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SENTENCING GUIDELINES: Toward Sentencing Reform for Drug Couriers

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TOWARD SENTENCING REFORM FOR DRUG COURIERS*

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INTRODUCTION

A typical Second Circuit drug courier prosecution involves a foreign defendant, often a woman,[1] working for an unapprehended supplier who is operating from abroad. The defendant is arrested at Kennedy airport, pleads guilty and is sentenced in proportion to the quantity of drugs secreted in her digestive tract, shoes or luggage. The proper sentence is the only matter seriously contested in such cases.

Until recently, a principal sentencing issue in drug courier cases has been whether the defendant was sufficiently aware of the amount of drugs on her person so as to be held accountable for it.[2] In its decision in *United States v. de Velasquez*,[3] the Second Circuit eliminated this issue, upholding a norm of strict quantity-based sentencing for all cases of drug possession.[4] In *de Velasquez*, the court concluded that " a defendant convicted of importing drugs may be sentenced for the total quantity of drugs in his possession even if he thought he possessed a lesser quantity. . . . [and] even if the total quantity was not foreseeable."[5]

While the Court in *de Velasquez* ruled out downgrading the base sentence because of a defendant's mistake about

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[1] For an enlightening discussion about women drug couriers in the New York justice system, see Tracy Huling, *Injustice Will Be Done: Women Drug Couriers and the Rockefeller Drug Laws* (Correctional Association, 1992).

[2] *See, e.g.*, United States v. Martinez, 987 F.2d 920 (2d Cir. 1993).

[3] 28 F.3d 2 (2d Cir.), *cert. denied*, 115 S. Ct. 679 (1994).

[4] *Id.* at 6.

[5] *Id.* at 3. *See also* United States v. Ivonye, 30 F.3d 275 (2d Cir. 1994); United States v. Ekwunoh, 12 F.3d 368 (2d Cir. 1993); United States v. Imariagbe, 999 F.2d 706 (2d Cir. 1993).

weight,[6] it did not foreclose a downward departure from the base sentence.[7] The court cautioned, however, that a downward departure based on mistake as to weight would be upheld only in unusual cases where "the gap between belief and actuality was so great as to make the [Sentencing] Guideline grossly unfair in operation."[8] Even this limited avenue of relief under the Sentencing Guidelines is closed to drug couriers who are subject to five- and ten-year statutory minimum sentences.[9] For a defendant facing a mandatory minimum sentence, the only avenue of relief is through fruitful cooperation with law enforcement.[10]

The inevitability of the straight-weight sentence also draws attention to an underlying issue of sentencing policy: the emphasis that drug weight receives as a sentencing factor, particularly for offenders who have limited awareness and no ecomomic stake in the weight of the drugs concealed on their persons. This Article proposes that a courier's accountability for drug weight, as a matter of rational sentencing policy and justice, should be in proportion to his involvement as well as his stake in the particular shipment and in the ongoing enterprise. Couriers who are categorized as minor participants, in both the shipment and the ongoing enterprise, should bear a correspondingly diminished responsibility for the weight of the drugs. Moreover, Congress should abolish weight-based minimum sentences for this category of offender.

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[6] *de Velasquez*, 28 F.3d at 6.

[7] *Id.*, 28 F.3d at 6; *see also Ivonye*, 30 F.3d at 276 ("We write briefly in this case only to emphasize that . . . the *[d]e Velasquez* ruling does not preclude consideration of a downward departure."); *Imariagbe*, 999 F.2d at 708 ("Perhaps one might hypothesize an unusual situation in which the gap between belief and actuality was so great as to make the Guidelines grossly unfair in application, meriting at least a downward departure . . . . ").

[8] *de Velasquez*, 28 F.3d at 6 (quoting *Imariagbe*, 999 F.2d at 708); *accord Ivonye*, 30 F.3d at 276.

[9] *See* 21 U.S.C. § 841(a)(1) (1988); 21 U.S.C. § 841(b)(1) (1988).

The applicability of the 10-year mandatory sentence for possession of more than one kiligram of heroin was the only issue on appeal in *Ekwunoh*. The Second Circuit decided that the district court's refusal to impose the 10-year mandatory sentence was improper. *Ekwunoh*, 12 F.3d at 369.

