

Drugs on the Docket Podcast

Season 1 Episode 5 – Data and storytelling in federal drug sentencing and the U.S. Sentencing Commission with Doug Passon and Mark Allenbaugh

TRANSCRIPT:

Hannah Miller: Have you ever wondered how judges decide the amount of time a person must serve in prison for committing a federal offense? Turns out there is a system, an imperfect system, but a system nonetheless. We've all watched movies where an impassioned attorney, like Atticus Finch in *To Kill a Mockingbird*, delivers an epic closing argument, humanizing the defendant in a last ditch effort to mitigate the legal consequences imposed upon their client or to secure, ideally, an innocent verdict.

These scenes illustrate an important aspect of our country's criminal legal system, where judges and prosecutors adhere to laws and guidelines for charging and sentencing purposes, and also where criminal defense attorneys employ certain litigation strategies to influence what that sentence might be. Of course, not every case is a dramatic, high-profile murder. In fact, according to the United States Sentencing Commission, in 2021, 85% of reported federal cases pertained to drugs, immigration, fraud, embezzlement or theft. But drug offenses accounted for one third of all federal cases.

For the last 40 years, state and federal government have been particularly focused on drug crime. So it begs the question, what might be different about federal drug cases when it comes to sentencing? And as the War on Drugs has evolved, what story does the data tell us about drug sentencing over time?

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 discussing federal court sentencing. If you like what you hear in today's episode, visit go.osu.edu/drugsonthedocket to follow the series.

Welcome back to *Drugs on the Docket*. My co-host today is Doug Berman, a professor at The Ohio State University, Moritz College of Law and executive director of the Drug Enforcement and Policy Center. Before we introduce our guests, yes, two guests, double the trouble, double the fun. I want to point out that today's topic is very much in your wheelhouse, Doug Berman. Care to share about your blog with listeners? What's it called? What can people find on that blog?

Doug Berman: Oh, thank you very much, Hannah. And thanks to Mark Allenbaugh and Doug Passon for joining us. I'll introduce them in a minute. But I'm more than happy to talk about my blog, which stunningly I've been doing for almost 20 years now. It's called *Sentencing Law and Policy*, and just a little background for anyone who cares. I got it started when I was finishing coauthoring the casebook with the title *Sentencing Law on Policy*. And my first thought was this would just be a little website that would help users of the casebook find new material or kind of keep up to date and maybe build a little bit of community. And then the Supreme Court, bless its heart, decided to decide a bunch of big sentencing cases. And before I knew it, I was blogging about any and everything related to the Supreme Court's jurisprudence and then a range of other topics in this space. And so now, 20 years later, I'm still still going. Not quite strong, right, but going going along and trying to do my best to both capture some of the kind of sentencing news that's out there on a variety of fronts and also host some commentary or promote other people's work in the sentencing space. And that's among the ways I've gotten to know both Doug Passon and Mark Allenbaugh. And I'm grateful they're joining us today.

Hannah Miller: Awesome. So if you're listening, check out Doug's blog. But until then, we've got a great episode about sentencing. So, Doug, go ahead and give us give us some more background on Doug and Mark.

Doug Berman: Sure. So joining us today, first we've got Doug Passon. He goes first because he's named Doug. All Dougs get special treatment in my world. And he's a criminal defense lawyer for over 25 years. An award-winning

documentary filmmaker as well, and very much a nationally recognized expert in the field of video sentencing advocacy. His firm helped produce high quality defense documentaries, day-in-the-life videos, continuing legal education programs for attorneys across the country.

And really, the idea for this version of Drugs on the Docket podcast was a product of the great fortune I've had to be on Doug Passon's podcast, which is called Set for Sentencing, which shows up every week on all the major podcast opportunities. I very much recommend anybody interested in sentencing topics to check out Doug's work over there. It covers all sorts of subjects across a range of frontiers. And so I was just incredibly grateful he said yes to join us here to talk about drugs on the docket and drug sentencing today. Welcome, Doug.

Doug Passon: Thank you so much for having me. Thank you for what you guys are doing, especially the blog. Doug, you know, it's my go to resource for all things sentencing and for coming on my podcast and supporting me. And I just I'm really glad to be here. Thanks.

