Relevant Conduct in Conspiracies with Role Adjustments

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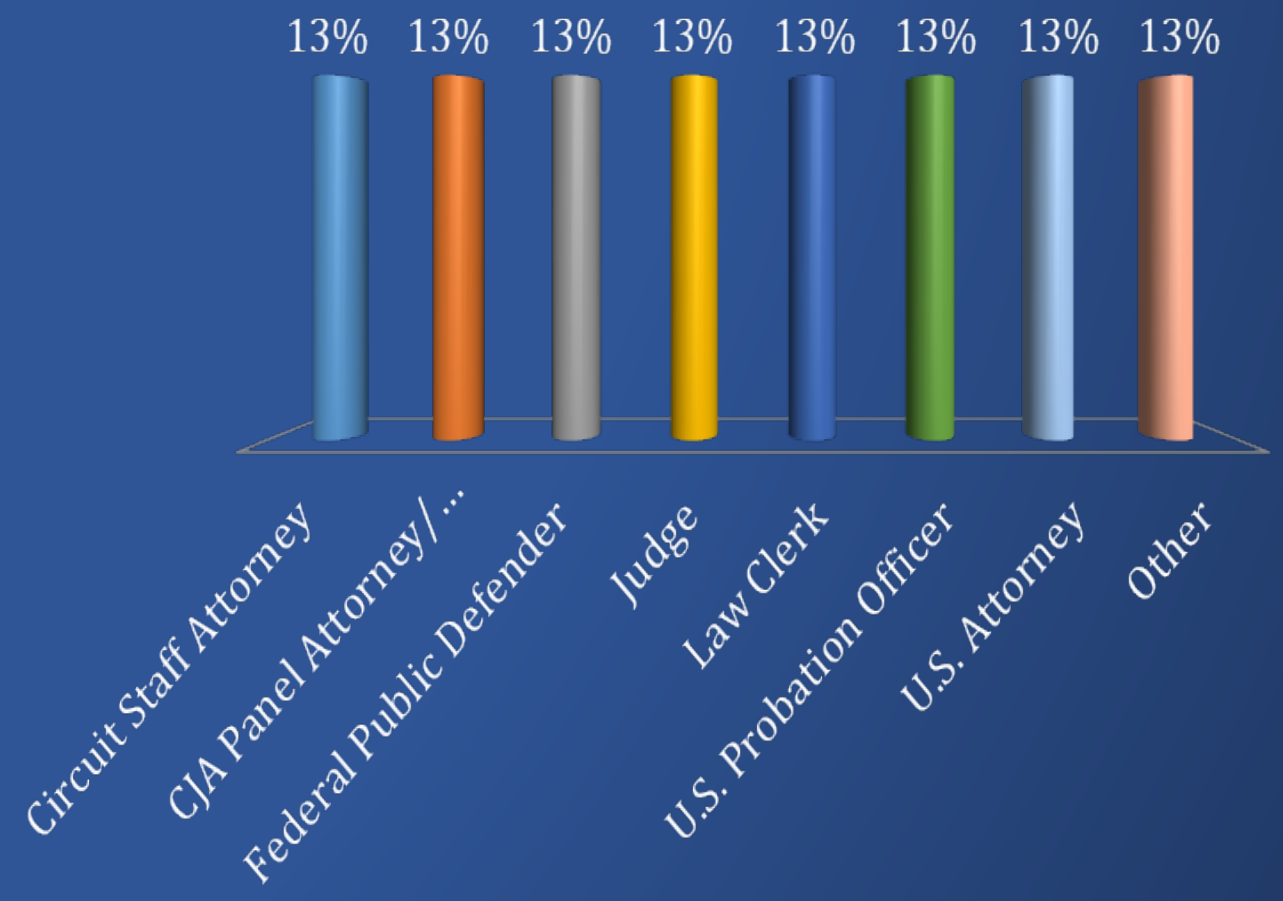
Discussion Topics

- Relevant Conduct Principles
- Aggravating Role
- Mitigating Role

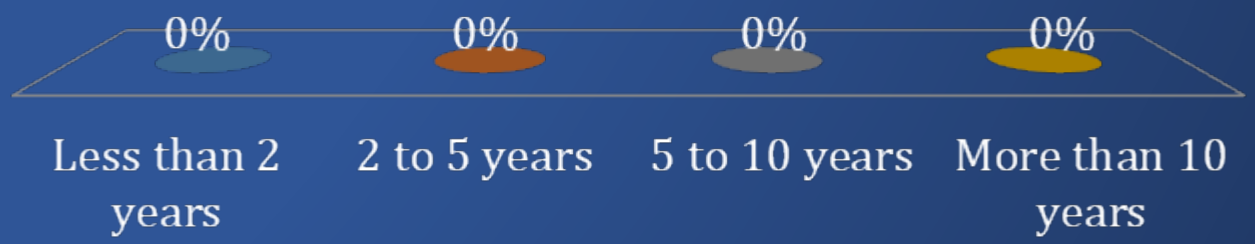
Who's in the audience?

A. Circuit Staff Attorney
B. CJA Panel Attorney/ Private Defense Attorney
C. Federal Public Defender
D. Judge
E. Law Clerk
F. U.S. Probation Officer
G. U.S. Attorney
H. Other



Years of experience with federal sentencing?

A. Less than 2 years
B. 2 to 5 years
C. 5 to 10 years
D. More than 10 years



Relevant Conduct in Conspiracies

General Principles

Mythbusters

- All defendants in a conspiracy will have the same relevant conduct
- If a defendant knows about prior conduct by co-defendants, he is held accountable
- A defendant can be held accountable for all prior related conduct without limitation
- Prior convictions can be used for both relevant conduct and criminal history points

Relevant Conduct in a Nutshell

WHO: Acts of the defendant

Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

In preparation

During

Avoiding detection

Outside the Offense of Conviction: Same course of conduct/ Common scheme or plan

Holding a Defendant Accountable for the Acts of Others Under Relevant Conduct

When can you hold the defendant accountable for the acts of others?

3-Part Analysis of (a)(1)(B)

1. The scope of the defendant's jointly undertaken criminal activity

2. If acts of others were in furtherance of the defendant's undertaking, and

3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking

Determining Scope in a Conspiracy

Scope of jointly undertaken criminal activity

≠

Scope of the entire conspiracy*

*May be the same, but not necessarily

Relevant Conduct: Jointly Undertaken Activity

- *United States v. Ramirez*, 2018 WL 651454 (11th Cir. January 31, 2018)

- *"The District Court determined . . .'[a]s a member of a conspiracy he is held accountable for all of the loss that was generated during the course of the conspiracy. So it's all relevant conduct that is attributable to him.'* ***This was an incorrect statement of the law."***

Determination of Scope of Undertaking

§1B1.3, Comment Note 2

- An individualized determination
- Based on **each** defendant's undertaking

Knowledge of Criminal Activity Not Enough for Relevant Conduct

"Bright Line Rule"

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.

Standard for "Reasonable Foreseeability"

§1B1.3, App. Note 2, Illustrations

- Not based on the foreseeability of the specific defendant

- Based on an objective person standard:
  - Would a *reasonable person* have foreseen that another person in the undertaking would commit such an act in furtherance of the undertaking?

Holding a Defendant Accountable for Acts Outside the Offense of Conviction

§1B1.3**(a)(2):**

"Expanded" Relevant Conduct

Analysis of §1B1.3(a)(2)

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others (3-part analysis)

WHEN: Offense of Conviction

(a)(2): **Same course of conduct/ Common scheme or plan**

Offenses for Which "Expanded" Relevant Conduct[18] Applies

§1B1.3(a)(2) & "Rule (d)"

- The applicable Chapter Two guideline must be one included in a list at §3D1.2(d) (or be of that type), which is the list used for "grouping" multiple counts of conviction of a certain type

Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

"Expanded Relevant Conduct" at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

"Common Scheme or Plan"

§1B1.3(a)(2); App. Note 9(A)

- Offenses must be connected to each other by at least one common factor, such as:
  - Common victims
  - Common accomplices
  - Common purpose
  - Similar *modus operandi*

"Same Course of Conduct"

§1B1.3(a)(2); App. Note 9(B);

- Similarity
- Regularity (repetitions)
- Temporal proximity

Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

"Expanded Relevant Conduct" at §1B1.3(a)(2) Does Not Apply

- Robbery
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses

§1B1.3(a)(1) & (a)(2): Analysis

WHO: (a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others (3-part analysis)

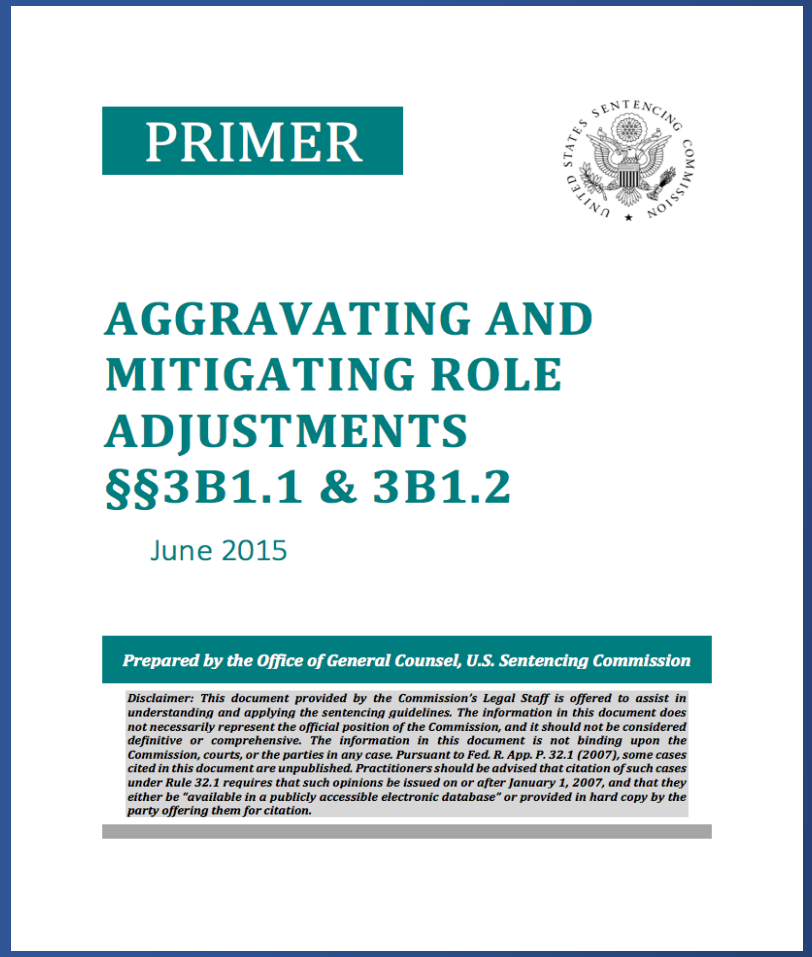
WHEN: Offense of Conviction

(a)(1): In preparation | During | Avoiding detection

(a)(2): ~~Same course of conduct/ Common scheme or plan~~

Role Adjustments

§3B1.1 and §3B1.2



PRIMER

AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS §§3B1.1 & 3B1.2

June 2015

Prepared by the Office of General Counsel, U.S. Sentencing Commission

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Multiple “participants” required for a role adjustment

- Participants have to be criminally responsible, but not necessary charged or convicted
- The defendant is a participant; informants may be participants; undercover officers are not
- A role reduction is not applicable unless more than one participant was involved in the offense

Aggravating Role

§3B1.1

- Based on two factors:
  - Defendant acted as organizer, leader, manager, or supervisor
  - Number of participants or “otherwise extensive”

Aggravating Role: Factors for the Court to Consider
App. Note 4, §3B1.1

- Decision making authority
- Nature of participation in the commission of the offense
- Recruitment of accomplices
- Right to a larger share of proceeds
- Planning and organizing the offense
- Degree of control over others

Mitigating Role Adjustment

Misperceptions?

- All drug couriers must or should receive a mitigating role reduction.
- In a drug case involving multiple defendants, someone must or should receive a role reduction.
- Role reductions are rare in fraud cases.
- Someone who plays an important or essential role in the criminal activity can't receive a role reduction.

Minor Role Guideline Amended in 2015

- Amendment 794
  - REASON FOR AMENDMENT: *This amendment is a result of the Commission's study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony.* ***Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended.***

Role in the Offense Adjustments

Chapter Three, Part B

- §3B1.2 Mitigating Role
  - If the defendant was a minimal participant in any criminal activity, **decrease by 4 levels**.
  - If the defendant was a minor participant in any criminal activity, **decrease by 2 levels**.
  - In cases falling between (a) and (b), **decrease by 3 levels**.

Mitigating Role

§3B1.2 Minor Role App. Note 3(A)

Applicability of Adjustment –

Designed for the defendant who is "substantially less culpable than the average participant – in the criminal activity."

