CHECKLIST FOR GUILTY PLEA APPEALS

1	Did you determine whether the indictment was proper? (*See* pp. 14-15)	
2	Did you determine whether the trial court properly calculated the defendant's prior record level calculation? (*See* pp. 3-8)	
3	Did you determine whether the trial court imposed a proper sentence based on the offense classification and the defendant's prior record level? (*See* p. 9)	
4	Did you use the correct sentencing grid to check the defendant's sentence? (*See* p. 9)	
5	If the trial court imposed an aggravated sentence, did you determine whether the court complied with N.C. Gen. Stat. § 15A-1340.16? (*See* pp. 2-3)	
6	If the trial court imposed an aggravated sentence, did you determine whether any of the aggravating factors were based on evidence that also supported any elements of the offenses? (*See* pp. 2-3)	
7	If the court imposed probation, did you determine whether the probationary sentence was proper? (*See* pp. 18-19)	
8	If the defendant filed a motion to suppress, did you determine whether the defendant reserved the right appeal the denial of the motion? (*See* pp. 10-11)	
9	If the defendant filed a motion to suppress, did you determine whether the defendant gave notice of appeal from the judgment? (*See* pp. 7-8)	
10	Did you determine whether the defendant's guilty plea was knowing, intelligent, and voluntary? (*See* pp. 15-16)	
11	Did you determine whether the State presented a sufficient factual basis for each element of each charge? (*See* pp. 16-17)	
12	Did you determine whether the defendant can get the benefit of the plea bargain? (*See* p. 17)	

COMMON ISSUES IN GUILTY PLEA APPEALS

Appellate Advocacy Foundations
August 8-9, 2019
David Andrews, Assistant Appellate Defender

Disclaimer: This document is not intended to be an exhaustive list of issues that can be raised in guilty plea appeals. Instead, the purpose of this document is to describe issues that occur with some frequency in such appeals. Please do not rely on this document as a substitute for independent legal research.

A word of caution: Guilty plea appeals often entail risks to client. It is important that you are aware of these risks and that you explain these risks to the client.

If you are assigned to an appeal in which there is an error that, if successfully challenged, could invalidate the guilty plea, you must advise the client of the risks of raising the error on appeal. If the client understands the risks and wants to you to make the argument, be sure to get the client's written permission.

There are at least two risks that guilty plea appeals entail. First, if you make an argument that invalidates all or part of the plea agreement, the plea agreement will no longer be valid. *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev'd for reasons stated in the dissenting opinion*, 366 N.C. 327, 734 S.E.2d 571 (2012) (per curiam). Second, if the State re-prosecutes the defendant after the case is remanded, the defendant will not be protected from receiving a higher sentence. *See* N.C. Gen. Stat. § 15A-1335 (the protection against receiving a higher sentence after a successful appeal "shall not apply when a defendant . . . succeeds in having a plea of guilty vacated.").

These risks come up in variety of ways. However, the following arguments are examples of where these risks arise:

1. Sufficiency of the evidence to support an aggravated or mitigated sentence.
2. Prior record level calculation.
3. Sentence calculation.
4. Subject matter jurisdiction (defective indictment or information).
5. Factual basis for the guilty plea.
6. Voluntariness of the guilty plea.
7. Benefit of the bargain.
8. Restitution.

This list is not exhaustive. If you identify an argument in a guilty plea appeal, be sure to determine whether it will invalidate the plea agreement or the guilty plea before raising the argument on appeal.

Issues that can be raised on direct appeal: There are only a few issues that can be raised on direct appeal in guilty plea cases. See below for a description of those issues.

1. Evidentiary Issues for Aggravated or Mitigated Sentences (N.C. Gen. Stat. § 15A-1444(a1)):

    a. N.C. Gen. Stat. § 15A-1444(a1) specifies that a defendant may appeal as a matter of right the issue of whether his or her sentence is supported by "evidence introduced at the trial and sentencing hearing . . . ." Although this provision specifically refers to "evidence," the Court of Appeals has held that a defendant who stipulates to an aggravating factor for which the prosecutor has provided a factual basis may appeal under this provision. *State v. Graves*, No. COA17-1380, 2018 N.C. App. LEXIS 1174 at *6 (N.C. Ct. App. Dec. 4, 2018) (unpublished). However, you should also raise the argument in a petition for writ of certiorari out of an abundance of caution because *Graves* is unpublished and therefore not binding.
    b. In order to appeal under this provision, the defendant's sentence must be either in the aggravated or mitigated range. A defendant may not rely on this provision to challenge a presumptive range sentence. *State v. Mungo*, 213 N.C. App. 400, 403, 713 S.E.2d 542, 544 (2011).
        i. This is true even if the minimum sentence is at the top of the presumptive range and overlaps with the aggravated range. *State v. Daniels*, 203 N.C. App. 350, 355, 691 S.E.2d 78, 81 (2010).
    c. If the trial court imposed an aggravated sentence, be sure to scrutinize the evidence supporting the aggravating factors:
        i. If the evidence did not support an aggravating factor, the case must be remanded for re-sentencing. *State v. Thompson*, 64 N.C. App. 354, 354, 307 S.E.2d 397, 398 (1993).
        ii. If the evidence supporting an aggravating factor also supported the underlying conviction, you should consider arguing that the aggravating factor was a form of impermissible double-counting. *State v. Darby*, 102 N.C. App. 297, 301, 401 S.E.2d 791, 793 (1991).
        iii. A stipulation to an aggravating factor will not prevent the defendant from challenging the aggravating factor on appeal. *State v. Bacon*, 228 N.C. App. 432, 434, 745 S.E.2d 905, 907 (2013).
    d. If the defendant received an aggravated sentence, make sure that (1) the State gave notice of the aggravating factors and (2) the defendant either admitted to any aggravating factors after a plea colloquy or the State proved the aggravating factors beyond a reasonable doubt and a jury returned a verdict finding the aggravating factors. N.C. Gen. Stat. § 15A-1340.16.
        i. It is possible that the Court of Appeals will conclude that arguments involving the lack of notice or defects in plea procedures for aggravating factors are not covered by N.C. Gen. Stat. § 15A-1444(a1). If either issue arises in your case, you should consider raising the issues in both a brief and a petition for writ of certiorari.
    e. If the defendant received an aggravated or mitigated sentence, make sure that the trial court did not reject uncontested evidence of mitigating factors.
        i. Even if the defendant received a mitigated sentence, the defendant can still

challenge mitigating factors that were supported by the evidence, but were rejected by the trial court. *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011).

f. **Caution**: If the plea agreement specifies an aggravated range sentence but the evidence does not support one or more aggravating factors or the aggravating factors are otherwise invalid, be sure to advise the client that there is a risk that the client will receive a higher sentence on remand if the appeal is successful. If the client still wants to proceed with the appeal, get the client's written permission.

