

Drugs on the Docket Podcast

Season 1 Episode 1 – Federal drug sentencing and the evolution of the crack-powder ratio with Mark Osler

TRANSCRIPT:

Hannah Miller: On June 17th, 1986, the Boston Celtics picked up university of Maryland forward Len Bias in the first round of the NBA draft. At the time, many said he could be the next Michael Jordan. Sadly, Bias never set foot on the court in Boston. On June 19th, just two days after the draft, he died of cardiac arrest caused by a cocaine powder overdose. Bias' death came at a time when the war on drugs was picking up steam but had not yet gained complete bipartisan support. Media coverage of the overdose got the attention of lawmakers and Bias became the poster child for the antidrug movement. Within months, Congress passed the anti-drug Abuse Act, which some called the Len Bias Law. It imposed mandatory minimum prison terms for a range of drug activities.

In the eighties, crack cocaine was portrayed as particularly menacing, even though there's no pharmacological difference between crack cocaine and powder cocaine. Despite the fact that Bias overdosed on powder cocaine, the Anti-Drug Abuse Act included a crack powder ratio 100 to 1, which would trigger a mandatory five-year prison term if someone was caught with a mere five grams of crack. On the other hand, someone caught with powder cocaine would need to possess 500 grams to trigger the same mandatory sentence. Within a few years of the Anti-Drug Abuse Act going into effect, disparities in federal drug sentences between Black and White Americans widened dramatically. The majority of those prosecuted for crack offenses were Black. And according to the U.S. Sentencing Commission, 87% of those currently serving federal prison time for crack offenses are Black.

Since the passage of the Anti-Drug Abuse Act, many Supreme Court cases have focused on the 100 to 1 crack powder ratio, and proponents of reform have advocated for the ratio to be eliminated altogether. But where do things stand today and what can we expect going forward.

From the Drug Enforcement and Policy Center at the Ohio State University, this is Drugs on the Docket. Each episode will tell the story of how U.S. court decisions impact drug law and policy and continue to shape the war on drugs. I'm your host, Hannah Miller. Today, we're taking a closer look at federal drug sentencing and the evolution of the crack powder ratio. If you like what you hear in today's episode, visit go.osu.edu/drugsonthedocket to follow the series.

Today's co-host is Doug Berman, a professor at the Ohio State University Moritz College of Law and executive director of the Drug Enforcement and Policy Center. Doug, would you do the honor of introducing our guest?

Douglas Berman: Absolutely. Today we are chatting with Mark Osler, a professor of law at the University of Saint Thomas School of Law and the founder of the first law school clinic specializing in federal commutations. I have had the absolute pleasure of knowing and working with Mark for really the better part of two decades. And I've always been deeply inspired by how Mark advocates for sentencing and clemency policies that are rooted in principles of human dignity and just good common sense. Mark's writings on clemency, sentencing, narcotics policy, you name it, have appeared in just about every major paper: The New York Times, The Washington Post, The Atlantic. And he's so prolific. He's got publications in too many prestigious law journals for us to name here. But with that introduction and no further ado, Mark, thanks for joining us.

Mark Osler: Well, it's really my pleasure. And it's an honor to be your guest.

Hannah Miller: Now, I'm not a lawyer and I'm not as well versed in the criminal legal system as you, Mark, or Doug. But I've drawn some parallels between the drug wars and another kind of war I know a good deal about. So in Star Wars, there's a light side and a dark side. And for critics of America's war on drugs, the prosecuting side seems to have this dooming presence like the Death Star. And in this analogy, Mark, you're part of the rebellion going up against the dark forces of the modern drug war. But this wasn't always the case, was it? You were actually a federal prosecutor for many years.

Mark Osler: Yeah, that's true. And it's something that really informs what I do today and have done over the course of the years. I was a federal prosecutor in Detroit. I am from the Detroit area originally and I went back there and worked for a big firm for three and a half years, paid off some loans and as soon as I could got over to the U.S. Attorney's Office and prosecuted in general crimes there for five years. 1995 to 2000 is a pretty interesting time to be a federal prosecutor in Detroit. Among other things, we had a huge number of crack cases coming through that office. But there were other types of things that we did as well in a wide variety of cases. I had a case against Hezbollah. I had a case against, you know, immigrant smugglers. But day after day, what we saw coming in was crack cases.

Hannah Miller: So why the switch?