Minor Role and Relevant Conduct
3B1.2 App. Note 3A

- *"A defendant who is accountable under 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline."*

Factors for the Court to Consider

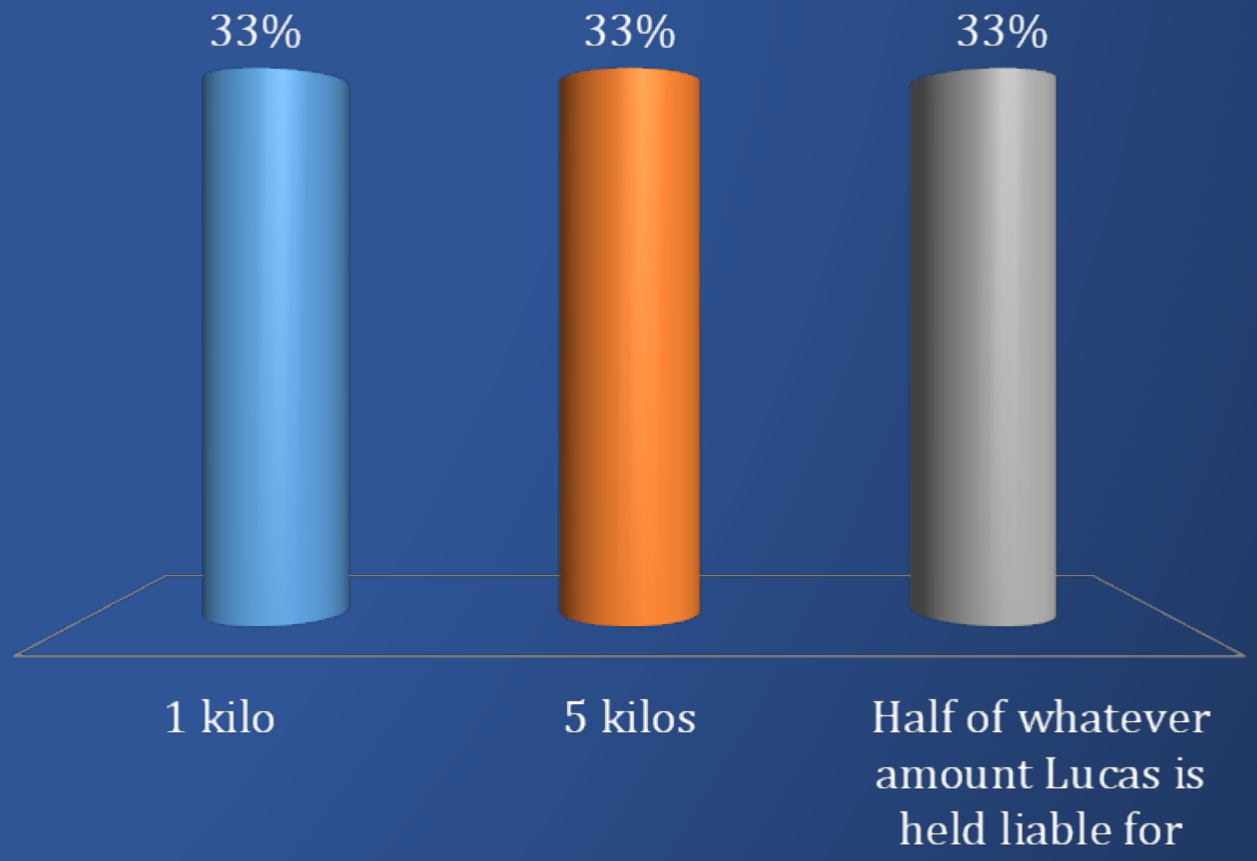
§3B1.2, App. Note 3(C) – non-exhaustive list

i. The degree to which the defendant understood the scope and structure of the criminal activity
ii. The degree to which the defendant participated in the planning/organization of the activity
iii. The degree to which the defendant exercised decision-making authority
iv. The nature and extent of the defendant's participation in the commission of the criminal activity
v. The degree to which the defendant stood to benefit from the criminal activity

SCENARIOS

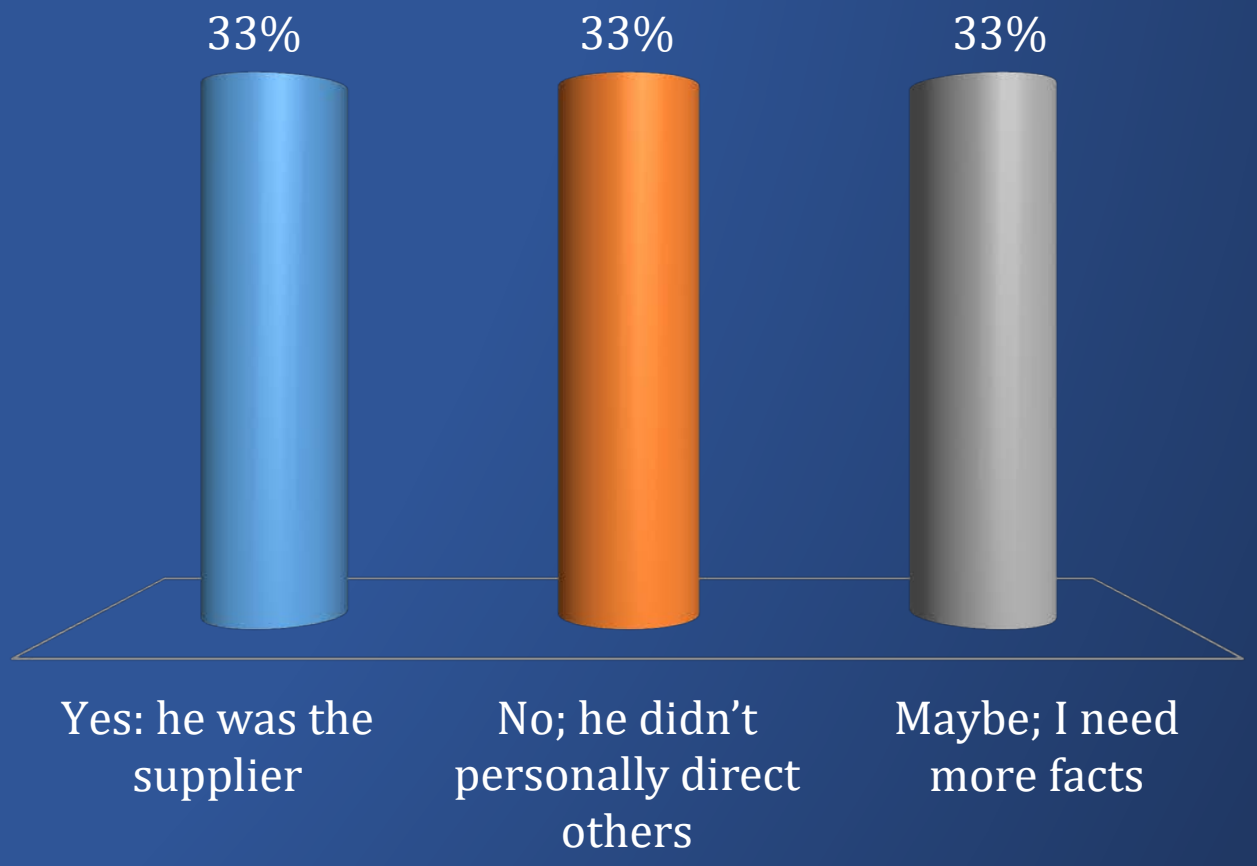
Scenario #1: What quantity of drugs will Brooks be liable for?

A. 1 kilo
B. 5 kilos
C. Half of whatever amount Lucas is held liable for



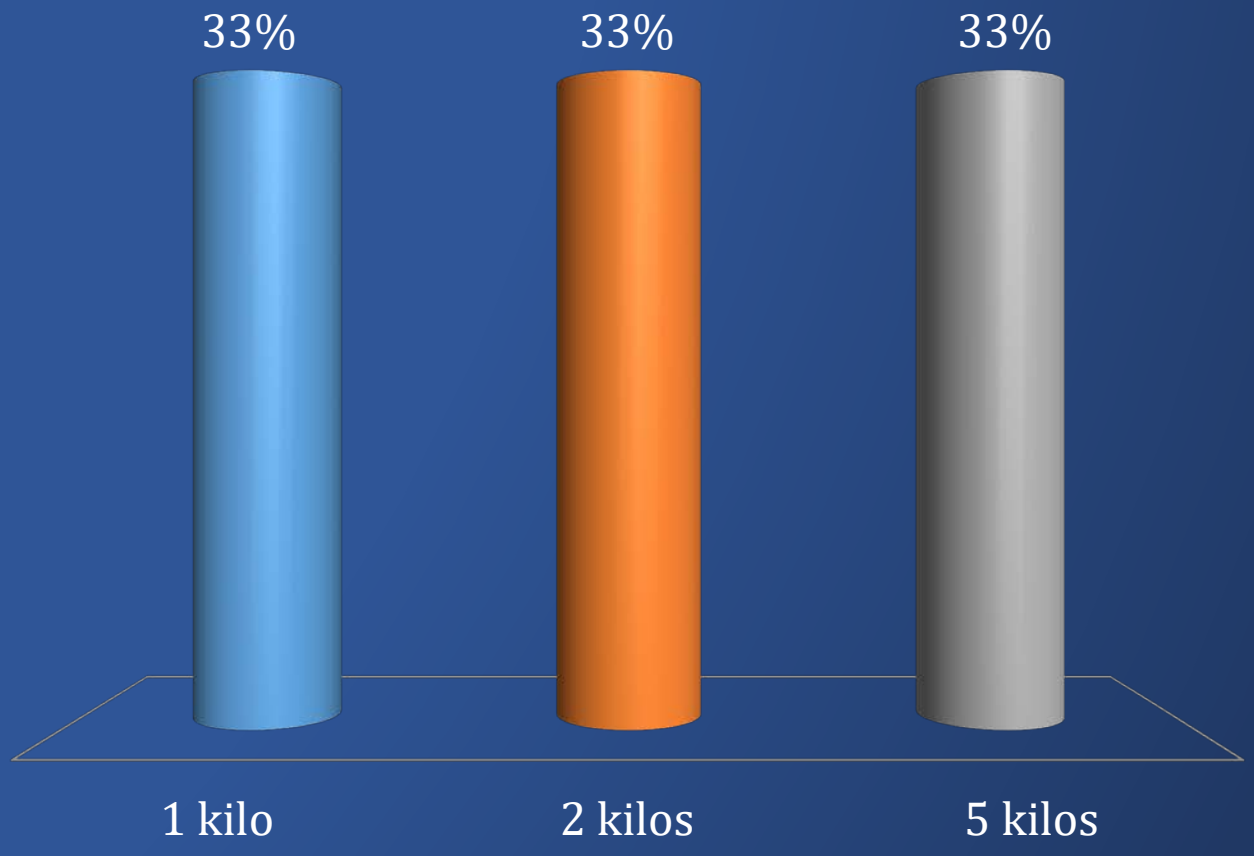
Scenario #2: Will the aggravating role enhancement apply to Brooks?

A. Yes: he was the supplier
B. No; he didn't personally direct others
C. Maybe; I need more facts



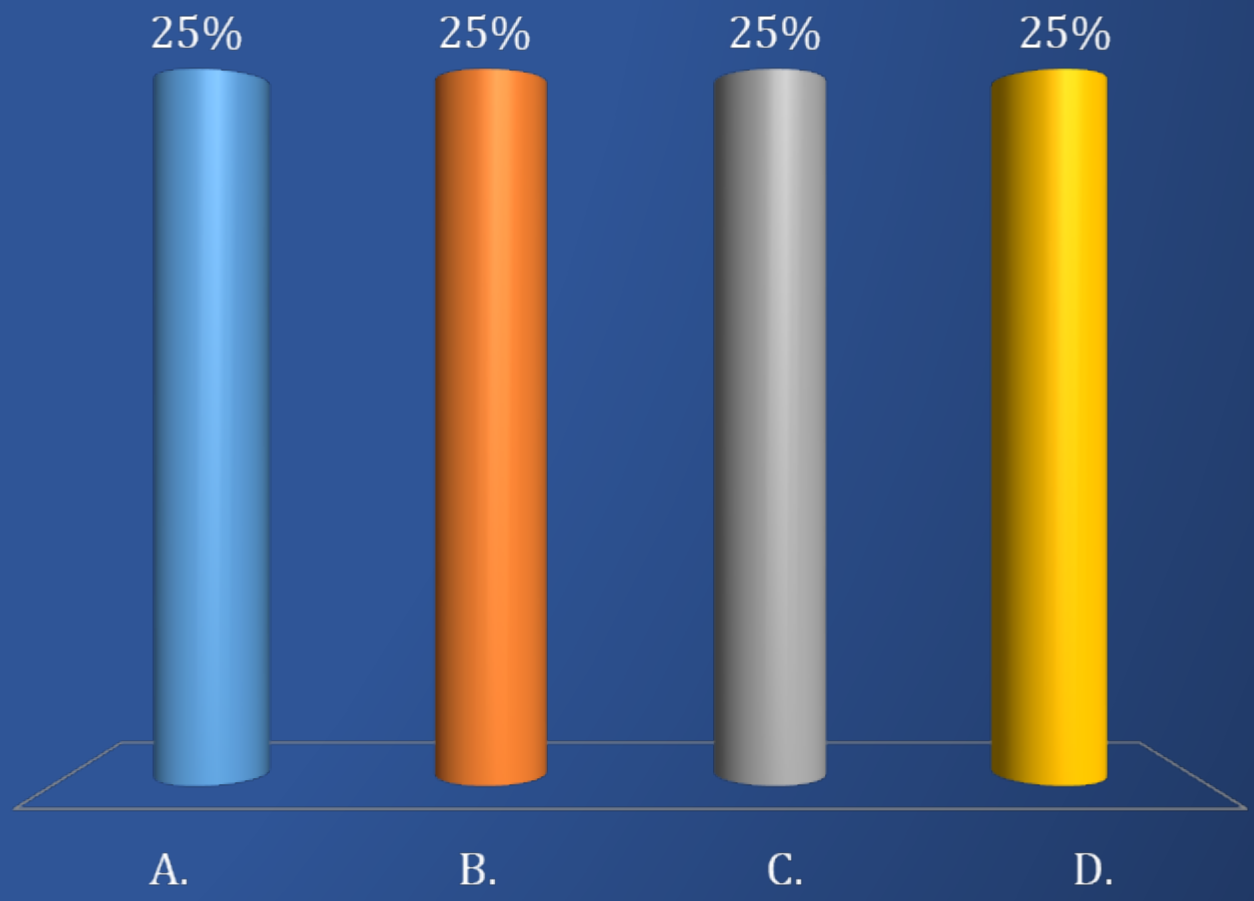
Scenario #3: What quantity of drugs are attributable to Lucas?

