

# Chapter 23

## Guilty Pleas

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## Appendix 23-1: Checklist for Guilty Pleas

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This chapter deals with issues involving guilty pleas and the procedures that must be followed when a defendant pleads guilty. Specifically, it addresses duties that counsel owe to their clients with regard to guilty pleas, the plea bargaining process, the plea colloquy, sentencing, and appeals. The chapter also includes a checklist for entering guilty pleas.

Statutes addressing plea procedures in superior court are primarily in Chapter 15A, Articles 57 (Pleas) and 58 (Procedures Relating to Guilty Pleas in Superior Court) of the North Carolina General Statutes. Although the procedures discussed in Article 58 do not apply explicitly to plea negotiations in district court, the expectation of the General Assembly in enacting the procedures was that the same general procedures would be used in district court, albeit in a “less formal” manner. *See* G.S. Ch. 15A, Art. 58 Official Commentary (located immediately before G.S. 15A-1021).

For an additional resource on guilty pleas, see Jessica Smith, [Pleas and Plea Negotiations in North Carolina Superior Court](#), NORTH CAROLINA SUPERIOR COURT JUDGES’ BENCHBOOK (UNC School of Government, June 2015).

### 23.1 In General

**Prevalence of plea bargaining.** Although the right to a trial by jury is considered one of the most fundamental rights afforded to criminal defendants under the U.S. Constitution, jury trials are actually the exception to the way in which most American criminal cases are resolved. Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717 (Supp. 2006). Guilty pleas are “the predominant method by which most criminal cases are resolved—approximately 93 percent of cases in the federal system and approximately 91 percent in the states.” [ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY](#), at xi–xii (3d ed. 1999); *see also State v. Alexander*, 359 N.C. 824 (2005) (stating that 96% of criminal cases that survived dismissal in North Carolina during fiscal year 2002–03 resulted in guilty pleas).

The U.S. Supreme Court sanctioned plea agreements in *Santobello v. New York*, 404 U.S. 257, 260–61 (1971), stating:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called “plea bargaining,” is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It 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. *See Brady v. United States*, 397 U.S. 742, 751–752 (1970).

*See also State v. Slade*, 291 N.C. 275, 277 (1976) (noting that “‘plea bargaining’ has emerged as a major aspect in the administration of criminal justice”); [ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY](#), at xiii (3d ed. 1999) (noting that the allowance of negotiated guilty pleas “is an appropriate and beneficial part of the criminal justice system” and “is necessary to ensure the continued functioning of the system in those cases that go to trial”).

The use of plea agreements has also been sanctioned by the N.C. General Assembly. *See State v. Khan*, 366 N.C. 448, 453 (2013) (noting that because a defendant who pleads guilty is giving up rights guaranteed by the federal and state constitutions, the individual statutes set out in Chapter 15, Article 58 of the N.C. General Statutes “set out a procedure that is transparent to the parties and to the public.”); G.S. Ch. 15A, Art. 58 Official Commentary (recognizing and listing a number of benefits that result from “bring[ing] plea negotiations out of the back room and put[ting] them on the record.”) (located immediately before G.S. 15A-1021).

**Basic characteristics of plea bargains.** “Generally, a plea arrangement or bargain is ‘[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu[ally] a more lenient sentence or a dismissal of the other charges.’” *State v. Alexander*, 359 N.C. 824, 830–31 (2005) (quoting BLACK’S LAW DICTIONARY 1173 (7th ed. 1999)). Although occurring in the context of a criminal proceeding, a plea bargain remains contractual in nature. *State v. Rodriguez*, 111 N.C. App. 141, 144 (1993) (noting that “[a] plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain”).

Plea bargaining is expressly permitted in North Carolina, and the trial judge is permitted to participate. *State v. Simmons*, 65 N.C. App. 294 (1983) (citing G.S. 15A-1021). However, there is no constitutional right to plea bargain—the prosecutor need not make any plea offer if he or she prefers to go to trial. *Weatherford v. Bursey*, 429 U.S. 545 (1977); *see also State v. Collins*, 44 N.C. App. 141 (1979), *aff’d*, 300 N.C. 142 (1980).

Pleading guilty to a crime waives a number of significant constitutional rights, including the right to a jury trial, the right to put the State to its proof, and most defenses to a crime. *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969); *State v. Ford*, 281 N.C. 62 (1972); *see*

also *State v. Caldwell*, 269 N.C. 521 (1967) (by pleading guilty, the accused generally waives all defenses other than that the indictment charges no offense). Thus, as a matter of due process under the Fifth and Fourteenth Amendments to the U.S. Constitution, the decision to plead guilty must be “knowing and voluntary.” See *Boykin*, 395 U.S. 238; *Johnson v. Zerbst*, 304 U.S. 458 (1938); *State v. Bozeman*, 115 N.C. App. 658 (1994). This means that:

- the decision to plead guilty must be the client’s;
- the client must be informed about his or her options and the consequences of pleading guilty; and
- the client may not be coerced by any party, including the court, to plead guilty.

See *North Carolina v. Alford*, 400 U.S. 25 (1970); *State v. Pait*, 81 N.C. App. 286 (1986). If a defendant’s guilty plea is not made voluntarily and knowingly, “it has been obtained in violation of due process and is therefore void.” *Boykin*, 395 U.S. 238, 243 n.5.

