

Advanced Supervised Release (ASR) and Extraordinary Mitigation

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How to Win Friends and Influence People



Credit where Credit is Due!



- Most of this presentation is taken DIRECTLY from the works of **Jamie Markham**, his book on the Justice Reinvestment Act and his various blog contribution on the subject, and I hereby give him complete and total credit for the content that is helpful here.
- To the extent anything herein is found to be confusing or incoherent, I take full ownership of those parts.
- I readily and shamelessly admit that much of the wording in the slides is taken directly from his work.
- Thanks Jamie!

What is ASR?

- ASR allows certain inmates to get out of prison before their minimum release date, provided they participate in and complete risk reduction incentive programs while in the custody of the Department of Adult Corrections.
- **GS 15A-1340.18**. is the Statutory Reference for the ASR program.

Who is Eligible for ASR?

- *Eligible defendant.* Only defendants convicted and sentenced based upon the following felony classes and prior record levels are eligible for ASR:
- D, Prior Class Record Level I-III
- Class E, Prior Record Level I-IV
- Class F, Prior Record Level I-V
- Class G, Prior Record Level I-VI
- Class H, Prior Record Level I-VI
- The law also limits ASR eligibility to defendants sentenced to an active sentence. Defendants initially sentenced to probation but later revoked apparently are not eligible for ASR.

Who is Eligible for ASR?

OFFENSE CLASS	Months on Life Without Parole					
	I	II	III	IV	V	VI
A	10-15	15-20	20-25	25-30	30-35	35-40
B1	10-15	15-20	20-25	25-30	30-35	35-40
B2	10-15	15-20	20-25	25-30	30-35	35-40
C	10-15	15-20	20-25	25-30	30-35	35-40
D	10-15	15-20	20-25	25-30	30-35	35-40
E	10-15	15-20	20-25	25-30	30-35	35-40
F	10-15	15-20	20-25	25-30	30-35	35-40
G	10-15	15-20	20-25	25-30	30-35	35-40
H	10-15	15-20	20-25	25-30	30-35	35-40
I	10-15	15-20	20-25	25-30	30-35	35-40

MINIMUM SENTENCE: 10 Months
 MAXIMUM SENTENCE: 40 Months

How Does a Defendant Get ASR?

- 1. Must be in an Eligible Grid Cell.
- 2. The Prosecutor MUST agree to ASR
- 3. Must be Ordered by the Court into the program.
- **NO DEFENDANT MAY BE ORDERED INTO ASR OVER A PROSECUTOR'S OBJECTION**

How to Sentence a Defendant to ASR

- After determining that the offense falls into a relevant block on the grid, that the prosecutor consents, and that ASR will be utilized, the Court must first set the ORIGINAL non-ASR sentence that the defendant would have received but for the decision to grant ASR.
- Example: In a Class D, Level 2 offense, sentenced in the presumptive range, you would sentence as you normally would; ie: 60-84 months.
- Next you would set an ASR release date.

Release date

- The ASR release date is:
 - A) If the sentence is in the presumptive or aggravated range on the grid, you would select the **LOWEST SENTENCE IN THE MITIGATED RANGE FOR THAT GRID BLOCK**. Example: for a Class D Level 2 sentence, that would be 44 months. It is the mitigated sentence all the way to the left of that grid.
 - If the sentence is in the Mitigated Range, the ASR date would be 80% of the minimum in the mitigated sentence imposed.