A. 1 kilo
B. 2 kilos
C. 5 kilos



Scenario #4: Does the aggravating role enhancement apply to Lucas?

A. Yes: he recruited others
B. Yes: he decided where street level dealers would sell drugs
C. No; he was a middle man
D. No; he did not acquire drugs from the supplier



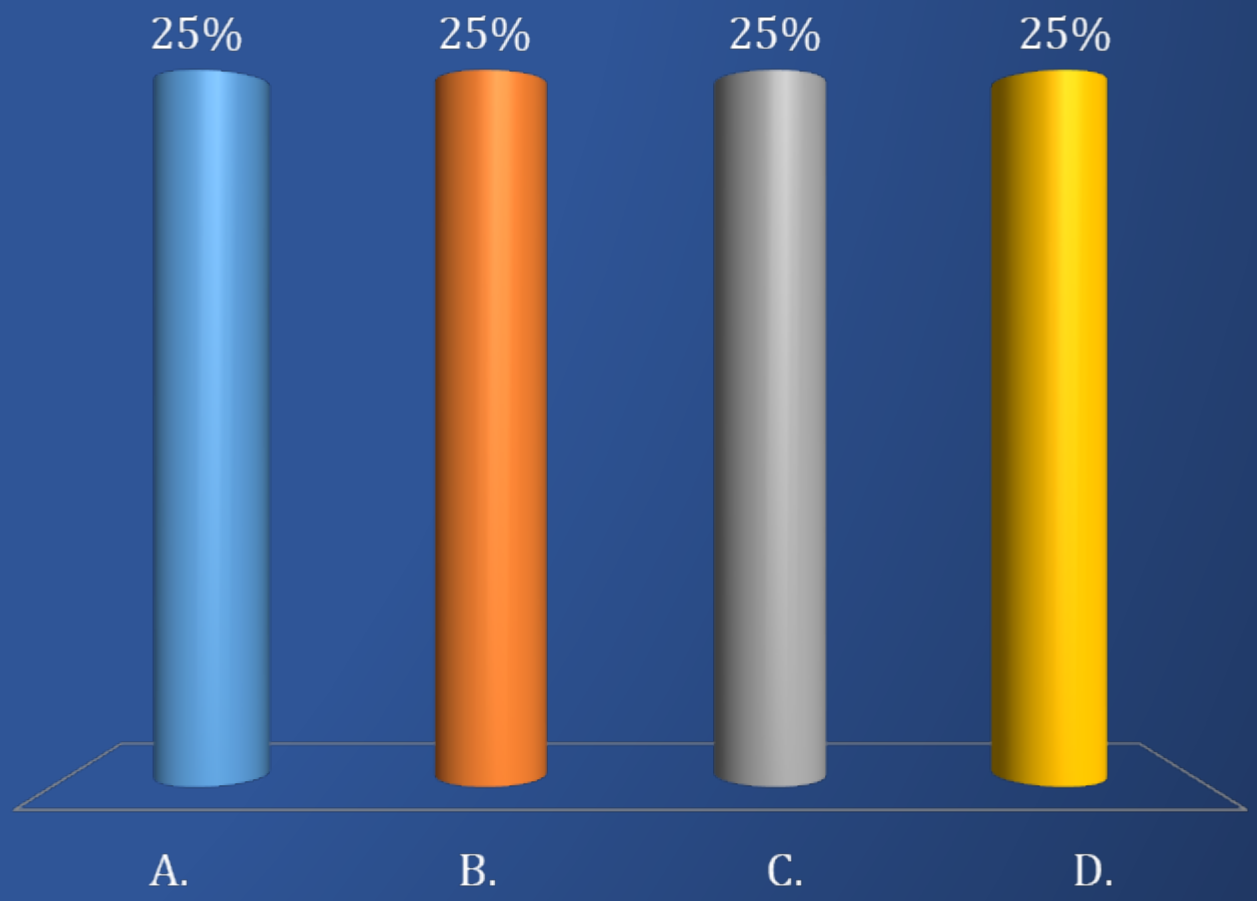
Scenario #5: Will Greg be held liable for the drugs sold by others in the conspiracy?

A. Yes; he pleaded guilty to a conspiracy so he is liable for the entire amount

B. Yes; it's foreseeable that other people are part of the conspiracy

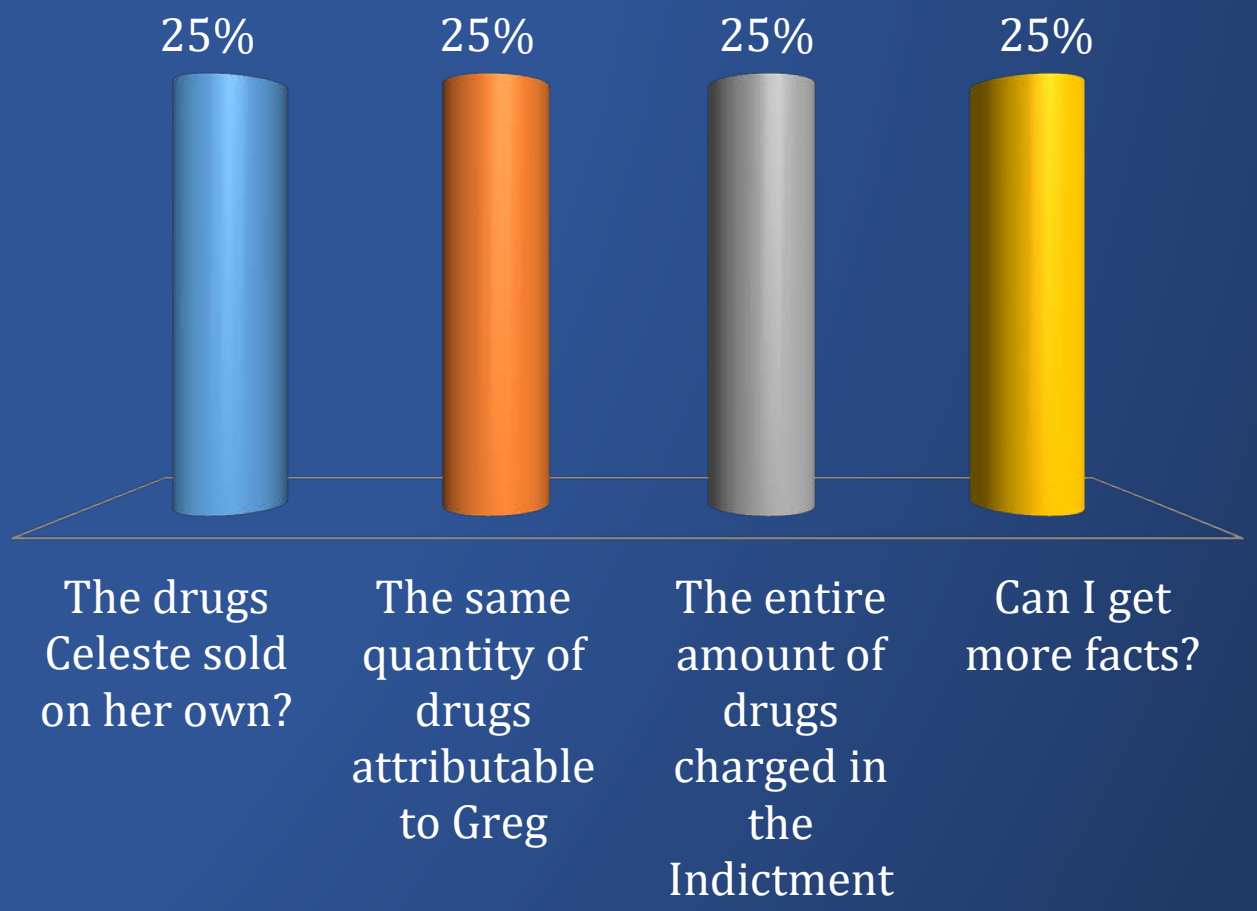
C. No; he doesn't know others in the conspiracy

D. No; the acts of others are not within the scope of his actions



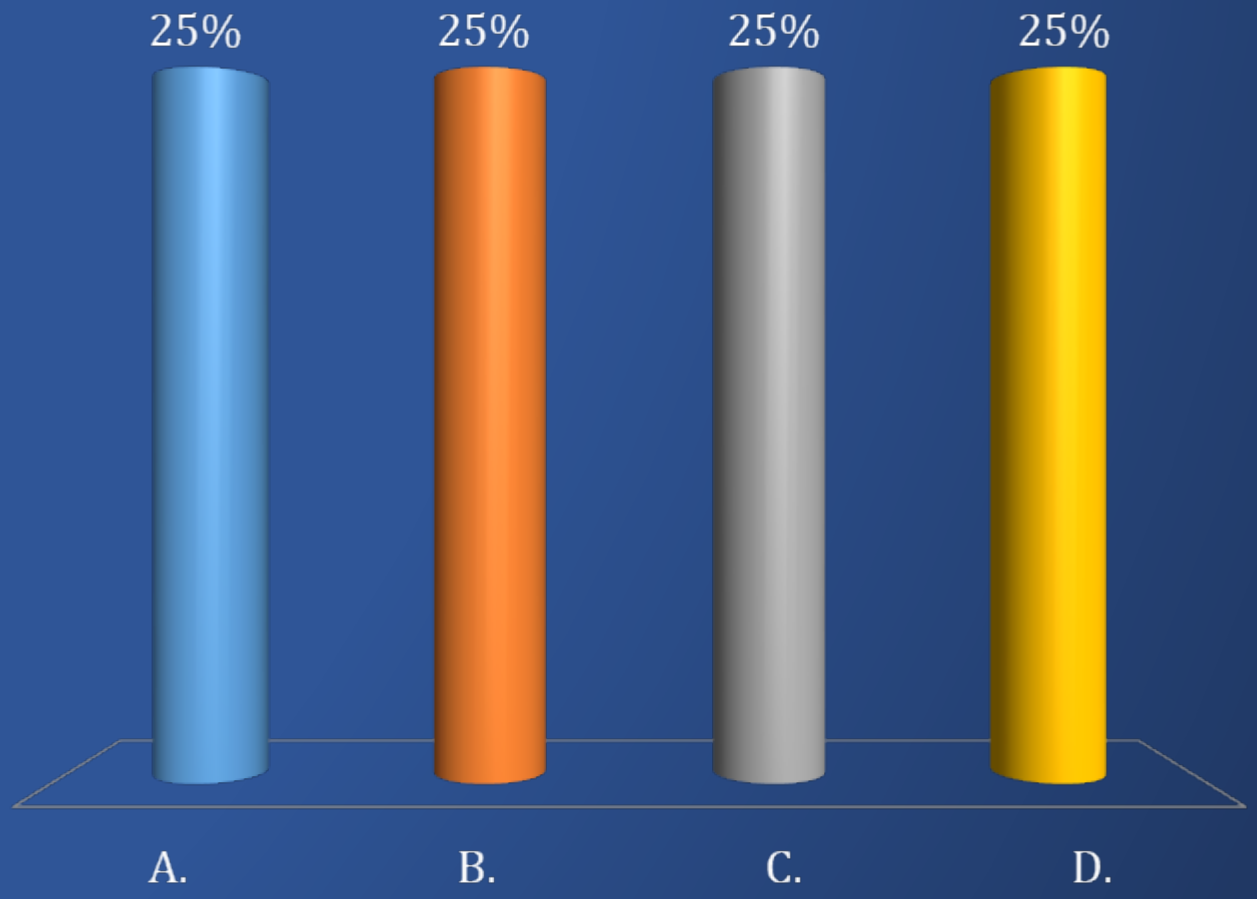
Scenario #6: What quantity of drugs will be attributable to Celeste?

- ✓ A. The drugs Celeste sold on her own?
- B. The same quantity of drugs attributable to Greg
- C. The entire amount of drugs charged in the Indictment
- ✓ D. Can I get more facts?



