

Shorter sentences for drug mules: The early impact of the sentencing guidelines in England and Wales

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## Shorter sentences for drug mules: The early impact of the sentencing guidelines in England and Wales

### ABSTRACT:

In February 2012, new sentencing guidelines for drug offences became effective in all courts in England and Wales. An explicit aim was to reduce the length of sentences for drug 'mules' and so make them more proportionate. This article examines their early impact drawing on data from the Court Proceedings Database and the Crown Court Sentencing Survey for importing/exporting a Class A drug. Overall, the guidelines have achieved their intended aim. The length of the average custodial sentence for drug trafficking fell following the introduction of the guidelines, largely due to taking defendants' roles into account. Notably: three quarters of those in 'lesser' roles received sentences less than four years, representing an important change. Nonetheless, around 10% of mules received very long sentences due to the continued use of drug weight in sentencing. The new guidelines represent an internationally important innovation in drug policy reform.

Key words: proportionality, drug mules, sentencing guidelines, Crown Court Sentencing Survey.

## Shorter sentences for drug mules: The early impact of the sentencing guidelines in England and Wales

### Introduction

This article examines the early impact of new sentencing guidelines for drug offences, introduced in February 2012 with the stated aim of reducing sentences for drug 'mules' (Sentencing Council 2011c, 2012b). The term is used here to describe a person who carries drugs across an international border for someone else. Drug mules play a minor, subordinate role in the supply chain, and so can be considered a distinct category of drug trafficker (EMCCDA 2012; Fleetwood 2011). Whilst some legal scholars differentiate between willing 'couriers' motivated by profit, and 'mules' who are involved due to pressure (Smith and Gowlandt 2014, 396, FN 5), profit and pressure are not necessarily mutually exclusive. Whilst some may become involved due to economic vulnerabilities, especially women due to the feminisation of poverty (Bailey 2013; Giacomello 2013; Dorado 2005; Sudbury 2005), coercion and violent intimidation are commonly used to control all mules (Caulkins et al. 2009; Fleetwood 2014). Some consider the term, 'mule' derogatory<sup>i</sup> but it usefully distinguishes between categories of carriers: those working for others (mules), self-employed couriers (working independently) and organisers (who invest capital and employ others, including mules) (Matrix Knowledge Group 2009; Fleetwood 2014).

Internationally, this array of roles in international drug trafficking is rarely reflected in drug laws, or in sentencing. For example, mandatory minimum sentences apply harsh penalties to all offenders regardless of their role, with considerable collateral damage (Oliss 1994; Chesney-Lind 2002; Youngers and Rosin 2005). Huling reported that women mules served very long 'mandatory minimums' of fifteen years to life under the so-called Rockefeller drug laws (1996). A similar approach can be found in South America where long sentences have been the norm (Metaal and Youngers 2011). Sometimes no distinction is made between international drug trafficking, street level selling and use (Corva 2008; Giacomello 2013). In England and Wales, mandatory minimums are not used, yet drug importers have been subject to very long sentences (more below). The negative consequences of the global war on drugs are well documented (Rolles, 2010; Collins, 2014), and the harsh punishment of drug mules is part of this picture.

Since 1995, the focus in UK drug policy has been addressing demand for illicit drugs, in particular the link between offending and problem drug use through the expansion of treatment services for drug using offenders (Seddon, 2000, Duke, 2006;

Stevens, 2007). The 2002 England and Wales Updated Drug Strategy (Home Office, 2002) however emphasised the importance of preventing drugs from entering the UK through greater inter-agency and international cooperation as well as increasing sentences for drug traffickers, amongst whom 'mules' were not differentiated. The most recent strategy states the intention to 'bear down relentlessly on those involved in the drug trade' (foreword by Teresa May, Home Office 2010: 2). Since the establishment of the Central Drugs and Illegal Immigration Unit in 1973 drug trafficking has been targeted via inter-agency and intelligence-led policing (Lee and South 2008; Dorn and Murji, 1992) which has continued in the establishment of the Serious and Organised Crime Agency in 2007 and subsequently the National Crime Agency in 2013. The powers of surveillance, intrusion and coercion bestowed on SOCA in order to pursue organised criminals are described by Lee and South (2008) as unprecedented – and in relation to drug mules, would seem to be the use of a hammer to crack a nut.

Seizure of drugs at the point of importation is therefore one element of supply reduction strategy in UK drugs policy and in terms of quantity, seizures by customs and excise from ports and airports account for most drugs seized (Reuter and Stevens, 2007). Nonetheless, some have argued that the quantity of drugs transported by courier is a mere drop in the ocean, so apprehension is likely to have little effect on either availability or price (Reuter and Stevens 2007). The apprehension and harsh punishment of drug mules under the banner of deterrence, may serve a symbolic purpose, rather than an effective strategy. The NCA continues the approach followed by the Serious and Organised Crime Agency (SOCA), which describes drug trafficking as 'the single greatest organised crime threat to the UK' (2007), linking it with arms trafficking, people trafficking and terrorism (2013). Drug mules, who are arguably the smallest cogs in the machine of organised crime, are therefore caught up in policies concerning the security and integrity of the British state.

