



**FREQUENTLY ASKED QUESTIONS:  
2009-2010 FEDERAL CRACK REFORM BILLS IN THE HOUSE & SENATE**

**Q-1: What is the status of crack cocaine reform legislation in the U.S. House of Representatives and the U.S. Senate?**

**A:** One bill has passed the full Senate and one bill has advanced in the House.

In the Senate, the bill is S. 1789, introduced by Rep. Richard Durbin (D-Ill.). S. 1789 was passed by the entire Senate on March 17, 2010. This bill is not retroactive. It is not a law yet.

In the House, the bill is H.R. 3245, introduced by Rep. Bobby Scott (D-Va.). This bill has been voted out of the House Judiciary Committee, but as of March 25, 2010, it still has not been voted on by the entire House of Representatives. It is not scheduled for a vote. We do not know when or if it will be scheduled for a vote. This bill is not retroactive. It is not a law yet.

**Q-2: How would H.R. 3245 and S. 1789 change the current 100-to-1 ratio between crack and powder cocaine?**

**A:** Under current law, five grams of crack cocaine and 500 grams of powder cocaine trigger the same five-year sentence. Fifty grams of crack cocaine and five kilograms of powder cocaine trigger the same 10-year sentence. This creates what is commonly referred to as the 100-to-one ratio between crack and powder cocaine.

The Senate bill (S. 1789) and House bill (H.R. 3245) would change the current 100-to-1 ratio. Both bills would also eliminate the current 5-year mandatory minimum for simple possession (without intent to distribute) of crack cocaine. Here is a chart describing how H.R. 3245 and S. 1789 would change current law:

<b>BILL</b>	<b>5 Year Mandatory Minimum</b>	<b>10 Year Mandatory Minimum</b>	<b>Simple possession of 5 grams of crack</b>
Current law	5 g crack 500 g cocaine (100:1 ratio)	50 g crack 5,000 g cocaine (100:1 ratio)	5-year mandatory minimum sentence
H.R. 3245	500 g crack 500 g cocaine (1:1 ratio)	5,000 g crack 5,000 g cocaine (1:1 ratio)	No mandatory minimum
S. 1789	28 g crack 500 g cocaine (18:1 ratio)	280 g crack 5,000 g cocaine (18:1) ratio	No mandatory minimum

**Q-3: What must happen next before S. 1789 can become law?**

**A:**

- S. 1789, while already passed by the Senate, must still be passed by the full House. If the House passes S. 1789 without making any changes to the bill, it will go to the President for his signature.



- If only minor changes are made to a bill by the House, the legislation would go back to the Senate for a vote. If the House passes a bill that is significantly different from S. 1789, the differences between the bill passed by the House and the bill passed by the Senate must be resolved by a “conference committee” made up of a group of senators and representatives who must agree on one, identical bill. The final bill that the conference committee comes up with must go back to the House and the Senate and be passed by both the House and the Senate.
- The President must sign the bill into law.

**Q-4: What must happen next before H.R. 3245 can become law?**

**A:**

- H.R. 3245 must pass in a vote by the full House.
- The Senate must take up H.R. 3245. Typically the bill must go through the same process in the Senate as it did in the House. The Senate may choose to approve the bill as received, reject it, ignore it, or amend it. If the Senate passes H.R. 3245 without making any changes to the bill, it will go to the President for his signature.
- If the Senate approves the bill with minor changes, the legislation would go back to the House for a vote. If the Senate passes a bill that is significantly different from H.R. 3245, the differences between the bill passed by the House and the bill passed by the Senate must be resolved by a “conference committee” made up of a group of senators and representatives who must agree on one, identical bill. The final bill that the conference committee comes up with must go back to the House and the Senate and be passed by both the House and the Senate.
- The President must sign the bill into law.

**Q-5: When will the House vote on H.R. 3245 or S. 1789?**

**A:** We do not know when the House will vote, and we don’t know which bill they will choose to vote on, though it is increasingly looking like the House will take up some version of the Senate bill. Keep checking [www.famm.org](http://www.famm.org) for updates, and we will contact our members via e-mail when a vote has been scheduled.

**Q-6: Is it still possible for the House to pass a bill that equalizes crack and powder at a one-to-one ratio?**

**A:** While still possible, it is highly unlikely. The Senate passed S. 1789 after making a compromise that resulted in a ratio of 18-to-one. This compromise makes it less likely that a one-to-one ratio will pass out of the House.