Doug Berman: So continuing our love fest, I get to say how grateful I am for Mark Allenbaugh's work. Mark is an attorney and entrepreneur with a nationally-recognized expertise in federal sentencing, law policy and practice and data especially. He is a co-founder of Sentencing Stats LLC. Previously, he's been affiliated with the Sentencing Committee for the National Association of Criminal Defense Lawyers, the Federal Sentencing Guideline Task Force for the D.C. Chapter of the Federal Bar Association, the U.S. in Commission's Practitioner Advisory Group and the ABA's Corrections and Sentencing Committee. And that's that's a lot of committee work, Mark, that I know you do, but you also also make beautiful charts and graphs and obviously a podcast isn't the best place to show that off. But I want to welcome you here and thank you for the work that you've done through the years and helping me to both understand sentencing data and visualize it much better than I can on my own.

Mark Allenbaugh: Well, thank you for having me, Doug. I appreciate this opportunity.

Hannah Miller: So we got a little bit of background on how Doug knows Doug and Doug knows Mark, but I would like to know before we really kick things off, how do you, Doug Passon, and Mark know each other? How did you first become acquainted and what kind of work have you done together since?

Doug Passon: You want to do that or shall I Mark Allenbaugh?

Mark Allenbaugh: Go ahead.

Doug Passon: Well, Mark, Mark and I both have the good fortune to work very closely with a gentleman by the name of Alan Ellis, who is a nationally recognized sentencing and post-conviction relief attorney. And I've been working for Alan for about eight or nine years. And Mark, how long and a lot longer than that, right?

Mark Allenbaugh: About 15 years, yeah.

Doug Passon: And Mark and I, we are such a great team. People refer to me as the "soft stuff" guy and Mark is the "hard stuff" guy, because he's very much about the guidelines and, and the statistics and the data and I'm very much about the story. And so we work together because both are very, very important elements of sentencing, and that's our division of labor. And we really work well together. And Mark is a regular guest on Set for Sentencing, lending his expertise on the guidelines. Well, I worked in another set for sentencing club. Let's see how many we can do.

Doug Berman: Well, it's Mark's turn to do some plugs now and then I'll ask you a more pointed question in a minute. But go ahead.

Mark Allenbaugh: I guess I could do the plugs as we go along and we talk about some data.

Doug Berman: I'll start with you, Mark. In federal courts, the reality is, roughly speaking, you know, maybe half, maybe even more than half of the cases that work their way through the federal system are either directly drug sentencing cases or, you know, drug activity is somehow connected to them. And my sense is, and I like the kind of hard and soft dichotomies, I might use it here, both on the hard side, drilling in on the data and the way the guidelines function. And on the soft side, how you tell stories in this space. It may not be different in kind, but it's different in the degree that a drug case necessarily kind of engages the way we think about sentencing in a somewhat different way. I just want to get your take on how drug cases feel different when maybe they're coming to you and someone's asking for, you know, an analysis of comparable results or how the guidelines are functioning, because I do think they are something of a different animal.

Mark Allenbaugh: Yes, the drug sentencing is a different animal than federal criminal sentencing overall, mainly because of the influence of the mandatory minimums over the years, with respect to the crack cocaine and the powder cocaine sentencing disparity. But also related to that, of course, is the racial component. As you look at the Sentencing Commission's data, you can see that there are some very dramatic and statistically significant racial disparities, not only with sentencing, but the types of drugs that are involved in the prosecution of drug offenses. And they're treated differently under the guidelines. And there is not really empirical evidence as to why those are treated differently, if the the point of the guidelines in the point of sentencing is to try to reduce recidivism or to deter future offenses. That has not seemed to work at all.

And just to go into my overall critique of the guidelines is they're genius and awful at the same time. What they are awful for is providing guidance or any type of guideline to courts in terms of what sentence to impose. For your listeners that don't know how the federal sentencing guidelines work, it's a complex algorithm that pumps out two variables for a judge to look at. One is what's called the total offense level, and that's the number from 1 to 43, where 43 is the highest or most severe offense level. And the criminal history category, which is a category from 1 to 6, where one indicates the offender has very little to no criminal history and six is generally somebody that you would call a career offender that has surveyed it quite a bit.

When the guidelines were first created back in the eighties, they were mandatory. And then the Supreme Court case called Booker came along in 2005 and made the guidelines purely advisory. And what that means is the guidelines, because they're purely advisory, judges do not have to follow them. So what has happened since 2005, judges have, in an increasing frequency departed or varied as we call, that's the term of art now, is a variance, varied from the guidelines now almost always below the guidelines.

Doug Berman: Is at the genius part? That that you know now judges have that discretion or?

