

THE INMATE'S GUIDE TO 2011 RETROACTIVE CRACK COCAINE SENTENCE REDUCTION ELIGIBILITY



RE: 2011 UNITED STATES SENTENCING COMMISSION'S RETROACTIVE
APPLICATION OF AMENDMENT 750 TO ITS GUIDELINES MANUAL

Prepared by PCR Consultants

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Help and hope for defendants, inmates and their families.

Summary and Author's Note

This document is a guidebook for any and all inmates who wish to learn more about their eligibility for sentence reductions. On November 1, 2011 the newest set of amendments to the United States Sentencing Commission's Guidelines Manual become active and usable.

One of these amendments makes the reductions in the drug quantity table contained in the Guidelines Manual retroactive. There are many pieces to consider when determining if a given inmate is eligible for such a reduction, and PCR Consultants has published this document to give inmates a clear understanding of what makes or breaks their eligibility for sentence reductions. This guide has been provided free of charge to all legal libraries within the federal Bureau of Prisons as a service to current inmates, by a former inmate. Please enjoy.

Eric M. Baird

Founder and CEO, PCR Consultants

Legal Disclaimer: This small pamphlet is intended for inmates who wish to have a better understanding of their eligibility to receive sentence reductions in their crack cocaine sentences. This guide is not intended to be or replace the legal advice of an attorney, and should not be construed as legal advice of any kind. Further, any and all reductions in sentences are at the complete discretion of sentencing judges. In the post-*Booker* world, even inmates eligible for reductions may not receive any relief from their respective sentencing courts. This guide is to be used as a starting point for inmates who wish to learn more about what creates and/or bars persons convicted of certain crack cocaine offenses from relief pursuant to the United States Sentencing Commission's new retroactive policy. PCR Consultants takes no responsibility for use or misuse of the information provided herein. © PCR CONSULTANTS, 2009-2011

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CHAPTER I

Overview of the Fair Sentencing Act of 2010

The Fair Sentencing Act of 2010 (the “Act”) was formally enacted by the 111th Congress. Its date of enactment was August 3rd, 2010. The purpose of the Act was “To restore fairness to Federal cocaine sentencing.”

All federal courts began using the new standards imposed by the law on its enactment date to defendants who **committed** certain crack cocaine offenses on or after that date. Three Circuit Courts of Appeal¹ have since held that those who committed their offenses before the Act's enactment date, but were sentenced after it, should also receive the relief from the Act. The Act is broken up into the ten (10) sections below²:

- Section 1. Short Title;
- Section 2. Cocaine Sentencing Disparity Reduction;
- Section 3. Elimination of Mandatory Minimum Sentence for Simple Possession;
- Section 4. Increased Penalties for Major Drug Traffickers;
- Section 5. Enhancements for Acts of Violence During the Course of a Drug Trafficking Offense;
- Section 6. Increased Emphasis on Defendant's Role and Certain Aggravating Factors;
- Section 7. Increased Emphasis on Defendant's Role and Certain Mitigating Factors;
- Section 8. Emergency Authority for United States Sentencing Commission;
- Section 9. Report on Effectiveness of Drug Courts;
- Section 10. United States Sentencing Commission Report on Impact of Changes to Federal Cocaine Sentencing Law.

1 The First, Third, and Eleventh Circuits have held that the Act applies to these “pipeline” cases. The Seventh Circuit has held that it does NOT apply. All other Circuits have not decided.

2 See Appendix page I for full text of the Fair Sentencing Act of 2010

The parts of the Act that directly impact the purpose of this guide are Sections 2 and 3. To make this guide shorter and easier to read, there will be no discussion here on the rest of the Act.

Section 2

Section 2 of the Act changes two sections of the United States Code (U.S.C.). First, it changes 21 U.S.C. §841(b)(1)³ by changing the quantities of “cocaine base” that trigger the mandatory minimum sentences. Where 5 grams used to trigger a 5 year mandatory minimum and 50 grams would trigger a 10 year mandatory minimum, those quantities changed to 28 grams and 280 grams respectively.