Yet change is underway. The United Nations Office on Drugs and Crime recently called for countries to 'ensure the adoption of *proportionate* penalties for drug offences' and Argentina, Brazil, South Africa and New Zealand are currently reviewing sentences for drug offences (Lai 2012: 2). At the time of writing, Ecuador has just introduced a new penal code that retrospectively gives reduced penalties to 'micro-traffickers', including drug mules (Álvarez Velasco 2014). The distinct, subordinate role of mule is now recognised internationally (United Nations Commission on Narcotic Drugs 2009, 2011) alongside popular and political consensus that punishment ought to be lowered to reflect this (Jacobson et al. 2011). The sentencing guidelines examined here are the first to distinguish between roles in international trafficking and so represent a significant

innovation in the realm of drug policy reform (Lai 2012; Harris 2011).

This article examines the initial impact of new sentencing guidelines for drug offences introduced in February 2012 in England and Wales. Analysis draws on data from the Court Proceedings Database and the Crown Court Sentencing Survey. Particular attention is paid to the impact on sentences for drug mules. It is not known what portion of convicted drug importers they comprise, although the Sentencing Council estimated between 10-30% (Sentencing Council 2012d: 5). Convictions for drug importation have been steadily declining for the last eight years. In 2005, 929 people were convicted and just 381 in 2013. Typically 70-80% of convictions for drug importation involve a Class A drug, and so our analysis focuses on this group. We look specifically at the differences in sentence lengths according to the weight of drug carried and the person's role in trafficking, to explore whether the sentencing guidelines had the intended effect of improving proportionality, and reducing sentences for drug mules. Overall, distinguishing between roles has resulted in shorter sentences for those in lesser roles. 73% of those in lesser role were sentenced to four years or less. Nonetheless, a minority of those in lesser role received long sentences due to having large drug quantities. We start with a contextualised presentation of the new sentencing guidelines, before explaining our methods and findings.

### **Sentencing for drug importation/exportation in England and Wales before 2012**

Importation of illegal drugs is prohibited by the Misuse of Drugs Act 1971 (section 3) and Customs and Excise Management Act 1979 (section 170(2)) (Sentencing Council 2012b). Before 2012, sentencing drew on guideline judgements, including *Aramah* 1982, *Bilinki* 1988 and *Aranguren and others* (1994), for Class A drugs. Although there is not scope for an in depth discussion here (see Harper et al. 2000: 102), three key features have prevailed since the first guideline judgment in 1982 (Harper et al. 2000). Firstly, greater punishment is merited by greater quantities of illegal drugs (before 1994, this was estimated street value) (Harper et al. 2000; Fortson 1996). Approximate tariffs were established in guideline judgements, for example the case of *Aramah* established that seven years was appropriate for a street value of £100,000 or more (ibid). The apparent rationale is that greater quantities of drug would have resulted in greater harm. Secondly, whilst attention was given to establishing and revising conventions around drug quantities, the offender's role was given much less consideration. Nonetheless, Fortson reported an 'expectation' that role is taken into account (1996), and Lady Justice Hallett observed: 'there was a time when some judges

divided offenders according to military ranks: generals, lieutenants and foot soldiers'.<sup>1</sup> Yet, little research documents if or how this was done in practice (Fortson 1996), or what effect this approach had on proportionality. Thirdly, sentencers ought to be led by the principle of deterrence, and so ought not take mitigation into account, especially in cases involving a Class A drug (Harper et al. 2000; Fortson 1996). Personal mitigation typically includes good character, illness, and remorse (Cooper 2013). The rationale was apparently to discourage traffickers from recruiting vulnerable individuals (Green 1998).

These principles are borne out by research. In their analysis of sentences for drug importation in the 1990s, Harper et al. record that for Class A drugs the main determinants in sentencing were the estimated street value (pre 1994), drug weight (post 1994) and guilty pleas (2000). During the 1990s, the average sentence for importing a Class A drug was 7 years 11 months for less than 5 kilos, and 11 years 6 months for larger quantities (Ibid: 110). Furthermore, personal mitigation had little detectable impact on sentencing: 'role, gender and children were not statistically significant predictors of sentence length' (Harper et al. 2000: 100).

