STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant		
DOB	Age	Highest Level Of Education Completed

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: *Use this section **ONLY** when the Court is rejecting the plea arrangement.*
☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file.

Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge

NOTE TO COURT FOR DEFENDANT APPEARING BY REMOTE AUDIO-VIDEO CONNECTION: *If defendant is unrepresented, obtain a waiver of the defendant's right to physical presence on form AOC-CR-411 before beginning the plea colloquy. If defendant is represented, address the defendant directly and obtain defendant's waiver of the right to be present pursuant to the colloquy in this section.*

The undersigned judge finds that the defendant appeared before the court by remote audio and video transmission, was represented by counsel, and having been addressed personally by the court, knowingly, intelligently, and voluntarily waived the right to personal appearance at this proceeding in response to the questions set out below:

(i). Are you currently able to hear and see me, your lawyer(s), and the attorney for the State from your current location, either in person or over the audio and video transmission? (i) _____

(ii). Has your attorney explained to you that you have a right to be present physically in court for this plea, the possible consequences of waiving that right, that you do not have to waive that right, and that if you do not waive that right, this plea will be conducted in person without an unreasonable delay? (ii) _____

(iii). Do you understand that by agreeing to participate in this proceeding by audio and video transmission, you are giving up your right to be present physically? (iii) _____

(iv). Do you now waive your right to be present physically and agree to having this proceeding today by means of audio and video transmission? (iv) _____

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☐ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

	Answers
1. Are you able to hear and understand me?	(1) _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?	(2) _____
3. At what grade level can you read and write?	(3) _____
4. (a) Are you now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances?	(4a) _____
(b) When was the last time you used or consumed any such substance?	(4b) _____
(c) How long have you been using or consuming this medication or substance?	(4c) _____
(d) Do you believe your mind is clear, and do you understand what you are doing in this hearing?	(4d) _____
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?	(5) _____
6. (a) Have you and your lawyer discussed the possible defenses, if any, to the charges?	(6a) _____
(b) Are you satisfied with your lawyer's legal services?	(6b) _____
7. (a) Do you understand that you have the right to plead not guilty and be tried by a jury?	(7a) _____
(b) Do you understand that at such trial you have the right to confront and to cross examine witnesses against you?	(7b) _____
(c) Do you understand that by your plea(s) you give up these and other important constitutional rights to a jury trial?	(7c) _____
8. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law?	(8) _____
☐ 9. Do you understand that upon conviction of a felony you may forfeit any State licensing privileges you have in the event that your probation is revoked?	(9) _____
10. Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?	(10) _____
11. Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved?	(11) _____

(Over)

12. Do you understand that you are pleading ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges shown below? *(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)* (12) _____

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punishment

☐ See attached AOC-CR-300A, for additional charges.

*G = Guilty GA = *Alford* plea NC = No Contest

TOTAL MAXIMUM PUNISHMENT

MANDATORY MINIMUM FINES & SENTENCES *(if any)*

✓ **NOTE TO CLERK:** *If this column is checked this is an added offense or reduced charge.*

‡ **NOTE:** *Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

13. Do you now personally plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges I just described? (13) _____

14. ☐ (a) Are you in fact guilty? (14a) _____

☐ (b) *(no contest plea)* Do you understand that, upon your plea of no contest, you will be treated as being guilty whether or not you admit that you are in fact guilty? (14b) _____

☐ (c) *(*Alford *guilty plea)*

(1) Do you now consider it to be in your best interest to plead guilty to the charges I just described? (14c1) _____

(2) Do you understand that, upon your "*Alford* guilty plea," you will be treated as being guilty whether or not you admit that you are in fact guilty? (14c2) _____

☐ 15. *(Use if aggravating factors are listed below)* Have you admitted the existence of the following aggravating factors: (15) _____

_____

_____

_____,

have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors?

☐ 16. *(Use if sentencing points are selected below)* Have you admitted the existence of the following sentencing points not related to prior convictions: ☐ offense committed while on supervised or unsupervised probation, parole, or post-release supervision ☐ offense committed while serving a sentence of imprisonment ☐ offense committed while on escape from a correctional institution, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with the appropriate notice about these sentencing points? (16) _____

☐ 17. *(Use if No. 15 or 16 selected above)* Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination? (17) _____

18. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (18) _____

19. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (19) _____

STATE VERSUS	File No.
Name Of Defendant	

20. Have you agreed to plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) _____

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (22) _____

23. Do you now personally accept this arrangement? (23) _____

24. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (24) _____

25. Do you enter this plea of your own free will, and do you fully understand what you are doing? (25) _____

26. Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence? (26) _____

27. Do you have any questions about what has just been said to you or about anything else connected to your case? (27) _____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		*Date*
Date	*Name (type or print)*	*Signature Of Defendant*
☐ *Notary*	*Signature*	*Name Of Defendant (type or print)*
SEAL	*Date My Commission Expires* / *County Where Notarized*	
☐ *Magistrate* ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*		

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charges to which the defendant is pleading, and the aggravating and mitigating factors and prior record points for sentencing, if any.

Date	*Name Of Lawyer For Defendant (type or print)*	*Signature Of Lawyer For Defendant*

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charges in this case.

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

(Over)

PLEA ADJUDICATION

Upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that:

1. There is a factual basis for the entry of the plea *(and for the admission as to aggravating factors and/or sentencing points)*;
2. The defendant is satisfied with his/her lawyer's legal services;
3. The defendant is competent to stand trial;
4. ☐ The State has provided the defendant with appropriate notice as to the aggravating factors and/or points; ☐ The defendant has waived notice as to the aggravating factors and/or points; and
5. The plea *(and admission)* is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea *(and admission)* is hereby accepted by the Court and is ordered recorded.

Date	*Name Of Presiding Judge (type or print)*	*Signature Of Presiding Judge*

SUPERIOR COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

DISTRICT COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

CERTIFICATION BY PROSECUTOR

The undersigned prosecutor enters a dismissal to the above charges pursuant to a plea arrangement shown on this Transcript Of Plea.

Date	*Name Of Prosecutor (type or print)*	*Signature Of Prosecutor*

Article 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

(a) In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may recommend that the defendant make restitution or reparation out of any earnings gained by the defendant if he is granted work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order or recommendation providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d) and Article 81C of this Chapter.

If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and the plea agreement may include a provision that the defendant will be ordered to pay for such treatment.

When restitution or reparation is recommended as part of a plea arrangement that results in an active sentence, the sentencing court shall enter as a part of the commitment that restitution or reparation is recommended as part of the plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation recommendations incident to commitments. (1973, c. 1286, s. 1; 1975, c. 117; c. 166, s. 27; 1977, c. 614, ss. 3, 4; 1977, 2nd Sess., c. 1147, s. 1; 1979, c. 760, s. 3; 1985, c. 474, s. 2; 1987, c. 598, s. 3; 1997-80, s. 2; 1998-212, s. 19.4(e).)

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
(2) Determining that he understands the nature of the charge;
(3) Informing him that he has a right to plead not guilty;
(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
(5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
(6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1989, c. 280; 1993, c. 538, s. 10; 1994, Ex. Sess., c. 24, s. 14(b).)

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

(a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the prosecutor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.

(b) Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal. If a judge rejects a plea arrangement disclosed, in open court, pursuant to subsection (a) of this section, then the judge shall order that the rejection be noted on the plea transcript and shall order that the plea transcript with the notation of the rejection be made a part of the record.

(c) If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 186; 2009-179, s. 1.)

JURY SELECTION

Robert L. Farb, UNC School of Government (August 2015)
Updated by Christopher Tyner (January 2024)

Contents

I. Introduction. This section covers jury selection in both capital and non-capital cases. For a comprehensive discussion of jury selection in capital cases, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK, 79-103 (3d ed. 2013). Another comprehensive resource is JULIE RAMSEUR LEWIS AND JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL VOL. 2 TRIAL, Ch. 25, Selection of Jury (2020 ed.) [hereinafter DEFENDER MANUAL]. The incorporation in whole or in part of excerpts from these publications is gratefully acknowledged.

II. Qualifications of Jurors. The qualifications of jurors are set out in G.S. 9-3:

- be a citizen of North Carolina and a resident of the county in which the juror serves
- has not served as a juror during the past two years (see additional discussion below)
- be at least eighteen years old
- be physically and mentally competent
- be able to understand the English language (see additional discussion below)
- has not been convicted of or plead guilty or no contest to a felony without restoration of citizenship (see additional discussion below)
- has not been adjudged mentally incompetent

In addition, a person who serves a full term of service as a grand juror is exempt from service as a juror or grand juror for six years. G.S. 9-3, 9-7(b).

G.S. 9-3 was modified by 2023 legislation, S.L. 2023-140, Sec. 44.(a), with an effective date of July 1, 2024. On or after the effective date, new G.S. 9-3(a)(1) requires that a person be a citizen of the United States to be qualified as a juror. Prior to the enactment of the legislation and as reflected in the bulleted list above, G.S. 9-3 did not explicitly require that a person be a United States citizen to serve as a juror, instead requiring that a person be a citizen of North Carolina. G.S. 9-3 (2022). It is arguable that a person necessarily must be a citizen of the United States to be a citizen of North Carolina. *See* U.S. Const. amend. XIV, § 1 (stating that United States citizens are citizens of the state in which they reside); DEFENDER MANUAL at 25.2 (stating that "a North Carolina citizen is one who is a citizen of the United States and a resident of North Carolina"). Older cases from the North Carolina Supreme Court held that people who were not United States citizens were disqualified from jury service under common law. Hinton v. Hinton, 196 N.C. 341 (1928); *see also* State v. Emery, 224 N.C. 581, 584 (1944) (citing *Hinton*). Note that Section 26 of Article I of the North Carolina Constitution, adopted in 1970, states that "[n]o person shall be excluded from jury service on account

of . . . national origin," though it does not appear that the North Carolina appellate courts have analyzed that constitutional provision in the context of whether a person who is not a United States citizen is disqualified from serving as a juror. There is no federal constitutional prohibition on requiring that jurors be United States citizens. *See* Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320, 332 (1970) (stating that "States remain free to confine the selection [of jurors] to citizens"). The juror qualification requirements otherwise were substantively unchanged by the 2023 legislation. *Compare* G.S. 9-3(a)(1)-(10) (as modified by S.L. 2023-140, Sec. 44.(a)), *with* G.S. 9-3 (2022).

A person who does not meet the statutory requirements to be qualified to serve as a juror is subject to challenge for cause. G.S. 9-3; *see also* Section XIII, below (discussing challenges for cause).

A. Service as a Juror During Past Two Years. People who have served on federal juries as well as those who have served on state juries are disqualified from serving within two years. State v. Golphin, 352 N.C. 364, 424-25 (2000). The two-year exclusion is triggered only if the juror is sworn; merely receiving a jury summons is insufficient. State v. Berry, 35 N.C. App. 128, 134 (1978). The date to be used when determining the end of the two-year period is the date when all the jurors are sworn at the beginning of jury selection. *Golphin*, 352 N.C. at 425.

B. English Language Capability. In *State v. Smith*, 352 N.C. 531, 547-48 (2000), the court upheld the constitutionality of the requirement that jurors hear and understand English. Since *Smith* was decided, G.S. 9-3 was amended to require that a juror only needs to understand English, deleting the requirement to hear English. This change was made to accommodate jurors who are deaf or otherwise hard of hearing. For information how a judge or other court official arranges for services to these jurors, consult the Administrative Office of Courts.

C. Restoration of Felon's Citizenship. A convicted felon's citizenship is automatically restored on the unconditional discharge of an inmate, parolee, or probationer, an unconditional pardon, or the satisfaction of all the conditions of a conditional pardon. G.S. 13-1(1) through (3). Similar conditions apply to a felon who was convicted in federal court or another state court. G.S. 13-1(4), (5).

III. Selecting the Jury Pool. There is a two-step process for selecting the jury pool (also known as the "jury panel," but the term "jury pool" will be used here). First, the jury commission for each county, either annually or biannually, constructs a master jury list of potential jurors to be used for grand and trial (petit) juries from lists of registered voters and licensed drivers. G.S. 9-2(a), 9-2(b).

Second, the clerk of superior court ("the clerk") or the assistant or deputy clerk prepares a randomized list of names from the master jury list of those to be summoned by the sheriff for jury duty. G.S. 9-5. Upon request of the clerk and with agreement of the clerk and senior resident superior court judge, the duties of the clerk may be performed by "judicial support staff." G.S. 9-7.1(a). That term is defined to include certain employees of the Judicial Branch other than employees of the clerk. G.S. 9-7.1(b).

When the jury pool reports to court, G.S. 9-14 requires the clerk to swear all jurors who have not been selected as grand jurors. *See also* N.C.P.I.—Crim. 100.22 (introductory remarks). Each juror takes the oath required by section 7 of article VI of the North Carolina Constitution and the oath required by G.S. 11-11.

Sometimes the jury pool, particularly for a capital trial, consists of a large number of prospective jurors. The trial judge in such a case may choose to subdivide the juror pool into separate panels for administrative reasons. If so, the judge should ensure that the subdivision of the jury pool is accomplished by a random process.

IV. Challenges to Jury Pool.

A. Equal Protection Challenges. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and article I, sections 19 and 26, of the North Carolina Constitution protect against jury selection procedures that intentionally exclude members of an identifiable class, such as race, from jury service. Castaneda v. Partida, 430 U.S. 482, 493-94 (1977); State v. Hardy, 293 N.C. 105, 113-15 (1977). A defendant alleging discrimination in the jury selection process need not belong to the class that is the subject of alleged discrimination—that is, a white defendant has standing to challenge the exclusion of blacks from jury service. *See* Campbell v. Louisiana, 523 U.S. 392, 398 (1998).

The defendant has the burden of proving intentional discrimination. State v. Ray, 274 N.C. 556, 563 (1968). The defendant must first establish a prima facie case of discrimination against a particular group by showing that the jury selection procedure resulted in substantial underrepresentation of that group. *Compare Castaneda*, 430 U.S. at 496-97 (prima facie case established), *with Hardy*, 239 N.C. at 114-16 (prima facie case not established). The burden then shifts to the State to rebut the prima facie case by showing a race-neutral reason for the discrepancy. *Castaneda*, 430 U.S. at 497 (State failed to rebut prima facie case); United States v. Perez-Hernandez*,* 672 F.2d 1380, 1387-88 (11th Cir. 1982) (State rebutted prima facie case).

B. Fair Cross-Section Challenges. The Sixth Amendment requires that the jury be drawn from a "representative cross-section" of the community. *See* Duren v. Missouri, 439 U.S. 357, 363-64 (1979); Taylor v. Louisiana, 419 U.S. 522, 528-29 (1975). The primary difference between a fair cross-section and equal protection challenge is that to prove a fair cross-section violation, the defendant is not required to prove intentional discrimination by the State. Instead, the defendant need only show the exclusion of the alleged class was "systematic" or an inevitable result of the selection procedure that excluded the class from the process. *Taylor,* 419 U.S. at 538 (cross-section violation when state constitution and state law provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service; 53% of people eligible for jury service were female, but no more than 10% of people in jury pool were female); State v. Bowman*,* 349 N.C. 459, 467-69 (1998) (no prima facie case of systematic underrepresentation when black population was 39.17% and blacks in jury pool were 23%). The cross-section requirement applies only to the jury pool and not to the twelve-person jury. Holland v. Illinois, 493 U.S. 474, 480-81 (1990).

A challenge to the jury pool must comply with the procedural requirements of G.S. 15A-1211(c), which includes a requirement that the challenge must be in writing and be made and decided before any juror is examined.

C. Remedy for Successful Challenge. If a challenge on either equal protection or cross section grounds is successful, the trial court must dismiss the jury pool, G.S. 15A-1211(c), and a new jury pool must be lawfully selected.

V. Supplemental Jurors to Original Jury Pool. Sometimes an original jury pool will be insufficient to meet the court's needs. To facilitate the court's business, G.S. 9-11(b) permits a trial judge, in his or her discretion, at any time before or during a court session, to direct that supplemental jurors be selected from the master jury list in the same manner as regular jurors. The judge may discharge these jurors at any time during the session and they are subject to the same challenges as regular jurors. *Id.* This statute "neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served." State v. Mebane, 106 N.C. App. 516, 524 (1992) (finding no abuse of discretion by trial judge in continuing with jury selection after the original pool had been depleted even though only four of the fifty supplemental jurors selected from the jury list had been served and had reported for jury duty).

Under G.S. 9-11, trial judges also are permitted, without using the jury list, to "order the sheriff to summon from day to day additional jurors to supplement the original venire." Supplemental jurors summoned by the sheriff must have the same qualifications as jurors selected for the regular jury list and are subject to the same challenges. G.S. 9-11(a). This type of juror is "selected infrequently and only to provide a source from which to fill the unexpected needs of the court." State v. White, 6 N.C. App. 425, 428 (1969).

The sheriff may use his or her discretion in determining the method of selection of the supplemental jurors, but "must act with entire impartiality." *White*, 6 N.C. App. at 428 (quotation omitted). G.S. 9-11(a) provides that if the judge finds that the sheriff is not suitable to select additional jurors because of a direct or indirect interest in the trial, the judge can appoint some other suitable person to summon the supplemental jurors (for example, the head of another law enforcement agency in the county whose agency is not involved in the trial). Challenges to the selection of the supplemental jurors are sustainable if "there is partiality or misconduct [by] the Sheriff, or some irregularity in making out the list." State v. Dixon, 215 N.C. 438, 440 (1939) (quotation omitted).

VI. Special Venire from Another County. A special venire of jurors from outside the county or the district where the case is being tried may be summoned for jury duty by the judge if he or she determines that it is necessary for a fair trial. The defendant or the State may move for special venire or the judge may do so on his or her own motion. G.S. 9-12(a); G.S. 15A-958. This motion can be made as an alternative to a motion for a change of venue. State v. Moore, 319 N.C. 645, 646 (1987). The party making a motion for a special venire has the burden of proof to establish that "it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *Id.* at 650 (quotation omitted); State v. Jaynes, 342 N.C. 249, 264 (1995).

The judge can order the jurors to be brought from any county or counties in the district or set of districts in which the county of trial is located or in any adjoining district or districts as defined in G.S. 7A-41.1(a). *See* G.S. 9-12(a). These jurors are selected and serve in the same manner as supplemental jurors from master jury lists. They also are subject to the same challenges as other jurors with the exception of a challenge for non-residency in the county of trial. *Id.* Transportation may be furnished to the jurors instead of mileage. G.S. 9-12(b).

VII. Requests to be Excused Not Requiring Personal Appearance. In certain situations, a person summoned for jury duty may request to be excused, deferred, or exempted from service without appearing in person. 2023 legislation amended G.S. 9-6 with a new subsection (a1), effective July 1, 2024, that states: "All applications for excuses from jury duty, including applications based on disqualification under G.S. 9-3, shall be made on a form developed and furnished by the Administrative Office of the Courts." S.L. 2023-140, Sec. 44.(b). The new form was not yet available at the time of writing.

A. Excusing Juror Based on Age. There is no maximum age for jury service. People who are 72 years old or older may request to be excused from the jury in writing rather than by personally appearing in court. A signed statement of the ground for the request must be filed with the chief district court judge or his or her designee (a district court judge, the clerk, or judicial support staff) at least five business days before the date the person is summoned to appear. G.S. 9-6.1(a) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-6.1(a) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change and has an effective date of July 1, 2024). The district court judge, who handles these requests in advance of trial, has the discretion whether to allow or deny the request, but a judge may not adopt a blanket policy of excusing all elderly jurors who request to be excused. *See* State v. Rogers, 355 N.C. 420, 447-48 (2002).

The same standard applies at the superior court trial. *See* State v. Elliott, 360 N.C. 400, 406-08 (2006) (trial judge did not abuse his discretion in refusing to excuse an elderly prospective juror when she had no hardship other than advanced age; four elderly prospective jurors that had been excused each had a compelling personal hardship). A judge should remember, based on *State v. Rogers* that he or she must exercise his or her discretion whether to excuse elderly jurors and may not adopt a blanket policy of excusing them.

B. Excusing Jurors Who Are Students. A person who is a full-time student enrolled at an out-of-state postsecondary private educational institution, including a trade or professional institution, college, or university may request to be excused from the jury in writing rather than by personally appearing in court. A signed statement of the ground for the request must be filed with the chief district court judge or his or her designee (a district court judge, the clerk, or judicial support staff) at least five business days before the date the person is summoned to appear. G.S. 9-6.1(a) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-6.1(a) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change and has an effective date of July 1, 2024). If the session of court for which the full-time student is summoned for jury service is scheduled during a period of time when he or she is taking classes or exams, G.S. 9-6(b1) mandates that the person must be excused upon request made pursuant to G.S. 9-6.1(a) and supported by documentation showing enrollment at the out-of-state educational institution.

C. Excusing Juror with Disability. A person summoned as a juror who has a disability that could interfere with his or her ability to serve as a juror may request in writing (rather than personally appearing in court) to be excused from jury service by filing a signed statement with the ground to support the request, including a brief description of the disability. The request must be filed with the chief district court judge or his or her designee (a district court judge, the clerk, or judicial support staff) at least five business days before the date the person is summoned to appear. G.S. 9-6.1(b) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-

6.1(b) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change and has an effective date of July 1, 2024).

A superior court during jury selection also may excuse a juror who has a disability that could interfere with the ability to serve. State v. Alston, 341 N.C. 198, 222 (1995) (juror excused after it became apparent that she had been very sick with the measles and encephalitis and she did not understand the proceedings).

D. Procedure. A person summoned as a juror may request either a temporary or permanent exemption from jury service. G.S. 9-6.1(c). Except in situations where excusal is mandatory on the basis of enrollment as a full-time student out of state, the judge, clerk, or judicial support staff member responsible for hearing applications for excuses from jury duty has discretion whether to grant the requested excuse under the same standards otherwise applicable to hardship excuses, see Section VIII.A. below, and may substitute a temporary exemption for a requested permanent exemption. G.S. 9-6.1(c) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-6.1(c) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023). Eligible supplemental jurors summoned under G.S. 9-11 may give notice of their request for an excuse at the time of being summoned. *Id*. If a request is rejected the prospective juror must be immediately notified by telephone, letter, or personally. *Id*.

VIII. Hardship Excuses. The General Assembly has declared it is the public policy of the state that jury service is a solemn obligation of all qualified citizens and that people qualified for jury service should be excused or deferred only for reasons of "compelling personal hardship" or because service would be "contrary to the public welfare, health, or safety." G.S. 9-6(a).

A. Procedure. The chief district court judge must promulgate procedures whereby applications for excuses from jury duty are heard and determined in district court before the date that a jury session or sessions of superior or district court convenes. G.S. 9-6(b). The chief district court judge may delegate the duty to receive, hear, and pass upon applications for excuses to another district court judge, judicial support staff, or to the clerk of superior court (with the clerk's consent) (S.L. 2023-103, Sec. 8.(a) amended G.S. 9-6(b) by permitting the duty to receive, hear, and pass upon applications for excuses to be delegated to the clerk of superior court with the clerk's consent, effective October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change in substance and has an effective date of July 1, 2024). As noted above, 2023 legislation, S.L. 2023-140, Sec. 44.(b), amended G.S. 9-6 with a new subsection (a1), effective July 1, 2024, requiring that requests for excuses from jury duty be made on a form developed by the Administrative Office of the Courts. The new form was not yet available at the time of writing.

With the exception of the mandatory excuse for certain full-time students enrolled out-of-state, G.S. 9-6(a) generally provides that an excuse from jury duty "should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety." A superior court judge during jury selection also may excuse or defer prospective jurors for hardship. G.S. 9-6(f). A judge has broad discretion in determining what constitutes hardship. *See, e.g.,* State v. Rogers, 355 N.C. 420, 448 (2002) (language of G.S. 9-6(a) gives court "considerable latitude" and decision whether to excuse juror "lies in the [court's] discretion"); State v. Hedgepeth, 350 N.C.

776, 797 (1999) (no error in failing to excuse juror who had inoperable brain tumor when trial judge was convinced that juror's memory impairment was insufficient to disqualify juror).

The judge (and presumably the clerk or judicial support staff) hearing applications for excuses from jury duty must excuse any person who is disqualified from service under G.S. 9-3. G.S. 9-6(d); *see also* Section II., above. The judge must inform the clerk of superior court of persons excused from jury service and the clerk must keep a record of excuses separate from the master jury list. G.S. 9-6(e). Effective July 1, 2024, G.S. 9-6(e) requires that this record be kept in accordance with G.S. 9-6.2, which requires, among other things, that the clerk communicate to the State Board of Elections information regarding requests to be excused from jury service on the basis that the person is not a United States citizen. *See generally* S.L. 2023-140, Sec. 44.

B. Right to be Present. A defendant's unwaivable right to be present during his or her capital trial does not apply to a district court's proceedings to hear hardship excuses before the superior court trial. State v. McCarver, 341 N.C. 364, 378-79 (1995). However, the unwaivable right to be present begins once the superior court case is called for trial, which means thereafter a superior court judge may not excuse jurors outside the defendant's presence. State v. Cole, 331 N.C. 272, 275 (1992); State v. Smith, 326 N.C. 792, 794 (1990).

IX. Preliminary Procedures Before Voir Dire Questioning.

A. Defendant's Plea to Charges. Unless the defendant has filed a written request for an arraignment, the court must enter a not guilty plea on the defendant's behalf. A defendant who filed a written request for an arraignment must be arraigned and have his or her plea recorded outside the prospective jurors' presence. G.S. 15A-1221; 15A-941.

B. Pleadings May Not Be Read to Prospective Jurors. The judge may not read the pleadings (e.g., the indictment) to the jury. G.S. 15A-1213.

C. Judge's Preliminary Instructions to Prospective Jurors. Before questioning begins, the trial judge must identify the parties and their attorneys and must briefly inform the prospective jurors of the

- charges against the defendant,
- dates of the alleged offenses,
- name of any alleged victim,
- defendant's plea, and
- any affirmative defense of which the defendant has given pretrial notice

G.S. 15A-1213; 15A-1221(a)(2). The judge may use N.C.P.I.—Crim. 100.20 to accomplish these duties. *See also* N.C.P.I.—Crim. 100.21 (remarks to prospective jurors after excuses heard).

In a capital case, there is an additional instruction, N.C.P.I.—Crim. 106.10, that the judge may give to the prospective jurors that briefly explains the trial and sentencing proceedings.