[10] 18 U.S.C. § 3553(e) (1988); UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, § 5K1.1 (West 1994) [hereinafter "U.S.S.G."].

I. THE *DE VELASQUEZ* CASE

When Ana Marín de Velasquez passed through customs at Kennedy Airport upon arriving from Colombia, an inspector found 168 grams of heroin hidden in the soles of her shoes.[11] Although she admitted to having knowingly ingested heroin that turned out to weigh 636 grams, she disclaimed any awareness of the heroin in her shoes.[12] According to Ms. de Velasquez, her supplier had told her only that her shoes would identify her to her New York contact.[13] She maintained her ignorance of the drugs in her shoes before the probation department and in a letter to the sentencing court.[14]

A. *The Decision of the District Court*

The district court imposed a forty-six month sentence that was based upon the total amount of heroin recovered from the defendant's shoes and digestive tract.[15] While the sentence was the most lenient that could have been imposed for that quantity of heroin, it was nine months longer than the minimum sentence available for the ingested heroin alone.[16] The district court denied the defendant's motion for a sentence reduction. The court reasoned that a reduction was foreclosed by the Second Circuit's recent opinion in *United States v. Imariagbe*[17] which held that drug couriers need not know the full amount of heroin on their persons in order to be sentenced for that amount.

B. *The Decision of the Second Circuit*

On appeal, the defendant urged that the weight of the heroin in her shoes had to be discounted on due process grounds, not only because she did not know about it, but be-

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[11] *de Velasquez*, 28 F.3d at 3.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 4.
[16] *Id.*
[17] 999 F.2d 706, 707 (2d Cir. 1993).

cause it was objectively unforeseeable.[18] In affirming the district court's decision, the Second Circuit reaffirmed *Imariagbe*, and went on to hold that quantity-based sentences for drug possession must be imposed without regard to foreseeability.[19] The court held that the sentencing limitation based on "unforeseeability" is only applicable in drug conspiracy cases in which the defendant is to be held accountable for drugs possessed by another.[20]

The court of appeals maintained that "there is nothing startling, or even notable, in the conclusion that a defendant who knows she is carrying some quantity of illicit drugs should be sentenced for the full amount on her person."[21] Indeed, "straight weight" sentencing for drug couriers is not a remarkable development, given the clear command of the Sentencing Guidelines[22] and the logic of Second Circuit precedent, which generally holds the knowing drug possessor/distributor accountable at sentencing for unforeseen aggravating circumstances.[23]

If the decision in *de Velasquez* was unremarkable, however, it was by no means dictated by the Sentencing Guidelines or by Second Circuit precedent. Indeed, the Court in *de Velasquez* considered and rejected a viable alternative: to limit the courier's culpability to the weight he could reasonably have foreseen to have been placed on or in his person by the sup-

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[18] *de Velasquez*, 28 F.3d at 4.

[19] *Id.* at 4.

[20] *Id.* at 6; *see* United States v. Martinez, 987 F.2d 920, 926 (2d Cir. 1993).

[21] *de Velasquez*, 28 F.3d at 5.

[22] Reference to U.S.S.G. § 1B1.3 demonstrates congressional intent to make drug couriers accountable for all quantities of drugs with which they are directly involved without regard to the issue of reasonable foreseeability. Concerning the requisite mens rea for drug quantity, the Sentencing Guideline provides that "a defendant who transports a suitcase knowing that it contains a controlled substance . . . is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of the controlled substance." U.S.S.G. § 1B1.3, illustration (a)(1).

[23] *See, e.g.*, United States v. Obi, 947 F.2d 1031 (2d Cir. 1991) (upholding mandatory minimum sentence where defendant unaware of quantity of narcotics involved); United States v. Pineda, 847 F.2d 64 (2d Cir. 1988) (upholding mandatory minimum sentence where defendant claimed he was unaware of quantity of narcotics involved); United States v. Falu, 776 F.2d 46 (2d Cir. 1985) (upholding uniform double penalty for selling drugs near a school); United States v. Pruitt, 763 F.2d 1256 (2d Cir. 1985) (upholding uniform double penalty for selling drugs to a minor), *cert. denied*, 474 U.S. 1084 (1986).

