosecutorial district. A defendant also may enter guilty pleas to outstanding charges in other districts with the written permission of the prosecutor from the other district. G.S. 15A-1011(c). The foreign prosecutor or his or her representative may appear in person or file an affidavit as to the nature of the evidence that proves the charges. A defendant's plea under this statute waives venue. *Id.*

The superior court has jurisdiction to accept pleas to some misdemeanors under G.S. 15A-1011(c). The misdemeanors must be before the superior court on an information or

indictment, which means that the misdemeanors must have been transactionally related to a felony. *See id.*; *see also* G.S. 7A-271. The district court may not accept pleas to felonies except in cases within the concurrent jurisdiction of the district and superior court—that is, Class H and I felonies with the judge's, prosecutor's, and defendant's consent. G.S. 15A-1011(c); *see also* G.S. 7A-272(c).

H. Guilty Pleas to Class H or I Felonies in District Court

A district court judge has jurisdiction to accept a guilty (or no contest) plea to a Class H or I felony with the defendant's and prosecutor's consent. G.S. 7A-272(c). The State may proceed by information filed in district court pursuant to G.S. 15A-644.1. Or, if the defendant has been indicted and the case has been transferred to superior court, a superior court judge may transfer the case back to district court, with the defendant's, prosecutor's, and presiding district court judge's consent, to allow the defendant to plead guilty. G.S. 15A-1029.1(a); G.S. 7A-272(c). If the district court judge accepts a guilty plea to a Class H or I felony, the procedures set out in Chapter 15A, Article 58 apply in the same manner as if the plea were entered in superior court. G.S. 7A-272(d); G.S. 15A-1029.1. Appeals are to the appellate division, not to the superior court for a trial de novo as with guilty pleas to misdemeanors in district court. *See infra* § 23.6A, Appeal from District Court.

I. Guilty Pleas through Counsel

A defendant, through counsel and without making a personal appearance, may plead guilty to relatively minor offenses to the extent provided in G.S. 15A-1011(a). Appointed counsel rarely will be involved in such cases. G.S. 15A-1011(a)(3) allows a defendant to submit a written waiver of appearance and guilty plea with the approval of the presiding judge. G.S. 15A-1011(a)(4) allows written appearances and pleas of guilty to traffic, hunting, alcoholic beverage control (ABC), and other minor offenses on the "waiver" list. The list, created by the chief district court judges of North Carolina, authorizes defendants to submit written guilty pleas to magistrates and clerks of court. *See* G.S. 7A-148(a) [added by S.L. 1992-900, sec. 118, in place of G.S. 7A-146(8), which was repealed but is still referenced in G.S. 15A-1011(a)(4)].

J. Breach of Plea Agreement

Although occurring in the context of a criminal proceeding, a plea bargain is contractual in nature and is measured by contract-law standards. *See State v. Rodriguez*, 111 N.C. App. 141 (1993); *see also United States v. Martin*, 25 F.3d 211 (4th Cir. 1994). "A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain." *Rodriguez*, 111 N.C. App. 141, 144. When the State and the defendant enter into a plea agreement, both of the parties must be held accountable for upholding the promises that each made as part of the bargain. *State v. Fuller*, 177 N.C. App. 149 (2006) (unpublished).

Breach of plea agreement by the State. A constant factor in the plea bargaining process "is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971); *see also State v. Wall*, 348 N.C 671, 676 (1998) (stating that a defendant who pleads guilty in reliance on a prosecutor's promise is "entitled to receive the benefit of his bargain"). If the State fails to fulfill promises made to the defendant during plea negotiations, the defendant's constitutional rights have been violated and he or she is entitled to relief. *See State v. Blackwell*, 135 N.C. App. 729 (1999), *remanded on other grounds*, 353 N.C. 259 (2000). Although a plea agreement is in essence a contract, "it is markedly different from an ordinary commercial contract." *Id.* at 731. Due process and basic contract principles demand strict adherence to the terms of the plea agreement because the defendant has given up fundamental constitutional rights, including the right to a jury trial, in reliance on the prosecutor's promises. *See State v. Rodriguez*, 111 N.C. App. 141 (1993). The State is held "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." *Blackwell*, 135 N.C. 729, 731 (citation omitted); *see also State v. Tyson*, 189 N.C. App. 408 (2008) (remanding case for determination of whether defendant's guilty plea was induced by likely inadvertent misrepresentations made by State regarding the full consequences of his guilty plea under the plea agreement).

