



FREQUENTLY ASKED QUESTIONS ABOUT CRACK AMENDMENT RETROACTIVITY

Q: What is the crack amendment?

A: On May 1, 2007, the U.S. Sentencing Commission proposed an amendment to the U.S. Sentencing Guidelines to reduce the sentencing ranges for crack cocaine offenses by two levels. The amendment went into effect on November 1, 2007, and will affect 70 percent of crack cocaine cases sentenced in federal courts, reducing sentences by an average of 15 months.

Q: What does “retroactivity” mean?

A: Amendments to the Sentencing Guidelines that reduce sentences apply only to those sentenced after the date the amendment goes into effect. When the Commission makes an amendment “retroactive,” it permits people sentenced before the amendment date to ask the court to recalculate their sentence using the new, lower sentence range. To make the amendment apply to people sentenced *before* November 1, 2007, the Commission was required to vote to make the amendment “retroactive” and add it to the list of amendments in § 1B1.10(c) of the guidelines.

Q: Has the Commission made the amendment retroactive?

A: Yes. On December 11, the Commission publicly voted *unanimously* to make the crack amendment apply to prisoners sentenced before November 1, 2007, for crack offenses. The effective date of retroactivity was March 3, 2008. The effective date was set for this date so that courts and probation officers would have time to prepare to process cases.

Q: What is the impact on sentences now that the crack amendment is retroactive?

A: Sentences could be reduced by *an average of 27* months for approximately 19,500 federal prisoners sentenced before November 1, 2007. Individual sentence reductions, however, will vary a great deal and can be shorter or longer than 27 months, depending on the original crack sentence and how much the court decides to reduce any given prisoner’s sentence. Over 1,500 of those prisoners could be eligible for immediate release from prison if they are given the full benefit of the crack amendment.

Q: Why did the Commission make the crack amendment retroactive?

A: The Commission has long stated that the current crack guidelines overstate the seriousness of crack offenses, are too broad, apply mostly to low-level offenders, and disproportionately affect blacks. The Commission said these concerns were “so urgent and compelling” that reform was necessary. Those concerns are equally valid for people currently in prison and for those not yet in prison. Applying the crack amendment to those sentenced before November 1, 2007, was the right thing to do and will increase respect for the guidelines and fairness in the system.

Q: Will the crack amendment reduce sentences for people in state prison or convicted in a state court?

A: No. The crack amendment only applies to people in federal prison or convicted in a federal court.



Q: Will the crack amendment automatically apply to all crack offenders sentenced before November 1, 2007?

A: No. Only the sentencing court can decide whether the amendment applies to the prisoner and whether the prisoner gets a sentence reduction. To obtain a sentence reduction, the prisoner must make a motion under 18 U.S.C. § 3582(c)(2) to the court that sentenced him/her. This 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).

IMPORTANT NOTE: There is **no guarantee** that any given prisoner will receive a sentence reduction, even if they are eligible for one. Whether to reduce a crack sentence is entirely up to the court that sentenced the individual.

Q: How can prisoners get legal help?

A: To find out whether a prisoner's case fits the criteria and to get assistance with a sentence reduction motion, the prisoner should contact the trial or appellate attorney who represented the prisoner. If the attorney is not able to help, the prisoner should call or write the Federal Public Defender's office in the district in which the prisoner was convicted and explain that the prisoner is unrepresented and wants to seek a sentence reduction motion. Every district is handling the motions differently. In some districts, courts are appointing the Federal Defender to represent people seeking sentence reductions, with or without a request from the prisoner that the court do so. In other districts, prisoners must file a motion for appointment of counsel with the court, which then decides whether to appoint the Federal Defender to represent the prisoner. In some districts, the Federal Defenders are not being appointed to represent anyone, so prisoners must represent themselves. We cannot guarantee that the Federal Defender in any given district will be able to provide help, but all the offices are aware that the guideline was made retroactive, and many are prepared to help. Prisoners can find the Federal Public Defender in the district in which they were convicted by going to http://www.fd.org/pdf_lib/defenderdir.pdf. Even if the Federal Public Defender cannot help, the prisoner should write to the court that sentenced the prisoner to ask that an attorney be appointed to help request a sentence reduction. You can locate courts by going to this link: <http://www.uscourts.gov/courtlinks/>. A memo prepared by the federal public defenders also discusses arguments that can be raised, the right to an attorney, and other important issues. You can get a copy of the memo at: http://www.fd.org/odstb_CrackCocaine.htm.

Q: Does the crack amendment change the mandatory minimum sentences for crack crimes?

A: No. The mandatory minimum sentence for a crime involving at least five grams of crack will remain five years. The mandatory minimum sentence for a crime involving at least 50 grams of crack will remain 10 years. Only Congress can change these mandatory minimums.

Q: Does the crack amendment do anything to reduce sentences for meth offenders?

A: No, unless the crime involved meth *and* crack, and the sentence was calculated for meth *and* crack. (See next question)



Q: Does the crack amendment do anything to reduce sentences for offenders convicted of possessing or selling more than one type of drug?

A: Yes, as long as at least one of the drugs involved was crack. Cases that involved crack and some other drug (e.g., meth, heroin, powder cocaine) are called “poly-drug cases.” When the Sentencing Commission first passed the crack amendment, they created a new drug equivalency chart for courts to use to recalculate sentences for poly-drug cases. Unfortunately, this chart created an unintended problem: in rare cases, the use of the chart did not always result in the 2-level reduction the Commission had intended. After the problem was identified, the Commission issued a technical amendment that got rid of the new drug equivalency chart the Commission had created. Starting May 1, 2008, all sentences for poly-drug cases involving crack will be calculated using the old drug equivalency charts and the new rules set by the Commission’s technical amendment. These changes are retroactive and apply to all poly-drug offenders whose cases involved crack and who were sentenced before November 1, 2007.