plier as part of a "jointly undertaken criminal activity."[24] This approach would be reconcilable with the Sentencing Guidelines, as well as the Court's opinions in nonpossessory drug conspiracy cases, both of which limit a nonpossessing drug conspirator's sentence to the "foreseeable weight" distributed by coconspirators.[25]

II. REASONABLE APPLICATION OF WEIGHT AS A FACTOR: *UNITED STATES V. EKWUNOH*

The "foreseeable weight" approach previously was adopted for a drug courier by the district court in *United States v. Ekwunoh*.[26] In its review of the sentence imposed in *Ekwunoh*, the Second Circuit reserved judgment on the applicability to drug couriers of foreseeable as opposed to actual weight, but overturned a sentence based on foreseeable weight because it found that the actual weight possessed was foreseeable by this particular courier.[27]

Caroline Ekwunoh was arrested when she went to the airport at the behest of her boyfriend to receive a shipment of heroin that had been flown in from Nigeria.[28] She was instructed to pay $2,000 for the shipment.[29] The drug source, a confidential informant for the Drug Enforcement Administration, accompanied the defendant to her car and handed her an attache case that contained just over one kilogram of heroin in its lining.[30] She was arrested immediately upon putting the

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[24] U.S.S.G. § 1B1.3(a)(1)(B). Section 1B1.3(a) states, inter alia, that in the case of jointly undertaken criminal activity, the base offense level should be determined on the basis of all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. § U.S.S.G. 1B1.3(a)

[25] *See* United States v. Martinez, 987 F.2d 920 (2d Cir. 1993); *see also* United States v. Lanni, 970 F.2d 1092 (2d Cir. 1992) (Sentencing judge must make specific factfinding with respect to amount of drugs "reasonably foreseeable" by each conspirator: "[t]he scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy.") (quoting United States v. Perrone, 936 F.2d 1403, 1416 (2d Cir. 1991)).

[26] 813 F. Supp. 168, 171 (E.D.N.Y.), *vacated*, 12 F.3d 368 (2d Cir. 1993).

[27] United States v. Ekwunoh, 12 F.3d 368, 370-71 (2d Cir 1993).

[28] *Id.* at 369.

[29] *Id.*

[30] *Id.*

case in her trunk.[31]

To avoid the ten-year minimum sentence for possessing one kilogram of heroin, Ekwunoh testified that the $2,000 she was given could not possibly have purchased that amount of heroin.[32] On the numerous prior occasions when she had served her boyfriend as a drug courier, she had usually received no more than a 250 gram shipment of heroin.[33] Moreover, her boyfriend had told her that she was to meet a "drug swallower," rather than someone who would be handing her drugs. Based on her boyfriend's drug swallowing, the defendant knew that 400 grams approximates the human abdominal capacity.[34]

The district court credited the defendant's claim that the amount of heroin supplied by the government informant exceeded her reasonable expectations as to the shipment, and imposed a five-year minimum sentence based upon a foreseeable weight of 400 grams.[35] The government appealed this decision.

On appeal, the Second Circuit recognized that *Ekwunoh* was not a suitable case in which to banish the defendant's beliefs about drug weight from the sentencing process. Given the brevity of Ekwunoh's possession and the government's role in determining the weight of the shipment, it would have been a travesty to disregard the defendant's expectations about the weight of the drugs that had been handed to her. Therefore, the court avoided the issue, and "assum[ed], without deciding, that even in a possession case, the defendant may be sentenced only for the quantity of drugs he knew or should reasonably have foreseen that he possessed."[36]

The court of appeals, however, overruled the district court's factual finding that Ekwunoh could not have foreseen a shipment of one kilogram. In view of the defendant's prior drug distribution for her boyfriend as well as similar experience with her brother and previous boyfriends, the court concluded

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[31] *Ekwunoh*, 813 F. Supp. at 171.
[32] *Ekwunoh*, 12 F.3d at 369.
[33] *Id.*
[34] *Id.* at 370.
[35] *Ekwunoh*, 813 F. Supp. at 171.
[36] *Ekwunoh*, 12 F.3d at 370.