D. Jury Instruction on Employer's Unlawful Discharge of Employee for Juror's Service. If appropriate under the circumstances of a particular trial, a judge may

want to instruct the prospective jurors about the prohibition in G.S. 9-32 against an employer's discharging or demoting a juror because the employee has been called for jury duty or is serving as a grand juror or petit juror. Below is a suggested jury instruction to prospective jurors before voir dire begins.

> Members of the jury, because this trial may be lengthy and may cause you to miss many work days, I want to inform you of North Carolina law concerning your employer and service as a juror. An employer is prohibited by law from discharging or demoting any employee because he or she has been called for jury duty or is serving as a juror. An employer who violates this law is subject to a civil lawsuit for damages suffered by an employee as a result of the violation, as well as reinstatement to the employee's former position.

E. Jury Questionnaire. A judge has the discretion to grant a party's request that prospective jurors complete a questionnaire as part of the jury selection process. State v. Lyons, 340 N.C. 646, 667 (1995) (no error in denying the defendant's motion for a questionnaire); State v. Fisher, 336 N.C. 684, 693-94 (1994) (same; noting that "[r]egulation of the manner and extent of the inquiry of prospective jurors concerning their fitness rests largely in the discretion of the trial court"). A judge may review the questionnaire to determine whether questions should be deleted or revised. State v. Blakeney, 352 N.C. 287, 298 (2000) (trial court did not abuse its discretion in deleting question on defendant's jury questionnaire that asked about jurors' contacts with people of other races; defendant did not show that he was prohibited from asking same question during voir dire); *Fisher*, 336 N.C. at 694 (similar holding).

F. Random Selection of Prospective Jurors for Questioning. G.S. 15A-1214(a) requires that the court clerk must call jurors from the jury pool by a system of random selection that precludes advance knowledge of the identity of the next juror to be called. All counties use an automated system to ensure a random selection. The statute also provides that a juror who is called and assigned to the jury box retains the seat assigned until excused.

X. Voir Dire Procedure.

A. Generally. Two sets of statutes govern jury voir dire, G.S. 9-14 and 9-15, and G.S. 15A-1211 through 15A-1217. These statutes grant the trial judge broad discretion to determine the extent and manner of voir dire. *See, e.g.*, *Fisher*, 336 N.C. at 693-94 (extent and manner of voir dire subject to trial judge's close supervision and subject to reversal only on showing of abuse of discretion). Note that while a trial judge has broad discretion with respect to voir dire, the North Carolina Court of Appeals recently held that structural error occurred during jury selection where the trial court admonished prospective jurors in a manner that, while well intentioned, interjected issues of race and religion into the selection process such that some potential jurors likely would be reluctant to honestly answer questions posed in voir dire. State v. Campbell, 280 N.C. App. 83, 89 (2021).

B. Recording Jury Selection. In a capital case, jury selection must be recorded. G.S. 15A-1241(a)(1) (requiring recording of all proceedings except jury selection

in non-capital cases). Upon a motion of any party or on the judge's own motion, jury selection must be recorded in a non-capital case. G.S. 15A-1241(b).

C. Number of Peremptory Challenges. Peremptory challenges allow a party to remove a juror for any reason, except for impermissible racial and other reasons under *Baston v. Kentucky*, discussed in Section XIV.B., below. Challenges for cause are discussed in Section XIII., below.

Peremptory challenges under G.S. 15A-1217 are allotted to the parties based on the number of defendants, not on the number of charges against any defendant.

In capital cases, each defendant is allowed 14 challenges and the State is allowed 14 challenges for each defendant. In noncapital cases, each defendant is allowed six challenges and the State is allowed six challenges for each defendant.

Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges.

The North Carolina Supreme Court has held that a trial court does not have the authority to grant additional peremptory challenges other than permitted in G.S. 15A-1214(i) (trial court must grant additional peremptory challenge if, on reconsideration of defendant's previously denied challenge for cause, the court determines that juror should have been excused for cause). State v. Smith, 359 N.C. 199, 207 (2005); State v. Hunt, 325 N.C. 187, 198 (1997).

The exercise of peremptory challenges is discussed in more detail in Section XIV., below. The case law sometimes refers to a peremptory challenge as a "peremptory strike" and the exercise of a peremptory challenge as "striking" a prospective juror. This chapter also uses that terminology at times, particularly when helpful for clarity while discussing "*Batson* challenges," a term that refers to a party's claim of allegedly impermissible use of a peremptory strike by the opposing party.

D. Parties' Right to Question Jurors. Counsel for both parties are statutorily entitled to question jurors and are primarily responsible for conducting voir dire. G.S. 15A-1214(c); G.S. 9-15(a). The trial judge "may briefly question prospective jurors individually or as a group concerning general fitness and competency." G.S. 15A-1214(b). However, both parties are entitled to repeat the judge's questions. G.S. 15A-1214(c). State v. Jones, 336 N.C. 490, 496-98 (1994) (trial judge erred when, at outset of jury selection, he indicated that counsel for either side would not be permitted to ask any question of a prospective juror that had been previously asked and answered).

To expedite voir dire, the trial judge may require the parties to direct certain general questions to the panel as a whole; however, a blanket ban prohibiting parties from questioning jurors individually violates G.S. 15A-1214(c). *See* State v. Campbell, 340 N.C. 612, 627 (1995); State v. Phillips, 300 N.C. 678, 681-82 (1980).

E. Order of Questioning. G.S. 15A-1214(d) requires that the prosecutor question prospective jurors first. When the prosecutor is satisfied with a panel of twelve after exercising challenges for cause and peremptory challenges, the prosecutor passes the panel to the defense for questioning and exercise of challenges for cause and peremptory challenges. Then the questioning reverts to the State to fill all vacancies and then back to the defendant. Failure to comply with the statute is

error, although it may not necessarily constitute prejudicial error. *See, e.g.*, State v. Lawrence, 352 N.C. 1, 13 (2000); State v. Woodley, 286 N.C. App. 450, 464-66 (2022) (defendant was not prejudiced by statutorily noncompliant jury selection procedure involving the passing of five jurors at a time because of social distancing in the jury box during COVID-19 pandemic).

In noncapital cases the trial court has discretion whether to allow a party to attempt to rehabilitate a juror who is challenged for cause by the opposing party. State v. Enoch, 261 N.C. App. 474, 488 (2018) (citing precedent establishing that providing an opportunity to rehabilitate is not mandatory; trial court did not err by denying defendant an opportunity to rehabilitate before granting State's peremptory challenge). Note that challenges for cause are discussed in detail in Section XIII. and juror rehabilitation in capital cases is discussed in Section XII.A.

F. Order of Questioning with Co-Defendants. After the State is satisfied with a panel of twelve jurors, the panel should be passed to each co-defendant consecutively, who exercise challenges for cause and peremptory challenges, and then the questioning reverts to the State to fill all vacancies and then goes back to the co-defendants. G.S. 15A-1214(e), (f). The trial judge has the discretion to determine the order of examination among multiple defendants. G.S. 15A-1214(e).

G. Alternate Jurors. The trial judge may permit the seating of one or more alternate jurors. G.S. 15A-1215(a). However, in a capital trial or a capital sentencing hearing (when the defendant has pled guilty to the offense), the judge is required to provide for the selection of at least two alternate jurors. G.S. 15A-1215(b). The judge should consider the expected length of a capital trial or sentencing hearing in deciding how many additional alternates beside the required two should be selected. The same considerations are relevant in determining how many alternates, if any, should be selected in a non-capital case.

H. Individual Voir Dire. Individual voir dire is a process in which a single prospective juror is questioned by the parties without the presence of the other prospective jurors. A defendant does not have a right to individual voir dire. State v. Nicholson, 355 N.C. 1, 18 (2002). The trial judge in capital cases has statutory authority to permit individual voir dire of jurors. G.S. 15A-1214(j). Even absent statutory authority, it would appear that a judge also may do so in a non-capital case given a trial court's broad authority over the jury selection process. State v. Ysaguire, 309 N.C. 780, 784 (1983) (implicitly recognizing discretion to allow individual voir dire in non-capital case). A judge who permits individual voir dire may limit it to certain issues, such as death qualification, pretrial publicity, or other sensitive topics. State v. Roache, 358 N.C. 243, 274 (2004).

When conducting individual voir dire in a capital case pursuant to G.S. 15A-1214(j), the State first must pass on each juror just as it passes on twelve jurors when conducting regular voir dire. G.S. 15A-1214(j); *Roache*, 358 N.C. at 272-74. The North Carolina Supreme Court has stated that in cases where G.S. 15A-1214(j) does not apply but individual voir dire nevertheless is conducted, the State must pass on twelve jurors just as it would during regular voir dire. *Roache*, 358 N.C. at 274.

I. Reopening Voir Dire. After a juror has been accepted by one or both parties, if the trial judge discovers that a juror has made a misrepresentation during voir dire or for other "good reason," the judge may reopen voir dire of the juror, before or after the jury has been impaneled. State v. Holden, 346 N.C. 404, 429 (1997); G.S. 15A-1214(g). For example, when a juror appears to have changed his or her mind since the State's examination, or the juror's answers to defense questions appear inconsistent with answers to the State's questions, there may be a good reason to reopen voir dire. State v. Womble, 343 N.C. 667, 678 (1996) (trial judge had good reason to reopen voir dire of juror whose answers to questions posed by defense counsel indicated that he might be unable to return death sentence); State v. Brady, 299 N.C. 547, 553 (1980) (trial judge did not commit reversible error by permitting further examination and challenge of juror by State after jury was impaneled and trial had begun, when juror indicated that he was employed by and worked closely with defendant's brother).

The trial judge may question the juror or permit the parties to do so, and the judge may excuse the juror for cause. G.S. 15A-1214(g). Once the judge reopens examination of a juror, each party has the "absolute" right to exercise any remaining peremptory challenges to excuse the juror. G.S. 15A-1214(g)(3); State v. Womble, 343 N.C. 667, 678 (1996). Reopening occurs when the judge allows the parties to question the juror, State v. Boggess, 358 N.C. 676, 683 (2004), State v. Hammonds, 218 N.C. App. 158, 165 (2012), even if neither party asks any questions. State v. Thomas, 230 N.C. App. 127, 132-33 (2013). In *Thomas*, after the jury was impaneled a juror informed a court official that she knew a State's witness. The trial judge questioned the juror, but neither party did so even though the judge gave them the opportunity. The court held that once the trial judge allowed the parties to question the juror, it reopened examination. The defendant was not required to ask any questions in order to exercise a peremptory challenge to remove the juror. The court remanded the case for a new trial. The North Carolina Supreme Court has observed that a trial judge "has leeway to make an initial inquiry" into whether there are grounds for reopening voir dire by, for example, questioning the juror or consulting with the parties, and that this initial inquiry does not necessarily constitute a formal reopening of voir dire such that the juror may be challenged for cause or by peremptory challenge. *Boggess*, 358 N.C. at 683 (2004); *see also* State v. Gidderon, 289 N.C. App. 216, 219-222 (2023) (trial court did not abuse its discretion by declining to reopen voir dire after examining juror); State v. Adams, 285 N.C. App 379, 390 (2022) (same).

XI. Scope of Permitted Questioning. Jury voir dire serves two basic purposes. It assists counsel: (1) to determine whether a basis for a challenge for cause exists, and (2) to intelligently exercise peremptory challenges. State v. Wiley, 355 N.C. 592, 611 (2002); State v. Anderson, 350 N.C. 152, 170 (1999).

The scope of permitted voir dire is largely a matter of trial court discretion. There are a large number of appellate cases concerning proper and improper voir dire questions, and sometimes they appear inconsistent. An explanation for the apparent inconsistency is that appellate courts emphasize a trial judge's broad discretion in controlling jury selection. If one judge allows a question in one trial, while a different judge disallows a similar question in another trial, both judges' rulings may be affirmed.

Also, one must remember that appellate courts review only a small number of all voir dire rulings, namely a convicted defendant's appellate challenge when a trial judge upheld a prosecutor's question over a defendant's objection or sustained a prosecutor's

objection to a defendant's question. Left unreviewed are a prosecutor's unsuccessful objection to a defendant's question, a defendant's successful objection to a prosecutor's question, and all questions in a trial in which the defendant was found not guilty, a mistrial was declared, or a conviction was not appealed by the defendant.

For a more detailed discussion of voir dire questions in capital trials, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK, 81-95 (3d ed. 2013).

A. Questions About Juror's Racial Bias. The United States Supreme Court held in *Ham v. South Carolina*, 409 U.S. 524, 527 (1973), that the black defendant, who was a civil rights activist and whose defense was selective prosecution for marijuana possession because of his civil rights activity, was entitled under the Due Process Clause of the Fourteenth Amendment to voir dire jurors about racial bias. *Ham* later was limited by *Ristaino v. Ross*, 424 U.S. 589 (1976), which held that the Due Process Clause does not provide for a general right to question prospective jurors about racial prejudice. Such questions are constitutionally mandated in the "special circumstances" where racial issues are "inextricably bound up with the conduct of the trial," such as was the case in *Ham. Ristaino*, 424 U.S. at 597. In *Ristaino*, an assault with intent to murder case tried in Massachusetts state court, the Court noted that while voir dire questioning about racial bias was not constitutionally mandated on the mere basis that the defendants were black and the victim was white, "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." 424 U.S. at 597, n.9. *See also Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion adopting supervisory rule for federal courts that it is reversible error for trial court to disallow requested voir dire on racial or ethnic prejudice if circumstances of the case indicate that there is a reasonable possibility that such prejudice might have influenced the jury). In *State v. Crump*, 376 N.C. 375, 381-89 (2020), the North Carolina Supreme Court held that the trial court committed prejudicial error during voir dire where it "flatly prohibited" the defendant from posing questions "about racial bias and police-officer shootings of black men." The case involved assault charges related to an exchange of gunfire between the defendant and officers, and the issue of police officer shootings of black men was a topic of significant national attention at the time of the trial. The court in *Crump* grounded its reasoning in the state and federal constitutional guarantees of a fair and impartial jury and the essential role that inquiry into relevant issues through voir dire plays in ensuring those rights. *Id*. at 381-82. The court contrasted the improper categorical denial of a line of inquiry into a relevant issue in the case at hand with a trial court's general discretion to properly regulate the manner and extent of questioning during voir dire. *Id*. at 384.

With respect to capital cases, the United States Supreme Court in *Turner v. Murray*, 476 U.S. 28, 36-37 (1986), held that defendants being tried for an interracial crime have a right under the Sixth Amendment to question prospective jurors about racial bias. The trial judge has the discretion to determine the breadth of racial bias questions. *See* State v. Robinson, 330 N.C. 1, 12-13 (1991) (trial judge in capital trial allowed defendant to question jurors whether racial prejudice would affect their ability to be fair and impartial and allowed defendant to ask white jurors about their associations with blacks; trial judge did not err in prohibiting other questions, such as "Do you belong to any social club or political organization or church in which there are no black members?" and "Do you feel

like the presence of blacks in your neighborhood has lowered the value of your property . . . ?"); *see also Crump*, 376 N.C. at 384 (noting *Robinson's* recognition of a trial court's discretion to manage the form and number of questions on the issue of racial bias).

Issues concerning racial and other impermissible reasons in exercising peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), are discussed in Section XIV.B. below.

B. Stakeout Questions. Probably the most litigated voir dire question is commonly known as the stakeout question (also known as a hypothetical question). The North Carolina Supreme Court has described the stakeout question as an impermissible attempt to elicit in advance what a juror's position would be under a certain state of the evidence or on a given state of facts. State v. Vinson, 287 N.C. 326, 336 (1975), *vacated in part on other grounds*, 428 U.S. 902 (1976); *see also Crump*, 376 N.C. at 388 (mere fact that question "implicated a factual circumstance bearing similarity to the defendant's own case does not transform an appropriate question into an impermissible stakeout question"). Jurors should not be asked to pledge themselves to a future course of action before hearing evidence and receiving instructions on the law. *Id.*

As the cases below illustrate, appellate courts may appear to be inconsistent in deciding the stakeout issue. However, this apparent inconsistency may be explained because a trial judge has broad discretion over jury questioning and his or her rulings will be upheld unless there is an abuse of discretion.

Cases Upholding Trial Court's Ruling Barring Defense Question

State v. Rogers, 316 N.C. 203, 219 (1986) (defendant wanted to ask prospective jurors whether the fact that defense called fewer witnesses than the State would make a difference in their verdict), *overruled on other grounds*, State v. Vandiver, 321 N.C. 570 (1988).

State v. Maness, 363 N.C. 261, 269 (2009) (defendant asked whether the juror could, if convinced that life imprisonment was the appropriate penalty, return such a verdict even if the other jurors were of a different opinion).

State v. Jaynes, 353 N.C. 534, 548-49 (2001) (defense counsel asked about which specific circumstances would cause jurors to consider life sentence).

State v. Bracey, 303 N.C. 112, 119 (1981) (defense counsel asked jurors if they would change their opinion that defendant was not guilty if eleven other jurors held a different opinion)

State v. Jackson, 284 N.C. 321, 325 (1973) (defendant asked jurors if they would adopt an interpretation of the evidence that points to innocence and reject that of guilt if they found that the evidence was susceptible to two reasonable interpretations).

State v. Richmond, 347 N.C. 412, 424 (1998) (defense counsel asked whether jurors could return life sentence knowing that defendant had prior conviction for first-degree murder).

State v. Wiley, 355 N.C. 592, 610 (2002) (defense counsel asked, "Have you ever heard of a case where you thought that life without the possibility of parole should be the punishment?").

State v. Miller, 339 N.C. 663, 679 (1995) (defendant sought to ask whether, because of defendant's drug abuse, jurors could consider a particular mitigating circumstance; general questions, such as whether the juror could follow instructions about considering mitigating circumstances, are permissible, but this inquiry was an improper attempt to stake out the jurors).

State v. Leroux, 326 N.C. 368, 383 (1990) (defendant made inquiries such as "Would your theories about the overindulgence of alcohol tend to color your thinking about [defendant] if you find that he is an alcoholic from the evidence?" and "Do you have such strong feelings about the use of alcohol that you couldn't be fair to someone that you believe to be an alcoholic?"; counsel may not "fish" for legal conclusions or argue its case during jury voir dire).

Cases Reversing Trial Court's Ruling Barring Defense Question

State v. Crump, 376 N.C. 375, 386-88 (2020) (rejecting State's argument that defense counsel posed stake out questions by asking (1) whether prospective jurors were aware of a recent case in the same jurisdiction involving similar circumstance to the case at hand, and (2) generally whether prospective jurors had opinions and/or biases regarding police officer shootings of black men; neither of these lines of inquiry involved improper stake out questions as they did not pose a hypothetical and appropriately explored the relevant issue of prospective jurors' ability to be unbiased)

State v. Hatfield, 128 N.C. App. 294, 297 (1998) (defense counsel should have been allowed to ask prospective jurors if they thought that children were more likely to tell the truth when they made allegations of sexual abuse; the question properly inquired into jurors' sympathies toward molested child and was indistinguishable from *State v. McKoy*, 323 N.C. 1 (1988), summarized below).

State v. Hedgepeth, 66 N.C. App. 390, 393 (1984) (defense counsel should have been allowed to ask prospective jurors about their willingness and ability to follow the judge's instructions that they were to consider defendant's prior criminal record only to determine his credibility as a witness).

Cases Upholding Trial Court's Ruling Allowing Prosecutor's Question

State v. McKoy, 323 N.C. 1, 13 (1988) (prosecutor asked whether jurors would be sympathetic toward a defendant who was intoxicated at the time of the offense), *vacated in part on other grounds*, 494 U.S. 433 (1990).

State v. Bond, 345 N.C. 1, 16 (1996) (prosecutor asked whether jurors could return a death sentence knowing that defendant was an accessory and not present at the shooting scene).

State v. Green, 336 N.C. 142, 158 (1994) (prosecutor asked whether any juror could conceive of any first-degree murder case when the death penalty would be the right punishment).

State v. Clark, 319 N.C. 215, 220 (1987) (prosecutor asked jurors whether lack of eyewitnesses would cause them any problems after having informed them that State would rely on circumstantial evidence and having defined circumstantial evidence).

State v. Chapman, 359 N.C. 328, 346 (2005) (prosecutor asked prospective jurors, "Would you feel sympathy towards the defendant simply because you would see him here in court each day of the trial?").

State v. Johnson, 164 N.C. App. 1, 21 (2004) (prosecutor asked jurors whether they would consider accomplice's testimony when accomplice was testifying pursuant to plea bargain).

State v. Roberts, 135 N.C. App. 690, 697 (1999) (prosecutor asked whether jurors had a "per se problem with eyewitness identification").

State v. Henderson, 155 N.C. App. 719, 726 (2003) (prosecutor asked whether jurors would expect State to provide medical evidence that the crime occurred).

C. Other Voir Dire Questions

1. **Confusing Statements About Law.** Parties may not ask questions that incorporate incorrect or misleading statements of law. *See* State v. Bryant, 282 N.C. 92, 95 (1972) (improper to ask jurors if after hearing the evidence "you thought that [defendant] was probably guilty, and if you were not convinced absolutely that he was not guilty," would you be able to return a verdict of not guilty); State v. Wood, 20 N.C. App. 267, 269 (1973) (improper to ask if juror should have "one single reasonable doubt" would juror vote to find the defendant not guilty).
2. **Defendant's Failure to Testify or Offer Evidence.** Because a criminal defendant has the right not to testify, a defendant may ask jurors whether exercising that right would affect their ability to be fair and impartial or to follow the trial court's instructions on the law. *See* State v. Bates, 343 N.C. 564, 588 (1996) (citing precedent establishing that such inquiry is "entirely proper"). However, the trial court retains considerable discretion as to the manner and extent of this inquiry so long as the defendant is provided sufficient opportunity to explore the issue, State v. Campbell, 359 N.C. 644, 665 (2005) (trial court did not err by limiting inquiry where jurors were properly instructed by court on defendant's right not to testify and the defendant was able to inquire whether they could be able to follow the law). It is worth noting that several appellate cases have found questions concerning the potential effect of a defendant's decision not to testify on a juror's verdict to have been properly disallowed as stake out questions. *See, e.g.*, State v. Hill, 331 N.C. 387, 404 (1992) (court held that trial judge properly refused to allow defendant to ask prospective jurors, before they had been instructed on applicable legal principles, whether they would "feel the need to hear from" the defendant to find him not guilty); State v. Phillips, 300 N.C. 678, 682 (1980) (trial judge properly

barred the defendant from asking juror if defendant would have to prove anything to her before he would be entitled to verdict of not guilty; court stated that jurors should not be asked what kind of verdict they would render under certain named circumstances).

3. **Jurors' Personal Lives, Experiences, and Beliefs**. Generally, the parties are entitled to inquire into the experiences, beliefs, and attitudes of prospective jurors which are relevant to their ability to be fair and impartial and to follow the law in the case at hand. *See, e.g.*, State v. Lloyd, 321 N.C. 301, 307 (so stating), vacated on other grounds, 488 U.S. 807 (1988). The appellate courts have been careful to note, however, that this generally permissible line of inquiry does not amount to "the right to delve without restraint into all matters concerning potential jurors' private lives." *Id*. As with other matters, the trial court has considerable discretion to control the manner and extent of inquiry on this issue. *See, e.g.*, State v. Anderson, 350 N.C. 152, 171-72 (1999) (trial judge did not err by sustaining the State's objection to defendant's questions about jurors' religious beliefs; impermissible questions concerned jurors' church memberships and whether their churches' members ever expressed opinions about the death penalty; instead of questions relating to the jurors' religious beliefs, the impermissible questions concerned the juror's affiliations and beliefs espoused by others in their churches); State v. Mash, 328 N.C. 61 (1991) (trial judge properly prohibited defendant from questioning jurors about their "difficulty" in considering expert mental health testimony and the jurors' personal experiences with alcohol; court noted that trial judge allowed sufficient inquiry in this case about jurors' ability to be fair, to consider the evidence, and to follow the law); State v. Laws, 325 N.C. 81, 109 (1989) (trial judge properly barred defendant's question as to whether juror believed in literal interpretation of the Bible; counsel's right to inquire about jurors' beliefs to determine their biases and attitudes does not extend to all aspects of their private lives or religious beliefs; judge had allowed the defendant to inquire about other aspects of the jurors' religious activities), *vacated on other grounds*, 494 U.S. 1022 (1990); State v. Huffstetler, 312 N.C. 92, 104 (1984) (trial judge properly barred defendant's inquiry of jurors concerning the death penalty positions held by the leaders of their churches).

4. **Pretrial Publicity.** Due process requires that a defendant receive a fair trial by an impartial jury free from prejudicial outside influences, such as pretrial publicity. *Sheppard v. Maxwell,* 384 U.S. 333, 362 (1966). Parties may question prospective jurors whether they have knowledge of the case and, if so, whether they could set aside that knowledge and base their verdict solely on the evidence introduced at trial and the judge's instructions on the law. State v. Moseley, 338 N.C. 1, 18 (1994). The trial judge in his or her discretion may allow individual voir dire on the pretrial publicity issue, particularly if the judge finds it appropriate to allow the parties to question the prospective jurors about the content of their knowledge of the case, even though such inquiry is not necessarily constitutional required (see *Mu'Min v. Virginia*, discussed below). Individual voir dire on pretrial publicity was noted in *State v. Boykin*, 291 N.C. 264, 269 (1980), and utilized by the trial judge in *State v. Moseley*. See Section X.H. above, for a discussion of individual voir dire.

In *Mu'Min v. Virginia*, 500 U.S. 415, 419 (1991), the Court considered a case in which defendant's first-degree murder trial had received extensive pretrial publicity. The trial judge questioned prospective jurors about their knowledge of the homicide and—if they admitted knowledge—whether they could be fair and impartial. However, the trial court refused the defendant's request that the judge question prospective jurors concerning the *content* of that knowledge. On appeal, the Court held that the trial court's refusal did not violate the defendant's Sixth Amendment right to an impartial jury or right to due process under the Fourteenth Amendment.

When a defendant makes a motion for a change of venue based on pretrial publicity, the judge conducts a full hearing, and the record fails to show that any juror objectionable to the defendant was permitted to sit on the jury or fails to show the defendant exhausted his or her peremptory challenges before accepting the jury, the denial of the motion for a change of venue is not error. State v. Harding, 291 N.C. 223, 227 (1976); State v. Harrill, 289 N.C. 186, 191 (1976), *vacated on other grounds*, 428 U.S. 904. It is an abuse of discretion to fail to grant a change of venue or a special venire panel if the evidence presented shows the existence of prejudicial pretrial publicity such that "there is a reasonable likelihood that a fair trial cannot be had." *Boykin*, 291 N.C. at 270.