## 23.2 Basic Steps

As a practical matter, entering a guilty plea involves a four-step process. The **first step** is to negotiate and prepare the plea agreement and memorialize the agreement in a written transcript of plea. The N.C. Administrative Office of the Courts has created a “[Transcript of Plea](#)” form, AOC-CR-300, which is typically used as the written transcript of plea. The attorney should read the questions on this form to the client and record the client’s answers before going to court.

The **second step** is the plea colloquy that occurs in open court. The trial judge must address the defendant directly to ensure that he or she is pleading guilty knowingly and voluntarily. The judge must be informed of the conditions of any plea agreement, and he or she has the responsibility to ensure that there is a sufficient factual basis for the plea. At the conclusion of the plea colloquy, the judge, if satisfied, accepts the plea.

The **third step** of the process is sentencing. A specific sentence may or may not be included in a plea agreement. If there is no sentencing agreement, or if the plea agreement permits a range of possible sentences, counsel will need to prepare for a sentencing hearing. Sentencing is not covered in this manual, but a few selected topics are included below.

Finally, the **fourth step** is to consider whether to file an appeal. The scope of a possible appeal is limited after entry of a guilty plea in superior court. Likewise, when a defendant pleads guilty to a felony in district court, the right to appeal is limited, and the appeal is to the court of appeals. In contrast, when a defendant pleads guilty to a misdemeanor in district court, the defendant has the right to appeal de novo to superior court.

Each of these four steps is discussed in more detail below. Also discussed are some related issues, including the admissibility of plea negotiations at trial, challenges to prior guilty pleas, and conceding guilt to a lesser offense during trial.

## 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' BENCHMARK (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.

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**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.

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**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).

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**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.

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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.

## 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).

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**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.

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**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.

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**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).

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**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.

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**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.

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#### 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' BENCHMARK, 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 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. Zubieta*, \_\_\_ 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.

## 23.5 Felony Sentencing

Structured sentencing is not considered in this manual, but a few issues specific to guilty pleas are discussed below.

### A. Aggravated Sentences

G.S. 15A-1022.1 provides that before accepting a guilty or no contest plea to a felony, the judge must determine whether the State intends to seek a sentence in the aggravated range and, if so, which factors the State seeks to establish. The judge also must determine whether the State seeks a finding that an “under supervision” point should be found under G.S. 15A-1340.14(b)(7) (whether the defendant committed the new offense while on probation, parole, or post-release supervision, while serving a sentence of imprisonment, or while on escape from a correctional facility).

If the State is seeking to aggravate a sentence based on aggravating factors or the “under supervision” point, the judge must determine whether the State has given written notice to the defendant at least thirty days before the entry of the guilty or no contest plea as required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice. G.S. 15A-1022.1(a); *see also State v. Snelling*, 231 N.C. App. 676 (2014). The trial judge cannot impose an aggravated sentence if the State failed to give proper notice unless the defendant waives the right to notice. *See Snelling*, 231 N.C. App. 676; *State v. Mackey*, 209 N.C. App. 116 (2011); *see also State v. Crook*, \_\_\_ N.C. App. \_\_\_, 785 S.E.2d 771 (2016) (holding that trial judge erred in including the “under supervision” point in sentencing defendant where trial judge did not determine that State gave proper notice and no evidence showed that defendant waived notice; inclusion by State of that point in the prior record level worksheet provided in discovery was not sufficient notice under G.S. 15A-1340.16(a6) and defendant’s stipulation to the point at sentencing was not clear evidence of notice).

If the State has properly alleged one or more aggravating factors or the “under supervision” point, a defendant has several options. If he or she contests the existence of the factors or the “under supervision” point, a defendant can request that a jury be impaneled to determine whether the factors or point exist (unless the alleged factors are ones that a judge is permitted to find under G.S. 15A-1340.16(d)(12a) or (18a)). *See* G.S. 15A-1340.16(a3), (a5). Alternatively, it appears that a defendant can now request a bench trial on the sentencing issues after pleading guilty to the underlying offense. *See* G.S. 15A-1201(b) (allowing waiver of jury trial and referencing G.S. 15A-1340.16(a3), which otherwise provides for a jury determination of aggravating factors when a defendant pleads guilty to a felony but contests the existence of aggravating factors).

If the defendant chooses to admit the existence of the alleged aggravating factors or the “under supervision” point, a jury or bench trial is unnecessary. *See* G.S. 15A-1340.16(a1). In accepting the defendant’s admission to aggravating factors or points, the judge generally must engage in the colloquy for accepting a guilty plea under G.S. 15A-1022(a) and must follow the procedures in G.S. 15A-1022.1, including advising the defendant of his or her rights, determining that there is a factual basis for the factors and points admitted by the defendant, and determining that the decision to admit is the informed choice of the defendant. *See* G.S. 15A-1022.1(b); G.S. 15A-1340.16(a1). The procedures specified in G.S. 15A-1022(a) and G.S. 15A-1022.1 for the handling of guilty pleas must be followed in the handling of admissions to aggravating factors and prior record points “unless the context clearly indicates that they are inappropriate.” G.S. 15A-1022.1(e); *see also State v. Marlow*, 229 N.C. App. 593 (2013).