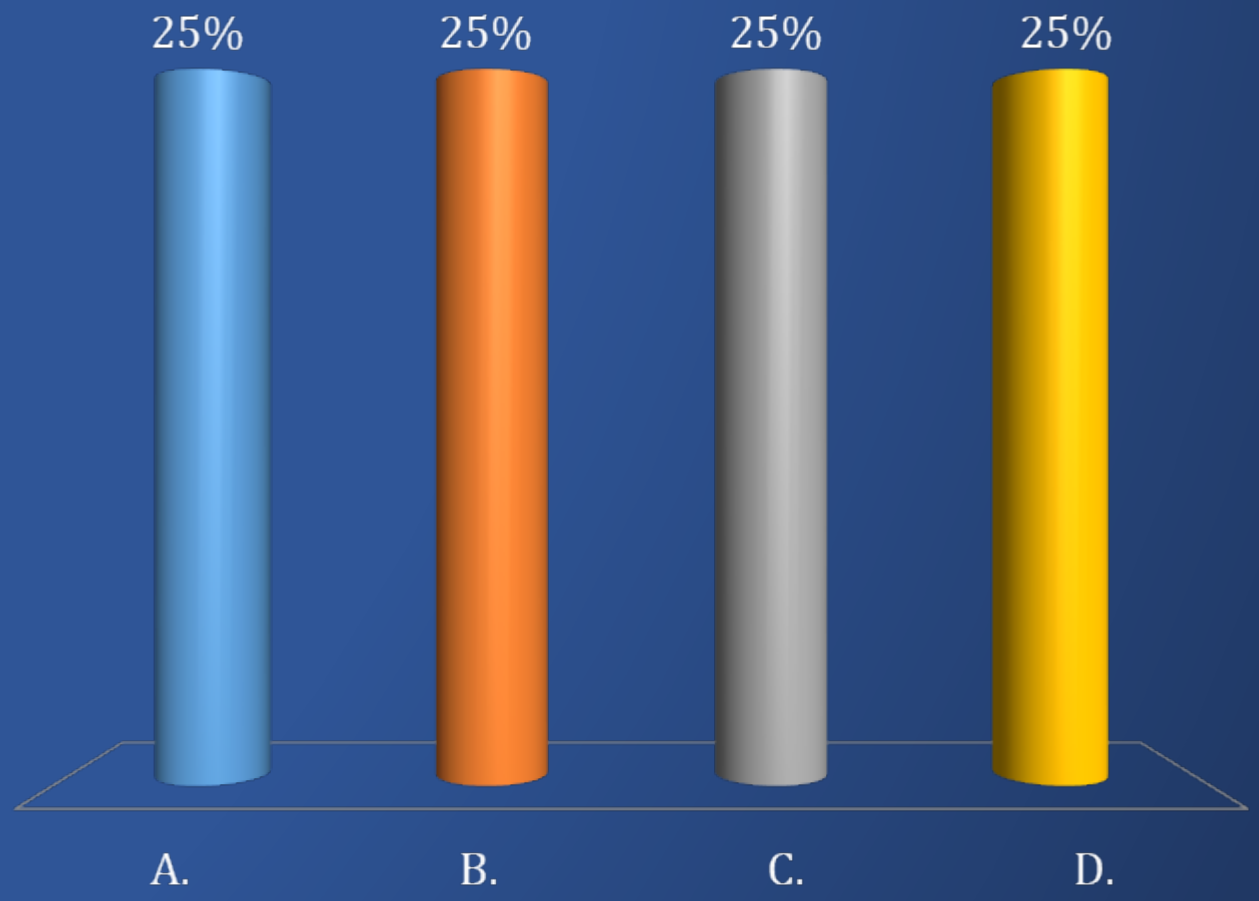
Scenario #7: Will Celeste get a 2-level enhancement for the gun Greg carried?

A. Yes; she knew about the gun
B. Yes; the offense of conviction involved a weapon
C. Yes; guns and drugs always go together
D. No; she never personally carried the weapon



Scenario #8: Is Celeste eligible for safety valve?

A. No; she got the gun enhancement
B. No; she was involved a large conspiracy
C. Yes; she never personally possessed a weapon
D. Yes; she played a minor role in the offense

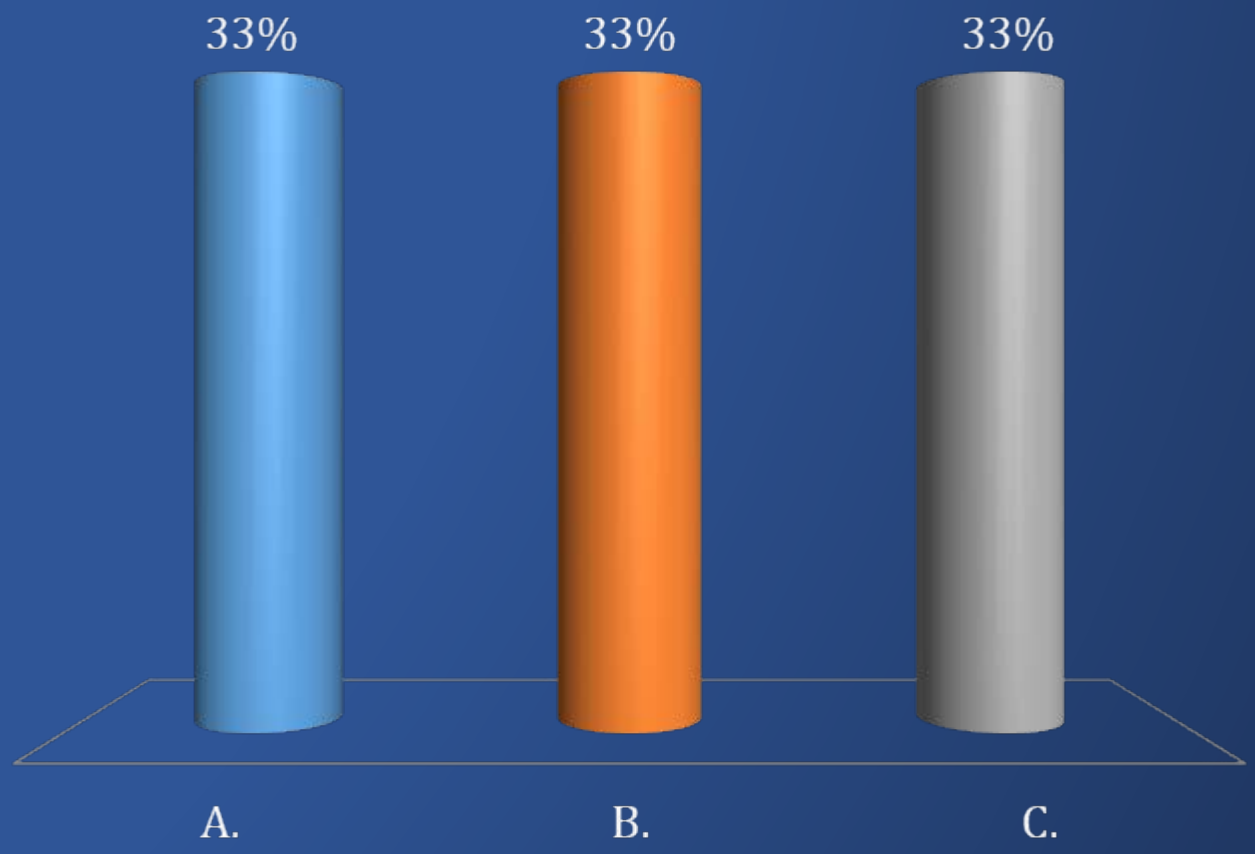


Scenario #9: Can Celeste get a minor role reduction?

A. Yes; she sold a small quantity of drugs within the larger conspiracy

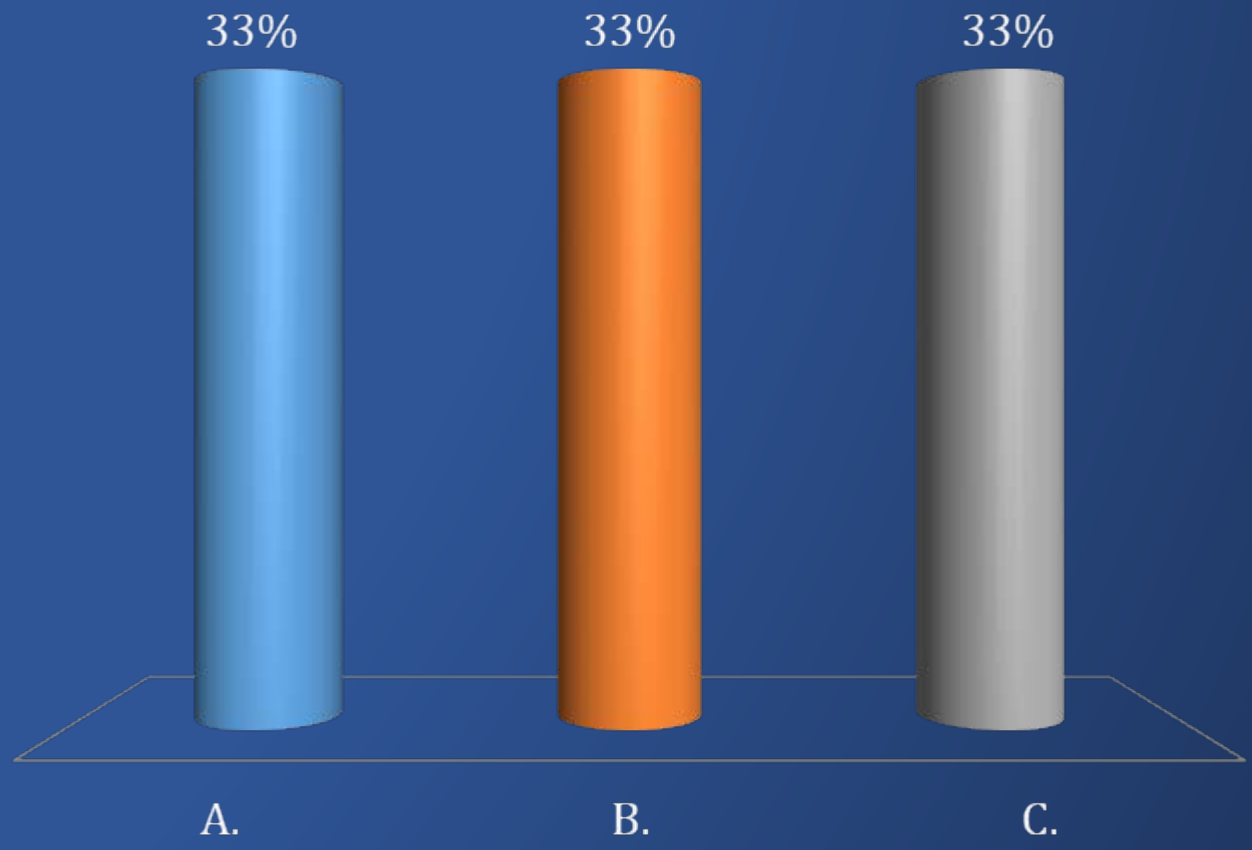
B. No; her relevant conduct was already reduced to her own drug amount

C. No; she got the gun enhancement



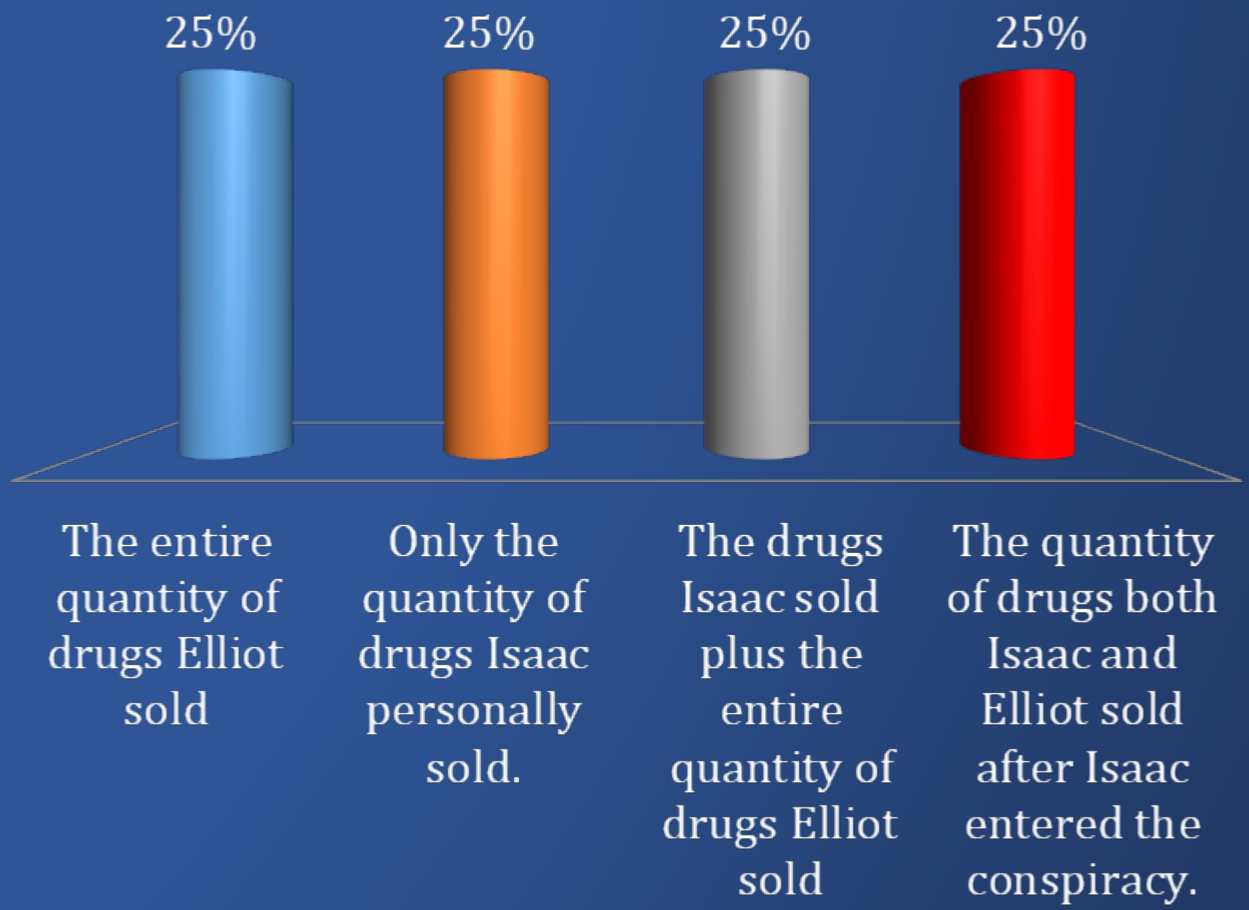
Scenario #10: Will Elliot be held responsible for the drugs he sold prior to entering the conspiracy?

