

Chapter 21: Guilty Pleas

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Pertinent Statutes

G.S. 15A-1011 (types of pleas permitted)
G.S. 15A-1021 through -1027 (pleas of guilty in superior court)
G.S. 90-95(h)(5) (substantial assistance in drug cases)

Significant U.S. Supreme Court Cases

Boykin v. Alabama, 395 U.S. 238 (1969) (plea of guilty invalid unless record demonstrates knowing and voluntary waiver of trial rights)

North Carolina v. Alford, 400 U.S. 25 (1970) (plea of guilty may be validly entered even if defendant does not personally acknowledge guilt, if there is factual basis for entry of plea)

Santobello v. New York, 404 U.S. 257 (1971) (prosecutor must comply with conditions of plea agreement; remedy for failure to do so may be either to require specific performance or permit defendant to vacate plea)

Hill v. Lockhart, 474 U.S. 52 (1985) (standard for ineffective assistance of counsel where defendant pleads guilty on advice of attorney)

Parke v. Raley, 506 U.S. 20 (1992) (presumption of regularity applies to prior pleas of guilty; defendant has burden of showing plea proceedings were invalid under *Boykin*)

Significant North Carolina Cases

State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998) (discussing adequacy of judge's colloquy and adequacy of factual basis for plea of guilty)

State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987) (where defendant asks about difference between premeditated and felony murder, court obligated to explain elements of crimes; otherwise, plea of guilty to first-degree murder is not knowing and voluntary)

State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994) (defendant must be informed of any mandatory minimum sentence attached to crimes for which he or she is pleading guilty, or plea is not knowing and voluntary)

State v. Brown, 142 N.C. App. 491, 543 S.E.2d 192 (2001) (discussing proper method for preserving right to appeal denial of suppression motions when pleading guilty)

State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771, *aff'd*, 346 N.C. 165, 484 S.E.2d 525 (1997) (proper method of challenging prior guilty plea on *Boykin* grounds that the state intends to use as a sentencing enhancer is to file motion for appropriate relief in original cause)

State v. Goforth, 130 N.C. App. 603, 503 S.E.2d 676 (1998) (setting forth standard for ineffective assistance of counsel in informing client of consequences of guilty plea)

References (cont'd)

State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990) (defendant permitted to withdraw plea for any fair and just reason prior to sentencing)

State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985) (attorney may not concede defendant's guilt to lesser included offense during closing argument without explicit consent of client)

State v. Lineberger, 342 N.C. 599, 467 S.E.2d 24 (1996) (discussing limitations on judge's ability to reject plea; judge not permitted to reject plea unless plea contains sentencing provision or is involuntary)

State v. Pait, 81 N.C. App. 286, 343 S.E.2d 573 (1986) (plea of guilty not knowing and voluntary where trial judge told defendant his plea of not guilty was "frivolous")

State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980) (defendant's admission of guilt standing alone is not sufficient factual basis for plea)

State v. Wagner, 148 N.C. App. 658, 560 S.E.2d 174 (2002) (if plea is vacated on appeal, charges dismissed as part of plea may be reinstated and defendant may receive a more severe sentence than negotiated as part of plea bargain)

State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998) (plea that contained invalid sentencing condition had to be vacated)

Checklist

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

I. Preparing the Plea Agreement (§ 21.2)

- ✓ 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 non-citizens.
- ✓ 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 his or her right to withdraw the plea of guilty for any good reason up until when 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 Colloquy (§ 21.3)

- ✓ 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).

Checklist (cont'd)

- ✓ 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 prior to 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. Sentencing (§ 21.4)

- ✓ 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 or mitigated range in the sentencing chart, the judge must make findings to support the sentence.

IV. Appeal From Guilty Pleas (§ 21.5)

- ✓ 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.
- ✓ Other issues, such as the voluntariness of the plea, ineffective assistance of counsel, or competence 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.

V. Related Issues (§ 21.6)

- ✓ 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 enhancer, 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.