Whilst each nation has its own specificities, sentencing in England and Wales reflects some common themes in international approaches to tackling drug trafficking, especially a logic of 'punitive deterrence' (Beckett 1997; Corva 2008) and rationalised punishment according to metrics of drug value/weight (Harris 2010; Fleetwood 2011). Critics note that these privilege individual choice and responsibility and minimise the significance of social inequality and vulnerability (Fleetwood 2011). In the case of drug mules in particular, these models of punishment have often resulted in the harshest punishments for those who occupy marginal roles in drug trafficking, especially drug mules. Although some aspects of rationalised punishment persist, sentencing reforms in England and Wales arguably reflect a move away from these trends towards more proportionate punishment, on the whole.

### **Sentencing guidelines for drug offences in England and Wales**

Sentencing guidelines for drug offences were introduced by the Sentencing Council on 27th February 2012 (2012b) as part of a large-scale project to codify sentencing practice and promote consistency in sentencing for all offences (Ashworth and Roberts 2013; Padfield 2013). The Coroners and Justice Act 2009 establishes their statutory power: 'Every court must, in sentencing an offender, follow any sentencing

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<sup>1</sup> R v Lewis, Wijtvliet and Vriezen [2012] EWCA Crim 1414.

guidelines which are relevant to the offender's case [...] unless the court is satisfied that it would be contrary to the interests of justice to do so' (in Pina-Sanchez and Linacre 2013: 1119). Unlike sentencing grids used in some US states, these are guidelines which judges may depart from them where they consider it is in the interests of justice to do so (Roberts 2013a).

The guideline for drug importation offences is unique in that it aims to change sentencing outcomes. In the consultation document, the Sentencing Council clearly states:

There is one group of offenders, however, for whom in some cases the Council considers current sentencing to be *disproportionate to the levels of culpability and harm caused*. These are the so-called drug "mules". An increased focus on role in the development of the sentencing ranges for importation offences may result in a downward shift in sentences for these types of offenders, to bring them in line with the overall sentencing framework and ensure that these offenders are sentenced fairly and consistently according to the severity of their offence. (Sentencing Council, 2011c: 4-5, our emphasis).<sup>ii</sup>

The guidelines make clear that punishment ought to be proportionate to the culpability and harm caused, in keeping with the Sentencing Council's statement of Overarching Principles (Sentencing Guidelines Council 2004; Ashworth 2010: 105; Maslen and Roberts 2013). In this way, proportionality is only in reference to *other* drug importers. This is in keeping with the 'just deserts' approach taken by the Sentencing Council more generally (Ashworth 2010; Raine and Dunstan 2009) and underscores the fact that this is a small scale reform that does not tackle broader issues of proportionality raised by drug policy campaigners. For example, sentences for drug trafficking are typically longer in England and Wales than in other parts of Europe and so can be considered disproportionate in comparison (International Drug Policy Consortium 2011). Harris questions whether drug trafficking merits punishments on a par with serious, violent crimes (2010). Sentencing guidelines for inflicting grievous bodily harm/unlawful wounding recommend significantly shorter sentences than those for lesser roles in drug trafficking (Sentencing Council 2011a). The explicit rationale for this important change in policy is thus greater proportionality, but there are also implicit rationales. A scoping exercise undertaken by the Sentencing Council established that the proposed reduction in sentences for mules could result in a saving of between two and seven million pounds per year (Sentencing Council 2012d: 5). Although it is difficult to know what prompted

this reform, it should also be noted that concerns about foreign national prisoners, especially women, many of whom were convicted of drug offences, is long standing (Prison Reform Trust et al. 2012). Thus, these changes are not the result of drug policy campaigns per se, although they have likely played a role.

There is only space here for a brief outline of the relevant aspects of the guidelines (Sentencing Council 2012b). Firstly, drug quantities continue to be used as a proxy for harm; however it is tempered by consideration for the offender's role. Together these form the primary basis for determining a provisional sentence. Judges decide between three roles: 'leading' (someone in an organising capacity), 'significant' (someone in an operational or management role) and 'lesser'. The Council intends that the lowest category of culpability, 'lesser', apply to drug mules (2011c). It is described as someone who: 'Performs a limited function under direction; engaged by pressure, coercion, intimidation; involvement through naivety/exploitation; no influence on those above in a chain; very little, if any, awareness or understanding of the scale of operation' (Sentencing Council 2012b: 4). This list is non-exhaustive and is intended as a guide, given that defendants may fall into more than one category.

