FREQUENTLY ASKED QUESTIONS:
THE FAIR SENTENCING ACT OF 2010, S. 1789
FEDERAL CRACK REFORM BILL

Q1: Has Congress passed crack cocaine reform legislation?
A: Yes. On March 17, 2010, the U.S. Senate unanimously passed S. 1789, the Fair Sentencing Act of 2010 (the FSA), which increases the amount of crack cocaine quantities needed to trigger the five- and 10-year mandatory minimums. The U.S. House of Representatives passed the FSA by a voice vote on July 28, 2010.

Q2: Is the bill law?
A: Yes. President Obama signed the FSA into law on August 3, 2010.

Q3: Does the FSA change any state laws?
A: No. The FSA only changes federal crack sentencing laws.

Q4: Does the FSA benefit people who are already in prison?
A: None of the crack mandatory minimum reforms in the new federal law apply to people who were sentenced for federal crack offenses before August 3, 2010. In other words, **the reforms are not "retroactive."**

Q5: How does the FSA change the 100-to-1 ratio between crack and powder cocaine?
A: Under the old law, conviction for possession with intent to distribute five grams of crack cocaine and 500 grams of powder cocaine triggered the same five-year sentence. Fifty grams of crack cocaine and five kilograms of powder cocaine triggered the same 10-year sentence. This created what is commonly referred to as the 100-to-1 ratio between crack and powder cocaine.

The FSA increased the amounts of crack cocaine needed to trigger the five- and 10-year mandatory minimums, reducing the 100-to-1 ratio to a ratio of 18-to-1. Under the FSA, 28 grams of crack triggers a five-year mandatory minimum, and 280 grams of crack triggers a 10-year mandatory minimum. The FSA did not change the powder cocaine triggering weights. It also eliminated the current five-year mandatory minimum for simple possession (without intent to distribute) of crack cocaine. Here is a chart comparing the old law with the FSA:

	5 Year Mandatory Minimum	**10 Year Mandatory Minimum**	**Simple possession of 5 grams of crack**
Old crack law	5 g crack 500 g powder cocaine (100:1 ratio)	50 g crack 5,000 g powder cocaine (100:1 ratio)	5-year mandatory minimum sentence
New crack law (the FSA)	28 g crack 500 g powder cocaine (18:1 ratio)	280 g crack 5,000 g powder cocaine (18:1) ratio	No mandatory minimum

Q6: Is it still possible for Congress to pass a bill that equalizes crack and powder at a one-to-one ratio?
A: It is still possible, but faces challenges. While the 18-to-1 ratio in the FSA does not eliminate the sentencing disparity, it was a bipartisan compromise. Bipartisan support was essential to passing crack sentencing reform. The FSA is not perfect, but it was the best that Congress was able to pass at the time. On June 20, 2011, Representative Bobby Scott (D-VA) introduced a new bill to eliminate the crack-powder disparity and establish a one-to-one ratio. The bill is H.R. 2242, the Fairness in Cocaine Sentencing Act of 2011, and it is cosponsored by Representatives John Conyers (D-MI), ranking member of the House Judiciary Committee; Ron Paul (R-TX); and Roscoe Bartlett (R-MD). It is not a law. FAMM supports the bill, but does not know if or when it will become law. You can follow its progress at our website, www.famm.org.

Q7: How can we make the changes to the crack mandatory minimums retroactive?
A: By getting Congress to pass a new law that makes the changes to mandatory minimum crack sentences retroactive. This will require getting a member of Congress to introduce a new bill, and getting that bill passed by the House of Representatives and the Senate and then signed into law by the president. Making a sentencing reform retroactive is controversial and extremely rare. On June 23, 2011, Representative Bobby Scott (D-VA) introduced H.R. 2316, the Fair Sentencing Clarification Act. If it becomes law, the bill would make the FSA retroactive. It is cosponsored by Representatives Ron Paul (R-TX); Roscoe Bartlett (R-MD); John Conyers (D-MI), ranking member of the Judiciary Committee; Keith Ellison (D-MN); and Alcee Hastings (D-FL). The bill is not a law. FAMM supports the bill, but does not know if or when it will become law. You can follow its progress at our website, www.famm.org.

Q8: Didn't the U.S. Sentencing Commission make crack mandatory minimums retroactive?
A: 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. The U.S. Sentencing Commission can only make changes to crack *sentencing guidelines* retroactive.

Q9: Going forward, how many people will the FSA benefit?
A: The U.S. Sentencing Commission estimates that each year, nearly 3,000 people charged with federal crack offenses will receive shorter sentences because of the FSA's reforms. Going forward, the FSA should shorten crack sentences by an average of 27 months, saving the government 1,500 prison beds and an estimated $42 million over the next five years.

Q10: Who will benefit from the FSA?
A:

- People who are charged with possession with intent to distribute crack cocaine, and who are sentenced AFTER the bill was signed into law will be subject to the five-year mandatory minimum only if their drug quantity is equal to or greater than 28 grams.