Mark Osler: You know, I was I was a student of a professor at Yale named Dan Freed. He convinced me of the importance of criminal law and the importance of sentencing. And when I went back to Detroit and he was working at the firm I realized that some of what we did was making a difference for the good and some wasn't. What really changed me more than anything else was the speeches that defense attorneys made. Case after case after case, the judge would turn to me and say, Mr. Osler, what do you want? I'd say it's a mandatory ten-year sentence, Your Honor. And then she turned to the defense attorney who would make this futile speech and go on for 20 or 25 minutes. It was futile because it's mandatory sentencing. The judge did not have the ability to vary from the guidelines, but in the end, it moved me. I eventually was convinced of their arguments that it wasn't making a difference, that it was damaging those communities we were trying to help. That I could drive by where that person was selling crack and there'd be somebody else doing the same thing. And I did that. They were right. And so eventually I was convinced that probably I could do good by trying to change the way that was going down as well. And I think that's such a lesson to those of us that want to have an impact on something. We don't know what our futile speeches do. It's really the reason to give futile speeches is you don't know who's listening. And so I went back to my law school, asked how you became a professor and the lady turned around at her credenza, took out one page, a sheet of paper, and said, you fill this out. And they have a big, you know, interviewing convention. And I went to that and I ended up at Baylor and I taught there for ten years.

Douglas Berman: Correct me Mark if it's wrong to frame it this way, but I think you reflected what a lot of folks of our generation kind of had a vision of in the eighties and nineties. Oh, you want to advance justice, go work for the Department of Justice. That's what, that's the title of the building. And what they're they're supposedly to go do. And yet the fact that Hannah, you know, started the conversation by, you know, parallel the justice system in the in the drug war particularly is, you know, the dark force, you know, I think reflects what I find a lot of my students now think, you know, certainly more progressive folks, you know, sort of describe the work that prosecutors do, especially in the drug war context. Is it kind of in that vein? And I guess there's always sort of a joke of like, you know, how did the stormtroopers get to be stormtroopers? Do they realize they're stormtroopers. You know, I'd like to sort of hear more about kind of what you sort of expected when you started working as a prosecutor, especially in Detroit, in an area that, if not the defining city in the war on drugs, you know, sort of right at the center of the crack epidemic. It's an awful lot of people thought prosecutors were going to be the key to helping address a range of social problems. Now, did you expect to have a lot of drug cases? Did the drug cases feel different?

Mark Osler: Yeah. I mean, I, I think that as someone who identifies himself as a progressive, I believed that government could solve problems and that people of conscience within the government could solve problems. And that was my view was that there was, there was this problem. And part of the problem was, was racist policing and racism within the system that if I was a person of good conscience, I could go in there and solve different kinds of problems, including different types of of criminal problems. But what happened is once I started, I learned that there were some cases where I could solve discrete problems. You know, there was a there was a real rash of airbags being stolen, for example. And so I got that case. I built it up. And instead of taking out all the people who were stealing the airbags, we just took out one fence and the brake in rate to cars in southeastern Michigan went down 75%. Now, that's really making a difference. And I saw that in some of my cases, I did not see it in the drug cases. You know, the more that I learned about the way narcotics trafficking works, the less confident I was that we were doing the right thing. You know, we were sweeping up the wrong people. You know, sometimes I analogize it to trying to shut down the Walmart by arresting the greeter, the cashier. That's not that's not going to work. And it didn't work. But, you know, what was different was that in some of these other areas, as a line prosecutor, I had some discretion to build up a case to develop a target. But in the narcotics cases, you know, a lot of times it was presented as a one off. An agent would come in and say, okay, we got this guy, he was selling. It's on tape. Here's the tape. Boom. And, you know, we've got the crack in the evidence locker. It's time to indict. Let's go over to the grand jury. And there is a

stunning lack of creativity there. There was a real lack of true metrics of measuring whether we were successful or not. You know, the real metric of success is the price on the street, because if we affect the supply, the price will go up. Well, if we'd ever looked at that metric, we would have seen that we were failing miserably.

Douglas Berman: Did you get kind of a sense of what made this a futile enterprise? Is it something built into the law, something built into society or, you know, some maybe a mix thereof?

Mark Osler: Well, one thing that that I became aware of over time was that we were prioritizing exactly the wrong person. That we were going after crack the 100:1 ratio that someone was sentenced the same for one gram of crack, as it were, for 100 grams of powder cocaine. You know, it was something that was catnip for investigators. You know, you could make what was identified as a kingpin case that was very easy to make after crack markets developed, cocaine was brought into the United States in powder form. Now it's distributed throughout the United States in powder form. Then within Detroit it was distributed as powder. And then it was that last person in the chain who would rack it up on a stove at home and then go out on the street. It was the least culpable person that we were targeting. And also I realized that there was a racial component to it, that it was mainly Whites or Hispanics that were at those other levels. But at the at the street level, where they were easy to sweep up, it was Black men. And out of my crack cases, I don't think I had a white defendant. And there were dozens of them.

Douglas Berman: The Supreme Court turned the guidelines from mandatory into advisory. But it sounds like you're saying because Congress back in 86 treated crack. So much more severely under our sentencing laws, that sent a signal, a signal to the agents, a signal to the prosecutors, hey, Congress wants us, even if we're getting the low-level guys, you know, that's the priority because, you know, that's the most dangerous drug, or at least so it was thought, you know, in the eighties. And I guess I wonder against that backdrop, I know the U.S. Sentencing Commission issued a bunch of reports highlighting the racial disparity, highlighting the illogic of the 100 to 1 ratio. And there's a lot of academics, myself included, who hoped Congress would give effect to that. And we'll talk about that in a minute as well. But did that matter to anybody that this expert commission had said, hey, this is this is kind of backwards and this is not the way we ought to be doing it.