XII. Capital Case Issues.

A. Death Qualification of Jury. Under *Wainwright v. Witt*, 469 U.S. 412 (1985), a prospective juror in a capital case is subject to a challenge for cause if his or her views about capital punishment would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and . . . oath." 469 U.S. at 424 (internal quotations omitted). Similarly, under G.S. 15A-1212(8), a juror may be challenged for cause if he or she "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." *See* State v. Richardson, 385 N.C. 101, 206 (2023) (stating that G.S. 15A-1212(8) codifies the constitutional principles flowing from *Wainwright* and related North Carolina precedent). The process of removing prospective jurors whose opposition to capital punishment meets this standard is sometimes called "death qualification" of the jury.

The mere fact that a prospective juror is opposed to capital punishment is not enough. *Wainwright,* 469 U.S. at 421; *Richardson*, 385 N.C. at 206. However, when a juror's personal beliefs about the death penalty would substantially limit his or her ability to follow the court's instructions during a capital sentencing hearing or would prevent the juror from fairly considering the imposition of a death sentence, the juror must be excused. *Id*. Furthermore, the juror's bias need not be "unmistakably clear" to justify removal; it is enough that the trial judge is left with the "definite impression" that the juror would not be impartial. *Wainwright*, 469 U.S. at 425-26.

The North Carolina Supreme Court has rejected the argument that a death-qualified jury will be more inclined to convict than a jury that has not been death qualified. State v. Taylor, 332 N.C. 372, 390 (1992). The United States Supreme Court has held that even if this were so, death qualification would not violate a defendant's Sixth Amendment right to a fair and impartial jury. Lockhart v. McCree*,* 476 U.S. 162, 183 (1986). Therefore, a defendant is not entitled to

two different juries—one that has not been death qualified to consider guilt or innocence and a second that has been death qualified to consider punishment. North Carolina statutory law provides that the same jury should be used for both the guilt/innocence and sentencing stages of a capital trial, unless the trial jury is unable to reconvene for sentencing. G.S. 15A-2000(a)(2); State v. Bondurant, 309 N.C. 674, 682 (1983) (holding that G.S. 15A-2000 "contemplates that the same jury which determines guilt will recommend the sentence"). Likewise, it is permissible to death qualify a jury for a joint trial that is capital as to one defendant but noncapital as to another. Buchanan v. Kentucky, 483 U.S. 402, 419-20 (1987).

The State has a right to ask prospective jurors questions that are designed to determine whether the jurors are subject to a *Witt* challenge. Thus, a prosecutor may ask prospective jurors whether their views about the death penalty would substantially impair their ability to sit on the jury, *State v. Price,* 326 N.C. 56, 67, *vacated on other grounds*, 498 U.S. 802 (1990), and whether they would have the "intestinal fortitude" to vote for a sentence of death if they were satisfied that the legal requirements for such a sentence had been met. State v. Murrell, 362 N.C. 375, 390-91 (2008).

When the State challenges a prospective juror under *Witt*, the defense may ask the judge for the opportunity to question the juror. This request is commonly known as the opportunity to rehabilitate, because the defendant wants to show that the juror's purported opposition to capital punishment would not substantially impair his or her performance of duties as juror and that the State's challenge for cause should therefore be denied. A trial judge may not automatically deny the defendant's request but instead must exercise his or her discretion in deciding whether to allow a defendant to rehabilitate a prospective juror. State v. Brogden, 334 N.C. 39, 44 (1993); *see also Richardson*, 385 N.C. at 207 (whether to allow rehabilitation is a matter within the trial court's discretion). If a juror's responses are clear and unequivocal and the defendant fails to show that defense questioning would likely produce different responses, then the judge may grant the State's challenge for cause without allowing the opportunity to rehabilitate the juror. *Richardson*, 385 N.C. at 207; State v. Kemmerlin, 356 N.C. 446, 462 (2002); State v. Nicholson, 355 N.C. 1, 27 (2002); State v. Reeves, 337 N.C. 700, 739 (1994).

Consistent with the general principles governing the reopening of voir dire, discussed in Section X above, there are limited circumstances in which it is permissible to revisit the death qualification of a seated juror. For example, the court held in *State v. Barts,* 316 N.C. 666, 680 (1986), that it was proper to reopen voir dire of a juror who reported that after she was seated, she became so agitated and emotional when contemplating the prospect of deciding whether to impose the death penalty that she sought medical attention, then stated emphatically that she would never be able to vote for the death penalty. In *State v. Holden*, 321 N.C. 125, 153 (1987), the court held that it was also proper for the court to reopen voir dire immediately before the sentencing phase of a capital case when the court learned that a juror had expressed to a third party her inability to follow the law and to consider returning a sentence of death.

If a prospective juror expresses reservations about the death penalty that are not serious enough to justify a *Witt* challenge, the State may use a peremptory strike to remove the juror. *See, e.g.,* State v. Fullwood, 323 N.C. 371, 381-83 (1988), *vacated on other grounds*, 494 U.S. 1022 (1990).

If a trial judge wrongly excuses a juror under *Witt* when in fact the juror's reservations about the death penalty do not rise to the requisite level, any resulting death sentence must be vacated. Gray v. Mississippi, 481 U.S. 648, 667 (1987). However, the defendant's conviction of first-degree murder remains intact. State v. Rannels, 333 N.C. 644, 655 (1993).

B. Jurors Who May Be Biased in Favor of Death Penalty. In *Morgan v. Illinois,* 504 U.S. 719, 729 (1992), the United States Supreme Court held that

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

In order to challenge "automatic death" jurors, the defendant must be allowed an opportunity to question prospective jurors about their ability to consider a sentence other than death for first-degree murder. *Id.* at 729-34. Because the defendant's rights under *Morgan* are the counterpart to the State's rights under *Witt*, it appears that the State would have the same opportunity to rehabilitate prospective jurors challenged for cause by the defendant as the defendant has to rehabilitate prospective jurors challenged for cause by the State.

C. Questions About Life Imprisonment in Capital Trial. The Court in *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994), held that when life imprisonment without parole is the alternative punishment to a death sentence, a capital sentencing jury must be informed of that fact when future dangerousness is an issue. G.S. 15A-2002 complies with this ruling by requiring the judge to instruct a capital sentencing jury that a sentence of life imprisonment means a sentence of life without parole. In addition, the judge may give N.C.P.I.—Crim. 106.10 to the prospective jurors that briefly explains the trial and sentencing proceedings, which includes a statement that a defendant convicted of first-degree murder will be sentenced to death or life imprisonment without parole. The North Carolina Supreme Court in *State v. Williams*, 355 N.C. 501, 544 (2002), made clear that it adhered to its prior rulings that a defendant is not entitled to ask prospective jurors whether they could understand and follow an instruction that life imprisonment means life without parole. Whether the trial court could allow such questioning in its discretion has not been decided.

XIII. Challenges for Cause.

A. Constitutional Basis. Under the Sixth Amendment and the Fourteenth Amendment's Due Process Clause, jurors who are biased against the defendant and cannot decide the case based on the trial evidence and the law must be

excused. Irvin v. Dowd, 366 U.S. 717, 722 (1961). A defendant does not have a right to any particular juror, but the defendant is entitled to twelve jurors who are competent and qualified to serve. State v. McKenna, 289 N.C. 668, 681, *vacated on other grounds*, 429 U.S. 912 (1976). The method for excusing a juror who is biased or is not qualified to serve is referred to as a challenge for cause.

B. Statutory Grounds for Challenges for Cause. G.S. 15A-1212 sets out statutory grounds for challenging a juror for cause. These grounds include that the prospective juror:

- is not qualified under G.S. 9-3 (see Section II above);
- is incapable of rendering jury service due to mental or physical infirmity;
- is, or has been previously, a party, a witness, a grand juror, a trial juror, or a participant in civil or criminal proceedings involving a transaction which relates to a charge against the defendant;
- is, or has been previously, a party adverse to the defendant in a civil action;
- has complained against or been accused by the defendant in a criminal prosecution;
- is related to the defendant or alleged victim of the crime by blood or marriage within the sixth degree (degrees of kinship are explained in G.S. 104A-1; to calculate your degree of kinship to another person, you ascend up from yourself through the generations until you reach a common ancestor and then descend down to the other person; the count excludes yourself; for example, you are related in the second degree to your siblings and the fourth degree to your first cousin);
- has formed or expressed an opinion of the defendant's guilt or innocence;
- is presently charged with a felony;
- as a matter of conscience is unable to render a verdict in accordance with the law; or
- for any other reason is unable to render a fair and impartial verdict.

G.S. 15A-1211(d) states that a judge "may excuse a juror without challenge by any party if [the judge] determines that grounds for challenge for cause are present." *See, e.g.*, State v. Tirado, 358 N.C. 551, 572-74 (2004) (trial court did not err by excusing prospective juror who was no longer a resident of the county); State v. Wiley, ___ N.C. App. ___, ___, 892 S.E.2d 86, 88-89 (2023) (trial court did not err by excusing juror midtrial upon learning that he no longer was a resident of the county).

1. Prior Knowledge of Case. North Carolina courts have consistently held that a juror is not disqualified simply because the juror has prior knowledge of the case. To be excused for cause, the prior knowledge or connection to the case must prevent the juror from rendering an impartial verdict. State v. Jaynes, 353 N.C. 534, 546 (2001) (juror's knowledge of defendant's prior death sentence was not disqualifying because she stated that she could set her knowledge aside and base her sentencing decision on evidence presented in court); State v. Yelverton, 334 N.C. 532, 543 (1993) (similar ruling on prior knowledge); State v. Hunt, 37 N.C. App. 315, 320 (1978) (similar ruling involving police officer as a

prospective juror who had heard defendant's case discussed by other officers).

2. **Juror's Opinion on Impartiality Not Dispositive.** A juror's subjective or expressed belief that he or she can set aside prior information and decided the case on the evidence does not necessarily render the juror qualified. The trial judge must make an independent, objective evaluation of the juror's impartiality. State v. Brogden, 334 N.C. 39, 53 (1993) (Frye, J., concurring).
3. **Inability to Follow Law.** Jurors who are unable to follow certain legal principles must be excused for cause. *Compare* State v. Cunningham, 333 N.C. 744, 755 (1993) (error to fail to excuse juror whose answers to questions on voir dire failed to show that she would afford the defendant the presumption of innocence), State v. Hightower, 331 N.C. 636, 641 (error to fail to excuse juror who expected defendant to testify), *and* State v. Leonard, 296 N.C. 58, 63 (1978) (error to fail to excuse jurors who stated they would not acquit even if defendant proved insanity defense), *with* State v. McKinnon, 328 N.C. 668, 677 (1991) (no error when judge refused to excuse juror who initially stated that she would want defendant to present evidence on his behalf; juror later agreed to abide by proper burden of proof).
4. **Other Sources of Bias.** Other possible sources of juror bias may be asserted. For example, it has been held to be error to fail to remove a juror for cause when:

    - a juror's husband was police officer and juror stated her connection with police would bias her, State v. Lee, 292 N.C. 617, 625 (1977); and
    - a juror was related to accomplice witnesses and said he would likely believe these witnesses, State v. Allred, 275 NC. 554, 563 (1969).

    By contrast, having a connection to those involved in the case on the State's side may not justify a challenge for cause. State v. Benson, 323 N.C. 318, 323-24 (1988) (no challenge for cause where juror had a mere acquaintance with four police officers who were prospective State's witnesses); State v. Whitfield, 310 N.C. 608, 612 (1984) (no challenge for cause where first juror challenged was father of assistant district attorney who was not participating in defendant's trial; second juror challenged was a member of police department but officers who handled case and testified were sheriff's deputies). A challenge for cause also was properly rejected when a juror had a friend who had been murdered but stated she could separate facts of defendant's case from friend's case. State v. House, 340 N.C. 187, 194 (1995).

C. Preservation of Appellate Review of Denial of Challenge for Cause. If the defendant challenges a juror for cause and the trial judge declines to remove the juror, the defendant must follow precise steps under G.S. 15A-1214(h) to preserve the error for appellate review:

1. exhaust all peremptory challenges;

2. renew the motion for cause against the juror at the end of jury selection as set out in G.S. 15A-1214(i); and
3. have the renewal motion denied.

Regarding the second step—renewing a motion for cause—a defendant who has exhausted peremptory challenges may move orally or in writing to renew a previously denied challenge for cause if the defendant:

1. had peremptorily challenged the juror; or
2. states in the motion that the defendant would have challenged that juror if his or her peremptory challenges had not already been exhausted.

G.S. 15A-1214(i); *see also* State v. Johnson, 317 N.C. 417, 433 (1986) (G.S. 15A-1214(h) and (i), read together, require a defendant who has peremptory challenges available when a challenge for cause is denied must exercise a peremptory to remove the unwanted juror); State v. Wilson, 283 N.C. App. 419, 424-25 (2022) (defendant failed to preserve appellate review of alleged erroneous denial of challenge for cause by not adhering to procedures of G.S. 15A-1214(i)).

If the judge reconsiders the denial of the challenge for cause and determines that the juror should have been excused for cause, the judge must allow the party an additional peremptory challenge. G.S. 15A-1214(i).

D. Excusing Qualified Juror in Capital Case. Just as it is error for the trial judge to decline to excuse an unqualified juror, it is also error for the judge to exclude a juror who is qualified to serve on the death penalty issue. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). If the trial judge does so, the error is reversible per se on appeal, even if the State does not exhaust its peremptories. Gray v. Mississippi, 481 U.S. 648, 664 (1987) (improperly excusing qualified juror under *Witherspoon* reversible error per se).

XIV. Peremptory Challenges.

A. Generally. The right to peremptory challenges is statutory, not constitutional. *See* Rivera v. Illinois, 556 U.S. 148, 157 (2009) (peremptory challenges are creatures of statute and states may decline to authorize them).

Peremptory challenges allow the parties to excuse jurors based on the party's own criteria, generally without inquiry or a required explanation. The only limit on the exercise of peremptories is that neither side may exercise a peremptory challenge because of the juror's race, gender, or other constitutionally protected characteristic.

For a discussion of the number of peremptory challenges allotted to each side, see Section X.C. above.

B. Equal Protection Limitations: *Batson* & Its Progeny. Under the United States Supreme Court's landmark ruling in *Batson v. Kentucky,* 476 U.S. 79, 89 (1986), it is a violation of the Equal Protection Clause for either party to exercise a peremptory challenge based on a prospective juror's race or sex. Although *Batson* concerned only racial discrimination, its principles were extended to "gender-based" discrimination in *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994). The North Carolina constitution also prohibits discrimination in jury selection. State v. Waring, 364 N.C. 443, 474 (2010). In *Flowers v. Mississippi*, 139 S. Ct.

2228, 2243 (2019), the United States Supreme Court observed that because they "operate at the front lines of American justice," trial court judges "possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process." *See also* State v. Campbell, 384 N.C. 126, 131 (2023) (quoting *Flowers* on this point).

The defendant need not be of the same race or gender as the prospective juror who was excused in order to assert that the State improperly challenged the juror. Powers v. Ohio, 499 U.S. 400, 415 (1991); State v. Locklear, 349 N.C. 118, 140 (1998).

To preserve a *Batson* challenge for appellate review, an appellant must make a record which shows the race of a challenged juror. State v. Bennett, 374 N.C. 579, 592 (2020). Several North Carolina Supreme Court cases hold that statements of counsel based on a prospective juror's appearance are not sufficient to establish the race of a prospective juror, nor are the subjective impressions of the court reporter. *See, e.g.*, State v. Brogden, 329 N.C. 534, 546 (1991) (holding that the defendant failed to preserve a *Batson* claim by defense counsel's subjective impressions of jurors' race and notations made by the court reporter of her subjective impressions); State v. Payne, 327 N.C. 194, 200 (1990) (defense lawyer's affidavit was insufficient to establish jurors' race). However, in *Bennett* the North Carolina Supreme Court explained that subjective impressions of a prospective juror's race are sufficient to establish a record for appellate review in situations where there is a "complete absence of any dispute" among the trial participants about the prospective juror's race. 374 N.C. at 594-95. Distinguishing *Brogden* and *Payne* as cases involving attempts to "establish racial identity on the basis of the subjective impressions of a limited number of trial participants," the court observed that the record in *Bennett* established that trial counsel, the prosecutor, and the trial court "each agreed that [the prospective jurors at issue] were African American." *Id*. The court reasoned that this agreement among the participants amounted to a stipulation of the racial identity of the prospective jurors; thus, the court proceeded to review the merits of the defendant's *Batson* claim. *Id*. at 595. The best evidence of a prospective juror's race or gender may be the juror's own statement of the characteristic for the record. *See* State v. Mitchell, 321 N.C. 650, 656 (1988) (if there is any question about a prospective juror's race, it must be resolved by the trial judge's questioning of the juror or other proper evidence). A juror may make such a self-identifying statement in a questionnaire or in open court. Note, however, that the court in *Bennett* emphasized that its research failed "to find a decision from any . . . American jurisdiction" precluding methods for determining racial identity other than self-identification. 374 N.C. at 596-97. Similar principles presumably apply to situations involving *Batson* challenges on the basis of gender though there is no North Carolina case law on the issue.

When a party contends that the other side has exercised a peremptory challenge in a discriminatory manner—that is, when a party makes a *Batson* claim—the trial judge must follow a three-step process to resolve the issue:

1. *Prima facie showing*. The party making the *Batson* claim must make a prima facie showing that the other side exercised a peremptory challenge based on race or gender.
2. *Neutral justification.* If a prima facie showing has been made, the other side must offer a justification for its use of its peremptory challenge that is not based on race or gender.

3. *Pretext for purposeful discrimination*. The party making the *Batson* claim then may attempt to show that the nondiscriminatory justification is pretextual and that the other party in fact engaged in purposeful discrimination. *See generally* Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008).

Each of these steps are discussed below.

1. Prima Facie Showing. The *Batson* requirement of a prima facie showing "is not intended to be a high hurdle for defendants to cross." State v. Hoffman, 348 N.C. 548, 553 (2008). Indeed, the Court held in *Johnson v. California*, 545 U.S. 162, 168 (2005), that establishing a prima facie case does not require a litigant to show that it is more likely than not that the opposing party has engaged in discrimination. Nonetheless, the showing must be a strong enough to permit an inference of discrimination and to require a response. As reflected in the case summaries below, more than a few *Batson* challenges fail at this stage. Among the factors that a court may consider in assessing whether such a showing has been made by a defendant alleging racial discrimination are

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145 (1995) (describing factors in context of a defendant's *Batson* claim as to prosecutor's use of peremptory challenges against black jurors).

Courts sometimes refer to accounting for the races of the defendant, victim, and witnesses as evaluating the "susceptibility of the particular case to racial discrimination." State v. Porter, 326 N.C. 489, 498 (1990) (quotation omitted). The analysis of whether a prima facie case has been established should take account of the totality of relevant facts before the trial court. State v. Campbell, 384 N.C. 126, 136 (2023); State v. Hobbs, 374 N.C. 345, 351 (2020) (*Hobbs I*) (stating that historical evidence of discrimination in a jurisdiction also is a factor that must be considered); *see also* State v. Richardson, 385 N.C. 101, 197-98 (2023) (recognizing that the court in *Hobbs I* held that historical evidence of discrimination in a jurisdiction must be considered). In *State v. Richardson*, the North Carolina Supreme Court indicated that trial courts have discretion, which may be guided by the rules of evidence, as to the admissibility of evidence presented by a party as support for a prima facie case. 385 N.C. at 197-98 ("We acknowledge the lack of any precedent which categorically provides that the rules of evidence may not be employed in the discretion of a trial court during the prima facie stage of a *Batson* challenge during jury selection and . . . decline to create such an

exception to the general applicability of the evidentiary rules during trial proceedings based on the facts presented here . . .."). The *Richardson* court held that the trial court did not clearly err in excluding on hearsay grounds an affidavit from two academic researchers who had studied jury selection in North Carolina capital cases and which purportedly showed that the prosecutor in *Richardson* had disproportionately used peremptory challenges to excuse Black jurors in four prior capital cases. *Id*.

Similar factors to those identified in *Quick* are relevant when considering a claim by the State that the defendant exercised a peremptory challenge in a discriminatory manner, *State v. Cofield*, 129 N.C. App. 268, 276 (1998) (quoting *Quick's* list of factors in case involving claim asserted by the State); *see also State v. Hurd*, 246 N.C. App. 281, 291-92 (2016) (applying general *Batson* framework to so-called "reverse *Batson*" claim asserted by the State in context of defendant's use of peremptory challenge to remove white male juror). Similar factors also are relevant when considering a claim of gender discrimination. *Richardson*, 385 N.C. at 203-04 (so stating); State v. Call, 349 N.C. 382, 403-04 (1998) (listing factors concerning gender analogous to those in *Quick* concerning race).

If the trial judge finds that the party has failed to make a prima facie showing, the judge should terminate the inquiry at that stage and need not make extensive written findings of fact. *Campbell*, 384 N.C. at 138. *Richardson*, 385 N.C. at 202. If the judge rules that the party has made a prima facie showing, the remaining steps in the three-step process must be completed. If a party offers, or the trial judge requests, a neutral justification before the trial judge has ruled on the sufficiency of the prima facie case, the sufficiency of the prima facie case becomes moot, and the issue becomes the validity of the neutral justification. Hernandez v. New York, 500 U.S. 352, 359 (1991); State v. Tucker, ___ N.C. ___, 895 S.E.2d 532, 546 (2023) (noting that prima facie case determination is mooted if a party voluntarily offers neutral justifications before trial judge has ruled); State v. Williams, 343 N.C. 345, 359 (1996). Note, however, that not all pre-ruling exchanges between a trial judge and the party exercising a strike objected to on *Batson* grounds necessarily constitute a request for or the volunteered provision of a neutral justification that moots the issue of whether a prima facie case has been established. *See, e.g.*, *Richardson*, 385 N.C. at 193 (prima facie case determination was not mooted where, prior to ruling, trial court asked prosecutor to respond "to the prima facie showing issue;" the court's request and prosecutor's response were concerned solely with the sufficiency of the defense's prima facie case rather than any non-discriminatory justification for the prosecutor's strike).

Some appellate cases contemplate that the judge, after finding no prima facie case, has the option of allowing the parties to articulate for the record their arguments relevant to the second and third steps in the *Batson* process, as such a procedure may facilitate appellate review if the judge's ruling on the adequacy of the prima facie case is rejected on appeal. *Williams*, 343 N.C. at 359 (trial court did so in response to a request from the party asserting the *Batson* claim). However, recent North Carolina appellate cases indicate that it is error for a trial court to order the parties to articulate arguments concerning the second and third steps

of the *Batson* analysis after ruling that no prima facie case exists. In *State v. Campbell*, the trial judge ruled that a prima facie case had not been established but nevertheless ordered the State to articulate reasons for its peremptory challenge. 384 N.C. at 136. The North Carolina Supreme Court stated that the "*Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing" and went on to say that the State "appropriately objected to the trial court's attempt to move beyond step one." Later, in *State v. Tucker*, ___ N.C. ___, 895 S.E.2d 532 (2023), the Court relied on *Campbell* to expressly state that it is error for a trial court to rule that no prima facie case has been established and then direct parties to place race-neutral reasons into the record. ___ N.C. at ___, 895 S.E.2d at 546 (discussing issue while determining whether a MAR was procedurally barred). After the trial court has ruled that no prima facie case exists, a party appropriately may object to the court's attempt to require that arguments concerning the second and third *Batson* steps be placed into the record or may decline to offer arguments when explicitly given the opportunity to do so. *Campbell*, 384 N.C. at 136 (after trial judge ruled that no prima facie case existed, prosecutor first declined judge's invitation to offer neutral justification for peremptory strike and then "appropriately objected" to judge's subsequent order to state a neutral justification); *Richardson*, 385 N.C. at 194 (after trial judge ruled that no prima facie case existed prosecutor declined judge's invitation to offer neutral reasons for peremptory strike, stating "the record is clear"). Note that if a trial court rules on the ultimate issue of purposeful discrimination in a situation where the parties have articulated arguments for the record (for example where a trial court finds no prima facie case yet the challenged party nevertheless volunteers neutral reasons for a strike), that ruling renders moot the initial finding that no prima facie case has been established, *Hobbs I*, 374 N.C. at 354 (so stating), and obligates the trial court to make adequate findings of fact and conclusions of law on that ultimate issue just as if the court had found the existence of a prima facie case. *Williams*, 343 N.C. at 359.

Case Summaries: Prima Facie Showing Generally

Johnson v. California, 545 U.S. 162, 168, 170 (2005). The defendant, who was black, was charged with murder. Out of a pool of forty-three prospective jurors for his trial, three were black. The prosecutor used three of his twelve peremptory strikes to remove the African-American jurors. When the defendant objected under *Batson*, the trial judge ruled that the defendant had failed to establish a prima facie case of discrimination. A defendant under California law was required to present "strong evidence" of discrimination to make a prima facie case; the state supreme court indicated that this required evidence that it was "*more likely than not*" that the prosecutor had acted in a discriminatory manner. The United States Supreme Court reversed, holding that the California courts used "an inappropriate yardstick by which to measure the sufficiency of a prima facie case" and that a defendant need only present "evidence sufficient to permit the trial judge to draw an inference that

discrimination has occurred," a lower threshold than the preponderance standard employed below.

State v. Locklear, 349 N.C. 118, 141 (1998). The court held that under *Powers v. Ohio*, 499 U.S. 400 (1991), the defendant, a Native American, had standing to contest the state's peremptory challenges of prospective black jurors. The court rejected the defendant's argument that it was a violation of the Equal Protection Clause for the trial judge to consider his *Batson* motion separately as to challenged Native American and black prospective jurors. The court noted that racial identity between the defendant and some of the challenged jurors in this case was a legitimate factor that the trial judge could consider in ruling on the defendant's motion. 349 N.C. at 141 (citing *Powers* for proposition that "'[r]acial identity between the defendant and the excused person might in some cases be the explanation for the prosecutor's adoption of the forbidden stereotype.'"). Likewise, the fact that the defendant and the challenged black jurors were of different races was also a relevant circumstance that the trial judge could consider.

