

# Drugs on the Docket Podcast

## Season 1.5 Episode 5.5 – Criminal history reforms to the Federal Sentencing Guidelines

### 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 US court decisions impact drug law and policy and continue to shape the War on Drugs. I'm your host, Hannah Miller.

The US Sentencing Commission is an independent agency in the judicial branch of the federal government. It was created by the Sentencing Reform Act of 1984 in response to widespread sentencing disparities. To combat these disparities, the commission is tasked with establishing sentencing policies and practices known as the guidelines for federal courts. It also conducts and distributes research on federal crime and sentencing issues and advises the legislative and executive branch in the development or amending of sentencing policy.

In this episode, we're unpacking a recent amendment to the guidelines, which, if enacted by Congress, would result in a reduction in sentence for thousands of incarcerated individuals, some of whom would be eligible for early release as soon as the changes go into effect.

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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. Episode 5 from season one is what I lovingly refer to as Doug's on the Docket because we had two Doug's. You, Doug Berman, and our friend Doug Passon who hosts the podcast, Set for Sentencing, and shared some insights from his experience helping attorneys and clients craft their sentencing narratives and also help them produce mitigation videos during sentencing. But let's back up. When someone is being charged with a federal crime, there's sometimes a trial but nine out of 10 defendants will take a plea deal. And after a conviction, there's a sentencing process and a hearing where the judge imposes a sentence. In the federal system, what is the nature of that sentencing process that the judge uses to determine what the punishment will be?

**Douglas Berman:** In an earlier era, through most of the 20th century, there wasn't much of a sentencing process. Judges had really broad discretion to pick almost any sentence between whatever the statutory ranges were and that could mean probation sometimes all the way up to a life sentence. And that was rightly perceived as subject to an awful lot of disparity and a huge amount of uncertainty and that prompted something that I've studied whole career around which is the effort to bring more law to sentencing. And in the federal system that's taken the form of the Federal Sentencing Guidelines. There's also mandatory minimums, we've talked about that in some other episodes, which also shape and structure the work of prosecutors and judges and very much influence sentencing outcomes.

But since 1984, when Congress passed the Sentencing Reform Act, there have been these guidelines. They're written by a special and seems very sensible which is they create a set of recommended ranges that are entirely based on a grid that uses on one axis the seriousness of the offense. And of course, that makes sense if the offense is less serious, we think there should be a lesser recommended sentence, if it's more serious it should be a longer sentence. And so, there's what's called the severity level, or the offense level. That's built on a lot of rules that look at all the intricacies of the offense. You know, did it involve a lot of money if it was a fraud? Did it involve a lot of drugs uh if it was a drug? Did it involve a weapon? All those things get worked into the guidelines that then convert to this offense level that maps onto this grid.

Then there is the other axis which again makes a lot of sense and it's built around a defendant's criminal history. Logically, we say if you're a first offender you probably shouldn't be facing as long of a recommended sentence as you would if you're a repeat offender, especially if you've got lots of criminal history and maybe violent history or otherwise involves more serious offenses. And so, the guidelines that were written by the Sentencing Commission try to capture that as well. And as might be clear as the way I'm describing this, there are so many complications in every aspect of

this process. The way in which the law writes up, here are the rules for deciding how serious your offense is, and the way in which the law writes up here's how we're going to categorize how serious your criminal history is, is in some respects as varied as human beings are and criminal offenses are. And at one level that's great because we hope the guidelines capture all the nuances of individuals and their misdeeds but another level, it's a lot of work for lawyers and a lot of uncertainty that we were trying to get away from now not based on the discretion of individual judges but based on how we're going to interpret different legal provisions and then how that's going to map on to the sentencing process.

**Hannah Miller:** So, how do crimes related to the use or trafficking of drugs play into this process for calculating a sentence? I know that there are a multitude of matters that the sentencing guidelines try to address in terms of setting a punishment so are judges consistent on these matters?

**Douglas Berman:** The drug offenses I think are ones where we particularly see at least the potential for significant disconnect between what the guidelines emphasize and what judges think are central to making fair and effective sentencing decisions.