that the actual weight was foreseeable.[37] The court observed that Ekwunoh had admittedly transported far more than a kilogram of heroin in the months immediately preceding her arrest.[38] Indeed, had *Ekwunoh* been a sentencing guidelines case, the base sentence might have been increased by virtue of her admitted course of conduct as a drug distributor.[39] But the decision to hold Ekwunoh accountable for the entire kilogram of heroin was not arrived at merely by adding up the weight of recent past shipments. Instead, the court's opinion as to "foreseeability" was plainly influenced by its view that Ekwunoh was not a minor participant in the drug operation, but rather had an important and lucrative role.[40] The court reasoned that "[s]urely, a reasonable distributor of heroin in such quantities could not turn a blind eye to the possibility that someday she would be handed at one time a one-kilogram cache of heroin for distribution."[41]

The court of appeals's characterization of Ekwunoh as a "distributor" contrasts with the district court's view of her as one "acting under the domination of her boyfriend."[42] But whether Ekwunoh was a dominated or a co-active participant, there can be little dispute that she was not a "minimal" or "minor" participant in the drug trade.[43] The record left no doubt about the importance of her ongoing participation, her close working relationship with the source, and her considerable economic stake in what was evidently a family business. Indeed the court of appeals's analysis demonstrates the very close connection between what a defendant's role in the drug

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[37] *Id.* at 370-71.

[38] *Id.* at 370.

[39] U.S.S.G. § 1B1.3(a)(2). *See, e.g.*, United States v. Shonubi, 998 F.2d 84 (2d Cir. 1993).

[40] In fact, the district court's opinion notes that the defendant posted a $50,000 cash bail, made a substantial downpayment on a new home in Florida, and bought a $7700 automobile during the pendency of the case. *Ekwunoh*, 813 F. Supp. at 171.

[41] *Ekwunoh*, 12 F.3d at 370-71.

[42] *Ekwunoh*, 813 F. Supp. at 180.

[43] In other cases, the Second Circuit has held that the criteria for determining who is a minimal or minor participant under § 3B1.2 are "the nature of the defendant's relationship to other participants, the importance of the defendant's action to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." *Shonubi*, 998 F.2d at 90 (quoting United States v. Garcia, 920 F.2d 153, 155 (2d Cir. 1990) (per curiam)).

operation is and what she will be capable of foreseeing about any given shipment.

If the equitable principle of just deserts were paramount, Ekwunoh's relationship to the supplier, as well as her role and stake in the drug enterprise, would all have been salient issues. In this litigation, "foreseeability of weight" is clearly a derivative issue that turns on the actor's degree of participation and interest. But these salient factors would not have come into play if Ekwunoh's sentence had been decided under the "straight weight" rule articulated in *de Velasquez*. Ekwunoh would, in all probability, have received the same ten-year sentence had this been her first experience as a courier. On the other hand, Ekwunoh's sentence automatically would have been reduced by half, regardless of her role, had the D.E.A.'s scale been a few grams out of balance.

Thus, under the straight-weight rule, morally significant sentencing factors are marginalized, rather than occupying center stage in the sentencing process. Regardless of how one views the sentence imposed in *Ekwunoh*, it is difficult to defend the process by which it would have been determined under straight-weight sentencing. The inescapable ten-year minimum sentence that would have been imposed demonstrates the moral untenability of a sentencing scheme in which "straight weight" operates in tandem with mandatory minimum sentencing.

III. WEIGHT AS A FACTOR FOR EXPERIENCED DEFENDANTS: *UNITED STATES V. IVONYE* AND *UNITED STATES V. IMARIAGBE*

In contrast to *Ekwunoh*, *Ivonye* and *Imariagbe* involved freelance drug couriers who were decidedly less well-connected to the drug source. Each of these defendants testified that he had been misled about the weight of the shipment for which he had been specially recruited by his supplier.[44] The defendant in *Ivonye* had been told by his supplier that 250 grams had been placed in his shoes, when in fact 336.5 grams were found

[44] *Ivonye*, 30 F.3d at 276; *Ekwunoh*, 12 F.3d at 369; *Imariagbe*, 999 F.2d at 707.

there.[45] The defendant in *Imariagbe* had been told that the lining of the suitcase he was given contained only 400 grams of heroin, rather than the 850 grams actually present.[46]