Chapter 21: Guilty Pleas

21.1 Basic Steps

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, 187 S.E.2d 741 (1972); *State v. Caldwell*, 269 N.C. 521, 153 S.E.2d 34 (1967) (by pleading guilty, 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 United States Constitution, the decision to plead guilty must be “knowing and voluntary.” *Boykin v. Alabama*, *supra*; *Johnson v. Zerbst*, 304 U.S. 458 (1938). This means: (i) that the decision to plead guilty must be the client’s; (ii) that the client must be informed about his or her options, and the consequences of pleading guilty; and (iii) that a client may not be coerced by any party, including the court, to plead guilty. *North Carolina v. Alford*, 400 U.S. 25 (1970); *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

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 Administrative Office of the Courts publishes 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 defendant and record the defendant’s answers prior to court.

The **second step** is the plea colloquy that occurs in court. The trial judge must address the defendant directly to ensure that he or she is pleading guilty knowingly and voluntarily. The court must be informed of the conditions of any plea agreement, and the court has the responsibility for ensuring 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 will be covered more thoroughly elsewhere 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. *See* G.S. 7A-272(d). 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.

21.2 Preparing the Plea Agreement

A. Client's Right to Enter Plea

Under the ABA Standards for Criminal Justice, the decision as to what plea to enter is ultimately the client's. ABA Standards for Criminal Justice, Standard 4-5.2 (quoted with approval in *State v. Brown*, 339 N.C. 426, 451 S.E.2d 151 (1994) and *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991)).

Counsel's duties. A lawyer 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. 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. ABA Standards for Criminal Justice, Standard 4-6.1 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. However, ultimately it must be the client him or herself who makes the final decision. 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, prior to 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, you may want to document in the file that you advised the client to wait until after discovery was complete to enter his or her plea.

Incompetent defendants. 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: (i) unable to understand the nature of the proceedings against him or her; (ii) comprehend his or her own situation in reference to the proceedings; or (iii) rationally assist in his or her defense. The standard for incapacity to plead is the same as the standard for incapacity to proceed to trial. *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 incompetent, you may seek a mental health evaluation and a

competency hearing pursuant to G.S. 15A-1002, -1003. For further discussion of incapacity, *see* Volume 1, Ch. 2: Capacity to Proceed.

Mentally disabled defendants. A mentally impaired defendant, if not incompetent 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 give mentally impaired clients the same control over their case as fully functional adults. North Carolina Rules of Professional Conduct, Rule 1.14 (client under disability); ABA Standards for Criminal Defense, Standard 5.2 (control and direction of case). This means that a mentally ill or mentally retarded client should be given the choice of how to plead. However, it is the lawyer’s responsibility to investigate all possible defenses to a crime prior to recommending a plea of guilty, including, of course, all defenses based on the client’s mental state.

ARC (Association for Retarded Citizens), an advocacy group for mentally retarded people, notes that retarded people are more likely than fully functional adults to engage in the following behaviors:

- not understand rights (but pretend to understand);
- not understand commands;
- be overwhelmed by police presence;
- act upset at being detained and/or try to run away;
- say what he or she thinks others want to hear;
- have difficulty describing facts or details of the offense;
- be the last to leave the scene of the crime and the first to get caught;
- be confused about who is responsible for the crime and “confess” even though innocent.

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

If the lawyer believes that a client is too impaired to make informed choices in his or her best interest, the lawyer may move to have the client’s competency assessed or may seek the appointment of a guardian *ad litem*. Rules of Professional Conduct, Rule 1.14(b); ABA Juvenile Justice Standards Relating to Counsel for Private Parties, Standard 3.1.

Counsel may also seek the appointment of a mental health or mental retardation expert to assist in communicating with the defendant and exploring possible defenses. Such motions may and should be made *ex parte*. *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (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. *See* Volume I, Ch. 5, for further discussion of experts.

Juvenile clients. Ethical guidelines provide that, as in the case of a mentally disabled adult, an attorney should seek to give a juvenile client the same control over his or her case as a fully functional adult. N.C. Rules of Professional Conduct, Rule 1.14; ABA Juvenile Justice Standards Relating to Counsel for Private Parties, Standard 3.1. 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).

B. Types of Pleas

A defendant may plead guilty, not guilty, or, with the prosecutor's and court's permission, no contest. G.S. 15A-1011.