Mark Allenbaugh: Well, no. One of the main points of the guidelines was to increase uniformity in sentencing. So similarly situated individuals would be sentenced similarly. And now because it's, if you will, a crapshoot on whether or not a judge is going to follow the guidelines, and if he or she decides not to follow the guidelines, how far below, they're going to vary below the guidelines. There's no rhyme or reason to it. And so the guidelines have become a mess with respect to sentencing. So that's the bad part. The good part, and what hasn't been, I think, leveraged or understood by the courts and prosecutors and defense counsel is the data. And what you can do with that data is go out and find those that are similarly situated and see with all the data that that the commission has collected over the years, to see how people or people that have committed similar offenses are getting sentenced, as well as those that have committed dissimilar offenses.

If you're a judge and you're considering imposing, you know, a pretty significant sentence on somebody for drug offenses, well, how would that match up to, let's say, somebody who committed a serious aggravated assault or something like that? And this will also give courts the ability to, to see just how serious, or how misaligned the guidelines may be with respect to sentencing, but also with the data see what the real world practice is. And that's the genius.

Doug Berman: We're hearing, Doug, how a data guy thinks about how we can we can do better. And, you know, I wonder and especially thinking of you as the story guy, everybody's story is different. And is it your sense that no everyone's everyone's unique, every case is unique and every sentencing has to be unique, that the kind of soft story factors are what judges are responding to when they're kind of ending up all over the map here as Mark was suggesting, and whether you would take pride in that to some degree, because it means people are telling good stories, especially in drug cases where I do think we hear different accountings of whether it should matter that somebody themselves had a drug problem or more were, you know, actively involved in, you know, distributing in vulnerable communities and the like. And so I would love your take on both Mark's view about where the data takes us and just how the drug cases should be looked at.

Doug Passon: Well, first of all, you know, Doug B., I'm not a fan of the guidelines, especially the old regime prior to Booker in 2005, because it was so difficult to deviate from these guidelines. So it was basically, this is the offense, this what the guidelines say, here's your punishment. And I am a firm believer that we do not just sentence for the crime, we sentence the person. That you have to look at the person's life circumstances, their life history and the circumstance of the offense. So yeah, every single case is different. So to use this blunt tool of the guidelines to me has always been a problem.

And then you add to that fact that these guidelines were so fundamentally flawed in their inception, and now that they're advisory, that's great. But it's like, think of that in real life. What does that mean? It means they give the judges advice. And so in your own life, who do you take advice from that you trust? You know, I would take advice from my dad. He's very wise and I know he has my best interests at heart. You know, the drunk uncle at Thanksgiving? Not so much. And in my opinion, these guidelines are the drunk uncle. But here's the beauty of it. And here's why I love Mark Allenbaugh, because what he does with his deconstruction of the guidelines and with his looking at the data and with his, you know, scientifically-based evidence that these guidelines are fundamentally flawed, therefore they should be ignored, he is like, I guess I'll use a midwestern reference, is it snowing there? Giant snow plow, for me to clear away the mud and the muck in the slush and the slipperiness of these guidelines and say, okay, if the guidelines don't rule the day, then what does? And then we're in the operative sentencing statute, which we know is 18 U.S.C. Section 3553, which forces us to look at the person. So we have to look at the history and characteristics of a person. That's their story. We have to look at the nature and circumstances of the offense. That is their story. So in every case it shifts to the person and enforces us, good defense lawyers know this, some are still coming to this slower than others, but that mitigation and story is everything at sentencing. It's the way that that we win once Mark clears away the clutter.

Doug Berman: And I'm at risk now of using the drunk uncle metaphor too much, but especially in the context of data we get from the Sentencing Commission, I think the fiscal year 2021 data, Mark, shows that judges don't listen to that drunk uncle very much in drug cases, specifically, maybe only about a quarter of the offenses are sentenced within the guideline range. And you were mentioning how many are below guideline sentences. Why are we still even having the drunk uncle give his opinion in a world in which it's clear that the vast majority of the judges aren't paying attention? And I wonder sort of your take on both how we got here and whether there's a tipping point or is this inevitable that people are going to keep ignoring it?

Mark Allenbaugh: Well, first of all, we haven't had a commission until recently, so there is very little the commission could do or could do nothing until recently. But we're we're going to be stuck with a drunk uncle for a while, but one who is now in AA and is starting to recover. The first big step was admitting the commission has a problem by getting commissioners, and now we have commissioners that can go in and start to address some of these needed changes.