2. Prior Record Level Calculation (N.C. Gen. Stat. § 15A-1444(a2)(1)):

   a. Determine whether the defendant or his trial attorney stipulated to the defendant's prior convictions.
      i. The defendant or his trial attorney may stipulate to prior convictions orally or by signing the prior record level worksheet. *State v. Hussey*, 194 N.C. App. 516, 523, 669 S.E.2d 864, 868 (2008). A blank worksheet, which includes a section for stipulating to convictions, is included in the appendix. (A pp 1-2)
      ii. In addition, the defendant or his attorney may stipulate to the classification of the offense. *State v. Arrington*, 371 N.C. 518, 526, 819 S.E.2d 329, 334 (2018); *State v. Salter*, ___ N.C. App. ___, ___, 826 S.E.2d 803, 809 (2019). However, when there is "clear record evidence demonstrating the parties' stipulation was an error or mistaken," the trial court "should defer to the record evidence rather than a defendant's stipulation." *State v. Green*, No. COA18-1114, 2019 N.C. App. LEXIS 606, 12 (N.C. Ct. App. Jul. 16, 2019).
      iii. The defense attorney's silence during the sentencing hearing can sometimes amount to a stipulation. *See State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007) (holding that the defense attorney stipulated to convictions listed on a worksheet because he had an opportunity to object to the convictions, but used the opportunity to present mitigating factors).
   b. If the defendant did not stipulate to his prior convictions, make sure that the State proved that the convictions existed as required by N.C. Gen. Stat. § 15A-1340.14(f).
      i. An unsigned prior record level worksheet does <u>not</u> satisfy the State's burden of proof. *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003).
      ii. A Division of Criminal Information printout generally satisfies the State's burden of proof. *State v. Safrit*, 154 N.C. App. 727, 730, 572 S.E.2d 863, 866 (2002).
      iii. If the State's evidence indicates that the defendant was convicted of an offense that could be classified different ways, but the evidence does not indicate which classification is correct, the State has failed to satisfy its burden of proof. *See State v. McNeill*, ___ N.C. App. ___, ___, 821 S.E.2d 862, 864 (2018) (remanding for re-sentencing where the State failed to prove whether the defendant had previously been convicted of the Class 1 misdemeanor version of possession of drug paraphernalia or the Class 3 misdemeanor version).
   c. Make sure the trial court properly calculated the defendant's prior record level points:
      i. For an example of an appeal involving several arguments about a trial court's

improper prior record level calculation, please see Issue II in the defendant's brief in *State v. Glover*, No. COA18-538.

ii. Even if the defendant stipulated to the existence of his prior convictions, you can still challenge the trial court's erroneous calculation of the defendant's prior convictions or sentencing points on appeal. *See, e.g., State v. Fair*, 205 N.C. App. 315, 315, 695 S.E.2d 514, 515 (2010) ("Unlike a stipulation to the existence of a prior conviction, which is binding on appeal, the trial court's determination as to whether a conviction may be counted for felony sentencing purposes is reviewable on appeal.").

iii. It is improper for the court to assess points for convictions that were joined with the conviction that is the subject of the appeal. *State v. West*, 180 N.C. App. 664, 669-70, 638 S.E.2d 508, 512 (2006).

iv. The trial court may not assess any points for prior Class 2 or Class 3 misdemeanors. N.C. Gen. Stat. § 15A-1340.14(b). *State v. Sanders*, 225 N.C. App. 227, 229, 736 S.E.2d 238, 240 (2013).

d. Make sure that any points the trial court assessed for traffic offenses were proper:

i. The only misdemeanor traffic offenses that count toward a defendant's prior record level are impaired driving, impaired driving in a commercial vehicle, and misdemeanor death by vehicle. N.C. Gen. Stat. § 15A-1340.14(b)(5). Thus, a conviction for driving while license revoked, which is a Class 1 misdemeanor in some circumstances, does not provide any sentencing points. *Id.*; *State v. Flint*, 199 N.C. App. 709, 728, 682 S.E.2d 443, 454 (2009).

ii. Although the classification for impaired driving is not defined under N.C. Gen. Stat. § 20-138.1, it is a Class 1 misdemeanor for sentencing purposes. *State v. Armstrong*, 203 N.C. App. 399, 410, 691 S.E.2d 433, 441 (2010).

e. Make sure that any points related to status offenses were proper:

i. Habitual Felon Charges:

1. The trial court may not assess any prior record level points for any of the convictions that the State used to establish the defendant's habitual felon status. N.C. Gen. Stat. § 14-7.6; *State v. Miller*, 168 N.C. App. 572, 576, 608 S.E.2d 565, 567 (2005).
2. An indictment for attaining habitual felon status may be returned before, after, or simultaneously with a substantive felony indictment. *State v. Blakney*, 156 N.C. App. 671, 675, 577 S.E.2d 387, 390 (2003). However, the trial court lacks jurisdiction to sentence a defendant as an habitual felon where the habitual felon indictment is issued before the offense date of the underlying substantive offense. *State v. Flint*, 199 N.C. App. 709, 718, 682 S.E.2d 443, 448 (2009).
3. If the State used more than three prior felony convictions in the habitual felon indictment, it may not use any of those convictions for prior record level points. *State v. Lee*, 150 N.C. App. 701, 704, 564 S.E.2d 597, 598 (2002).
4. If the defendant has multiple convictions that arose before turning 18, the State is only permitted to use one of the convictions to support a judgment for attaining habitual felon status. N.C. Gen. Stat. § 14-7.1.
5. A juvenile adjudication "is not synonymous with the conviction of a

crime," *In re Jones*, 11 N.C. App. 437, 438, 181 S.E.2d 162, 162 (1971), and, thus, will not support a judgment for attaining habitual felon status. *See* N.C. Gen. Stat. § 14-7.1 (defining habitual felon as a person who has been "convicted of or pled guilty" to three felony offenses).

6. The trial court is allowed to assess points for convictions from the same calendar week as convictions the State uses to establish the defendant's habitual felon status. *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996).

ii. Other Status Offenses:

1. The trial court may not assess points for a prior conviction of impaired driving that serves as the basis for the defendant's habitual impaired driving sentence. *State v. Gentry*, 135 N.C. App. 107, 111-12, 519 S.E.2d 68, 70-71 (1999).
2. It is permissible for a trial court to count prior DWI convictions that served as the basis for habitual impaired driving convictions in addition to the habitual impaired driving convictions when sentencing the defendant for a later offense. *State v. Hyden*, 175 N.C. App. 576, 581, 625 S.E.2d 125, 128 (2006).
3. The State may use felonies such as habitual impaired driving, habitual misdemeanor assault, and speeding to elude arrest as the substantive felony that is elevated under the habitual felon statutes. *State v. Baldwin*, 117 N.C. App. 713 (1995) (habitual impaired driving); *State v. Smith*, 139 N.C. App. 209 (2000) (habitual misdemeanor assault); *State v. Scott*, 167 N.C. App. 783 (2005) (speeding to elude arrest).
4. The trial court may enter judgment on a conviction for possession of a firearm by a felon and assess prior record level points for the conviction that serves as the basis for the defendant's status as a felon. *State v. Goodwin*, 190 N.C. App. 570, 578, 661 S.E.2d 46, 51 (2008).

f. If the defendant has prior out-of-state convictions, make sure that the State proved that the offenses were substantially similar to North Carolina offenses as required by N.C. Gen. Stat. § 15A-1340.14(e).

i. Although the defendant may stipulate that the conviction was a felony or misdemeanor, *State v. Bohler*, 198 N.C. App. 631, 638, 681 S.E.2d 801, 806 (2009), the defendant may not stipulate that an out-of-state conviction is substantially similar to a North Carolina offense. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006).

ii. Make sure the State identified the relevant out-of-state statutes during the sentencing hearing. The State cannot wait until the defendant appeals to identify the relevant statutes. *State v. Sanders*, 367 N.C. 716, 719, 766 S.E.2d 331, 333 (2014); *State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009).

