

# Drugs on the Docket Podcast

## Season 1.5 Episode 4.5 – Pulsifer v. United States and the future of federal mandatory minimums

### TRANSCRIPT:

**Hannah Miller:** 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.

Over a period of 50 years, Congress waged a War on Drugs and put in place a number of drug-related sentencing laws intended to deter drug-related crimes. After it became evident that punitive laws and mass incarceration were not having the intended effect on public safety, lawmakers began to reform the federal legal system through the passage of legislation like the Second Chance Act in 2008, the Fair Sentencing Act in 2010, and the First Step Act in 2018. According to the Sentencing Project, such reforms reduce the number of people imprisoned for a drug offense by 46 percent between 2007 and 2020. Despite a modest year-over-year decline in the federal prison population, many continue to fight for reform. One Supreme Court case, Pulsifer v. United States, has the potential, should the Court rule in favor of the petitioner, to spare thousands of federal defendants from being subjected to overly harsh, mandatory minimum sentences.

If you like what you hear in today's episode visit [go.osu.edu/drugsonthedocket](http://go.osu.edu/drugsonthedocket) to follow the series.

While we work hard to bring you more content, Doug and I are looking back at topics covered in season one of Drugs on the Docket. Weldon Angelos, our guest in episode 4 of season 1, was sentenced to 55 years in federal prison for three counts of possession of a firearm. These were stacked on top of various marijuana trafficking charges which is what made his sentence so horrifically long. The good news is he was released after a federal court granted him a reduction in sentence and then he was pardoned by President Trump. The bad news is he spent 13 years in prison before any of those things took place. So, Doug, there's a lot that we could unpack from that episode but

I want to start with a basic question. What is a mandatory minimum and what was the original intention of using mandatory minimums for criminal sentencing as it relates to drug offenses?

**Douglas Berman:** The move to mandatory minimums, in a range of settings, is at times based on a desire to have just consistent sanctions associated with specific offenses. And here's where I like to throw in, not to show support for mandatory minimums, but to highlight that I think a lot of what concerns us about mandatory minimums are their severity, rather than that they're mandatory or minimums. Or maybe another way to say that is the minimum is not that minimum. And so what's my example here? Here my example is there's a mandatory minimum for illegal parking, where there's even a sign up there that says, you know, the minimum fine you will get if you're illegally parked in this handicapped spot is 250 dollars. That's technically a mandatory minimum. And I bring up that example because this is where the next kind of layer of kind of rationale often drives mandatory minimums and that relates to trying to deter effectively. The notion being if people are told and know that there's a relatively severe minimum that will apply to their conduct then they won't engage in that conduct. And I think that probably works pretty well when we're talking about handicap parking though I use that example also because we don't see the potential injustice as if the mandatory minimum, suppose it was literally five years in prison. Right? I think we'd be a little troubled if everybody who ended up in a handicapped parking spot would be subject to five years incarceration, no ifs ands or butts. Though, and this is why I've picked that number, that's what we've then carried over to the drug trafficking context, and it's where both this notion of everybody should get an equal punishment, but especially we want to be particularly inclined to deter certain behavior. That's where we've gotten five years. The crack powder disparity, which we've talked about in another episode, was the most severe example where simply possession of crack, originally, could get you a five-year mandatory minimum. And I do think the supporters of these laws would say, hey, we want to heavily deter this activity.