While the presentence testimony in both *Ivonye* and *Imariagbe* did not necessarily establish regular activity as a courier, a role in an ongoing enterprise or a stake in the size of the particular shipment, it surely did evidence some degree of experience in the drug trade, particularly an understanding and concern for the legal consequences of drug weight.[47] Under the Second Circuit's analysis in *de Velasquez*, the bare fact that these freelance couriers were susceptible to being misled about weight argues for holding them accountable for excess drug weight as a consciously assumed business risk.[48] In both *Ivonye* and *Imariagbe*, however, that the defendants had exhibited a specific concern about the weight of the drugs they were carrying reduces the value of this straight-weight analysis.[49]

The courier who initiates a discussion of drug weight with the supplier does not display the inadvertent or uncomprehending state of mind popularly associated with the drug "mule" or "camel." An individual who is interested in drug weight is less likely to be duped or misled on the subject and more likely to be deterred by a weight which he regards as unacceptably risky. Because of their interest and concern for drug weight, rather than because of the magnitude of their mistake, the defendants in *Ivonye* and *Imariagbe* arguably are legitimate candidates for sentencing in proportion to drug weight.

IV. THE UNFAIR RESULT OF THE WEIGHT FACTOR IN *DE VELASQUEZ*

Unlike the defendants in *Ekwunoh*, *Ivonye* and *Imariagbe*, Ana Marín de Velasquez embodies the popular conception of the drug "mule." Like a beast of burden, she was employed to transport another's goods, ignorant of the heightened risks (mainly to herself) or heightened benefits (entirely to another)

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[45] *Ivonye*, 30 F.3d at 276.
[46] *Imariagbe*, 999 F.2d at 707.
[47] *Ivonye*, 30 F.3d at 276; *Imariagbe*, 999 F.2d at 707.
[48] *de Velasquez*, 28 F.3d at 6.
[49] *Ivonye*, 30 F.3d at 276; *Imariagbe*, 999 F.2d at 707.

associated with a larger shipment. When Ms. de Velasquez was detained at Kennedy airport and confronted with the 167.8 grams of heroin removed from her shoes, she denied any knowledge of its presence.[50] At the same time, however, she promptly admitted to the arresting officer that she had ingested heroin supplied by Colombian compatriots, which was later determined to weigh 636.3 grams.[51]

In upholding a base sentence that was derived from all drugs in the defendant's possession, the court of appeals in *de Velasquez* ruled out a downward departure based on the defendant's mistake. The court noted that *de Velasquez* was an "ordinary mine-run case," not one in which "the gap between belief and actuality was so great as to make the Sentencing Guideline grossly unfair in operation."[52]

Perhaps the court in *de Velasquez* would have approved a downward departure if the larger cache of drugs had been placed in the defendant's shoes, rather than in her intestines. If so, the difference in the sentence would scarcely correspond to any intelligible distinction in culpability. Indeed, the moral significance of the "gap between belief and actuality" presupposes that the offender knows and appreciates the toxic potential of the drugs she has ingested. It is questionable whether any drug swallower meaningfully can be said to appreciate the toxicity for the body politic of the substance she harbors in her own body.

The heroin in de Velasquez's shoes increased her base sentence by two offense levels, and the resulting sentence by nine months or about twenty-five percent. While the additional drug weight resulted in a substantial, arbitrary increase in incarceration, the Sentencing Guidelines also afforded her countervailing lenity under the statutory mitigating factors.[53] Ms. de Velasquez received a four-level reduction for minimal participation,[54] a three-level reduction for acceptance of responsibility,[55] and the lowest permissible sentence in an eleven-month discretionary range.[56] Each of these offender-related

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[50] *de Velasquez*, 28 F.3d at 3.

[51] *Id.*

[52] *Id.* at 6 (citation omitted).

[53] U.S.S.G. § 3B1.2.

[54] *de Velasquez*, 28 F.3d at 3 (citing U.S.S.G. § 3B1.2(a)).

[55] *Id.* at 3-4 (citing U.S.S.G. § 3E1.1).

[56] This sentencing level, level 23, provides for incarceration for a minimum of

mitigating provisions in section three of the Sentencing Guidelines offset more incarceration than she suffered because of the additional heroin in her shoes.