Mark Osler: You know, I was a prosecutor in 95, and I don't think I was aware that the Sentencing Commission recommended switching the ratio back to 1 to 1. So, it wasn't what the guidelines commission was saying, it's what the guidelines were that really mattered. And that's because they're so normative. I mean, 100 to 1 sounds like there's a bunch of people in lab coats in some secret lab in D.C. who came up with this. You know, I often say when I'm talking to students that if you if you pick up a fashion magazine, you know, Vogue or something, they'll say 84 great looks for fall. And you know how many great looks for a fall? Well, there's there's 84, according to Vogue. And they're the experts. And that's about as scientific as the 100 to 1 ratio was. But once we have a number like that, we assume it's rational. And I think for for many of us who were in the system, we accepted that rationality and it wasn't part of the culture to question it. And you have to remember that that kind of drug case was typically handled by new AUSA. It's people like me. People who were between 26 and 35, you know, relatively young for a legal career. And when you're someone who's just in that position and suddenly you've got this responsibility, you look for baselines and you're because you don't want to be an outlier. You don't want to be out of step with everyone else. And that's the thing about the guidelines. So the ultimate baseline that it's a system that appears rational on its face is presented as being rational and the law enshrines it as being rational. And so, of course, that's the baseline that you're going to go to. And that's exactly what happened.

Hannah Miller: I want to kind of, I want to come back and talk a little bit more specifically about the Supreme Court cases that led up to your involvement with *Spears vs. United States*. Some of the listeners are likely familiar with Booker and even Kimbrough, but how would you, Mark, summarize these key precedents and their relationships with each other?

Mark Osler: Yeah. I mean, one thing about these cases is, as we often see with the Supreme Court, there's step after step after step. And the first step in all of this was a case called *Apprendi* in 2000 where the Supreme Court said that the Sixth Amendment right to a jury trial meant that you couldn't have a judge find factors that change the statutory maximum in a case. And that was in a hate crimes case in New Jersey. And then they applied that same principle to the Washington sentencing guidelines in the case in 2000 for *Blakely*. And I remember when *Blakely* came down, people like Doug and I were on the phone with each other continually, it seemed like, because we knew that this was going to come around and somehow impact the federal sentencing guidelines. So it was inevitable. And that's what Booker was. Booker was a challenge to the federal sentencing guidelines, which were mandatory at that time, saying

that people were being deprived of the right to a jury because a judge was finding facts, would raise their sentence. There's two ways that you could deal with that. You could have the prosecutors actually prove those factors to a jury. You know, the other potential remedy was that you could make them advisory rather than mandatory. Now, the Supreme Court was deeply split on this and you ended up with separate merits opinion and remedial opinion. And in the remedial opinion, instead of having prosecutors prove up those enhancements elected to make the guidelines advisory. But what that meant was pretty vague. They said that on appeal there was a standard of reasonableness. There was going to be relevance given to the statute 18 U.S.C. 3553 that talks about traditional sentencing factors and, you know, things like rehabilitation and retribution and deterrence. But the guidelines are still going to remain as a baseline and the judges still have to calculate them before analyzing all these other factors. At that point, the sense was that the guidelines were going to be sticky, but not a lot.

Douglas Berman: You know what we mean by sticky, I think, is that we'll still follow the guidelines most of the time, but will have discretion in those outlier cases a little bit more to go below or above those guidelines. We'd had judges for many, many years saying these guidelines are too rigid. We don't get enough opportunity to do individualized decision making outside the guidelines to sentence this individual I have before me without the kind of the rigid rules and usually the very severe sentences the guidelines recommend. But then when they were sort of freed from those shackles and that was actually some language used by some judges, we've been freed from the shackles of mandatory guidelines. There were some that were very eager to use that new discretion, but there were lots who were like, let's be really cautious and careful because, you know, what if we trigger Congress or somebody else to react and put those shackles back on, you know, by adopting a different approach to the system? And so that's where I think for every set of guidelines, how sticky they needed to be treated, how much respect they needed to be given, became a real point of contention among litigants and judges. And again, here's where we started to see real diversity among the judges.