Four categories of drug quantities are used. For cocaine and heroin importation these are: category 1 (5 kilos); category 2 (1 kilo); category 3 (150g) and category 4 (5g) (Sentencing Council 2012b). These are not 'threshold quantities' (Hughes et al. 2014), but are merely indicative. The assumption that greater drug quantities equal greater harm caused is perhaps overly simplistic. Arguably, the 'harms' produced by the drug trade go well beyond simply bringing drugs into a country. Researchers document harms directly, and indirectly related to international drug trafficking, including interpersonal violence, political corruption, money laundering, urban degradation and lack of safety in public places (Zaitch 2009). Researchers have questioned too, to what extent drug mules ought to be held responsible for factors outside their knowledge or control: few know what they are carrying (Green 1998: 9). This is especially stark in comparison with self-employed couriers who often carry smaller quantities than mules and so receive shorter sentences (Green 1998, Fleetwood 2011).

Secondly, whilst deterrence remains a guiding principle (Smith and Gowlandt 2012), personal mitigation now features. This change is arguably driven by consistency with other sentencing guidelines rather than a tacit acceptance that deterrence may not be relevant. Personal mitigation plays a secondary role after role and drug weight. Both standard mitigation factors are included (i.e. good character, remorse, ill health, caring responsibilities), and offence specific factors, crucially 'involvement due to pressure/coercion' and 'offender's vulnerability exploited' (Sentencing Council 2012b).



## **Methodology**

To explore the impact of the guidelines on sentencing outcomes, sentencing data for cases involving importing/exporting a Class A drug was extracted from two sources. Firstly the Court Proceedings Database (CPD), which records all sentences in all courts in England and Wales and from which the Home Office publishes annually as aggregate data by gender of the defendant, nature of the offence, type of disposal and sentence length.<sup>iii</sup> To contextualise changes, analysis draws on data from 2007-2013. The CPD contains complete data about all prosecutions including the defendants' gender, age, and the length of the sentence and so offers an accurate picture of sentence lengths before and after February 2012. Unless stated otherwise, data come from here.

Secondly, data comes from the Crown Court Sentencing Survey (CCSS). Administered by the Sentencing Council, Judges are required to fill out a survey for each sentence given as part of on-going monitoring of sentencing in England and Wales. This survey 'constitutes a census of all sentences imposed by courts completing the forms, rather than a sample of cases' (Roberts 2013: 106). In addition to recording the defendant's gender, age, and the length of the sentence (as the CPD does), it also records data specifically relating to the guidelines: the offender's role (leading, significant, lesser), drug weight (category of harm), previous relevant convictions, mitigating and aggravating factors and information about guilty pleas. This data enables analysis of how decisions about role, drug quantities, mitigation and guilty pleas affect sentencing.

Since the CCSS records factors only taken into account after the introduction of the guidelines, analysis of the CCSS draws on data after the guidelines were introduced (for the last three quarters of 2012 and 2013). Although Roberts describes it as a 'census', the non-response rate for the CCSS is approximately 39% (Pina-Sanchez and Linacre 2013: 1131; Roberts 2013a), and survey completion varies by court, from 18% to 90% (Sentencing Council 2012c: 11). Comparing the number of cases listed in the CPD and the CCSS reveals the response rate for cases involving drug importation/exportation is 55% for 2012, and 56% for 2013. Since the CCSS is incomplete, analysis explores tendencies rather than correlations.

Analysis focused on changes in sentencing for importing a Class A drug only. Relatively few people are convicted of importing Class B and C drugs each year and the situation is distinct.<sup>iv</sup> Particular attention was given to the impact of the guidelines on sentences for those in 'lesser' roles. Whilst it is not known how judges categorise defendants' roles, it is reasonable to assume that most of those in a 'lesser' role will be mules, even if the converse is not necessarily true.

### **Sentencing trends for importing a Class A drug**

The number of people sentenced for unlawful importation/exportation of any illegal drug fell from 1,654 in 2002 (Sentencing Council 2011b) to just 458 in 2013. Around three quarters of convictions for drug importation involve Class A drugs (mainly cocaine and heroin): this number was 707 in 2004, and fell to 340 in 2013. Thus, the guidelines came into play in the context of an overall decline in convictions. This arguably reflects an overall decline in seizures of a Class A drug by the UKBA over a similar period (Coleman 2013; Home Office 2011, 2012, 2013a, 2013b).

After the introduction of the guidelines, the average sentence for importing a Class A drug fell sharply. In 2012, the average sentence for importing/exporting a Class A drug was 6 years (72.3 months), substantially shorter than in 2007-2011 when the average sentence was around 7 years, 6 months (90 months). In 2013, it had crept back up to 7 years, 1 month (85.2 months). Nonetheless, sentence lengths for importing a Class A drug have been subject to historic fluctuations. In 2002 the average was just 6 years (the same as in 2012) but by 2009, it had gradually increased back up to 7 years, 6 months (Sentencing Council 2011b: 7), the same as in 2013. So, whilst average sentences appear to show an initial reduction in sentence length, this change needs to be read in its historical context. A more detailed analysis is necessary to better understand what lies beyond this change.