Another example, the example that comes up in the Weldon Angelos case, were a series of mandatory minimums associated with possessing a gun in conjunction with drug trafficking. And there literally were statements on the floor of the House when the idea of a five-year mandatory consecutive, you know, added on to the underlying drug punishment. There were representatives saying things like, we want drug dealers to know if you're going to do your drug dealing, leave your guns at home. Right? And that was the thought, that this severe sanction would deter this additional behavior. The problem of course is it doesn't. And there's a little bit of a story of Deterrence Theory, which is if punishments are not consistent, and particularly if they're not swift and certain, then people don't really uh feel the deterrent effect. And then this gets to the reality of how mandatory minimums get applied. The problem with turning to mandatory minimums and expecting them, especially these severe ones, to have a significant deterrent effect whether it's on drug trafficking or a weapon possession or the like, is they don't get applied consistently. Prosecutors can and do vary the way in which they apply these mandatory minimums, partially based on their own sense of justice, maybe they think it would be too severe in a particular case, partially just because of case management realities. Uh, oh, you're willing to plead guilty very quickly, okay. I'll take the mandatory minimum off the table and that will allow us to have a more efficient approach to these cases and in fact that's what we see in the data time and time and time again for especially the most severe drug mandatory minimums, gun mandatory minimums. If you go to trial, you often get hammered with them. And of course the judge, because they're mandatory, can't go below what the statute otherwise provides, but if you're willing to plead guilty, or otherwise cooperate with law enforcement, then those mandatories are taken off the table. And so we don't get the consistency, either in the same punishment being fairly applied to everybody involved in this activity, nor do we get the deterrence because there's kind of well-known differences in who the law ends up applying to and how it gets applied that undercuts that rationale as well.

**Hannah Miller:** So, to clarify, prosecutors have discretion to either apply mandatory minimums in their prosecutorial duties but judges, if someone goes to trial cannot diverge from those mandatory minimums.

**Douglas Berman:** Yeah that, that's exactly right and the exactly key kind of underbelly of how mandatory minimums function. They serve to tie the hands of judges, when there's a conviction. The convictions are often through trial and these mandatory minimums are still on the table, but sometimes it can be part of a plea as well. Or as happened in Weldon Angelos's case, he was offered a plea that would only keep one of his mandatory minimums on the table and so he would be facing 15 years but because he turned that plea down he then was facing multiple, consecutive mandatory minimums. The threat in the original demand letter from the prosecutors was, you'll be looking at 105 years. He ultimately got acquitted on a couple of those so he only ended up facing 55 years. But it was, you know, then judge Paul Cassell, who was on that episode, highlighting that his hands were tied at that point, even though indisputably the evidence showed Weldon Angelos was not a major kingpin who would in any way shape or form justify getting that kind of extreme sentence.

**Hannah Miller:** Are the laws that resulted in Angelos's lengthy prison sentence, are they still on the books or have things changed since he was tried in 2004?

**Douglas Berman:** Things have changed. A number of advocates on both sides of the political aisle, very conservative folks like Senator Mike Lee out of Utah, uh very liberal folks like Cory Booker out of New Jersey, all agree that these mandatory minimums that ended up applying to Weldon were just way too extreme in operation. And so the First Step Act, passed in 2018, included a provision that said you don't get that added 25 years. Again remember that was the kicker in Weldon's case. Five years for the first gun charge but then 25 years for each additional one, even though this was all part of one prosecution. And the new law now says no, no, the only time you get that super maxed out mandatory minimum of 25 years, is if you've already gotten convicted, served your time and then get truly a second offense uh subsequently that includes a gun. If you have multiple gun charges that you're convicted of in one sequence, it's just going to be five, plus five, plus five. Now they're still stacking, and it's still possible that pretty long sentences can be produced, especially in some cases where you know law enforcement will wait sometimes weeks to see a number of drug sales go forward, or a number of other activities that could trigger if a gun's involved, these extreme sentences. And so there's still concerns. certainly that I have, that these mandatory minimums can function in unjust. But the most extreme version of what Weldon faced, that produced his 55-year sentence, that's now been amended so that other people can't be subject to those kinds of extreme terms.