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. This type of plea may be entered only with the prosecutor's and court's permission. G.S. 15A-1011. For criminal law purposes, a "no contest" plea carries all of the consequences of a plea of guilty. *State v. Outlaw*, 326 N.C. 467, 390 S.E.2d 336 (1990) (witness may be impeached under Rule 609 on basis of "no contest" plea); *State v. Jackson*, 128 N.C. App. 626, 495 S.E.2d 916 (1998) ("no contest" plea entered after 1975 may be used as prior conviction under habitual felon statutes); *but see State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990) ("no contest" convictions entered prior to 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*, POPULAR GOVERNMENT at 13–24 (Winter 1998) (<http://iog.unc.edu/programs/crimlaw/faculty.htm>).

Alford plea. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court held that a defendant can factually maintain his innocence but at the same time plead guilty. The trial court 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, 185 S.E.2d 693 (1972). Like a "no contest" plea, an *Alford* plea carries all of the direct and collateral consequences of pleading guilty. "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, 534 S.E.2d 666, 670 (2000) (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.

Conditional pleas. 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 (based on constitutional violation or substantial

violation of Criminal Procedure Act). If the appeal is successful, the plea is vacated. To preserve the right to appeal, the defendant must explicitly notify the state and the court of his or her intention to appeal before the plea is entered. *State v. Brown*, 142 N.C. App. 491, 543 S.E.2d 192 (2001); *State v. McBride*, 120 N.C. App. 623, 463 S.E.2d 403 (1995), *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (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. For more on this procedure, *see* Volume I, Ch. 14: Suppression Motions.

C. Plea Bargaining

A valid plea bargain may include:

- an agreement by the prosecutor to dismiss or reduce charges;
- 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)).

See generally G.S. 15A-1054 (charge reductions and sentencing concessions permissible).

A plea bargain may not include conditions that are otherwise barred by law. For instance, a defendant may not plead guilty in exchange for concurrent sentences when the law requires that consecutive sentences be imposed. Where a plea agreement contains invalid conditions, the defendant must be allowed to withdraw the plea. *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998); *see also Hamilton v. Freeman*, 147 N.C. App. 195, 554 S.E.2d 856 (2001) (DOC may not unilaterally alter illegal sentencing agreement contained in plea bargain; proper remedy is for DOC to notify court to vacate plea).

Except for payment of attorney's fees and court costs, restitution to the victim, and fines, plea bargains may not include payment provisions. For example, the prosecutor may not offer more advantageous pleas to defendants willing to make charitable contributions to designated organizations. North Carolina State Bar Ethics Opinion, RPC 204 (1995).

The prosecutor may not agree to refrain from disclosing the defendant's prior record. Although a defense lawyer 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 Rules of Professional Conduct, the duty of candor to 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 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. *State v. Craig*, 21 N.C. App. 51, 203 S.E.2d 401 (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, 170 S.E.2d 575 (1969) (defendant indicted for larceny could not plead guilty to receiving stolen goods, where that offense was not lesser included offense of larceny). If you want to construct a plea bargain that includes accepting responsibility for a related but unindicted offense, the prosecutor should dismiss the indictment with prejudice and seek a superceding indictment or prepare an information. On an appeal from district court, the prosecutor must prepare an information. A defendant charged with a non-capital offense may waive indictment and proceed on an information. In district court, the prosecutor should file a statement of charges. *See* Volume I, Ch. 8: Pleadings (forthcoming).

Benefits to third parties. Benefits to third parties are not impermissible in plea bargains but should be scrutinized carefully by the court. *United States v. Morrow*, 914 F.2d 608 (4th Cir. 1990) (plea bargain involving leniency for third person can pose greater danger of inducing false or involuntary guilty plea); *see also State v. Summerford*, 65 N.C. App. 519, 309 S.E.2d 553 (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. Even where evidence of an aggravating circumstance exists, 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.

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." *State v. Wells*, 104 N.C. App. 274, 410 S.E.2d 393 (1991) (whether trial court finds that defendant's aid amounts to "substantial assistance" is discretionary); *State v. Perkerol*, 77 N.C. App. 292, 335 S.E.2d 60 (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, 301 S.E.2d 401 (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). If part of the defendant’s plea agreement is that he or she will provide “substantial assistance” to the prosecution, make sure that all parties and the judge agree that the defendant’s information or proffered testimony will meet the statutory definition and that the court will be willing to make the finding.