iii. When an out-of-state offense has elements that are similar to multiple North Carolina offenses, the rule of lenity requires appellate courts to interpret the out-of-state statute in favor of the defendant. *State v. Hanton*, 175 N.C. App. 250, 259, 623 S.E.2d 600, 606 (2006).

iv. If the State presented statutes at the sentencing hearing, make sure the statutes were from the year the defendant was convicted. Statutes from later years are generally not sufficient to satisfy the State's burden of proof. *State v. Burgess*, 216 N.C. App. 54, 57-58, 715 S.E.2d 867, 870 (2011). However, evidence indicating that a later version of a statute was in effect when the defendant was convicted can satisfy the State's burden of proof. *State v. Best*, No. COA13-498, slip op. at 12 (N.C. Ct. App. Nov. 5, 2013) (unpublished).

g. Make sure that the prior offenses are all from different dates as required by N.C. Gen. Stat. § 15A-1340.14(d).
   i. If the defendant was convicted of more than one offense during one calendar week in superior court, the court can only use the conviction for the offense with the highest point total. If the defendant was convicted of more than one offense in a single session of district court, the court can only use one conviction.
   ii. If the defendant sustained multiple convictions in both district court and superior court on the same day, the court can only use one district court conviction and one superior court conviction for prior record points. *State v. Fuller*, 179 N.C. App. 61, 70-71, 632 S.E.2d 509, 515 (2006).

h. Make sure that any points that the defendant received for something other than a prior conviction are proper.
   i. The court can assess a point under N.C. Gen. Stat. § 15A-1340.14(b)(7) if the defendant committed the offense while on probation, parole, post-release supervision, while in prison, or while on escape from a correctional institution. However, the State must give the defendant notice of its intent to prove the point and then prove the point to a jury unless the defendant admits to it. N.C. Gen. Stat. § 15A-1340.16(a5). The Court of Appeals has upheld the assessment of a point under N.C. Gen. Stat. § 15A-1340.14(b)(7) despite the lack of a plea colloquy. *See State v. Marlow*, 229 N.C. App. 593, 602, 747 S.E.2d 741, 748 (2013) (a colloquy about the point would have been "inappropriate and unnecessary" under the circumstances). By contrast, the Court remanded a case for re-sentencing when the State failed to give notice of its intent to prove the point even though the defendant stipulated to the point. *State v. Crook*, ___ N.C. App. ___, 785 S.E.2d 771 (2016); *State v. Snelling*, 231 N.C. App. 676, 680, 752 S.E.2d 739, 743 (2014).
   ii. If the trial court assessed a point because all of the elements of the current offense were included in the defendant's prior offenses, make sure the court's ruling on the point was proper.
      1. If the trial court consolidated several offenses for sentencing, the comparison to prior offenses only involves the most serious offense. N.C. Gen. Stat. § 15A-1340.15(b); *State v. Prush*, 185 N.C. App. 472, 479, 648 S.E.2d 556, 560-61 (2007). The same is true even if all of the consolidated offenses were elevated to the same level because of the defendant attained habitual felon status. *State v. Gardner*, 225 N.C. App. 161, 170, 736 S.E.2d 826, 832 (2013).

i. Make sure that the trial court did not assess any points for prior adverse judgments that do not count toward the trial court's prior record level calculation.

i. Prior delinquency adjudications do not qualify for prior record level points. *State v. Tucker*, 154 N.C. App. 653, 659, 573 S.E.2d 197, 201 (2002).

ii. A judgment finding the defendant in criminal contempt does not count toward the defendant's prior record level calculation under the Structured Sentencing Act. *State v. Reaves*, 142 N.C. App. 629, 636, 544 S.E.2d 253, 258 (2001).

iii. A prior conviction that is elevated as part of a sentencing enhancement can only be counted as the original classification for the underlying substantive offense. *State v. Flint*, 199 N.C. App. 709, 729, 682 S.E.2d 443, 454 (2009).

iv. A prior conviction from district court that the defendant appealed to superior court and that is pending at the time of the sentencing hearing does not qualify for prior record level points. N.C. Gen. Stat. § 15A-1340.11(7)(a).

v. The trial court may count a guilty plea or a guilty verdict for which prayer for judgment was continued toward the defendant's prior record level calculation. *State v. Graham*, 149 N.C. App. 215, 220, 562 S.E.2d 286, 289 (2002).

vi. It is proper for the court to count a guilty plea that the defendant entered as part of a conditional discharge under N.C. Gen. Stat. § 90-96(a) and for which the defendant was still on probation at the time of the sentencing hearing. *State v. Hasty*, 133 N.C. App. 563, 571-72, 516 S.E.2d 428, 433 (1999).

j. If the trial court's calculation was wrong, make sure the defendant was prejudiced:

i. An error in the trial court's prior record level calculation is subject to harmless error review. That is, a defendant is not entitled to re-sentencing unless the error resulted in the trial court sentencing the defendant at a higher prior record level. *See State v. Adams*, 156 N.C. App. 318, 324, 576 S.E.2d 377, 382 (2003) (holding that the defendant was not entitled to re-sentencing because his prior record level "would still have been VI" even if the trial court had erroneously determined that all of the elements of his present offense were included in a prior offense).

ii. As far back as 2005, the Court of Appeals held that the defendant is not prejudiced by the trial court's improper prior record level calculation if the sentence the defendant received was within the range of the correct prior record level. *See State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005). However, *Ledwell* does not appear to be binding because it conflicts with Supreme Court precedent and at least one earlier decision of the Court of Appeals. In *State v. Williams*, 355 N.C. 501, 587, 565 S.E.2d 609, 659 (2002), the Supreme Court held that the defendant was prejudiced by the trial court's decision to sentence him at a higher record level "because the trial court could have sentenced defendant to lesser time . . . if the proper prior record level had been calculated." Based on *Williams*, the Court of Appeals held that the trial court's erroneous prior record level calculation "requires remand." *State v. McNeill*, 158 N.C. App. 96, 99, 580 S.E.2d 27, 29 (2003).

iii. If the trial court sentenced the defendant at the wrong prior record level, be prepared to argue that *Ledwell* is not binding and that re-sentencing is required under *Williams* and *McNeill*.

k. **Caution:** If the plea agreement specifies a particular sentence but there are errors in the trial court's calculation of that defendant's prior record level, think carefully about how to proceed with the appeal.

i. If you intend to challenge the trial court's assessment of points for some of the defendant's prior convictions, you should only do so if you also intend to argue that the entire plea agreement is invalid. Otherwise, arguments about the trial court's prior record level calculation are of no use to the client. To that end, be aware that the Court of Appeals recently held in *State v. Green*, No. COA18-1114, 2019 N.C. App. LEXIS 606, 12 (N.C. Ct. App. Jul. 16, 2019) that the defendant "successfully repudiated" the plea agreement, which specified an "active sentence of 87-117 months bottom mitigated," after successfully challenging the trial court's inclusion of two prior convictions in its prior record calculation.

ii. In addition, if you intend to challenge the trial court's assessment of one or more of the defendant's prior convictions and to argue the plea agreement is invalid in light of the court's improper assessment, be sure to get the client's written permission to do so. If you are successful, there is a risk that the client will receive a higher sentence on remand.

3. Sentence Disposition (N.C. Gen. Stat. § 15A-1444(a2)(2)):

a. Make sure that the type of sentence that the defendant received was proper based on the felony classification and the defendant's prior record level.

i. There are three types of sentence dispositions: (1) community, (2) intermediate, and (3) active. N.C. Gen. Stat. §§ 15A-1340.11, 15A-1340.17(c)(1).