If the prosecution fails to comply with the terms of the plea agreement, the defendant is entitled to either: (i) the opportunity to withdraw his or her guilty plea (i.e., to rescind it); or (ii) specific performance of the plea agreement, depending on the circumstances. *Santobello*, 404 U.S. 257 (vacating judgment and remanding case for determination of appropriate relief where prosecutor violated the term of the plea bargain that the prosecution would make no recommendation as to sentence); *see also Kernan v. Cuero*, ___ U.S. ___, 138 S. Ct. 4 (2017) (per curiam) (concluding that, under federal law, there was no clearly established right to specific performance entitling the defendant to habeas corpus relief where the State violated terms of plea agreement and petitioner received a higher sentence than was bargained for; the state court was is in a better position to decide whether the circumstances of the case required specific performance of the agreement or the opportunity to rescind it); *State v. King*, 218 N.C. App. 384 (2012) (holding that State must comply with a condition of the plea agreement that required it to return funds seized from defendant even though it was later discovered that the funds had been turned over to the Drug Enforcement Administration; because money is fungible and it was within the State's power to return funds equal to the amount seized, the trial judge erred in finding that specific performance was not possible and in ordering rescission); *State v. Tyson*, 189 N.C. App. 408 (2008) (remanding case for determination of whether defendant's guilty plea was induced by misrepresentations by the State; if so, trial judge had discretion to grant specific performance of the plea agreement in accordance with defendant's reasonable interpretation of that agreement, or to allow rescission of the guilty plea); *State v. Isom*, 119 N.C. App. 225 (1995) (holding that defendant was entitled to withdraw his guilty plea where State, after sentencing, rescinded the portion of the plea agreement that allowed defendant to be sentenced as a Committed Youthful Offender because he was not statutorily eligible for that status);

Rodriguez, 111 N.C. App. 141 (ordering specific performance where prosecutor violated the express term of the plea agreement that the State would take no position on sentencing).

The factors that either an appellate or trial court may consider in deciding between rescission and specific performance are:

- who broke the bargain;
- whether the violation was deliberate;
- the wishes of the defendant; and
- any change of circumstances or new information between the plea and the violation.

Blackwell, 135 N.C. App. 729 (finding that State violated the *spirit* of the plea agreement by using defendant's guilty plea to felonious impaired driving derivatively to prove the offense of felony murder at trial and remanding case to trial court for determination of appropriate remedy).

Specific performance is not available if it would violate the laws of North Carolina. *See, e.g., Wall*, 348 N.C 671 (defendant not entitled to specific performance to enforce a plea agreement that provided that the sentence would run concurrently with the sentence defendant was already serving because this term violated the express mandate of G.S. 14-52 that required burglary sentences to run consecutively to previously imposed sentences; defendant entitled to withdraw his guilty plea and go to trial or try to negotiate another plea arrangement).

Breach of plea agreement by the defendant. If a defendant elects not to stand by his or her portion of the plea agreement, the State is not bound by its portion of the agreement. *See State v. Fox*, 34 N.C. App. 576 (1977) (defendant's appeal to superior court for trial de novo from his guilty plea to reduced charges in district court released State from its promise to forego prosecution on the greater charges). The remedy depends on the circumstances of each particular case and the terms of the plea agreement.

In some cases where a defendant breaches the plea agreement, the guilty plea must be set aside and the parties returned to their original positions. *See, e.g., 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) (finding that defendant could not repudiate his portion of the agreement to accept an aggravated sentence while attempting to retain the portion of the agreement where the State agreed to dismiss the murder charge and allow defendant to plead to voluntary manslaughter; entire plea agreement must be set aside and case remanded for disposition on original charge of murder); *see also State v. Anderson*, ___ N.C. App. ___, 804 S.E.2d 189 (2017) (where defendant successfully obtained vacation of one of three convictions consolidated pursuant to a negotiated plea, the fundamental terms of the agreement became unfulfillable and the entire plea agreement had to be set aside); *State v. Fuller*, 177 N.C. App. 149 (2006) (unpublished) (finding no error by trial judge in setting aside defendant's guilty plea to conspiracy and reinstating the more serious original charges that had been dismissed under the agreement where defendant

failed to fulfill his promise to provide truthful testimony in a co-defendant's trial). *Cf. Ricketts v. Adamson*, 483 U.S. 1 (1987) (finding no double jeopardy violation where defendant's conviction for second degree murder was vacated and the original charge of first degree murder reinstated after defendant breached the plea agreement when he refused to testify against co-defendants at their retrial).