The guidelines are largely built around the quantity of the drugs involved and at one level that makes perfect sense. Right? If you're involved in trafficking a very small amount of drugs, we don't think that's as serious as if you're trafficking a large amount of drugs. Similarly, the nature of the drug. So, marijuana trafficking gets a different guideline, usually a lesser one, than fentanyl trafficking or methamphetamine trafficking. And so those are all factors that are built into the guidelines.

However, they tend to really dominate how long they will be so that a larger quantity of drugs will always lead to a much longer recommendation than a smaller quantity. But judges often recognize that quantity can be a very poor proxy for really how culpable and serious the offender is. And of course, the classic example here are persons who serve as drug mules. The mule has no idea what kind of drugs are in the package or how much of the drugs are in the package, and yet that's what ends up dominating the guideline calculation.

And so, in cases like that, judges are often inclined to say, well, the defendant wasn't focused on that, they were just doing this sort of courier job. I don't think I should give so much weight to the fact that this one involved 10 kilograms whereas this other one only involved one kilogram. And another layer that gets to drug offenses is many judges, I think sensibly so, say, oh, and this person was doing this courier work because they themselves are addicted and they needed to raise money or you know they were getting paid just by being given some of the drugs, and that's what drove them to commit this offense.

Uh, we rightly, I think, concern ourselves with the way in which addiction and other challenges with drug use drive people into criminal activity and that's not incorporated into the guidelines at all, and as a result, judges often want to include that factor in their own judgment about what length of sentences actually needed, even though the guidelines don't speak to that directly.

**Hannah Miller:** All right, so, speaking of the US Sentencing Commission, they voted to amend the complicated criminal history rules and in August they also voted for retroactive sentence reduction for eligible incarcerated persons beginning February 2024. So, the guidelines aren't perfect, and it's made even more complicated by the fact that there's a human analysis component to setting a punishment using the guidelines.

So, why did the commission make these moves? Who does this vote impact? And what do you think will be some of the challenges for implementing the rules going forward?

**Douglas Berman:** The commission to its wonderful credit has literally dozens of really sophisticated data analysis, uh, specialists and they gather terrific data about everybody who works their way through the federal sentencing system. They look to break down type of crime, type of criminal history, and match that up with recidivism. And their studies show again, and again, and again, persons in criminal history category one, the least criminal history amount, are least likely to recidivate, whereas people in criminal history category five and six are the people most likely to recidivate.

And so, the commission analyzed and realized that if some of your earlier offenses were committed while you were on probation or while you were on parole or while you were on supervised release, in other words your status was you were being watched by the criminal justice system, the status is not a good predictor of recidivism. Tens of millions of people use illegal drugs and never get in trouble for that, but if you're under criminal justice supervision you're much

more likely to be subject to drug testing, to be picked up for illegal drug use, and then get even more criminal history for that that just snowballs in this way.

And so, they passed a rule, and it's a complicated rule, that says, we're not going to use those status placements as a basis to ramp up your criminal history, especially for lower-level offenders. The other thing that the commission realized, and their evidence showed really strongly, is the group that's currently in criminal history category one, meaning the people with the least criminal history, really divide into two big groups: people with literally no criminal justice contact at all, what now are going to be called zero-point offenders, that they've got zero prior criminal activity or at least prior criminal history, and then other people that had been put in criminal history category one who may have had one point of criminal history. And you can get one point of criminal history from a relatively low-level offense. And so, you would still be in the lowest category, this is between points and categories, you'd be in the lowest category for the guidelines, but you didn't have zero points of criminal history. And the commission's data showed very strongly that the people with zero points of criminal history have very low recidivism rates. The people with one point of criminal history have low recidivism rates but not as dramatically low as the so-called zero-point offender.

And so, the commission created a new zero-point offender rule to have the recommended sentence be even lower for people with zero points than the people with a little bit of criminal history. Fundamentally, what the commission was saying is our data shows our rules don't currently capture the nuances of what the data shows recidivism is really about, and we want to adjust our criminal history rules to do that.