1. A defendant sentenced to community punishment may not be given an active sentence or special probation. N.C. Gen. Stat. § 15A-1340.11(2). However, community punishment may involve supervised or unsupervised probation. N.C. Gen. Stat. § 15A-1341(b).
2. A defendant sentenced to community punishment for the Class A1 misdemeanor of stalking must be placed on supervised probation. N.C. Gen. Stat. §§ 14-277.3A.
3. A defendant convicted of assault or affray, and who inflicts serious injury upon another person or who uses a deadly weapon on a person with whom the person has a personal relationship and in the presence of a minor must be placed on supervised probation if the court imposes community punishment. N.C. Gen. Stat. § 14-33(d).
4. A defendant sentenced to intermediate punishment must be placed on supervised probation. N.C. Gen. Stat. § 15A-1340.11(6). Intermediate punishment may include special probation. *Id*.

ii. A defendant convicted of a Class I felony with a prior record level I, II, or III cannot receive an active sentence. N.C. Gen. Stat. § 15A-1340.17.

iii. Special probation (otherwise known as a split sentence) is only available for defendants who are subject to intermediate punishment. N.C. Gen. Stat. § 15A-1351(a). According to the sentencing grid under N.C. Gen. Stat. § 15A-1340.17, the following defendants are not eligible for intermediate punishment and, therefore, cannot receive split sentences:

1. A defendant convicted of a Class I felony with a prior record level I.

2. A defendant convicted of a Class H felony with a prior record level VI.
3. A defendant convicted of a Class G felony with a prior record level V or VI.
4. A defendant convicted of a Class F felony with a prior record level IV, V, or VI.
5. A defendant convicted of a Class E felony with a prior record level III, IV, V, or VI.
6. A defendant convicted of a Class A-D felony.

4. Sentence Calculation (N.C. Gen. Stat. § 15A-1444(a2)(3)):

a. Make sure that the sentence reflects the correct part of the sentencing grid for the offense class and prior record level for the defendant.
b. Over the past several years, the General Assembly has repeatedly changed the laws that govern criminal sentences. Be sure to apply the correct sentencing grid for each of your appeals. Sentencing grids are available on the Judicial Branch website.
c. A defendant convicted of attaining habitual felon status must be sentenced four classes higher than the substantive offense and no higher than a Class C felony level. N.C. Gen. Stat. § 14-7.6.
d. If the defendant pled guilty to conspiracy, attempt, or solicitation, make sure the trial court sentenced the defendant in accordance with N.C. Gen. Stat. §§ 14-2.4 (conspiracy), 14-2.5 (attempt), and 14-2.6 (solicitation). These inchoate crimes are generally, but not always, punished at a lower offense class.
e. If the defendant pled guilty based on a theory of acting in concert or aiding or abetting, the defendant is generally punished at the same level as a defendant who personally committed an offense. *State v. Williams*, 299 N.C. 652, 655-56, 263 S.E.2d 774, 777 (1980).
f. A defendant who pleads guilty to accessory before the fact is generally sentenced at the same level as a principal. N.C. Gen. Stat. § 14-5.2. A defendant who pleads guilty to accessory after the fact is generally sentenced two classes lower than the felony unless a different classification is specified by statute. N.C. Gen. Stat. § 14-7.
g. If the defendant pled guilty to trafficking, the sentence is specifically defined under N.C. Gen. Stat. § 90-95(h).
    i. There is no prior record level calculation for trafficking offenses.
    ii. The sentence for conspiracy to engage in trafficking is the same as trafficking. N.C. Gen. Stat. § 90-95(i).
    iii. The class for a conspiracy or attempt to commit a trafficking or non-trafficking drug offense is the same as the underlying drug offense that the defendant conspired or attempted to commit. N.C. Gen. Stat. § 90-98.
    iv. Although conspiracy to traffic is subject to the mandatory sentence for trafficking, attempted trafficking, though the same class as a completed trafficking crime, is subject to sentencing under the Structured Sentencing Act. *State v. Clark*, 137 N.C. App. 90, 97, 527 S.E.2d 319, 323 (2000).
h. If the defendant pled guilty to multiple misdemeanors, the court may not impose consecutive sentences that exceed twice the maximum sentence for the most serious misdemeanor. N.C. Gen. Stat. § 15A-1322(a).

i. **Caution:** If the plea agreement specifies a particular sentence but there are errors in the trial court's calculation of that sentence, think carefully about how to proceed with the appeal.

i. As described in section 2(k) above, a successful challenge to the trial court's calculation could place the client at risk of receiving a higher sentence on remand.

5. Denial of a Properly Preserved Motion to Suppress (N.C. Gen. Stat. § 15A-1444(e)):

a. Make sure that before pleading guilty, the defendant preserved the right to appeal the denial of the motion to suppress. Under N.C. Gen. Stat. § 15A-979(b), the defendant must give notice of his intent to appeal the suppression order to the prosecutor and the court before pleading guilty. *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). The most common way to comply with *Reynolds* is to include in the written transcript of plea a statement that the defendant reserves the right to appeal the denial of the suppression motion. A sample written plea agreement preserving the right to appeal the denial of a suppression motion is attached to this handout. (A p 3)

i. A stipulation in the record on appeal that the defendant gave proper notice of his intent to appeal the denial of a suppression motion is not sufficient to comply with *Tew* and *Reynolds*. *State v. Brown*, 142 N.C. App. 491, 493, 543 S.E.2d 192, 193 (2001).

ii. For many years, there was some confusion about whether the Court of Appeals could review an unpreserved suppression motion through a writ of certiorari. In 2015, the Court of Appeals held that a defendant could not seek review by writ of certiorari if the defendant failed to give notice of intent to appeal the denial of the suppression motion. *See State v. Harris*, 243 N.C. App. 137, 141, 776 S.E.2d 554, 556 (2015).

iii. However, according to this pleading in *State v. Perez*, No. COA19-273, there are arguments that *Harris* was wrongly decided. For one, *Reynolds* itself stated that if the defendant fails to give notice of intent to appeal, he will waive the "appeal of right" provisions of N.C. Gen. Stat. § 15A-979. *Reynolds* itself did not discuss the right to seek review by writ of certiorari. In addition, in *State v. Walden*, 52 N.C. app. 125, 278 S.E.2d 265 (1981) – which was issued long before *Harris* – the Court of Appeals acknowledged that the defendant failed to give notice of intent to appeal, but treated the appeal as a petition for writ of certiorari and reviewed the merits of the suppression issue. Third, the Court of Appeals has "broad discretion" to issue a writ of certiorari, *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018), which arguably includes circumstances in which the defendant did not give notice of intent to appeal the denial of a motion to suppress.

b. Make sure that after pleading guilty, the defendant gave notice of appeal from the judgment. If the defendant preserved the suppression issue, but failed to give notice of appeal from the judgment, the appeal will be dismissed. *State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010).

i. If the defendant failed to give notice of appeal from the judgment or the notice of appeal is defective, you can file a petition for writ of certiorari on the

ground that the right to prosecute the appeal was lost by failure to take timely action. *State v. Sutton*, 232 N.C. App. 667, 672, 754 S.E.2d 464, 467 (2014).

c. Please note that the type of motion that can be appealed in this context is not just a motion to suppress evidence based on constitutional violations. If the defendant pled guilty, he may also appeal the denial a motion to suppress that is based on violations of the N.C. Rules of Evidence. *State v. Tate*, 300 N.C. 180, 184, 265 S.E.2d 223, 226 (1980); *State v. King*, 214 N.C. App. 114, 119, 713 S.E.2d 772, 776 (2011).