In other cases where the defendant breaches the agreement, the guilty plea will be upheld and the defendant will not be entitled to "go to trial" on the original charges. *See State v. Hatley*, 185 N.C. App. 93, 98 (2007) (finding that defendant was not entitled to withdraw his guilty plea and be restored to the position he occupied before this guilty plea; under terms of the plea agreement, State did not have to comply with its promise to recommend a sentence at the low end of the presumptive range once defendant breached his promise to cooperate truthfully with the ongoing investigation;); *State v. Russell*, 153 N.C. App. 508, 510 (2002) (upholding judgments imposing consecutive sentences even though State had agreed to concurrent sentences if defendant testified against his co-defendants; once defendant breached the agreement, plea agreement unambiguously gave State option of praying judgment on the guilty pleas and defendant was not entitled to withdraw the pleas and "go to trial").

K. Time Limit on Collateral Attack on Conviction

Statutory rule. A trial judge's failure to comply with the Article 58 procedures relating to guilty pleas in superior court may not be the basis for review of a conviction after the appeal period for the conviction has expired. G.S. 15A-1027 expressly states this rule. *See also State v. McGee*, 244 N.C. App. 528 (2015) (finding that defendant's argument that the trial judge did not comply with the plea procedures set out in G.S. 15A-1023 and G.S. 15A-1024 was barred by G.S. 15A-1027 where the defendant's motion for appropriate relief challenging the procedures was a collateral attack and was filed more than seven years after the appeal period had expired); *State v. Rush*, 158 N.C. App. 738 (2003) (holding that defendant could not challenge the revocation of probation and activation of her sentences based on the fact that the sentences were inconsistent with her plea agreement; this collateral attack, made four years after the sentences were imposed, was barred by G.S. 15A-1027).

Certiorari review. Although a defendant's direct challenge to improper plea procedures does not fall within the scope of G.S. 15A-1444, which sets out the specific grounds that give rise to an appeal as a matter of right from a guilty plea, these challenges may be reviewed pursuant to a discretionary writ of certiorari. *See* G.S. 15A-1444(e); *State v. Rhodes*, 163 N.C. App. 191, 194 (2004) (stating that "consistent with N.C. Gen. Stat. § 15A-1027, 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"; court treated defendant's invalid notice of appeal filed within the appeal period as a petition for writ of certiorari, granted review, and vacated his sentence based on the trial judge's violations of express provisions of G.S. 15A-1024); *State v. Rush*, 158 N.C. App. 738 (2003) (noting that defendant could have filed a petition for writ of certiorari upon the trial judge's entry of the judgment that did not comply with the terms

of the plea agreement); *see also State v. Adkins*, ___ N.C. App. ___, 809 S.E.2d 924 (2018) (unpublished) (granting defendant's petition for writ of certiorari to review procedural irregularities in his plea hearing where trial counsel had erroneously attempted to give oral notice of appeal one week after the hearing).

To avoid the procedural bar set out in G.S. 15A-1027, a defendant who wishes to seek certiorari review of irregular plea procedures should give notice of the intent to do so within the "appeal period," i.e., within fourteen days of conviction. *See generally* N.C. R. APP. P. 4(a)(2) (notice of appeal to appellate court must be filed within fourteen days of entry of judgment); *see also* N.C. Commission on Indigent Defense Services Rule 3.2(b) (May 29, 2015) (authorizing the appointment of the Office of the Appellate Defender in cases where an indigent person seeks to file a petition for writ of certiorari in the appellate division).

Motions to withdraw guilty plea. A defendant who would like to strike his or her plea due to irregularities in the plea procedure is not subject to the time limitation bar of G.S. 15A-1027 if he or she files a motion to withdraw the guilty plea within the fourteen-day "appeal period." *See generally State v. Handy*, 326 N.C. 532, 536 (1990) (noting that a post-judgment motion to withdraw a guilty plea is considered a motion for appropriate relief, i.e., a collateral attack on the plea). A defendant then has an appeal as of right from a denial of a motion to withdraw the guilty plea based on a violation of the plea procedures. *See* G.S. 15A-1444(e); *State v. Zubiena*, ___ N.C. App. ___, 796 S.E.2d 40, 47 (2016) (recognizing that defendant had a statutory right to appeal from the denial of her motion to withdraw her guilty plea based on her assertion that the trial judge violated G.S. 15A-1024 when he sentenced her "other than provided for in" the plea agreement); *State v. Salvetti*, 202 N.C. App. 18 (2010) (specifically holding that defendant had a right to appeal the denial of his post-sentence motion to withdraw his guilty plea that asserted various violations of G.S. 15A-1022).

Additional resources. For further discussion of motions to withdraw guilty pleas, see *supra* § 23.4E, Defendant's Right to Withdraw Plea. For further discussion of a defendant's limited right to appeal from guilty pleas and alternative remedies, see *infra* § 23.6, Appeal from Guilty Pleas, and § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court.