In simple terms, it now takes 28 grams of crack cocaine to get a 5-year mandatory minimum sentence, and 280 grams to get a 10-year mandatory minimum sentence. Note that these are mandatory minimums for possession, distribution, manufacturing, or conspiracy to do so only. Different elements of the drug crime sentencing statutes give mandatory minimums for prior felony drug convictions and violence as a part of the crime as well.

Therefore, it is important to know what triggered a mandatory minimum in the first place. More on this in the next chapter.

³ The Penalties section of the Controlled Substances Act

Section 3

Section 3 of the Act changes the penalty for simple possession of “crack cocaine”.⁴ This was done simply by striking one sentence:

“Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning “Notwithstanding the preceding sentence,”.

These two sections changed the face of crack cocaine sentences. By increasing the amount of crack cocaine a defendant must be charged with to invoke a mandatory minimum sentence, Congress effectively lowered the sentences for all such offenses.

Why? The next section of this Guidebook discusses how the United States Sentencing Commission uses mandatory minimums, and the Act specifically, in determining its sentencing guidelines.

4 Statutorily, crack cocaine is: “[A] mixture or substance described in [21 U.S.C. §841(1)(a)(ii)] which contains cocaine base;”
– 21 U.S.C. §841(1)(a)(ii) describes a substance that contains a detectable amount of - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; (II) Cocaine, its salts, optical and geometric isomer, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

CHAPTER 2

Overview of USSC Amendment

The new 2011 Amendment does only one thing: it makes the 2010 Amendment retroactive. The pieces of the 2010 Amendment, demanded by the Fair Sentencing Act of 2010 does all the real work (see excerpt on the next page).

The United States Sentencing Commission (USSC) publishes its sentencing guidelines for crack cocaine sentences based upon the statutory penalties, namely mandatory minimums, created by Congress. Mandatory minimum sentences establish milestones by which the USSC uses to establish the base offense levels of crack cocaine sentences in its Drug Quantity Table.⁵

These base offense levels are then increased using any enhancements sought by the case prosecutor and inserted into the Sentencing Table.⁶ The base offense level is then matched with a defendant's Criminal History Category to determine the sentencing range guideline for that specific case.

Since the quantities of crack cocaine required to trigger mandatory minimum sentences were increased, the base offense levels for all crack cocaine sentences based on the Drug Quantity table were decreased to match. These lower base offense levels are used to calculate reduced sentences.

Example: Prior to the Act, a defendant had a base offense level of 24 for a certain amount of crack cocaine. After the Act, the new drug quantity base-offense-level is 20. Four points is then reduced from the base offense level used to sentence this defendant and the new guidelines range is calculated. From this new range, a new sentence is formally handed down.

⁵ Found in the USSC Guidelines Manual §2D1.1(c)

⁶ Found in the USSC Guidelines Manual §5A

From the Nov 1, 2010 Amendment (#750):

“The Fair Sentencing Act of 2010, Pub. L. 111-220 (the "Act"), reduced statutory penalties for cocaine base ("crack" cocaine) offenses, eliminated the mandatory minimum sentence for simple possession of crack cocaine, and directed the Commission to review and amend the sentencing guidelines to account for specified aggravating and mitigating circumstances in certain drug cases. Section 8 of the Act required the Commission to promulgate, under emergency authority, the amendments provided for in the Act and such conforming amendments as the Commission determined necessary to achieve consistency with other guideline provisions and applicable law. The Commission was required to promulgate the amendment as soon as practicable, and in any event not later than 90 days after enactment of the Act. **The Commission established an effective date of November 1, 2010, for this amendment.**” (Emphasis in original)

As easy as this sounds, there are several barriers that will keep an inmate from qualifying for a sentence reduction at all. The next chapter, Chapter 3, will deal with the factors which qualify an inmate for sentence reductions, and Chapter 4 will deal with factors which dis-qualify an inmate for sentence reductions.