Mark Osler: Yeah. I mean, I guess when I say sticky, what I mean, just think about, you know, something stuck to your desk. It takes effort to move it. It just means that it takes effort to move off of that place where it stuck and where it stuck is going to be the guidelines, at least in the eyes of some judges, not all of them. There's this duality, and I love the Star Wars reference because there it's all about balance in Star Wars and in here it's about balance, too, because you've got these two opposing values. One is uniformity that all the judges are going to do the same thing, and the other is the discretion of judges. After all, we picked these people to have this great position because they are wise and they are able to, you know, evaluate things in individual circumstances. You can think about this as individual consideration versus uniformity, too, but individual consideration is embedded within the discretion of that judge. There's this fear that, well, once we've rolled over towards discretion after Booker, then it's going to go back and go back towards uniformity, once Congress reacts to that. We've been through a couple of rounds of that already before Booker. We did see disparities increase after Booker, which was to be expected. And they increased over time. You know, when I was practicing, you'd have a Carter nominee right next to a Reagan nominee. And they had very different takes on the same kind of case. And so that's going to create these disparate outcomes if you allow that discretion.

Douglas Berman: And I'll jump in to say it's worth noting for the record, even though it's not relevant to the issue we're going to discuss in the follow up cases that Freddie Booker was actually a crack defendant. And so the actual case that became the signature for the Supreme Court's monumental ruling that ultimately made the guidelines advisory was a crack case. But that ruling didn't get into the details of crack sentencing. It was the big broad now, the guidelines are advisory because of this constitutional concern about trial rights. But then that led to these follow up cases, Kimbrough and ultimately the one you litigated, Mark, in Spears, as judges differentiated or deviated somewhat in the way in which they treated the crack guidelines after Booker. They know they have some discretion But it was sort of unclear. And this led to the follow up Supreme Court cases of just how much discretion they had after Booker for crack specific cases. Because of all of this debate, like we talked about before, concerning the injustices in the Sentencing Commission's articulation of the problem with the guidelines that built in the 100 to 1 crack powder quantity ratio.

Mark Osler: Yeah. And, you know, the thing that's interesting is that, Doug, I'm sure you remember this, one of the cases that was supposed to clean up some of the crack cases was a crack case involving a man named Claiborne. And that went up before the Supreme Court in 2006. I think we worked on an amicus brief and I went out for the argument on it and it was a fascinating argument and it was going to resolve a question that had remained from Booker because the DOJ had said, okay, guidelines are advisory, except where Congress has expressly spoken and

they created 100 to 1 ratio, not the Sentencing Commission. So Booker does not apply to the crack guidelines, and that's one of the issues. There were others that Claiborne was going to clean up, so we all walked out of that thinking, okay, well, I can't wait to read this opinion. Meanwhile, in that interim, Claiborne himself, I think, was from the Saint Louis area. He's at a gas station and he has a passenger with him. The passenger goes and steals a truck of somebody who's in the gas station, and the guy comes out of the gas station and shoots Claiborne dead. And so the case is moved. And that's how we ended up with Kimbrough being two years later after Booker. And what Kimbrough looked at was this issue of, well, aren't the crack guidelines still mandatory and the Supreme Court said no. Booker impacts these as well in that there is the ability to sentence outside of the guidelines. Now, one of the things that was difficult about the Kimbrough decision, it was written by Justice Ginsburg. And Justice Ginsburg had a complicated role in all of this. She switched sides in Booker at the last minute, for example, on the remedy. That's how the remedy ended up being different than the merits. And she wrote the opinion in Kimbrough, and one of the phrases she used was mine run case know. In a mine run case, this can happen and no one knew what that meant. That's not a term of art, really. And it left a lot of play. And of course, my thought what happened after that is that there was a number of cases following that where judges would pick a different ratio. And very often they picked the most recent one that the Sentencing Commission recommended, which is 20 to 1 instead of 100 to 1. So they'd say, well, we think 100 to 1 is wrong. We're going with the experts in this, which is the Sentencing Commission. They say 20 to 1. I'll impose 20 to 1. The DOJ did not like that. The DOJ said, no, actually you can't pick some other ratio. It has to be rooted in something very unusual about the case and the individual. You can't just say I reject 100 to 1 and I pick this other ratio and there was a circuit split on that. And so Doug and I, working with Graham Boy and some other people, we started to challenge this and enter amicus briefs on appeal. You know, during that period, I was probably America's least successful appellate lawyer. I got to go argue this issue in the first circuit, second circuit, third circuit, in the eighth and ninth circuits on consecutive days and lost and lost and lost. Where the Spears case came from was that we'd lost in the Third Circuit, and I decided to seek cert on it. And take it to the Supreme Court. And I sat in Waco at my kitchen counter with a student named Dustin Benham, who's now a professor at Texas Tech. And we wrote our briefs and then working that the day after President Obama was inaugurated in 2009, the Supreme Court issued the opinion, saying that judges could categorically reject the 100 to 1 ratio and pick another ratio. And that ended up having a bigger impact. And then probably a lot of us expected, as judges cited it, when they exercised their discretion.

