

CRIMINAL EVIDENCE: PLEAS AND PLEA DISCUSSIONS

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I. Rule 410. Rule 410 provides, with one exception discussed below, see Section I.F., that the following evidence is inadmissible when offered by or against a defendant who made the plea or participated in the plea discussions:

- A plea of guilty which was later withdrawn.
- A plea of no contest.
- Any statement made in the course of any plea proceedings in superior court pursuant to G.S. Ch. 15A, Article 58, comparable procedures in district court, proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest.
- Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

The full text of Rule 410 is reproduced in the sidebar on the next page.

A. Guilty Pleas: Must be Withdrawn or Unconsummated. The rule covers guilty pleas that were withdrawn, statements made in connection with plea proceedings where the plea was later withdrawn, and statements made in connection with plea discussions which did not lead to a guilty plea or resulted in a plea that was

later withdrawn. Thus if a defendant pleaded guilty and the plea was not withdrawn, the rule does not render inadmissible statements made in connection with the plea proceeding. For the standards that apply to a request to withdraw a plea, see [Guilty Pleas in Superior Court](#) in this Benchbook. It is not clear how the rule applies to pleas that are rejected by the trial court or set aside on appeal or on a motion for appropriate relief.

Rule 410

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of no contest;
- (3) Any statement made in the course of any proceedings under Article 58 of Chapter 15A of the General Statutes or comparable procedure in district court, or proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest;
- (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

- B. No Contest Pleas.** The Rule makes inadmissible pleas of no contest, regardless of whether or not the plea has been withdrawn, and any statements made in the course of plea proceedings that result in no contest pleas.
- C. “Any Statement.”** In addition to covering guilty pleas that are later withdrawn and pleas of no contest, Rule 410 covers “any statement” made in the course of specified plea proceedings and plea discussions. As such, the rule appears to cover statements made by the defendant, defense counsel, the prosecutor, the judge, and any other participants. Statements by the defendant include, for example, admissions made when the plea is taken and admissions made to provide a factual basis for the plea. See Commentary to N.C. R. EVID. 410. The rule is not limited to statements made in court. *Id.* Thus, if the court were to defer its decision on a plea agreement pending an evaluation by Sentencing Services, statements that the defendant made in connection with that process would be covered. *Id.*
- D. Plea Discussions with an Attorney for the Prosecuting Authority.** For statements to qualify as those made in the course of plea discussions, they must be “with an attorney for the prosecuting authority.” N.C. R. EVID. 410. This means that the statements “must be made in negotiations with a government attorney or with that attorney’s express authority.” *State v. Curry*, 153 N.C. App. 260, 263 (2002) (citation omitted). Thus, if statements are made to a law enforcement officer who had been delegated authority to negotiate a plea, Rule 410 would

apply. By contrast, statements made to a trial judge at a pretrial hearing are not covered. *State v. Haymond*, 203 N.C. App. 151, 166 (2010) (so holding).

- E. “For or Against” the Defendant.** The rule provides that plea evidence is inadmissible when offered “for or against the defendant who made the plea or was a participant in the plea discussions.” Thus, the rule covers both evidence offered by the State and evidence offered by the defense. In this respect, North Carolina’s rule differs from the federal rule, which covers this type of evidence only if offered against the defendant. See Commentary to N.C. R. EVID. 410.

Unlike the federal rule, North Carolina’s rule does not contain an exception allowing a statement made by a defendant under oath, on the record, and with counsel present to be used against the defendant in a subsequent perjury prosecution. *Id.*

Because the rule only prohibits admission of plea evidence for or against the person who made the plea or participated in the discussion, it does not apply when the statements are offered against another party, for example, in a co-conspirator’s trial.

- F. Fairness Exception.** Rule 410 contains one exception: “such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.” The Commentary to Rule 410 explains that “if a defendant upon a motion to dismiss . . . were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue.” See *also State v. Thompson*, 141 N.C. App. 698, 703 (2001) (State’s cross-examination of the defendant regarding plea discussions was not incompetent as a matter of law when the defense introduced evidence of plea discussions during the defendant’s testimony; in his testimony, the defendant stated that he had refused a plea offer by the State of seventeen months imprisonment and would refuse an offer of twelve months, knowing that he risked a sentence of seven years if found guilty; during cross-examination, the State posed questions about the plea discussions to explain why the State had been unable to offer defendant a plea bargain with a probationary sentence).