Case Summaries: Upholding Trial Court's Finding on Prima Facie Case

State v. Richardson, 385 N.C. 101, 201 (2023). The trial court did not err in determining that the defendant failed to make a prima facie showing of discrimination based upon either race or gender in the prosecutor's peremptory strike of a Black female prospective juror. With respect to alleged racial discrimination, the court noted that while the prosecutor had struck Black prospective jurors at a higher rate than white prospective jurors, this difference standing alone was insufficient to establish a prima facie case given that the challenged strike occurred early in the selection process, the case was not particularly susceptible to racial discrimination, and the prosecutor's statements and questions during voir dire did not appear to be racially motivated. As for the alleged gender discrimination, the court noted that the prosecutor had struck women at a higher rate than men but explained that this difference was insufficient to establish a prima facie case given that there were twice as many women as men available as potential jurors and four of the five jurors already seated were women.

State v. Campbell, 384 N.C. 126, 136 (2023). The trial court did not err in determining that the defendant failed to make a prima facie showing where the State exercised three out of four peremptory strikes to remove black prospective jurors. The court observed that the defendant, the victim, and at least one key witness all were black. It went on to explain that while numerical analysis can be useful in evaluating the existence of a prima facie case, "reliance on a single mathematical ratio, standing alone in a cold record" was insufficient to show that the trial court erred in finding that a prima facie case had not been made. The court noted that there was no information in the record about the total number of black prospective jurors in the jury pool or the racial make-up of the jurors who were seated.

State v. Waring, 364 N.C. 443, 480 (2010). The trial court correctly ruled that the defendant failed to make a prima facie showing when the State successfully challenged for cause the first three black prospective jurors, then peremptorily challenged the fourth; the fourth juror expressed personal opposition to the death penalty, even though she ultimately stated that she could follow the law and consider capital punishment if seated.

State v. Maness, 363 N.C. 261, 275 (2009). When the prosecutor struck prospective juror A, who was black, the prosecutor had used five of eight peremptory challenges to remove black jurors and had accepted only three of eight black prospective jurors. Nonetheless, the trial court correctly rejected the defendant's *Batson* claim for lack of a prima facie case. Numerical analysis, "while often useful, is not necessarily dispositive," and the court noted that race was not a factor in the trial and that the State had questioned prospective jurors in a consistent manner regardless of race.

State v. Taylor, 362 N.C. 514, 529 (2008). When the State exercised a third peremptory challenge on a black prospective juror, the defendant made a *Batson* claim. The trial court properly found no prima facie case. The State had also used seven challenges on white jurors and had accepted two black jurors. The fact that "the state had accepted two out of five, or forty percent, of eligible African-American jurors" tended to show a lack of discrimination. Furthermore, "the prosecutor's statements and questions during voir dire appear[ed] evenhanded and not racially motivated," and the prospective juror expressed hesitation about her ability to vote for the death penalty.

State v. Smith, 351 N.C. 251, 262 (2000). The court held that the trial court did not err in finding that the defendant failed to establish a prima facie case under *Batson*. The defendant noted that the State exercised six of its eight peremptory challenges to excuse African Americans and that number was disproportionate to the population of Halifax County, which was 50 to 60 percent black. The court noted that the State had accepted the first black prospective juror to enter the jury box and also had struck whites before striking the prospective black juror in issue. The court also noted that the defendant, the victim, and the state's key witnesses were all black. The court concluded its review by observing that the prosecutor did not make any racially motivated statements or ask any racially motivated questions of prospective African-American jurors.

State v. Ross, 338 N.C. 280, 286 (1994). The court held that the defendant failed to make a prima facie showing of discrimination where the State exercised only one peremptory challenge during jury selection and used it to remove a black man. The prosecutor accepted two black jurors who sat on the trial jury, and there was no other evidence showing discrimination by the prosecutor. (The court's opinion has a useful discussion of what constitutes a prima facie case.)

Case Summaries: Reversing Trial Court's Finding on Prima Facie Case

State v. Barden, 356 N.C. 316, 344 (2002). The court held that the trial judge erred in ruling that the defendant had not made a prima facie showing of racial discrimination under *Batson.* When the defendant asserted the *Batson* claim, the prosecutor had accepted only 28.6 percent of the African-American prospective jurors (peremptorily challenging five of seven eligible jurors) but had accepted 95 percent of the white jurors (peremptorily challenging only one of twenty eligible white jurors). The court stated that although a numerical analysis is not necessarily dispositive, it can be useful in determining whether a prima facie case has been made. The court also stated that the issue was a close one and noted that it had held in *State v. Gregory*, 340 N.C. 365 (1995), that a 37.5 percent acceptance rate of minority jurors had not established a prima facie case.

State v. Hoffman, 348 N.C. 548, 553 (1998). A black defendant was tried for the murder of a white person and jury selection included a series of *Batson* challenges. The State successfully challenged the first black prospective juror for cause based on her death penalty views. The State exercised a peremptory challenge to the second black prospective juror. The trial judge ruled that the defendant had not established a prima facie showing, noting in part that there was no pattern of peremptory challenges against black prospective jurors. The State initially accepted the third black prospective juror but was allowed the next day to excuse this juror for cause based on her death penalty views that were revealed that next day. The State exercised a peremptory challenge on the fourth black prospective juror, who twice had been represented by defendant's trial counsel. The court held that the trial judge did not err in ruling that the defendant had not established a prima facie case as to this juror. Eleven white jurors had been seated when the State then exercised a peremptory challenge against another prospective black juror. The trial judge again ruled that the defendant had not established a prima facie case. The North Carolina Supreme Court determined that this ruling was error. It noted that the State had peremptorily challenged every black prospective juror who was not excused for cause. Later, during the selection of the alternate jurors, the state peremptorily challenged the next prospective black juror. The court held that the trial judge again erred in his ruling that the defendant had not established a prima facie case.

State v. McCord, 140 N.C. App. 634 (2000). The defendant was convicted of first-degree murder and other offenses. The defendant was black and the victim was white. The initial panel of prospective jurors consisted of ten white jurors and two black jurors, A and B. The defendant objected on *Batson* grounds to the State's use of peremptory challenges of A and B. Before ruling on whether the defendant had established a prima facie case to require the State to give reasons for the challenges, the trial judge allowed the State to offer reasons. The judge considered the reasons and ruled that they were nondiscriminatory. The court upheld the trial judge's ruling concerning jurors A and B. Later during the voir dire, the State

exercised peremptory challenges of two additional black jurors, C and D, and the defendant again objected on *Batson* grounds. The trial judge ruled that the defendant had failed to establish a prima facie case, but the Court of Appeals held, relying on *State v. Hoffman*, 348 N.C. 548 (1998), discussed in detail above, that the defendant had established a prima facie case concerning jurors C and D. The court noted that the defendant was black and the victim was white, that the State used its peremptory challenges to excuse four of the six black jurors in the jury pool, and that the composition of the jury panel was eleven white jurors and one black juror.

State v. Cofield, 129 N.C. App. 268, 277 (1998). During jury selection the State accepted a jury of six black and six white jurors and passed them to the defendant. The defendant peremptorily challenged four white prospective jurors on behalf of the defendant, who was black. The State challenged the exercise of these challenges as racially discriminatory under *Batson*. The court held that the trial judge correctly ruled that a prima facie case had been established.

2. Neutral Justification. If the party making a *Batson* claim presents a prima facie case, the other side must come forward with a neutral justification for its use of the peremptory strike. The justification must be "comprehensible", *State v. Maness,* 363 N.C. 261, 272 (2009), "clear[,] and reasonably specific," *Batson v. Kentucky,* 476 U.S. 79, 98, n.20 (1986), but "need not rise to the level of a challenge for cause." *Maness,* 363 N.C. at 272. Indeed, at this stage, the explanation need not be "persuasive, or even plausible." Purkett v. Elem*,* 514 U.S. 765, 768 (1995); State v. Clegg, 380 N.C. 127, 149 (2022) (citing *Purkett* for notion that inquiry at this stage "is limited only to whether the [party] offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny"). Because it will rarely, if ever, be the case that a party admits purposeful discrimination at this stage, the second step in the process is not normally dispositive. It can be, however, if a party fails to present a neutral justification for the dismissal of each prospective juror when several are at issue, *State v. Wright,* 189 N.C. App. 346, 352 (2008), or if "a discriminatory intent is inherent in the explanation" offered by a party. State v. Fletcher*,* 348 N.C. 292, 313 (1998). Rather, the second step is typically a prelude to the third step, when the judge assesses the validity of the proffered justification.

3. Pretext for Purposeful Discrimination. In the final step of the process, the court must determine whether the party whose conduct is at issue engaged in purposeful discrimination—that is, whether the party's neutral justification is a mere pretext. The burden of showing discrimination rests with the party making a *Batson* claim. Rice v. Collins*,* 546 U.S. 333, 338 (2006). Accordingly, the party making the claim must be given an opportunity to rebut the neutral justification offered by the other party. State v. Green, 324 N.C. 238, 240-41 (1989). This opportunity does not include cross-examining the prosecutor about his or her use of peremptory challenges. State v. Jackson, 322 N.C. 251, 258 (1988).

The party making the claim need not show that the other party used its peremptory challenge based solely or exclusively on the race or gender of the prospective juror. It is sufficient to show that the juror's race or gender was a "significant," *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), or motivating factor, *State v. Waring,* 364 N.C. 443, 480-81 (2010), in striking the juror. The appellate courts have characterized this burden as "showing that a peremptory strike was motivated in substantial part by discriminatory intent" or, put another way, showing that "it was more likely than not that the challenge was improperly motivated." *Clegg*, 380 N.C. at 157 (citing U.S. Supreme Court precedent).

Determining whether a party has engaged in intentional discrimination requires consideration of all relevant circumstances. *Waring*, 364 N.C. at 475; *see also* State v. Cuthbertson, 288 N.C. App. 388, 401 (2023) (trial court's independent consideration of relevant factors identified by precedent but not raised by parties was proof to appellate court that trial court properly considered all relevant circumstances). The trial court may not rule summarily in rendering this determination but instead must make findings of fact and conclusions of law explaining how it weighed the totality of relevant evidence. State v. Hobbs, 374 N.C. 345, 358-59 (2020) (*Hobbs I*) (so stating); State v. Hood, 273 N.C. App. 348, 357 (2020) (trial court erred by ruling summarily on *Batson* challenge; remanding for specific findings in light of *Hobbs I* and noting that such findings must take account of all relevant circumstances); State v. Alexander, 274 N.C. App. 31, 46 (2020) (similar). A trial court's failure to make factual findings supporting an asserted nondiscriminatory reason for a challenged peremptory strike generally will result in that reason carrying no weight on appellate review or at subsequent *Batson* proceedings. Snyder v. Louisiana, 552 U.S. 472, 479 (2008) (disregarding the State's asserted race-neutral reason for a peremptory strike on the basis of prospective juror's apparent nervousness where the trial court made no finding for the record concerning the juror's demeanor or the credibility of the reason); *Clegg*, 380 N.C. at 155 (trial court properly rejected a "body language and lack of eye contact" reason asserted on a *Batson* rehearing where it had made no specific finding corroborating that demeanor at trial).

The factors that are relevant at the prima facie case stage are also relevant for assessing whether a party has engaged in intentional discrimination. *See* State v. Hobbs, 384 N.C. 144, 148 (2023) (*Hobbs II*) (listing such factors as relevant to third step). For example, if the party accepted some jurors of the same race or gender as the juror that the party excused, that is a factor that weighs against a finding of intentional discrimination. State v. Bell, 359 N.C. 1, 12 (2004). Whether the party accepted an unusually high or low percentage of prospective jurors from a particular group would also be relevant. The United States Supreme Court has provided the following non-exclusive list as an example of evidence that a party may present to attempt to show purposeful discrimination on the basis of race:

- statistical evidence about the opposing party's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;

- evidence of the opposing party's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- the opposing party's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the opposing party's peremptory strikes in past cases;
- other relevant circumstances that bear upon the issue of racial discrimination.

Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019); *see also Hobbs I*, 374 N.C. at 356. Analogous factors presumably could be used in a case involving alleged discrimination on the basis of gender. Note that the North Carolina Supreme Court has stated that the nature of one party's peremptory challenges is not a factor relevant to whether the other party has engaged in intentional discrimination. *Hobbs I*, 374 N.C. at 357 (2020) (in context of defendant's *Batson* challenge to prosecution peremptory strikes court stated that "the peremptory challenges exercised by the defendant are not relevant to the State's motivations").

In the context of a *Batson* claim based upon racial discrimination, the *Flowers* court provided general guidance about several of the factors listed above. With respect to the relevant history of the opposing party's peremptory strikes in past cases, the Court explained "that a defendant may prove purposeful discrimination by establishing a historical pattern of racial exclusion of jurors in the jurisdiction in question," but that demonstrating such history is not necessary to prevail on a *Batson* claim. 139 S. Ct. at 2244-45. *See also Hobbs II*, 384 N.C. at 149 (trial court considered historical use of peremptory strikes in the jurisdiction). Relevant history also may include previous proceedings in the case where the *Batson* claim is raised. The *Batson* claim in *Flowers* arose from the sixth trial against the defendant following a series of mistrials and conviction reversals by the state appellate court, including a reversal for a separate *Batson* violation. Examining this direct history, of which the trial court was aware, the Court observed that in the defendant's prior trials the State used peremptory strikes against "as many black prospective jurors as possible" and that this pattern "necessarily inform[ed]" its assessment of purposeful discrimination in the proceeding at hand where the State used peremptory strikes against five of six black prospective jurors. 139 S. Ct. at 2245-46.

On the issue of disparate questioning and investigation, the *Flowers* court explained that while it is possible for such inquiry to "reflect ordinary race-neutral considerations," the "dramatically disparate" approach revealed in the record was further evidence of purposeful discrimination. *Id*. at 2247-48. The Court took note of the fact that, on average, the State asked twenty-nine questions to each struck black prospective juror and only one to each seated white juror. This disparity was not reasonably attributable to differences between the jurors unrelated to race. *Id*. *Compare Hobbs II*, 384 N.C. at 149 (trial court did

not err in finding no disparity in questioning and that any differences that did exist were a function of the different styles of three prosecutors involved in voir dire), *with Clegg*, 380 N.C. at 159-61 (trial court erred by failing to adequately consider disparate questioning described in the opinion).

Appellate courts considering *Batson* claims often have focused on whether the reason given by the party using the peremptory challenge applied equally to prospective jurors of a different race or gender who were not challenged by the party. For example, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step" Miller-El v. Dretke, 545 U.S. 231, 241 (2005); *Flowers*, 139 S. Ct. at 2249; *Hobbs I*, 374 N.C. at 358-59; *see also* State v. Barden, 362 N.C. 277, 279 (2008) (remanding for further consideration of a *Batson* challenge and instructing the trial court to "consider the voir dire responses of prospective juror Baggett and those of Teresa Birch, a white woman seated on defendant's jury" and to give "[t]he State . . . an opportunity to offer race-neutral reasons for striking juror Baggett while seating juror Birch"); *Hobbs II*, 384 N.C. at 156 (noting that trial court conducted "extensive comparative juror analysis").

In *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008), the prosecutor struck a juror because "[h]e's a student teacher . . . [and] might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase." However, the United States Supreme Court found this explanation to be pretextual, in part because of "the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as" the excused juror's student teaching. 552 U.S. at 483. Such juror comparisons have sometimes been characterized as "[m]ore powerful than . . . bare statistics." *Miller-El v. Dretke*, 545 U.S. at 241. Yet courts have also noted the difficulty of finding appropriate comparisons, given the many factors a party may consider when assessing the suitability of a juror. State v. Porter, 326 N.C. 489, 501 (1990) ("Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror . . . ."); *see also Hobbs II*, 384 N.C. at 150 (suggesting that the trial court's approach of considering each juror's characteristics "as a totality" rather than under a "single factor approach" was supported by U.S. Supreme Court case law instructing that the "overall record" and "all of the circumstances" should be accounted for in the analysis of purposeful discrimination).

Flowers also addressed the issue of a party misrepresenting the record when offering race-neutral reasons for a peremptory challenge, saying that it is "entirely understandable" that incorrect statements may be made in the course of the sometimes hurried "back and forth of a *Batson* hearing" and that isolated mistakes "should not be confused with

racial discrimination." 139 S. Ct. at 2250. The Court stated, however, that "when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling," and, under the facts presented, considered certain misrepresentations to be further evidence of discrimination. *Id*. *See also Clegg*, 380 N.C. at 144 (shifting explanations or misrepresentations of the record may be indications of pretext). In addition to the possibility of misrepresentations serving as evidence of discrimination, an asserted nondiscriminatory justification that is unsupported by the record carries no weight in the ultimate determination of whether a challenged peremptory strike is motivated by purposeful discrimination, and the unsupported reason must be disregarded. *Clegg*, 380 N.C. at 157 ("If the trial court finds that all of [a party's] proffered race-neutral justifications are invalid, it is functionally identical to [the party] offering no race-neutral justifications at all."). While articulated in the context of a *Batson* claim of racial discrimination, analogous principles seemingly would apply to claims of gender discrimination.

The appellate courts have noted that in many cases a trial court's ultimate determination of whether a peremptory strike was impermissibly motivated in substantial part by discriminatory intent will turn largely on the court's evaluation of credibility and demeanor – determinations that "lie peculiarly within a trial judge's province." *Flowers*, 139 S. Ct. at 2244 (quotation omitted); *Hobbs II*, 384 N.C. at 148. As noted above, a trial court must make findings of fact and conclusions of law explaining how it weighed the totality of relevant evidence. *Hobbs I*, 374 N.C. at 358-59. Importantly, the trial court's task is to evaluate the race-neutral reasons articulated by the party who has exercised the objected-to peremptory strike and, in doing so, the court should not consider "reasoning not presented by the [party] on its own accord." *Clegg*, 380 N.C. at 158 (trial court erred by considering race-neutral reasoning not advanced by the party). Additionally, proffered reasons not supported by the record must be disregarded. *Id*. at 157. A trial court's properly supported ruling on a *Batson* challenge is given great deference on appeal and will be overturned only if it is clearly erroneous. *Id*. at 145.

Case Summaries: Strike Motivated by Purposeful Discrimination

Foster v. Chatman, 578 U.S. 488 (2023). The Court determined that prosecutors were motivated in substantial part by race in exercising peremptory strikes against two black prospective jurors in a capital murder case. The Court's analysis focused largely on a prosecutor's misrepresentations of the record when asserting race-neutral reasons for the strikes. Additionally, the credibility of certain asserted reasons, which included representations that the prospective jurors were considered perhaps acceptable at a point in time during voir dire, was undermined by evidence that the prosecution had listed the each of them on a list titled "definite NO's" which was later discovered in the prosecution's file. The prosecutor's credibility also was undermined by side-by-side comparisons between accepted white jurors and the black prospective jurors who were struck.

State v. Clegg, 380 N.C. 127 (2022). Though the trial court properly considered certain historical evidence offered by the defendant in support of a *Batson* challenge and properly disregarded various race-neutral reasons asserted by the prosecution in rebuttal, the trial court erred by failing to properly apply the "motivated in substantial part by discriminatory intent" burden of proof. Specifically, the trial court erroneously focused on ways that the facts at hand were distinguishable from the facts of U.S. Supreme Court cases finding *Batson* violations rather than focusing on the general legal principles that derive from those cases. The trial court explicitly found that the race-neutral reasons offered by the prosecution were insufficient but nevertheless ruled that the defendant, who offered supporting evidence, had not met his burden under *Batson*. The trial court also erred by "considering within its *Batson* step three analysis reasoning not presented by the prosecution on its own accord." The court held that the totality of the evidence presented for the trial court's proper consideration established that it was sufficiently likely that the strike was motivated by discriminatory intent and thus reversed the trial court's contrary ruling.

Miller-El v. Dretke, 545 U.S. 231 (2005). The Court granted habeas relief to a capital defendant based on racial discrimination by the prosecution during jury selection. The state struck ten of eleven eligible black prospective jurors; explained some of its strikes with reasons that applied equally to white jurors who were not removed; questioned black and white prospective jurors differently about the death penalty; used a Texas procedure called the "jury shuffle" to minimize the number of African Americans likely to sit on the jury; and apparently relied on a training manual that expressly encouraged prosecutors to remove minorities from the jury. In light of this evidence, the Court determined that the state's race-neutral reasons for its strikes were pretexts for purposeful discrimination.

State v. Cofield, 129 N.C. App. 268, 279 (1998). During jury selection the State accepted a jury of six black and six white jurors and passed them to the defendant. The defendant peremptorily challenged four white prospective jurors on behalf of the defendant, who was black. The State challenged the exercise of these challenges as racially discriminatory under *Batson*. The court held that the trial judge did not clearly err in finding, based on the evidence before the judge, that the defendant's explanations for the challenges were merely pretextual excuses for purposeful racial discrimination.

Case Summaries: Strike Not Motivated by Purposeful Discrimination

State v. Hobbs, 384 N.C. 144 (2023). The trial court did not err in determining that there was no purposeful discrimination in the State's peremptory strike of three black prospective jurors. Evidence in the record supported the trial court's findings that the State did not engage in disparate questioning or investigation during voir dire, that there was not a history of discriminatory peremptory strike usage in the jurisdiction, and that side-by-side juror comparisons did not reveal intentional

discrimination. The opinion includes detailed descriptions of the side-by-side juror comparisons.

State v. Waring, 364 N.C. 443, 487-91 (2010). The court held that the trial court correctly found no purposeful discrimination in the State's decision to excuse a black prospective juror. The prosecutor's race-neutral reasons were (1) the juror had never formed a personal view about the death penalty; (2) she did not keep up with the news; and (3) she had been charged with a felony. The supreme court noted that only two of the nine peremptory challenges exercised by the prosecutor were used on black jurors and that two black jurors were passed by the State, an acceptance rate of 50 percent. Further, the court compared the prospective juror at issue with white jurors accepted by the State and found that the reasons given by the prosecutor were genuine distinctions.

State v. Maness, 363 N.C. 261, 272 (2009). The court held that the trial court did not clearly err in accepting the prosecutor's race-neutral justification for removing an African-American prospective juror. The prosecutor noted that the juror had a history of mental illness and had worked with substance abusers and so might "overly identify with defense evidence pertaining to defendant's cannabis dependence and attention deficit disorder."

State v. Spruill, 338 N.C. 612, 632 (1994). The court found no *Batson* error after considering the following factors: (1) the race of the defendant, victims, and key witnesses; (2) the prosecutor's questions and statements during voir dire; (3) the prosecutor's use of a disproportionate number of peremptory challenges to strike black jurors in a single case; and (4) the prosecutor's acceptance rate of black jurors.

State v. Jackson, 322 N.C. 251, 257 (1988). The court held that the criteria prosecutors used in selecting jurors were valid: they wanted a jury that was "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." Stating that it may not have reached the same result as the trial court but noting the deferential standard of review, the court upheld the trial judge's conclusion that the State did not discriminate in exercising its peremptory challenges based on this criteria and other circumstances.

State v. Rouse, 339 N.C. 59, 80 (1994), *overruled in part on other grounds*, State v. Hurst, 360 N.C. 181 (2006). Evidence supported the contention that the reason for the prosecutor's peremptory challenge of a black juror was the juror's reservations about the death penalty and not her race.

State v. Porter, 326 N.C. 489, 501 (1990). The court noted that the case was tried at a time when racial tensions were particularly high in the county following a sheriff deputy's shooting of a man known as an "Indian activist" – an incident unrelated to the case at hand. The prosecutor asked Indian prospective jurors about their perceptions of racism in the

criminal justice system, and peremptorily challenged those Indian jurors who indicated that racism might be motivating the prosecution. The court deemed the challenged line of questioning to be a permissible effort to determine whether prospective jurors' perceptions of the trial process would affect their ability to render a fair verdict. The defendant further argued that the prosecutor impermissibly exercised peremptory challenges to exclude potential Indian jurors based on their race. In concluding that the trial court did not err in finding no discrimination by the prosecutor, the court stated that the alleged disparate treatment of prospective jurors is not necessarily dispositive. The court explained: "Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State." 326 N.C. at 501.

4. Remedies. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court stated:

> [W]e express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. 476 U.S. at 99, n.24 (citations omitted).

In *State v. McCollum*, 334 N.C. 208 (1993), the court stated that when a trial judge determines that a party has committed a *Batson* violation, it is the "better practice" and "clearly fairer" to order that jury selection start over with a new panel of prospective jurors. *Id.* at 236. According to the court, asking "jurors who have been improperly excluded from a jury because of their race to then return to the jury[,] to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would . . . require near superhuman effort." *Id.* Nonetheless, the court of appeals affirmed a case in which the trial judge found a *Batson* violation by the defendant and required the improperly challenged jurors to serve. State v. Cofield, 129 N.C. App. 268, 273 (1998).

Appellate courts review trial judges' *Batson* rulings deferentially. Snyder v. Louisiana, 552 U.S. 472, 477 (2008) ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."); State v. Clegg, 380 N.C. 127, 145 (2022) (same). If an appellate court determines that a trial judge erred in finding no prima facie case, the usual remedy is a remand for a retrospective *Batson* hearing. *See, e.g.*, State v. Barden, 356 N.C. 316, 345 (2002). If an appellate court holds that a trial judge erred in finding no purposeful

discrimination, *Batson* itself demands that the defendant's "conviction be reversed." *Batson,* 476 U.S. at 100; *Clegg*, 380 N.C. at 162.

There are no North Carolina cases that explain how an appellate court should proceed if it rules that a trial court erred in finding a *Batson* violation by a defendant and therefore incorrectly forced the defendant to accept a juror that the defendant wished to remove. In *Rivera v. Illinois*, 556 U.S. 148, 157 (2009), the Court held that the proper remedy for depriving a defendant of a peremptory challenge through an incorrect *Batson* ruling is a matter of state law.

XV. Impaneling of Jury. After all jurors, including alternate jurors, have been selected, the clerk impanels the jury by instructing them in the language set out in G.S. 15A-1216. *See also* N.C.P.I—Crim. 100.25 (precautionary instructions to jurors).

PLEAS & PLEA NEGOTIATIONS IN SUPERIOR COURT

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Contents

I. Introduction. Disposition by guilty plea plays a significant role in the administration of criminal justice in the North Carolina court system. In the superior courts, the majority of criminal cases are disposed of by guilty plea. *See* 2021- 2022 Statistical and Operational Report of North Carolina Trial Courts (reporting that in 2021-22, 1,938 superior court criminal cases were disposed of by jury trial to a verdict and 69,080 cases were disposed of by guilty plea).