### **Distribution of sentences for importing a Class A drug**

Before the new guidelines, sentences ranged from very long to very short: from one day to 25 years (Harper et al. 2000:108). Interestingly, between 2007-2011 around 10 people a year received non-custodial disposals, typically a suspended sentence. Furthermore, around ten defendants a year received custodial sentences of less than 18 months. This wide variety is not surprising given the expectation that judges would consider role (Fortson 1996). It will also reflect small and large drug quantities, although sentencing data for this period does not record such data.

After the introduction of the guidelines, two changes appear to represent a general downward shift in sentences. Firstly, the number and proportion of sentences in the range of 5-10 years decreased. This category has, historically, comprised the majority of sentences (average sentences fall into this group). In 2012, this category represented just 32% of sentences and in 2013 just 24%. Secondly, an increase in the number of sentences of less than 4 years is observable. In 2012, 42% of Class A importers were sentenced to less than 4 years, but in 2013, this dropped to 25%. For

custodial sentences of 4 years or less, release from prison is automatic at the half-way point (Grimwood and Strickland 2013). In summary, sentences continue to be spread across a wide range; however there has been a general downward shift in sentences.

[Table 1 here: Distribution of all custodial sentences for importing a Class A drug (2007-2013)]

Sentence	2007	2008	2009	2010	2011	2012	2013
Less than 18 months	16 (3%)	3 (1%)	10 (2%)	9 (2%)	15 (4%)	4 (1%)	3 (1%)
18 months to 3 years	15 (3%)	14 (3%)	36 (7%)	33 (8%)	29 (7%)	42 (12%)	26 (9%)
3-4 years	25 (5%)	30 (6%)	35 (7%)	32 (8%)	53 (12%)	97 (29%)	40 (14%)
Over 4, less than 5 years	58 (12%)	43 (8%)	54 (10%)	49 (12%)	42 (10%)	52 (15%)	89 (32%)
Over 5 years, less than 10 years	317 (63%)	376 (72%)	302 (57%)	218 (55%)	198 (46%)	108 (32%)	68 (24%)
Over 10 years and less than life	72 (14%)	59 (11%)	91 (17%)	56 (14%)	89 (21%)	37 (11%)	52 (19%)
Percentage of sentences of 4 years or less	11%	9%	15%	19%	23%	42%	25%
Total	503 (100%)	525 (100%)	528 (100%)	397 (100%)	426 (100%)	340 (100%)	278 (100%)

## Findings from the Crown Court Sentencing Survey

### *Drug quantity and sentence length*

CCSS data enable a closer examination of the relationship between drug quantities and sentencing after the introduction of the guidelines. The total drug weight a person is caught in possession of has long played a fundamental role in sentencing for drug trafficking offences (as stated above), and a clear relationship can be found after the introduction of the guidelines.

Some background information on the general situation can be drawn from drug seizure data. Between 2009 and 2012/2013 around two thirds of cocaine seizures, and around half of heroin seizures made by the UKBA involved quantities of up to or less than 1 kilo (Coleman 2013, Home Office 2013a, 2013b). Reflecting this, most sentences recorded in the CCSS concerned quantities of around 1kg (category 2). Around a quarter were for large quantities of around 5 kilos, and around 15% involved quantities of 150g (category 3). There was only one instance involving a category 4 quantity (around 5g) in 2012 (who received a suspended sentence), and 6 in 2013 (one received a suspended sentence, another a fine, and four received custodial sentences). Sentences for importing a category 4 quantity (around 5g) are the same as for supply.

There is a clear relationship between sentence length and category after the introduction of the guidelines (see Figure 1). Offences involving around 5 kilos comprise almost all sentences longer than 10 years, and represent about half of sentences over 5 years and up to 10 years. Conversely, most sentences involving around 150g (category 3) were less than four years. Interestingly, sentences for cases involving around a kilo (category 2) varied from 12 months to over 10 years.