Even with the maximum benefit of the mitigating factors, however, the fact remains that Ms. de Velasquez, a paradigmatic drug mule, received a sentence (forty-six months for 800 grams) that is identical or comparable to that imposed upon savvy freelance couriers Imariagbe, (forty-six months for 850 grams) and Ivonye (thirty months for 336 grams).

CONCLUSION: DRUG WEIGHT SHOULD NOT BE AN IMPORTANT SENTENCING FACTOR FOR DEFENDANTS WHO ARE MINOR PARTICIPANTS IN DRUG TRANSACTIONS

Drug weight should be demoted as a sentencing factor for drug couriers who are indisputably "minimal participants" with no prior history of carrying drugs and no economic stake in the weight of the drugs with which they are arrested. Surely the vagaries of drug weight should not dictate the sentence of a first-time courier who agreed to carry an unspecified amount of drugs for a stranger in exchange for the price of his airline ticket or some other small flat fee.

Straight-weight sentencing, imposed without regard to the offender's awareness of drug weight, has been characterized as "an erosion of our Anglo-American system of criminal justice."[57] The district court in *Ekwunoh* urged that disregard of the offender's state of mind as to drug weight abandons the principles of proportionality, based on mens rea, in favor of administrative uniformity and efficiency:

> If a narcotics defendant's culpability must turn on the rigid operation of mathematical schemes based upon the objective weight of the drugs, that defendant is at least entitled to hold the government to some burden of proof (or to permit the defendant to assume some burden of proof) regarding the defendant's state of mind with respect to that quantity. Otherwise our system of individualized justice based upon blameworthiness is placed at risk by the gradual

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46 months and a maximum of 57 months. *See* U.S.S.G., Sentencing Table, Ch. 5 Pt. A.

[57] *Ekwunoh*, 813 F. Supp 168, 178 (E.D.N.Y. 1993); *see generally*, Alun Griffiths, Comment, People v. Ryan: *A Trap for the Unwary*, 61 BROOK. L. REV. (forthcoming 1995).

> encroachment of a mechanical regulatory system that neither knows nor cares about the critical mental states of those individuals who come before the courts."[58]

In a stinging rebuke to the application of federal drug enforcement policy, the district court in *Ekwunoh* implied that no United States Attorney would seek to impose an irrebuttable straight-weight sentence upon a valued member of our society, such as a law school graduate traveling abroad who had been misled about the quantity of drugs placed in her luggage by a classmate.[59] Rather, this brand of hyperefficient case processing is reserved for persons of lower social and economic status.[60]

To avoid imposition of a mandatory minimum sentence based on weight, the drug couriers in *de Velasquez*, *Ekwunoh*, *Ivonye* and *Imariagbe* testified at their pre-sentence hearings either that they had been lied to by their supplier about the quantity of drugs placed on their person or that the particular shipment for which they were arrested exceeded what they could have foreseen from past shipments from the same source.[61] A "dishonest-supplier" defense was advanced in *de Velasquez*, *Ivonye* and *Imariagbe*. *Ekwunoh* involved an unexpectedly large shipment and, incidentally, an unexpected source: an informant for the D.E.A.

In upholding a doctrine of strict accountability for unforeseen extra weight, the Second Circuit has treated the dishonesty of the supplier or the unexpectedly large shipment as a risk assumed by anyone who knowingly distributes drugs. As the court noted in *de Velasquez*: "[i]n a possession case, however, we see no reason why a defendant who knowingly traffics in drugs should not bear the risk that his conduct may be more harmful to society than he intends or foresees. We therefore decline to fashion a rule that would permit a defendant to avoid the consequences of that risk because of a fortuitous lack of knowledge or foreseeability—fortuities which apparently occur with some frequency."[62] This last remark intimates that

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[58] *Ekwunoh*, 813 F. Supp. at 177.

[59] *Id.* at 178.

[60] *Id.*

[61] *de Velasquez*, 28 F.3d at 3; *Ekwunoh*, 12 F.3d at 369; *Ivonye*, 30 F.2d at 276; *Imariagbe*, 999 F.2d at 707.

[62] *de Velasquez*, 28 F.3d at 6 (citation omitted).

the "mistake-of-weight" defense is an inducement to perjury, in that it is both easy to raise and difficult to refute.

