

## Options to Mitigate Sentences for Drug Trafficking

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North Carolina's special sentencing rules for drug trafficking are tough. A recently revised summary of those rules is available [here](#). They include mandatory imprisonment and fines that go well beyond the sentence for a crime of comparable offense class on the regular Structured Sentencing grid. A first-time offender convicted of Class G sale of a Schedule I controlled substance could get an 8-month minimum sentence and probation. A Class G trafficker gets 35–51 months, active, plus a \$25,000 fine. As Jessie noted in [this prior post](#), trafficking sentences can pile up quickly.

With that in mind, I get a fair number of questions about situations where trafficking is the right charge as factual matter, but everyone, including the prosecutor, feels that the sentencing rules of [G.S. 90-95\(h\)](#) aren't the appropriate measure of justice in the case. This post collects some of the options for dialing a trafficking sentence back to something between the mandatory sentences of G.S. 90-95(h) and the regular sentencing grid.

**Substantial assistance.** Under G.S. 90-95(h)(5), the sentencing judge can give a person convicted of trafficking essentially any sentence—a lower prison term, a reduced fine, or probation—if the judge finds that that the defendant has provided “substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals.” The assistance offered need not be limited to accomplices, etc., in the defendant's individual case; the court can consider assistance offered in the prosecution of other cases. *State v. Baldwin*, 66 N.C. App. 156, 158 (1984). There is no time limit on when the assistance must be rendered; any time before sentencing is fine. *State v. Perkerol*, 77 N.C. App. 292 (1985).

The ultimate decision on whether the defendant provided substantial assistance is in the discretion of the trial judge. *State v. Wells*, 104 N.C. App. 274, 276–77 (1991). And even when the judge finds that the defendant has offered substantial assistance, the decision to grant any sort of relief is also discretionary. *State v. Willis*, 92 N.C. App. 494 (1988).

When the judge finds substantial assistance and decides to reduce the sentence, the reduction is not limited by the ordinary Structured Sentencing grid for that class of offense. *State v. Saunders*, 131 N.C. App. 551, 553 (1998). However, to aid in the administration of the sentence, the court should probably order a maximum that corresponds to the imposed minimum according to the regular formula: 120% of the imposed minimum, rounded to the next highest month, plus additional time for post-release supervision as appropriate.

**Attempted trafficking.** Under [G.S. 90-98](#), attempted trafficking is the same offense class as the completed offense, but it is punished under the regular sentencing grid for that offense class and that defendant's prior record level. Returning to the grid results in a substantially reduced sentence. To illustrate, a Class E trafficker gets an active sentence of 90–120 months; the corresponding attempt could get as little as 15 months, suspended, depending on the defendant's record. There's also no mandatory fine for the attempt.

Note that G.S. 90-98 also suggests that conspiracies to traffic are sentenced under the regular grid. They are not. G.S. 90-98 begins by saying that it applies “[e]xcept as otherwise provided in this Article.” G.S. 90-95(i) otherwise provides, saying that the mandatory penalties of G.S. 90-95(h) apply to conspiracy convictions just as they apply to the object offense.

**Habitual felon.** In *State v. Eaton*, \_\_\_ N.C. App. \_\_\_, 707 S.E.2d 642 (2011), we learned that trafficking convictions may be sentenced under the habitual felon law. As I noted in [this prior post](#), application of the habitual felon law results in a shorter sentence for many drug traffickers. A Class D trafficker gets 175–222 months. Habitualize that crime to Class C and the defendant could get as little as 44–65 months depending on his or her record.

**Consolidated or concurrent sentences.** Drug trafficking sentences must run consecutively with “any sentence being served by the person sentenced.” G.S. 90-95(h)(6). However, as Jeff discussed [here](#), a trafficking conviction may run concurrently or apparently even be consolidated with other convictions sentenced at the same time, including other trafficking convictions, as none of them is yet “being served.” *State v. Walston*, 193 N.C. App. 134, 141–42 (2008).

**Not Advanced Supervised Release.** One form of mitigation that probably does not apply to drug trafficking is Advanced Supervised Release. An ASR date is determined based on the “shortest mitigated sentence for the offense at the offender’s prior record level.” [G.S. 15A-1340.18\(d\)](#). Neither of those determining factors makes sense as applied to drug trafficking: there are no mitigated sentences for drug trafficking under G.S. 90-95(h), and drug trafficking sentences do not take prior record level into account.

Those are some of the options I can think of. If you know of others or have thoughts on these, please post a comment. Whether as part of wholesale reform (like Jeff discussed [yesterday](#)) or retail-level plea negotiations, it’s good to have options.