Although the sentencing statutes discussed above expressly provide for only three ways for an aggravating factor or an “under supervision” point to be found (admission by the defendant followed by a “guilty plea colloquy” or submission to the judge or to a jury for determination beyond a reasonable doubt), the appellate courts appear to have approved another option—stipulation by the defendant. *See, e.g., State v. Khan*, 366 N.C. 448 (2013) (ruling that where defendant stipulated to the existence of an aggravating factor in the Transcript of Plea and orally at the plea hearing, trial judge’s procedure satisfied the requirements of G.S. 15A-1022.1); *Marlow*, 229 N.C. App. 593 (citing G.S. 15A-1022.1(e) and holding that where defense counsel stipulated to defendant’s record that included an “under supervision” point, trial judge was not required to follow guilty plea procedures and conduct questioning of defendant because the context revealed that it was inappropriate and unnecessary in that case); *see also State v. Deese*, 238 N.C. App. 363 (2014) (unpublished) (following *Marlow* and holding that where defense counsel acknowledged that he had reviewed the prior record level worksheet with defendant and then orally stipulated to the *prior convictions* shown on the worksheet without further objection, trial judge was not required to follow guilty plea procedures and conduct questioning of defendant regarding the “under supervision” point listed on the worksheet).

For further discussion of the statutory procedures applicable when a prior record point for being on probation, parole, or post-release supervision is alleged, see Jamie Markham, [The Right Way to Find the “Under Supervision” Prior Record Level Bonus Point](#), N.C.

CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 27, 2016). For further discussion of the waiver of the right to a jury trial, see *infra* § 24.2B, Waiver of Right.

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**Practice note:** If your client enters into a plea agreement in which the negotiated sentence is in the aggravated range of the sentencing chart, the State still must offer a factual basis for the aggravating factors and the procedures set out above must be followed. Likewise, if your client enters into a plea agreement in which the negotiated sentence is in the mitigated range of the sentencing chart, you must present evidence in support of a mitigating factor or factors because the trial judge is required to make sentencing findings that support the mitigated sentence. See G.S. 15A-1340.16(b), (c). The judge is not required to make findings if he or she accepts a negotiated sentence in the presumptive range. See, e.g., *State v. Caldwell*, 125 N.C. App. 161 (1997).

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## B. Aggravating Factors Based on Elements of a Dismissed Offense

Before the U.S. Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and the enactment of North Carolina's "*Blakely* bill," (S.L. 2005-145), North Carolina appellate courts held that the trial judge could find, as an aggravating factor, an element of an offense that is dismissed as part of a plea bargain. For example, in *State v. Melton*, 307 N.C. 370 (1983), the defendant had been charged with first-degree murder and pled guilty to second degree murder. The trial judge was permitted to find premeditation and deliberation as an aggravating factor. *Melton* held that, "[a]s long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *Id.* at 378.

After the passage of North Carolina's *Blakely* bill, it appears that if the State seeks to establish as an aggravating factor an element of a dismissed offense, the State must, as with other aggravating factors not specifically listed in G.S. 15A-1340.16(d), include the allegation in an indictment or other charging instrument as specified in G.S. 15A-924 and, unless admitted by the defendant, prove its existence to the jury (or to the judge if the defendant waives a jury determination) beyond a reasonable doubt. G.S. 15A-1340.16(a), (a4).

## C. Use of Testimony from Prior Trial

**Defendant's prior testimony.** If the defendant testifies against a co-defendant at a trial held before the defendant's sentencing hearing, that testimony may be used as evidence against the defendant at his or her sentencing hearing. See *State v. O'Neal*, 116 N.C. App. 390 (1994) (sentencing judge could incorporate by reference, and consider as evidence of premeditation and deliberation, defendant O'Neal's own testimony from a co-defendant's trial).

**Other witness's testimony at co-defendant's trial.** Evidence other than the defendant's testimony that was developed from the trials of co-defendants connected with the same

offense may not be used to support a finding of an aggravating factor. *See State v. Thompson*, 314 N.C. 618 (1985); *State v. Benbow*, 309 N.C. 538 (1983). The parties may avoid this limitation by stipulating to evidentiary facts developed at related trials as long as the stipulations are not too extensive. “Even with . . . a stipulation[,] reliance exclusively on . . . record evidence from other trials (in which the defendant being sentenced had no opportunity to examine the witness) as a basis for a finding of an aggravating circumstance may constitute prejudicial error.” *Benbow*, 309 N.C. 538, 549. “The policy behind this ruling is that the focus at the previous trial is on the culpability of others and not the defendant being [presently] sentenced . . . .” *O’Neal*, 116 N.C. App. 390, 394.

#### D. Restitution Orders and Recommendations

Restitution or reparation may be made part of a plea arrangement. *See* G.S. 15A-1021(d). Any order or recommendation for restitution must be supported by evidence presented at the sentencing hearing. *See, e.g., State v. Burkhead*, 85 N.C. App. 535 (1987) (vacating restitution order for \$5,000 when evidence showed unpaid medical expenses of about \$450). A prosecutor’s unsworn statement is not sufficient to support a restitution award. *State v. Smith*, 210 N.C. App. 439 (2011); *State v. Buchanan*, 108 N.C. App. 338 (1992). A restitution worksheet, unsupported by testimony or documentation, is likewise insufficient to support an order of restitution. *Smith*, 210 N.C. App. 439; *State v. Mauer*, 202 N.C. App. 546 (2010). A defendant’s silence or lack of objection does not constitute a stipulation as to the amount of restitution. *State v. Mumford*, 364 N.C. 394 (2010); *Mauer*, 202 N.C. App. 546.