CHAPTER 3

Eligibility Requirements

The requirement for a sentence reduction is simple on its face. An inmate must be sentenced for violating one of two statutes dealing with the drug trade, and specifically for crack cocaine violations of them. Those two statutes are:

- 21 U.S.C. §841(a) Unlawful acts – Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
 - (a)(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
 - to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
- 21 U.S.C. §846 – Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Following these two statutes, **any inmates who was sentenced before August 3, 2010⁷ for possession, manufacturing, distribution, dispensing, creating or possession with intent to distribute or dispense (or conspiracy to do any of those things) may be eligible for a sentence reduction.**

The requirement here is that the inmate must have been sentenced using the Drug Quantity Table of the Guidelines Manual, because that is the section where base-offense-levels were reduced. Given this information the requirements to be eligible for a sentence reduction are that an inmate must be convicted of a crack cocaine crime as defined above, be currently incarcerated in the Bureau of Prisons for this conviction, be sentenced under the older guidelines, and have a release date that gives the court and BOP time to grant immediate release (if applicable).

⁷ Specifically, under the pre-FSA 2010 guidelines

Sentence Reduction Eligibility Checklist	Check Box
1. Be convicted under for a crime as defined above (21 U.S.C. §841⁸ & §846).	
2. Be currently incarcerated	
3. Be currently incarcerated by the federal Bureau of Prisons	
4. Be serving a sentence that was based upon the pre- FSA 2010 Guidelines Manual	
5. Have a release date at least a month after the intended filing date of reduction pleading.	

⁸ The statutes that follow each of these enumerated statutes also apply. Most charges that appear on Judgement and Commitment Orders list these as their statutes.

CHAPTER 4

Disqualifying Factors

In its most basic terms, the new policy that makes crack cocaine sentence reductions retroactive only requires that an inmate who is already serving his sentence is sentenced using the drug quantity table in §2D of the Sentencing Guidelines Manual. This means that inmates who were sentenced outside the Drug Quantity Table do not qualify.

Further, the new policy cannot break through the mandatory minimums that were in effect at the time of sentencing. This means that inmates who are serving mandatory minimum sentences given to them before August 3, 2010 cannot benefit from these sentence reductions even if they are otherwise eligible. These topics are broken down into more detail below.

Sentences Outside the Drug Quantity Table

Inmates may be charged with eligible crack cocaine violations but may be disqualified from sentence reductions because the portion of the Guidelines Manual used to calculate their sentence was used absent the Drug Quantity Table. Examples of this are called cross references within the guidelines manual which include, but is not exclusive to: Career Criminals and Armed Career Criminals.

To find out the specifics behind any sentence, the easiest place to look is your sentencing docket. In cases where there is no judicial opinion to be published in law texts, a judge will publish a Statement of Reasons (SOR) which enumerate the section of the Guidelines Manual they used to calculate base-offense-level, Enhancements, and Criminal History Category. This is the surest way to know exactly what the Court views in terms of eligibility and disqualifications when applied to this new retroactive policy.

Statements of Reason can be found for free using the PACER website.⁹ An account must be created and, once inside, the case can be located by using these steps:

1. Click “Case Locator” Tab
2. Select the specific District Court of Conviction
 - Ensure the Court is District Court, not Bankruptcy Court
3. Type in inmate name or case number
4. Click on “Docket”
5. Find SENTENCING or JUDGEMENT. The Statement of Reasons (SOR) should be immediately after one of these entries.

Mandatory Minimum Sentences

Drug quantities are not the only way mandatory sentences are passed down for drug offenses under the two statutes from Chapter 3. There are two other types of mandatory minimums that the new USSC policy will not help with. If a defendant has a prior felony drug conviction, he may be given a statutory enhancement¹⁰ written into the Penalties section of §841.

Also, “...if a death or serious bodily injury results from the use of such substance...such person shall be subject to” another statutory enhancement. This “statutory enhancement” is the mandatory minimum for those cases. Don't fret, because there is good news.

Just because an inmate is subject to a mandatory minimum, that may not be what his or her sentence amounted to. The only limitation of the new policy is that it cannot reduce a defendant's sentence *below* that minimum amount.

⁹ PACER: Public Access to Court Electronic Records. (<http://www.PACER.gov>)

¹⁰ This is different from a Guidelines Manual enhancement. Statutory enhancements like this one only invoke mandatory minimums and cannot be changed by the Guidelines Manual.