Pleas and plea negotiations must comply with constitutional requirements. Additionally, North Carolina statutory law provides procedures for taking pleas and conducting plea negotiations. Case law adds to this body of law. This section summarizes that law.

For a discussion of the admissibility of pleas and pleas negotiations at trial see, Criminal Evidence: Pleas and Plea Discussions in this Benchbook.

For a discussion of *Harbison* claims—allegations that defense counsel made an unconsented-to admission of guilt at trial—see Ineffective Assistance of Counsel in this Benchbook.

II. Types of Pleas. A defendant may plead not guilty, guilty, or no contest to a criminal charge. G.S. 15A-1011(a). There is no such thing as a plea of "innocent." State v. Maske, 358 N.C. 40, 61 (2004).

A. Not Guilty.

1. Effect. By pleading not guilty, a defendant requires the State to prove, beyond a reasonable doubt, every element of the charged offense. *Id.*

2. Defendant May Not Be Penalized for Not Guilty Plea. A defendant has a constitutional right to plead not guilty, *id.*; State v. Larry, 345 N.C. 497, 524 (1997); State v. Kemmerlin, 356 N.C. 446, 482 (2002), and may not be punished for exercising that right. *Maske,* 358 N.C. at 61*;* State v. Boone, 293 N.C. 702, 712-13 (1977). Thus, the fact that a defendant pleaded not guilty may not be considered by the sentencing judge. *Compare Boone,* 293 N.C. at 712-13 (remanding for resentencing where the record revealed that the sentence was induced in part by the defendant's exercise of his right to plead not guilty), State v. Cannon, 326 N.C. 37, 38-39 (1990) ("[w]here it can reasonably be inferred … that the sentence was imposed … in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result"; after the possibility of a negotiated plea was discussed and the defendants demanded a jury trial, the judge told counsel "in no uncertain terms," that if convicted, the defendants would receive the maximum sentence), State v. Peterson, 154 N.C. App. 515, 518 (2002) (judge improperly considered the defendant's exercise of his right to a trial by jury; at sentencing the judge stated that the defendant "tried to be a con artist with the jury", "rolled the dice in a high stakes game with the jury," "[he] lost that gamble", and that "any rational person would never have rolled the dice and asked for a jury trial with such overwhelming evidence"), *and* State v. Pavone, 104 N.C. App. 442, 446 (1991) (trial judge improperly considered the defendant's failure to accept a plea and exercise her right to a jury trial; at sentencing the trial judge noted that plea discussions were not productive and said, "you must understand that having moved through the jury process and having been convicted, it is a matter in which you are in a different posture"), *with* State

v. Johnson, 320 N.C. 746, 753 (1987) (trial court made no statement indicating that the defendant's exercise of the right to a jury trial was considered), *and* State v. Gant, 161 N.C. App. 265, 272 (2003) (disapproving of the trial court's reference to the defendant's failure to enter a plea agreement, but holding on the facts that the defendant was not punished more severely because he exercised his right to a jury trial).

B. Guilty.

A plea of guilty is a confession that the defendant did the acts in question and "is itself a conviction" in that "nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242 (1969). By pleading guilty, a defendant not only relieves the State of its burden to prove every element of the offense but also waives several constitutional rights. *Id.* at 243; *see also* State v. Pait, 81 N.C. App. 286, 289 (1986). Those waived rights include the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin,* 395 U.S. at 243.

A defendant may plead guilty to a capital charge. *See* Section IV.H., below. A guilty plea may be "straight up"—that is, made without any agreement with the prosecutor—or it may be pursuant to a plea agreement in which the prosecution has offered the defendant some benefit in exchange for pleading guilty. *See* Section III below (plea bargaining). One reason a defendant might plead guilty "straight up," is the belief that accepting responsibility may lead to milder punishment. *See* State v. McClure, 280 N.C. 288, 294 (1972).

1. Effect.

A valid guilty plea acts as a conviction of the offense charged and serves as an admission of all of the facts alleged in the charging document. *Boykin,* 395 U.S. at 242 (1969); State v. Thompson, 314 N.C. 618, 623-24 (1985).

2. *Alford* Pleas.

Under *North Carolina v. Alford*, 400 U.S. 25 (1970), a defendant may plead guilty while factually maintaining innocence, provided that the record contains "strong evidence of actual guilt." *Id.* at 37 ("[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."); *see also* State v. McClure, 280 N.C. 288, 291-94 (1972) (trial judge properly accepted plea although defendant did not expressly admit guilt); State v. Canady, 153 N.C. App. 455, 457-58 (2002) (*Alford* plea requires "strong evidence" of guilt, which was present in this case). Such pleas are known as *Alford* pleas.

a. Effect. An *Alford* plea carries all of the consequences of a guilty plea. State v. Alston, 139 N.C. App. 787, 792 (2000).

Because an *Alford* plea "indicates a reluctance to take full responsibility" for the criminal conduct at issue it may "merit[] against finding" the mitigating sentencing factor that the defendant accepted responsibility for his or her conduct. State v. Meynardie, 172 N.C. App. 127, 133-34 (2005), *aff'd and remanded*, 361 N.C. 416 (2007).

Although it is generally stated that *Alford* pleas estop the defendant from denying guilt in later civil proceedings, jurisdictions differ on that issue. Jeff Welty, *Alford Pleas*, NC CRIM. LAW BLOG (April 13, 2010) (citing cases). The North Carolina courts have not yet decided this issue. *Id.*

Maintaining innocence pursuant to an *Alford* plea does not excuse a defendant's failure to participate in a sex offender rehabilitation program ordered as a condition of probation and requiring an acknowledgment of guilt. *Alston*, 139 N.C. App. at 794.

b. Discretion to Accept or Reject. In *Alford,* the United States Supreme Court indicated that a defendant has no constitutional right to have a plea accepted:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, although the States may by statute or otherwise confer such a right.

Alford, 400 U.S. at 38 n.11 (citation omitted). The *Alford* Court went on to note that "[l]ikewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence". *Id.*

As matter of state law, in situations where the plea agreement does not include a sentencing recommendation from the prosecutor the North Carolina Supreme Court has interpreted G.S. 15A-1023(c) to require that a trial judge accept a defendant's knowing and voluntary plea when it is supported by an adequate factual basis even if the defendant does not admit factual guilt. State v. Chandler, 376 N.C. 361, 366-68 (2020) (trial court erred by rejecting such a plea; remanding case to trial court with instruction to district attorney to renew the plea offer that was rejected by the trial court).

C. No Contest. A judge may accept a no contest plea—also called a plea of nolo contendere—if there is a factual basis for the plea. G.S. 15A-1022(d); *see* Section IV.E. below (discussing factual basis). A no contest plea is one "by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." *Alford,* 400 U.S. at 35. Basically: the defendant agrees not to contest the charge. *See* State v. Cooper, 238 N.C. 241, 243 (1953). "Implicit in the nolo contendere cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." State v. McClure, 280 N.C. 288, 293 (1972) (quoting *Alford*, 400 U.S. 25).

1. Effect. A no contest plea is "tantamount to a plea of guilty." *Cooper,* 238 N.C. at 243; *see also* State v. Holden, 321 N.C. 125, 162 (1987).

Although a no contest plea is not an admission of guilt and may not be used in another case to prove that the defendant *committed* the crime to which he or she pled no contest, evidence of such a plea may be used to prove that a defendant was *convicted* of the pleaded-to offense. *Holden*, 321 N.C. at 161-62; State v. Outlaw, 326 N.C. 467, 469 (1990). Thus, a past conviction resulting from a no contest plea

- may be admitted under evidence Rule 609(a) for purposes of impeachment, *Outlaw*, 326 N.C. at 469; *see generally* Rule 609: Impeachment by Evidence of Conviction of a Crime in this Benchbook;
- constitutes a conviction for purposes of the capital aggravating circumstances described in G.S. 15A-2000(e)(2) (defendant was previously convicted of a capital felony) and G.S. 15A-2000(e)(3) (defendant was previously convicted of a felony involving the use or threat of violence), *see Holden*, 321 N.C. at 161-62; and
- may be used as one of the three prior felony convictions required to support a habitual felon charge, State v. Jones, 151 N.C. App. 317, 329 (2002); *but see* State v. Petty, 100 N.C. App. 465, 468 (1990) (no contest plea entered before 1975 (effective date of amendments to G.S. 15A-1022) may not be used to adjudicate habitual felon status).

Note that the reasoning supporting the limitation on the use of no contest pleas entered before 1975 described by *Petty* arguably could be extended to each of the uses described in the foregoing list, though there is no North Carolina case law directly addressing the issue. *See Petty*, 100 N.C. App. at 467-68 (explaining that enactment of G.S. 15A-1022(c) changed prior North Carolina law which limited use of no contest pleas as adjudications of guilt to the case in which the plea was entered).

The main benefit of a no contest plea is that, unlike a guilty plea, it may not be used in a subsequent civil action to prove that the defendant committed the offense at issue. Wayne R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE §21.4(a) (4th ed. 2015) [hereinafter CRIMINAL PROCEDURE).

2. Advisement by Judge. When taking a no contest plea, the trial judge must inform the defendant that after the defendant's no contest plea, he or she will be treated as guilty whether or not guilt is admitted. G.S. 15A-1022(d); *see also* State v. May, 159 N.C. App. 159, 166 (2003) (judge sufficiently explained consequences of the no contest plea).

3. Consent Required.
A defendant may plead no contest only if the prosecutor and presiding judge consent. G.S. 15A-1011(b). Few standards exist to guide the judge in the exercise of discretion as to whether to accept a no contest plea. *See* 5 CRIMINAL PROCEDURE § 21.4(a).

D. Conditional Plea. North Carolina law allows a defendant to enter a guilty plea while reserving the right to appeal an adverse ruling on a motion to suppress. The requirements to preserve such an appeal are discussed in Section VII.B.1.c., below.

E. Plea To Aggravating Factors & Prior Record Level Points. Under *Blakely v. Washington,* 542 U.S. 296 (2004), unless pleaded to by a defendant, any fact other than a prior conviction that increases punishment beyond the prescribed statutory maximum must be proved to the jury beyond a reasonable doubt. After *Blakely,* the North Carolina statutes were amended to allow for guilty pleas to aggravating factors and prior record level points under G.S. 15A-1340.14(b)(7) (offense committed while the defendant was on probation, parole, or post-release supervision, serving a sentence of imprisonment, or on escape from a correctional institution while serving a sentence of imprisonment). G.S. 15A-1022.1; *see also* State v. Khan, 366 N.C. 448, 455 (2013) (plea that included aggravating factor was proper).

If the defendant admits the aggravating factor or factors but pleads not guilty to the felony, a jury must be empaneled to dispose of the felony; if the defendant pleads guilty to the felony but contests the aggravating factor or factors, a jury must be empaneled to determine if the aggravating factor or factors exist. G.S. 15A-1340.16(a2), (a3).

Procedures for taking pleas to aggravating factors and to the G.S. 15A-1340.14(b)(7) prior record level point are discussed in Section IV.D.5. below.

F. Plea to Habitual Status. A defendant may plead guilty or no contest to a habitual offender status, such as habitual felon, violent habitual felon, habitual breaking and entering, or armed habitual felon. *See, e.g.*, State v. Szucs, 207 N.C. App. 694, 701-02 (2010) (plea to habitual felon was valid); State v. Jones, 151 N.C. App. 317, 330 (2002) (no contest plea to habitual felon). A stipulation to the required prior convictions is insufficient; the trial court must take a plea to the habitual status. State v. Gilmore, 142 N.C. App. 465, 471 (2001) (stipulation insufficient "in the absence of an inquiry by the trial court to establish a record of a guilty plea"); State v. Edwards, 150 N.C. App. 544, 549–50 (2002) (following *Gilmore*); State v. Williamson, 272 N.C. App. 204, 220-21 (2020) (same); State v. Jester, 249 N.C. App. 101, 108 (2016) (same). *But see* State v. Williams, 133 N.C. App. 326, 330 (1999) (stipulation to habitual felon status was sufficient when the trial court continued by posing questions to the defendant that "establish[ed] a record of her plea of guilty"). *See generally* Section IV. below (Taking a Plea).

G. Failure to Plead; Waiver of Arraignment. If the defendant fails to plead, the court must record that fact and the defendant must be tried as if he or she had pled not guilty. G.S. 15A-941(a).

If the defendant fails to file a written request for arraignment, the court will enter a plea of not guilty on the defendant's behalf. G.S. 15A-941(d).

III. Plea Bargaining. Some guilty pleas are entered pursuant to a plea bargain with the prosecutor whereby the defendant agrees to plead guilty in exchange for some consideration by the State. The consideration offered can take many forms, such as allowing a plea on a lesser charge, agreeing to dismiss charges or not to bring other charges, or promising to recommend a particular sentence. The defendant's incentives to plea bargain include, among other things, limiting his or her exposure to punishment, controlling the nature of the conviction ultimately entered, and avoiding a criminal trial. *See, e.g.*, Brady v. United States, 397 U.S. 742, 752 (1970). The incentives for the prosecution are varied but no doubt include judicial economy, as plea bargaining allows for quick disposition of a large number of cases. *See, e.g.*, *id.* at 752. The United States

Supreme Court has noted that disposition by plea negotiation is a "highly desirable" part of the criminal justice system in that

> [i]t leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by, shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971).

A. No Right to Bargaining. Although G.S. 15A-1021(a) allows the prosecution and the defense to negotiate a plea, the defendant has no constitutional right to engage in plea bargaining. Weatherford v. Bursey, 429 U.S. 545, 561 (1977). A prosecutor has broad discretion to decide whether to engage in plea negotiations with a defendant and what plea will be offered. *See* State v. Woodson, 287 N.C. 578, 594-95 (1975) (prosecutor had full authority to negotiate with and accept pleas from two co-defendants but not others), *rev'd on other grounds,* 428 U.S. 280 (1976). To challenge that discretion as unconstitutionally selective, a defendant must prove that the prosecutor's decision was "deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification." 287 N.C. at 595 (quotation omitted) (no constitutional infirmity in prosecutor's selection, no abuse of discretion and no arbitrary classification); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (selectivity in enforcement does not violate the constitution so long as it is not deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification).

B. Scope of Negotiations.

1. Generally. Plea negotiations may include discussion of the possibility that in exchange for the defendant's guilty or no contest plea, the prosecutor will not charge, will dismiss, will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. G.S. 15A-1021(a). Restitution or reparation may be part of the plea arrangement. G.S. 15A-1021(c). *But see* State v. Murphy, 261 N.C. App. 78, 83-85 (2018) (trial court could not order defendant to pay restitution to four alleged victims of defendant's breaking and entering spree where the charges related to those victims were dismissed in exchange for defendant's guilty pleas to offenses involving other victims; "[T]he restitution authorized under our General Statutes requires a direct nexus between a convicted offense and the loss being remedied."). The prosecution may condition a plea offer on the defendant providing information to the prosecution, *Woodson*, 287 N.C. at 593 ("state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not" (quotation omitted)), *rev'd on other grounds*, 428 U.S. 280 (1976), or on truthful testimony by the defendant in criminal proceedings. G.S. 15A-1054(a).

It is not a violation of due process for a prosecutor to legitimately threaten a defendant during plea negotiations with institution of more

serious charges if the defendant does not plead guilty. *See Bordenkircher*, 434 U.S. at 365. And if the defendant declines to plead guilty, no constitutional violation occurs when the prosecutor carries out that threat. *See id.* at 360, 365 (distinguishing a case where the prosecutor without notice brings more serious charges after the defendant insists on pleading not guilty); *see also* United States v. Goodwin, 457 U.S. 368, 380-84 (1982) (presumption of vindictiveness did not apply; after defendant requested a jury trial on misdemeanor charges, he was indicted for a felony). As the Court explained in *Goodwin*, "[a]n initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecution." 457 U.S. at 380.

2. **Leniency for Third Parties.** Although a prosecutor's offer of leniency to a person other than the defendant has withstood a due process challenge in North Carolina, *see* State v. Summerford, 65 N.C. App. 519, 521-22 (1983) (prosecutor offered to dismiss charges against wife in exchange for husband's guilty plea); *see also* State v. Salvetti, 202 N.C. App. 18, 31-32 (2010) (prosecutor did not use improper pressure when he made the defendant's wife's plea deal contingent on the defendant's guilty plea), the United States Supreme Court has indicated that offers of more lenient or adverse treatment of a third party might require heightened scrutiny. *See Bordenkircher*, 434 U.S. at 364 n.8 (such an offer "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider"). Applying the Court's cautionary note, other jurisdictions have approved plea deals offering leniency for third parties. *See, e.g.*, Harman v. Mohn, 683 F.2d 834, 837-38 (4th Cir. 1982) (as part of plea bargain, the prosecutor agreed to dismiss an indictment against the defendant's wife; the prosecutor observed "the high standard of good faith required in this type of plea bargain" and the judge carefully examined it).

3. **"Package" Pleas.** In a "package" plea all defendants must agree to the bargain before any will be allowed to benefit from it. As has been observed:

> Consistent with the package nature of the agreement, defendants' fates are often bound together: If one defendant backs out, the deal's off for everybody. This may well place additional pressure on each of the participants to go along with the deal despite misgivings they might have.

United States v. Caro, 997 F.2d 657, 658-59 (9th Cir. 1993) (footnote omitted). Relying on authority from other jurisdictions, the North Carolina Court of Appeals has rejected the argument that package pleas are per se involuntary. State v. Salvetti, 202 N.C. App. 18, 31-32 (2010) (going on to hold that the prosecutor's offer to give the defendant's wife a plea deal if the defendant pleaded guilty did not constitute improper pressure). Although other jurisdictions also have approved of package pleas, *see, e.g.,* United States v. Morrow, 914 F.2d 608, 613-14 (4th Cir. 1990); United States v. Clements, 992 F.2d 417, 419 (2d Cir. 1993), some have required the trial court to be informed of the package nature of the plea so

that it can engage in a "more careful" examination of voluntariness. *Caro,* 997 F.2d at 660. *But see Clements,* 992 F.2d at 419-21 (although the "preferred practice" is to advise the court of the condition, the government's failure to inform the trial court of the package nature of the plea did not mean that the trial court abused its discretion by denying a motion to withdraw the plea where the plea was otherwise voluntary).

4. **Appeal & Related Waivers.** Although no North Carolina courts have dealt with the issue in a published case, courts in other jurisdictions are split on whether the right to appeal may be waived as part of a negotiated plea. *See* 5 CRIMINAL PROCEDURE § 21.2(b). A number of courts, including the Fourth Circuit, have held that waiver of the right to appeal may be part of a plea bargain. *See* United States v. Davis, 954 F.2d 182, 185-86 (4th Cir. 1992); State v. LeMaster, 403 F.3d 216, 220 (4th Cir. 2005) (so noting). Other Fourth Circuit decisions have recognized that there is a "narrow class of claims" that have been found to survive a general waiver of appellate rights. *See LeMaster*, 403 F.3d at 220 n.2 (noting for example a claim that a sentence was based on an impermissible factor, such as race, and an allegation that the defendant had been completely deprived of counsel during sentencing). Others conclude that this right is non-negotiable. *See* 5 CRIMINAL PROCEDURE § 21.2(b).

   A number of federal circuit courts, including the Fourth Circuit, have held that a defendant may waive the right to collaterally attack a plea. *LeMaster*, 403 F.3d at 220 (citing cases). In the North Carolina state courts, the procedural device for a collateral attack is a motion for appropriate relief. *See* G.S. 15A-1411 through -1422; *see generally* Motions for Appropriate Relief in this Benchbook.

5. **Limits on Prosecutorial Conduct.** The Official Commentary to G.S. 15A-1021 suggests that during plea bargaining a prosecutor may not seek to induce a plea of guilty or no contest by:

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

   See State v. Salvetti, 202 N.C. App. 18, 32 (2010) (finding that none of these forms of pressure were applied). Additionally, State Bar Ethics opinions provide that during plea bargaining, the prosecutor may not:

   - Use or threaten to use the prosecutor's statutory calendaring power to coerce a defendant to plead guilty. JULIE RAMSEUR LEWIS AND JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL VOL. 2 TRIAL (2020) Ch. 23 at 23-11 (citing North Carolina State Bar Ethics Opinion RPC 243 (1997) (unethical for prosecutor to threaten that if the defendant does not accept the plea bargain, the prosecutor will make the defendant sit in the courtroom all

week and then place the defendant's case "on the calendar every Monday morning for weeks to come"), available at www.ncbar.gov/ethics/).

- Offer more advantageous pleas to the defendant in exchange for a donation to a specified charitable organization. *Id.* (citing N.C. State Bar Ethics Opinion RPC 204 (1995) (prosecutors could not ethically offer special treatment to offenders who were charged with violating traffic laws or minor criminal offenses in exchange for their donation to the local school board), available at www.ncbar.gov/ethics/).
- Agree to refrain from informing the court of the defendant's prior record. *Id.* at 23-11.

6. Terms Contrary to Law. A plea agreement term that is contrary to law is unenforceable. State v. Wall, 348 N.C. 671, 676 (1998) (court could not enforce plea agreement term that the sentence for the pleaded-to offenses would run concurrently to a sentence already being served when the law required that the sentences run consecutively). When a defendant is precluded from receiving the benefit of his or her bargain because a plea agreement term is unenforceable as contrary to law, the defendant is entitled to withdraw the plea. *Id*.; State v. Demaio, 216 N.C. App. 558, 565 (2011) (plea agreement set aside where it sought to preserve the right to appeal adverse rulings on motions to dismiss and in limine when no right to appeal those rulings existed); State v. White, 213 N.C. App. 181, 187-88 (2011) (plea agreement set aside where it attempted to preserve the defendant's right to appeal an adverse ruling on his motion to dismiss a felon in possession charge on grounds that the statute was unconstitutional as applied); State v. Smith, 193 N.C. App. 739, 742-43 (2008) (similar). The defendant then can opt to go to trial on the original charges or try to renegotiate a plea agreement that does not violate the law. *See, e.g.*, *Wall*, 348 N.C. at 676.

There is however a caveat to this rule. If the defendant is told that the particular term is likely to be unenforceable, its inclusion does not necessarily invalidate the plea. State v. Tinney, 229 N.C. App. 616, 620-25 (2013) (the defendant's plea was valid even though the plea agreement contained an unenforceable provision preserving his right to appeal the transfer of his juvenile case to superior court; distinguishing cases holding that the inclusion of an invalid provision renders a plea agreement unenforceable, the court noted that here the trial court told the defendant that the provision was, in all probability, unenforceable and the defendant nevertheless elected to proceed with his guilty plea); *see also* State v. Ross, 369 N.C. 393, 394-401 (2016) (distinguishing *Demaio* and upholding the defendant's plea reasoning that it was not actually conditioned upon preservation of the right to appeal a non-appealable matter; the appeal issue was discussed during the plea colloquy and the trial court warned the defendant that he "may not be able to proceed" with an appeal and the defendant "indicated multiple times that he understood the trial court's explanation regarding the waiver of certain rights" as a consequence of pleading guilty). Notwithstanding this authority, the best practice is to require the parties to present a plea agreement without any unenforceable terms.

C. Judge May Participate in Discussions. A trial judge may participate in plea negotiation discussions. G.S. 15A-1021(a).

D. Defendant's Presence. If represented by counsel, the defendant need not be present during plea negotiation discussions. *Id.*

E. Judge's Authority to Accept or Reject Arrangement. A judge must accept a plea arrangement in which the prosecutor has not agreed to make any recommendations as to sentence if the plea is the product of informed choice and it is supported by a factual basis. G.S. 15A-1023(c). However, the defendant has no right to have a plea arrangement as to sentencing accepted by the court. G.S. 15A-1023(b) ("Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly."); *see also* State v. Wallace, 345 N.C. 462, 465 (1997) ("A plea agreement involving a sentence recommendation by the State must first have judicial approval before it can be effective; it is merely an executory agreement until approved by the court."); State v. Collins, 300 N.C. 142,149 (1980) (a plea agreement containing a recommended sentence requires judicial approval). As discussed in Section III.F., below, even when a judge initially approves a plea arrangement as to sentence, the judge may withdraw consent upon learning of information that is inconsistent with the representations made when approval was given.

F. Agreement Regarding Sentence.

1. "Pre-Approval" by Judge. If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a sentence, they may, with the judge's permission, advise the judge of the terms of the arrangement and the reasons for it before the plea is made. G.S. 15A-1021(c). Because the statute uses the permissive "may," the judge is not required to engage in this discussion.

If the judge agrees to consider the arrangement, the judge may indicate to the parties whether he or she will concur in the proposed disposition. G.S. 15A-1021(c). If the judge agrees with the disposition, the judge may change his or her mind upon later learning information inconsistent with the representations made. *Id.*; State v. Wallace, 345 N.C. 462, 467 (1997) (trial court properly refused to accept a plea after learning new information concerning circumstances of homicide). This procedure allows the parties to get the judge's reaction to the proposed sentence; if the judge reacts negatively, the parties may resume negotiations and bring a revised arrangement back to the judge. Official Commentary to G.S. 15A-1021.

2. Agreement Must Be Disclosed at Time of Plea. Regardless of whether the parties have consulted with the judge before the plea, if they have agreed on a plea arrangement in which the prosecutor will recommend a particular sentence, they must disclose the substance of their agreement to the judge when the plea is taken. G.S. 15A-1023(a).

3. **Judge Must Notify Parties of Acceptance/Rejection.** Before accepting the plea, the judge must advise the parties whether he or she approves the arrangement and will dispose of the case accordingly. G.S. 15A-1023(b).