There is no explicit burden of proof established in the restitution statutes. However, the N.C. Court of Appeals has analogized the North Carolina restitution statutes to the federal restitution provision, 18 U.S.C. § 3664(e), which requires the attorney for the government to establish the amount of loss suffered by the victim, and the defendant to show lack of financial resources and the existence of financial needs of any dependents. *See State v. Tate*, 187 N.C. App. 593, 596 (2007) (agreeing with the analogous federal provision that states that “[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence”); *see also State v. Riley*, 167 N.C. App. 346, 349 (2004) (allocating burden of showing that she would not be able to make the required restitution payments to the defendant).

For further discussion of the requirements of the restitution statutes, see Jamie Markham, [Restitution](#), UNC SCH. OF GOV’T (Feb. 2012).

## 23.6 Appeal from Guilty Pleas

### A. Appeal from District Court

**Misdemeanor pleas.** Except to the extent it is permissible for a defendant to waive his or her right to appeal as part of a plea agreement (*see supra* § 23.3C, Plea Bargaining), a



defendant who enters a plea of guilty to a misdemeanor in district court has the right to appeal for trial de novo in superior court. G.S. 15A-1431; *State v. Fox*, 34 N.C. App. 576 (1977). A trial de novo returns a defendant to his or her position before the plea in district court. *State v. Sparrow*, 276 N.C. 499 (1970) (in trial de novo, judgment below is annulled); *Fox*, 34 N.C. App. 576. Any charges dismissed as part of the plea bargain in district court may be reinstated, and the superior court has jurisdiction over those charges. G.S. 15A-1431. Also, the trial judge in superior court may sentence the defendant to a longer sentence than that imposed in the district court as long as the sentence is statutorily permissible. *Sparrow*, 276 N.C. 499; *State v. Meadows*, 234 N.C. 657 (1951). The State may not reinstate charges in superior court that were dismissed independently of the plea bargain, which unconstitutionally penalizes the defendant for filing an appeal. For a discussion of this limit, see 1 NORTH CAROLINA DEFENDER MANUAL § 13.4D (Motion to Dismiss for Vindictive or Selective Prosecution) (2d ed. 2013).

For further discussion of the defendant's right to appeal from a district court judgment in misdemeanor cases, see *infra* § 35.1B, Defendant's Right to Appeal from District Court Judgment.

**Felony pleas in district court.** Where a defendant pleads guilty or no contest to a Class H or I felony in district court pursuant to G.S. 15A-1029.1(a) and G.S. 7A-272(c), the defendant's appeal is to the court of appeals. G.S. 7A-272(d); G.S. 15A-1029.1(b); see also *State v. Goforth*, 130 N.C. App. 603 (1998) (attorney erroneously advised defendant that she could appeal sentence to superior court after felony guilty plea in district court).

## B. Appeal from Superior Court

**Generally.** A criminal defendant who enters a plea of guilty or no contest in superior court has a limited right of appeal. A defendant can appeal as a matter of right the following issues:

1. Whether the prior record level was properly calculated. G.S. 15A-1444(a2)(1).
2. Whether the sentence disposition was a type that was authorized for the defendant's class of offense and prior record level—e.g., the defendant received an active or intermediate sentence when only an intermediate or community sentence was authorized. G.S. 15A-1444(a2)(2).
3. Whether the lengths of the minimum and maximum sentences are outside those set by statute for the defendant's class of offense and prior record level. G.S. 15A-1444(a2)(3).
4. If the defendant was sentenced outside of the presumptive range, whether there were improper findings of aggravating circumstances or improper failures to find mitigating circumstances. See G.S. 15A-1444(a1); see also *State v. Davis*, 206 N.C. App. 545 (2010); *State v. Rogers*, 157 N.C. App. 127 (2003). The N.C. Court of Appeals has interpreted the governing statutory provision to mean that a defendant is entitled to an appeal when his or her sentence falls within the aggravated range *or* within the mitigated range. See *State v. Mabry*, 217 N.C. App. 465, 470 (2011) (holding that “a defendant receiving a mitigated sentence must, under the plain

- language of the statute, have a right to appeal the sufficiency of the evidence supporting his or her sentence”).
5. Whether a motion to withdraw the plea of guilty or no contest was improperly denied. G.S. 15A-1444(e); *see also State v. Handy*, 326 N.C. 532 (1990) (defendant entitled to an appeal as of right after the trial judge denied his motion to withdraw his plea of guilty; death sentence vacated because denial of the presentence motion was improper).
  6. Whether there were evidentiary and procedural issues in a sentencing hearing before a jury on the existence of aggravating circumstances or sentence enhancements. *See, e.g., State v. Hurt*, 361 N.C. 325 (2007) (granting new sentencing hearing where trial judge’s *Blakely* error in failing to submit an aggravating factor to the jury was not harmless beyond a reasonable doubt).
  7. Whether a motion to suppress evidence based on constitutional grounds or on a substantial violation of Chapter 15A was improperly denied. G.S. 15A-979(b); G.S. 15A-1444(e); *see also State v. Smith*, 193 N.C. App. 739 (2008).

A defendant who pleads guilty has no right of appeal from any other issue. *See, e.g., State v. Parks*, 146 N.C. App. 568 (2001) (no right to appeal denial of motion to dismiss habitual felon indictment following entry of guilty plea to charge of being habitual felon); *State v. Waters*, 122 N.C. App. 504 (1996) (no right to appeal ineffective assistance of counsel claim).