Douglas Berman: And I want to pick up on two things that's a little bit in the weeds, but I think really important in the weeds. One is you won through a per curiam summary reversal, which is pretty rare, sometimes sad for the litigants, because it means you didn't get a chance to go make your argument and appear in front of the court and get all the attention that that brings. But it actually brings justice and clarity to this field much quicker. So that was kind of an extraordinary achievement at a time of great uncertainty. You know, once the Supreme Court says the guidelines are advisory so fascinating, the DOJ comes in and says, well, that may be a general rule, but for something that Congress has spoken to, sorry, judges, you don't get that power. You still have to follow what Congress said and the Supreme Court said. No, no, no. That's not right. They do have that power in all cases. And it's like, okay, my understanding of what a number of other judges were trying to do when they would have formally announced and embraced a kind of an alternate crack powder ratio. Hey, I want to be consistent in all of my case. I don't want to do this sort of case by case, kind of make it up as I go along, just like the guidelines are more consistent because of their guidelines. I know the guidelines are bad in this area. The Sentencing Commission has told us they're bad in this area. So I'll follow what the Sentencing Commission recommends, and I'll do that consistently across all my cases. And still, DOJ was troubled on the idea that, well, that's not your job to make up an alternative ratio. Maybe you have the authority to vary in these cases, but we want you to do them as one offs because that's all we think you're supposed to be doing. And ultimately, your achievement and Spears is as they know. No. If a judge thinks the right way to approach this, exercising their discretion is to pre-announce a consistent way to handle all these cases in their courtroom. That's within the ambit of what Booker allows. And I think you're right that that, you know, not only was real important in the crack cases, but it made judges across a range of cases understand that the discretion that Booker gave them. Wasn't just the discretion to do individualized justice, but to look to the statutory sentencing factors to kind of frame the best way to go about sentencing. And that's still the system we have in place today. And I won't give you all the credit for keeping advisory guidelines in place, but it is remarkable at this moment. Now, we've had the Post Booker Advisory Guideline System applicable in federal courts even longer than the system when it was mandatory. And it seems to be functioning far from perfect. But at least it's functional in a way. And I think Spears is a big part of that story, especially in drug cases, because it's in drug cases, not just crack cases. This is an issue that gets litigated a lot in meth cases and some other MDMA cases where there's such a sense that the guidelines are unscientific and don't really capture what's important for a just an effective sentence. The judges feel emboldened because of Spears, because of

Kimbrough going all the way back to Booker, hey, I got to do justice in this case and come up with the right way to sort through these issues and not just, you know, follow a book just because it's in a book.

Mark Osler: Yeah. And sentencing hearings are different to. I have this sense and I've seen this in some cases that the judges now, they see the defendant, they see the defendant as a person. And you don't see them scribbling away, you know, redoing guideline calculations on the fly. I mean, sometimes you do because they still have the duty to come up with the calculation. But at least in some cases, we've got a deeper consideration of those ancient values that people are capable of rehabilitation, that there's some people that we have to incapacitate. And I think that's to the good.

Hannah Miller: To which Supreme Court case or multiple Supreme Court cases would you attribute the shift in attitude when it comes to sentencing and dealing with sentencing?

Mark Osler: Yeah, it's the whole process. I mean, it's Apprendi to Blakely, to Booker, to Gaul, which is another one to Kimbrough, to Spears and culture changes slowly. And part of this is a cultural shift that we've seen, an incomplete one and certainly an inconsistent one, but in some places, a cultural shift where it gives the federal defenders and other defense attorneys more to work with and a window that they can push things through to try to get in to consideration. And so I don't think that there's one breaking point that there's been a lot of things and a lot of people who have pushed it in that direction. And, of course, it's an incomplete trip. There's a lot more to do to make it more just and to allow for more consideration of the humanity and the whole story of the defendant.

Hannah Miller: So not long after Spears, just in talking about how these things continue to evolve, not long after Spears, Congress finally amended the federal statutes with the 100 to 1 correct ratio to make it 18 to 1 through the Fair Sentencing Act. So, did the Fair Sentencing Act resolve the issues we've seen with crack powder sentencing disparities, or is it coming back? Why does it keep coming back?

Mark Osler: Yeah, I mean, the crack powder ratio is still relevant after the Fair Sentencing Act for a couple of reasons. I mean, one is that they didn't make it retroactive. And so you had, you know, these thousands and thousands of people already in prison under a sentencing regime that had now been rejected and rejected, you know, under the expert advice of the Sentencing Commission and all of us who studied it. And yet, you had these people in prison serving that sentence who didn't have a recourse for consideration through the courts. So that was a huge failing, I think. The other is that the you know, the new ratio of 18 to 1 is pretty made up and there's a lot of legends about that happened, how that happened, you know, ten two senators negotiating in the Senate gym, things like that. But sometimes the tradeoff is, okay, I'll vote for this as long as it's not retroactive. There is no principle in that. There really is. It's just, that is that is the worst kind of legislative deal that I can imagine. Just because you if it's wrong, it's wrong. And you have to give that to the people who are already serving the sentence. And so it was problematic in that way. Of course, it was problematic as well in that, you know, the Sentencing Commission probably had it right in 1995 when they said it should go to 1 to 1 and 18 to 1 better, but not best.