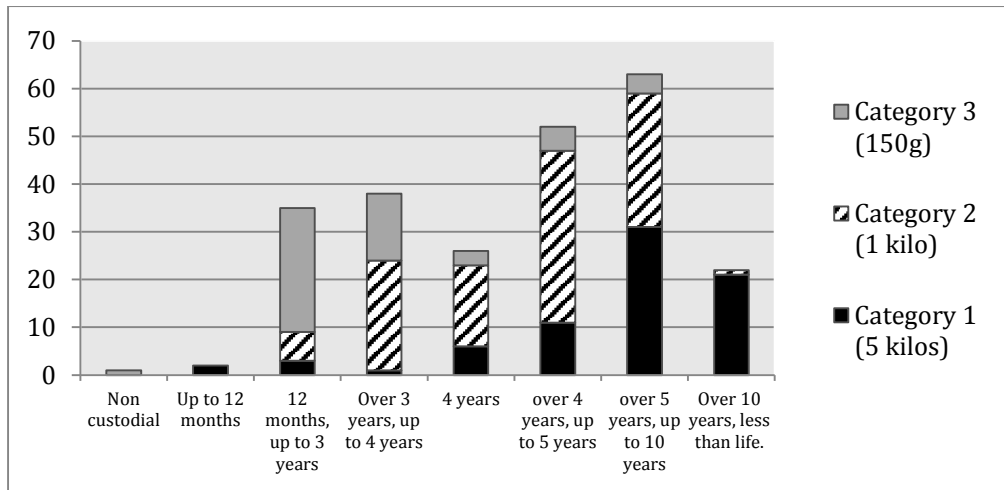


Figure 1 Length of sentence by drug quantity categories (Q2-4 2012 and 2013)

### ***Offender's role and sentence length***

The offender's role has a clear impact on sentence length (figure 2). Judges recorded very few offenders as being in a 'leading' role (only 25, or 9%), 40% (106) were in a significant role, but the majority (144, or 52%) were in a 'lesser' role category. Most (71%) of those in a 'lesser' role received a sentence of 4 years or less. In comparison, 80% those in leading roles received sentences of 5-10 years, or more. Despite this overall trend, a small number (12 out of 144) of those in a lesser role received sentences over 5 years. Conversely 3 of those in a leading role received a sentence of less than 3 years.

[Figure 2 here]

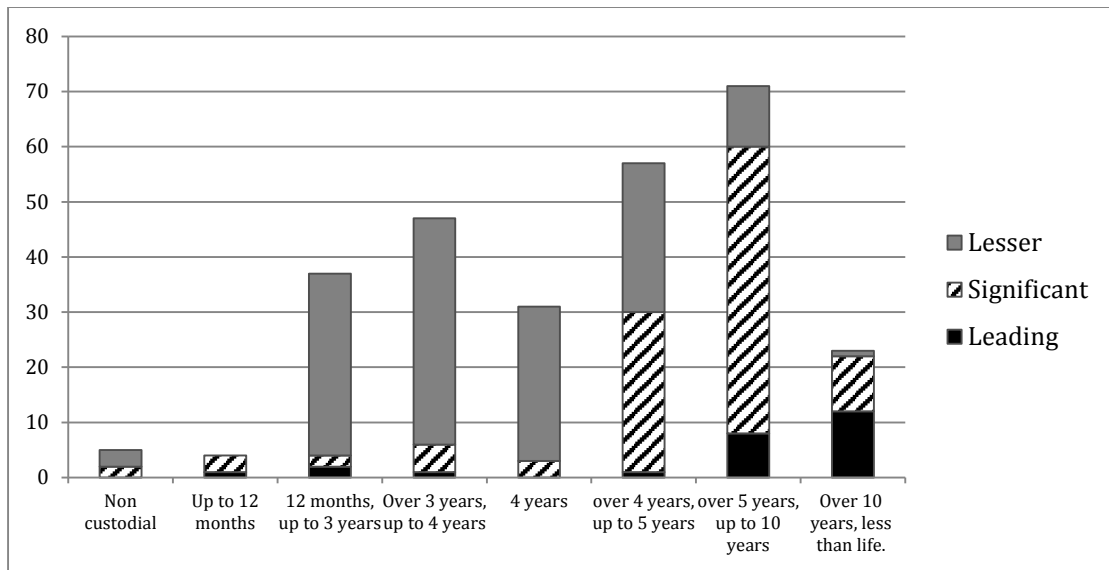


Figure 2 Length of sentence by defendants' role (Q2-4 2012 and 2013)

Thus, the intended effect of maintaining long sentences for those in leading roles, and shorter sentences for lesser roles seems to have been at least partly achieved. Interestingly, sentences for those in significant roles vary enormously in length, ranging from non-custodial to over ten years. This middle role includes those in management roles as well as couriers motivated by profit, or with some awareness of the scale of the operation (also Loveless 2012). The application of these categories in sentencing will inevitably involve a degree of interpretation by judges.

### Sentences for drug mules

Two intended effects of the sentencing guidelines are evident so far: shorter sentences for offenders in a leading role, and for those caught with smaller weights of drugs. We now consider what implications these trends may have for sentences for drug mules, and what effect taking mitigating factors into account may have on sentence length. The factors influencing long and short sentences are examined in turn.

