



**FREQUENTLY ASKED QUESTIONS ABOUT
THE 2011 RETROACTIVE CRACK GUIDELINE AMENDMENT**

ATTENTION: This FAQ should answer most of your questions. It is lengthy. Please read the entire document!

History of the 2011 Retroactive Crack Guideline Amendment

In 2010, Congress passed the Fair Sentencing Act (FSA) with nearly unanimous bipartisan consent in both houses and the support of the White House and Department of Justice.

The FSA increased the amounts of crack cocaine that trigger mandatory minimum sentences for federal crack cocaine crimes, in effect lowering crack sentences. The FSA also narrowed the ratio between powder and crack cocaine offenses from 100:1 to 18:1, as shown below:

| LAW | 5 Year Mandatory Minimum | 10 Year Mandatory Minimum | Simple possession of 5 grams of crack |
|--------------------------------------|---|--|--|
| OLD LAW | 5 grams crack 500 g cocaine (100:1 ratio) | 50 g crack 5,000 g cocaine (100:1 ratio) | 5-year mandatory minimum sentence |
| FSA (not retroactive) | 28 g crack 500 g cocaine (18:1 ratio) | 280 g crack 5,000 g cocaine (18:1 ratio) | No mandatory minimum |

The FSA directed the U.S. Sentencing Commission to change the federal sentencing guidelines to correspond to the FSA’s changes to the mandatory minimums. The FSA also directed the Commission to amend the guidelines to add certain sentencing enhancements and reductions that apply to all federal drug sentences.

Congress gave the Commission emergency authority to temporarily make the changes required by the FSA. The temporary crack guideline amendment went into effect on November 1, 2010, and will expire on October 31, 2011.

The Commission submitted the permanent crack guideline amendment (virtually identical to the temporary amendment) to Congress in April 2011. Unless Congress votes to reject it, the Commission’s crack guideline amendment will go into effect on November 1, 2011.

Q-1: Will the 2011 crack guideline amendment be retroactive?

A: Yes. On June 30, the Commission voted unanimously to make the 2011 crack guideline amendment retroactive. This means that approximately 12,040 federal crack offenders sentenced under the sentencing guidelines *before* November 1, 2010, *may be eligible* for sentence reductions.



Q-2: How can prisoners benefit from the retroactive crack amendment?

A: No one gets a sentence reduction automatically. Sentence reductions must be requested by submitting a motion under 18 U.S.C. § 3582(c)(2) to the court that sentenced the prisoner. Generally, the motion will be submitted to the court by an attorney. The court will typically give the prosecutor a chance to oppose the sentence reduction. The court can give all, part, or none of the requested sentence reduction. **There is no guarantee that any prisoner will receive a sentence reduction**, even if they are eligible for one. Whether a person gets a sentence reduction is entirely up to the court.

The § 3582(c)(2) motion can be formal (i.e., a motion with legal arguments in its support) or informal (i.e., a letter to the court asking for a reduction), but **the amendment does not go into effect until November 1, 2011**. This means that even if courts consider motions before that date, any sentence reductions they grant will not take effect until *after* November 1, 2011.

Q-3: How can prisoners find legal help with requesting a sentence reduction?

A: First of all, we urge patience. All federal district courts are already familiar with crack retroactivity, because they handled similar motions in 2008, when the “crack minus two” amendment (see Q-12) was made retroactive. No motions for sentence reductions under the new retroactive crack amendment are likely to be granted before November 1, and many districts are working now to figure out who can benefit, by how much, and when. For legal help, prisoners or their family members can **contact the Federal Public Defender’s Office in the district where they were convicted, or contact the lawyer who helped them at sentencing**. Contact information for public defenders can be found at http://www.fd.org/pdf_lib/defenderdir.pdf. If the federal public defender cannot help, the prisoner can (1) write to the court that sentenced the prisoner, and (2) ask the court to appoint an attorney to help the prisoner with the request for a sentence reduction. You can locate courts at <http://www.uscourts.gov/courtlinks>.

Q-4: Can FAMM help me with my motion, tell me how the retroactive amendment will affect me, or help me recalculate my sentence?

A: No. FAMM does not give legal advice or help. Prisoners and their families should contact the federal public defenders for help with filing their motion.

Q-5: Does FAMM have a form or sample § 3582(c)(2) motion available that prisoners can use?

A: No. FAMM has not written a form motion and will not be making one available. Because every case is different and will raise unique issues, we cannot make a sample motion available that will fit everyone’s individual needs.

Q-6: How much will the retroactive crack amendment shorten sentences?

A: Sentences could be reduced by *an average of 37 months*. Individual sentence reductions, however, will vary a great deal and can be shorter or longer than 37 months, depending on the original crack cocaine sentence and how much the court decides to reduce any given prisoner’s sentence.



Q-7: Who is eligible to seek a sentence reduction based on the retroactive crack guidelines?