- II. G.S. 15A-1025.** G.S. 15A-1025 provides: “The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.”

- A. “Fact” of Plea Discussions or Arrangement.** By its terms, the statute covers “the fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement.” Thus it prohibits testimony by an officer recounting statements made by the defendant about a plea his lawyer had negotiated with the prosecutor. *State v. Wooten*, 86 N.C. App. 481, 78-79 (1987) (ordering a new trial). It also bars the prosecutor from asking the defendant if he pled guilty to a charge as a result of a plea bargain. *State v. Riley*, 202 N.C. App. 299, 303 (2010) (finding such a question to be error). Although some cases suggest broader coverage, the North Carolina Supreme Court has indicated that the statute only covers the fact of plea bargaining and the fact that a plea arrangement was made, not statements made in connection with plea bargaining

or plea proceedings. *State v. Jenkins*, 292 N.C. 179, 188 (1977) (even if made during plea bargaining, statements would not violate the provisions of the statute unless the fact of plea bargaining was revealed).

- B. Withdrawal or Inability to Reach Agreement.** G.S. 15A-1025 makes inadmissible the fact that the parties engaged in plea discussions or reached a plea arrangement regardless of whether the plea was later withdrawn or whether the discussions resulted in a plea.
 - C. No Contest Pleas.** Unlike Rule 410, G.S. 15A-1025 does not expressly cover no contest pleas.
 - D. “Against or In Favor of the Defendant.”** G.S. 15A-1025 bars admission of the evidence against or in favor of the defendant. Thus, it applies to evidence offered by both the defense and the prosecution. Because the rule only prohibits admission of plea evidence against or in favor of the defendant, it does not apply when the statements are offered against another party, for example, in a co-conspirator’s trial.
 - E. Defendant, Counsel, or Prosecutor.** The statute only covers the fact that the defendant, defense counsel, and the prosecutor engaged in plea discussions or made a plea arrangement. Thus, courts have rejected attempts to construe the statute as including conversations with officers, *State v. Lewis*, 32 N.C. App. 298, 300 (1977) (statement to arresting officer).
 - F. No Exception.** As discussed in Section I.F. above, Rule 410 contains an exception that applies when another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it. G.S. 15A-1025 contains no such exception. At least one case has suggested that the lack of an exception in G.S. 15A-1025 creates a conflict between the statute and the rule. *State v. Thompson*, 141 N.C. App. 698, 703 (2001). However, given that G.S. 15A-1025 only covers the fact that the parties engaged in plea negotiations and not the statements made in connection with those negotiations, the rules can be reconciled.
 - G. Proceeding Covered.** The applicability of Rule 410 and the rules of evidence generally is set out in Rule 1101. That rule provides that the evidence rules do not apply at sentencing, and at other proceedings. G.S. 15A-1025 is not so limited.
- III. Other Uses.** Rule 410 and G.S. 15A-1025 cover pleas and statements made in connection with specified plea discussions and plea proceedings. These provisions do not render inadmissible evidence of the underlying acts, e.g., when offered pursuant to Rule 404(b), or the fact of a conviction, e.g., when offered under Rule 609.
- IV. Statements Made in Connection With Plea Negotiations.** If the statements at issue occurred during a formal plea negotiation process, application of Rule 410 is relatively simple. However, when the statement at issue is made outside of the formal plea negotiation process, questions can arise about whether the statement is actually covered by Rule 410 or G.S. 15A-1025.