D. Informing Client of Consequences of Plea Bargain

The Compendium of Standards for Indigent Defense Services is a compilation of ABA and various state guidelines on the defense function. There is a consensus among these sets of guidelines 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;
- Mandatory minimum sentence;
- Sex offender registration requirements;
- Possibility of forfeiture of assets;
- Whether sentence for future offenses may be enhanced on basis of current conviction;
- Effects on immigration status;
- Whether court may impose costs, including attorneys fees and court costs;
- Loss of, or restrictions on, drivers’ license or professional license.

Other collateral issues need not be raised by the lawyer. However, if a client asks for advice on a particular collateral consequence, the lawyer must accurately inform the client of the law. *State v. Goforth*, 130 N.C. App. 603, 503 S.E.2d 676 (1998) (lawyer who failed to accurately answer defendant’s question about collateral consequence of plea was ineffective).

E. Judge’s Participation in Plea Discussions

Generally. G.S. 15A-1021 allows trial judges to participate in plea negotiations. 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.

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); *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986) (judge who told defendant he was tired of frivolous not-guilty pleas coerced defendant into pleading guilty).

Sentencing provisions in plea agreements. Where the parties have agreed on a particular sentence as part of a plea agreement, the judge must approve of the sentencing arrangement. If the judge does not approve, he or she must give the defendant the opportunity to withdraw the plea. G.S. 15A-1023. With the permission of the judge, the parties may disclose to the judge their intended sentencing agreement prior to the defendant's tender of a plea of guilty and obtain the judge's preliminary approval of the arrangement. G.S. 15A-1021(c).

Judge not required to approve of plea conditions other than sentencing recommendations. If the parties reach a plea bargain that does not involve the prosecutor's recommendation of a particular sentence, the judge does not have to approve the deal. Rather, the judge must accept the plea if: (i) it is an informed choice of the defendant and (ii) 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 if there is a factual basis for it and the defendant enters the plea knowingly and voluntarily.

21.3 The Plea Colloquy

Once the parties have reached a negotiated plea settlement, the defendant must tender his or her plea of guilty in open court, and the trial judge then must accept the plea. The trial judge has three responsibilities in accepting pleas. First, the judge must be convinced that the plea of guilty 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. Third, if the plea agreement includes a sentencing recommendation, the trial court must approve the recommendation. The trial court's responsibilities in accepting a plea are discussed further 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 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 a "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, 446 S.E.2d 140 (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. at 661, 446 S.E.2d at 142, quoting *Cuthrell v. Patuxent Institution*, 475 F.2d 1364 (4th Cir. 1973). *Bozeman* held that a mandatory minimum sentence is a “direct consequence” that must be revealed to the defendant. Our 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, 442 S.E.2d 161 (1994).

Statutory colloquy with defendant. Prior to accepting a plea of guilty, the trial court 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;
- the possibility of deportation if he or she is not a citizen of the United States;
- the “nature of the charges.”

G.S. 15A-1022(a). In addition, the court must ensure the defendant is satisfied with counsel. *Id.*

The court must address the defendant in person and not only through counsel. *State v. Williams*, 65 N.C. App. 472, 310 S.E.2d 83 (1983) (error but harmless on unusual facts of case for judge to fail to address defendant in person—case puts onus on defense counsel to object). Our Supreme Court has held that the judge does not have to list the elements of the offense, or explain different theories of an offense, unless the defendant makes a specific inquiry or indicates that he does not understand the charges. Compare *State v. Barts*, 321 N.C. 170, 362 S.E.2d 235 (1987) (where defendant stated he did not understand premeditated murder, judge obligated to explain it to him) with *State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (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 court must inquire of the defendant personally, the prosecutor, and defense counsel regarding:

- whether the plea of guilty is the product of a plea bargain;
- if so, what the conditions of the bargain are;

- whether the defendant is entering the plea of his or her own free will; and
- whether anyone has promised or threatened the defendant to cause him or her to enter the plea.