A: The Commission estimates that 12,040 federal crack offenders are *eligible* to seek sentence reductions. Prisoners are eligible to seek a sentence reduction if they:

- **Were convicted in a federal court.** The retroactive amendment does not benefit people convicted in state courts for state crimes.
- **Were convicted of a crime involving crack cocaine.** The retroactive amendment does not benefit federal offenders whose cases did not involve crack (i.e., cases involving only methamphetamine, marijuana, powder cocaine, etc.).
- **Were sentenced before November 1, 2010.** If you were sentenced for a federal crack offense on or after November 1, 2010, you were sentenced under the temporary emergency amendment to the crack guidelines. The temporary amendment's drug weights are identical to the drug weights in the retroactive amendment – which means the retroactive amendment won't reduce your sentence any further.
- **Are serving a guideline sentence for crack cocaine.** The retroactive guideline does not shorten mandatory minimum sentences for crack offenses. For example, a person who is serving *only* a five or 10-year mandatory minimum (without any additional time under the sentencing guidelines) *cannot* benefit from the retroactive crack amendment.
- **Are not on supervised release.** The amendment does not shorten the time a person is spending on supervised release. If you are already out of federal prison and on supervised release, the retroactive amendment cannot help you get off of supervised release earlier.
- **Are not in a federal halfway house.** The retroactive amendment does not shorten the time a person is spending in a halfway house. If you are already in a halfway house, you are likely to be out of the halfway house before the retroactive amendment goes into effect.

To find out if you or a loved one is eligible for a sentence reduction, contact the federal public defenders or the lawyer who helped you at sentencing.

Q-8: Are crack offenders eligible for the sentence reduction if their case involved a gun?

A: Yes, if the prisoner meets all the other eligibility criteria. Please note, though, that the retroactive amendment does not change and cannot reduce the mandatory minimum sentences for certain gun convictions, such as convictions under 18 U.S.C. § 924(c) or for being an armed career criminal.

Q-9: Are career offenders eligible for sentence reductions?

A: Most likely no. Sentences for career offenders are not based on the amount of crack involved in the case. Instead, career offender sentences depend on the charge the person faced and the statutory *maximum* punishment that charge carries. A separate sentencing guideline, USSG § 4B1.1, controls career offender sentences. That guideline was not reduced. The retroactive crack amendment does *not* change the career offender guideline in any way. Nonetheless, if career offenders think they should benefit from the retroactive amendment, they should contact a lawyer.



Q-10: Does the retroactive crack amendment do anything to reduce sentences for other types of federal drug offenders?

A: Only if the crime involved another type of drug (e.g., meth, marijuana, heroin) *and* crack, and the sentence was calculated for that drug *and* crack.

Q-11: How does the retroactive crack amendment change the crack guidelines?

A: The retroactive amendment changed the crack drug weights in the guidelines so that they reflect the lowered mandatory minimums for crack offenses created by the FSA. Below is a chart describing how the retroactive amendment changes the crack guidelines:

| Base Offense Level | Old Crack Guidelines Amount of crack | Retroactive Amendment's Drug Weights Amount of crack |
|-----------------------------------|---|---|
| 38 | 4.5 KG or more | 8.4 KG or more |
| 36 | At least 1.5 KG but less than 4.5 KG | At least 2.8 KG but less than 8.4 KG |
| 34 | At least 500 G but less than 1.5 KG | At least 840 G but less than 2.8 KG |
| 32 | At least 150 G but less than 500 G | At least 280 G but less than 840 G |
| 30 | At least 50 G but less than 150 G | At least 196 G but less than 280 G |
| 28 | At least 35 G but less than 50 G | At least 112 G but less than 196 G |
| 26 | At least 20 G but less than 35 G | At least 28 G but less than 112 G |
| 24 | At least 5 G but less than 20 G | At least 22.4 G but less than 28 G |
| 22 | At least 4 G but less than 5 G | At least 16.8 G but less than 22.4 G |
| 20 | At least 3 G but less than 4 G | At least 11.2 G but less than 16.8 G |
| 18 | At least 2 G but less than 3 G | At least 5.6 G but less than 11.2 G |
| 16 | At least 1 G but less than 2 G | At least 2.8 G but less than 5.6 G |
| 14 | At least 500 MG but less than 1 G | At least 1.4 G but less than 2.8 G |
| 12 | Less than 500 MG | Less than 1.4 G |

Remember: The FSA's changes to mandatory minimum crack sentences DO NOT apply retroactively! When judges apply the retroactive crack amendment, they must continue to follow the mandatory minimums under the old, pre-FSA law.

Q-12: How is this retroactive crack amendment different than the 2007 "crack minus two" amendment? Does the new retroactive crack amendment undo "crack minus two"?