- People who are charged with possession with intent to distribute crack cocaine and who are sentenced AFTER the bill was signed into law will be subject to the 10-year mandatory minimum only if their drug quantity is equal to or greater than 280 grams.
- People who are charged with first-time simple possession of crack cocaine and who are sentenced AFTER the bill was signed into law will not be subject to a mandatory minimum sentence.

Q11: Who will NOT benefit from the FSA?
A: The FSA will not help

- People who were sentenced before August 3, 2010, and are currently in federal prison.
- People convicted in state courts for state crimes. The FSA only applies to people convicted in federal courts.
- People whose drug offenses do not involve crack cocaine. The FSA only changes crack mandatory minimum sentences, not mandatory minimums for any other type of drug (e.g., methamphetamine, marijuana, heroin, etc.), unless the sentence was calculated for that drug *and* crack cocaine.

Q12: If a person is awaiting sentencing (or resentencing after an appeal), should that person postpone sentencing (or resentencing) until the FSA is made retroactive?
A: People who are awaiting trial, sentencing, or resentencing after an appeal for a federal crack offense committed *before* August 3, 2010 should **discuss this question with their lawyers**.

Q13: Does the FSA apply to "pipeline" cases?
A: Yes. "Pipeline cases" refer to those people who were convicted of crack offenses committed *before* August 3, 2010, but who were not or will not be sentenced until *after* August 3, 2010. The "pipeline" has already carried about 3,800 cases to sentencing, and it will stretch out for four more years, when the five-year statute of limitations on pre-FSA crack offenses expires.

After the FSA was enacted, the Department of Justice (DOJ) took the position at sentencing that the new law did not benefit people in the pipeline because their offenses occurred before the FSA was signed into law on August 3, 2010. Many prosecutors argued in court that people who were sentenced on or after August 3, 2010 for conduct that occurred *before* that date still had to be sentenced under the old mandatory minimums (where five grams of crack triggered a five-year mandatory minimum and 50 grams triggered a 10-year mandatory minimum). For example, if Joe committed his crack offense on April 1, 2010 and was scheduled for sentencing on August 4, 2010, the prosecutor took the position that Joe would be sentenced under the old mandatory minimum laws – because his crime was committed *before* the FSA became law.

Some courts agreed with the DOJ's old position and sentenced people to the pre-FSA mandatory minimum sentences. Other courts did not. They decided to apply the FSA to pipeline cases because they found that Congress clearly wanted the FSA's new mandatory minimums to apply

to crack offenders as soon as the FSA became law – even if those offenders committed their crimes before August 3, 2010.

Defense lawyers, some judges, and advocacy organizations thought the DOJ's position was unduly rigid and led to profoundly unfair results. FAMM and others urged the DOJ to reverse its policy, and the DOJ did so on July 15, 2011. Attorney General Eric Holder announced that the **DOJ now believes that Congress intended that the FSA should apply to all federal crack offenders sentenced *on or after* August 3, 2010**, regardless of when the crime took place.

The Attorney General's July 15 memo to U.S. Attorneys emphasizes that **the FSA is not retroactive and will not benefit people sentenced *before* August 3, 2010 who were subject to mandatory minimums**.

Q14: Who might benefit from the DOJ's policy change on "pipeline" cases?
A: People sentenced **after July 15, 2011** may benefit if the sentencing court agrees with the DOJ that the FSA applies to them, even though their crack offense occurred before August 3, 2010.

Some defendants sentenced **after August 3, 2010 and before July 15, 2011**, who were subject to the pre-August 3, 2010 mandatory minimums may benefit from the new DOJ policy if and when courts revisit those cases. It is important to know that:

- The rules about whether and how a court can change a sentence it has already imposed (including limits contained in plea agreements) are very strict and complicated and could in some cases prevent relief even in otherwise deserving cases; and
- Even though the DOJ has changed its mind about these cases, its decision does not bind the courts. Some judges may choose not to disturb old, pre-FSA mandatory minimums, even if the prosecutor urges them to do otherwise.

FAMM does not know who may benefit from the DOJ's change in policy, and we cannot give people legal advice, referrals to attorneys, or help with recalculating sentences. **Federal crack offenders sentenced AFTER August 3, 2010 , who think they might benefit, should contact their lawyers as soon as possible** to find out if and how they may benefit from the DOJ's policy change.

Q15: When will there be more clarity about whether pipeline cases can benefit from the FSA?
A: The U.S. Supreme Court is currently considering two cases that could resolve this question. The cases are *Dorsey v. United States* (11-5683) and *Hill v. United States* (11-5721). On January 30, 2012, FAMM joined an amicus brief spearheaded by the ACLU in these two cases. The Court will announce its decisions on the cases sometime before June 1, 2012. Keep checking FAMM's website, www.famm.org, for updates.

Q16: Can FAMM tell people whether they can benefit from the FSA, or recalculate sentences?

A: No. FAMM cannot provide its members with legal advice or opinions on this issue. Again, people with questions about this issue should speak with their lawyers.

LEGAL DISCLAIMER:

FAMM cannot provide legal advice, representation, referrals, research, or guidance to those who need legal help. Nothing on this form is intended to be legal advice or should be relied on as legal advice. If you or your loved one feel that you need legal advice, you should speak with an attorney.

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