G.S. 15A-1022(b); *see also State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000) (above questions meet statutory and constitutional requirements to ensure plea is voluntary).

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. N.C. State Bar Ethics Opinion, RPC 152 (1993) (prosecutor may not knowingly conceal fact that he withdrew charge as part of plea agreement).

C. Factual Basis for Plea

Generally. Once the court has determined that a plea is a voluntary and knowing decision by the defendant, the court must find that there is a sufficient factual basis for the plea of guilty. The following information may be relied upon in finding a factual basis:

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

G.S. 15A-1022(c). The court may rely on any of the above sources. *See State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (not all of above sources required in every case).

The standard for finding a factual basis for a guilty plea is fairly lenient. *E.g., State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (factual basis for plea to first-degree murder sufficient where infant victim died of fractured skull, defendant had admitted to hitting victim on head, and witness had seen defendant abusing victim on past occasions). However, the record must positively show the factual basis. *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994) (factual basis for failure to appear charge not present when only witness at plea colloquy testified that defendant was present when case was called). Moreover, the defendant's admission of guilt standing alone is not sufficient. *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980). In preparing to negotiate a plea bargain with the prosecutor, it will be helpful to develop 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.

CAUTION: Be careful about permitting your clients to plead guilty to multiple counts of the same offense, such as multiple larcenies or multiple conspiracies—the evidence may support only one such offense. *E.g.*, *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995) (larceny or robbery of different objects from same person constitutes one larceny or robbery). In *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), the defendant pled guilty to eight counts of soliciting a murder, but the state’s factual showing proved one solicitation only. The appellate court upheld Kimble’s convictions because the defense lawyer did not move to withdraw the defendant’s plea on the grounds of the inadequacy of the factual basis. *Id.* Note that a defendant usually waives any double jeopardy claim, including an objection to multiple punishment, by pleading guilty. *State v. Hughes*, 136 N.C. App. 92, 524 S.E.2d 63 (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* Volume I, § 13.4B (discussing double jeopardy principles).

D. Judge’s Sentencing Discretion

Rejection of sentencing recommendation. A plea agreement involving a sentencing recommendation by the state must first have judicial approval before it can become effective. G.S. 15A-1023(b); *State v. Wallace*, 345 N.C. 462, 480 S.E.2d 673 (1997) (trial court permitted to reject plea agreement to second-degree murder that included specific sentencing recommendation); *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992). If the judge rejects a plea arrangement, he or she must give the defendant an opportunity to withdraw the plea of guilty. G.S. 15A-1024. If the trial judge rejects the plea offer, the defendant is entitled as a matter of right to a continuance. *State v. Tyndall*, 55 N.C. App. 57, 284 S.E.2d 575 (1981); *see also State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459 (1985) (defendant must affirmatively ask for continuance).

Limits on judge’s discretion to reject plea. A judge may not reject a plea agreement that does not involve a sentencing recommendation unless there is no factual basis for the plea or the judge believes the plea is not a voluntary and informed decision by the defendant. G.S. 15A-1023(c); *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983) (judge required to accept plea to second-degree murder where there was a factual basis for plea and plea was voluntary—judge retained sentencing discretion); *State v. Lineberger*, 342 N.C. 599, 467 S.E.2d 24 (1996) (trial judge erred in rejecting plea to second-degree murder in potentially capital case because trial judge believed plea rendered death penalty scheme arbitrary—defendant entitled to reinstatement of plea offer). Note that the court still may reject the plea if it determines that the defendant is not entering the plea voluntarily. If the judge seems unhappy with a plea arrangement, advise your client to be careful not to say anything that would give the judge reason to reject the plea as involuntary.

E. Defendant's Right to Withdraw Plea

If the defendant moves to withdraw his or her plea of guilty before sentencing, he or she should be permitted to do so for any “fair and just” reason. *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990) (defendant permitted to withdraw plea of guilty to murder, prior to sentencing hearing, where he stated that he had felt “pressured” to plead guilty); *State v. Deal*, 99 N.C. App. 456, 393 S.E.2d 317 (1990) (defendant with limited intelligence who misunderstood his plea bargain permitted to withdraw plea prior to sentencing).