The rate of within guideline sentences, in other words, the frequency in which judges have followed the drug guideline, which is 2D 1.1, has decreased significantly over the last 12 years. Back in 2010, judges imposed sentences within that guideline about 45% of the time, and that has more or less steadily decreased since then. Just last year it was only 28% of the cases. But what this shows you is barely a quarter of the time are defendants being sentenced within that guideline.

Doug Berman: And this is against the backdrop of in 2014, the commission changing the guidelines to do what was called drugs minus two at the time. So there was a recognition that the guidelines were way too harsh for drug offenses. They lowered it across the board and even that did very little to engender judicial affinity to the advice that was being given, because we still see this pattern of fewer and fewer sentences being imposed within the drug guidelines, even after the commission made a change, presumably trying to capture the widespread view that that the existing guidelines were way too severe.

Mark Allenbaugh: The guidelines actually do need a significant overhaul. What's also interesting is, of course, as the rate of within guideline sentences has decreased, the rate of below guideline sentences or downward variances obviously have increased significantly from 30.4% in 2010 to 47.5% last year. And this is something I wish the Commission would publish more frequently. The attorneys and prosecutors and judges are very concerned about the rate of variances, but that's only half the story. The other story is how big of a variance. So what if a judge varies? It could be just one month below the guidelines or 100 months below the guidelines. That's really telling the story about what's going on with sentencing. And so what's interesting here as the the the rate of variances has increased, the degree of downward variances has remained about the same. Judges are tending to sentence below the guideline range, about a third. So just to make that less abstract, if the sentencing guidelines says 100 months, judges now on average are sentencing at about 70 months, going about a third or so below the guideline or 66 months below the guideline range. And that's staying rather consistent.

And so what that tells me and what should it should be telling the commission is the guidelines need to be recalibrated and nobody's listening. The whole guideline scheme, at least for drug offenses, needs to be calibrated downward by about a third. That's what courts are telling the commission. And they're telling the commission that in increasing

frequency every year, as we can see. The rate of downward variances keeps going up and up and up and up, and it's staying about the same, but about a third. So what judges are saying is fix the guidelines. You got to lower them by about 33%. When the commission first created the sentencing guidelines, they went back and they looked at data, old probation records, and they looked at 10,000 cases. That's what the guidelines grew up out of was data.

Doug Berman: And I still want to talk about fixing the guidelines, and we'll get back to you, Doug, in a minute to just to focus on how how do we sober up that uncle. But, Hannah, why don't you jump in and give the really what I think is the heart of the guideline revision question?

Hannah Miller: Well, before I get to that, I actually want to take a step back. So in Ohio, we have the Ohio Sentencing Commission, and I know that there is a big hullabaloo over reporting sentencing to a central database so that we have something to show, essentially like this, where we can see variance. And it's not specific necessarily to drug cases, but any type of sentencing. And there has been some pushback to that. And so I want to know generally about data on the federal level for judges. Is this aggregate data or can you see judge by judge the degree to which they vary from these guidelines and whether or not the way that the U.S. Sentencing Commission collects data could could inform practices for how states could do it, to inform state judges and not not just necessarily in federal cases, but on cases that take place within the state? Violations is like Ohio revised code, for instance, and how we can do sentencing better?

Mark Allenbaugh: Great question. To take the first part of your question first about judge specific identifiers in the data. The commission does collect that. The commission collects basically all pertinent filings in every federal sentencing, and that basically is the plea agreement, the pre-sentence investigation report, the order of judgment and conviction and what's called a statement of reasons, which is a document that, like the pre-sentence investigation report, generally isn't available to the public, but it's what the commission can glean a bunch of data from. For example, the age of the defendant, the ethnicity of the defendant, the actual weight of the drugs, the different drugs that were involved, the criminal history, the educational history of the defendant, etc.

At the inception of the commission, there was a policy decision made by the Administrative Office of U.S. Courts to clean the Sentencing Commission's data of any judge identifiers and defendant identifiers. So what that means is you can go in the data, you can go into the commission's sentencing data, and you can find every single case that has been sentenced within the United States over the last 20 years. But what you cannot find is the name of the defendant or the name of the judge. And the reason why that policy decision supposedly was made is the Administrative Office and federal judges at the time were afraid that that data would be used by Congress or politicians or other interest groups to criticize judges for their sentencing. That makes no sense to me, frankly.

Hannah Miller: Yeah, right. Imagine that.