A: In 2007, the Commission reduced guideline levels for crack sentences by two base offense levels. This "crack minus two" amendment was made retroactive, making about 20,000 federal crack offenders eligible for sentence reductions. So far, over 16,000 people have received the benefit of "crack minus two." The new retroactive crack amendment is different from "crack minus two" – it makes the crack guideline drug weights conform to the 18:1 ratio that Congress created in the Fair Sentencing Act. The new retroactive crack amendment does not undo or



repeal the 2007 “crack minus two” amendment – that amendment is still in effect, and federal crack offenders who have not benefited from it yet can still try to do so.

Q-13: Can federal crack offenders seek sentence reductions if they already got a sentence reduction under the 2007 “crack minus two” amendment? If they didn’t?

A: Yes. Regardless of whether you received a sentence reduction under the 2007 retroactive “crack minus two” amendment, you can ask the court for a sentence reduction under this year’s retroactive crack amendment as long as you meet the eligibility criteria listed above. Some people who received the “crack minus two” sentence reduction will be able to receive another sentence reduction; others won’t. Prisoners can ask the federal public defenders about whether they can benefit from the 2007 and the 2011 retroactive crack amendments.

Q-14: How will judges decide how much of a reduction people will get?

A: When a person files a request for a sentence reduction under 18 U.S.C. § 3582(c)(2), the court will recalculate the person’s sentence using the new drug weights listed above (Q-11). If the recalculation produces a lower sentencing range, the judge can (but isn’t required to) sentence the person anywhere within that new range. If the recalculation does not produce a lower sentencing range, the person is not entitled to a sentence reduction.

Q-15: Are there limits on how much of a sentence reduction a person may receive?

A: Yes. There are two major limits to consider:

1. When courts apply the retroactive crack guideline, they *cannot reduce a sentence below the minimum of the new, recalculated guideline range*. For example, if a person is serving a 135-month sentence, and her recalculated sentencing range is 121-151 months, the lowest sentence she can get is 121 months. The only exception is if the person gave the government substantial assistance and got a sentence reduction under USSG § 5K1.1 when they were originally sentenced. If that is the case, the judge can reduce the sentence comparably lower than the new, recalculated guideline range.
2. Judges *cannot give sentences that are below the mandatory minimums*, unless the person’s sentence is already below the mandatory minimum because he gave the government substantial assistance or received the safety valve.

Q-16: Does the amendment make the FSA’s changes to crack mandatory minimum sentences retroactive?

A: No. Only Congress can make the FSA’s changes to the crack mandatory minimum sentences retroactive. To make those changes retroactive, Congress must pass a new law. On June 23, 2011, Representative Bobby Scott (D-VA) introduced a bipartisan bill, H.R. 2316, the Fair Sentencing Clarification Act. If it becomes law, H.R. 2316 would make the FSA’s changes to mandatory minimums apply retroactively to federal (not state) crack offenders who committed their crimes before August 3, 2010. It is not a law yet, and it may never become a law. To become a law, it must go through many other steps first, and it must be passed by both houses of Congress and signed by the president. For more information about the bill and to encourage your members of Congress to support the bill, please see FAMM’s website, www.famm.org.



Q-17: Can Congress stop people from benefiting from the retroactive amendment?

A: Theoretically, yes. Congress could reject the Commission’s permanent crack amendment with a majority vote against it in both houses anytime before November 1, 2011. Alternatively,

Congress could pass a law that bans the courts from applying the amendment. At this time, though, we do not expect Congress to take these actions.

Q-18: How can I or my loved ones thank the Commission for making the amendment retroactive?

A: Write a thank-you letter addressed to

Chairwoman Patti Saris
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Begin your letter “Dear Chairwoman Saris and Commissioners.” You can email it to pubaffairs@ussc.gov or send it in the mail.

Q-19: What did FAMM do to promote retroactivity of the crack amendment?

A: FAMM has long been one of the leading organizations fighting for sentencing reform, including retroactive application of the FSA and the new crack amendment. In May and June, FAMM asked its supporters – many of whom are federal prisoners or their loved ones – to write letters to the Commission and ask it to make the crack amendment retroactive. FAMM supporters sent thousands of letters to the Commission and told their friends and families to do the same. The Commission received over 43,000 letters commenting on retroactivity. FAMM’s president, Julie Stewart, and a FAMM member who benefited from the retroactive 2007 “crack minus two” amendment testified at the Commission’s hearing on June 1, 2011. They told the Commissioners that making the guideline amendment retroactive was the right thing to do. FAMM also submitted written testimony calling for retroactivity. FAMM continues to work with a coalition of experts, practitioners, and advocates to win relief for prisoners.

Q-20: Will FAMM keep us informed about retroactive application of the FSA?

A: Yes. Keep checking on FAMM’s website (www.famm.org) for full updates on how the amendment is being applied retroactively and how FAMM is working to make the FSA retroactive. Also on our website, you can also sign up to receive email updates from FAMM.

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