**Hannah Miller:** And there's also other legislation in the pipeline, correct? The Smart Sentencing Act?

**Douglas Berman:** Really for about the last two decades, there's been a rich understanding that mandatory minimums can be too extreme and so there have been a variety of bills, and the Smart Sentencing Act is the latest version of

it, that would create kind of a general authority for judges to go below a mandatory minimum if certain criteria are satisfied and they put their reasoning on the record. And that would be subject to appeal, so that if an appellate court were to decide, if a prosecutor were to object, that there was a justification for going below the mandatory minimum, an appeals court could say nope, this is not one of those cases that ought to get a break. But fundamentally, and this is an important point to kind of emphasize in this context, prosecutors really like having that ultimate power to decide who's subject to a mandatory minimum and who isn't. That enables them to move plea negotiations along and enables them to get cooperation as they're trying to break up, you know, whether it's drug conspiracies or other kinds of group criminality. And so, prosecutors have been pretty consistently oppositional to anything that would categorically enable judges to say, oh, in this case, I should be able to go below the mandatory minimum. And so, although these bills have gotten a range of support through the years, none of them have really seemed to get close to passage, in large part because the Department of Justice, quite aggressively states, we need these tools and we need these tools to be in our hands only. We need the discretion to make these choices.

And I will add, in addition to providing substantial assistance, cooperating as one way through the prosecutor's office to get out from under a mandatory minimum. There's also a statutory provision called the Safety Valve which creates truly a safety valve for defendants who are low-level and don't have other aggravating factors, allows them to get below the mandatory minimum. And that's been a very, kind of, important exception or carve out to the severity of mandatory minimums for the most low-level drug offenders. And I think that's been itself part of where prosecutors are able to say, hey look, we've already changed our law to let the low-level folks, the kind of folks that you're worried are being unfairly subject to these mandatory minimums. For all the other folks, you know, we should have the the power and it shouldn't be in the hands of the judge to always go below the mandatory minimums.

**Hannah Miller:** So, speaking of the Safety Valve, this is under scrutiny currently because it's going to come before the United States Supreme Court. What can you tell us about the case and how it might influence the continued evolution of mandatory minimums?

**Douglas Berman:** As there was praise for the Safety Valve, there was concern that the definition of limited criminal history was too limited. And in particular, this gets to broader structural concerns about who's over policed and different disparities that are baked into our system. The strong data and advocacy highlighted that particularly people of color who may have some criminal history, but it's a low-level buy and bust or you know minor state-level drug conviction, maybe some other very low-level convictions at the state level when they were juveniles, they were getting excluded from the Safety Valve because they just would have too much criminal history, even though it seems like they're the kind of low-level offender that the Safety Valve ought to apply to. And again, Congress, to its credit, responded to these concerns through the First Step Act, past in 2018, and expanded the range of criminal history that one could have and still be eligible for the Safety Valve.

Now here's where we get to the Supreme Court story. Not surprisingly, as Congress wrote, okay, you can have more criminal history, they tried to make an elaborate set of limitations on that, oh, you can't have this many convictions, oh, you can't have a violent conviction, oh, you can't have been on probation or parole at the time of one of your new convictions. Or else I think they wanted to say if any of those criteria are satisfied you're ineligible for the safety valve exception to the mandatory minimum. However, they used the word and instead of the word or in the statutory text, and a bunch of courts have said, huh, we're supposed to read the text and be faithful to the text, seems like Congress by using the word and says you have to have violence in your offense and be on probation or parole and have some of these other criteria, and they all have to be satisfied for you to not be eligible for the safety valve. And reading and as and would seem to make almost every drug offender eligible for the safety valve. Again, I don't think that's what Congress intended. I think they imagined it to be a much more limited expansion of who's eligible for the safety valve, but the strict text of the statute has to be read to really almost apply to everybody unless they have the most extreme criminal history. And this has split the circuits. Some circuits have said, well, it's clear Congress didn't mean to expand the safety valve that much. We think the right way is to read and as or. And others are saying, it says and, we're supposed to read and as and. It's literally about whether and means or. And I don't know what the court's going to do especially.