Factors that favor permitting the defendant to withdraw a plea include: (i) a defendant's assertion of innocence; (ii) weaknesses in the state's case; (iii) a short length of time between the entry of the guilty plea and the desire to change it; (iv) lack of counsel, or lack of access to counsel, at critical times; and (v) evidence showing that the defendant misunderstood the consequences of the plea. These factors should be weighed against any prejudice to the state in determining whether to permit the defendant to withdraw the plea. *State v. Graham*, 122 N.C. App. 635, 471 S.E.2d 100 (1996) (defendant who moved to withdraw plea five weeks after entry of plea and who made “no concrete assertion of innocence” not permitted to withdraw guilty plea).

After sentence is imposed, a defendant may withdraw his or her plea of guilty only “to avoid manifest injustice.” *State v. Handy, supra*.

F. State's Right to Rescind Plea Agreement

Right to rescind before acceptance of plea. The State may withdraw from a plea agreement at any time until: (i) entry of the plea by the defendant—that is, when the court accepts the plea in open court; or (ii) there is an act of detrimental reliance by the defendant on the plea arrangement. *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980); *State v. Marlow*, 334 N.C. 273, 432 S.E.2d 275 (1993) (in case with two joined co-defendants, in which each offered a plea, state permitted to rescind offer where trial court 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 the court accepts the plea, the defendant has a constitutional right to enforcement of the plea's provisions. *Santobello v. New York*, 404 U.S. 257 (1971); *State v. Johnson*, 95 N.C. App. 757, 383 S.E.2d 692 (1989) (state obligated to abide by plea agreement when prosecutor did not move to vacate plea until after court had accepted defendant's plea of guilty). If the prosecution fails to comply with the plea agreement, the defendant is entitled to either: (i) rescission of the plea; or (ii) specific performance of the plea agreement, depending on the circumstances. *Santobello, supra*; *State v. Isom*, 119 N.C. App. 225, 458 S.E.2d 420 (1995) (remedy of rescission of plea ordered); *State v. Rodriguez*, 111 N.C. App. 141, 431 S.E.2d 788 (1993) (ordering specific performance). The factors that either an appellate or trial court may consider in deciding between rescission and specific performance are: (i) who broke the bargain, (ii) whether the violation was deliberate, (iii) the wishes of the defendant, and (iv) any change of circumstances or new

information between the plea and the violation. *State v. Blackwell*, 135 N.C. App. 729, 522 S.E.2d 313 (1999) (remanding to trial court for determination of appropriate remedy), *remanded on other grounds*, 353 N.C. 259, 538 S.E.2d 929 (2000).

G. Defendant's Right to Plead to Other Crimes

Upon entry of a guilty plea, or conviction, a defendant may request permission of the court to enter pleas of guilty to any outstanding charges in the prosecutorial district. A defendant may also enter guilty pleas to outstanding charges in other districts with the permission of the prosecutor from the foreign district. G.S. 15A-1011(c). The superior court has jurisdiction to accept pleas to some misdemeanors under this section. 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. *Id.*; G.S. 7A-271. The district court may not accept pleas to felonies under this provision 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).

21.4 Sentencing

If the defendant has entered a plea of guilty under a plea agreement that does not include a specific sentencing arrangement, the trial court must hold a sentencing hearing and sentence the defendant according to structured sentencing. Additionally, if your client enters a plea agreement in which the negotiated sentence is in the aggravated or mitigated range of the sentencing chart, the court is required to make sentencing findings that support the aggravated or mitigated sentence. *See* G.S. 15A-1340.16(b), (c). Structured sentencing will be considered elsewhere in this volume. However, a few issues specific to guilty pleas are included here.

Aggravating factors based on elements of a dismissed offense. Our appellate courts have held that the trial court may 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, 298 S.E.2d 673 (1983) the defendant had been charged with first-degree murder and pled guilty to second degree murder. The trial court 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.*, 307 N.C. at 378, 298 S.E.2d at 679.