**Q-7: If passed and signed into law, would H.R. 3245 or S. 1789 benefit people who are already in prison?**

**A:** No. As the bills are currently written, none of their reforms would apply to people who are already in prison (in other words, the reforms would not become “retroactive”).



**Q-8: Who would NOT benefit if H.R. 3245 or S. 1789 is passed and signed into law?**

**A:** If passed, both the Senate and House proposals would only impact federal crack cocaine sentences. It will not help

- People who are already sentenced and currently in federal prison.
- People convicted in state courts for state crimes. The reforms, if passed, only apply to people convicted in federal courts.
- People whose drug offenses do not involve crack cocaine. The bills would only change crack mandatory minimum sentences, not mandatory minimums for any other type of drug (e.g., methamphetamine, marijuana, heroin, etc.).
- People found guilty of a crack cocaine offense that was committed before the bill is signed into law. Please see the following question and answer for more information.

The crack reform bills, if passed, also will not change other mandatory minimum laws or certain guidelines that have their own rules, such as:

- The career offender guideline, § 4B1.1 of the U.S. Sentencing Guidelines
- Gun offenses carrying mandatory minimums (e.g., 18 U.S.C. § 924(c) or § 924(e) (ACCA)).

**Q-9: If a person is in jail and has not been sentenced yet, should he postpone sentencing until a crack reform bill becomes a law?**

**A:** It is important to note that we are many steps from a bill becoming law. If a reform proposal is enacted into law, people who have not been sentenced yet should discuss this question with their lawyers. Whether a person receives the benefit of the new law, if passed, depends on many factors.

People subject to a mandatory minimum sentence for a crack offense should be aware that under federal law, crimes are punished according to the sentencing law that was in effect at the time the crime was committed. The exception is when Congress clearly states that a new law is retroactive.

On the other hand, the guidelines in effect on the date of sentencing apply, unless they are made retroactive by the Sentencing Commission, or unless the guidelines in effect on the date of the crime are more favorable than those in effect on the date of sentencing. It is likely that the Commission will reduce guideline ranges to match the new mandatory minimums, but it is less likely that it will make the changes retroactive if Congress does not make the new mandatory minimums retroactive. People who are eligible for a 5K1.1 motion, for providing the government substantial assistance, or safety valve relief may benefit from a lower guideline range. That is because both people who receive a substantial assistance departure or are safety valve eligible are sentenced according to the guidelines, not the mandatory minimum.

**EXAMPLE 1:** Joe sold 5 grams of crack in February, and is indicted that same month. A few months later, S. 1789 passes both houses of Congress and is signed into law by President Obama. The new law – which Congress does not make retroactive – goes into effect on the day it is signed into law, making 28 grams of crack punishable by a 5-year



mandatory minimum. A month later, Joe is convicted and sentenced. Because Joe was convicted of a crack offense committed before the bill became law and Congress did not make that law retroactive, Joe will be sentenced under the law that was in effect in February on the day he committed his crime. In February, the law that was in effect required a 5-year mandatory minimum sentence for selling at least 5 grams of crack. This is the sentence Joe will receive. Joe does not benefit from the new law.

EXAMPLE 2: Joe sold 48 grams of crack in February and is indicted that same month. A few months later, S. 1789 passes both houses of Congress and is signed into law by President Obama. The new law – which Congress does not make retroactive – goes into effect on that day, making 28 grams of crack punishable by a 5-year mandatory minimum. Ninety days later, the Commission reduces the guideline ranges for quantities of crack, but does not make the favorable changes retroactive. A month later, Joe is convicted and sentenced. The government moves for a 5K1.1 departure from the mandatory minimum. Because Joe is no longer subject to the mandatory minimum, the guideline range in effect on the day of sentencing applies if it is more favorable to Joe than the guidelines in effect in February when he committed the crime.

**Q-10: If passed, will the crack reform bill benefit career offenders?**

**A:** No. The bill, if passed, will *not* change the career offender guideline, U.S.S.G. § 4B1.1 – not even for those career offenders whose crimes involved crack cocaine. The career offender guideline has its own special rules and will not be impacted by any changes Congress makes to crack mandatory minimum laws. Sentences under the career offender guideline are based on the statutory maximum punishment for a drug offense. The new bills would not change these statutory maximums – they would only change the statutory mandatory minimums for crack offenses. In other words, because the crack reform bills do not change the statutory maximums, they will not produce any changes to the career offender guideline.