Douglas Berman: And, you know, valuably, but still incomplete as the arc of justice bends, there's now this equal act, which, as I understand it, is a proposal that's already made it through the House of Representatives and has significant support in the Senate to make it 1 to 1 to 25 years after the Sentencing Commission said this is the right thing to do to get to that right equality between crack and powder, which are just different, different versions of the same substance. But that hasn't gotten past yet. And I don't know if you want to speak to, you know, what is it about the politics? Is there something the court could have done? Right. You know, I do think to some degree, courts coming up with their own ratios and going a bunch of different ways after Booker with crack sentencing may have, in a sense, prodded. Congress to at least do something. And yet Congress is yet to speak the next piece of it with the Equal Act. Do you have any sense of whether we should be hopeful or pessimistic about 1 to 1 finally getting there? And does that tell us something a little bit more about just, you know, the limits of courts or the limits of Congress as we try to achieve better justice in this space?

Mark Osler: Yeah, it's amazing. I mean, the equal act, which would make the ratio 1 to 1, you know, it's passed the house. It's got a supermajority in the Senate and they can't get it passed. You know, I love watching Kevin ring from Bam. His Twitter feed is his head exploding over the fact that they just won't pull the trigger on it. And he's right. I mean, it's remarkable. But the story as a whole demonstrates something that I think maybe is a lesson that's been learned in Congress, which is that, you know, sentencing like the 100 to 1 ratio, it's a ratchet. And once you turn it up, it's very hard to get it back. And if you do, you have to do it one ratchet at a time. And interestingly, we haven't seen Congress do the same thing with except for meth with, which was a while ago with subsequent drugs of the moment.

And that's a good thing. Now, why the timidity? There's a fear of being cast as soft on crime, of course. But also, I think that, you know, some of the problem is Democrats, that you have some Democrats who they just don't want to engage in this. And that's baffling to me. There's different principles that lead you to this. I am not sure what principles it is they lack that don't lead them to supporting 1 to 1.

Douglas Berman: When we talk about 100 to 1 ratio and we talk about other drug sentencing in the federal system, sometimes state systems work this way as well. We're fundamentally kind of hinging so much of our conversation around the assumption that the quantity of drugs involved in the offense is a good metric and should be a primary metric for deciding how long the sentence should be. And when I talk to students in my sentencing class, we all get that as a basic concept. But who gets caught with the big pile of drugs isn't the person who's making all the money. Do you think there's any hope for getting away from that sort of quantity based metric, or at least, you know, finding ways to think more thoughtfully about drug sentencing and responses to drug offending. That's not as, dare I say, pedantic, as oftentimes the federal sentencing system seems to be.

Mark Osler: You know enough about me to know that if I write an academic article about something that should change, I usually, you know, go to members of Congress and try to talk them into it. And when I talk about this issue, you know, the reaction goes, oh, well, yeah, that makes sense. But there's a real reluctance to do anything about it. And the baseline problem is that when we peg narcotics sentences to the amount of drugs that are possessed or trafficked, the problem is, especially with the conspiracy rules that hold that everybody in the conspiracy is responsible for that amount. We end up with some really unfair sentences that are not accounted for by the role in the offense provisions in the sentencing guidelines. You know, for example, they say, hey, I have a buddy who's got a bunch of meth down in Laredo. I want you to drive down to Laredo. Come back. I'll pay you \$2,000 for doing that. And so they go down to Laredo. I'm going to make \$100,000 off the deal, and I pay them \$2,000. They get caught on the way back. They may never get me just that that person who has the much lesser role. And so it's a terrible metric, particularly when combined with the conspiracy rules would make a lot more sense. And this is what I argue for is pegged to how much money the person is making off the scheme. Then we'd have a real proportionality between the players in a conspiracy. The reason there's resistance to that is because prosecutors use that to pressure the lower level people to flip and to provide information on the higher level people. And they don't want to give that up. However, that same mechanism is what leads to some of the worst sentences that we see. And I know in my clemency work, these are a lot of times the people we represent because prosecutors will say, do that. Let's say it's the person going to Laredo. All right. You tell us who paid you to do this. And if you don't, we're going to sentence you and enhance you and you're looking at a 20-year mandatory minimum sentence. For example, let's say the person says no, you know, maybe it's someone who's related to me or is romantically involved with me or, you know, there's all kinds of reasons that people do this, then that person is going to end up you know, the prosecutor made a promise. That person says, no, I won't. Well, they have a choice. They can say, okay, well, I didn't really mean it. I'm not going to stick you with a 20 year sentence. But they don't do that because they fear they lose credibility within future cases. So, they stick the person with that really lengthy sentence. Now, maybe the bigger trafficker later. They bring them in and they get a deal or they plead and then we end up with that person with a lesser sentence or what's called an upside down case. And that happens all the time. And many of the people that we know within clemency work, like Amy Pobre, where people are incarcerated in that kind of upside down case.