4. **When Judge Rejects Arrangement.**

   a. **Must Notify Parties & Give Opportunity to Modify.** If the judge rejects the arrangement, the judge must inform the parties, refuse to accept the plea, and advise the defendant personally that neither the State nor the defendant is bound by the arrangement. *Id.* The judge must tell the parties why he or she rejected the arrangement and give them a chance to modify it. *Id.*; *see, e.g.*, State v. Santiago, 148 N.C. App. 62, 68 (2001) (judge rejected arrangement because of concern regarding sentence). However, the State is not required to modify the agreement. State v. Bailey, 145 N.C. App. 13, 21 (2001). As noted in Section III.F.1. above, even if the judge previously indicated that he or she agreed with the proposed disposition, the judge may change positions upon learning information inconsistent with earlier representations. *See* G.S. 15A-1021(c).

   b. **Rejection Must Be Noted in Record.** When the trial judge rejects a plea arrangement as to sentence in open court at the time of the plea, the judge must order that the rejection be noted on the plea transcript and that the transcript be made a part of the record. G.S. 15A-1023(b).

   c. **No Appeal.** A judge's decision rejecting a plea arrangement is not subject to appeal. *See* G.S. 15A-1023(b); *see also Santiago*, 148 N.C. App. at 68.

   d. **Right to Continuance.** If the judge rejects the plea arrangement, the defendant is entitled to a continuance until the next session of court. G.S. 15A-1023(b). Although failure to grant a motion for a continuance is reversible error, *see* State v. Tyndall, 55 N.C. App. 57, 62-63 (1981) ("absolute right" to continuance), the court is not required to order a continuance on its own motion. State v. Martin, 77 N.C. App. 61, 65 (1985). While a defendant has an "absolute right to a continuance" under G.S. 15A-1023(b) he or she may waive that right by failing to assert it in apt time. State v. Hicks, 243 N.C. App. 628, 643 (2015) (defendant waived his right to a continuance following the trial court's rejection of his *Alford* plea agreement; after rejection of agreement the defendant expressly consented to being arraigned and proceeding to trial and failed to assert statutory right to continuance until second week of trial when State already had begun presentation of evidence).

      No right to a continuance attaches when a judge denies a defendant's request to plead guilty under a plea arrangement that already has been rejected and thus is null and void. State v. Daniels, 164 N.C. App. 558, 562 (defendant could not resurrect a plea agreement that had been rejected by the trial court).

5. If Sentence Does Not Conform to Agreement. If at the time of sentencing, the judge decides to impose a sentence other than that provided for in a plea arrangement, the judge must inform the defendant that a different sentence will be imposed and that the defendant may withdraw the plea. G.S. 15A-1024; *compare* State v. Puckett, 299 N.C. 727, 730-31 (1980) (ordering that judgment entered on guilty plea be vacated where trial court failed to comply with G.S. 15A-1024), *and* State v. Rhodes, 163 N.C. App. 191, 194-95 (2004) (same), *with* State v. Blount, 209 N.C. App. 340, 346 (2011) (no violation of G.S. 15A-1024 where plea agreement did not require sentencing in the mitigated range but only that the State "shall not object to punishment in the mitigated range"), *and* State v. Zubiena, 251 N.C. App. 477, 486-87 (2016) (sentence imposed was not inconsistent with plea arrangement where arrangement was silent as to specific sentencing terms). *See also* State v. Wentz, 284 N.C. App. 736, 740-42 (2022) (distinguishing *Blount* and finding that plea agreement "laid out an agreed-upon sentence [for a specific term of imprisonment] for the trial court to either accept or reject" notwithstanding language in agreement that "the State does not oppose consolidating the offenses for sentencing"; trial court's decision to run sentences consecutively did not conform to agreement and trial court erred by denying the defendant's right to withdraw his plea under G.S. 15A-1024; any ambiguity in the agreement related to the agreed-upon term of imprisonment and the extent of the trial court's discretion to run the sentences consecutively must be construed against the State); State v. Robertson, 290 N.C. App. 360, 362 (Sept. 5, 2023) (citing *Wentz* and holding that the trial court erred by denying the defendant's right under G.S. 15A-1024 to withdraw his plea after imposing sentence which deviated from the plea agreement; plea agreement called for a "suspended sentence in the presumptive range" but trial court imposed special probation with an active term of 30 days). The North Carolina Court of Appeals has advised that when the sentencing terms of a plea arrangement arguably are unclear, the trial court should seek clarification of the terms from the parties, especially in cases where both the State and the defendant have a different understanding of the terms than the trial court. *Robertson*, 290 N.C. App. at 364 (record suggested that neither the State nor the defendant understood their agreement to include the special probation imposed by the trial court).

Although failure to follow this procedure has been held to be reversible error, *see, e.g., Puckett,* 299 N.C. at 730-31; *Rhodes,* 163 N.C. App. at 194-95; State v. Marsh, 265 N.C. App. 652, 656 (2019) ("our review of the case law shows no instances where a harmless or prejudicial error standard has been applied in cases involving [G.S. 15A-1024], as plea arrangements are *contractual* in nature"), a defendant's lack of diligence in asserting such a failure may waive the right to challenge the plea. *See* State v. Rush, 158 N.C. App. 738, 740-41 (2003) (where the defendant failed to file a motion to withdraw her guilty plea, failed to give notice of appeal within ten days after judgment, and failed to petition for writ of certiorari, she waived challenge to the judgment, which imposed a sentence other than that included in the plea arrangement; issue was not raised until probation was revoked).

The North Carolina Court of Appeals has interpreted the statutory terms "other than provided for in a plea arrangement" to include a

sentence that is lighter than the one agreed to in the plea agreement. State v. Wall, 167 N.C. App. 312, 316-17 (2004) (after a successful motion for appropriate relief challenging his initial sentence, the defendant was resentenced to 133-169 months imprisonment; because the plea agreement specified 151-191 months he should have been allowed to withdraw his plea). *See also Marsh*, 265 N.C. App. at 655-56 (following *Wall* to hold that trial court erred by failing to advise the defendant of his right to withdraw his plea where court imposed two separate judgements rather than a consolidated judgement, despite fact that term of imprisonment was "materially the same"). It also has held that like a sentencing, a resentencing triggers application of G.S. 15A-1024. *See Wall*, 167 N.C. App. at 315; State v. Kirkman, 215 N.C. App. 274, 283-84 (2016).

Upon withdrawal, the defendant is entitled to a continuance until the next session of court. *See* G.S. 15A-1024.

G. Arrangements Relating to Charges Only. If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time of the plea. G.S. 15A-1023(c). As noted in Section III.E. above, the judge must accept the plea if it is knowing, voluntary, and intelligent and there is a factual basis for it.

H. Effect of Court's Rejection of Plea Arrangement. Once a plea arrangement has been rejected by the court, the arrangement is no longer available for the defendant to accept. State v. Daniels, 164 N.C. App. 558, 561-62 (2004).

I. *De Novo* Trial in Superior Court. If a defendant pleads guilty to a misdemeanor in district court pursuant to a plea arrangement in which misdemeanor charges were dismissed, reduced, or modified and then appeals for a trial *de novo* in superior court, the superior court has jurisdiction to try all of the misdemeanor charges that existed before entry of the plea. G.S. 7A-271(b); G.S. 15A-1431(b). If a felony charge is reduced to a misdemeanor in district court pursuant to a plea arrangement and the defendant appeals for trial *de novo* in superior court, the State may indict the defendant on the original felony and the defendant may be tried for that offense. State v. Fox, 34 N.C. App. 576, 579 (1977).

J. Backing Out of an Agreement.

1. When State May Back Out. The State may withdraw from a plea agreement any time before entry of the plea or before there is an act of detrimental reliance by the defendant. State v. Collins, 300 N.C. 142, 148-49 (1980); State v. Hudson, 331 N.C. 122, 146-49 (1992) (following *Collins*; rejecting the defendant's argument that suspending trial preparation constituted detrimental reliance in a case where plea agreement contained sentence recommendation that had not yet been approved by trial judge); State v. Marlow, 334 N.C. 273, 279-81 (1993) (following *Collins;* rejecting the defendant's argument that submitting to a polygraph constituted detrimental reliance); State v. Johnson, 126 N.C. App. 271 (1997) (following *Collins* and *Marlow*).

2. When Defendant May Back Out. A defendant may withdraw from a plea agreement before entry of the plea, regardless of any prejudice to the prosecution. *Collins,* 300 N.C. at 149. The North Carolina Supreme Court has explained:

> [P]lea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading. Thus, the prosecutor agrees to perform if and when defendant performs but has no right to compel defendant's performance.

Id.

K. Seeking Conditional Discharge Not Included in Arrangement. In State v. Dail, 255 N.C. App. 645, 647-49 (2017), the Court of Appeals held that a trial court erred by refusing to follow the procedures for considering a defendant's eligibility for a conditional discharge for a first controlled substance offense under G.S. 90-96(a) even though the defendant's plea agreement did not explicitly contemplate the applicability of the statute. The Court explained that it is mandatory that a trial court consider a defendant's eligibility for conditional discharge when he or she falls within the ambit of the statute, at least in cases where the defendant so requests. *See also Dail*, 255 N.C. App. at 651-52 (Bryant, J., concurring) (emphasizing for Superior Court judges the existence of Form AOC-CR-237 and its associated process for determining a defendant's eligibility for conditional discharge). Though there is no case law specifically addressing the issue, the reasoning of *Dail* may extend to cases involving defendants eligible for conditional discharge under G.S. 14-204 (prostitution), G.S. 14-277.8 (threats or reports of mass violence committed before attaining 20 years of age), and G.S. 14-313 (tobacco and related product offenses involving minors) because of the similar mandatory nature of the language of those statutes. Note that Form AOC-CR-237 (Request for Report of Conditional Discharge) may be used in such cases.

IV. Taking a Plea.

A. Defendant's Decision. Because a plea of guilty or no contest involves a waiver of constitutional rights, "[a] plea decision must be made exclusively by the defendant." State v. Harbison, 315 N.C. 175, 180 (1985); State v. Perez, 135 N.C. App. 543, 547 (1999).

B. Defendant's Presence.

A superior court judge may receive a plea of not guilty, guilty, or no contest only from "the defendant himself," G.S. 15A-1011(a), except when:

- The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer.
- There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945 (providing that a represented defendant who wishes to plead not guilty may waive arraignment prior to the date arraignment is calendared by filing a written plea signed by the defendant and counsel).

- The case involves a misdemeanor and there is a written waiver of appearance submitted with the approval of the presiding judge.
- The defendant executes a waiver of appearance and plea of not guilty as provided in G.S. 15A-1011(d). Under G.S. 15A-1011(d) a defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his or her behalf when:
  - (1) the defendant agrees in writing to waive the right to testify and the right to face his or her accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case;
  - (2) the defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and
  - (3) the judge allows the absence of the defendant because of distance, infirmity or other good cause.

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

C. Plea Arrangement Relating to Sentence. For a discussion of plea procedure when the parties' agreement relates to the sentence, see Section III.F. above.

D. Must Be Knowing, Voluntary, and Intelligent. Due process requires that a guilty plea must be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 244 (1969); *see also* State v. Harbison, 315 N.C. 175, 180 (1985); State v. McClure, 280 N.C. 288, 293 (1972). By pleading guilty, a defendant waives important constitutional rights. *Boykin,* 395 U.S. at 243. Such a waiver must be made freely and with a full understanding of the significance and consequences of the action. *Id.* at 243-44 ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."); Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). A plea that is not knowing, voluntary, and intelligent is void. *Boykin*, 395 U.S. at 243 n.5.

1. Voluntary. The requirement that a plea be a "voluntary expression of [the defendant's] own choice," *Brady,* 397 U.S. at 748, requires that it not have resulted from, for example, actual or threatened physical harm or overbearing mental coercion. *Id.* at 750*; see also* State v. Santos, 210 N.C. App. 448, 451-52 (2011) (rejecting the defendant's argument that his guilty plea was the result of unreasonable and excessive pressure by the State and the trial court; although the defendant asserted that the trial court pressured him to accept the plea during a 15 minute recess, denying him time needed to reflect, the plea offer was made days earlier and the trial judge engaged in an extensive colloquy with the defendant ensuring that the plea was knowing and voluntary); State v. Salvetti, 202 N.C. App. 18, 32 (2010) (the prosecutor's offer of a package deal in which the defendant's wife would get a plea deal if the defendant pleaded guilty did not constitute improper pressure). The constitutional requirement that a plea be voluntary is reflected in the statutory requirement that "[n]o

person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest." G.S. 15A-1021(b).

In North Carolina, a judge's comments have been held to have impermissibly imposed such pressure, rendering the plea involuntary. *See* State v. Benfield, 264 N.C. 75, 76-77 (1965) (after the judge told defense counsel that he thought the jury would convict and that if it did so, "he felt inclined to give [the defendant] a long sentence[,]" the defendant, knowing that a co-defendant who pleaded guilty got a suspended sentence, changed his plea to guilty); State v. Pait, 81 N.C. App. 286, 287-90 (1986) (when the defendant attempted to plead not guilty, the judge became visibly agitated and said angrily that he was tired of "frivolous pleas;" the judge asked the defendant whether he had made an incriminating statement to the police and when the defendant replied that he did, the judge directed counsel to confer with the defendant and return with an "honest plea"); *see also* State v. Cannon, 326 N.C. 37, 38-40 (1990) (when the trial court asked about the possibility of a negotiated plea, counsel advised that the defendants wanted a jury trial; the judge then stated that if the defendants were convicted, they would receive the maximum sentence; the defendants went to trial and were convicted; the appellate court noted that had the defendants pled guilty after they heard the judge's remarks, "serious constitutional questions would have arisen as to the voluntariness of the pleas"). *But see* State v. King, 158 N.C. App. 60, 67-70 (2003) (the trial judge explained the habitual felon phase of the trial to the *pro se* defendant and inquired as to whether the defendant wished to plead guilty; although the judge told the defendant that he would give "consideration for someone pleading guilty", the judge also stated that he was not promising the defendant anything or threatening him in any way, and made it clear that if the defendant did not want to plead guilty that the hearing before the jury would proceed; the trial judge appointed a lawyer to represent the defendant and the defendant conferred with the attorney before he accepted the guilty plea; distinguishing *Benfield, Cannon,* and *Pait* and holding that plea was voluntary).

The fact that a plea was entered to avoid a severe penalty, such as the death penalty, does not render it involuntary. North Carolina v. Alford, 400 U.S. 25, 31 (1970); Brady v. United States, 397 U.S. 742, 755 (1970).

2. Knowing & Intelligent. For a plea to be made intelligently, the defendant must understand (1) the nature of the charges, *Brady,* 397 U.S. at 756, (2) their "critical element[s]," *compare* Henderson v. Morgan, 426 U.S. 637, 647 n.18 (1976) (second-degree murder plea was invalid where record showed that the critical element of intent to kill was not explained to the defendant), *with* State v. Barts, 321 N.C. 170, 174-76 (1987) (the defendant knowingly entered a plea of guilty as to both felony-murder and premeditation and deliberation theories of first degree murder; trial judge adequately explained both theories and the defendant's responses indicated that he understood the nature of the plea and its possible consequences), and (3) the consequences of the plea. *See Brady,* 397 U.S. at 755; State v. Bozeman, 115 N.C. App. 658, 661 (quoting *Brady*). *Compare* State v. Collins, 221 N.C. App. 604, 608-09 (2012) (rejecting

the defendant's argument that the trial court did not adequately explain that judgment may be entered on his plea to assault on a handicapped person if he did not successfully complete probation on other charges), *with* State v. Rogers, 256 N.C. App. 328, 336-37 (2017) (suggesting that trial court erred by informing the defendant incorrectly that after entering an *Alford* plea the defendant would be able to appeal the denial of his *pro se* motion to dismiss for lack of jurisdiction; error was harmless given the motion's lack of substantive merit).

With respect to the requirement that the defendant understand the charges, the Supreme Court has observed:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson, 426 U.S. at 647.

The requirement that the defendant understand the consequences of the plea has been interpreted to mean that the defendant must be informed of direct consequences of the plea but not of collateral consequences. *Bozeman*, 115 N.C. App. at 661 ("Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be 'entered by one fully aware of the *direct consequences,* including the actual value of any commitments made to him by the court.'" (quoting *Brady,* 397 U.S. at 755)); State v. Reynolds, 218 N.C. App. 433, 434-38 (2012) (plea was invalid where trial court misinformed the defendant regarding a direct consequence; the trial court told the defendant that the maximum possible sentence was 168 months in prison when the maximum sentence (and the term imposed) was 171 months).

a. **Direct Consequences.** Direct consequences have been broadly defined "as those which have a 'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Bozeman,* 115 N.C. App. at 661 (quoting Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973)). The North Carolina courts have held or indicated that the following are direct consequences of a plea:

- The maximum sentence. *See* State v. Smith, 352 N.C. 531, 550 (2000); *Reynolds,* 218 N.C. App. at 434-38 (plea invalid where the trial court misinformed the defendant that the maximum sentence was 168 months when in fact it was 171 months and that period was imposed); *see generally* G.S. 15A-1022(a)(6) (judge must inform the defendant of the maximum sentence). *But see* State v. Szucs, 207 N.C. App. 694, 701-02 (2010) (plea to habitual felon was valid where the trial court told the defendant that

the plea would elevate punishment for the underlying offenses from Class H to Class C but did not inform him of the minimum and maximum sentences associated with habitual felon status); State v. Salvetti, 202 N.C. App. 18, 27-28 (2010) (the defendant, who was sentenced to a maximum sentence of 33 months, was not prejudiced by the trial judge's failure to comply with G.S. 15A-1022 and inform him of the maximum possible sentence of 98 months even where the Transcript of Plea form incorrectly stated the maximum punishment as 89 months).

- The mandatory minimum sentence; *see Bozeman*, 115 N.C. App. at 661-62 (drug trafficking case); *Smith*, 352 N.C. at 550; *see generally* G.S. 15A-1022(a)(6) (judge must inform the defendant of mandatory minimum sentence). *But see* State v. Brooks, 105 N.C. App. 413, 419 (1992) (no prejudicial error occurred when judge mistakenly informed the defendant that applicable mandatory minimum was 28 years).
- An additional term of imprisonment associated with habitual offender status. State v. McNeill, 158 N.C. App. 96, 104 (2003) (but finding failure to so inform the defendant was harmless beyond a reasonable doubt).

Also, *State v. Morganherring,* 350 N.C. 701, 719 (1999), indicates that if, as a result of a guilty plea to a felony the defendant would "in all likelihood" be convicted of felony-murder, the murder conviction is a direct consequence of the felony plea.

b. **Collateral Consequences.** The North Carolina courts have held the following to be collateral consequences that need not be addressed in the judge's colloquy with the defendant:

- The fact that pleaded-to felonies may establish aggravating circumstances at the penalty phase following the defendant's plea to first-degree murder. State v. Smith, 352 N.C. 531, 551 (2000) ("Nothing is automatic or predictable about how a sentencing jury may weigh these aggravating circumstances or whether countervailing mitigating circumstances will be offered or how they will be weighed.").
- Sex offender satellite-based monitoring. State v. Bare, 197 N.C. App. 461, 478-80 (2009).
- Parole eligibility. State v. Daniels, 114 N.C. App. 501, 502-03 (1994).

c. **Defendant's Mistake.** The rule that a plea must be intelligently made does not mean that it will be vulnerable to attack if it later turns out that the defendant did not correctly assess all of the relevant factors. *See Brady,* 397 U.S. at 757. As the United States Supreme Court has stated: "A defendant is not entitled to withdraw [a] plea merely because he [or she] discovers long after

the plea has been accepted that his [or her] calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* If, however, the defendant was misinformed by counsel or not informed at all by counsel, the defendant may wish to pursue an ineffective assistance of counsel claim. For a discussion of mutual mistakes of law and their impact on the plea, see Section VI.B. below. For a discussion of ineffective assistance claims, see Ineffective Assistance of Counsel in this Benchbook.

3. **No Right to Modify.** If the plea is rejected on grounds that it is not free and voluntary, failure to provide an opportunity to modify has been held not to be error. State v. Martin, 77 N.C. App. 61, 65 (1985).

4. **Colloquy.** G.S. 15A-1022(a) is designed to effectuate the constitutional requirement that a guilty plea be knowing, voluntary, and intelligent. *See, e.g., Bozeman*, 115 N.C. App. at 661; Official Commentary to G.S. 15A-1022. The statute does not apply when the defendant pleads not guilty. State v. Ruffin, 232 N.C. App. 652, 658 (2014).

G.S. 15A-1022(a) provides that except when the defendant is a corporation or in misdemeanor cases where there is a waiver of appearance, a superior court judge must address the defendant "personally" and:

- Inform him or her of the right to remain silent and that any statement the defendant makes may be used against him or her.
- Determine that the defendant understands the nature of the charge.
- Inform the defendant that he or she has a right to plead not guilty.
- Inform the defendant that by his or her plea the defendant waives the right to trial by jury and to be confronted by the witnesses against him or her.
- Determine that the defendant, if represented by counsel, is satisfied with counsel's representation.
- Inform the defendant of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.
- Inform the defendant that if he or she is not a citizen, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

G.S. 15A-1022(a). Each of the points of communication and inquiry described by G.S. 15A-1022(a) are mandatory and cannot be bypassed even if one appears not to be applicable to a particular defendant. State v. Marzouq, 268 N.C. App. 616, 621-22 (2019) (it would be error for trial court to skip over citizenship issue during plea colloquy regardless of fact that defendant asserted his citizenship status in the transcript of plea). With respect to the trial court's duty to ascertain whether a defendant is satisfied with counsel's representation, the Court of Appeals has held that a trial court does not err by refusing to accept a guilty plea when the

record affirmatively demonstrates that the defendant is dissatisfied with defense counsel. State v. Foster, 105 N.C. App. 581, 587 (1992) (defendant answered "no" when asked if he was satisfied with defense counsel's representation). A trial judge should be mindful that a defendant's expressed dissatisfaction with defense counsel or lack of understanding of the nature of the charge raises a question as to whether a plea is knowing, voluntary, and intelligent. Therefore, a cautious trial judge presented with such a situation may choose to reject the plea or conduct a more searching inquiry into whether the plea is knowing, voluntary, and intelligent, though the latter course of action is not a prerequisite to rejecting the plea. *Foster*, 105 N.C. App. at 584 (rejecting defendant's argument that trial court erred by not inquiring further before rejecting plea upon defendant's expressed dissatisfaction with defense counsel during G.S. 15A-1022(a) colloquy).

Although G.S. 15A-1022 does not require the trial court to inquire of the defendant whether he or she is in fact guilty, *see* State v. Bolinger, 320 N.C. 596, 603 (1987), the Transcript of Plea form includes a question to that effect. *See* AOC-CR-300 (Rev. 2/23) (Question 14(a) states: "Are you in fact guilty?"). As discussed in Sections II.B.2. and II.C. above, a plea may be accepted even if the defendant does not admit guilt, and this possibility is reflected in the questions that follow on the Transcript of Plea. *Id.* at Question 14(b) (no contest pleas) and Question 14(c) (*Alford* pleas).

Although not constitutionally required or codified in the statutory plea procedure, the General Assembly has required the North Carolina Administrative Office of the Courts to include the following questions on the Transcript of Plea:

- Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?
- Do you understand that your plea of guilty may impact how biological evidence related to your case (for example blood, hair, skin tissue) will be preserved?

S.L. 2009-86, sec. 1-2. *See generally* G.S. 15A-268 (preservation of biological evidence); G.S. 15A-1444 (appeal; certiorari). *See* Section VII., below (discussing appeals after guilty pleas).

Reflecting the constitutional standards for a knowing, voluntary, and intelligent plea discussed above, G.S. 15A-1022(b) provides that a guilty or no contest plea may not be accepted unless the judge determines that it is "a product of informed choice." Similarly reflecting the constitutional standards for voluntariness, G.S. 15A-1021(b) provides that "[n]o person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest" and G.S. 15A-1022(b) makes inquiry into improper pressure in violation of G.S. 15A-1021(b) a part of the judge's colloquy. Specifically, G.S. 15A-1022(b) requires the judge to inquire of the prosecutor, defense counsel, and the defendant "personally" to determine whether there were any prior plea discussions, whether the parties had entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b).

Both G.S. 15A-1022(a) and (b) require the judge to inquire "personally" of the defendant and others. It is not enough to simply accept a completed Transcript of Plea form (AOC-CR-300). State v. Hendricks, 138 N.C. App. 668, 670 (2000) (trial judge erred by failing to personally address the defendant, even though the transcript of plea form covered all the areas omitted by the trial judge; "our legislature's explicit reference to the trial judge addressing the defendant personally and informing him of his rights illustrates that reliance on the transcript of plea alone (with which the judge has no involvement in the first place) is insufficient to meet section 15A-1022's procedural requirements"); *see also Marzouq*, 268 N.C. App. at 623 ("The requirements outlined in [G.S. 15A-1022] are mandatory, regardless of what a defendant might say, and we advise the courts of this State to comply with them.").

5. Pleas to Aggravating Factors & Prior Record Level Points. As noted in Section II.E., above, after *Blakely*, the North Carolina statutes were amended to allow for guilty pleas to aggravating factors and a prior record level (PRL) point under G.S. 15A-1340.14(b)(7) (offense committed while the defendant was on probation, parole, or post-release supervision, serving a sentence of imprisonment, or on escape from a correctional institution while serving a sentence of imprisonment). Specifically, G.S. 15A-1022.1 provides that before accepting a plea of guilty or no contest to a felony, the trial judge must determine:

- whether the State intends to seek a sentence in the aggravated range and if so, which factors are at issue; and
- whether the State seeks a finding that a PRL point should be found under G.S. 15A-1340.14(b)(7).

If the State seeks a sentence in the aggravated range or a PRL point under G.S. 15A-1340.14(b)(7), the trial court also must determine whether the State has provided the required notice under G.S. 15A-1340.16(a6) or whether such notice has been waived. G.S. 15A-1022.1(a).

In all cases in which the defendant admits to the existence of an aggravating factor or to a finding of a point under G.S. 15A-1340.14(b)(7), the trial judge must comply with the basic plea procedure in G.S. 15A-1022(a). G.S. 15A-1022.1(b); *see generally* Section IV.D.4., above. In addition to the basic plea procedures, the trial court must address the defendant "personally" and advise the defendant that he or she:

- is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
- has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

G.S. 15A-1022.1(b).

Before accepting an admission to an aggravating factor or a point under G.S. 15A-1340.14(b)(7), the trial court must determine that there is a factual basis for the admission and that the admission is the result of the defendant's informed choice. G.S. 15A-1022.1(c). The trial court may

base its determination on the same evidence considered with respect to the factual basis for the substantive offense, *see* Section IV.E. below, as well as any other appropriate information. G.S. 15A-1022.1(c).

In terms of timing, a defendant may admit to the existence of an aggravating factor or to the existence of a point under G.S. 15A-1340.14(b)(7) before or after the trial of the underlying felony. G.S. 15A-1022.1(d).