Felony Offenses Committed on or after October 1, 2013
MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL						DISPOSITION
	I 0-1 Pt	II 2-5 Pts	III 6-9 Pts	IV 10-13 Pts	V 14-17 Pts	VI 18+ Pts	
A Max. Death or Life with Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life with Parole	A	A	A	A	A	A	Aggravated PRESUMPTIVE Mitigated
	260-300 180-240 164-180	276-340 221-276 166-225	357-397 254-317 189-254	365-416 262-346 179-252	Life with Parole 252-336	Life with Parole 290-386	
B2 Max. 600 (120)	A	A	A	A	A	A	
	60-186 125-157 94-125	80-225 144-180 108-144	207-238 145-207 124-165	238-267 190-238 143-189	275-342 219-273 164-219	394-503 253-314 189-253	
C Max. 237 (47)	A	A	A	A	A	A	
	23-62 58-73 49-58	63-84 67-83 59-67	94-124 77-96 59-77	109-138 88-110 69-89	127-158 101-127 76-100	166-202 117-146 87-107	
D Max. 204 (20)	A	A	A	A	A	A	
	44-80 33-64 25-33	73-82 59-73 48-59	84-105 67-84 51-67	97-121 78-97 59-79	119-138 89-111 67-89	138-160 103-128 77-93	
E Max. 95 (19)	U/A	U/A	A	A	A	A	
			23-39 23-29 15-23	38-49 26-33 17-23	50-59 30-38 20-29	60-63 35-44 26-35	
F Max. 59	U/A	U/A	U/A	A	A	A	
	14-28 13-14 10-13	16-23 15-19 10-15	21-27 17-21 13-17	25-31 20-25 15-20	28-36 23-28 17-23	31-40 24-33 20-26	
G Max. 47	U/A	U/A	U/A	A	A	A	
	13-16 10-13 8-10	16-18 12-14 9-12	17-21 13-17 10-13	19-24 15-19 11-15	23-27 17-22 13-17	26-31 20-25 15-20	
H Max. 39	U/A	U/A	U/A	A	A	A	
	6-8 5-6 4-5	8-10 6-8 4-6	10-12 8-10 6-8	11-14 9-11 7-9	13-19 12-15 9-12	20-25 16-20 12-16	
I Max. 24	C	C/I	I	U/A	U/A	U/A	
	6-8 4-6 3-4	6-9 4-6 3-4	8-8 6-8 4-5	9-10 6-8 4-6	9-10 7-8 5-7	10-12 8-10 6-8	

Note: Numbers shown are in months. The number shown below each offense code reflects the maximum possible sentence for that class of offense (the highest maximum sentence) from the application of the different combination of a separate(s) (as B1 through I) and crime(s) included in a paragraph.

A – Other Punishment
C – Community Punishment
U/A – Unlawful Arrest

Extraordinary Mitigation possible (page 10)
Aggravated Presumptive Sentence possible (page 10)
Mitigated Sentence possible (page 10)

What are the Risk Reduction Incentives the Defendant must complete?

The Division of Adult Correction and Juvenile Justice of the Department of Public Safety is authorized to create risk reduction incentives consisting of treatment, education, and rehabilitative programs. The incentives shall be designed to reduce the likelihood that the prisoner who receives the incentive will reoffend.

[N.C.G.S. 15A-1340.18\(b\)](#)

- Upon release, a defendant who received the benefit of ASR and completed the risk reduction initiatives successfully will be subject to longer periods of Post Sentence Release.
- Revocation rules would be the same as in any other PSR circumstance, only there would be a longer period of incarceration to serve upon revocation due to the early release.

Example

- If a Class E, Level I offender is sentenced in the presumptive range to 20–36 months, active, and ordered into the ASR program. The defendant's ASR date will be 15 months, which is the shortest mitigated sentence for a Class E, Level I offender.
- If the defendant completes risk reduction incentives in prison, DOC must release him onto post-release supervision after 15 months.
- The period of supervised release in the community is 12 months, but the sentence hanging over his head is 21 months (less any earned time he might earn during his 15 months in prison).

Questions?

Extraordinary Mitigation

N.C.G.S. 15A-1340.13

- **(g) Dispositional Deviation for Extraordinary Mitigation.** -- Except as provided in subsection (h) of this section, the court may impose an intermediate punishment for a class of offense and prior record level that requires the imposition of an active punishment if it finds in writing all of the following:
 - **(1)** That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
 - **(2)** Those factors substantially outweigh any factors in aggravation.
 - **(3)** It would be a manifest injustice to impose an active punishment in the case. The court shall consider evidence of extraordinary mitigating factors, but the decision to find any such factors, or to impose an intermediate punishment is in the discretion of the court. The extraordinary mitigating factors which the court finds shall be specified in its judgment.
- **(h) Exceptions When Extraordinary Mitigation Shall Not Be Used.** -- The court shall not impose an intermediate sanction pursuant to subsection (g) of this section if:
 - **(1)** The offense is a Class A or Class B1 felony;
 - **(2)** The offense is a drug trafficking offense under [G.S. 90-95\(h\)](#) or a drug trafficking conspiracy offense under [G.S. 90-95\(i\)](#); or
 - **(3)** The defendant has five or more points as determined by [G.S. 15A-1340.14](#).

How do you use it?