Rather than focusing on the simple amount of drugs carried, and the defendant's knowledge of that amount, the sentencing of every drug courier should begin with a searching inquiry into whether or not the courier is a minimal or minor participant in the drug trade. It is settled Second Circuit law that minimal participation in a drug operation cannot be inferred from the bare fact that the defendant is a courier,[63] is not an entrepreneur,[64] or has limited finances.[65] On the other hand, an inquiry into the significance of drug weight would be meaningless if the amount of drugs recovered from the defendant automatically ruled out a finding of minimal participation. To determine "minimal participation," the sentencing court should be charged with assessing culpability in the context of all the circumstances. In addition to evidence of knowledge and experience in the drug trade, this would include the offender's pattern of foreign travel, cash flow and overall lifestyle. Due process requires nothing less when the result of the determination is a matter of five or ten years of incarceration.

If the courier is determined to be a minimal participant, drug weight should be a secondary sentencing factor. A plausible benchmark for drug weight as a sentencing factor would be to consider it in the same way that the value of stolen property factors into the sentencing of robbers, burglars and extortionists.[66] There surely is no justification in either deterrence or just-deserts theories to treat drug couriers more harshly than robbers and burglars. In fact, robbers and burglars, unlike drug couriers, are ordinarily cognizant of the value of what they are stealing and reap the full benefit of it. Moreover, increased penalties for stealing or extorting more money would have a more certain deterrent value.

The amount of property stolen, extorted or blackmailed raises the sentence by one offense level if it exceeds $10,000, and by seven offense levels if it exceeds $5 million.[67] The amount of property burgled raises the offense by one level if it

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[63] United States v. Shonubi, 998 F.2d 84, 90 (2d Cir. 1993) (citation omitted).
[64] *Id.*
[65] *Id.*
[66] *See* U.S.S.G. §§ 2B2.1(b)2), 2B3.1(b)(6).
[67] U.S.S.G. § 2B3.1 (b)(6).

exceeds $2,500, and by eight levels if it exceeds $5 million.[68] The weightiest offense characteristics in robbery relate to the manner of commission: whether a firearm was discharged (seven offense levels) and the degree of bodily injury (two to six levels).[69]

By contrast, the base sentences for drug possession and distribution range from offense level six to offense level forty-two, depending only upon the nature and quantity of the drugs possessed, and without any regard whatsoever to differentiating offender characteristics.[70] These come into play only at the secondary stage of downward and upward adjustment.[71]

Straight-weight sentencing is predicated upon single-minded fidelity to congressional intent to deter drug distribution.[72] While the *de Velasquez* court acknowledged that "[h]arsh penalties may result for the courier [from straight-weight sentencing, it declined to] construct a rule of law to mitigate the perceived harshness of Congress's sentencing regime."[73] That, the court observed, would be a case of the tail wagging the dog.[74] In declining to reform the substantive sentencing law, the Court might also have noted that the limited downward adjustments for "minimal or minor participation" reflect a congressional intent to assign a circumscribed value to individual mitigating considerations in drug courier cases.[75] Perhaps the most important and salutary practical effect of the *de Velasquez* opinion and its progeny will be to make the anomalies between drug sentencing and the sentencing for other comparably serious offenses more difficult to ignore.

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[68] U.S.S.G. § 2B2.1(b)(2).

[69] U.S.S.G. § 2B3.1(b)(2)-(3).

[70] U.S.S.G. § 3B1.2(a).

[71] U.S.S.G. § 3E1.1.

[72] *de Velasquez*, 28 F.3d at 5 ("Congress, for purposes of deterrence, intended that narcotics violators run the risk of sentencing enhancements concerning other circumstances surrounding the crime") (citing United States v. Obi, 947 F.2d 1031, 1032 (2d Cir. 1991) (per curiam)).

[73] *Id.* at 6.

[74] *Id. See also* United States v. Cordoba-Hincapie, 825 F.Supp 485, 523 (E.D.N.Y. 1993) ("we confront many situations in which the sentencing tail increasingly can be seen to be wagging the guilt-innocence dog").

[75] *See* U.S.S.G. § 3B1.2 (mitigating rule).