In addition to the express directive in G.S. 15A-1022.1(b) requiring a trial court to comply with the procedures of G.S. 15A-1022(a) when a defendant admits an aggravating factor or a PRL point under G.S. 15A-1340.14(b)(7), there is a general directive in G.S. 15A-1022.1(e) that the procedures of Article 58 of Chapter 15A apply to the handling of such admissions "unless the context clearly indicates that they are inappropriate." Note, however, that regardless of whether particular procedures described by G.S. 15A-1022.1 are appropriate in a given case, it is error for a trial court to assess an aggravating factor or a PRL point under G.S. 15A-1340.14(b)(7) to a defendant without determining whether the notice requirements of G.S. 15A-1340.16(a6) have been met or waived. State v. Snelling, 231 N.C. App. 676, 682 (2014) (finding such error regardless of fact that certain procedures under G.S. 15A-1022.1 were unnecessary in light of the defendant's stipulation to the PRL point).

North Carolina cases addressing the provisions of G.S. 15A-1022.1 in the context of both guilty pleas and sentencing proceedings following a conviction at trial are summarized below.

> State v. Wright, 265 N.C. App. 354, 356-61 (2019) (where State provided notice of intent to prove aggravating factor 20 days before trial rather than the 30 days required by G.S. 15A-1340.16(a6), the trial court's colloquy with the defendant, during which defense counsel stated that he had been "provided the proper notice and seen the appropriate documents" established a valid waiver of the statutory notice requirement; trial court's colloquy otherwise satisfied the requirements of G.S. 15A-1022.1 where the defendant responded affirmatively to the court's direct inquiry of whether he had discussed with counsel the ramifications of stipulating to the aggravating factor, wished to waive the jury's determination of the factor, and in fact so stipulated).
>
> State v. Marlow, 229 N.C. App. 593, 601-02 (2013) (in the context of a sentencing proceeding after guilty verdicts were returned at trial by a jury, the court held that the trial court's failure to specifically advise the defendant of his right to have a jury determine the existence of a PRL point under G.S. 15A-1340.14(b)(7) as required by G.S. 15A-1022.1(b) was excused by G.S. 15A-1022.1(e) because the defendant stipulated to the point with the assistance of counsel and did not object or hesitate when asked about the prior convictions).
>
> State v. Scott, 287 N.C. App. 600, 607 (2023) (following *Wright* to conclude on similar facts that the trial court's colloquy established that the defendant waived the notice requirement of G.S. 15A-

1340.16(a6); following *Marlow* to conclude that the "trial court was not required to follow the precise procedures prescribed in [G.S. 15A-1022.1]" given that the defendant stipulated to the G.S. 15A-1340.14(b)(7) PRL point in open court with the assistance of counsel).

State v. Dingess, 275 N.C. App. 228, 229-35 (2020) (distinguishing *Wright* and vacating the entirety of a plea agreement in which the defendant agreed to admit an aggravating factor where there was nothing in the record establishing that the trial court complied with G.S. 15A-1022.1 or that the defendant received or waived the notice required by G.S. 15A-1340.16(a6)).

6. Mass Pleas. There do not appear to be any North Carolina cases testing the validity of "mass pleas," in which the judge convenes defendants and advises them of their rights in a group setting. Regardless of whether such a procedure is valid, it may subject individual pleas to attack.

E. Factual Basis. A judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. G.S. 15A-1022(c); *see* State v. Sinclair, 301 N.C. 193, 197-99 (1980) (insufficient factual basis); State v. Dickens, 299 N.C. 76, 79 (1980) (sufficient factual basis). This determination may be based upon information including but not limited to:

- a statement of the facts by the prosecutor
- a written statement of the defendant
- an examination of the presentence report
- sworn testimony, which may include reliable hearsay
- a statement of facts by the defense counsel

G.S. 15A-1022(c).

The statute "does not require the trial judge to elicit evidence from each, any, or all of the enumerated sources." State v. Barts, 321 N.C. 170, 177 (1987); *see also* State v. Atkins, 349 N.C. 62, 96 (1998); *Sinclair,* 301 N.C. at 198; *Dickens,* 299 N.C. at 79. Rather the judge may consider any information properly brought to his or her attention in determining whether there is a factual basis for the plea. *Barts,* 321 N.C. at 177; *Atkins,* 349 N.C. at 96; *Sinclair,* 301 N.C. at 198; *Dickens,* 299 N.C. at 79. However, whatever information the judge does consider must appear on the record so that an appellate court can determine whether the plea was properly accepted. *Barts,* 321 N.C. at 177; *Atkins,* 349 N.C. at 96; *Sinclair,* 301 N.C. at 198. At a minimum, "some substantive material independent of the plea itself [must] appear of record which tends to show that defendant is, in fact, guilty." *Sinclair,* 301 N.C. at 199 (defendant's bare admission of guilt or plea of no contest provides an insufficient factual basis for a plea). *Compare* State v. Agnew, 361 N.C. 333, 334-38 (2007) (transcript of plea, defense counsel's stipulation to the existence of a factual basis, and indictment together did not establish sufficient factual basis for a plea where they provided "scant factual information" of the defendant's conduct), *with* State v. Crawford, 278 N.C. App. 104, 117-18 (2021) (distinguishing *Agnew* and finding that transcript of plea and indictments provided a sufficient factual basis where the indictments provided

factual information "beyond . . . simply alleg[ing] the charge to be indicted"). Describing it as an "independent judicial determination," the North Carolina Supreme Court has explained that a trial court assessing the sufficiency of a proffered factual basis must consider "whether the stipulated facts fulfill the various elements of the offense or offenses to which the defendant is pleading guilty." State v. Robinson, 381 N.C. 207, 217 (2022) (vacating a plea to multiple assault charges arising from a single incident on grounds of insufficient factual basis where there was not evidence of a distinct interruption in the assault); *see also* State v. Alston, 268 N.C. App. 208, 210 (2019) (elements of charged offenses could reasonably be inferred from prosecutor's factual summary). The statute does not set forth the applicable standard of proof that applies to the factual basis determination. However, when the plea is an *Alford* plea, the factual record must show "strong" evidence of guilt. *See* Section II.B.2., above (discussing *Alford* pleas).

F. Pleas to Uncharged & Other Offenses. A judge may accept a plea to an uncharged offense only if it is a lesser included of a charged offense. *See* In Re Fuller, 345 N.C. 157, 160-61 (1996) (stating rule in the context of a judicial discipline issue); State v. Bennett, 271 N.C. 423, 425 (1967) ("a defendant . . . cannot plead guilty to an offense which the indictment does not charge"); State v. Neville, 108 N.C. App. 330, 332-33 (1992) (plea to uttering a forged instrument could not stand where the indictment charged forgery; court lacked jurisdiction to enter the plea). Of course, problems in this regard can be avoided by the filing of an information, as provided in G.S. 15A-644(b). Note, however, that an information only may be used to charge a criminal offense against a person who is represented by counsel, G.S. 15A-641(b), and indictment may not be waived by a defendant who is not represented by counsel. G.S. 15A-642(b). *See also* G.S. 15A-644(b) (valid information must contain signed waiver of indictment). Thus, the filing of an information cannot facilitate a plea to an uncharged offense in the case of an unrepresented defendant. *Cf.* State v. Nixon, 263 N.C. App. 676, 681 (2019) (trial court lacked jurisdiction to accept guilty plea to an offense that was not a lesser included and which was charged by an information that was defective for lack of a formal waiver of indictment).

A judge should not accept a plea to a lesser included offense over the State's objection. State v. Brown, 101 N.C. App. 71, 80-81 (1990) ("The State has every right to attempt to convict a defendant of the crimes charged."). If a judge takes a plea to a lesser included offense over such an objection, double jeopardy does not bar the State from trying the defendant for the greater offense if that offense was pending at the time the plea was entered. Ohio v. Johnson, 467 U.S. 493, 494 (1984); *see also* State v. Hamrick, 110 N.C. App. 60, 66-67 (1993).

Upon entry of a plea of guilty or no contest, the defendant may request permission to enter a plea of guilty or no contest to other crimes with which he or she is charged in the same or another prosecutorial district. G.S. 15A-1011(c). However, a defendant may not plead to crimes charged in another prosecutorial district unless the district attorney of that district consents in writing. *Id.* The prosecutor or his or her representative may appear in person or by filing an affidavit as to the nature of the evidence gathered as to these other crimes. *Id.* Entry of a plea in this way constitutes a waiver of venue. *Id.*

A superior court has jurisdiction to accept the plea even though the case otherwise may be within the exclusive original jurisdiction of the district court,

provided there is an appropriate indictment or information. *Id.* A district court may accept pleas under G.S. 15A-1011(c) only in cases within the original jurisdiction of the district court and in cases within the concurrent jurisdiction of the district and superior courts, as set out in G.S. 7A- 272(c). *Id.* (for a discussion of recent legislative changes to G.S. 7A-272(c), see Shea Denning, *Legislature Tweaks Jurisdictional Rules for District and Superior Courts*, NC CRIM. LAW BLOG (Sept. 5, 2023)). This procedure achieves economies to the State by "wrapping up all charges against a defendant at once." Official Commentary to G.S. 15A-1011. The consent of the prosecutor in any other district in which other charges are pending is designed to cut down on "judge- or [prosecutor]- shopping." *Id.*

G. In Open Court; Record Required. As a general rule, a plea may be received "only from the defendant himself in open court." G.S. 15A-1011(a). For a discussion of when a plea may be received in the defendant's absence, see Section IV.B. above.

When the defendant has pleaded guilty, the record must demonstrate that the plea was made knowingly, voluntarily and intelligently. Brady v. United States, 397 U.S. 742, 747 n.4 (1970) ("[T]he record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily."); *see* Section IV.D., above (discussing the requirement that a plea be knowing, voluntary, and intelligent). In *Boykin v. Alabama*, the United States Supreme Court stated that a waiver of constitutional rights would not be presumed from a silent record. 395 U.S. 238, 243 (1969); *see also* State v. Allen, 164 N.C. App. 665, 669-70 (2004). The North Carolina Supreme Court has reiterated this requirement:

> *Boykin* requires us to hold that a plea of guilty or a plea of Nolo contendere may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly. Hence, a plea of guilty or of Nolo contendere, unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated . . . . If the plea is sustained, it must appear affirmatively that it was entered voluntarily and understandingly.

State v. Ford, 281 N.C. 62, 67-68 (1972); *see also* State v. Wilkins, 131 N.C. App. 220, 224 (1998) (plea must be knowing and voluntary and "the record must affirmatively show it on its face"); State v. Jester, 249 N.C. App. 101, 107-08 (2016) (where there is no record of a transcript of plea or of compliance with G.S. 15A-1022 prejudice is "inherent in the court's failure to ensure that the defendant's plea was knowingly and voluntarily entered" and need not be established by the defendant).

Additionally, G.S. 15A-1026 requires a verbatim record of proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c). This record must include the judge's advice to the defendant, and his or her inquiries of the defendant, defense counsel, and the prosecutor, and any responses. G.S. 15A-1026. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the assent of the defendant, defense counsel, and the prosecutor be recorded. *Id.* The Transcript

of Plea form, AOC-CR-300, helps to create the record of the plea. *But see* Section IV.D.4., above (noting that the court must address the defendant personally and that a completed form alone does not satisfy this requirement). Strict compliance with the requirements for a record helps to protect pleas from collateral attack. *See Boykin,* 395 U.S. at 244 & n.7 (a record "forestalls the spin-off of collateral proceedings that seek to probe murky memories); *Ford,* 281 N.C. at 68 (developing evidence that a plea was entered voluntarily and knowingly serves "generally to protect the plea and judgment from collateral attack in State post-conviction and federal *habeas corpus* proceedings"). As noted in Section III.F.4.b., if the judge rejects a plea agreement as to sentence, that rejection must be made a part of the record. G.S. 15A-1026; G.S. 15A-1023(b).

H. **Capital Cases.** A defendant may plead guilty to first-degree murder and the State may agree to accept a sentence of life imprisonment, even if evidence of an aggravating circumstance exists. *See* G.S. 15A-2001(b). For the procedural rules governing sentencing in a capital case in which there has been a guilty plea, see G.S. 15A-2001(c).

I. **Counsel.** Once the Sixth Amendment right to counsel attaches, *see generally* Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008) (the right attaches at the initial appearance after arrest or when the defendant is indicted or an information has been filed, whichever is earlier), it extends to "critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80-81 (2004). Because plea bargaining and plea proceedings are critical stages, a defendant has a right to counsel at these stages. *See id.* at 81 (entry of guilty plea); State v. Detter, 298 N.C. 604, 619 (1979). Thus, G.S. 15A-1012(a) provides that a defendant may not be called upon to plead until he or she has had an opportunity to retain counsel or, if he or she is eligible for assignment of counsel, until counsel has been assigned or waived.

For a discussion of the procedure for taking a waiver of counsel, see Counsel Issues in this Benchbook. For cases in the original jurisdiction of the superior court, a defendant who waives counsel may not plead within less than seven days following the date he or she was arrested or was otherwise informed of the charge. G.S. 15A-1012(b). The purpose of this delay is to give a "'cooling off' time to the defendant who may during a period of emotional stress decide both to waive counsel and plead guilty." Official Commentary to G.S. 15A-1012(b).

For a discussion of ineffective assistance of counsel claims related to guilty plea proceedings, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES (School of Government, UNC-Chapel Hill 2003).

J. **Competency.** A judge may not accept a plea from a defendant who is not competent. Godinez v. Moran, 509 U.S. 389, 396 (1993); G.S. 15A-1001(a). The standard for incapacity to plead is the same as incapacity to proceed to trial. *Moran*, 509 U.S. at 398-99. G.S. 15A-1001(a) provides that the standard for incapacity is "when by reason of mental illness or defect [the person] is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." The constitutional standard, which the North Carolina Supreme Court has said is "essentially the same," State v. LeGrande,

346 N.C. 718, 724 (1997), is whether the defendant has "sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding" and whether the defendant has a "rational as well as factual understanding of the proceedings against him." *See Moran*, 509 U.S. at 396 (internal quotation omitted). The United States Supreme Court has noted that a judge is not required to make a competency determination every time he or she takes a guilty plea. *See id.* at 401 n.13. Rather, it has said: "As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." *Id.*

Difficult questions as to competency can arise when the defendant is taking prescribed medications, or not taking medications as prescribed. The Transcript of Plea Form, *see* AOC-CR-300, includes the following questions:

> 4(a). Are you now using or consuming alcohol, drugs, narcotics, medicines, pills or any other substances?
> 4(b). When was the last time you used or consumed any such substance?"
> 4(c). How long have you been using or consuming this medication or substance?

When the answer to question 4(a) is yes, some follow-up will be required. If a defendant indicates that he or she is taking prescription medications, the judge may wish to follow-up with questions, such as:

1. What are your prescribed medications?
2. What is your prescribed dosage of each one?
3. How often are you supposed to take each medication?
4. For what problems are the medications prescribed?
5. Have you taken each of the medications as prescribed during the past 10 days?
6. When you are taking the medications as prescribed, do any of them cause any side effects, in particular, do they affect your ability to think clearly or communicate with other people?
7. Do you ever suffer any such problems when you do not take the medications as prescribed?
8. As you stand here today, are you able to think clearly? Are you able to understand clearly what I am saying to you? Are you able to express to me the things that you wish to say?
9. Is there anything else that I need to know about your medications or any physical or emotional difficulty?

The importance of such an inquiry is highlighted by cases in which defendants later assert incompetence at the time of their pleas on grounds that they failed to take prescribed medication, *see, e.g.*, State v. Ager, 152 N.C. App. 577, 583-84 (2002) (rejecting the defendant's claim that he was not competent at the time of the plea; the defendant failed to take one of his prescribed medications, Prozac, for two weeks before entry of the plea; rejecting claim that the defendant's medications caused mental confusion), *affirmed per curiam,* 357 N.C. 154 (2003), or that the pleas were not knowing and voluntary.

K. Sentencing. If the sentence is not part of a negotiated plea agreement, sentencing after a guilty plea is conducted just like sentencing after a jury verdict of guilt. The applicable procedure when a plea agreement pertains to sentence is discussed in Section III.F., above. For a discussion of *Blakely v. Washington* and pleas to aggravating factors and prior record level points not involving prior convictions, see Section II.E., above. If the defendant pleads guilty only to the offense and contests an aggravating factor or prior record level point not involving a prior conviction, a jury must be empaneled to decide these issues. G.S. 15A-1340.16(a3), (a5). For sentencing procedures that apply in a capital case in which there has been a guilty plea, see G.S. 15A- 2001(c).

If the plea is pursuant to a plea arrangement that includes restitution or reparation, G.S. 15A-1021(d) contains both guidance and requirements for the trial judge.

V. Withdrawal of a Plea. The standard for allowing withdrawal of a plea differs depending on whether a motion to withdraw is made before or after sentencing. Both standards are discussed below. Regardless of when the motion is made, if it is granted the relief will be the same: the case proceeds as if no plea was in place. This means that the parties are free to try to renegotiate, but are under no obligation to do so.

A. Before Sentencing. As discussed in Section III.F. above, if at the time of sentencing the judge decides to impose a sentence other than that provided for in a negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea. That scenario is the only one that creates a right to withdraw a plea prior to sentencing. However, the trial court may allow the defendant to withdraw a guilty plea prior to sentencing for any "fair and just" reason. State v. Handy, 326 N.C. 532, 539 (1990); *see also* State v. Meyer, 330 N.C. 738, 742 (1992); *Ager*, 152 N.C. App. at 579. Note, however, that the Court of Appeals has held that the higher standard for withdrawal applicable to motions made after sentencing also applies where a defendant moves to withdraw a plea during a period of pre-sentence release after being informed by the trial court of the sentence which will be imposed at a later proceeding. State v. Lankford, 266 N.C. App. 211, 213-15 (2019). While there is no right to withdraw a plea, motions to withdraw made before sentencing, and "especially at a very early stage of the proceedings, should be granted with liberality." *Handy,* 326 N.C. at 537; *Meyer,* 330 N.C. at 742-43. Some of the factors to be considered in determining whether a fair and just reason exists include:

- whether the defendant has asserted legal innocence;
- the strength of the State's proffer of evidence;
- the length of time between entry of the guilty plea and the desire to change it;
- whether the defendant had competent counsel at all relevant times;
- whether the defendant understood the consequences of the plea; and
- whether the plea was entered in haste, under coercion or at the time when the defendant was confused.

Handy, 326 N.C. at 539; *see also Meyer,* 330 N.C. at 743 (quoting *Handy*); *Ager,* 152 N.C. App. at 579 (same); State v. Marshburn, 109 N.C. App. 105, 108 (1993) (same). In considering the factors enumerated in *Handy*, which are "not intended

to be exhaustive nor definitive," a trial court is not required to "expressly find that a particular factor benefits either the defendant or the State." State v. Taylor, 374 N.C. 710, 723 (2020). Rather, the factors are "an instructive collection of considerations to aid the court in its overall determination" of whether a fair and just reason for a defendant's withdrawal of a guilty plea exists. *Id*.

If the defendant asserts confusion or misunderstanding at the time of the plea, the "defendant must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter." *Marshburn,* 109 N.C. App. at 109. *Compare Marshburn,* 109 N.C. App. at 109 (the defendant alleged misunderstanding about the effect of his plea on an unrelated pending federal conviction), *with* State v. Deal, 99 N.C. App. 456, 464 (1990) (the defendant had a "basic misunderstanding of the guilty plea process"). The court of appeals has declined to decide what effect an active misrepresentation by the State as to collateral consequences would have on the right to withdraw a plea. *Marshburn,* 109 N.C. App. at 109 n.1.

Once the defendant makes the required showing, the State may refute it with "evidence of concrete prejudice" to its case by reason of the withdrawal. *Handy*, 326 N.C. at 539; *see also Meyer*, 330 N.C. at 743; *Marshburn*, 109 N.C. App. at 108. Lack of prejudice to the State does not, in and of itself constitute a fair and just reason for withdrawal. *Ager*, 152 N.C. App. at 584. Although the State may refute the defendant's motion to withdraw with evidence of prejudice, it "need not even address this issue until the defendant has asserted a fair and just reason why he should be permitted to withdraw." *Meyer,* 330 N.C. at 744; *see also Taylor*, 374 N.C. at 725; *Ager*, 152 N.C. App. at 584; State v. Scott, ___ N.C. App. ___, 902 S.E.2d 336, 341 (2024). Examples of concrete prejudice include:

- destruction of important physical evidence;
- death of an important witness; and
- that the defendant's codefendant has already been tried in a lengthy trial.

See Marshburn, 109 N.C. App. at 108. North Carolina appellate cases applying the fair and just standard are summarized below.

Fair and Just Reason

State v. Handy, 326 N.C. 532, 539-42 (1990) (the defendant asserted innocence, tried to withdraw within 24 hours and said he felt pressured to plead guilty; the State did not argue substantial prejudice).

State v. Deal, 99 N.C. App. 456, 461-64 (1990) (the defendant had a basic misunderstanding of the implications of his guilty plea and had low intellectual abilities; although the withdrawal motion was not made for over 4 months the delay appears to have resulted from his problems with his attorney; the State did not argue prejudice).

No Fair and Just Reason

State v. Taylor, 374 N.C. 710, 718-24 (2020) (analyzing *Handy* factors and determining that the defendant failed to show a fair and just reason for the withdrawal of his guilty plea to second-degree murder and robbery

charges, a plea which contemplated that the defendant would testify against a co-conspirator whose charges later were dismissed; the Court was unpersuaded that the defendant's inconsistent pre-arrest statements to law enforcement were assertions of legal innocence given the nature of those statements and the defendant's admission of guilt and stipulation to a factual basis at the plea hearing; while the State's proffer of evidence was "not overwhelming" it was uncontested and therefore "sufficient" in this case for purposes of the *Handy* analysis; the eighteen month delay between the defendant's entry of his guilty plea and his motion to withdraw it did not weigh in his favor regardless of the motion arising from what the defendant characterized as the "changed circumstances" of the dismissal of charges against his co-conspirator during that time; the possibility of being tried capitally did not amount to coercion and the record indicated that the defendant understood the nature and consequence of his plea).

State v. Meyer, 330 N.C. 738, 743-45 (1992) (only reason offered for withdrawal motion made 3½ months after plea was changed circumstances due to extensive media coverage generated by the defendant's escape from custody; the State's case was strong; the defendant did not assert legal innocence or argue lack of competent counsel, that he misunderstood the consequences of the plea, that it was entered in haste or that he was confused or coerced).

State v. Scott, ___ N.C. App. ___, 902 S.E.2d 336, 339-41 (2024) (analyzing *Handy* factors and concluding that all of them weighed against the defendant who sought to withdraw his plea seventeen months after entering it when the State prayed for judgment after the defendant chose not to testify for the State in an unrelated matter; concluding (1) defendant never asserted innocence; (2) State's proffer of evidence was strong; (3) defendant was represented by competent counsel; (4) timing of entry of plea and motion to withdraw reflected series of reasoned decisions; and (5) trial court explicitly forecast potential for consecutive, active sentences that were later entered).

State v. Crawford, 278 N.C. App. 104, 106-14 (2021) (analyzing *Handy* factors and determining that the defendant failed to show a fair and just reason supporting withdrawal of his *Alford* plea; while the State's proffered evidence was not significant, the other factors weighed in favor of denying the defendant's motion to withdraw; specifically, the defendant did not assert legal innocence until after the trial court denied his motion to withdraw and did not make the motion until more than two months after entering the plea, during which time he had not wavered in his decision).

State v. Whitehurst, 253 N.C. App. 369, 375 (2017) (noting in process of rejecting the defendant's argument that a fair and just reason supported the withdrawal of his plea that the defendant had failed to cite any authority for his argument that being incarcerated at the time of plea is *per se* evidence of coercion; declining to adopt such a position).

State v. McGill, 250 N.C. App. 121, 127-35 (2016) (noting in a comprehensive analysis of *Handy* factors that the Court's research of precedent "failed to produce a single case in which our appellate courts have found that the trial court erred in denying a defendant's motion to withdraw his guilty plea where the defendant did not, as a ground for his motion, assert his legal innocence" and finding that the defendant's failure to do so here "weigh[ed] heavily against him;" going on to find that no other *Handy* factor weighed in the defendant's favor and, thus, that no fair and just reason supported the defendant's motion to withdraw his plea).

State v. Chery, 203 N.C. App. 310, 313-19 (2010) (that plea was a no contest or *Alford* plea did not establish an assertion of legal innocence for purposes of the analysis; although the defendant testified at a co-defendant's trial that he did not agree to take part in the crime, his testimony was negated by his stipulation to the factual basis for his plea and argument for a mitigated sentence based on acceptance of responsibility; the State's proffered factual basis was strong and the fact that a co-defendant was acquitted at trial was irrelevant to the analysis; the plea was knowing and voluntary; any alleged misrepresentation by the defendant's original retained counsel could not have affected the plea where the defendant was represented by new counsel at the time of the plea; although the defendant sought to withdraw his plea 9 days after its entry, he executed the plea transcript approximately 3½ months before the plea was entered and never wavered in this decision).

State v. Watkins, 195 N.C. App. 215, 225-28 (2009) (the defendant "waffled" about his plea after entering it but did not file a withdrawal motion for nearly 2 years; the defendant's equivocal statements regarding guilt were insufficient assertions of innocence; the State's forecast of evidence was not weak; the defendant had competent representation; there was no indication that the defendant misunderstood the consequences of his plea; there was no haste or coercion; and the State demonstrated that withdrawal would prejudice its case because all co-defendants had been sentenced and could not be relied upon to testify against the defendant).

State v. Ager, 152 N.C. App. 577, 582-85 (2002) (in a motion to withdraw made 20 months after entry of the plea, the defendant did not assert legal innocence; there was no ineffective assistance of counsel and the defendant was competent at the time of the plea; the plea was not made hastily; although the State indicated that withdrawal would cause no prejudice, the defendant failed to show a fair and just reason for withdrawal), *aff'd per curiam*, 357 N.C. 154 (2003).

State v. Davis, 150 N.C. App. 205, 206-08 (2002) (in a motion to withdraw filed 7 days after the plea, the defendant asserted that he thought he was pleading to driving while impaired, not second-degree murder; however, the record showed that the defendant was not confused, he was represented by counsel and there was no haste or coercion; the defendant's response "No, sir" to his attorney's question "Do you feel like

you're guilty of second degree murder?" was not a concrete assertion of innocence; State's proffer of evidence was "significant").

