



# U.S. Sentencing Commission's Decision on Retroactivity of the Crack Cocaine Amendment

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## Summary

In May 2007, the U.S. Sentencing Commission submitted to Congress several amendments to the Federal Sentencing Guidelines, one of which had the effect of lowering the recommended penalties for crack cocaine offenses committed by criminal defendants sentenced after November 1, 2007. One of the stated purposes of this “crack cocaine amendment” was to alleviate some of the problems associated with the “100-to-1” drug quantity ratio in the federal drug trafficking laws that made crack cocaine defendants subject to the same sentence as those defendants trafficking in 100 times more powder cocaine, even though the two substances are chemically similar and have the same physiological and psychotropic effects. Prior to this amendment, the Guidelines called for prison terms for crack cocaine offenses that were three to six times longer than those for offenses involving equivalent amounts of powder cocaine. The crack cocaine amendment, which became effective on November 1, 2007, reduces this crack/powder penalty disparity by recommending sentences that are, on average, between two and five times longer than sentences for equal amounts of powder cocaine.

On December 11, 2007, the Sentencing Commission unanimously voted to apply the crack amendment retroactively, thus allowing eligible crack cocaine offenders who were sentenced prior to November 1, 2007, to petition a federal judge to reduce their sentences. However, the Commission chose to delay the effective date of its decision on retroactivity until March 3, 2008, in order to allow courts time to prepare for these motions. Shortened sentences for eligible, previously sentenced crack offenders are not automatic or guaranteed as a result of this retroactivity decision; rather, federal judges must determine whether an offender is eligible for a reduced sentence and the length of that reduction, after considering among other things the potential danger posed to public safety by an earlier release of the offender.

Legislation introduced in the 110<sup>th</sup> Congress, H.R. 4842, would provide for only prospective effect of the crack cocaine amendment.

In its 2007 amendments to the Federal Sentencing Guidelines, the U.S. Sentencing Commission (“the Commission”)<sup>1</sup> adopted changes that reduced the recommended range of imprisonment terms for federal crack cocaine offenses.<sup>2</sup> The crack cocaine amendment went into effect on November 1, 2007, in the absence of an affirmative disapproval by an act of Congress.<sup>3</sup> The amendment provided for a two-level downward adjustment to the base offense level associated with each quantity of crack for crack-related offenses<sup>4</sup> committed by defendants sentenced after November 1, 2007.<sup>5</sup> In July 2007, the Commission proposed that the amendment be made retroactively applicable to previously sentenced crack cocaine offenders.<sup>6</sup> After receiving public comment on the issue of retroactivity<sup>7</sup> and holding public hearings to consider the issue,<sup>8</sup> the Commission voted 7-to-0 in favor of retroactivity on December 11, 2007. While the Commission found “that the statutory purposes of sentencing are best served by retroactive application of the amendment,” it emphasized that not all previously sentenced crack cocaine offenders will automatically receive a reduction in sentence—rather, federal sentencing judges will have the final authority to make that determination based on the merits of each case, after considering a variety of factors, including whether public safety would be endangered by early release of the prisoner.<sup>9</sup> To allow courts time to prepare for the motions that may be filed for such sentence reductions, the Commission elected to delay the effective date of its decision on retroactivity until March 3, 2008.<sup>10</sup>

Prior to being amended, the Federal Sentencing Guidelines had employed a 100:1 ratio that treated 100 grams of powder cocaine the same as one gram of crack cocaine;<sup>11</sup> in other words, 100 times more powder cocaine than crack cocaine was needed to trigger the same punishment

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<sup>1</sup> The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission, an independent body within the judicial branch of the federal government, and charged it with promulgating guidelines for federal sentencing. In *United States v. Booker*, the U.S. Supreme Court declared that the Sixth Amendment right to a trial by jury requires federal courts to regard the then-mandatory Federal Sentencing Guidelines as “effectively advisory” when determining an appropriate sentence for offenders. 543 U.S. 220, 245 (2005). For more information on the Federal Sentencing Guidelines, see CRS Report RL32766, *Federal Sentencing Guidelines: Background, Legal Analysis, and Policy Options*, by Lisa M. Seghetti and (name redacted).