Mark Allenbaugh: Yeah. Yeah. That mean that is the purpose of the data. And again, you know, federal judges, unlike state judges, they're not voted into office. They're they're appointed for life. They have life tenure. And so what if they're going to get criticized? They get criticized all the time by by their brethren on the circuit courts. So I don't I, I vehemently disagree that that policy is still in place. It was a brief viewed, I think a few years ago, The New York Times had an article about that that created a big uproar in Congress. And there was some momentum about getting the commission to release the judge-specific identifiers. But then I'm not sure what happened in just the next news cycle went on and and that kind of disappeared. But that would be something I think that really needs to be addressed. Now, with that said, I have a way where I could get the judge specific data, but it's very time consuming and it's very expensive to do and it's not something that's very easy to do. And and with that in that regard, also the Commission's database, even though it's publicly available, it's a mess. And unless you're an expert, not just in sentencing law, policy practice in the guidelines, but the data itself is very hard to decipher and make it useful.

Doug Berman: Though I am not that sympathetic to the, oh my gosh, people will look at what we're doing. I am sympathetic to the reality that sending data can be removed from the stories and people who don't fully understand the reality of different dockets, different caseloads, different advocacy made by different lawyers in different cases is dangerously easy. We had an example of this a couple of years ago, where somebody takes a database, crunches a bunch of numbers and says, ah, this judge, according to the data, is the most racist because they give the longest sentences to African-American defendants. And this judge is giving the lowest sentences to sex offenders. And in fact, we saw a kind of a variation on this during Justice Ketanji Brown Jackson's hearings with respect to the child porn cases. And so is there a similar risk when it comes to the stories?

Doug Passon: Well, there's a risk. You know, just let's focus on the statistical aspect that you talk about. I think in federal court it might be a little different because federal judges are appointed by the president for life and they are a little bit less concerned about public perception of their rulings. Unless you're Judge Ketanji Brown Jackson and you have to answer for your your rulings before a Senate confirmation hearing, I don't think people are going to scrutinize it in a general sense, like that. They might scrutinize an individual case, especially a high profile case. Now, I don't know how your state system works, but in Arizona, it's a different story because there's a retention vote every every election cycle. And, you know, it used to be that the judges would never get voted out, but a couple of them did this last cycle. Because people really are paying attention. So some states you run for reelection. I mean, you have to answer to the people a lot more than a federal judge.

So putting that aside with the story element, I think it's the same thing. Federal judges especially are by and large independent, and they're going to make the right decision based on what are the, what is the true facts presented in a case. And unless, again, it's a high profile case like an Elizabeth Holmes or something like that, nobody's paying attention. And the judge can do what she's going to do in the comfort of her kingdom, and it's going to be okay. And as far as story goes, look, there's always a risk. What we do as defense lawyers by default, is highly criticized and misunderstood by the public. And so there may be a really outstanding sentencing result that we achieve where someone got an extremely low sentence or even probation. And the public, who doesn't fully understand how the process works, wasn't sitting in the courtroom to hear the real story, and all the mitigation may wag a finger and say, this is ridiculous, this is injustice, but they simply don't know. But my contention is a good story, a credible story, well-told will always move the needle in sentencing no matter what the outside perception may be.

Hannah Miller: Because you're in Arizona, you are in a very different part of the country than, say, northeast. Can you talk a little bit about how you have told stories or if there's a major difference in how you need to tell stories, depending on the defendant, where they're coming from, the outcomes and the impact of the sentencing on those individuals? And I'm speaking specifically about people of color living in the Southwest or living in Arizona.

Doug Passon: I was a federal public defender for 12 years, and I remember the first day in court and my mentor, who's now actually a Superior Court judge, took me around to the initial appearances where, you know, a person is first arrested and all the people who are arrested that day have to see the judge for the first time. And they're all seated in the jury box, shackled. And he stood up, my mentor, and said to the court, I'd like the court to take judicial notice that every single person in this jury box, shackled, is either Brown or Black. And that's the reality of, by and large, the justice system in general, but specifically in Arizona. We're a border state, so obviously we have a large Hispanic population.

We're also at a lot of Indian reservations. So American Indians comprise a huge percentage of federally charged because the major crimes from the reservation go federal. And then we have all the immigration crimes being a border state, and then drug trafficking crimes are huge because they're smuggling drugs across the border. And also they've stepped up enforcement on the Indian reservations because methamphetamine especially has become a problem in certain communities on the reservation. So they're stepping up federal enforcement, i.e., arresting low level hand-to-hand sales under the assumption that that's going to somehow deter the public as if there's not going to be ten more people behind that person once she's carted off to jail. So in terms of the kinds of stories we tell, I mean, those are pretty potent ones, especially the hand-to-hand drug sales.

