



CRACK COCAINE SENTENCING REFORM: A MODEST STEP IN THE RIGHT DIRECTION

What is Amendment 9, “Crack Minus Two”?

The crack minus two amendment to the federal sentencing guidelines reduces the guideline level for crack cocaine penalties. Guideline levels for all quantities of crack cocaine have been lowered by two guideline levels. For instance, the guideline level triggered by a conviction of five grams of crack cocaine was Level 26 (63-78 months). The amendment adjusts the level downward by two so that five grams now corresponds to Level 24 (51-63 months). The change incorporates the mandatory minimum sentence of five years (60 months) for five grams of crack cocaine. The same is true of the guideline corresponding to a conviction for 50 grams, which was previously Level 32 (121-151 months) and now is Level 30 (97-121 months), which incorporates the statutory mandatory minimum penalty of 10 years (120 months) for 50 grams of crack.

The Amendment does not change statutory mandatory minimums set by Congress; only Congress can do that.

Why did the U.S. Sentencing Commission decide to reduce the guideline range?

The Commission promulgated the amendment to the crack guideline because the 100-to-1 drug quantity ratio between crack cocaine and powder cocaine has created problems that “are so urgent and compelling” that an interim measure was deemed necessary. The Commission expressed its hope that Congress would act to address the disparity comprehensively.

Under federal law, offenses involving five grams of crack cocaine, the equivalent of slightly more than a teaspoon of sugar, results in a mandatory five-year prison sentence. A person abusing powder cocaine, another form of the same drug, however, must handle 100 times that amount (500 grams, more than two cups) before being sentenced to serve the same amount of time.

The Commission has repeatedly criticized the 100-to-1 ratio since 1995 because of the gravity of the problems caused by the harshness of the crack cocaine sentencing structure.¹²³ In its latest crack report, the Commission found that the penalties for crack cocaine

- overstate the harm of crack compared to powder cocaine;
- are too broad and apply mostly to low-level offenders;
- primarily affect African American defendants; and
- overstate the seriousness of most crack offenses and fail to provide adequate proportionality.⁴

¹ United States Sentencing Commission, Report to Congress, Cocaine and Federal Sentencing Policy 1995, 1997, 2002, 2007

² United States Sentencing Commission, Report to Congress, Cocaine and Federal Sentencing Policy, 196 (Feb. 1995).

³ United States Sentencing Commission. Amendments to the Sentencing Guidelines, 66 (May 11, 2007), available at <http://www.ussc.gov/2007guid/may2007rf.pdf>.

⁴ United States Sentencing Commission, Report to Congress, Cocaine and Federal Sentencing Policy, 8, (May 2007).

The conclusions that the Commission reached were based on lessons drawn from the prison terms imposed on tens of thousands of people sentenced for crack cocaine offenses since the inception of the sentencing guidelines.

Why did FAMM urge the Commission to make to make the crack minus two guideline retroactive?

It would be a cruel injustice to base the crack cocaine reduction on an assessment that these people have suffered under an unjust structure and then deny the benefit of the amendment to the very people whose experiences led the Commission to lower the sentences in the first place. The purposes of this amendment are noble and are as equally valid for those individuals currently serving time as they are for those sentenced after November 1, 2007.

Who is released?

According to the Commission's analysis, making the crack guideline amendment retroactive could affect 19,500 prisoners over the course of 30 years. The average reduction in sentence would be 27 months. The crack cocaine amendment will **not** apply to those convicted under the career offender or armed career criminal act. It will also not affect those sentenced at mandatory minimum sentences of five and ten years or people serving life in prison.

Won't communities be flooded with criminals and crack dealers?

No. In the first year, only an estimated 2,520 additional individuals would be eligible for release from prison than otherwise would have been released if the guideline were not made retroactive. The remainder of those who are eligible for reduced sentences would be released gradually over a period of more than three decades.

Retroactivity is not automatic. No prisoner will be eligible for release without judicial approval. Retroactivity gives judges the discretion to determine whether to reduce the sentence of any given eligible prisoner. Federal judges must consider a variety of factors, including public safety, when deciding whether to reduce the sentence. Judges will hear from defendants and must also consider the views of the U.S. Attorney. If the U.S. Attorney believes a prisoner poses a threat to the community if released early, the U.S. Attorney will make that argument to the court. The court can balance those competing positions and then determine whether individuals may pose a threat if released into a community earlier than their original release date. Of course, most prisoners will be released at some point, regardless of whether the amendment was retroactive.

Geographic distribution and staggered release dates reduce the impact of early release on communities. Only three districts account for three percent or more of the total number of people eligible for release (Eastern District of Virginia, 7.2 percent; Middle District of Florida, 4.0 percent; and District of South Carolina, 3.9 percent).

The following table shows the projected release dates for eligible prisoners by year and compares them to the estimated release dates for these same prisoners if the crack cocaine amendment were not made retroactive. The most significant impact of the amendment is seen in the first year after the amendment becomes effective.

Projected Year of Release for Retroactive Eligible Crack Cocaine Offenders⁵

Release	# if change is <u>is</u> retroactive	# if change is <u>not</u> retroactive	Difference
Within 1 year	3,804	1,284	2,520
Within 2 years	2,118	1,995	123
Within 3 years	1,967	1,894	73
Within 4 years	1,773	1,833	-60
Within 5 years	1,353	1,577	-224
Within 6 years	5,661	8,093	-2,432

Won't all the newly released prisoners just reoffend?

Believe it or not, drug offenders can be rehabilitated. Also, many who will benefit from retroactivity will still serve lengthy sentences – ten to 30 years – and will have aged out of the crime prone years by the time they are released.

The Justice Department, however, argues that 23 percent of eligible crack offenders are in criminal history category III (three priors) and 35 to 55 percent of them risk recidivism. The rates of recidivism cited by the Department represent the *average* rates for *all* kinds of offenders, not just drug offenders. The real rate of recidivism is likely to be lower. For Criminal History Categories II and higher, drug offenders actually have the *lowest or second lowest* rate of recidivism of all offenders, ranging from 16.7 percent (Criminal History Category II) to 48.1 percent (Criminal History Category V).⁶ More important is that across all criminal history categories and for all offenders, the largest proportion of “recidivating events” that count toward these rates of recidivism are supervised release revocations, which can include revocations based on anything from failing to file a monthly report to failing to file a change of address.⁷ In fact, drug trafficking accounts for only a small fraction – as little as 4.1 percent – of recidivating events for all offenders.⁸

This may be an overestimation of additional crime, because judges are not required to release people early if they believe they pose a public safety threat. Once released, former inmates will be closely supervised during the reentry period.

Won't this divert valuable resources we need to fight crime?

Reducing sentences by an average of 27 months would have an initial social cost savings of 1 billion to 1.7 billion dollars, including housing and caring for inmates, capitol construction costs and staff.⁹ It will cost the Court time and money to process changes to sentences and frontload cost for monitoring of newly released inmates. These costs are far outweighed by the social cost savings.

⁵ [Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive](#) 2007

⁶ United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, Ex. 2 (May 2004) at 13 & Ex. 11.

⁷ *Id.* at 4,5 & Exs. 2, 3, 13.

⁸ *Id.* at Ex. 13.

⁹ Anne Morrison Piehl, Department of Economics & Program in Criminal Justice, Rutgers, The State University of New Jersey, Testimony to Commission, November 13, 2007.