<sup>2</sup> 72 Fed. Reg. 28,558 (May 21, 2007).

<sup>3</sup> 28 U.S.C. § 994(p).

<sup>4</sup> The Federal Sentencing Guidelines employ a drug quantity table based on drug type and weight, that assigns base offense levels for various drug trafficking offenses. These offense levels correspond with sentencing ranges (listed in months), based on the offender’s criminal history.

<sup>5</sup> For example, a first-time offender possessing between 5 and 20 grams of crack cocaine now faces imprisonment terms of 60 to 63 months, down from the previous sentencing range of 63 months to 78 months.

<sup>6</sup> 72 Fed. Reg. 41,794 (July 31, 2007).

<sup>7</sup> Opinions were received from a variety of parties, including the judiciary, the executive branch, interested organizations, members of the defense bar, and individual citizens. These public comment letters are available at [http://www.ussc.gov/pubcom\\_Retro/PC200711.htm](http://www.ussc.gov/pubcom_Retro/PC200711.htm).

<sup>8</sup> See transcript of the public hearing, held by the Commission on November 13, 2007, available at [http://www.ussc.gov/hearings/11\\_13\\_07/Transcript111307.pdf](http://www.ussc.gov/hearings/11_13_07/Transcript111307.pdf).

<sup>9</sup> U.S. Sentencing Commission, *News Release: U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses*, Dec. 11, 2007, available at <http://www.ussc.gov/PRESS/rel121107.htm>.

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Sentencing Guidelines § 2D1.1(c)(1)(November 1, 2006). For a detailed explanation of the 100:1 crack cocaine/powder cocaine penalty disparity issue and related Supreme Court case law, see CRS Report RL33318, *Sentencing Levels for Crack and Powder Cocaine: Kimbrough v. United States and the Impact of United States v. Booker*, by (name redacted) and (name redacted).

for a particular drug offense.<sup>12</sup> Yet over a series of reports issued since 1995, the Commission has announced its determination that the crack/powder sentencing disparity is unwarranted and fails to meet the sentencing objectives set forth by Congress. The Commission concluded that the 100:1 ratio was the product of incorrect assumptions about the relative harmfulness of the two forms of the drug and overstates the seriousness of most crack cocaine offenses.<sup>13</sup> The Commission observed that because 85% of defendants convicted of crack offenses are black, the sentencing guidelines' more severe prison terms for crack versus powder fuels a "widely-held perception" that they "promote[] unwarranted disparity based on race."<sup>14</sup> Finally, the Commission pointed out that the disparity results in an anomalous outcome: "retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced."<sup>15</sup>

To address these concerns, the Commission's 2007 crack cocaine amendment eliminates the 100:1 ratio in the Federal Sentencing Guidelines; the revised ratio now varies at different offense levels, ranging between 25:1 and 80:1. Note, however, that the amendment does not alter the statutory 100:1 ratio found in 21 U.S.C. § 841(b)(1), which provides mandatory minimum sentences<sup>16</sup> of five years for drug offenses involving 100 grams of powder cocaine or 5 grams of crack cocaine, and 10-year minimum sentences for defendants accountable for 50 grams of crack or 5,000 grams of powder. A reduction of the statutory 100:1 ratio would require legislative action by Congress.<sup>17</sup>

## **Potential Impact of the Retroactivity Decision**

The Commission had conducted a data analysis of the estimated impact of retroactive application of the crack cocaine amendment on federal prisoners; these findings were released on October 3, 2007.<sup>18</sup> According to the study, approximately 19,500 prisoners sentenced between October 1, 1991 and June 30, 2007 would be eligible to seek a reduced sentence.<sup>19</sup> The average sentence reduction for eligible offenders would be 27 months, or about a 17 % sentence reduction.<sup>20</sup> These offenders would be eligible for release at various times over a period of more than 30 years; 3,804 offenders would be eligible within one year after March 3, 2008.<sup>21</sup>

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<sup>12</sup> For example, an offense involving 150 KG or more of powder cocaine was punished the same (assigned the same base offense level of 38) as 1.5 KG or more of crack cocaine. The crack amendment increases the quantities of crack cocaine at each offense level in order to reduce the 100:1 ratio disparity.