6. Denial of a Motion to Withdraw Guilty Plea (N.C. Gen. Stat. § 15A-1444(e)):

a. If the defendant made the motion to withdraw prior to sentencing, the appellate court must apply the "fair and just reason" standard. *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990). If the defendant made the motion after sentencing, the appellate court must apply the "manifest injustice" standard. *Id*.

b. The defendant has the right to appeal a motion to withdraw made either before or after sentencing. *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980); *State v. Zubiena*, ___ N.C. App. ___, 796 S.E.2d 40 (2016); *State v. Salvetti*, 202 N.C. App. 18, 25, 687 S.E.2d 698, 703 (2010).

c. Additional information on withdrawal motions may be found on the North Carolina Criminal Law Blog.

d. Defendants generally have a difficult time prevailing in appeals involving withdrawal motions. However, there are three cases in which the defendants won. All of these cases involved pre-sentencing withdrawal motions:

i. *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990): The defendant moved to withdraw his guilty plea to first-degree murder less than twenty-four hours after he pled guilty. In vacating the guilty plea, the Supreme Court noted that the State had made "no argument that it would be substantially prejudiced by" allowing the defendant to withdraw the plea. *Id*. at 542, 391 S.E.2d at 164.

ii. *State v. Deal*, 99 N.C. App. 456, 393 S.E.2d 317 (1990): The Court of Appeals vacated the defendant's guilty plea to armed robbery because the defendant had "low intellectual abilities" and was "laboring under a basic misunderstanding of the guilty plea process" when he pled guilty. *Id*. at 464, 393 S.E.2d at 321.

iii. *State v. Suites*, 109 N.C. App. 373, 427 S.E.2d 318 (1993): The Court of Appeals vacated the defendant's guilty plea to accessory before the fact to second-degree murder because the principal was acquitted of second-degree murder and, under North Carolina precedent, the acquittal of the principal required the acquittal of any individual charged or convicted as an accessory.

7. Sex offender registration and satellite-based monitoring (N.C. Gen. Stat. § 7A-27(b)):

a. If the trial court imposed an order requiring the defendant to register as a sex offender or submit to satellite-based monitoring, you can challenge the order on direct appeal even though the defendant pled guilty. *See State v. Pell*, 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011) (holding that, under N.C. Gen. Stat. § 7A-27, the defendant had a right to appeal an order requiring him to register as a sex offender)

b. If you challenge such an order, make sure the defendant gave written notice of appeal as required in civil cases by Appellate Rule 3. *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010). If the defendant did not give written notice of appeal, you will need to raise the argument in a petition for writ of certiorari.
c. For information on sex offender registration and satellite-based monitoring, be sure to review the flow chart prepared by Jamie Markham.
d. For information on hearings under *Grady v. North Carolina*, 191 L. Ed. 2d 459 (2015), please review the packet prepared by Andy DeSimone and Jim Grant.

8. Denial of a motion for appropriate relief (N.C. Gen. Stat. § 15A-1422):

    a. A defendant has the right to appeal motions for appropriate relief that are filed in conjunction with guilty pleas. N.C. Gen. Stat. § 15A-1422; *State v. Kittrell*, No. COA08-988, slip op. at 5 (N.C. Ct. App. Jun. 2, 2009) (unpublished). However, the defendant must give notice of appeal not only from the final judgment, but also from the denial of the motion for appropriate relief in order to get merits review on the issues raised in the motion for appropriate relief. *State v. Hagans*, 188 N.C. App. 799, 805-06, 656 S.E.2d 704, 708-09 (2008).

9. Jury trial on some charges, guilty plea to other charges:

    a. The Court of Appeals appears to reach inconsistent results when the defendant goes to trial on some charges, but pleads guilty to other charges. *See State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995) (reviewing an argument about the substantive offense, but holding that the defendant had no right to appeal a conviction for attaining habitual felon status because he pled guilty to the charge); *but see State v. Glover*, 156 N.C. App. 139, 575 S.E.2d 835 (2003) (reviewing the plea colloquy for one of the defendant's convictions as well as other issues the defendant had the right to appeal); *State v. Bailey*, 157 N.C. App. 80, 577 S.E.2d 683 (2003) (same). Even though the case law is mixed on this point, you can still raise defects in the plea hearing in a petition for writ of certiorari in addition to a brief. *See* #23 on p. 20.

Guilty plea appeals involving DWI convictions: Almost all of the arguments described above involving sentencing do not apply to DWI cases. See below for a discussion of these issues in DWI cases.

10. If you are assigned to a guilty plea appeal involving a DWI conviction, be aware that many of the provisions of N.C. Gen. Stat. § 15A-1444 do not apply to DWI cases.
    a. A defendant who pled guilty to DWI and received an aggravated sentence cannot challenge the evidence supporting the sentence under N.C. Gen. Stat. § 15A-1444(a1) because DWI is a misdemeanor and N.C. Gen. Stat. § 15A-1444(a1) only applies to felonies. *State v. Shaw*, 236 N.C. App. 453, 454, 763 S.E.2d 161, 162 (2014).
    b. A defendant who pled guilty to DWI cannot challenge the trial court's prior record level calculation, sentence disposition, or sentence duration under N.C. Gen. Stat. § 15A-1444(a2) because the statute only applies to defendants sentenced under

Structured Sentencing. *State v. Shaw*, 236 N.C. App. at 454, 763 S.E.2d at 162. Defendants convicted of DWI are sentenced under a different statutory scheme under Chapter 20 of the North Carolina General Statutes. *See id.*; N.C. Gen. Stat. § 20-179.

c. If the State failed to give notice of an aggravating factor or the trial court improperly imposed an aggravated sentence, erroneously calculated the defendant's prior record level, or issued a sentence that was too long, you should raise the arguments in a petition for writ of certiorari. If you file a petition for writ of certiorari, be sure to assert that the Court of Appeals has the authority to issue a writ of certiorari to review the argument under N.C. Gen. Stat. § 15A-1444(e) and *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018).

Issues that <u>cannot</u> be raised on direct appeal: In general, a defendant who pled guilty cannot raise issues that are not listed in N.C. Gen. Stat. § 15A-1444(a1), (a2), and (e).

11. The following issues are examples of arguments that cannot be raised on direct appeal from a guilty plea.

    a. Whether the defendant's sentence violates double jeopardy. *State v. Rinehart*, 195 N.C. App. 774, 776, 673 S.E.2d 769, 771 (2009).
    b. Whether the defendant's sentence constitutes cruel and unusual punishment. *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003).
    c. Whether the trial court improperly granted the State's motion to continue. *State v. Moore*, 156 N.C. App. 693, 695, 577 S.E.2d 354, 355 (2003).
    d. Whether the trial court improperly denied the defendant's motion to dismiss the criminal charge. *State v. Demaio*, 216 N.C. App. 558, 565, 716 S.E.2d 863, 868 (2011); *State v. Smith*, 193 N.C. App. 739, 743, 668 S.E.2d 612, 614 (2008).
    e. Whether the trial court imposed an improper condition of probation. *State v. Sale*, 232 N.C. App. 662, 665, 754 S.E.2d 474, 477 (2014).
    f. Whether the trial court erroneously ordered the defendant to forfeit property. *State v. Royster*, 239 N.C. App. 196, 199, 768 S.E.2d 196, 198 (2015).