**Q-11: Can Congress pass a bill that makes the crack-powder reforms retroactive?**

**A:** Yes. Making a sentencing reform retroactive is controversial and extremely rare, but not impossible. If the bill passes, we will urge Congress to make its changes retroactive.

**Q-12: If either H.R. 3245 or S. 1789 becomes a law, can the U.S. Sentencing Commission make the new law retroactive?**

**A:** No. The Commission can only make changes to the U.S. Sentencing Guidelines retroactive. The crack bills change mandatory minimum laws, *not* guidelines. Only Congress can make changes to mandatory minimums retroactive.

**Q-13: If either H.R. 3245 or S. 1789 becomes a law, can President Obama or Attorney General Holder make the new law retroactive?**

**A:** No. Only Congress can make changes to mandatory minimum laws retroactive.



**Q-14: What’s the difference between mandatory minimums and sentencing guidelines?**

**A:** Sentencing laws are created by Congress. For every crime, Congress creates a law that includes a maximum sentence for the crime. Sometimes, Congress also creates a minimum punishment for that crime. These minimum sentences are called “mandatory minimums.” Both S. 1789 and H.R. 3245, if passed into law, would change the amount of crack it takes to trigger the current 5 and 10-year mandatory minimums for crack crimes (see 21 U.S.C. § 841(b)). Only Congress can change these sentencing laws, and only Congress can decide if those changes to the laws are retroactive.

The sentencing guidelines are not mandatory minimums. Guidelines cannot change or get rid of mandatory minimums. The U.S. Sentencing Commission writes and passes guidelines. The U.S. Congress writes and passes mandatory minimums.

**Q-15: Do the crack reform bills allow the Sentencing Commission to amend the crack guidelines?**

**A:** Yes. Both bills give the Commission “emergency authority” to change the crack guidelines within 90 days of the date the bill becomes a law. If a crack bill becomes law, it is likely that the Commission will amend the crack sentencing guidelines within three months of the day the bill became law. Amending the guidelines will allow the Commission to ensure that the new crack-powder ratio is reflected throughout the Drug Quantity Tables (U.S.S.G. § 2D1.1), which determine how long crack sentences are (with the exception of mandatory minimums, which the Commission cannot change).

FAMM does not know when or how quickly the Commission will amend the crack guidelines if a crack reform bill becomes law. If a bill becomes law, FAMM will ask the Commission to amend the crack guidelines quickly and accordingly. We will keep our members updated on the Commission’s decisions at [www.famm.org](http://www.famm.org).

**Q-16: If the Sentencing Commission amends the crack guidelines after a crack reform bill becomes law, will those guideline changes be made retroactive?**

**A:** If a crack sentencing reform bill is passed into law, and the Sentencing Commission amends the guidelines so that crack guideline sentences are shorter, the Commission could vote to make those guideline changes retroactive. The Commission can vote at any time to make a change to the guidelines retroactive. However, FAMM does not know if or when the Commission would do this. If or when that time comes, we will ask the Commission to make its guideline changes retroactive. The Commission cannot make changes to mandatory minimum laws retroactive. Only Congress can change mandatory minimum laws and make those changes retroactive.

**Q-17: Should people serving a federal prison sentence for a crack offense begin looking for or hiring attorneys to help them get a sentence reduction?**

**A:** First, neither of the crack reform bills is a law yet – and no one can say with any certainty that either of these bills will *ever* become a law. Second, neither of the crack reform bills is retroactive – and it is unlikely that either bill, if passed, will be made retroactive. People should be extremely cautious about paying or hiring anyone who promises that a crack bill will become



law, that a bill will be made retroactive, or that a new law will benefit people who are already in prison. *If* a reform bill passes, and *if* it is made retroactive, FAMM will update its members on how the courts, prosecutors, and defense attorneys plan to handle sentence reduction motions.

**Q-18: Can FAMM tell me how the bills, if they become law, will affect people awaiting sentencing?**

**A:** No. **FAMM does not give legal advice**, and we do not know all the details of each person's case. If one of the crack reform bills becomes a law, people awaiting sentencing should talk to their lawyers about the possibility of relief.

**Q-19: Will passing S. 1789 save the federal government money?**

**A:** Yes. The Congressional Budget Office (CBO) released a report that estimates that, if passed, S. 1789 would lead to reduced spending for the federal prison system totaling \$42 million between 2011 and 2015. A copy of the CBO report is available online at <http://www.cbo.gov/ftpdocs/114xx/doc11413/s1789.pdf>.

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