For an in-depth discussion of the 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. For a discussion of possible alternative remedies following a guilty plea, *see* subsection C., below.

**Possible waiver of right to appeal issues under G.S. 15A-1444(a2).** If a defendant enters into a plea bargain that contains specific sentencing provisions, the defendant may waive, or partially waive, the right to appeal the issues set out in G.S. 15A-1444(a2). For example, in *State v. Hamby*, 129 N.C. App. 366, 369–70 (1998), the court found that the defendant had “mooted the issues of whether her prior record level was correctly determined, whether the type of sentence disposition was authorized and whether the duration of her prison sentence was authorized” by stipulating in her plea agreement that her prior record level was II and that the judge was authorized to sentence her to a minimum of 29 months and a maximum of 44 months and by agreeing that her sentence could be intermediate or active in the trial judge’s discretion.

However, after *Hamby*, the Court of Appeals clarified that when a defendant’s stipulation involves a question of law, the stipulation does not preclude appellate review of the issue of whether the prior record level was properly calculated. *See State v. Gardner*, 225 N.C. App. 161, 166 (2013) (rejecting State’s argument that defendant’s stipulation to her prior record level had mooted the issue on appeal that the trial judge erred in adding one point to defendant’s prior record level based on the judge’s determination that all the elements of the present offense were included in a prior offense for which defendant had been convicted); *see also State v. Burgess*, 216 N.C. App. 54 (2011) (holding that even though

defendant had stipulated to his prior record level and agreed to a specific sentence in his plea agreement, he had not mooted the issue on appeal that the trial judge erred in calculating his prior record level by including points for convictions from other jurisdictions; whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law). *But cf. State v. Edgar*, 242 N.C. App. 624 (2015) (defendant’s stipulation to his prior record level, which included a felony conviction falling within the Class I default classification for out-of-state convictions, was binding because it did not include any questions of law; defendant did not attempt to show that the offense was substantially similar to a misdemeanor in North Carolina and his stipulation mooted any contentions he may have raised on appeal as to the calculation of his prior record level pursuant to G.S. 15A-1444(a2)).

**Preserving right to appeal from denial of suppression motion.** Where a defendant intends to enter a guilty plea but wants to preserve his or her right to appeal the denial of a suppression motion, the defendant bears the burden of creating a record that clearly states the defendant’s intention to appeal. The defendant must inform the judge and the prosecutor of his or her intent to appeal before the plea is entered. *State v. McBride*, 120 N.C. App. 623 (1995), *aff’d per curiam*, 344 N.C. 623 (1996). In *State v. Brown*, 142 N.C. App. 491 (2001), the Court of Appeals held that a stipulation in the appellate record that the defendant intended to appeal the denial of a suppression motion was not sufficient to preserve the issue—the trial record itself had to demonstrate the defendant’s intention.

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**Practice note:** To ensure the right is preserved, counsel should advise the State during plea negotiations of the defendant’s intent to appeal from the denial of the suppression motion and should file a written “notice of intent to appeal” before entry of the plea. Additionally, both the written transcript of plea and the record from the in-court plea colloquy should include a statement that the defendant intends to appeal the denial of a suppression motion under G.S. 15A-979. The last step is to enter an oral or written “notice of appeal” from the judgment itself (not from the denial of the motion to suppress) *after* entry of final judgment in order to confer jurisdiction on the appellate court. *See State v. Miller*, 205 N.C. App. 724 (2010) (appeal dismissed because, although defendant properly gave notice of his intention to file an appeal before he pled guilty, his written notice of appeal entered after final judgment was “from the denial of Defendant’s motion to suppress[,]” not from his judgment of conviction); N.C. R. APP. P. 4; *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 14.7, Appeal of Suppression Motions (2d ed. 2013).

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### C. Alternative Remedies

**Writs of certiorari.** G.S. 15A-1444(e) provides that a defendant who has entered a plea of guilty or no contest and has no statutory right to appeal may file a petition for writ of certiorari to the appellate division and request discretionary review. Rule 21 of the N.C. Rules of Appellate Procedure purports to limit certiorari review to only three instances:

1. where the party lost the right to appeal by failing to take timely action;
2. where the order appealed from is interlocutory and there is no right of appeal; or
3. to review a trial judge's ruling on a motion for appropriate relief.

See N.C. R. APP. P. 21(a)(1).

Based on these conflicting statutory provisions and the conflicting cases that ensued, the N.C. Court of Appeals reached the conclusion that if a defendant, after pleading guilty or no contest, could not assert one of the three procedural bases set out in Appellate Rule 21, the court could not grant certiorari and allow review unless the defendant showed exceptional circumstances pursuant to Appellate Rule 2 warranting the suspension of the appellate rules. See, e.g., *State v. Ledbetter*, \_\_\_ N.C. App. \_\_\_, 794 S.E.2d 551 (2016) (court, in its discretion, declined certiorari review of the denial of defendant's motion to dismiss based on *State v. Knoll*, 322 N.C. 535 (1988)); defendant's petition for writ of certiorari seeking review after her guilty plea failed to fall under any of the three grounds set out in Appellate Rule 21 and failed to meet the threshold requirements of Appellate Rule 2 which would justify the suspension of the procedural requirements of Appellate Rule 21), *rev'd and remanded*, \_\_\_ N.C. \_\_\_, 814 S.E. 2d 39 (2018); see generally N.C. R. APP. P. 2 (allowing suspension or variance of the provisions or requirements of the appellate rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest . . .").