12. Although a defendant who pleads guilty may not raise the issues described above on direct appeal, the Court of Appeals has "broad discretion" to review those issues through a writ of certiorari. *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018). Therefore, if the issue is preserved and has merit, consider raising the issue in both a brief and petition for writ of certiorari.

    a. **Caution:** Some of the arguments described above, such as violations of the protection against double jeopardy or the prohibition against cruel and unusual punishment, could undo the guilty plea if the arguments are successful. If that is the case, be sure to inform the client of the risks of undoing the guilty plea and get the client's written permission if the client still wants you to make the arguments.

Issues that have traditionally been raised through a writ of certiorari: Prior to *Ledbetter*, there were several issues that defendants who pled guilty could raise through a petition for writ of certiorari. See below for examples of these arguments.

13. Subject Matter Jurisdiction:

a. Be sure to review the original charging document and determine whether it is proper:
   i. If the defendant pled guilty based on an indictment, make sure the indictment contained all of the essential elements of the original charge. If the defendant pled guilty on an information, make sure both the defendant and the attorney signed the information as required by N.C. Gen. Stat. §§ 15A-642(c) and 15A-644(b). A copy of an information is attached to this handout. (A pp 4-5)
   ii. Make sure that the client pled guilty to the offense described in the indictment or to any lesser-included offenses. In *State v. Moore*, No. COA04-1107, slip op. (N.C. Ct. App. May 3, 2005) (unpublished), the defendant was originally charged with statutory rape, but pled guilty to indecent liberties. The Court of Appeals vacated the defendant's guilty plea because the indictment did not support his conviction for indecent liberties, which was not a lesser-included offense of rape.
   iii. Two good resources on indictments are: (1) The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment by Jessica Smith at the UNC School of Government and (2) 2017 Update to Arrest Warrant and Indictment Forms prepared by Jeffrey B. Welty at the UNC School of Government.

b. There are different ways to present jurisdictional arguments in guilty plea appeals:
   i. If you make a jurisdictional argument in conjunction with one or more of the arguments listed in N.C. Gen. Stat. § 15A-1444(a1), (a2), and (e), you can present all of the arguments in a brief. *See State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991) (stating that a jurisdictional challenge "may be made in the appellate division only if and when the case is properly pending before the appellate division"); *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003).
   ii. If the only issue that you raise is a jurisdictional argument, you should consider including the argument in a brief and petition for writ of certiorari.
      1. As grounds for review in the brief, you can cite *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 474 (2006); and *State v. Brooks*, No. COA07-940, slip op. at 3 (N.C. Ct. App. May 20, 2008) (unpublished).
      2. As grounds for review in the petition for writ of certiorari, you can cite N.C. Gen. Stat. § 15A-1444(e); *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018).
      3. Be aware that the Court of Appeals dismissed the guilty plea appeal in *State v. Hostetler*, No. COA16-680, slip op. at 4 (N.C. Ct. App. Mar. 7, 2017) (unpublished), because the only issue raised in the appeal involved a defective indictment. However, the indictment was challenged only in a brief. By contrast, the Court reversed the guilty plea in *State v. Culbertson*, ___ N.C. App. ___, 805 S.E.2d 511 (2017)

based on a defective indictment that was challenged both in a brief and a petition for writ of certiorari.

iii. You could also consider raising the issue in an application for writ of habeas corpus. Although this would be an unconventional method of raising a jurisdictional defect, the Supreme Court expressed approval of this approach in *State v. Pennell*, 367 N.C. 466, 472, 758 S.E.2d 383, 387 (2014). If you pursue this option, you can file the application for writ of habeas corpus with "any one of the justices or judges of the appellate division." N.C. Gen. Stat. § 17-6. When a judge has evidence that a person is being illegally restrained, it is the "duty" of the judge to issue a writ of habeas corpus.

14. Knowing, voluntary, and intelligent plea:

a. Be sure to review the trial court's plea colloquy with the defendant. N.C. Gen. Stat. § 15A-1022(a) provides a list of things the trial court must discuss with the defendant before it can accept a guilty plea. If the trial court did not ask the defendant about <u>any</u> of the points listed in N.C. Gen. Stat. § 15A-1022(a), the guilty plea must be vacated. *State v. Glover*, 156 N.C. App. 139, 575 S.E.2d 835 (2003); *State v. Harris*, 14 N.C. App. 268, 270, 188 S.E.2d 1, 3 (1972); *State v. Vanderburg*, 13 N.C. App. 248, 249, 184 S.E.2d 915, 916 (1971).

b. If the trial court omitted some of the warnings from N.C. Gen. Stat. § 15A-1022(a), it will likely be difficult to show that the plea was involuntary. *See State v. Richardson*, 61 N.C. App. 284, 289, 300 S.E.2d 826, 829 (1983) (holding that the trial court's failure to inform the defendant of the mandatory minimum sentence could not have reasonably affected the defendant's decision to plead guilty). Still, be sure to review the information the trial court provided regarding the sentence. The trial court must inform the defendant of the maximum possible sentence, which is "that which could be imposed if the defendant were in the highest criminal history category and the offense were aggravated." *State v. Lucas*, 353 N.C. 568, 596, 548 S.E.2d 712, 730 (2001), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). The defendant's guilty plea was vacated in *State v. Reynolds*, 218 N.C. App. 433, 437, 721 S.E.2d 333, 336 (2012), where the trial court informed the defendant that he could face a maximum sentence of 168 months, but then sentenced him to a maximum sentence of 171 months. By contrast, the defendant's guilty plea was upheld in *State v. Bullocks*, ___ N.C. App. ___, 811 S.E.2d 713 (2018), even though the trial court misinformed the defendant about the maximum sentence for one of his charges because the defendant was properly informed about the maximum and minimum sentences for other, more serious charges that were consolidated with the other charge and the defendant received the sentence he agreed to as part of a plea agreement.

c. Be sure to focus on deficiencies that would violate the Fourteenth Amendment Due Process Clause. In order to satisfy the Due Process Clause, the trial court must inform the defendant about (1) the privilege against self-incrimination; (2) the right to trial by jury; and (3) the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 279 (1969); *see also State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980) (observing that a guilty plea "involves the waiver of

various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury").

d. Even if the judge conducts a proper colloquy, you should consider raising a voluntariness claim if there is evidence of coercion in your case. In *State v. Benfield*, 264 N.C. 75, 77, 140 S.E.2d 706, 708 (1965), the court reversed a guilty plea despite the defendant's statement that his guilty plea was freely made where the trial judge advised the defendant the jury would probably return a guilty verdict and that the judge was inclined to give the defendant a long sentence based on a guilty verdict. Similarly, in *State v. Pait*, 81 N.C. App. 286, 288, 343 S.E.2d 573, 575 (1986), the trial judge conducted a thorough colloquy with the defendant. However, the court vacated the defendant's guilty plea because the trial judge was "visibly agitated" when the defendant entered a not guilty plea, directed the defense attorney to enter an "honest plea," and the defendant feared the judge would be hard on him if he did not plead guilty. *Id*.