And this is the last piece of it, obviously making more drug defendants eligible for a below mandatory minimum sentence is something that progressives have been advocating for, seems like a more liberal kind of outcome. However, conservatives have historically been very rigorous in saying the text of a statute is what controls, even if you think you know what Congress intended. That's not what they passed. They don't pass their intent, they pass the language of the statute, and so your duty bound, you must faithfully apply the statute, even if it

seems contrary to what you think Congress's intent is. And so I'm actually quite excited to see how some of the conservatives on the Supreme Court address this issue because it seems like a setting in which they're kind of statutory interpretation principles will run hard against, you know, kind of more conservative values in the criminal justice setting. And oral arguments are coming up in a few weeks. I suspect it will be one of those cases that other folks who aren't even following the criminal justice issues closely will be interested in because of the way in which the sort of the political dynamics play out. And of course an important point here. Most of the more liberal, progressive justices and judges on lower federal courts, they want to look at Congressional intent. They're eager to say we should have a statute influenced by Congressional intent. Are they going to say that here when that would seem to push away from what might be their preferred interpretation, or are they going to have a good time saying, hey, the text is the text.

**Hannah Miller:** If SCOTUS decides that the safety valve has a very broad reach, how will this impact congressional action or other stakeholders in our federal legal system?

**Douglas Berman:** If it's interpreted very broadly, I could imagine, particularly the Department of Justice, going to Congress and saying, hey Congress, change that and to an or, you didn't mean it to be so broad, and you used the wrong term and now we need to, we need to fix that. The sentencing commission, to its credit, has always incorporated a version of the safety valve into its guidelines. And its logic has been, hey, if these are the criteria that Congress says should allow a sentence below a mandatory minimum, then these are the criteria that we ought to use to allow for a reduction in the guideline sentencing range. Right? And so there's both the safety valve that is a statutory limit on whether you can go below the mandatory minimum and then there's a separate set of provisions in the guidelines that allow for lower sentences across the board if you meet those same criteria. And the commission itself, knowing this debate was percolating, was like, okay, we're going to use the exact same language. We'll wait to see what Congress says and then we'll figure out what to do after that. And so it's not just an issue for the few thousand, it's not really a few thousand, more than that, defendants every year that might be able to argue for below the mandatory minimum. It's also going to end up being a definition of the criteria that will shape the guideline range. In the vast majority of the cases, what the guideline is calculated to be has a real gravitational impact on what the sentence will be, and that's among the reasons why this is going to echo through drug sentencing for years and years to come, even if Congress doesn't react. If Congress reacts, then the Commission may react and on we go. I think the safety valve has been very valuable in order to allow for more equity and justice in drug sentencing but our efforts to do a law better sometimes is only good for the lawyers to have lots of things to fight over and we get caught up in these technical debates, like does and mean or, rather than actually have a chance to look at individual cases and figure out is this person deserving of a longer sentence or a lower sentence.

And I'll make one last point here, which is why this is not just a debate of interest in federal law but this really is a variation in one symptom of the broader disease of the way in which criminal history has become, I think, a deeply problematic aspect of how a lot of our sentencing structures function. And it's only been the last, you know, decade or two that we fully become aware of how much structural bias is built into our criminal history points. Right? We've had a tendency to say, oh, if you've got criminal history, that's a real valid thing to consider in giving you a longer sentence later, but I trust most people would be willing to admit that oftentimes they will do things that could lead to criminal history but they quote unquote get away with it. I'm thinking particularly here, uh I was talking about traffic laws before, right, who's got a long list of speeding tickets? It's not necessarily the people who've done the most speeding. Right? It's the people who have gotten caught the most speeding. We recognize that there's all sorts of, you know, variations in enforcement on our roadways. Well that's certainly true when it comes to our drug offenses. That's certainly true when it comes to our gun offenses. A lot of these public order offenses, it may be not who's committing the crimes, but rather which communities are being heavily policed, and these crimes are being most rigorously enforced. That's what drives criminal history. And yet, if our sentencing system puts all of this weight, whether it's, you know, ability to get below a mandatory minimum, whether it's what your guideline range is, whether your subject to three strikes laws, another example of a mandatory minimum in some other settings. Those are all hinging off of criminal history that I think we've more and more come to understand are reflective of a range of biases in different ways.

**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 adviser. The music is composed by Joe DeWitt.