A. Yes, it was part of the same course of conduct or common scheme or plan
B. No; he cant be held liable for acts that occurred prior to entering the conspiracy
C. Maybe; I need more information



Scenario #11: What quantity of drugs will be attributable to Isaac?

A. The entire quantity of drugs Elliot sold
B. Only the quantity of drugs Isaac personally sold.
C. The drugs Isaac sold plus the entire quantity of drugs Elliot sold
D. The quantity of drugs both Isaac and Elliot sold after Isaac entered the conspiracy.



RELEVANT CONDUCT IN CONSPIRACIES

You are the judge in a multi-defendant drug case. All the defendants have pleaded guilty. Defendants **ADAM BROOKS, CELESTE DRAKE, ELLIOTT FRANKS, GREG HANOVER, ISAAC JONES, KYLE LUCAS**, are charged in the District of Maryland with Indictment with one count of Conspiracy to Distribute and Possession with Intent to Distribute Heroin. The Indictment alleges that beginning in January 2015 until December 30, 2017, the five defendants did conspire to distribute 1 kilogram or more of Heroin in the McCulloh Homes in West Baltimore. The charge carries a ten-year mandatory minimum sentence.

The discovery described the following:

Beginning in January of 2015, Baltimore City Police Department and the DEA began investigating a drug distribution ring in the McCulloh Homes housing project. The investigation centered on Defendant **ADAM BROOKS** who, it was revealed, was a mid-level distributor of heroin. Over the course of two years, the investigation showed that Brooks worked with **ELLIOT FRANKS, GREG HANOVER, ISAAC JONES, KYLE LUCAS** and others, to distribute heroin in West Baltimore. **BROOKS** would get heroin from his supplier and deliver the drugs to street-level dealers who would sell the drugs. Over the course of the investigation, **BROOKS** received and sold over five kilos of heroin.

Whenever **BROOKS** got a shipment of drugs from his supplier, he called **KYLE LUCAS** first to coordinate the sale of the heroin. **LUCAS** and **BROOKS** were distant cousins and had been selling drugs together for several years. **BROOKS** was responsible for acquiring the drugs while **LUCAS** was in charge of finding street-level dealers. **LUCAS** recruited street level dealers to distribute to drugs around West Baltimore. Specifically, **LUCAS** recruited **ELLIOT FRANKS, GREG HANOVER**, and **ISAAC JONES** to act as street level dealers. **LUCAS** determined where the street dealers would sell drugs and what quantity of drugs each dealer would get. After all the drugs were sold, **BROOKS** received a larger portion of the drug proceeds.

ELLIOT had been selling cocaine with other drug dealers in Baltimore beginning in 2014. He began selling heroin for **BROOKS** and **LUCAS** in January 2016. **ELLIOT** and **ISAAC JONES** are step-brothers and have lived together in the same house since 2014. **ISAAC** knew about all of **ELLIOT'S** drug dealing activity but **ISAAC** worked full time as truck driver and did not want to deal drugs.

In June of 2017, **ISAAC** lost his job as a truck driver and, needing money, began dealing drugs with **ELLIOT**. After June, **ISSAC** and **ELLIOT** went to pick up drugs from **LUCAS** and **BROOKS**

every week. After **ISAAC** and **ELLIOT** got the drugs, they coordinated where they were going to make sales and share proceeds.

GREG HANOVER began selling drugs he received from **BROOKS** and **LUCAS** in January 2015. He knew there were other street level dealers who got drugs from **BROOKS** and **LUCAS** but **GREG** has never met anyone else who gets drugs from **BROOKS** and **LUCAS** nor has **Greg** ever seen anyone pick up drugs at the same time he does.

GREG always carries a weapon when he sells drugs because he has been robbed before while carrying drug proceeds. After the robbery, **GREG** was paranoid about being followed. He began constantly changing meeting locations to avoid detection. Sometimes, **GREG'S** girlfriend **CELESTE DRAKE** would accompany him when he made the sales. **CELESTE** sat in the car while he made the sales. She never touched the weapon because **GREG** carried it on his person.

On three occasions, **CELESTE** went by herself to meet with potential drug buyers because Greg was afraid he would be robbed again. On these occasions, **CELESTE** got drugs from **GREG**, and conducted the sales by herself. For these three sales, **GREG** paid her $20 from the drug proceeds.

RELEVANT CONDUCT IN CONSPIRACIES

1. **Brooks** and **Lucas** enter guilty pleas first. Based on the information received from the government and law enforcement officers, the probation officer found that **Brooks** and **Lucas** were responsible for distributing five kilos of heroin. **Brooks** challenges this drug amount in the PSR. **Brooks** argues that the Indictment alleges only one kilo of heroin and any quantity beyond that must be proven beyond a reasonable doubt. What quantity of drugs will **Brooks** be liable for?

_____
_____
_____

2. Would the aggravating role enhancement apply to **Brooks**?

_____
_____
_____

3. **Lucas** is also challenging the drug quantity in his PSR. He argues that he should not be held responsible for the same quantity of drugs as **Brooks**. **Lucas** argues that he is liable for 2 kilos, which is the amount he personally handled. **Lucas** noted that while he and **Brooks** shared the drug proceeds equally, he only worked under **Brooks'** direction and never met the supplier. What quantity of drugs will **Lucas** be liable for?

_____
_____
_____

4. Would the aggravating role enhancement apply to **Lucas**?

_____
_____
_____

RELEVANT CONDUCT IN CONSPIRACIES

5. **Greg** is the next defendant to be sentenced. The PSR states that **Greg** personally sold one kilo of heroin but stated that because he was part of a conspiracy, and knew there were other street level dealers, he should also be liable for the entire quantity of the conspiracy. Will **Greg** be liable for the drugs sold by others in the conspiracy?

_____
_____
_____

6. **Celeste** is sentenced a day after Greg. She made several objections to her PSR. First, she argues that her drug quantity should be limited to the three drug transactions she conducted by herself, which totaled 20 grams. What quantity of drugs is attributable to **Celeste**?

   _____
   _____
   _____

7. The PSR for **Celeste** also added a 2-level enhancement under §2D1.1(b)(1) for possession of a weapon. **Celeste** argues that she never carried a gun and therefore cannot be liable for the weapon. Will **Celeste** get the gun enhancement?

   _____
   _____
   _____

8. **Celeste** also argues that she is eligible for safety valve. The government agrees that she meets four out of the five criteria but argues that she cannot get safety valve because of the weapon. Can **Celeste** get safety valve?

   _____
   _____
   _____

9. Finally, **Celeste** argues that she is eligible for a minor role reduction because she is less culpable than other people in the conspiracy. The government agrees that she is less culpable but argues that she already received a reduction on the drug quantity and therefore, she is not eligible for further reductions. Will **Celeste** get minor role even if she is held responsible only for the quantity of drugs she sold?

_____
_____
_____

10. **Ellio**t and **Isaac** are sentenced last. **Elliot** and the government have agreed that **Elliott** is responsible for distributing two kilos of heroin in this conspiracy. However, the PSR noted that **Elliot** was selling drugs prior to joining this conspiracy, totaling 300 grams of cocaine. Government argues that the cocaine should be included in the drug quantity for the instant offense. Will **Elliot** be held responsible for the cocaine he sold before he entered the conspiracy?

_____
_____
_____

11. At **Isaac's** sentencing, the government argues that the drug quantity is two kilos, the same quantity as **Elliot**. The government notes that **Elliot** and **Isaac** lived together during the conspiracy and that **Isaac** knew that **Elliot** was selling heroin. **Isaac** argues he can only be held accountable for the drugs he sold, which totaled 1 kilo. What quantity of drugs will be attributed to **Isaac**?

    _____
    _____
    _____

PRIMER

AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS §§3B1.1 & 3B1.2

April 2017

Prepared by the Office of General Counsel, U.S. Sentencing Commission

TABLE OF CONTENTS

I. INTRODUCTION

This primer discusses issues related to adjustments pursuant to sentencing guidelines §§3B1.1 and 3B1.2 based on the defendant's aggravating or mitigating role in the offense. This primer addresses some of the procedural questions related to the adjustments, the definitions of terms used in the guidelines relating to the adjustments, and issues concerning the adjustments' application. It is not, however, intended as a comprehensive compilation of all case law addressing these issues.

Together, §§3B1.1 and 3B1.2 serve the guidelines' objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense conduct. To this end, §3B1.1 increases the defendant's base offense level if he or she served as an organizer, leader, manager, or supervisor in certain criminal activity, whereas §3B1.2 decreases the defendant's base offense level if he or she served only as a minor or minimal participant in the criminal activity. The determination of a defendant's role in the offense is not solely made on the basis of the elements and acts cited in the count of conviction, but also on the basis of all relevant conduct attributable to the defendant under §1B1.3 (Relevant Conduct).[1]

II. AGGRAVATING ROLE: §3B1.1

Section 3B1.1 provides for 2-, 3-, and 4-level increases to the offense level, depending on the defendant's aggravating role in the offense, as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.[2]

Applying the adjustment turns, first, on the *size and scope of the criminal activity* ("five or more participants or was otherwise extensive"), and, second, on the *defendant's particular*

[1] USSG Ch. 3, Pt. B, intro. commentary.

[2] USSG §3B1.1.

role in that activity (the defendant was an "organizer or leader" or a "manager or supervisor").[3]

The government bears the burden of proving by a preponderance of the evidence that the defendant should receive an aggravating role adjustment.[4] Upon finding that the government has met its burden of proving the requisite facts, the district court must apply the appropriate enhancement and has no discretion to decide whether to apply §3B1.1.[5] As for the appellate standard of review, "the determination of a defendant's role in an offense is necessarily fact-specific. Appellate courts review such determinations only for clear error. Thus, absent a mistake of law, battles over a defendant's status and over the scope of the criminal enterprise will almost always be won or lost in the district court."[6]

A. Size and Scope of the Criminal Activity

To apply a 3- or 4-level adjustment pursuant to §3B1.1(a) or (b), the criminal activity must have involved "five or more participants" or have been "otherwise extensive." In the absence of such a criminal activity, the defendant may only be subject to a 2-level increase pursuant to §3B1.1(c). Accordingly, in applying §3B1.1, the sentencing court must first determine the size and scope of the criminal activity.

3 *See* USSG §3B1.1, comment. (backg'd).

4 *See, e.g.,* United States v. Al-Rikabi, 606 F.3d 11, 14 (1st Cir. 2010) ("The government bears the burden of proving that an upward role-in-the-offense adjustment is appropriate in a given case . . . . It must carry that burden by preponderant evidence."); United States v. Gaines, 639 F.3d 423, 427 (8th Cir. 2011) ("The government bears the burden of proving by a preponderance of the evidence that the aggravating role enhancement is warranted."); United States v. Cruz Camacho, 137 F.3d 1220, 1224 (10th Cir. 1998) ("The burden is on the government to prove, by a preponderance of the evidence, the facts necessary to establish a defendant's leadership role."). *See also* United States v. Rodriguez, 851 F.3d 931 (9th Cir. 2017) (holding that district court was not required to submit to jury issue of whether a defendant convicted of drug crimes was an organizer or leader before imposing an enhancement under §3B1.1(a), where such adjustment did not affect the statutory maximum or mandatory minimum of defendant's sentence.)

5 *See, e.g.,* United States v. Jimenez, 68 F.3d 49, 51–52 (2d Cir. 1995) ("[T]he managerial role enhancement under § 3B1.1 'is mandatory once its factual predicates have been established.'") (citations omitted); Unites States v. Christian, 804 F.3d 819, 822 (6th Cir. 2015) ("Once a sentencing court makes a factual finding as to the applicability of a particular adjustment provision, the court has no discretion, but must increase the offense level by the amount called for in the applicable provision.") (citing *United States v. Feinman*, 930 F.2d 495, 500 (6th Cir. 1991)).

6 United States v. Graciani, 61 F.3d 70, 75 (1st Cir. 1995) (citations omitted).

1. "Five or More Participants"

Application Note 1 to §3B1.1 defines a *participant* as "a person who is criminally responsible for the commission of the offense . . . ."[7] A person who is not criminally responsible for committing the offense is not a participant; however, §3B1.1 does not require that a criminally responsible person actually be convicted to qualify as a "participant."[8] The defendant, as a criminally responsible person, *is* a participant for purposes of counting the number of participants under §3B1.1.[9]

The guidelines specifically provide that undercover law enforcement officers are not participants because they are not criminally responsible for committing the offense.[10] Unlike undercover officers, however, an informant may be considered a "participant" for any period of time during which he or she was a member of the conspiracy, before becoming a governmental informant.[11]

Courts "uniformly count" as participants those who "were (i) aware of the criminal objective, and (ii) knowingly offered their assistance."[12] Consistent with this principle, persons who are not co-conspirators can be "participants" if they aid the defendant with knowledge of the criminal activity. Accordingly, the definition of a *participant* is broader than conspiratorial liability. For example, in *United States v. Aptt*,[13] the court held that the defendant's high-level employee, who continued to solicit investments despite having notice that the company was operating a Ponzi scheme and made knowingly false representations to potential investors, was a "participant" in the criminal activity. Similarly,

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7 USSG §3B1.1, comment. (n.1).