I had a criminal justice professor who talked about the lightning rod effect, which is power gravitates towards the modes of least resistance, which means most, by and large, the defendants we see charged with drug cases are the lowest level offenders in this whole chain of players in the system. And that's a story that needs to be told, especially when the draconian guidelines, even for small amounts of substance, result in major prison sentence, can result in major prison sentences.

Doug Berman: My fear is sometimes the quantity ends up playing this misguided, overinflated role just because all the other possibilities are themselves so slippery. Everybody is going to say they're just a low level, you know, mule. And they didn't have a major part in the deal. And, you know, we'll assert that they had this mitigating factor or that mitigating factor, which becomes kind of the low hanging fruit is to zero in on quantity. And so that's why the guidelines haven't changed with that basic focal point. And yet, as we've talked about earlier, judges don't think that's a good metric or else they'd be following the guidelines more. So is it sort of your take on on the role of the drug quantity plays here and then, you know, where would we go if we're trying to sober up that uncle and get them to give better advice?

Mark Allenbaugh: Absolutely, Judges see the weight of the drug as not only overly punitive, but overly complicated in how to calculate. I mean, the guidelines are complicated enough, but then the drug guideline is like its own sub guideline, and there's all these machinations and algorithms that the court has to go through to figure out if the if the case involved crack cocaine and fentanyl and then ecstasy, you know, you have to calculate, make all these calculations to come up with a marijuana equivalency. And it's just mind bogglingly difficult. I think judges by and large, just give up on that process and say, I'm not going to sit here and try to be a mathematician and go through calculus to come up just with a simple number.

But to answer the second part of your question, what should judges use or what can the commission use in place of that is I don't think it needs to be replaced, just simplified. And, you know, and this is where the data could come in handy. Look at the data out there for what many would consider low level drug offenders and see what the average drug amount is. And they can look at the data and start coming up with different ways to both calculate it, to simplify the calculation of the drug weight, and how the drug is used in practice. And see, that's the beauty I think, of the guidelines and what's constantly overlooked is the data. The guidelines were born, born of the data. They need to be revised according to the data, and they're not. They're being revised according to policy and hunches and nonscientific political machinations rather than the science from which they were born. And so let's look at the science and look at the data and that will resolve this issue.

Doug Passon: And here's my big problem with weight being the driver. It allows for abuse and manipulation of the sentencing outcome by law enforcement, which is to say, back to this hand-to-hand sale on the on the reservation. Well, you know, the last case I handled like that, it wasn't just one, it didn't need to be more than one, because once you sell one gram of methamphetamine to an undercover officer, that's all they need to arrest you and prosecute you. But that's not good enough because they know that if they could do ten sales over the course of a few months or 20 sales, then they can aggregate that weight and influence the outcome of the sentencing. And and so it's a tool for them.

And, you know, we've had these reverse sting cases, which is undercover officers set up an imaginary say, robbery of a drug stash house, and they say there's going to be 6 pounds of cocaine there that we can take and sell and redistribute and sell and we can make \$1,000,000. Well, guess what? There are no drugs, but they get to take 6 pounds and use that as the weight in the guidelines, which is then in the land of mandatory minimum prison sentence, taking discretion away from the judge, which is a whole other problem. These are a weapon that that are used to to try to shape the outcome of sentencing. That's that's a problem.

Hannah Miller: So the Equal Act, which would effectively kind of simplify all of this by treating all cocaine the same, it was passed by the House of Representatives. It's currently stalled in the U.S. Senate for the foreseeable future, but it would effectively eliminate the crack powder ratio, which is currently set at 18 to 1. Are either of you optimistic about the equal tax passage? But also if it were to pass, do you have any optimism that, you know, we could take this even further if we're treating cocaine the same, maybe we could treat other types of drugs the same so that we are lessening our focus on drug quantity, maybe focusing on other factors of sentencing that are better indicators of severity of the sentence itself instead of these factors that can be manipulated, you know, just like you were saying, Doug P.

Mark Allenbaugh: Well, as for me, I am optimistic that the Equal Act will pass, but that in and of itself will not address many of the other issues with the with the drug guideline. And frankly, I'm not sure from either a policy or an empirical perspective, if treating all the drugs the same in terms of weight is feasible. And the reason why I say that is, you know, there's a big difference between a gram of marijuana and a gram of fentanyl. You know, that's something that that would have to be explored. I'm pretty sure a gram of fentanyl would kill just about anybody, whereas a gram of marijuana won't. So I mean, that's, you know, that's what I'm getting out there. And so I think it may be inevitable that we're going to have to distinguish certain drugs. And we're not talking about too many drugs. I mean, if you look at the drugs that are primarily prosecuted, the majority right now is methamphetamine, followed by powder cocaine, crack and then marijuana and fentanyl. So that's that's about 90% of all the drugs.

