

Going off the Grid

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In addition to sentencing in the mitigated range of the Structured Sentencing grid, there are two ways defendants can receive more lenient punishment in North Carolina: *extraordinary mitigation* and *substantial assistance*. Each law applies only in certain circumstances, and sometimes there's confusion between the two.

Extraordinary mitigation—or, more precisely, Dispositional Deviation for Extraordinary Mitigation under G.S. 15A-1340.13(g)—is a way for the court to impose intermediate punishment for a defendant whose offense class and prior record level would otherwise require an active sentence. In other words, it turns an “A” cell on the grid into an “I/A” cell. Because extraordinary mitigation may not be used for Class A or Class B1 offenses or for offenders with 5 or more prior record points, it really only applies to six cells on the grid: B2–I & II, C–I & II, and D–I & II [*bingo!*]. Offense classes below that already allow intermediate and/or community punishment, meaning the defendant would not be helped by a finding of extraordinary mitigation in any event. What extraordinary mitigation never allows is a deviation from the applicable sentencing range—you're limited to the same numbers in the same cell, but you can suspend an otherwise un-suspendable sentence. *State v. Messer*, 142 N.C. App. 515 (2001). Form AOC-CR-606 guides the court through the requisite findings in support of extraordinary mitigation.

Substantial assistance is both narrower and broader than extraordinary mitigation. It is narrower because it applies *only* to drug trafficking convictions under G.S. 90-95(h), but broader in terms of the relief available to the defendant. If the defendant is found to have provided substantial assistance in the “identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals,” the court may reduce the fine, impose a shorter minimum prison term, or place the defendant on probation—a big deal in drug trafficking world, with its mandatory minimum sentences that ordinarily can't be suspended. G.S. 90-95(h)(5). The courts have even told us that departures from the G.S. 90-95(h) sentencing scheme are not limited to the ordinary Structured Sentencing grid. Once substantial assistance is established the court is free to depart in *any* manner it likes. *State v. Saunders*, 131 N.C. App. 551 (1998). So, only in substantial assistance cases can the judge truly go off the grid.