Douglas Berman: Even though we've talked about important Supreme Court rulings that expanded judges discretion in applying or not applying the federal sentencing guidelines, that's not extended to mandatory minimums. Those are still in force and drug quantities still play that role. I don't think there's any clever way, even the most creative of judge could in a categorical way, say, I'm not going to look at weight anymore. I'm going to look at amount of money made. And likewise, we see some judges express concern about the upside down cases as you've described it. A lot of these forums and forces are the product of the way the statutes are written and ultimately are going to be something that only Congress can fix. Right. And that's where, you know, it's especially, I guess, discouraging when they they're they've got the votes to fix the crack powder ratio and they can't even get that to the finish line. Some of these bigger changes, some of these more systemic concerns, you know, seem harder and harder to address. I conclude not only that, you know, these are congressional issues and get your reaction to that, but it looks like we may be on the verge of having a whole new sentencing commission. For those who are listening to you, I know the Sentencing Commission is the only agency in the federal government that's technically located in the judicial branch and they're who wrote the original guidelines. They've got a rotating membership. And President Biden has now nominated a new set of commissioners that's a bipartisan group. Do you think they might be in a position to prod Congress to act, maybe even more so than the traditional judiciary the courts did? They can encourage Congress to do better.

Mark Osler: I'd be really surprised if that happens. And I hate to be Eeyore here, but we have seen real change from the commission in the past. It took extraordinary people. You know, Rachel Barkow, when she was on the commission, managed to convince unanimously the commission to lower almost all drug sentences by two events levels. And that was remarkable. And they made it retroactive. Rachel is a pretty remarkable person who was able to do that. We've got John Gleason coming on to the commission. Maybe he's that person now who's going to be that voice of conscience, who has the authority when he speaks that others will listen, having been a judge and a very successful prosecutor. But unfortunately, I don't think we're going to see the most meaningful reforms come from the Sentencing Commission unless they're willing to make wholesale changes. And, you know, for example, simplify the guidelines as a whole, you know, almost a restart on the guidelines. Short of that, it's going to be very difficult for them to get to these deeper issues. In the end, the entity that's capable of doing that is the Department of Justice. And when I say that, I guess I should play that out a little bit, which is, you know, when I was a prosecutor, like I said, in drug cases, I was sitting there and had to take what people brought me and with the narcotics and what they were bringing me was wrong, you know, and eventually I couldn't do it anymore. There needs to be a rethinking of if we're going to have narcotics be illegal. And that's a separate question. We have to recognize the role of economics, that this is a different kind of crime than murder or assault. That here this is a business crime. And I mean, I'll never forget Doug. After Spears came down, I was invited to talk to this Republican club in Dallas. So I go down and they want to know what this is all about. So I explain one to explain the narcotics interdiction, what Spears meant and this guy raises his hand. There's a lot of business people, you know, it's Dallas, the Republicans here is in he says, why do you think that would ever work? I say what do you mean? You said you're not ever going to close down a business by sweeping up low wage labor. And all the other Dallas Republicans are nodding in agreement. And so I ask, so what would you do? And the guy says, cash flow and credit. And it was an epiphany. I was like, well, of course, you know, that's what that's what would stop people and it doesn't involve incarcerating anybody either. And if there was a focus by law enforcement on interdicting the money side and making the business fail, that would be much more successful, at interdiction then then locking all these people up. There's a template, though, for doing this successfully, and that is material support of terrorism, that you've got a cadre of people within the FBI who are really good at tracking the money, including, you know, through blockchain. You know the fact that they're doing it through Bitcoin doesn't mean we can't get it in. If we had that expertise turned to actually address narcotics interdiction, it would be a big change and it would make the incarceration part of it unnecessary.

Hannah Miller: The Department of Justice definitely has a role to play, but they also take their cue from Congress, right, from legislation itself. So a question that I have then is as constituents, what sort of demands should we be making of our elected officials? I mean, like what would effective federal drug sentencing reform look like if such a thing could be achieved by legislation alone? Where do we start?

Mark Osler: Well, I mean, I think the starting point is try something different. I mean, this baseline recognition we've been doing the same thing for decades and it hasn't worked. Because if it had worked, the price of narcotics would have spiked. And it hasn't because that's the real measure of of successful interdiction that we do have to really look at legalization, decriminalization short of that. And if we if neither one of those for specific types of narcotics, new tactics other than find them, lock them up, take a picture of the giant pile of cocaine, move on to the next one, where as long as demand remains constant, supply will meet that demand. It's the iron rule of economics, and it's something that people in Congress would understand. And if we can just get them off of what they've been doing and supporting for decades, which has failed, we'd be moving in the right direction. So that's the most basic thing is challenging that status quo and putting into the public eye the failure of it.