Doug Berman: The data I think shows meth is getting the longest sentences right? Is that...

Mark Allenbaugh: Yes, meth is getting the longest sentences. Yep.

Doug Berman: You know, my sense is sometimes that gets lost in conversations. There was a long period where rightly so, people were very concerned about the severity of crack before the Fair Sentencing Act of 2010 lowered the

crack threshold to some degree, and crack was consistently getting the longest. And this was consistently, almost exclusively African-Americans who were subject to those severe terms.

Mark Allenbaugh: Right.

Doug Berman: But it is very interesting, since that reform has already happened, we'd like to see more with the Equal Act. But we've seen that that meth sentences have emerged both as the largest category of drug cases and the category getting the longest sentences. And I've certainly heard people complain, public defenders and others, that the math behind the meth sentences are even more ridiculous in terms of how you calculate weight, how, as Doug was saying earlier, that there's opportunities for stings and for law enforcement to drive up quantities, and that in part explains why there's such severity there. But I think it's you know that's one of the challenges in this space is there aren't that many drugs and yet there's there's ugly stories behind all of them.

Mark Allenbaugh: Well, that's getting rid of relevant conduct. But I think that's a that's a whole nother podcast I think.

Doug Berman: We were talking about how the guideline rules and the data show some differences drug by drug. Do the stories change drug by drug? Is it usually if you're getting a client coming in or you're developing some mitigation, all you need to know is a drug offender and you kind of have the same questions to ask or it does does the type of drug, and Hannah was asking earlier about kind of the region, dramatically impact, you know, the kind of the nature of the story that you're going to be telling? Sort of develop the full story for sentencing?

Mark Allenbaugh: The answer is yes. Part of that has to do with the nature of the drug itself, how dangerous it is, marijuana versus heroin or powder cocaine versus fentanyl, and also how the drug is manufactured, how it's brought to market. You know, methamphetamine, you know, we can make in our backyard here, whereas marijuana, you need to grow it somewhere and powder cocaine is usually imported. So there's all these different aspects to the drug distribution and and how the offense is committed. That depends on on the type of drug. And also in the region, like for example, here up in northeast Ohio, for the last few years, we've had a problem with fentanyl. Heroin is being cut with fentanyl now to make it cheaper and to let the heroin give you a stronger high and stuff like that. But it's resulting in a lot of deaths. And that's been a big problem up here in Cleveland and outside the Cleveland area. So courts have been very focused on punishing those types of offenders even more heavily than others. So that's something to be aware of. There's also the local politics surrounding the particular drug.

Doug Passon: For me, as I said, you know, if you go back to the lightning rod effect and you realize that most of our cases are not the high level drug kingpins who are manufacturing this, running the, you know, running the operation, enforcing it through violence, all those folks never get punished or rarely get punished. The majority are just the people who are either smuggling it across the border or selling it in smaller quantities, or even just we get a lot of conspiracy cases where I wired some money for somebody that is connected to a cartel and, you know, people getting swept in this very, very wide net. So in those cases, the story is really everything because it's about how they get involved in this. What is their relative level of culpability in this operation? Often it's what have they done to redeem themselves? You know, a lot of these folks are addicted. So much, so many of our clients come to us with addiction issues, mental health issues, abuse, there are domestic violence situations where maybe they're under the thumb of an abusive spouse or boyfriend who's deeply involved in drug trafficking. And they're just sort of it's unavoidable that they're going to be roped into some aspect of it. And these are the human elements of sentencing. And this is what we have to do to differentiate each and every case and remove them from the cookie cutter aspect of the guidelines.

Hannah Miller: What about any sentencing enhancements? Like if there's possession of a gun, do you find it easier to craft a story around someone who's like, not super culpable? Maybe he's addicted, but they found a gun and so then that increased his overall sentence or that he's facing longer because of that. Could you speak a little bit to that type of enhancement?