Q: How will the court decide whether a poly-drug offender gets the 2-level reduction?

A: To determine if a poly-drug offender is eligible for a sentence reduction under the crack amendment, first the court calculates what the offense level would be for crack and all the other drugs and reduces that offense level by two levels. Second, the court calculates what the offense level would be just for the other drugs, leaving out the crack. If the offense level for all of the drugs, minus the two levels, is higher than the offense level for just the other drugs, leaving out the crack, the offender is eligible for the 2-level sentence reduction.

EXAMPLE: A poly-drug offender was held accountable for 10 kg of powder and .5 kg of crack. Before the amendment, this amount of drugs resulted in an offense level of 38, using the old drug equivalency charts. To decide whether the offender gets the benefit of the crack amendment, the court goes through a two-step process. First, using the old drug equivalency charts, the court figures out the offense level for the 10 kg of powder and the .5 kg of crack (it is 38) and subtracts two levels—this results in an offense level of 36. Second, the court figures out the offense level for only the powder, leaving out the crack—this results in an offense level of 32. Because the offense level for the crack and the powder, minus two levels (36), is higher than the offense level for just the powder (32), the offender is eligible to get the 2-level sentence reduction. A new offense level of 36 (instead of the old offense level of 38) can be used to recalculate the sentence, resulting in a sentence reduction.

As in all crack retroactivity cases, poly-drug offenders must still bring a § 3582(c) motion to get a sentence reduction, and it is still up to the judge to decide whether to grant all, part, or none of the reduction.



Q: How many poly-drug offenders could benefit from the crack amendment?

A: For those who will be sentenced *after* November 1, 2007, approximately 850 crack poly-drug offenders per year should receive sentences that are lower by an average of 21 months. For those sentenced *before* November 1, 2007, approximately 842 offenders will be eligible for an average sentence reduction of 10 months.

Q: Who will not get the benefit of the retroactive crack amendment?

A: Those with base offense levels of less than 12 or greater than 43 and those whose offense involved more than 4.5 kilograms of crack cocaine will not be able to receive a sentence reduction. The crack amendment does not apply to state prisoners. If you are a federal crack offender, **the best course is to consult with your lawyer about whether you might benefit from the amendment.**

Q: Are those sentenced as armed career criminals or career offenders, or those who received only a 5 or 10-year mandatory minimum sentence for a crack offense eligible for a sentence reduction?

A: Some prisoners serving sentences for crack may face obstacles when seeking sentence reductions based on the retroactive crack guideline. They include:

- * Prisoners sentenced for crack and as career offenders
- * Prisoners sentenced for crack and as armed career criminals
- * Prisoners sentenced to a mandatory minimum for crack

Because there are legal arguments that may assist some of these prisoners, it is very important that **all prisoners serving sentences for crack consult with an attorney.** Remember, however, that **only people whose sentences include a sentence for a crack offense are eligible** for relief under the retroactive crack amendment. If a prisoner did not receive a sentence based at least in part on crack (for example, they are an ACCA offender whose current offense did not involve any drugs at all), they are not eligible for a reduction under the retroactive crack amendment.

Q: Does FAMM have a form or sample § 3582(c) 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: How are prosecutors responding to motions for sentence reductions based on the new amendment?

A: The prosecutors in each district are handling sentence reduction motions differently. Some United States Attorney's offices are opposing only motions in which people are seeking more than the 2-level reduction (i.e., people seeking a full resentencing under *Booker*). Some prosecutors are opposing motions from anyone they feel will be dangerous to the community if released early. Some prosecutors are working closely with defenders and the courts to make sure those eligible for immediate release are getting out on time. In other districts, the process is not working as quickly, and some who are eligible for immediate release have not had their motions



heard or been released yet. Prisoners and their loved ones should speak with the Federal Defenders in their districts to get more detailed information about how the prosecutors and courts in their districts are responding to the motions being filed.

Q: In districts where the courts are not ruling on sentence reduction motions quickly, what can prisoners and their family members do to make the process move faster?

A: First, prisoners and their family members should be patient. Many courts have received dozens or even hundreds of motions for sentence reductions. Some courts were not prepared for the large number of motions they have received and are doing their best to handle the motions efficiently. Some courts are trying to rule on the motions of those who could be eligible for immediate release before they rule on the motions of those who still have several years left to serve. Prisoners and their families should continue to work closely with their attorneys or the Federal Defenders to find ways to move their motions through the system promptly.

Q: Should family members write letters to the judge and prosecutor asking them to grant a sentence reduction to a loved one in prison?

A: *Before* writing any letters to a judge or prosecutor involved in your loved one's case, talk with your loved one's attorney. Every judge and prosecutor is different. Some may look favorably on letters from supporters, but others may not. Your loved one's lawyer can (1) review the letters and make sure that they include information that will help and not hurt your loved one's chances of getting a reduction, and (2) make sure the letters are given to the right people, in the right way, at the right time.

Q: Can someone at FAMM calculate what my (or my loved one's) new sentence will be if the court agrees to reduce the sentence?

A: No. We do not know all the details of each prisoner's case or all the factors used to calculate a sentence and we do not know what the judge will decide to do. Prisoners and their family members should contact an attorney for help calculating a possible reduction.

Q: Will FAMM keep us informed?

A: Yes. Keep checking on FAMM's website (www.famm.org) for full updates on how the amendment is being applied retroactively.