15. Factual basis for the guilty plea:

a. Be sure the State presented a sufficient factual basis for <u>each</u> element of <u>each</u> charge. "[G]uilty pleas must be substantiated in fact as prescribed by" N.C. Gen. Stat. § 15A-1022(c). *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007). "If the evidence contained in the record does not support defendant's guilty plea, then the judgment based thereon must be vacated." *State v. Brooks*, 105 N.C. App. 413, 417, 413 S.E.2d 312, 314 (1992).

b. This issue is arguably preserved for appellate review even if the defendant stipulated to or did not object to the State's factual basis.

   i. In *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002); and *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), the Court of Appeals held that the defendants' factual basis arguments were not preserved because the defendants failed to object to the State's factual summaries. However, in *State v. Agnew*, 361 N.C. 333, 337, 643 S.E.2d 581, 584 (2007), the Supreme Court specifically acknowledged that the defendant stipulated to the existence of a factual basis, and, yet, it reversed the defendant's guilty plea based on an insufficient factual basis despite the stipulation. *Agnew* is consistent with case law on stipulations. "Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979). The sufficiency of the factual basis for a plea is arguably a question of law that cannot be the subject of a stipulation.

   ii. Additionally, according to N.C. Gen. Stat. § 15A-1446(d)(16), an error in the entry of a guilty plea may be argued on appeal even if the defendant did not object to any errors during the plea hearing. Although other provisions under N.C. Gen. Stat. § 15A-1446 have been held unconstitutional because they conflicted with Appellate Rule 10, *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983), subsection (d)(16) arguably does not conflict with Appellate Rule 10. *See, e.g., State v. Mumford*, 364 N.C. 394, 403 699 S.E.2d 911, 917 (2010) (holding that N.C. Gen. Stat. § 15A-1446(d)(18) was not

unconstitutional because it did not conflict with Appellate Rule 10); *see also State v. Artis*, 174 N.C. App. 668, 622 S.E.2d 204 (2005) (holding that the trial court's failure to engage in a plea colloquy under N.C. Gen. Stat. § 15A-1022 was preserved even without objection based on N.C. Gen. Stat. § 15A-1446(d)(16)).

iii. If the State asserts that a factual basis argument is not preserved, you should respond and argue that the argument is preserved under *Agnew* and N.C. Gen. Stat. § 15A-1446(d)(16).

c. Be sure to consider the following factors in assessing the sufficiency of the factual basis for a guilty plea:

i. Transcript of Plea: A transcript of plea on its own does not provide a factual basis for a guilty plea. *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421 (1980).

ii. Stipulation: In *State v. Agnew*, 361 N.C. 333, 337, 643 S.E.2d 581, 584 (2007), the Supreme Court held that a stipulation to a factual basis could not support a guilty plea because it "gave the trial court no additional substantive information about the case . . . ." *Id*.

iii. Indictment: The indictment in *Agnew* was also not sufficient to support the factual basis because it "simply stated the charge and did not provide any further factual description of defendant's particular alleged conduct." *Id*. In *State v. Flint*, 199 N.C. App. 709, 728, 682 S.E.2d 443, 454 (2009), the Court of Appeals rejected an argument that indictments supported the factual basis for a guilty plea because it was "not clear if they were, in fact, before the trial court during defendant's plea."

d. The State might argue that the defendant is not prejudiced by the lack of a sufficient factual basis. For a discussion of why factual basis arguments should not be subject to prejudice arguments, please review the petition for discretionary review in State v. Graves, No. 33P19.

16. Benefit of the bargain:

a. If the defendant cannot get the benefit of the plea agreement, he may challenge the plea agreement through a petition for writ of certiorari.

i. The Court of Appeals will likely vacate the plea agreement if portions of the agreement were unenforceable and the defendant was not aware the agreement was not binding. *See, e.g., State v. Demaio*, 216 N.C. App. 558, 565, 716 S.E.2d 863, 868 (2011) (agreement reserving right to appeal denial of motion to dismiss and motion to limit expert testimony improper); *State v. Smith*, 193 N.C. App. 739, 743, 668 S.E.2d 612, 614 (2008) (defendant could not challenge denial of motion to dismiss habitual felon indictment in guilty plea appeal); *State v. Jones*, 161 N.C. App. 60, 62, 588 S.E.2d 5, 8 (2003) (defendant could not appeal habeas corpus motion after pleading guilty), *rev'd in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004).

b. If the defendant pled guilty with the understanding that he might not be able to raise some claims on appeal, the plea agreement will likely be considered valid:

i. In *State v. Ross*, 369 N.C. 393, 794 S.E. 2d 289 (2016), the Supreme Court

held that the plea agreement was valid because the defendant understood that he might not be able to seek review of pretrial motions he had filed. Similarly, in *State v. Tinney*, 229 N.C. App. 616, 622, 748 S.E.2d 730, 735 (2013), the Court of Appeals held that the plea agreement was not invalid because the defendant had "ample notice" that a provision in the agreement purporting to preserve the right to appeal a transfer order was unenforceable.

17. Right to counsel:

a. If the trial court allowed the defendant to waive his right to an attorney at the plea hearing without conducting a proper colloquy, be sure to determine whether the trial court complied with N.C. Gen. Stat. § 15A-1242. If the court failed to comply with the statute, the defendant can challenge the waiver of counsel in a petition for writ of certiorari. *See State v. Allen*, No. COA14-152, slip op. (N.C. Ct. App. Oct. 7, 2014) (unpublished).
b. If the defendant was not represented by an attorney during a sentencing hearing that occurred after the defendant pled guilty, the defendant can raise the lack of counsel in a petition for writ of certiorari. *State v. Rouse*, 234 N.C. App. 92, 95, 757 S.E.2d 690, 692 (2014).

18. Competency:

a. If there was a question about the defendant's competency to plead guilty, be sure to determine whether the trial court followed the proper procedures under N.C. Gen. Stat. § 15A-1001, *et. seq*. According to *State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 310 (1994), the question of the defendant's competency to plead guilty can be raised in a petition for writ of certiorari.

Other issues: Certiorari review is not limited to issues with a long history of litigation. Other issues, some of which are described below, might warrant review by writ of certiorari.

19. Probation:

a. If the trial court imposed probation, be sure that the sentence was stayed as required by N.C. Gen. Stat. § 15A-1451. If probation was not stayed, you should consider filing a petition for writ of supersedeas early in the appeal to enforce the stay.
b. Be sure to review the limitations on probationary sentences:
    i. A defendant sentenced to community punishment for a felony cannot be placed on probation for not less than 12 nor more than 30 months. N.C. Gen. Stat. § 15A-1343.2(d)(3).
    ii. A defendant sentenced to intermediate punishment for a felony cannot be placed on probation for not less than 18 nor more than 36 months. N.C. Gen. Stat. § 15A-1343.2(d)(4).
    iii. If the court finds that a longer term of probation is necessary, it may impose a longer period up to five years of probation. N.C. Gen. Stat. § 15A-1342(a). A

sample judgment imposing probation is included in the appendix. (A pp 7-10)

c. If the probationary sentence is too long, you should challenge the sentence as part of the guilty plea appeal. If you do not challenge the probationary sentence as part of the defendant's appeal from his guilty plea, the defendant might be barred from challenging the sentence at a later time. *See State v. Rush*, 158 N.C. App. 738, 740, 582 S.E.2d 37, 39 (2003) (rejecting argument about an improper probationary sentence because the defendant failed to file a petition for writ of certiorari when the sentence was imposed).
d. If there are other issues that you can raise on direct appeal, such as an erroneous prior record level calculation, add the argument about the probationary sentence to the brief. *See State v. Branch*, 194 N.C. App. 173, 178, 669 S.E.2d 18, 21 (2008) (reviewing the denial of a motion to suppress and an improper probationary term as part of a direct appeal in a guilty plea case). If there are no other issues that can be raised on direct appeal, you can challenge the probationary sentence in a petition for writ of certiorari.
e. If the trial court imposed special probation, which includes a period of confinement as part of a split sentence, be sure to review the terms of special probation:
    i. Special probation is automatically stayed if the defendant gives notice of appeal. N.C. Gen. Stat. 15A-1451. If you determine from the court file that the defendant received a term of special probation that was not stayed, you should file a petition for writ of supersedeas early in the appeal to enforce the stay. *State v. Stover*, 200 N.C. App. 506, 510, 685 S.E.2d 127, 131 (2009).
    ii. A split sentence imposed as part of special probation cannot be more than one fourth of the maximum sentence. N.C. Gen. Stat. § 15A-1351(a).