Upon review, the N.C. Supreme Court rejected the above analysis adopted by the Court of Appeals pertaining to its ability to grant certiorari review of guilty pleas, and held that Appellate Rule 21 cannot limit the jurisdiction to issue the writ of certiorari granted to the Court of Appeals by the General Assembly in G.S. 7A-32(c) in accordance with the N.C. Constitution. See *State v. Ledbetter*, \_\_\_ N.C. \_\_\_, 814 S.E.2d 39 (2018) (holding that certiorari review of defendant's petition for writ of certiorari was permitted by G.S. 15A-1444(e) and no other statute revoked or limited the jurisdiction or the discretionary authority of the Court of Appeals in that specific context). The Supreme Court then reversed and remanded the case to the Court of Appeals so that it could exercise its discretion to determine whether it should grant or deny the defendant's petition for writ of certiorari.

For further discussion of petitions for writ of certiorari, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments (discussing writs of certiorari generally).

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**Practice note:** As in cases where the defendant has an appeal as a matter of right, N.C. Commission on Indigent Defense Services [Rule 3.2\(b\)](#) (May 29, 2015) authorizes 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. Counsel should fully inform clients who plead guilty and then wish to seek certiorari review that the Office of the Appellate Defender can only file a petition for writ of certiorari if it determines that the petition "will present a potentially meritorious issue for review." See N.C. Commission on Indigent Defense Services [Rule 3.2\(b\)](#) (May 29, 2015). Counsel should also fully inform the client that because the writ of certiorari is a discretionary one, the

appellate court does not have to accept review. If you have questions about the process, contact the Office of the Appellate Defender.

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**Motions for appropriate relief.** Although a defendant may not be entitled to an appeal of right after pleading guilty, he or she may be able to pursue a motion for appropriate relief under G.S. 15A-1414 and G.S. 15A-1415. *See infra* § 35.3, Motions for Appropriate Relief. Generally, a defendant who enters a guilty plea waives all errors in the proceeding, including constitutional violations that occurred before entry of the plea. One exception to this rule is that the defendant may challenge the power of the State to bring him or her into court. *See Blackledge v. Perry*, 417 U.S. 21, 30 (1974); *State v. Reynolds*, 298 N.C. 380 (1979) (discussing *Blackledge*). For example, a defendant who pled guilty may use a motion for appropriate relief to challenge a conviction based on a fatally defective indictment, which constitutes a jurisdictional defect under North Carolina law.

A defendant also may challenge whether his or her guilty plea was voluntary and intelligent and whether he or she received effective assistance of counsel in entering the plea. *See State v. Waters*, 122 N.C. App. 504 (1996) (proper remedy for defendant who pled guilty and alleged ineffective assistance of counsel was MAR in trial division); *State v. Mercer*, 84 N.C. App. 623 (1987) (finding that defendant's MAR should have been granted if he had been improperly induced to plead guilty; remanded for the entry of a new order supported by proper and sufficient findings of fact and conclusions of law); *see also Blackledge v. Allison*, 431 U.S. 63 (1977) (affirming Fourth Circuit's reversal of the summary dismissal of defendant's claim for habeas corpus relief based on allegation that defendant had been improperly induced to plead guilty).

Additionally, a defendant may file a motion for appropriate relief seeking relief from a guilty plea if it was entered under the mistaken impression that he or she could preserve the right to appeal from the denial of pretrial motions (other than a motion to suppress from which there is a right to appeal). *See State v. Rinehart*, 195 N.C. App. 774, 777 (2009) (dismissing defendant's appeal for lack of appellate jurisdiction "without prejudice to defendant's right to file a motion for appropriate relief" challenging the denial of his pretrial motions to dismiss based on double jeopardy and the right to a speedy trial).

For a further discussion of possible grounds for motions for appropriate relief after a guilty plea, see Jessica Smith, [Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2001/04 (UNC School of Government, Oct. 2001).

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**Caution:** In some instances, G.S. 15A-1335 will bar the imposition of a greater sentence after a case has been set aside after appeal or collateral attack. For offenses committed before December 1, 2013, the statute precludes a court from imposing a more severe sentence for a conviction that has been set aside, whether the sentence was part of a negotiated plea or an open plea and whether the defendant reenters a guilty plea or is found guilty after trial. However, this statute was amended by Session Law 2013-385, s. 3 to specifically exempt application of this statute to offenses committed on or after

December 2013 when a “defendant, on direct review or collateral attack, succeeds in having a guilty plea vacated.”

Even before the 2013 amendment of G.S. 15A-1335, if a defendant was successful in having a guilty plea set aside on direct review or through an MAR, any charges that had been dismissed by the State as part of the negotiated plea agreement could be reinstated; the defendant may be sentenced on those reinstated charges and as a result receive a more severe sentence than he or she originally received pursuant to his or her plea bargain. For a further discussion of the risk of receiving a greater sentence after having a guilty plea set aside, see *infra* § 35.5B, Applicability of G.S. 15A-1335.