- To use extraordinary mitigation, the court must, under [G.S. 15A-1340.13\(g\)](#), find in writing that:
- The case presents extraordinary mitigating factors of a kind significantly greater than in the normal case;
- Those factors substantially outweigh any factors in aggravation; and
- **It would be a manifest injustice to impose an active punishment in the case.**
- Those findings, which rest in the discretion of the trial judge, may be recorded on form [AOC-CR-606](#).

STATE OF NORTH CAROLINA		Case No.
County		In The General Court Of Justice Superior Court Division
STATE VERSUS	EXTRAORDINARY MITIGATION FINDINGS (STRUCTURED SENTENCING)	
Name Of Defendant	G.S. 15A-1340.13	
<p>NOTE: The finding of extraordinary mitigation permits the Court, in its discretion, to impose an intermediate punishment for a class of offense and prior record level that requires the imposition of an active punishment under statute. The Court is not permitted to order extraordinary mitigation if (1) the defendant committed a Class A or B1 offense, (2) the defendant committed a drug trafficking offense under G.S. 85-41(b) or a drug trafficking conspiracy offense under G.S. 85-41(c), or (3) the defendant has had or more prior record points under G.S. 15A-1340.14.</p>		
<p>1. The Court finds that the class of offense and prior record level upon which the defendant stands convicted require the imposition of active punishment.</p> <p>2. After hearing evidence, and arguments of counsel on the issue of dispositional deviation for extraordinary mitigation, the Court, in its discretion, finds the following extraordinary mitigating factors:</p>		
<p>Based upon the foregoing findings, the Court, in its discretion, finds:</p> <p>1. That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.</p> <p>2. Those factors substantially outweigh any factors in aggravation.</p> <p>3. It would be a manifest injustice to impose an active punishment in this case.</p>		
Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge
<p>AOC-CR-606, Rev. 4/18 © 2018 Administrative Office of the Courts</p>		

- Extraordinary Mitigation may not be used for Class A or Class B1 offenses.
- Extraordinary Mitigation may not be used for offenders with 5 or more prior record points.
- Thus, the law may come into play in only six cells on the sentencing grid: Prior Record Level I and most of Prior Record Level II for Class B2, C, and D.
- Grid cells below those already allow a probationary sentence, and so the defendant would not be helped by a finding of extraordinary mitigation in any event

What is “Extraordinary”?

- **As is often the case, we must determine what it IS by first determining what it IS NOT:**
- The sheer number of ordinary mitigating factors cannot, standing alone, support a finding of extraordinary mitigation. *State v. Melvin*, 188 N.C. App. 827 (2008) (“[Q]uality of factors, not quantity, is the prime consideration for the trial court.”).

- There must be additional facts present, over and above those required to support an ordinary mitigator. *Id.*; State v. Riley, 202 N.C. App. 299 (2010).
- If it could not be an ordinary factor, then it clearly could not be an extraordinary one, ie: minor as a voluntary participant in sex crime by an adult.

- To be considered extraordinary, a mitigating factor must be **significantly greater than an ordinary mitigating factor**. The judge must look to the **quality** of the particular factor, not the overall **quantity** of proffered mitigators, when evaluating extraordinary mitigation.

NORMAL MITIGATING FACTORS COULD NOT CONSTITUTE EXTRAORDINARY MITIGATING FACTORS. --Trial court's finding of two statutory mitigating factors: (1) a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense, under [G.S. 15A-1340.16\(e\)\(3\)](#)); and (2) defendant aided in the apprehension of another felon, under [G.S. 15A-1340.16\(e\)\(7\)](#), was insufficient to support a finding of extraordinary mitigation.

Even two normal mitigating factors, without additional facts being present, did not constitute an extraordinary mitigating factor. [State v. Riley, 202 N.C. App. 299, 688 S.E.2d 477 \(2010\)](#), cert. denied [364 N.C. 246, 699 S.E. 2d 644, 2010 N.C. LEXIS 459 \(2010\)](#).

- ("[T]he offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.") Defendant relied only upon statements by his trial counsel that extraordinary mitigation existed, and "[c]omments by defense counsel are not evidence and are not sufficient to carry defendant's burden of proof of mitigating factors." [State v. Davis, 206 N.C. App. 545, 550, 696 S.E.2d 917, 920 \(2010\)](#).

The courts speak much more to what it is not than what it is. It appears the statutory guidance is the primary guidance to Judges considering Extraordinary Mitigation. There isn't a lot of case law on the topic because very few people who are granted EM appeal, so the court hasn't addressed what is EM, only what is not.

In your experience, what justifies finding Extraordinary Mitigation?