#### *Long sentences*

In 2012 and 2013, twelve (8%) of those in a lesser role received sentences of 5 years or more. Since most of those in a lesser role receive shorter sentences, these exceptional cases were analysed for explanatory factors. The influence of mitigating and aggravating factors on sentencing is difficult to judge from available data. Aggravating factors were not noted in the majority of cases, and typically only one (high purity) was recorded. In contrast, several mitigating factors were noted in most cases (an average of

three), usually: no 'previous relevant convictions', 'isolated incident', and 'good character'. Only one defendant had a previous, relevant conviction. In fact, the only commonality is large drug quantities: in most cases, the defendant was arrested with around 5 kilos (category 1, the most serious). Thus, even when mitigating factors are noted, those in a 'lesser' role may still receive a long sentences in the range of 5-10 years. Arguably, the reintroduction of mitigation for drug mules carrying larger quantities has had a rather limited effect.

### *Short sentences*

As mentioned above, most of those in a lesser role received sentences of four years or less after guidelines were introduced (71%, or 102). Most had small drug quantities (36 had a category 3 quantity (around 150g); 43 were arrested with quantities in the range of category 2 (1kg), and just 5 were arrested with a category 1 quantity).<sup>v</sup> As occurred with long sentences, mitigating factors were noted in most cases (75%), most commonly 'good character' or 'remorse'. The two most commonly mentioned were: involvement due to pressure/coercion (in 28% of records) and offender's vulnerability exploited (in 25% of records). These were newly allowable when the guidelines were introduced so it is not known how they are established in court, given that most defendants pleaded guilty. Furthermore, the impact of mitigating factors remains at the judge's discretion and so while they may be noted, they may have little influence on sentence length (Cooper 2013).

Interestingly, there was one instance of someone in a lesser role carrying a category 1 quantity receiving a short sentence (between 18 months and 3 years). The judge noted mitigating factors including that the offender's vulnerability was exploited, and they had a serious medical condition. The maximum reduction was given for guilty plea (33%), yet the sentence lies much below the range described in the guideline (6-9 years' custody) (Sentencing Council 2012b). Thus, mitigating factors may sometimes reduce the sentence quite significantly below that described in the guidelines. Having said that, this departure could be due to the defendant assisting the police in their investigations (this data is not recorded in either dataset). Nonetheless, as noted earlier, very short sentences like this did occur before 2012 (see Table 1).

Finally, it seems that overall, those in lesser roles are much more likely to plead guilty at the first available opportunity, and were also more likely to receive the maximum discount possible for guilty pleas, even when they did not plead guilty at the first available opportunity

[Table 3 here]

Role	Leading	Significant	Lesser
Plead guilty at first opportunity	16% (4)	47% (50)	56% (85)
Received maximum discount for guilty plea	12% (3)	52% (55)	74% (107)
Total	25	106	144

Table 3: Role and guilty plea (Q2-4. 2012 and 2013)

## Discussion

The sentencing guidelines appear to have immediately resulted in shorter sentences for those in lesser roles. This group comprise approximately half of those sentenced for importing a Class A drug, much above the Sentencing Council estimates of 10-30% (2012d: 5). Differentiating between offenders according to their role appears to play a major role in accomplishing proportionality. Nonetheless, some caveats must be made.

Firstly, as commentators predicted (Harris 2011; Fleetwood 2011), the continued use of drug weights appears to produce arbitrarily harsh sentences for some of those in a lesser role. Although this occurs in a relatively small proportion of cases (8%), it is troublesome that it occurs at all. The fact that some in a 'lesser' role receive sentences commonly given to those in significant or leading roles (between 5-10 years), undermines the intended principle of proportionality if it is accepted that those in lesser roles have little control over quantity of drugs carried (Fleetwood 2011). Indeed, rarely, those in leading roles could receive shorter sentences than mules due to the use of drug weights as a proxy for harm (see Figure 2). We therefore argue that role ought to take primacy over drug weight at sentencing. Doing so would support the stated aim of proportionality. It would also reflect the fact that those in leading roles may be responsible for wider harms than simply bringing illegal drugs into the country.

Secondly, the use of drug quantity may have the unintended effect of reducing punishment for those with greater culpability than mules. In 2012 and 2013, around a quarter of defendants were sentenced for offences involving small quantities of around 150g or less (category 3 and 4). Such quantities are probably not indicative of a commercial trafficking operation employing mules since the potential profit would barely meet the costs of paying a mule including international flights, purchasing and packaging the drugs and so on (Fleetwood 2011). So members of this group are likely to be 'self-employed couriers' carrying drugs for themselves (Caulkins 2009). As the

guidelines become better known, it may also be the case that self-employed traffickers adapt the quantities carried as a rational response to guideline thresholds (Matrix Knowledge Group 2009).