Hannah Miller: How do you talk to someone who has throughout their career kind of invested in this idea of the war on drugs and now is having to change their tune? How do you define this problem politically?

Mark Osler: One of the great things about working in this area is that it really is bipartisan. The problem was caused in a bipartisan way, and Democrats played a huge role. I mean, the creation of 100 to 1, part of it was Len Bias dies of a cocaine overdose. Turns out it was probably powder. Now, when Bias was a college basketball player from University of Maryland, who was drafted by the Boston Celtics. Now, both those things are relevant. That he played for Maryland means that he was in the D.C. media area. So The Washington Post covered him as the hometown hero. Being drafted by the Celtics mattered because, as you know, Boston loves sports and the Celtics were already really good in the eighties. Immediately after being drafted, Len Bias overdoses and dies. And you had these congressional leaders like Tip O'Neill, Ted Kennedy, they go back to Boston and people are outraged by this and you have to do something about this scourge of crack. And the lever for it had a lot to do with how much people in Boston love sports.

And that's how crazy this whole thing is. And so it was Democrats who pushed it through largely in the first place. Then, you know, we all know about Joe Biden's role in a lot of that as well. Now, of course, there were Republicans, too. Ronald Reagan eagerly signed it. You had Paula Hawkins down in Florida. We always had a primary proponent of it, too. But the undoing of it has to be bipartisan. And frankly, that it's really encouraging the way the efforts have been bipartisan. Conservatives have principles that drive them to agree with people who are progressive. You know, libertarians distrusts government. And when we allow government to remove people from society and lock them up for this period of time, that's a pretty good example of how it goes wrong. It proves the Libertarians point. You know, on the other side, you have progressives that recognize the racism that's inherent in this, the disparities that result. And so you have people coming together for different reasons. Now, in the middle of that, you've got people who are, they just don't want to engage in the issue. And unfortunately, they often are the people who are in the positions of power in terms of calling votes and things like that. Now, how do you engage them? What I've tried to do and obviously my success has been limited so far, is to shift the discussion not to one of some of these more hot button topics, but just effectiveness. You know, that that our regime for addressing narcotics has been ineffective. It has been inefficient. It's been costly. And, you know, and then talk about what I just said here, that supply and demand, those simple rules that we all learned in Econ 101, tell us that this won't work as long as demand is there, supply is going to meet. It. Frankly, people do understand that across the spectrum. What's lacking sometimes is the will to take action on it.

Hannah Miller: Regardless of who does it, something has to be done right?

Mark Osler: Well, sadly, no. I mean, the problem is this. Yeah, there's not a political cost to these members of Congress for not acting on the Equal Act, for example. People don't know about it. They don't care about it. There's all these other issues that overwhelm it and hide it. And that's what allows for the inaction. And we see this in other areas as well, that there's things that are really important that aren't getting done because we have a legislature that responds to the event of the moment rather than good government.

Douglas Berman: One of the many vices of federal policymaking is they can print their own money and no matter how big the federal prison population give them and how much money is wasted in the sense on drug interdiction, it's a drop in the bucket relative to the overall budget. There's often not voter accountability, there's not fiscal accountability. And when we've seen states do reform, whether it's on these issues or others in the criminal justice system, you know, often it's the bottom line, the dollars and cents that that end up driving, particularly at the bipartisan level and even more bipartisan. Than criminal justice reform is being particularly sensitive to the politics, the economics and the sort of the political structure around these issues is, I think so, so essential. And that's why I'm so excited to talk about these issues on Drugs on the Docket, because the courts are part of that. But inevitably, just one small part of this or this broader mosaic.

Mark Osler: In, you know, in terms of advocacy. And one thing I do want to note is that for me, when I'm trying to reach out to people, often conservatives, but sometimes others as well, there's a faith imperative for many of us, of people of different faiths. You know, I'm Christian, but people share usually this value of human dignity or the value of each person that we need to be seen and given a chance for redemption if we're willing to take that. And in the fact that we have this system that denies that consistently is something that offends people. I have a chair here as a professor, but I also have a chair in preaching, and that gives me the opportunity to talk to audiences who often haven't thought about this. They often think of it as, you know, I'm standing on a playground or something and I draw a circle and I want to start with a circle that has both me and my audience inside of it and then talk about principles going from there. And if we're going to be effective advocates, we have to do that.

Hannah Miller: Well, this has been very illuminating, Mark. I've definitely learned a lot today. And do you have any final thoughts, Doug, before we close out.

Douglas Berman: I just want to say thank you, Mark. I think we're going to need to have you on again because there's many more cases I know you've been involved with, and I hope the audience feels like they're in the circle we hope to draw with this endeavor.

Hannah Miller: Drugs on the Docket is a production of the Moritz College of Law, Drug Enforcement and Policy Center. This episode is produced by me, Hannah Miller and Holly Griffin. Doug Berman is our editorial advisor. The music is composed by Joe DeWitt.