Now, whenever the commission changes its guidelines to make them more lenient, and this of course, both these moves about criminal history would reduce the sentence that individuals would otherwise be facing going forward, the commission then has to make an independent decision about whether to make those new rules retroactive. And what that fundamentally means is all the people currently in federal prison, and that's literally now 160,000 people, should they get the benefit of these new reductions? Of course, they'd have to qualify for that, right? They'd have to be zero-point offenders, as the commission defined it, or they have to be people who got these status points and potentially got longer sentences because of it. Should they get the chance to now go into court and say, oh, I would have gotten a lower sentence if those new rules applied to me retroactively. Please lower my sentence. And the Commission in a notably divided vote, the commission doesn't always divide, ultimately said, yes, we're going to make this retroactive.

But there was real concerns, and I think justifiable concerns, that everybody's going to apply for this, even if they're not really eligible. So, we may literally get 90,000, that's what one of the estimates said, literally more than half of the entire federal prison population will be filing in court saying, give me a break under these new criminal history rules. When in fact, probably only about 15 or 20,000 are actually eligible. Now, 15 or 20,000 is a lot of people so it's a big deal even if only this narrower group benefits from these new retroactive rules. But courts are already worried about, and I think rightly worried about, that almost everybody in federal prison is going to apply to try to get the benefit of the rule even if they may not in fact be eligible for getting a reduced sentence.

**Hannah Miller:** As it pertains to these laws being applied retroactively, in what ways will that benefit a drug defendant and in what ways will this maybe hinder the drug defendant to get a good outcome?

**Douglas Berman:** The story of zero-point offenders versus the story of status point offenders may really really cleave on drug defendants a lot. Right? That for the federal system there are very few first-time drug offenders, particularly without, you know, kind of a lot of aggravating factors, and the kind of aggravating factors that might undermine getting the zero-point offender to begin with.

So, if you have any violence involved in your offense, then you can't get the zero-point offender breaks. So, you know, even if it's the occasional first drug trafficker that comes into federal court, probably they're unlikely to be zero point eligible, so I would expect, relatively speaking, less drug offenders are going to be in that bucket for seeking reductions. But then flip it over, I would expect drug offenders to be disproportionately among the group that have these status point stories.

And then your question, rightly so, leads me to sort of wonder, like, are federal judges going to be categorically disinclined or more inclined to give lower sentence to drug offenders under either of these buckets because of the widespread, I think, view that the federal system punishes drug offenders particularly harshly.

**Hannah Miller:** How would this work its way through the court if someone was like, I think that I qualify for this?

**Douglas Berman:** Thankfully, we've got some history here. So there have been a series of mostly drug related retroactivity rules in the past, when they lowered crack sentences twice based on a variety of dimensions and then about 10 years ago, they actually lowered all drug sentences across the board and made that retroactive. And the simple story is there's a provision in federal law that says judges can adjust the sentence without having a full resentencing. It can literally be done on the papers and it can be a submission, often the federal defender office in every district tries to come up with a list of people who have been sentenced that they think would be eligible that are still in prison and they'll submit that list to the courts and the courts will try to do this kind of rotely or matter of factly based on the presentence report and how the initial sentencing went through.

Here's where I think this is such a big challenging reality that's different from previous ways of doing it. The previous reductions were, it's a drug offense, you automatically get these points because it was a drug offense, and so all the people who weren't involved in drug offenses, even if they submitted for this, it was very easy for them to be like Oh no you're a fraud offender forget it, you don't qualify for these new rules. You were involved in an immigration offense, no, that's just not what this is about.

Here, because these are criminal history rules that apply to everybody in every kind of case, you got to do some real digging into the case to even figure out if the person's possibly eligible. In addition, unlike the drug retroactive rules from previous years, there are very few exclusions. The process of thinking through not just who it applies to, but should they get the benefit, was pretty simple.