8 *Id. See also* United States v. Brockman, 183 F.3d 891, 899 (8th Cir. 1999) ("Persons who are not indicted or tried, but who are nonetheless criminally responsible for defendant's crime, are 'participants' under § 3B1.1.") (citations omitted); United States v. Braun, 60 F.3d 451 (8th Cir. 1995) (holding that an individual could be a participant even if that person did not benefit from the commission of the offense).

9 *See* United States v. Paccione, 202 F.3d 622, 625 (2d Cir. 2000) (holding, consistent with the "apparent consensus among our sister circuits," that "a defendant may be included when determining whether there were five or more participants in the criminal activity in question").

10 USSG §3B1.1, comment. (n.1).

11 *See* United States v. Dyer, 910 F.2d 530 (8th Cir. 1990). *See also* United States v. Fells, 920 F.2d 1179, 1182 (4th Cir. 1990) (concluding that a person was not a "participant" because he "was an informant and undercover operative who had not been involved in [the] distribution network and was acting at the direction of the government").

12 United States v. Anthony, 280 F.3d 694, 698 (6th Cir. 2002); *accord* United States v. Boutte, 13 F.3d 855, 860 (5th Cir. 1994) (concluding that a person "need only have participated knowingly in some part of the criminal enterprise" to be a participant). *See also* United States v. Hall, 101 F.3d 1174, 1178 (7th Cir. 1996) ("[J]ust as a party who knowingly assists a criminal enterprise is criminally responsible under principles of accessory liability, a party who gives knowing aid in some part of the criminal enterprise is a 'criminally responsible' participant under the Guidelines.").

13 354 F.3d 1269 (10th Cir. 2004).

in *United States v. Alfonzo-Reyes*,[14] the court held that the defendant's wife was a "participant" in his fraud scheme where she knowingly falsified government loan applications at her husband's direction. Courts will also count as a "participant" a person that is deceased at the time of the defendant's sentencing, if that person participated in the criminal activity.[15]

Conversely, an *unwitting person* is not a "participant," even if the person assisted the criminal enterprise, because he or she ordinarily bears no criminal responsibility.[16] For example, in *United States v. King*,[17] the court held that the defendant's employees were not "participants" in his mail fraud schemes because they were merely "innocent clerical workers." In *United States v. Stevenson*,[18] the court held that an unwitting minor whom the defendant used as a messenger in his criminal activity was not a "participant." And in *United States v. Anthony*,[19] the court held that the defendant's attorney was not the necessary "fifth participant" in a scheme to make materially false statements to federal investigators, despite writing the key letter that conveyed his client's false statements to authorities, because he apparently did not know the statements were false. Likewise, a person's mere knowledge that criminal activity is afoot does not ordinarily make that person a "participant," absent some act in furtherance of the activity.[20]

In the drug conspiracy context, courts have held that *end users* of controlled substances are not "participants" in distribution conspiracies. Under these circumstances, "[w]here the customers are solely end users of controlled substances, they do not qualify as participants . . . absent an intent to distribute or dispense the substance. In order to qualify as a participant, a customer must do more than simply purchase small quantities of a drug for his personal use."[21] Individuals who are *more than mere end-user purchasers*, such as a

[14] 592 F.3d 280 (1st Cir. 2010).

[15] *See* United States v. Bennet, 765 F.3d 887, 898 (1st Cir. 2014) ("Clayton participated in the scheme, and his subsequent death simply does not alter that fact. Nor does Clayton's death affect whether [the defendant's] fraudulent scheme was 'otherwise extensive' when perpetrated . . . .").

[16] *See* United States v. McCoy, 242 F.3d 399, 410 (D.C. Cir. 2001). *See also* United States v. Harvey, 532 F.3d 326, 338 (4th Cir. 2008) ("'Participants' are persons involved in the activity who are criminally responsible, not innocent bystanders used in the furtherance of the illegal activity."). *See also* United States v. Cyphers, 130 F.3d 1361, 1363 (9th Cir. 1997) ("[M]ere unknowing facilitators of crimes will not be considered criminally responsible participants.").

[17] 257 F.3d 1013, 1024 (9th Cir. 2001).

[18] 6 F.3d 1262 (7th Cir. 1993).

[19] 280 F.3d 694 (6th Cir. 2002).

[20] *See* United States v. Mann, 161 F.3d 840, 867 (5th Cir. 1998) ("A finding that other persons 'knew what was going on' is not a finding that these persons were criminally responsible for commission of an offense."). *See also* United States v. Fluker, 698 F.3d 988, 1002 (7th Cir. 2012) ("'[M]ere knowledge of a conspiracy' is insufficient to establish that a person was 'criminally responsible.'") (citations omitted).

[21] United States v. Egge, 223 F.3d 1128, 1133–34 (9th Cir. 2000). *See also* United States v. Barrie, 267 F.3d 220, 224 (3d Cir. 2001) ("Customers of drug dealers ordinarily cannot be counted as participants in a drug

buyer who purchases drugs for further distribution or those who assist the transportation of drugs, are "participants" under §3B1.1.[22] Courts have also held that persons who receive stolen property, but without knowledge that it was stolen or without any participation in the theft, are not "participants" supporting application of the aggravating role adjustment.[23]

When determining whether there are "five or more participants" in the criminal activity, the court may consider *all* participants, and not only those who were subordinate to or supervised by the defendant. Courts have noted that "[t]he text of the guideline and its commentary does not require that five of the activity's participants be subordinate to the defendant; it merely requires that the activity involve five or more participants."[24] Indeed, a defendant does not need to even know of the other participants for purposes of applying §3B1.1.[25]

2. "Otherwise Extensive"

Even if the criminal activity did not involve at least five participants, the defendant may nonetheless be subject to an adjustment pursuant to §3B1.1(a) and (b) if the criminal activity was "otherwise extensive." Whether the criminal activity was "otherwise extensive" encompasses more than merely the number of "participants" because, as Application Note 3 to §3B1.1 provides, "[i]n assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered."[26]

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distribution conspiracy.").

[22] *See* United States v. Fells, 920 F.2d 1179, 1182 (4th Cir. 1990) (concluding that individuals to whom the defendant distributed crack cocaine, "who were themselves distributors" were "not end users . . . but were lower level distributors used by [the defendant] to market illegal drugs" and thus participants). *See also* United States v. Garcia-Hernandez, 530 F.3d 657, 665 (8th Cir. 2008) (concluding that a buyer was a participant where the defendant sometimes "fronted" him drugs, which he "was required to repay . . . after selling [the drugs] to others"); United States v. Alvarez, 927 F.2d 300, 303 (6th Cir. 1991) (affirming the district court's finding that those involved in transporting cocaine for the defendant were "participants").

[23] *See* United States v. Melendez, 41 F.3d 797, 800 (2d Cir. 1994); United States v. Colletti, 984 F.2d 1339, 1346 (3d Cir. 1992).

[24] United States v. Bingham, 81 F.3d 617, 629 (6th Cir. 1996).

[25] *See* United States v. Kamoga, 177 F.3d 617, 622 (7th Cir. 1999) (holding that "§ 3B1.1 [does not] require[] control over and/or knowledge of all of the other participants in a criminal activity"); United States v. Dota, 33 F.3d 1179, 1189 (9th Cir. 1994) ("Section 3B1.1 does not require that [the defendant] knew of or exercised control over all of the participants.").

[26] USSG §3B1.1, comment. (n.3). *See, e.g.*, United States v. Olive, 804 F.3d 747, 759 (6th Cir. 2015) (affirming application of the adjustment as "the scheme was quite extensive inasmuch as it involved the 'unknowing services of many outsiders': the many financial advisors who supplied 'clients' for defendant to defraud.").

Multiple circuits follow the test articulated by the Second Circuit in *United States v. Carrozzella*,[27] for determining whether the criminal activity was otherwise extensive. *Carrozzella* held that "otherwise extensive" as used in §3B1.1, requires, at a minimum, "'a showing that an activity is the *functional equivalent* of an activity involving five or more participants.'" [28] The sentencing court, in making this determination, must consider "(i) the number of knowing participants; (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; [and] (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme." [29] The second and third factors, the court explained, "separate out" the "service providers who facilitate a particular defendant's criminal activities but are not the functional equivalent of knowing participants" and the "[l]awful services that are not peculiarly tailored and necessary to the particular crime but are fungible with others generally available to the public . . . ." [30] However, the *Carrozzella* court cautioned that the guideline's use of the term "otherwise extensive" entails more than mere "head-counting," and that a sentencing court may conclude that the activity was not otherwise extensive even if it involved some combination of at least five knowing and unknowing participants.[31] At least three other circuits, the Third, Sixth, and District of Columbia circuits, have adopted the *Carrozzella* test.[32]

The First Circuit has adopted a "totality of the circumstances" test for determining whether a criminal activity was otherwise extensive. Under that test, the court may look to all of the circumstances of the criminal activity, "'including . . . the width, breadth, scope, complexity, and duration of the scheme.'" [33] The First Circuit nonetheless views the number of persons involved as relevant, explaining that "[i]n most instances, the greater the number of people involved in the criminal activity, the more extensive the activity is likely to be." [34] The Tenth Circuit has adopted the First Circuit's test.[35]

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[27] 105 F.3d 796 (2d Cir. 1997), *abrogated on other grounds by* United States v. Kennedy, 223 F.3d 157 (2d Cir. 2000).

[28] *Carrozzella*, 105 F.3d at 803 (*quoting* United States v. Tai, 41 F.3d 1170, 1174 (7th Cir. 1994)) (emphasis in original).

[29] *Id*. at 803–04.

[30] *Id.* at 804.

[31] *Id.*

[32] *See* United States v. Helbling, 209 F.3d 226 (3d Cir. 2000); United States v. Anthony, 280 F.3d 694 (6th Cir. 2002); United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001).

[33] United States v. Laboy, 351 F.3d 578, 586 (1st Cir. 2003) (*quoting* United States v. Dietz, 950 F.2d 50, 53 (1st Cir. 1991)).

[34] United States v. Dietz, 950 F.2d 50, 53 (1st Cir. 1991).

[35] *See* United States v. Yarnell, 129 F.3d 1127, 1139 (10th Cir. 1997).

In establishing "otherwise extensive" criminal activity, other courts have found certain factors to be persuasive, including: the total loss amount, the amount of financial benefit to the defendant, the duration of the crime, the number of victims, the geographic scope of the criminal enterprise, and the number of people involved.[36]

3. "Any Criminal Activity Other than Described in (a) or (b)"

To apply the 2-level adjustment established in §3B1.1(c), the court need only conclude that the defendant was involved in a "criminal activity," which need not involve "five participants or more" or be "otherwise extensive." Subsection (c) is thus broader than the remainder of §3B1.1. Because §3B1.1(c) requires that the defendant act as an organizer, leader, manager, or supervisor of another participant, the court must necessarily find that the "criminal activity" involved at least two participants—the defendant and another person—before applying the 2-level adjustment.[37]

The court may not apply §3B1.1(c), however, if it finds that the defendant held an aggravating role in a criminal activity that involved at least five participants or was otherwise extensive. The mandatory language of §3B1.1 requires the sentencing court in such circumstances to apply either subsection (a) or (b), depending on whether the defendant acted as an "organizer or leader" or "manager or supervisor."[38]

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[36] *See* United States v. Fluker, 698 F.3d 988, 1002 (7th Cir. 2012) ("In determining whether a scheme is otherwise extensive, we have considered: (1) the monetary benefits obtained during the scheme; (2) the length of time the scheme continued; (3) the number of people utilized to operate the scheme; and (4) the scheme's geographic scope."); United States v. Washington, 255 F.3d 483, 486 (8th Cir. 2001) (upholding enhancement based on otherwise extensive criminal activity where the defendant "utilized at least 11 logging companies to defraud at least 41 families in 13 states for over $800,000 over three years"); United States v. Rose, 20 F.3d 367, 374 (9th Cir.1994) ("Whether criminal activity is 'otherwise extensive' depends on such factors as (i) the number of knowing participants and unwitting outsiders; (ii) the number of victims; and (iii) the amount of money fraudulently obtained or laundered.") (citations omitted); United States v. Holland, 22 F.3d 1040, 1046 (11th Cir. 1994) ("Although this circuit does not employ a precise definition for the 'otherwise extensive' standard, there are a number of factors relevant to the extensiveness determination, including the length and scope of the criminal activity as well as the number of persons involved.").

[37] *See* USSG §3B1.1, comment. (n.2); United States v. Williams, 527 F.3d 1235, 1249 (11th Cir. 2008); United States v. Lewis, 476 F.3d 369, 390 (5th Cir. 2007). *See also* United States v. Tai, 750 F.3d 309, 318–20 (3d Cir. 2014) (remanding the case for resentencing where the court applied §3B1.1(c) without making the required factual findings concerning whether the defendant supervised a "criminally responsible" participant).