<sup>13</sup> UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v-vi (May 2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf).

<sup>14</sup> *Id.* at 103.

<sup>15</sup> UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 174 (May 2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).

<sup>16</sup> For more information on mandatory minimums, see CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*, by (name redacted).

<sup>17</sup> Bills introduced in the 110<sup>th</sup> Congress that address the statutory 100:1 ratio include H.R. 79, H.R. 460, H.R. 4545, H.R. 5035, S. 1383, S. 1685, and S. 1711.

<sup>18</sup> U.S. Sentencing Commission, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, Oct. 3, 2007, available at [http://www.ussc.gov/general/Impact\\_Analysis\\_20071003\\_3b.pdf](http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf).

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 23.

<sup>21</sup> *Id.* at 24-25.

## **Legal Authority for the Commission to Make the Amendment Retroactive**

As required by 28 U.S.C. § 994(o), the Commission must periodically review and revise the Federal Sentencing Guidelines. Pursuant to 28 U.S.C. § 994(u), the Commission is statutorily authorized to designate a Guideline amendment for retroactive application. This section of the U.S. Code provides, “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

18 U.S.C. § 3582(c)(2) prohibits sentencing courts from modifying a term of imprisonment once it has been imposed, unless such a reduction is consistent with policy statements issued by the Sentencing Commission.<sup>22</sup> Section 1B1.10 of the U.S. Sentencing Commission’s Guidelines Manual sets forth the policy statement that helps guide a court considering modifying a previously imposed imprisonment term pursuant to 18 U.S.C. § 3582(c)(2):

Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant’s term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.<sup>23</sup>

Subsection (c) of §1B1.10 lists the amendments that the Commission has decided may be retroactively applied; furthermore, subsection (b) states:

In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced...

It should be noted, however, that an amendment listed in §1B1.10(c) “does not entitle a defendant to a reduced term of imprisonment as a matter of right,” but rather confers discretionary authority upon federal judges to reduce such term.<sup>24</sup> Thus, no offender is automatically eligible for a downward sentence reduction by virtue of a guideline amendment being made retroactive; judicial approval would still be needed. In addition, a judge could not reduce a sentence below a statutory mandatory minimum. Also, defendants who received enhanced sentences under the Armed Career Criminal Act,<sup>25</sup> 18 U.S.C. § 924(e), are ineligible for a sentence reduction.

Factors that the Commission considers when deciding whether to make an amendment retroactive include (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range

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<sup>22</sup> 18 U.S.C. § 3582(c)(2).

<sup>23</sup> U.S. SENTENCING COMMISSION, 2007 FEDERAL SENTENCING GUIDELINE MANUAL, § 1B1.10(a), *available at* <http://www.ussc.gov/2007guid/TABCON07.html>.

<sup>24</sup> *Id.* § 1B1.10, Background.

<sup>25</sup> For more information about this law, see CRS Report RS22610, *Armed Career Criminal Act (ACCA): Using Prior Juvenile Adjudications for Sentence Enhancements*, by (name redacted).

made by the amendment, and (3) the difficulty for a court applying the amendment retroactively to determine an amended guideline range.<sup>26</sup>

A motion under 18 U.S.C. § 3582(c)(2) to reduce a previously imposed sentence may be filed by the defendant, the Director of the Bureau of Prisons, or on the sentencing court's own motion.<sup>27</sup> In considering such a motion, the sentencing court must evaluate several statutory factors, including the following:

- the nature and circumstances of the offense and the history and characteristics of the defendant;
- the need for the sentence imposed: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- the sentencing range established by the Sentencing Commission;
- any pertinent policy statement issued by the Sentencing Commission regarding application of the guidelines;
- the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- the need to provide restitution to any victims of the offense.<sup>28</sup>