Thirdly, the CCSS reveals that 38% of those sentenced for importing a Class A drug are placed in the rather ambiguous 'significant' (operational or management) role. Legal commentators have noted confusion about what exactly constitutes a mule and whether it is different to a courier (Loveless 2012). It may thus be that mules are being sentenced in a 'significant role', especially where it is thought that they had a level of knowledge about what they are doing, or were motivated by profit despite their minor role (ibid). Qualitative analysis is needed to help unpick this question.

This analysis represents one of a handful of investigations drawing on Crown Court Sentencing Survey data. Whilst some authors are optimistic about its usefulness (Pina-Sanchez and Linacre; Roberts 2013b), low response rates and incomplete forms limit in-depth analysis of sentencing decision-making. Whilst the availability of case level data is creditable, the categories used to record sentences are too broad to allow more fine-grained analysis, in particular for sentences described as 'over ten years but less than life'. Furthermore, potentially significant variables are omitted, in particular the defendant's ethnicity and nationality. Part-time judge, Nicola Padfield comments: 'This is not to say that that the survey is of no use, but its overall utility has to be questioned compared to more detailed qualitative data' (2013: 45).

There are a number of puzzles that could be more clearly answered drawing on qualitative data. In the analysis here, 'lesser role' is assumed to be more or less contiguous with drug mules (indeed this was the intention of the Sentencing Council). Nonetheless, the category of mule is contested (Loveless 2012). Judges must determine whether a person was involved due to coercion, or financial gain, yet the two are not mutually exclusive (Fleetwood 2014). Whilst CCSS data shows that involvement due to coercion is sometimes noted, questions about when such accounts are deployed, and how their credibility is assessed by judges are yet to be explored. This is an especially important question since claims of coercion or pressure will most often rely on the offender's testimony alone. Furthermore, a large proportion of defendants are likely to be foreign nationals, and so judges may not have access to pre-sentence reports. Whilst sentencers are obliged to take into account mitigating and aggravating factors, their relative impact on sentencing can only be understood by analysing court observation and sentence transcripts (Padfield 2013).

Finally, research (pre 2012 guidelines) found that mules sometimes pled 'not guilty' on the basis that they were coerced and sometimes received longer sentences of



up to 14 years as a result (Fortson 1996; Green 1998; Marshall and Moreton 2011). Our research points to a relatively high incidence of guilty pleas (and discounts) for those in lesser roles. Qualitative research is needed to explore advice given to defendants regarding plea as well as the role of legal defence in establishing mitigation.

## **Conclusion**

Overall, the sentencing guideline appears to have achieved greater proportionality: those in lesser roles generally received shorter sentences than more serious offenders, however the use of drug weights has the potential to produce aberrant outcomes, especially for drug mules carrying large quantities. A general downward shift in sentence lengths can be observed nonetheless. Thus, whilst the sentencing guidelines seem to represent a turn away from 'punitive deterrence' (Beckett 1997) towards greater proportionality, the continued use of drug weights represents a rationalised form of punishment which undermines this aim.

Establishing causality is notoriously difficult. Contextualising 2012 and 2013 changes against the previous decade reveals considerable fluctuations in long-term trends. Some changes (for example a long slow reduction of sentences in the range of 5-10 years) precede the guidelines. Commentators have argued that, rather than guidelines influencing practice, the reverse may be true (Roberts 2013b). In the case of drug importation, the guidelines introduce new factors into sentencing: specifically codifying role and admitting mitigating factors. We tentatively suggest that these factors may have driven an unprecedented increase in short to medium term sentences in the range of 3-4 years'. The future impact of these guidelines, both in England and Wales and further afield, remains to be seen.

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<sup>i</sup> The term ‘mule’ is sometimes considered derogatory since it describes people as animals, however alternatives such as ‘courier’ also carry with them problematic connotations.

<sup>ii</sup> This involved a period of consultation and research including interviews with drug mules (Marshall and Moreton 2011), focus groups with members of the public (Jacobson et al 2011), and consultations with judiciary (Sentencing Council 2012) and drug policy organisations (International Drug Policy Consortium, Transnational Institute and Sentencing Council 2011)<sup>ii</sup>.

<sup>iii</sup> Data tables – Criminal Justice Statistics, especially S5.1 Offenders convicted and sentenced at all courts and S5.8 Persons sentenced to immediate custody at all courts by offence, sex, length of sentence and average sentence length, in Volume 5, ‘Court Proceedings’.

<sup>iv</sup> In 2012, 81 people were sentenced for importing a Class B drug and 8 for a Class C drug **and 340 for a Class A drug**. A very brief analysis revealed a reduction in average sentence length in 2012 compared to 2011 for offences involving importation of Class B (36 months to in 2011 to 24 months in 2012) and C drugs (45 months in 2011 to 36 months). Oddly the average sentence for importation of Class C drugs was longer than Class B drugs between 2010-2012.

<sup>v</sup> Data on quantity was missing for 13 cases.