- A. Letters to the Prosecution.** In *State v. Walker*, 167 N.C. App. 110, 122 (2004), *vacated on other grounds*, 361 N.C. 160 (2006), the defendant wrote letters to the prosecutor stating that he was willing to confess and help in any way in order to get probation. The reviewing court held that the defendant's letters, which stated a sought-for plea arrangement, were plea discussions within the meaning of Rule 410 and G.S. 15A-1025. The court noted that even though the prosecutor did not initially respond to the letters, they ultimately lead to plea discussions, which resulted in the defendant entering a guilty plea, which was subsequently withdrawn. By contrast, in *State v. Flowers*, 347 N.C. 1, 26 (1997), the North Carolina Supreme Court held that the defendant's letter to a prosecutor did not constitute a plea discussion under G.S. 15A-1025. The court concluded the letter was merely an admission of guilt, a statement of the defendant's desire that the co-defendants not be tried for the crime, a request to have counsel removed, and a mention of a possibility of a plea bargain. The letter did not state the plea that the defendant had in mind or other specifics, and the prosecutor never responded to defendant's letter, did not engage in plea discussions with the defendant, and did not enter into a plea arrangement with the defendant.
- B. Defendant Must Believe He/She Is Negotiating a Plea And Belief Must Be Reasonable.** In *State v. Curry*, 153 N.C. App. 260 (2002), the court articulated and applied the standard that "conversations with government agents do not constitute plea discussions unless the defendant exhibits a subjective belief that he is negotiating a plea, and that belief is reasonable under the circumstances." *Id.* at 263 (citation omitted). In that case, the defendant was charged with, among other things, statutory rape. An assistant district attorney told defense counsel that "there may be possibilities of [Defendant] pleading to a string of indecent libert[y] [charges] although that was not an offer." The assistant district attorney made it clear that she had no authority to negotiate a plea bargain but indicated that the State might consider an offer if the defendant cooperated in the investigation. Based on this conversation, defense counsel told the defendant to cooperate in the hope that they "could work out a plea to something less than a charge of statutory rape," and the defendant later made incriminating statements to law enforcement officers. The court held that "[i]n light of the assistant district attorney's representation that she lacked the authority to enter plea discussions, there is no evidence to substantiate a reasonable, subjective belief on the part of Defendant that he was 'negotiating a plea' by cooperating with law enforcement." *Id.* at 264. The court noted that not only did the assistant district attorney lack the authority to make an offer, no offer was made and neither the defendant nor defense counsel ever expressed an intent to plead guilty to certain charges. The court concluded that because no offer had been made, the defendant's statement to law enforcement could not have been made "in the course of plea discussions with an attorney for the prosecuting authority." *Id.* (citation omitted); *see also State v. Hatmond*, 203 N.C. App. 151, 166 (2010) ("[I]t does not appear that defendant subjectively thought he was negotiating a plea . . .").
- V. Waiver.** In *United States v. Mezzanatto*, 513 U.S. 196, 203-04 (1995), the United States Supreme Court held that a defendant may waive the protections of Federal Rule of Evidence 410 and Rule 11(e)(6) (now Rule 11(f) (amended 2002)) of the Federal Rules of Criminal Procedure, which make inadmissible certain statements made during plea negotiations. In that case, the defendant was cross-examined at his federal drug trial

about inconsistent statements that he made during earlier plea negotiations with the government. However, before entering into those discussions, the defendant agreed that any statements he made might be used to impeach him at trial. To date, there are no North Carolina cases addressing whether a defendant may waive the protections of North Carolina's Evidence Rule 410 or G.S. 15A-1025.

VI. Summary Table. Figure 1 below presents a summary table of the relevant rules.

Fig. 1. Summary Table of Rule 410 & G.S. 15-A-1025.

Type of Evidence	Admissibility	Rule or Statute
Plea of no contest	Inadmissible for or against the defendant who entered the plea. Admissible if not offered for or against the defendant.	Rule 410
Guilty plea	Inadmissible for or against the defendant who entered the plea if the plea was later withdrawn. Admissible if: <ul style="list-style-type: none"> • not offered for or against the defendant or • the plea was not withdrawn. 	Rule 410
Fact that the parties engaged in plea discussions or made a plea arrangement	Inadmissible for or against the defendant involved in the discussions. Admissible if not offered for or against the defendant.	G.S. 15A-1025
Statements made during plea discussions	Inadmissible for or against the defendant involved in the discussions, if: <ul style="list-style-type: none"> • no guilty plea resulted or • a guilty plea resulted but was withdrawn. Admissible if: <ul style="list-style-type: none"> • not offered for or against the defendant or • a plea was reached and was not withdrawn or • the Rule 410 exception applies. 	Rule 410
Statements made during plea proceedings	Inadmissible for or against the defendant involved in the proceedings when the statements pertain to a guilty plea that was later withdrawn or a plea of no contest. Admissible if: <ul style="list-style-type: none"> • not offered for or against the defendant or • the guilty plea was not withdrawn or • the Rule 410 exception applies. 	Rule 410