Due process also protects the defendant to some extent from the reinstatement of charges or the imposition of a more severe sentence to punish the defendant for challenging a plea bargain. See *North Carolina v. Pearce*, 395 U.S. 711 (1969) (punishing exercise of rights is vindictive and violates due process). However, unlike a successful appeal following a trial, no presumption of vindictiveness arises for due process purposes if the second sentence after a trial is more severe than a first sentence after a guilty plea; the defendant must prove actual vindictiveness. See *Alabama v. Smith*, 490 U.S. 794 (1989); see also *infra* § 35.5A, Resentencing after Successful Appellate or Post-Conviction Review: In General (discussing constitutional limits on resentencing after successful appellate or post-conviction review).

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## 23.7 Other Issues

### A. Inadmissibility of Plea Negotiations at Trial

G.S. 15A-1025 states: “The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal . . . action . . . .” If plea negotiations fall apart, and the case goes to trial, neither side may introduce evidence about the prior plea negotiations. *State v. Bostic*, 121 N.C. App. 90 (1995) (G.S. 15A-1025 clearly prohibited introduction of evidence that defendant refused a plea bargain because he refused to admit guilt); see also N.C. R. EVID. 410 (Inadmissibility of pleas, plea discussions, and related statements).

G.S. 15A-1025 “was designed to facilitate plea discussions and agreements by protecting both defendants and prosecuting officials from being ‘penalized for engaging in practices which are consistent with the objectives of the criminal justice system.’” *State v. Wooten*, 86 N.C. App. 481, 482 (1987) (citation omitted). A defendant is entitled to a new trial if he or she can show prejudice from the prosecutor’s introduction of evidence obtained during plea negotiations. See *State v. Walker*, 167 N.C. App. 110, 122 (2004) (admission of incriminating letters from defendant to the prosecutor discussing defendant’s regret and his willingness to confess and “help in any way in order to get probation” constituted a plea discussion; admission was highly prejudicial and potentially influenced the jury’s decision), *vacated in part on other grounds*, 361 N.C. 160 (2006); *Wooten*, 86 N.C. App.

481, 481 (testimony by officer that defendant spoke with him after arrest and said that “[defendant’s] lawyer wanted to plead him to six years to the offense and he wanted to know what he should do”; this testimony referred to a plea bargain negotiated by defense counsel and prosecutor and therefore was expressly prohibited by G.S. 15A-1025). *But cf. State v. Flowers*, 347 N.C. 1 (1997) (letter from defendant to prosecutor, in which defendant admitted guilt, requested that co-defendants not be tried for murder, requested that his counsel be removed, and mentioned possibility of a plea bargain without any specifics, was not barred by G.S. 15A-1025; prosecutor did not respond to defendant’s letter, did not engage in plea discussions with defendant, and did not enter into plea arrangement with defendant).

The limitations set out in G.S. 15A-1025 apply only to evidence of communications related to plea bargaining between the prosecutor and the defense. Plea negotiations with a third party, including a law enforcement officer, may be admissible against the defendant. *See Bostic*, 121 N.C. App. 90, 102 (statement made by defendant to inmate that he hoped to get a plea was admissible because the statement “did not in any way indicate that ‘defendant or his counsel and the prosecutor engaged in plea discussions’”); *State v. Lewis*, 32 N.C. App. 298 (1977) (finding discussion between arresting officer and defendant admissible and declining to expand G.S. 15A-1025 beyond its explicit parameters).

## **B. Challenging Former Guilty Pleas**

Where a defendant challenges the validity of a guilty plea through an appeal or a petition for writ of certiorari, the record must affirmatively show that the guilty plea was made knowingly and voluntarily; otherwise, the plea is invalid. *Boykin v. Alabama*, 395 U.S. 238 (1969). However, at the end of a direct appeal, or when the time for appeal has expired, a “presumption of regularity” applies to a guilty plea. *Parke v. Raley*, 506 U.S. 20 (1992). The “presumption of regularity” shifts the burden to the defendant to show that his or her plea was involuntary. This can be a difficult burden to carry. *See State v. Bass*, 133 N.C. App. 646 (1999) (defendant unsuccessful in overturning prior uncounseled guilty plea that became basis of capital aggravating circumstance).

North Carolina courts also have held that the proper procedure for challenging a prior guilty plea on *Boykin* grounds is to file a motion for appropriate relief in the original cause. A defendant may not raise the issue of the voluntariness of a plea that is being used as a sentencing enhancement, or as the basis for a habitual felon charge, at the sentencing hearing or during a habitual felon trial. *See State v. Creason*, 123 N.C. App. 495 (1996) (collateral attack on prior conviction used as basis of habitual felon charge improper; proper procedure for adjudicating *Boykin* claim was motion for appropriate relief in the original cause), *aff’d per curiam*, 346 N.C. 165 (1997); *State v. Stafford*, 114 N.C. App. 101 (1994) (claim that prior pleas of guilty used to support habitual impaired driving charge were received in violation of *Boykin* could not be raised in habitual impaired driving case; defendant must file MAR in original cause); *State v. Noles*, 12 N.C. App. 676 (1971) (defendant could not collaterally attack voluntariness of underlying guilty plea on appeal of revocation of probation; proper procedure is to file MAR in



original cause). *Cf. Custis v. United States*, 511 U.S. 485 (1994) (if conviction is obtained in violation of right to counsel, defendant may collaterally attack conviction in case in which conviction is proposed to be used); *see also* G.S. 15A-980 (allowing motion to suppress prior conviction for violation of right to counsel).