Client's testimony at prior trial. If your client testifies against a co-defendant at a trial held before your client's sentencing hearing, his or her testimony in the co-defendant's case may be used as evidence against the client at his or her sentencing hearing. *See State v. O'Neal*, 116 N.C. App. 390, 448 S.E.2d 306 (1994) (sentencing court could incorporate by reference, and consider as evidence of premeditation and deliberation, O'Neal's own testimony at co-defendant's trial).

Sentencing court not permitted to rely on other witness's testimony at co-defendant's trial. If your client testifies against a co-defendant and is later sentenced, the sentencing court may not rely on evidence, other than your client's testimony, developed in the co-defendant's trial. *See State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (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." *Id.*, 309 N.C. at 549, 308 S.E.2d at 654.

Restitution orders and recommendations. Any order or recommendation for restitution must be supported by evidence presented at the sentencing hearing. *E.g.*, *State v. Burkhead*, 85 N.C. App. 535, 355 S.E.2d 175 (1987) (vacating restitution order for \$5,000, when evidence showed unpaid medical expenses of about \$450). There is no explicit burden of proof established in the restitution statutes. The structure of the statutes seems to imply that the victim has the burden of producing evidence of, and proving the amount of losses, and the defendant has the burden of proof on the issue of lack of ability to pay. G.S. 15A-1340.35, -1340.36.

21.5 Appeal from Guilty Pleas

A. Appeal from District Court

Misdemeanor pleas. Except where the defendant explicitly waives his right to appeal as part of a plea agreement, a defendant who enters a plea of guilty to a misdemeanor in district court may appeal for trial de novo in superior court. G.S. 15A-1431; *State v. Fox*, 34 N.C. App. 576, 239 S.E.2d 471 (1977). A trial de novo returns a defendant to his or her position prior to the plea in district court. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970) (in trial de novo, judgment below is completely annulled and not available for any purpose); *State v. Fox*, *supra*. 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. *State v. Sparrow*, *supra*; *State v. Meadows*, 234 N.C. 657, 68 S.E.2d 406 (1951). The state may not reinstate charges in superior court that were dismissed independently of the plea bargain as a way of penalizing the defendant for filing an appeal. For further discussion of vindictive prosecution, *see* Volume I, § 13.4D.

Felony pleas in district court. Where a defendant pleads guilty to a Class H or I felony in district court pursuant to G.S. 7A-272, the defendant's appeal is to the court of appeals. G.S. 7A-272(d); *see also State v. Goforth*, 130 N.C. App. 603, 503 S.E.2d 676 (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 in superior court has a limited right of appeal. A defendant who pleads guilty or no contest has the right to appeal the following issues:

- whether the sentence imposed was lawful under structured sentencing (G.S. 15A-1444(a2));
- if a defendant is sentenced in the aggravated range, the correctness of the trial court's findings of aggravating and mitigating factors (G.S. 15A-1444(a1));
- the trial court's denial of a motion to withdraw a guilty plea (G.S. 15A-1444(e));
- where the defendant has expressly preserved it, the denial of a motion to suppress evidence under G.S. 15A-974. *See* G.S. 15A-979.

A defendant who pleads guilty has no right of appeal from any other issue. *State v. Waters*, 122 N.C. App. 504, 470 S.E.2d 545 (1996) (no right to appeal ineffective assistance of counsel claim); *State v. Parks*, 146 N.C. App. 568, 553 S.E.2d 695 (2001) (no right to appeal denial of motion to dismiss habitual felon indictment following entry of guilty plea to charge of being habitual felon).

Partial waiver of right to appeal. If a defendant enters into a plea bargain that contains any type of sentencing provisions, the defendant may waive, or partially waive, the right to appeal his or her sentence. For example, in *State v. Williams*, 116 N.C. App. 354, 447 S.E.2d 437 (1994), the defendant pled guilty pursuant to a plea bargain that provided that the defendant's maximum exposure would be 40 years imprisonment. The Court of Appeals held that the defendant waived his right to appeal an aggravated sentence because the sentence was within the bargained-for range. In *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998), the defendant waived her right to appeal her sentence under section G.S. 15A-1444(a2) by admitting in her plea agreement that her prior record level was II and agreeing that her sentence could be intermediate or active in the trial court's discretion. *See also State v. Simmons*, 64 N.C. App. 727, 308 S.E.2d 95 (1983) (decided under Fair Sentencing Act; defendant who entered into plea agreement as to sentence had no right to appeal issue of whether sentence was supported by evidence).