Doug Passon: Yeah, and I think, Mark, you could talk to this, but but there is this distinction between the guidelines and the statutes, because often when we have gun cases where in the realm of 924 C, which is statutory mandatory minimum enhancements, five for possession, I think seven for brandishing, ten for use or discharge and then consecutive sentences. So when the guns are involved, the sentences have the potential to go, the needle gets buried in red. But even if you can negotiate the getting rid of the 924 C, Mark will tell you the guidelines have their own enhancements for use in connection with this this crime with a weapon. So that's a much harder from a story perspective to tell this story. But but you certainly, you certainly can. There there's a wonderful podcast and it's not mine. So this is a totally shameless plug, but it's called Sometimes It Rains. Well, I guess it's not totally shameless

because I was on the podcast, but it's a great story about an old pro baseball player from the eighties, and he got swept up in a crack distribution case and basically they brought him powder, but they said, we really want crack. Can you cook this for us? So he did it because he was trying to hook up with this girl who he was selling to. And once he cooks the powder, well, that's off the charts. But then when they search him, they find a gun in his house. And a lot of this this story is about the role that this gun played in his federal sentencing scheme. It's super fascinating. But the point is, once you get a gun in the mix, it really complicates, it really complicates things.

Doug Berman: I'm going to start wrapping this up, but but focus on something that I know you all think about a lot. And that's the role of prosecutors here. That I just would love you sort of take on, if there are some prosecutors out there listening to this, you know, how do they kind of operationalize these concerns? Is this something the executive branch just has to kind of go along and get along, or is there possibly a special role for the attorney general and his instructions to the line U.S. attorneys about how to deal with these kinds of cases?

Doug Passon: So talking just federally, I think back when President Obama was President and we had the Holder Memo, Eric Holder, and it was basically a directive to all of the federal prosecutors around the country to ease off of mandatory minimum charging or drug enhancements, those types of things, because let's face it, I talked about how the police have the power to kind of shape the sentencing outcome on the streets. But prosecutors really have the ultimate power because they decide what to charge. And just because they can charge something doesn't mean they have to or should. And that's what the Holder memo was was about, saying you don't have to do this in every case. Right? But they hold all the cards about what to charge and what what kind of a plea bargain to offer because 95, 6, 7 percent of all cases in federal court aren't going to trial. They're going to resolve by plea bargain. Well, guess who has the final say? You know, we're going to make you plead it is 924 C and we're not. You know, that is prosecutorial discretion. So the first takeaway is, sure, there are a lot of wonderful, reasonable people who are prosecutors, but by and large, I don't think anyone should have that much power and authority and discretion in the criminal justice system because bad things happen. And B, it's a culture thing. They need guidance from on high as to what they can and should do. And I guess C, ultimately Congress needs to just start taking some of this power away. And they can do that by getting rid of mandatory minimums, fixing disparities and giving the commission and the the sentencing guidelines, the directive they need to to make those fixes. So there's a lot we could do there.

Mark Allenbaugh: I agree. The commission has made the drug guidelines its number two priority. And one of the things that it does need to do is that safety valve. The safety valve still has not been fixed to comply with the changes from the First Step Act, which, you know, broadened the applicability of the safety valve. So instead, before you had more than one criminal history point, you were automatically ineligible for the safety valve. Now it's up to four criminal history points. And so that's not part of the guidelines yet, even though it's part of the statute.

Hannah Miller: Mark, really quick, if you had to summarize what the safety valve is, could you?

Mark Allenbaugh: It is a way for judges to sentence somebody below the mandatory minimum in certain situations.

Hannah Miller: Like a sentencing exception.

Mark Allenbaugh: It's a sentencing exception for mandatory minimums. Yes.

Hannah Miller: Ok.

Mark Allenbaugh: And it used to be really narrow. And now under the First Step Act, it's been broadened. But the commission still needs to change that formally in the guidelines.

Doug Berman: We're just so grateful for you all to help us to illuminate these range of issues and deepen our understanding and hopefully the listeners likewise even more fully understand why drug sentencing, especially in the federal system, is its own inebriated universe.

Mark Allenbaugh: Yes.

Doug Berman: So, you know, again, have a sober look at just what needs to get done and hopefully we'll see some of the changes, especially. Mark, grateful to you for for making sure we don't forget that there is a new sentencing commission. They've got a lot on their plate. But I'm hopeful that this is among the topics that they'll be looking at. And and so on that, Hannah, I don't know if you got any closing thoughts?

Hannah Miller: Really, really great job shamelessly plugging all the things today.

Doug Passon: Well, thank you, Hannah, for doing this. And Doug B., as always, appreciate it. I'm grateful to be here.

Mark Allenbaugh: Well, thank you for having me as well. I really appreciate it.

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.