For further discussion of this topic, see Robert L. Farb, [Boykin v. Alabama and Use of Invalid Guilty Pleas](#), UNC SCH. OF GOV'T (Feb. 1, 2010), and Jessica Smith, [Pleas and Plea Negotiations in North Carolina Superior Court](#), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, June 2015).

### **C. Concessions of Guilt during Trial**

There may be situations in which conceding your client's guilt to a lesser-included offense is your best strategy. Concessions of guilt have the same practical effect as guilty pleas because they deprive the defendant of his or her right against self-incrimination, the right of confrontation, and the right to trial by jury. *See State v. Harbison*, 315 N.C. 175 (1985). A defense attorney may not concede guilt without his or her client's explicit consent, and that consent must be given knowingly and voluntarily. *Id.* at 180 (holding that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent."); *see also McCoy v. Louisiana*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 1500, 1511 (2018) (holding that the Sixth Amendment guarantees a defendant the right to choose the objective of his or her defense, which includes refusing to allow counsel to concede guilt; "counsel's admission of a client's guilt over the client's express objection is error structural in kind" and is not subject to harmless-error review).

For an in-depth discussion of admissions of the defendant's guilt during trial, see *infra* § 28.6, Admissions of Guilt During Opening Statement, and § 33.6, Admissions of Guilt During Closing Argument.

## Appendix 23-1

### Checklist for Guilty Pleas

The following checklist may be useful in checking the validity of a guilty plea.

#### I. Preparing the Plea Agreement (§ 23.3)

- ✓ The offenses covered by the plea agreement are within the scope of the indictment (or warrant in district court).
- ✓ If the plea is outside the scope of the initial indictment, the indictment has been dismissed with prejudice and a superseding information filed. In district court, the prosecutor should file a statement of charges.
- ✓ The plea agreement contains no conditions that are barred by law.
- ✓ The judge has agreed to any explicit sentencing provisions in the agreement.
- ✓ If the plea is “no contest,” both the prosecutor and judge have agreed to accept this form of plea. Although not required by statute, it is the better practice to inform the prosecutor and court that you intend to enter an *Alford* plea.
- ✓ The intent to appeal from the denial of any suppression motions is explicitly preserved on the face of the plea agreement.
- ✓ The defendant understands the nature of the charges and the direct consequences of the plea, including the maximum possible sentence and any mandatory minimum sentence.
- ✓ The defendant understands the major collateral consequences of the plea, including the risk of deportation for noncitizens.
- ✓ The defendant understands his or her obligations under the plea agreement, including any obligation to make restitution, to participate in treatment programs, or to testify for the State.
- ✓ The defendant understands he or she may move to withdraw the plea of guilty for any good reason until the sentence is imposed, after which the right to withdraw from the plea is very limited.
- ✓ The defendant understands the limits on his or her right to appeal from a plea bargain.
- ✓ The defendant understands that the consequences of withdrawing from a plea agreement, or successfully appealing a plea, may be a trial in which a more severe sentence is imposed.

#### II. The Plea Procedure (§ 23.4)

- ✓ There is a factual basis for the plea presented on the record.
- ✓ The judge personally addresses the defendant, in accordance with G.S. 15A-1022(a), to ensure that the defendant is pleading voluntarily and understands the consequences of the plea.

- ✓ The judge questions counsel about the voluntariness of the plea in accordance with G.S. 15A-1022(b).
- ✓ The full plea agreement is disclosed to the court.
- ✓ If the defendant intends to appeal the denial of a suppression motion, the court and prosecutor are informed of this intent before the entry of the plea.
- ✓ The defendant is given the opportunity to plead to any other outstanding charges pursuant to G.S. 15A-1011(c).

### **III. Felony Sentencing (§ 23.5)**

- ✓ If a sentence is not a negotiated part of the plea agreement, counsel must be prepared for a full sentencing hearing, in which the State may present evidence of the defendant's prior record and any aggravating factors and the defendant has the burden of proving mitigating factors.
- ✓ If a negotiated sentence falls within the aggravated range in the sentencing chart, the defendant must admit the existence of the aggravating factors and the judge must question him or her in accordance with the procedures set out in G.S. 15A-1022 and G.S. 15A-1022.1. If the negotiated sentence falls within the mitigated range, the defendant must present evidence to support a mitigating factor or factors and the judge must make findings to support the sentence.

### **IV. Appeal from Guilty Pleas (§ 23.6)**

- ✓ A defendant who enters a plea of guilty on a misdemeanor in district court may appeal for a trial de novo in superior court.
- ✓ A defendant who enters a plea of guilty on a felony in superior court generally may appeal only: (i) the legality of his or her sentence; (ii) the judge's denial of a motion to withdraw a plea; or (iii) the denial of a suppression motion if properly preserved.
- ✓ Certain other issues, such as the voluntariness of the plea, ineffective assistance of counsel, or capacity to plead guilty, may be raised either through a petition for writ of certiorari in the appellate court or a motion for appropriate relief in the trial division, depending on the issue.

### **V. Other Issues (§ 23.7)**

- ✓ If plea negotiations fall apart and the case goes to trial, evidence of the negotiations is inadmissible.
- ✓ If the State intends to use a prior guilty plea as a sentencing enhancement, the proper procedure for challenging the former plea on *Boykin* grounds (plea not knowing and voluntary) is to file a motion for appropriate relief in the original cause.
- ✓ A lawyer may not concede his or her client's guilt to a lesser included offense during a trial without the client's informed consent.