[38] *See* United States v. Ross, 210 F.3d 916, 925 (8th Cir. 2000) ("In order to impose a two-level enhancement for role in the offense under § 3B1.1(c), the court must first determine that neither § 3B1.1(a) nor § 3B1.1(b) apply."); United States v. Gonzalez-Vazquez, 219 F.3d 37, 44 (1st Cir. 2000) ("[Section] 3B1.1 sets forth a precise adjustment scheme that cannot be modified by the district court . . . . Therefore, a court may not 'forgo the three-level increase called for by U.S.S.G. § 3B1.1(b) and instead impose a two-level increase' when it finds mitigating circumstances.") (*quoting* United States v. Cotto, 979 F.2d 921, 922 (2d Cir. 1992)); United States v. Kirkeby, 11 F.3d 777, 778–79 (8th Cir. 1993) ("A trial court's only options in cases involving a criminal activity with five or more participants are . . . a four-level enhancement under § 3B1.1(a),

B. ROLE IN THE CRIMINAL ACTIVITY

Proper application of §3B1.1 requires the court to determine whether the defendant was an organizer, leader, manager, or supervisor in the criminal activity.[39] "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct) . . . ."[40] Thus, the applicability of §3B1.1 is not limited only to the defendant's participation in the elements of the counts of conviction, but for all relevant conduct attributable to the defendant under §1B1.3.[41] Although the

a three-level enhancement under § 3B1.1(b), or no enhancement at all (if the defendant played no aggravating role in the offense).")

[39] To qualify for the aggravating role enhancement, the defendant must have been the organizer, leader, manager, or supervisor of at least one other participant in the criminal activity. *See* USSG §3B1.1, comment. (n.2). *See also* United States v. Musa, 830 F.3d 786, 788–89 (8th Cir. 2016) (remanding the case for resentencing to provide district court the opportunity to clarify whether the defendant "organized or led at least one other participant, and to identify what evidence in the record supports that finding."); United States v. Bonilla-Guizar, 729 F.3d 1179, 1186–87 (9th Cir. 2013) (remanding the case for resentencing stating that "the district court may apply the § 3B1.1 management enhancement only if it finds, based on evidence in the record, that [the defendant] managed at least one other participant in the crime."); United States v. Ofray Campos, 534 F.3d 1, 40–41 (1st Cir. 2008) (evidence was insufficient to support §3B1.1(c) enhancement against defendant based upon his operation of drug activity from his house and bar, even though there was evidence to show that defendant operated drug points round-the clock, there was no evidence to show that defendant controlled others in operating drug point); United States v. Lopez-Sandoval, 146 F.3d 712, 717 (9th Cir. 1998) ("even a defendant with an important role in an offense" cannot receive an enhancement under §3B1.1 unless there is also a "showing that the defendant had control over others.") (internal quotations omitted). However, a finding that the defendant exercised responsibility over property, assets, or activities in the criminal activity instead of other participants, could be a basis for an upward departure. USSG §3B1.1, comment. (n.2).

[40] USSG Ch. 3, Pt. B, intro. commentary.

[41] The determination of the size and scope of the criminal activity should also be made on the basis of all the conduct within the scope of §1B1.3, and not solely on the specifics acts and participation in the commission of the offense of conviction. For example, in *United States v. Lucena-Rivera*, 750 F.3d 43, 50–51 (1st Cir. 2014), the First Circuit affirmed the district court's conclusion that the criminal activity involved more than five persons, stating:

> [The defendant] does not dispute that more than five individuals were involved in his drug-trafficking operation, but contends that there was no basis to conclude that those individuals were also involved in the money-laundering offense of conviction . . . . [T]he definition of relevant conduct [includes] "all acts and omissions . . . by the defendant . . . that occurred during the commission of the offense of conviction, *in preparation for that offense,* or in the course of attempting to avoid detection or responsibility for that offense" (emphasis added). Here, the drug-trafficking activity was a necessary precursor to the money-laundering offense of conviction.

Lucena-Rivera, 750 F.3d at 50–51.

guidelines do not expressly define the terms related to the defendant's role in the criminal activity, the Commentary to §3B1.1 provides guidance, and there is an expansive body of case law interpreting and applying them.

With respect to the defendant's role in the criminal activity, courts have found that "[t]he line between being an organizer or leader, on the one hand, and a manager or supervisor, on the other, is not always clear . . . ."[42] Nonetheless, it is clear that the difference between organizers and leaders, and managers and supervisors, turns on the defendant's degree of responsibility in the criminal activity.[43] For that reason,

> [a]t the crux of this distinction and at the base of the rationale for this enhancement sits the relative culpability of each participant in the criminal enterprise: those who are more culpable ought to receive the harsher organizer/leader enhancement, while those with lesser culpability and responsibility receive the lesser enhancement imposed on managers/supervisors . . . . And those with the least relative culpability receive no enhancement at all.[44]

Given this hierarchy of responsibility, conduct within the scope of §3B1.1 overlaps its classifications, so that organizers and leaders also qualify as managers and supervisors.[45] Also, more than one person may qualify as an organizer or leader of a criminal activity, but titles given to members in the criminal activity, such as "kingpin" or "boss," "are not controlling."[46]

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[42] United States v. Bahena, 223 F.3d 797, 804 (8th Cir. 2000) (*citing* United States v. Delpit, 94 F.3d 1134, 1155 (8th Cir. 1996)).

[43] *See* USSG §3B1.1, comment. (backg'd) ("This section provides a range of adjustments to increase the offense level based upon . . . the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about *relative* responsibility.") (emphasis added).

[44] United States v. Weaver, 716 F.3d 439, 442 (7th Cir. 2013) (citations omitted). *See also* United States v. Herrera, 878 F.2d 997, 1000 (7th Cir. 1989) ("Organizers and leaders of criminal activity play an important role in the planning, developing, directing, and success of the criminal activity . . . . Thus, organizers and leaders generally are deemed more culpable than mere managers or supervisors.") (citations omitted).

[45] United States v. Quigley, 373 F.3d 133, 139 (D.C. Cir. 2004) ("We read subsection (b) to sweep in lower level managerial and supervisory conduct, and subsection (a) to encompass higher level managerial and supervisory conduct . . . . We are confident that all organizers or leaders of a conspiracy qualify as managers or supervisors under § 3B1.1(b).").

[46] USSG §3B1.1, comment. (n.4). *See* United States v. Antillon-Castillo, 319 F.3d 1058, 1060 (8th Cir. 2003) ("A defendant need not be *the* leader of an organization or lead 'all of the other participants in the activity' in order to be a leader under § 3B1.1(a).") (citations omitted) (emphasis in original); United States v. Vallejo, 297 F.3d 1154, 1169 (11th Cir. 2002) ("The defendant does not have to be the sole leader or kingpin of the conspiracy in order to be considered an organizer or leader within the meaning of the Guidelines.").

To distinguish leaders and organizers from mere managers and supervisors, Application Note 4 provides a non-exhaustive list of factors for the court to consider, including:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.[47]

Courts frequently look to these seven factors set out in Application Note 4 to determine whether the defendant was an "organizer or leader." If the district court's factual findings corroborate that some combination of these factors establishes the defendant as an organizer or leader, the court of appeals will likely not disturb the application of §3B1.1(a).[48] However, courts have been careful to note that the guidelines do not require that each of the factors have to be present in any one case, nor that any single factor is dispositive in determining whether §3B1.1(a) applies.[49] Nonetheless, where the district court's factual findings do not reveal that the defendant was an organizer or leader based on factors such as those enumerated in Application Note 4, it may err by applying the 4-level enhancement pursuant to §3B1.1(a).[50]

To qualify as "organizer or leader," the defendant must have exercised a significant degree of control and decision making authority over the criminal activity. For example, in *United States v. Bolden*,[51] the Eighth Circuit affirmed the district court's conclusion that the

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47 USSG §3B1.1, comment. (n.4).

48 *See* United States v. Noble, 246 F.3d 946, 953–54 (7th Cir. 2001); United States v. Bahena, 223 F.3d 797, 804–05 (8th Cir. 2000).

49 *See* United States v. Olejiya, 754 F.3d 986, 990 (D.C. Cir. 2014) ("No single factor is dispositive."); United States v. Robertson, 662 F.3d 871, 877 (7th Cir. 2011) ("no single § 3B1.1 factor is essential in determining whether the adjustment applies, and a court need not assign equal weight to each factor."); United States v. Ramirez, 426 F.3d 1344, 1356 (11th Cir. 2005) ("There is no requirement that all of the considerations have to be present in any one case . . . these factors are merely considerations for the sentencing judge."); United States v. Tejada-Beltran, 50 F.3d 105, 111 (1st Cir. 1995) ("There need not be proof of each and every factor before a defendant can be termed an organizer or leader."); United States v. Bernaugh, 969 F.2d 858, 863 (10th Cir. 1992) ("The Guidelines do not require that each of the factors be satisfied for § 3B1.1(a) to apply.").

50 *See*, *e.g.*, United States v. Martinez, 584 F.3d 1022,1028 (11th Cir. 2009) (concluding that the district court erred in applying §3B1.1(a) because the supported factual findings "do not establish, standing alone or in concert, any of the seven factors set forth in Comment Four to Section 3B1.1 . . . ."); United States v. Stevens, 985 F.2d 1175, 1184–85 (2d Cir. 1993) ("It did not suffice for the court simply to state that it had 'no doubt' that [the defendant] controlled the operation, without giving some explanation as to the evidentiary basis for its view.").

51 596 F.3d 976 (8th Cir. 2010).

defendant was an organizer or leader of a drug conspiracy, where the evidence showed that the defendant "recruited members of the conspiracy," "directed those members to distribute drugs," "supplied drugs for distribution," "retained a large portion of profit for himself," and "played a role in setting up [drug] transactions."[52] In *United States v. Szur*,[53] the Second Circuit affirmed the district court's finding that the defendant was the organizer or leader of a financial fraud scheme, where he and another person created the scheme, and the defendant himself received half of the proceeds from the sale of fraudulent stock, recruited others to sell the stock, was the owner of the firm, and was "ultimately responsible for the control of the [firm's] branch offices."[54]

By contrast, to be a manager or supervisor, the defendant need only "have exercised some degree of control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of carrying out the crime."[55] In

[52] *Bolden*, 596 F.3d at 984. *See also* United States v. Garcia, 512 F.3d 1004, 1006 (8th Cir. 2008) (affirming the application of §3B1.1(a) where the defendant "recruited others to join the conspiracy . . . received drug orders from customers, and . . . directed others to package and deliver drugs"). In drug trafficking cases, a defendant is not an "organizer or leader" solely because he bought or sold narcotics, even in large amounts. *See* United States v. Sayles, 296 F.3d 219, 226–27 (4th Cir. 2002). However, a court may consider the quantity of drugs where the evidence shows that the defendant was more than just a mere buyer or seller. *See* United States v. Ponce, 51 F.3d 820 (9th Cir. 1995); United States v. Iguaran-Palmar, 926 F.2d 7 (1st Cir. 1991); United States v. Garvey, 905 F.2d 1144 (8th Cir. 1990).

[53] 289 F.3d 200 (2d Cir. 2002).

[54] *Szur*, 289 F. 3d at 218. *See also* United States v. Borders, 829 F.3d 558, 570 (8th Cir. 2016) (concluding that the district court did not erred in applying §3B1.1(a) where the defendant led scouting parties to find vehicles to steal, directed another participant to remove VIN numbers to prevent police detection, and stole merchandise and arranged for its transportation, storage, and purchase).

[55] United States v. Fuller, 897 F.2d 1217, 1220 (1st Cir. 1990), *superseded by the 1993 amendment to the Commentary to §3B1.1, USSC App. C, Amendment 500, as recognized in* United States v. Caseslorente, 220 F.3d 727, 734 (6th Cir. 2000). *See also* United States v. Valencia, 829 F.3d 1007, 1012 (8th Cir. 2016), *cert. denied*, No. 16-7226 (Jan. 23, 2017) (upholding enhancement where the defendant "directed other members of the organization and enlisted their aid during at least one drug shipment"); United States v. Henry, 813 F.3d 681, 682–83 (7th Cir. 2016) (holding that "[i]f you recruit a person, tell him what his job is, specify his wage, and equip him with tools of his trade (the gun in this case), you're his manager" and that as such "an employee doesn't cease to be an employee merely because he's on a long leash."); United States v. Rodriguez, 741 F.3d 908, 912 (8th Cir. 2014) (upholding enhancement where the defendant "directed his coconspirator to transport drugs and drug proceeds," and concluding that "[t]he fact that [the defendant] reported to others in the conspiracy does not negate his role in managing and supervising the activities of a coconspirator."); United States v. Hertular, 562 F.3d 433, 448 (2d Cir. 2009) ("A defendant is properly considered as a manager or supervisor . . . if he 'exercised some degree of control over others involved in the commission of the offense or played a significant role in the decision to recruit or supervise lower-level participants.'") (citation omitted); United States v. Chau, 293 F.3d 96, 103 (3d Cir. 2002) ("[A] manager or supervisor is one who exercises some degree of control over others involved in the offense.") (internal quotations and alterations omitted); United States v. Backas, 901 F.2d 1528, 1530 (10th Cir. 1990) ("In order to be a supervisor, one needs merely to give some form of direction or supervision to someone subordinate in the criminal activity for which the sentence is given.").

United States v. Solorio,[56] the Sixth Circuit held the district court properly concluded the defendant was a "supervisor" in a "vast drug enterprise" where he recruited and exercised control over just one accomplice by directing that accomplice's drug activities.[57] Similarly, in *United States v. Voegtlin*,[58] the Eighth Circuit affirmed the district court's application of the 2-level adjustment on grounds that the defendant acted as a supervisor or manager by "[i]nstructing others to obtain precursors used to produce methamphetamine."[59] In *United States v. Griffin*,[60] the defendant acted as a "manager" of a chop-shop operation where he placed orders for stolen vehicles, gave instructions to others as to what kinds of vehicles to steal, gave instructions for dismantling the stolen vehicles, and managed the disposition of stolen car parts. And in *United States v. Powell*,[61] the defendant was a "supervisor" for purposes of §3B1.1(c) in evading federal fuel taxes where he supervised a single accountant's preparation of fraudulent tax documents.