Preserving right to appeal suppression motions. Where a defendant intends to enter a conditional plea and preserve the 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 court and the prosecutor of his or her intent to appeal before the plea is entered. *E.g., State v. McBride*, 120 N.C. App. 623, 463 S.E.2d 403, *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996). In *State v. Brown*, 142 N.C. App. 491, 543 S.E.2d 192 (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 had to demonstrate the defendant's intention. To ensure the right is preserved, 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.

C. Alternative Remedies

A defendant who has no right to appeal may file a petition for writ of certiorari to the appellate division and request discretionary review. G.S. 15A-1444(e); *State v. Parks*, 146 N.C. App. 568, 554 S.E.2d 695 (2001) (allowing defendant's petition for writ of cert. to review issue of denial of motion to dismiss indictment); *State v. Monserrate*, 125 N.C. App. 22, 479 S.E.2d 494 (1997) (cert. allowed to review issues relating to suppression hearing not properly preserved for appeal).

In the alternative, a defendant may file a motion for appropriate relief in the trial division. See *State v. Waters*, 122 N.C. App. 504, 470 S.E.2d 545 (proper remedy for defendant who pled guilty and alleged ineffective assistance of counsel was MAR in trial division).

CAUTION: Generally, when a case is remanded for resentencing after appeal, G.S. 15A-1335 bars the imposition of a greater sentence at the second sentencing hearing. However, the Court of Appeals has held that where a defendant is successful in having his guilty plea set aside on direct review or through an MAR, the defendant returns to the pretrial setting. Charges dismissed as part of the original plea bargain may be reinstated, and the defendant may receive a more severe sentence than he originally received pursuant to his or her plea bargain. *State v. Wagner*, 148 N.C. App. 658, 560 S.E.2d 174 (2002). The prosecutor may not reinstate charges or request a more severe sentence simply to punish the defendant for attacking the plea bargain. G.S. 15A-1335; *North Carolina v. Pearce*, 395 U.S. 711 (1969) (punishing exercise of rights is vindictive prosecution and violates due process). However, unlike a successful appeal following a trial, no presumption of vindictiveness arises; the defendant must prove the prosecutor's motive was vindictive. *Alabama v. Smith*, 490 U.S. 794 (1989).

21.6 Related 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 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, 465 S.E.2d 20 (1995); see also N.C. EVID. RULE 410 (inadmissibility of pleas, plea discussions, and related statements). This limitation applies only to communications directly related to plea bargaining between the prosecutor and the defense. If the defendant mentions plea negotiations to a third party, such statements may be admissible against the defendant. *Bostic, supra* (statement made by defendant to inmate that he hoped to get a plea was admissible); *State v. Lewis*, 32 N.C. App. 298, 231 S.E.2d 693 (1977) (discussion between arresting officer and defendant admissible); see also *State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997) (letter from defendant to prosecutor stating that police officer had discussed plea with defendant was admissible).

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 filed contemporaneously with an appeal, 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 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, 516 S.E.2d 156 (1999) (defendant unsuccessful in overturning prior uncounseled guilty plea that became basis of capital aggravating circumstance).

Our courts have also 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 enhancer, or as the basis for a habitual felon charge, at the sentencing hearing or during a habitual felon trial. *State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771, *aff'd*, 346 N.C. 165, 484 S.E.2d 525 (1997) (collateral attack on prior conviction used as basis of habitual felon charge improper; proper procedure for adjudicating *Boykin* claim was motion for appropriate relief); *accord State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846 (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 case). *Compare 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).

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 are closely analogous to pleas of guilty. A defense attorney may not concede guilt without his or her client’s explicit consent, and that consent must be given knowingly and voluntarily. *State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). A knowing consent requires that (i) the defendant be advised of his or her need for authorization, (ii) the defendant has discussed the consent with counsel, and (iii) the defendant wants counsel to make the concession on his or her behalf. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991); *State v. Perez*, 135 N.C. App. 543, 522 S.E.2d 102 (1999).