Now, with criminal history, not only is it a lot more complicated, I suspect we'll see prosecutors in a lot of cases, especially with respect to the status point, but maybe even with respect to the zero-point offender, because of the way it's written, they may come in and say, oh, there actually was more criminal history, we just didn't bring that in at the time because the sentence was already going to be long enough before. And so there might not just be debates on who's eligible, but debates over should they even get the benefit of this because of the way the case was processed before? And you know, that comes up in other settings as well, but it's going to be an incredible amount of work, I think, for defense attorneys to identify these cases, mostly it's going to be public defenders, and bring them to the courts effectively. For prosecutors to decide, oh, are they going to be just fine with this and basically agree, yes, that person deserves to get the benefit, or are they going to fight that because they don't think they either qualify or merit that treatment? And then, ultimately, for the judges to decide a lot of cases whether they're eligible or not.

And that's actually why this was a split vote, was because the commissioners were very concerned that this could truly overwhelm the courts and that there's a risk, particularly that we were talking about disparity before, that there isn't consistency around the country about how the cases even get brought to the court to get the benefit of the new rules, let alone how they get processed, and whether or not we will see, district by district, a consistency in who gets a reduced sentence under these new criminal history rules.

**Hannah Miller:** Has there ever been a task force setup to do this, that you can circumvent the court altogether?

**Douglas Berman:** Yes, some people have said there's got to be a better way but never have we sort of created the better way. I think when Congress first set up this system where they expressly authorized the commission to make its changes retroactive, it never imagined the federal prison population would be hundreds of thousands, and maybe also didn't expect the complications of the guidelines would be so, so massive.

And I think you're exactly right that this is part of the broader set of issues that is really driven by, you know, mass criminalization and mass incarceration. When we make the system so big, not only has it become harder and harder to do justice going forward, we make it too easy to make the argument, we can't fix anything because it would just be so massive to try to fix everything, and it's going to be so much unfairness and who gets the benefit and who doesn't and all that.

And that was kind of part of the arguments in the Sentencing Commission. They voted unanimously for these changes to the rules. Once we've made that judgment unanimously, we ought to make earlier people eligible. That's just what justice would call for. But then the other folks are like, yeah, that may be what some of you think justice calls for. This is going to be a bloody mess and it's going to be unjust to some degree when some people get the benefit and other people don't.

**Hannah Miller:** And speaking of analysis, so Mark Allenbaugh was the other guest on episode five and he works with [sentencingstats.com](http://sentencingstats.com) and gave us a tutorial on a number of trends across judges and sentencing. And so, I can

imagine that all of this data that's going to be collected there, there should be some type of way to look at discrepancies in the way that these new rules are applied.

**Douglas Berman:** Absolutely and the commission has historically done a very good job of keeping track of how many of these sentence reduction motions are brought in each district and what the grant rate is. Lots of prisoners will say, I should get that new reduction, and the judge has to first figure out, do you fit within the new rules? But then they have also authority, even if you technically fit within the new rules, if I think it will be unsafe to let you out earlier, and of course the classic version of this is if they've got a terrible prison record, often the prosecutor will highlight that and the judge will say, okay, you're technically eligible but I'm not giving you the reduction because I don't think it would advance public safety, you've got to finish out the original term. That gets coded as a denial.

You know, yet another layer of this, just to highlight how I guess sympathetic I am to the courts as they are going to be confronting some of these matters, the commission, I think sensibly, provided that even once their new guidelines go in place, the retroactivity part of it can't be given effect until February of 2024. So, they created kind of like a six-month buffer zone to let the courts sort all this. And my understanding is that Federal Defender offices, and maybe prosecutors as well, and certainly judges, are thinking about well, let's make sure we put to the front of the line the people who, if they get the benefit of this new rule, would get released right away.

Even sorting through how to sort through this is subject to a lot of discretion and that itself may influence some of the grant or denial rates. Right? This is hard work and because it's done en masse, there'll be occasional cases that we'll see and there'll be claims of unfairness or uncertainty, especially if they get appealed, but this is going to get done on the dockets. Right? It's going to be done by district judges looking at their cases and the arguments that are brought to them about the application of these rules, but ultimately, it's going to be very hard to assess, did this go well or poorly, because there's so many stories in there that are hard to unpack. I'm hopeful this will get as much attention as it deserves because it's a huge deal. I mean literally we're talking like, I haven't done the full calculations yet, but a million plus years of federal prison time. That's kind of a big deal.

**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.