State v. Graham, 122 N.C. App. 635, 636-38 (1996) (in a withdrawal motion made almost 5 weeks after the plea, the defendant's statement that he "always felt that he was not guilty" was not a concrete assertion of innocence; lawyer's notes reflected no conversation in which he coerced or persuaded the defendant to accept the guilty plea and at the motion hearing, the defendant indicated that he was satisfied with his lawyer; the evidence against the defendant was "strong").

State v. Marshburn, 109 N.C. App. 105, 108-09 (1993) (the defendant argued that when he entered his plea, he did not know whether he was guilty or not and that he thought that it would not count as a conviction in a pending federal case when in fact it was so considered; motion to withdraw was made some 8 months after the plea and the defendant did not claim that he lacked the full benefit of counsel; the defendant did not assert innocence and the asserted misunderstanding related only to the effects of his plea on an unrelated case).

B. After Sentencing. As discussed in Section III.F.5. above, if at the time of sentencing the judge decides to impose a sentence other than that provided for in a negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea. *See also* State v. Russell, 153 N.C. App. 508, 509 (2002) ("[I]f a trial court enters a sentence inconsistent with the agreed plea, the defendant is entitled to withdraw his guilty plea as a matter of right."). Although that scenario is the only one that creates a right to withdraw a plea after sentencing, the trial court may allow the defendant to withdraw a guilty plea after sentencing upon a showing of manifest injustice. State v. Shropshire, 210 N.C. App. 478, 481 (2011); *Russell*, 153 N.C. App. at 509; State v. Suites, 109 N.C. App. 373, 375 (1993). Several reasons explain the stricter standard for post-sentencing motions to withdraw than for similar pre-sentencing motions. First, once the sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and wish to have it set aside. *Handy,* 326 N.C. at 537. Second, by the time of sentencing, the prosecutor likely will have followed through on his or her promises, such as dismissing other charges, and it may be difficult to undo these actions. *Id.* And finally, the higher standard is supported by the policy of giving finality to criminal sentences which result from voluntary and properly counseled guilty pleas. *Id.*

The Court of Appeals has held that the same justifications for a stricter standard for post-sentencing motions exist in cases where a defendant enters a plea, is informed by the trial court of the sentence which will be imposed at a later proceeding, is granted a continuance and pre-sentence release, and subsequently moves to withdraw the plea before the sentencing proceeding occurs. State v. Lankford, 266 N.C. App. 211, 213-217 (2019). Thus, the manifest injustice standard apples in these cases as well. *Id*. (applying the standard). The Court of Appeals also has held that the manifest injustice standard applies to a motion to withdraw a guilty plea entered pursuant to the G.S. 90-96 conditional discharge scheme when the motion is made after the trial court dismisses the charge. State v. Saldana, 291 N.C. App. 674, 679-80 (2023) (stating that dismissal constituted "final judgment").

Only a few North Carolina appellate cases have had occasion to apply this standard. *Compare Suites,* 109 N.C. App. at 376-79 (manifest injustice existed to allow withdrawal of guilty plea to accessory before the fact to second-degree murder when named principal was later acquitted of first-degree murder), *with Shropshire*, 210 N.C. App. at 481 (trial court did not err by denying the defendant's motion to withdraw his guilty plea made after sentencing; the defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement); State v. Salvetti, 202 N.C. App. 18, 34-35 (2010) (trial court did not err in denying the defendant's motion to withdraw, made after sentencing; the court reasoned, among other things, that the trial court had determined that counsel was not ineffective and that the State's evidence was sufficient to support the conviction); *Russell,* 153 N.C. App. at 510 (rejecting the defendant's argument that manifest injustice existed because he was not fully informed of the sentencing consequences; the trial court was not required to inform the defendant that the sentence could be made to run at the expiration of sentences he was serving for unrelated convictions; the record showed that the plea was knowing and voluntary where the defendant signed a Transcript of Plea form and the trial court made a careful inquiry); *Saldana*, 291 N.C. App. at 679-83 (defendant's misunderstanding of the federal immigration consequences of his plea did not constitute manifest injustice); State v. Zubiena, 251 N.C. App. 477, 488 (2016) ("[M]ere dissatisfaction with one's sentence does not give rise to manifest injustice[.]"); *and* State v. Konakh, 266 N.C. App. 551, 556-58 (2019) (rejecting the defendant's manifest injustice argument where while represented by competent counsel he admitted his guilt, entered the plea knowingly and voluntarily, and participated in a careful colloquy with the trial court). Most of those cases indicate that the factors considered in connection with a motion to withdraw made prior to sentencing apply equally to a motion to withdraw made after sentencing. *Saldana*, 291 N.C. App. at 680 (so stating); *see also Shropshire*, 210 N.C. App. at 481; *Russell,* 153 N.C. App. at 509; *Salvetti*, 202 N.C. App. at 34; *Konakh*, 266 N.C. App. at 556-57.

Although there is variation among jurisdictions, it is generally thought that the following types of fact patterns rise to the level of a manifest injustice:

- when the defendant was denied effective assistance of counsel
- when the plea was not entered or ratified by the defendant or a person authorized to act in his or her behalf; and
- when the plea was involuntary.

See 5 CRIMINAL PROCEDURE § 21.5(a) (listing other fact patterns).

VI. Enforcing a Plea Agreement.

A. Breach of Agreement.

Once the plea is entered, the parties are bound by the plea agreement and failure to comply with it constitutes a breach.

1. Common Types of Breaches. Common prosecutorial breaches include breaking a promise to take no position on sentencing, *see* Santobello v. New York, 404 U.S. 257, 259 (1971) (prosecutor breached by recommending a sentence); State v. Rodriguez, 111 N.C. App. 141, 146 (1993) (prosecutor breached by noting for the trial court certain available

non-statutory aggravating factors), and breaking a promise to recommend a particular sentence. *See, e.g.,* United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) (prosecutor breached promise to recommend that the defendant receive a sentence of no more than 63 months and an adjustment for acceptance of responsibility). Of course, other types of prosecutorial breaches may occur. *See* State v. Blackwell, 135 N.C. App. 729, 730-32 (1999) (State breached promise not to use plead-to felony as a theory of first-degree murder under the felony-murder rule; although the State did not use the plead-to felony as the underlying felony, it used it derivatively to prove the underlying felonies).

A promise to take no position on sentencing means that the prosecutor is to make no comment to the sentencing judge, either orally or in writing, that "bears in any way upon the type or severity of the sentence to be imposed." *Rodriguez,* 111 N.C. App. at 145-46. Stated another way, "taking no position" means "making no attempt to influence the decision of the sentencing judge." *Id*. at 146. A breach of a promise to take no position on sentencing will not be excused on grounds that it was inadvertent, *see Santobello,* 404 U.S. at 262, or because it might not have influenced the sentencing judge. *Rodriguez,* 111 N.C. App. at 147 (rejecting the State's argument that no breach occurred because none of the non-statutory aggravating factors suggested by the prosecutor were found by the judge); *Santobello,* 404 U.S. at 262-63 (prosecutor breached by recommending a sentence; remand required even though trial judge stated that prosecutor's recommendation did not influence him). A promise to recommend a sentence does not require the prosecutor to advocate for the sentence or to explain the reasons for the recommendation. *See* United States v. Benchimol, 471 U.S. 453, 455-57 (1985).

Although less common, some cases deal with breach by defendants. *See* Ricketts v. Adamson, 483 U.S. 1, 4-5 (1987) (defendant breached by not testifying at his accomplices' retrial); State v. Knight, 276 N.C. App. 386, 391 (2021) (trial court erred by finding that the defendant breached his plea agreement by arriving an hour and fifteen minutes late to his sentencing hearing, which had been continued from the day identified in the plea agreement and for which the defendant had timely appeared).

2. Ambiguities Construed Against the State. Occasionally, ambiguity in the plea agreement complicates the determination of whether a breach has occurred. Although a plea agreement is a contract, it is not an ordinary commercial contract. *Blackwell*, 135 N.C. App. at 731. Because a guilty plea involves a waiver of constitutional rights, including the right to a jury trial, "due process mandates strict adherence to any plea agreement." *Id*. This strict adherence "require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." *Id.* (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)); *see also* State v. King, 218 N.C. App. 384, 388 (2012) (quoting *Blackwell*); *Knight*, 276 N.C. App. at 392 (same). Thus, ambiguities are construed against the State. *See also* State v. Wentz, 284 N.C. App. 736, 739-42 (2022) (discussing principle that

ambiguities are construed against the State in a case not involving breach).

3. Remedies after Breach. A defendant cannot be held to a plea bargain when the prosecution breaches. *Santobello*, 404 U.S. at 262. When such a breach occurs, the defendant's remedies are either specific performance or withdrawal of the plea. *Id.* at 262-63; *Blackwell*, 135 N.C. App. at 732. The court should consider the following factors when deciding between these remedies:

- who broke the bargain;
- whether the violation was deliberate or inadvertent;
- whether circumstances have changed between entry of the plea and the present time;
- whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate; and
- the defendant's wishes.

Blackwell, 135 N.C. App. at 732-33.

Some appellate decision have ordered specific performance as a remedy for a prosecution breach. *See* State v. King, 218 N.C. App. 384, 390-98 (2012) (where the defendant pleaded guilty pursuant to a plea agreement that called for, in part, the return of over $6,000 in seized funds, the court ordered specific performance even though the exact funds at issue had been forfeited to federal authorities; rescission could not repair the harm to the defendant where he already had completed approximately nine months of probation and had complied with all the terms of the plea agreement, including payment of fines and costs); *Rodriguez,* 111 N.C. App. at 148 (where the prosecutor breached a promise to take no position on sentencing, the court ordered a new sentencing hearing at which the State was to take no position on sentencing); *Knight*, 276 N.C. App. at 393 (ordering specific performance where prosecutor breached plea agreement promise that charges would be consolidated for judgment by arguing to the trial court that sentencing was in its discretion following defendant's late arrival to court). Others have ordered rescission. State v. Isom, 119 N.C. App. 225, 227-28 (1995) (rescission ordered where the plea agreement called for sentencing the defendant as a committed youthful offender but he did not qualify for that status based on his age). Still others, noting that trial court is in the best position to determine the appropriate remedy, have remanded for the trial court to choose between the two remedies. *Santobello,* 404 U.S. at 263; *Blackwell,* 135 N.C. App. at 732. *See also* Kernan v. Cuero, 138 S. Ct. 4, 9 (2017) (per curiam) (noting that the Court had never held that specific performance necessarily is the remedy for prosecutorial breach and that it had recognized in *Santobello* that the trial court is in the best position to determine the appropriate remedy).

When specific performance requires a new sentencing hearing, a different judge should conduct that proceeding. *See Santobello,* 404 U.S. at 263; *Rodriguez,* 111 N.C. App. at 148.

A defendant is not entitled to specific performance when the plea agreement contains terms that violate statutory law; in these cases, rescission is the appropriate remedy. State v. Wall, 348 N.C. 671, 676 (1998); *Rodriguez,* 111 N.C. App. at 148. *See generally* Section III.B.6. (discussing that plea agreement terms that are contrary to law are unenforceable).

When the agreement is conditioned on some future action by the defendant—such as truthfully testifying in an accomplice's trial—it typically contains a provision indicating that the agreement is null and void upon breach. When that is the case and breach occurs, double jeopardy presents no bar to re-trying and convicting the defendant on the original greater charges. Ricketts v. Adamson, 483 U.S. 1, 11 (1987) (so holding).

B. Mutual Mistake, Jurisdictional Defect, and Constitutional Invalidity. What if the parties enter into a plea agreement that is based on a mutual mistake of law? Where the mutual mistake improperly elevates the defendant's sentence, the defendant is not entitled to repudiate only the problematic portion of the agreement. Because the "defendant cannot repudiate in part without repudiating the whole," such a scenario requires that the entire plea be set aside and the original charges be reinstated. State v. Rico, 366 N.C. 327 (2012) (for the reasons stated in the dissenting opinion below, reversing State v. Rico, 218 N.C. App. 109 (2012)); *see also* State v. Robinson, 381 N.C. 207, 220 (2022) (a guilty plea "must be accepted or rejected as a whole"). *But see* State v. Murphy, 261 N.C. App. 78, 85-87 (2018) (defendant's stipulation to restitution later determined to be invalid was not an "essential or fundamental" term of his plea agreement and therefore it was not necessary to set aside the entire agreement; proper remedy was to vacate the restitution order and remand for sentencing solely on issue of restitution). A similar result obtains when the mutual mistake illegally lessens the defendant's sentence. In such a scenario the defendant is not entitled to specific performance; rather, the defendant's remedy is to withdraw the plea and proceed to trial on the original charges. *Wall,* 348 N.C. at 676. *See generally* Section III.B.6. (discussing that plea agreement terms that are contrary to law are unenforceable).

What if the parties enter a plea agreement involving an offense for which there exists a fatal jurisdictional defect or an offense that later is determined to be unconstitutional? In both situations the Court of Appeals has held that the entire plea must be set aside. *See* State v. Culbertson, 255 N.C. App. 635, 643-44 (2017) (entire plea set aside where defendant successfully attacked the validity of indictments charging two of several pleaded-to offenses); State v. Anderson, 254 N.C. App. 765, 780-81 (2017) (entire plea agreement, which expressly contemplated a complete disposition of all pending charges, was set aside where the Fourth Circuit, during the pendency of the defendant's direct appeal, deemed unconstitutional the statute defining one of several pleaded-to offenses).

C. Detrimental Reliance. The enforceability of a plea agreement sometimes becomes an issue when the State and the defendant have reached an agreement but one party withdraws from it before the plea is entered. As discussed below, the State may be compelled to honor an agreement that the defendant reasonably relied upon to his or her detriment prior to the State withdrawing from the agreement. *See* State v. Ditty, ___ N.C. App. ___, 902

S.E.2d 319, 324-25 (implicitly recognizing trial court's authority to rule on a "Motion to Enforce Plea Agreement" filed by the defendant), *temp stay allowed*, ___ N.C. ___, 901 S.E.2d 774 (2024).

The North Carolina Supreme Court has held that it is a violation of due process for the State to withdraw from a plea agreement prior to the defendant's entry of the plea but after a defendant has reasonably relied on the agreement to his or her detriment. State v. Collins, 300 N.C. 142, 148 (1980); *see also* State v. Hudson, 331 N.C. 122, 148 (1992). Whether a defendant has reasonably and detrimentally relied upon a plea agreement is a case-by-case determination. *See, e.g.*, *Hudson*, 331 N.C. at 148-49 (defendant's claimed reliance on withdrawn agreement was "nonspecific" and "doubtful;" moreover, because agreement at issue obligated the State to a sentencing recommendation which had no effect as a matter of law without approval from the trial judge, any reliance thereon by the defendant to his detriment would be unreasonable); *Collins*, 300 N.C. at 148 (same as *Hudson* regarding agreement for sentencing recommendation); *Ditty*, 902 S.E.2d at 330 (defendant did not detrimentally rely on withdrawn plea agreement), *temp stay allowed*, ___ N.C. ___, 901 S.E.2d 774. It appears that a potential remedy for the State's withdrawal from a plea agreement following a defendant's detrimental reliance is to require the State's specific performance of the agreement, *see Ditty*, ___ N.C. App. at ___, 902 S.E.2d at 321 (noting that trial court ordered specific performance but going on to conclude that trial court's underlying finding of detrimental reliance was error), *temp stay allowed*, ___ N.C. ___, 901 S.E.2d 774. The North Carolina appellate courts have not, however, squarely confronted situations where a defendant has detrimentally relied upon a withdrawn agreement that would be legally problematic to specifically perform, such as an agreement containing a term contrary to law.

A defendant is free to withdraw from a plea agreement prior to entering his or her guilty plea regardless of whether the State has relied on the agreement to its detriment. *Collins*, 300 N.C. at 149.

VII. Appeal & Post-Conviction Challenges.

A. Generally: Claims Waived By The Plea. As a general rule, a defendant who knowingly, voluntarily and intelligently enters an unconditional guilty plea waives all defects in the proceeding, including constitutional defects, that occurred before entry of the plea. *See* State v. Reynolds, 298 N.C. 380, 395 (1979) (holding that the defendant's plea waived his Fourth Amendment claim asserted on appeal, stating: "'When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea'" (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)); *see also* State v. Harwood, 228 N.C. App. 478, 487-88 (2013) (by pleading guilty to multiple counts of felon in possession, the defendant waived the right to challenge his convictions on double jeopardy grounds).

1. Exception: Claims Challenging Power of State to Prosecute. A guilty plea does not waive a claim challenging "the power of the State to bring the defendant into court to answer the charge." Blackledge v. Perry, 417 U.S. 21, 30 (1974); *Reynolds*, 298 N.C. at 395 (discussing *Perry*). Under this exception, a defendant who has pleaded guilty would not be barred from asserting, for example, a jurisdictional defect in the proceedings. *See, e.g.*, State v. Neville, 108 N.C. App. 330, 333 (1992) (guilty plea to

uttering a forged instrument did not waive appeal where the defendant was not indicted on that charge and never signed a waiver of a bill of indictment and thus issue was jurisdictional). The full scope of the "power of the State" exception is not entirely clear. *See* 5 CRIMINAL PROCEDURE § 21.6(a).

2. **Exception: Defect in the Plea Itself.** Entry of a guilty plea does not preclude a defendant from later alleging a defect in the plea—such as a claim asserting that the plea was not knowing, voluntary, and intelligent. *See* State v. Tyson, 189 N.C. App. 408, 416 (2008) (rule barring attack on a plea does not preclude a defendant from asserting that he or she was induced into accepting a plea based on misrepresentations by the State); 5 CRIMINAL PROCEDURE § 21.6(a) (noting that the types of claims that survive a plea include ineffective assistance of counsel affecting the plea process and defects in the plea proceeding which make the plea "other than voluntary, knowing and intelligent"); *see generally* Section IV.D. above (discussing the requirement that a plea be knowing, voluntary, and intelligent).
3. **Claim Preserved by Statute.** As discussed in the section immediately below, in North Carolina, statutory law expressly provides the defendant a right to appeal certain sentencing issues, a denial of a motion to withdraw the plea, and an adverse ruling on a motion to suppress.

B. Procedural Mechanisms for Review.

1. **Appeal.** A defendant who has entered a plea of guilty or no contest is not entitled to appellate review as a matter of right except when the appeal pertains to sentencing issues, the denial of a motion to withdraw the plea, and, in certain circumstance, an adverse ruling on a motion to suppress. G.S. 15A-1444; State v. Santos, 210 N.C. App. 448, 450 (2011). Thus, absent a motion to withdraw the plea, a defendant does not have an appeal as a matter of right to challenge a plea on grounds that it was not knowing, voluntary, and intelligent. *Santos,* 210 N.C. App. at 450. However, such a claim may be asserted in a petition for writ of certiorari, *see* Section VII.B.2. below, or in a motion for appropriate relief. *See* Section VII.B.3. below.
   a. **Sentencing Errors.** A defendant who pleads guilty or no contest has a right to appeal certain issues regarding the sentence. G.S. 15A-1444(a1)-(a2). Specifically, a defendant may appeal:

      - Whether a felony sentence is supported by the evidence. G.S. 15A-1444(a1). This issue is appealable only if the minimum term of imprisonment does not fall within the presumptive range. *Id.*
      - Whether a felony or misdemeanor sentence results from an incorrect finding of the defendant's prior record level or prior conviction level. G.S. 15A-1444(a2)(1).
      - Whether a felony or misdemeanor sentence contains a type of sentence disposition not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23. G.S. 15A-1444(a2)(2).
      - Whether a felony or misdemeanor sentence contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23. G.S. 15A-

1444(a2)(3). *See* State v. Pless, 249 N.C. App. 668, 670 (2016) (defendant did not have right to appeal drug trafficking sentence of unauthorized duration because it was governed by G.S. 90-95 rather than G.S. 15A-1340.17 or G.S. 15A-1340.23).

Nevertheless, when the defendant enters into a plea agreement that includes an agreement as to sentencing, the defendant may be deemed to have waived the right to appeal the sentence. State v. Hamby, 129 N.C. App. 366, 369-70 (1998) (the defendant waived her right to appeal her sentence by admitting in her plea agreement that she fell within Prior Record Level II and that the judge was authorized to sentence her to a minimum of 29 months and a maximum of 44 months and by agreeing that her sentence could be intermediate or active in the trial judge's discretion).

b. Denial of Motion to Withdraw Plea. A defendant who pleads guilty or no contest has a right to appeal from a denial of a motion to withdraw a plea of guilty or no contest. G.S. 15A-1444(e); *see, e.g.*, State v. Handy, 326 N.C. 532, 535 (1990).

c. Adverse Ruling on Suppression Motion. A defendant who pleads guilty or no contest has a right to appeal from an adverse ruling on a suppression motion, in certain circumstances. G.S. 15A-1444(e); G.S. 15A-979(b). To preserve the right to appeal such a ruling, a defendant who pleads guilty or no contest pursuant to a plea agreement must notify the State and the trial court that he or she intends to appeal "before plea negotiations are finalized." State v. Reynolds, 298 N.C. 380, 397 (1979); *see also* State v. McBride, 120 N.C. App. 623, 625 (1995), *aff'd per curiam*, 344 N.C. 623 (1996). This seems to mean any time before the trial court accepts the plea. *See* State v. Parker, 183 N.C. App. 1, 6 (2007) ("[D]efendant preserved his right to appeal from the trial court's denial of the motion to suppress by expressly communicating his intent to appeal the denial to the trial court at the time he pleaded guilty . . .."); State v. Christie, 96 N.C. App. 178, 179-80 (1989) (oral notice given in court when the plea was entered was sufficient). The notice must be "specifically given." *See* State v. Tew, 326 N.C. 732, 735 (1990) (defendant "did in fact specifically reserve his right to appeal upon entering his plea of guilty"); State v. McBride, 120 N.C. App. 623, 625 (1995) (citing *Tew* and stating that "[t]he rule in this state is that notice must be *specifically* given"). *See also* State v. Pimental, 153 N.C. App. 69, 74-76 (2002) (citing *McBride* and concluding that statement in Transcript of Plea that "Defendant preserves his right to appeal any and all issues which are so appealable" was not specific enough), *overruled on other grounds by* State v. Killette, 381 N.C. 686 (2022); State v. Brown, 142 N.C. App. 491, 492-93 (2001) (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 Court of Appeals has noted that a trial court retains jurisdiction to enter a written order denying a defendant's motion to suppress after the defendant pleads guilty

and notices his or her preserved appeal of an adverse ruling that has been announced orally. State v. Jordan, 242 N.C. App. 464, 468-69 (2015).

If a defendant who pleads guilty pursuant to an agreement fails to provide the required notice, the right to appeal is waived by entry of the plea. *See, e.g., Reynolds*, 298 N.C. at 397. These rules have led to what has become known as the conditional plea: a guilty plea conditioned on the right to appeal a denial of a suppression motion pursuant to G.S. 15A- 979(b).

If a defendant pleads guilty without a plea agreement, the North Carolina Supreme Court has held that it is not necessary for the defendant to provide the State or the trial court with notice of his or her intent to appeal in order to retain the right to appeal an adverse ruling on a suppression motion. State v. Jonas, ___ N.C. ___, 900 S.E.2d 915, 921 (2024) (reasoning that the fairness concerns underlying the notice rules flowing from *Reynolds* and related precedent do not exist in situations where there is no plea agreement).

2. Certiorari. Defendants who are not entitled to an appeal as a matter of right may obtain review by writ of certiorari. G.S. 15A-1444(a1) (defendant who has entered a plea of guilty or no contest to a felony may petition for review by way of certiorari of whether the sentence is supported by the evidence); G.S. 14A-1444(e) (defendant who has pleaded guilty or no contest and does not have a right to review under G.S. 15A-1444(a1), (a2) or G.S. 15A-979 may petition for review by way of writ of certiorari); State v. Pless, 249 N.C. App. 668, 670 (2016) (where the defendant did not have statutory right to appeal erroneous drug trafficking sentence the court reached the merits by granting certiorari).

a. Scope of the Appellate Division's Authority to Grant Writ. Rule 21 of the North Carolina Rules of Appellate Procedure provides that in connection with review of trial court rulings, a writ of certiorari may be issued to permit review:

- when the right to prosecute an appeal has been lost by failure to take timely action,
- when no right of appeal from an interlocutory order exists, or
- for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

Notwithstanding the limited bases for certiorari review described in Rule 21, the North Carolina Supreme Court has held that the rule does not limit the state appellate courts' authority and discretion to issue prerogative writs in cases other than those specifically identified in the rule, *see* State v. Ledbetter, 371 N.C. 192, 197 (2018), and has explicitly overruled North Carolina Court of Appeals cases that held or implied that Rule 21 limits certiorari review in guilty plea cases. State v. Killette, 381 N.C. 686, 690-91 (2022) (vacating Court of Appeals decision that Rule 21 deprived it of jurisdiction to engage in certiorari review of defendant's unpreserved challenge to denial of his pre-plea suppression

motions). Note that G.S. 15A-1027 provides that "[n]oncompliance with the procedures of [Article 58 (guilty plea procedures in superior court)] may not be a basis for review of a conviction after the appeal period for the conviction has expired." *See* State v. Marzouq, 268 N.C. App 616, 622-23 (2019) (G.S. 15A-1027 foreclosed the defendant's challenge in a MAR to the trial court's noncompliance with G.S. 15A-1022(a) by skipping the question regarding citizenship); State v. McGee, 244 N.C. App. 528, 532-34 (2015) (G.S. 15A-1027 foreclosed the defendant's challenge in a MAR filed seven years after sentencing to the trial court's noncompliance with G.S. 15A-1023(b) and G.S. 15A-1024 by failing to grant the defendant a continuance after rejecting a plea agreement).

b. **Transcript.** If an indigent defendant petitions the appellate division for a writ of certiorari, the trial court may, in its discretion, order the preparation of the record and transcript of the proceedings at the State's expense. G.S. 15A-1444(e).

3. **Motion for Appropriate Relief.** In certain circumstances a defendant may be able to challenge a plea through a post-conviction motion for appropriate relief. *But see Marzouq*, 268 N.C. App. at 622-23 (G.S. 15A-1027 foreclosed the defendant's MAR); *McGee*, 244 N.C. App. at 532-34 (same). For detail on the procedures applicable to Motions for Appropriate Relief, see Motions for Appropriate Relief in this Benchbook.