### **Previous Amendments Made Retroactive**

The Commission has made previous amendments to the Sentencing Guidelines retroactive on three occasions. In November 1993, the Commission revised the method of calculating the weight of LSD for determining the guidelines offense level;<sup>29</sup> this guideline amendment was made retroactive.<sup>30</sup> In November 1995, the Commission made a similar change to the weight calculation applicable to marijuana plants<sup>31</sup> and elected to make the amendment retroactive.<sup>32</sup> Finally, the Commission in November 2003 modified the manner in which the drug oxycodone is measured for purposes of calculating the guidelines offense level;<sup>33</sup> this amendment was made retroactive as well.<sup>34</sup> The Commission did not provide substantive reasons for making any of these amendments retroactive, and there is a lack of such information in the public record.

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<sup>26</sup> Federal Sentencing Guideline Manual, § 1B1.10, Background.

<sup>27</sup> 18 U.S.C. § 3582(c)(2).

<sup>28</sup> 18 U.S.C. § 3553(a).

<sup>29</sup> *Id.* Appendix C, Vol. I, Amend. 488.

<sup>30</sup> *Id.* Appendix C, Vol. I, Amend. 502.

<sup>31</sup> *Id.* Appendix C, Vol. I, Amend. 516.

<sup>32</sup> *Id.* Appendix C, Vol. I, Amend. 536.

<sup>33</sup> *Id.* Appendix C, Vol. II, Amend. 657.

<sup>34</sup> *Id.* Appendix C, Vol. II, Amend. 662.

## **Public Reaction**

Judges, public defenders, and sentencing-reform activists widely endorsed the decision to make the crack cocaine amendment retroactive.<sup>35</sup> Among other things, supporters of the decision pointed to the fairness of treating a crack offender who is sentenced prior to November 1, 2007, in the same manner as one who committed the same crime but is sentenced after that date.<sup>36</sup> Others argue that, because the other three amendments that were previously made retroactive involved drugs (LSD, marijuana, and oxycodone) that affect comparatively few black defendants, the decision to make the crack cocaine amendment retroactive helps to combat the perception of racism and unfairness in the criminal justice system within minority communities.<sup>37</sup>

U.S. Department of Justice officials have been critical of the Commission's decision, stating that "retroactive application will divert valuable resources from federal courts and prosecutors for resentencing at a time when violent crime is rising in many vulnerable communities around the country."<sup>38</sup> The Attorney General has also expressed concern about the potential effect of early release of prisoners on public safety.<sup>39</sup> While some Members of Congress have praised the retroactivity decision, others have opposed it.

## **Legislation in the 110<sup>th</sup> Congress**

H.R. 4842, introduced by Representative Lamar Smith on December 19, 2007, would provide for only prospective effect of the Sentencing Commission's crack cocaine amendment. Thus, the reduced crack cocaine sentencing guidelines would be applied to cases pending on and after November 1, 2007.

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<sup>35</sup> See Darryl Fears, *For Crack Offenders, Earlier Shot At Release*, WASH. POST., Dec. 12, 2007, A01; Richard Schmitt, *Ruling Could Free 2500 Drug Inmates*, L.A. TIMES, Dec. 12, 2007, A1.

<sup>36</sup> Comm. on Crim. Law, Judicial Conf. of the United States, *Letter to Judge Ricardo Hinojosa Re: Comments on Retroactivity of Crack Cocaine Amendments*, Nov. 2, 2007, at 3.

<sup>37</sup> Families Against Mandatory Minimums, *Letter to Judge Ricardo Hinojosa Re: Crack and Criminal History Guideline Retroactivity*, Nov. 1, 2007, at 4.

<sup>38</sup> Joe Palazzolo, *Courts Prepare for Crack Appeals*, LEGAL TIMES, Dec. 17, 2007.

<sup>39</sup> Richard Schmitt, *Mukasey May Try to Derail Early Releases*, L.A. TIMES, Jan. 26, 2008, A10.



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