Example: An inmate was sentenced in 2008 with felony possession and distribution of 72 grams of crack cocaine with a prior State felony conviction for distribution of crack cocaine. The mandatory minimum for this charge would be 10 years (because both the prior conviction and having over 50 grams of crack cocaine). After all sentencing factors were considered, a 165-month sentence was pronounced.

The lowest amount of time that inmate may serve with this new policy is 120 months due to the mandatory minimums involved. However, because this inmate was sentenced to more time than the mandatory minimum carried, a reduction of 45 months is theoretically possible under these reductions.

Conclusion

This small guide has presented the core information necessary to help an inmate educate themselves on what makes them eligible for sentence reductions pursuant to the 2011 United States Sentence Commission Guidelines Manual Amendments. Inmates who are currently serving federal sentences for crack cocaine convictions, who were sentenced using the Drug Quantity Table of the Guidelines Manual to determine base-offense-levels, are eligible for relief.

On the other hand, inmates who were sentenced to the mandatory minimum (and nothing more), or were given sentences that cross-referenced away from the Drug Quantity Table, are disqualified from getting any reductions from this Amendment.

Its also important to note that judges also have some rules they must follow. Inmates cannot be granted anything shorter than “time served”. Judges will re-calculate sentences based upon the new Drug Quantity Table's base-offense-levels, and will determine what the new, lower range is for each specific

applicant. Once a judge has this information he may or may not give any relief at all. It is entirely at their discretion. Their discretion, here again, is limited. Whatever the re-calculated sentencing range is, judges may not downward depart from it. They may sentence only as low as the bottom of the newly-calculated range.

This means that if an inmate was given a significant downward departure at sentencing, the possible reductions from this Amendment are smaller.

* * *

We here at PCR Consultants hope this small guide has been helpful and wish nothing but success for all inmates who wish to pursue sentence reductions. This guide was intended to help determine for yourself if you are eligible to go home months and even years earlier. If you would like more information on how PCR Consultants can help you interface directly with the courts with exhaustively research, tested, and proven Documentation Services, please get in touch with us.

PCR Consultants participates in CorrLinks and we always accept prepaid calls from federal institutions. We also welcome contact by friends and family members for more information about working with you in your quest for shorter sentences.



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One Hundred Eleventh Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday,
the fifth day of January, two thousand and ten*

An Act

To restore fairness to Federal cocaine sentencing.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the “Fair Sentencing Act of 2010”.

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking “50 grams” and inserting “280 grams”; and

(2) in subparagraph (B)(iii), by striking “5 grams” and inserting “28 grams”.

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking “50 grams” and inserting “280 grams”; and

(2) in paragraph (2)(C), by striking “5 grams” and inserting “28 grams”.

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning “Notwithstanding the preceding sentence.”.

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPENSE.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in subparagraph (A), by striking “\$4,000,000”, “\$10,000,000”, “\$8,000,000”, and “\$20,000,000” and inserting “\$10,000,000”, “\$50,000,000”, “\$20,000,000”, and “\$75,000,000”, respectively; and

(2) in subparagraph (B), by striking “\$2,000,000”, “\$5,000,000”, “\$4,000,000”, and “\$10,000,000” and inserting “\$5,000,000”, “\$25,000,000”, “\$8,000,000”, and “\$50,000,000”, respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), by striking “\$4,000,000”, “\$10,000,000”, “\$8,000,000”, and “\$20,000,000” and inserting “\$10,000,000”, “\$50,000,000”, “\$20,000,000”, and “\$75,000,000”, respectively; and

(2) in paragraph (2), by striking “\$2,000,000”, “\$5,000,000”, “\$4,000,000”, and “\$10,000,000” and inserting “\$5,000,000”, “\$25,000,000”, “\$8,000,000”, and “\$50,000,000”, respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT’S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if—

(1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;

(2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856); or

(3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant—

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant—

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that—

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant—

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall—

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797–u et seq.).

(b) CONTENTS.—The report submitted under subsection (a) shall—

- (1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;
- (2) address the effect of drug courts on recidivism and substance abuse rates;
- (3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;
- (4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and
- (5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*



**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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