20. Transfer from juvenile court to superior court:

a. A juvenile may not challenge a transfer order on direct appeal if the juvenile pled guilty in superior court. *State v. Evans*, 184 N.C. App. 736, 739, 646 S.E.2d 859, 861 (2007). However, the juvenile may nevertheless challenge the transfer order through a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e); *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018).
b. The superior court is limited to reviewing the district court's transfer decision for abuse of discretion. *In re E.S.*, 191 N.C. App. 568, 573, 663 S.E.2d 475, 478 (2008). This means that the superior court may not re-weigh the evidence or decide which factors are more important. *Id*. Instead, a superior court's ruling on the question of transfer is subject to reversal if the superior court failed to properly apply the abuse of discretion standard of review. *Id.*

21. Restitution:

a. When you review the restitution order, make sure that the State presented some evidence to support the order.
    i. An unsworn statement of the prosecutor, such as a restitution worksheet, is not evidence and "cannot support the amount of restitution recommended." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992).

ii. In *State v. Hillard*, ___ N.C. App. ___, ___, 811 S.E.2d 702, 704-05 (2018), the Court of Appeals held that "written victim impact statements, together with the oral victim impact statements, expense worksheet, and accompanying documentation," constituted "sufficient competent evidence" to support a restitution order. Other unpublished opinions suggest that a victim impact statement may be sufficient to support a restitution order. *See State v. Durham*, No. COA09-78, slip. op. (N.C. Ct. App. Jul. 7, 2009); *State v. Coleman*, No. COA08-136, slip op. (N.C. Ct. App. Dec. 15, 2008); *State v. McGill*, No. COA05-1071, slip op. (N.C. Ct. App. Jun. 6, 2006).

b. An improper restitution order in a guilty plea case may be challenged in a petition for writ of certiorari. *State v. Griffin*, No. COA17-195, slip op. at 3 (N.C. Ct. App. Aug. 15, 2017) (unpublished).

c. **Caution:** Be aware that the new version of the AOC form for written transcripts of plea includes a box in the plea agreement section for defendants to stipulate to restitution. (A p 12) As a result of this change, there is a risk that a successful challenge to the restitution order will undo the plea agreement. However, the Court of Appeals recently held that a stipulation to restitution as part of the plea agreement "is not an express agreement to pay that particular restitution as a condition of the plea agreement." *State v. Murphy*, ___ N.C. App. ___, ___, 819 S.E.2d 604, 609 (2018).

22. Court costs and attorney's fees:

a. Be sure to determine whether the trial court properly calculated court costs and attorney's fees. A schedule for court costs can be found on the Judicial Branch website. There is an appointment fee of $60 when an attorney is appointed to represent an indigent defendant. N.C. Gen. Stat. § 7A-455.1. According to the IDS fee schedule, the rate for Class A through D felonies is $70 per hour. The rate for all other offenses is $60 per hour.

b. Be sure to determine whether the trial court gave the defendant notice and an opportunity to be heard regarding attorney's fees. "Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 907 (2018).

How to raise arguments in a petition for writ of certiorari: There are a few different ways to seek certiorari review in a guilty plea appeal.

23. If you have an appeal with one or more arguments that cannot be raised on direct appeal, consider these strategies:

a. If one or more issues can be raised on direct appeal, but others cannot, include all of the arguments in a brief. In addition, file a petition for writ of certiorari with the issues that cannot be raised on direct appeal. Be sure to cite *State v. Ledbetter*, 371 N.C. 192, 814 S.E.2d 39 (2018) as authority for the right to seek certiorari review.

b. If none of the issues that you identify can be raised on direct appeal, you should consider including all the issues in both a brief and a petition for writ of certiorari. This strategy was followed in *State v. Joe*, No. COA15-878, slip op. (N.C. Ct. App. May 10, 2016) (unpublished), and resulted in the defendant's guilty plea being vacated based on the lack of a sufficient factual basis.
c. You could also file an *Anders* brief as part of the direct appeal and then a petition for writ of certiorari for any meritorious issues that cannot be raised on direct appeal.

Strategies for avoiding dismissal: There are two common situations in which the State will move to dismiss guilty plea appeals. See below for possible responses.

24. *Anders* Briefs:

a. If you file an *Anders* brief in a case in which the defendant pled guilty and stipulated to his prior record level, the State might move to dismiss the appeal. The State will likely rely on *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998). You should consider the following strategies:
    i. When you prepare the record on appeal, consider including a proposed issue on appeal requesting that the Court of Appeals review the case for prejudicial error under *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493 (1967).
    ii. File a response to the motion to dismiss. As part of the response, be sure to cite the proposed issue on appeal and assert that the Court of Appeals is required under the *Anders* decision and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), to review the defendant's appeal for prejudicial error. You should also point out that the Court of Appeals rejected similar motions to dismiss in the several unpublished opinions, including *State v. Morrison*, No. COA16-942, slip op. (N.C. Ct. App. Mar. 7, 2017); *State v. Taylor*, No. COA11-1535, slip op. (N.C. Ct. App. Aug. 21, 2012); and *State v. Clemons*, No. COA11-1034, slip op. (N.C. Ct. App. May 15, 2012). Finally, you should assert that even in *Hamby*, the Court of Appeals recognized that it was required to "examine any issue that defendant could have possibly raised." *Hamby*, 129 N.C. App. at 369, 499 S.E.2d at 197.

25. Withdrawal of Guilty Plea:

a. If you file a brief arguing that the trial court improperly denied the defendant's post-sentencing motion to withdraw his guilty plea, the State might file a motion to dismiss on the ground that the defendant has no right to appeal. The logic of the State's argument is that a post-sentencing motion to withdraw is a motion for appropriate relief for which there is no right to appeal.
b. You should file a response asserting that the Supreme Court and the Court of Appeals have held that a defendant has the right to appeal a post-sentencing motion to withdraw. *See State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160 (1990) ("Defendant may appeal as of right since the trial judge denied his motion to withdraw his plea of guilty."); *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185

(1980) (holding that the defendant was entitled to appeal under N.C. Gen. Stat. § 15A-1444(e) after the trial court denied his post-sentencing motion to withdraw his guilty plea); *State v. Zubiena*, 251 N.C. App. 477, 482, 796 S.E.2d 40, 45 (2016) (same); *State v. Salvetti*, 202 N.C. App. 18, 25, 687 S.E.2d 698, 703 (2010) (same).