The guideline commentary notes that, with respect to smaller criminal activities that involve fewer than five participants or are not otherwise extensive, "the distinction between organization and leadership, and that of management or supervision is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility."[62] Accordingly, §3B1.1(c) is inclusive and calls for the same 2-level adjustment regardless of the specific aggravating role held by the defendant. Nonetheless, the Ninth Circuit has declined to apply the 2-level adjustment "merely because a defendant's 'important role' makes him 'integral to the success of the criminal enterprise' and gives him a 'high degree of culpability.'"[63]

III. MITIGATING ROLE: §3B1.2

Section 3B1.2 provides for 2-, 3-, and 4-level decreases to the offense level, depending on the defendant's mitigating role in the offense, as follows:

56 337 F.3d 580, 601 (6th Cir. 2003).

57 *See also* United States v. Collins, 715 F.3d 1032, 1039 (7th Cir. 2013) (concluding that the defendant was a "manager or supervisor" as he recruited a participant, fronted him kilos of cocaine, told him how much to sell the product for, and verified his drug dealing procedures).

58 437 F.3d 741 (8th Cir. 2006).

59 *Voegtlin*, 437 F.3d at 748.

60 148 F.3d 850, 856 (7th Cir. 1998).

61 124 F.3d 655, 667 (5th Cir. 1997).

62 USSG §3B1.1, comment. (backg'd).

63 United States v. Doe, 778 F.3d 814, 825–26 (9th Cir. 2015).

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.[64]

Application of §3B1.2 turns primarily on the defendant's particular role in the criminal activity, specifically whether he or she was a "minimal" or "minor" participant. As with §3B1.1, "[t]he determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case."[65]

The defendant bears the burden of proving by a preponderance of the evidence that he or she is entitled to a mitigating role adjustment.[66] As with aggravating role adjustments, the fact-specific nature of mitigating role determinations results in a deferential appellate standard of review. Therefore, "[g]iven the allocation of the burden of proof, a defendant who seeks a downward role-in-the-offense adjustment usually faces an uphill climb in the *nisi prius* court. The deferential standard of review compounds the difficulty, so that a defendant who fails to persuade at that level faces a much steeper slope on appeal."[67]

A. "Substantially Less Culpable than the Average Participant in the Criminal Activity"

Application Note 3(A) explains that §3B1.2 operates to provide "a range of adjustments for a defendant who plays a part in committing the offense that makes him

64 USSG §3B1.2.

65 USSG §3B1.2, comment. (n.3(C)).

66 *See* United States v. Silva-De Hoyos, 702 F.3d 843, 846 (5th Cir. 2012); United States v. Brubaker, 362 F.3d 1068, 1071 (8th Cir. 2004); United States v. Carpenter, 252 F.3d 230, 234 (2d Cir. 2001). *See also* United States v. Castro, 843 F.3d 608, 613 (5th Cir. 2016) ("[A defendant] is not entitled to a §3B1.2 adjustment just because she played a lesser role than others in the criminal activity. [The defendant] is only entitled to a mitigation role adjustment if she showed by a preponderance of the evidence: (1) the culpability of the average participant in the criminal activity; and (2) that she was substantially less culpable than that participant.").

67 United States v. Teeter, 257 F.3d 14, 31 (1st Cir. 2001), *superseded on other grounds by the 2015 amendment to the Commentary to §3B1.2, USSC App. C, Amendment 794, as recognized in* United States v. Quintero-Leyva, 823 F.3d 519, 522 (9th Cir. 2016).

substantially less culpable than the average participant in the criminal activity."[68] The term "participant" as used in §3B1.2 carries the same meaning as "participant" for purposes of §3B1.1.[69] Thus, it is clear that the defendant may receive a mitigating role adjustment only if the criminal activity involved at least one other *participant*, as the commentary expressly states: "an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant . . . ."[70] As with aggravating role adjustments, it is not necessary that the other participants actually be convicted for their role in the criminal activity for §3B1.2 to apply.[71]

Before 2015, courts disagreed about what determining the "average participant" required. The Seventh and Ninth circuits concluded that the "average participant" meant only those persons who actually participated in the criminal activity at issue in the defendant's case, so that the defendant's relative culpability is determined only by reference to his or her co-participants in the case at hand.[72] The Ninth Circuit further clarified that the requisite comparison is to "average participants" and not to "above-average participants."[73] The First and Second circuits concluded that the "average participant" also included typical offenders who commit similar crimes. Under this latter

[68] USSG §3B1.2, comment. (n.3(A)). In 2015, the Commission revised the first sentence of Application Note 3(A) to §3B1.2 and inserted after "substantially less culpable than the average participant" the following phrase: "in the criminal activity." *See* USSG, App. C, Amendment 794 (effective November 1, 2015).

[69] *See* USSG §3B1.2, comment. (n.1). *See also* USSG §3B1.1, comment. (n.1) ("A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted.").

[70] USSG §3B1.2, comment. (n.2).

[71] *See supra* note 8. The fact that the defendant himself merely aided or abetted the criminal activity does not automatically entitle him to a mitigating role adjustment under §3B1.2. *See* United States v. Teeter, 257 F.3d 14 (1st Cir. 2001), *superseded on other grounds by the 2015 amendment to the Commentary to §3B1.2, USSC App. C, Amendment 794, as recognized in* United States v. Quintero-Leyva, 823 F.3d 519, 522 (9th Cir. 2016).

[72] *See, e.g.,* United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994) (explaining that "the relevant comparison . . . is to the conduct of co-participants in the case at hand."); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993) ("The controlling standard for an offense level reduction under [§3B1.2] is whether the defendant was substantially less culpable than the conspiracy's other participants."). *See also* United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) ("While a comparison to the conduct of a hypothetical average participant may be appropriate in determining whether a downward adjustment is warranted at all, the relevant comparison in determining which of the § 3B1.2 adjustments to grant a given defendant is to the conduct of co-participants in the case at hand.") (internal quotations omitted).

[73] United States v. Hurtado, 760 F.3d 1065, 1069 (9th Cir. 2014) ("That [the defendant's] supervisors, organizers, recruiters, and leaders may have *above-average* culpability—and thus are subject to aggravating rule enhancements under U.S.S.G. § 3B1.1—doesn't mean that [the defendant] is 'substantially less culpable than the average participant.'").

approach, courts would have ordinarily considered the defendant's culpability relative *both* to his co-participants *and* to the abstract typical offender.[74]

In 2015, the Commission amended the Commentary to §3B1.2 to address this circuit conflict and generally adopted the approach of the Seventh and Ninth circuits.[75] Application Note 3(A) now specifies that, when determining mitigating role, the defendant is to be compared with the other participants "in the criminal activity." Thus, the relative culpability of the "average participant" is measured only in comparison to those persons who actually participated in the criminal activity, rather than against "typical" offenders who commit similar crimes.

Application Note 3(B) to §3B1.2 provides that a defendant should ordinarily not receive a mitigating role adjustment if he or she benefitted from a reduced offense level by virtue of having been convicted of an offense that was "significantly less serious" than warranted by the actual offense conduct.[76] Courts have applied this note, for example, to deny the adjustments where, by virtue of the offense of conviction, the defendant's base offense level reflected only his or her own conduct and not the broader conspiracy in which the defendant participated.[77] Notably, courts have also interpreted Note 3(B) as applicable to any case in which the defendant's base offense level does not reflect the entire conspiracy, regardless of the offense of conviction.[78]

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[74] *See, e.g.,* United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004) ("[A] defendant must prove that he is both less culpable than his cohorts in the particular criminal endeavor and less culpable than the majority of those within the universe of persons participating in similar crimes."); United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) ("A reduction will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime.").

[75] *See supra* note 68. *See also* United States v. Cruickshank, 837 F.3d 1182, 1194 (11th Cir. 2016) ("Although this Court applies the version of the Guidelines in effect on the date of sentencing, when reviewing the district court's application of the Guidelines, we consider clarifying amendments retroactively on appeal regardless of the date of sentencing . . . . [T]he government in this case argues correctly that Amendment 794 merely clarified the factors to consider for a minor-role adjustment, and did not substantively change § 31B.2."); United States v. Quintero-Leyva, 823 F.3d 519, 523 (9th Cir. 2016) (holding that Amendment 794 "resolved a circuit split, and was intended as a clarifying amendment . . . . therefore . . . it applies retroactively to direct appeals.").

[76] *See* USSG §3B1.2, comment. (n.3(B)).

[77] *See* United States v. Lucht, 18 F.3d 541, 555–56 (8th Cir. 1994). *See also* United States v. Lara, 718 F.3d 994, 995–96 (8th Cir. 2013) (affirming denial of reduction "because at resentencing [the defendant] 'was held responsible only for the amount of drugs involved in the single episode of his arrest and not those related to the greater reach' of his criminal activity.") (citations omitted).

[78] *See* United States v. Roberts, 223 F.3d 377, 381 (6th Cir. 2000) ("Although this note applies by its terms only to a defendant who has been convicted of a lesser offense, it stands for the principle that when a defendant's base offense level does not reflect the conduct of the larger conspiracy, he should not receive a mitigating role adjustment simply because he was a minor participant in that broader criminal scheme.").

B. Minimal and Minor Participants

Upon determining that the defendant was "substantially less culpable than the average participant in the criminal activity," Application Notes 4 and 5 explain how to distinguish between "minimal" and "minor" participants. Application Note 4 provides that §3B1.2(a)'s 4-level reduction for *minimal participants "*is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group."[79] The note further provides that "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant."[80] Application Note 5 provides that §3B1.2(b)'s 2-level reduction for *minor participants* applies to defendants who are "less culpable than most other participants in the criminal activity, but whose role could not be described as minimal."[81]

C. Fact-Based Determination

Whether the defendant is entitled to a mitigating-role adjustment, was a minimal or minor participant, or occupied a role falling between minimal and minor, is "heavily dependent upon the facts of the particular case."[82] Given the fact-dependent nature of §3B1.2 role adjustments, clear principles are difficult to develop and apply. Nonetheless, Application Note 3(C) to §3B1.2 provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The factors direct the court to consider: (1) the degree to which the defendant understood the scope and structure of the criminal activity; (2) the degree to which the defendant participated in planning or organizing the criminal activity; (3) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (4) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; and (5) the degree to which the defendant stood to benefit from the criminal activity. The Commentary also emphasizes that the mere fact that a defendant performed an "essential" or "indispensable" role in the criminal activity is not conclusive in determining

79 USSG §3B1.2, comment. (n.4).

80 *Id.*

81 USSG §3B1.2, comment. (n.5).

82 USSG §3B1.2, comment. (n.3(C)).

whether to apply a mitigating role adjustment and that such defendant, if otherwise eligible, may receive a mitigating role adjustment.[83]

Courts have also interpreted §3B1.2 and its Commentary in order to provide further guidance for determining whether to apply a mitigating-role adjustment. Some courts have offered variations on Application Note 3(A)'s "substantially less culpable" language. In the Third Circuit, the minor role adjustment only applies if the defendant shows that his or her "'involvement, knowledge and culpability' were materially less than those of other participants" and not merely that other participants in the scheme may have been more culpable.[84] In the Eighth Circuit, a defendant is not substantially less culpable if he was "deeply involved" in the offense, even if he was less culpable than the other participants.[85]

Other courts have concluded that for purposes of applying the 4-level "minimal" participant adjustment, the defendant must have been only a "peripheral figure" in the criminal activity. Thus, "[t]o qualify as a minimal participant, a defendant must prove that he is among the least culpable of those involved in the criminal activity . . . . In short, a defendant must be a plainly peripheral player to justify his classification as a minimal participant."[86] The Fifth Circuit has gone further, concluding that defendant must demonstrate that he or she played only a peripheral role to receive *any* mitigating role adjustment, even the 2-level minor participant reduction.[87]

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[83] *Id*. Application Note 3(C) further provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment. *See* United States v. Gomez-Valle, 828 F.3d 324, 330-31 (5th Cir. 2016) (rejecting arguments based on the 2015 amendment to Commentary to §3B1.1, the court held that "Amendment 794 does not provide an affirmative right to a § 3B1.2 reduction to every actor but the criminal mastermind.").

[84] United States v. Brown, 250 F.3d 811, 819 (3d Cir. 2001).

[85] *See, e.g.,* United States v. Bradley, 643 F.3d 1121 (8th Cir. 2011) ("while relative culpability of conspirators is relevant to the minor participant determination, 'our cases make it clear that merely showing the defendant was less culpable than other participants is not enough to entitle the defendant to the adjustment if the defendant was 'deeply involved' in the offense.'") (*quoting* United States v. Bush, 352 F.3d 1177, 1182 (8th Cir.2003)). *See also* United States v. Cubillos, 474 F.3d 1114, 1120 (8th Cir. 2007) ("The propriety of a downward adjustment is determined by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable and by measuring each participant's individual acts and relative culpability against the elements of the offense.") (*quoting* United States v. Salvador, 426 F.3d 989, 993 (8th Cir. 2005)).

[86] United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004). *See also* United States v. Teeter, 257 F.3d 14, 30 (1st Cir. 2001), *superseded on other grounds by the 2015 amendment to the Commentary to §3B1.2, USSC App. C, Amendment 794, as recognized in* United States v. Quintero-Leyva, 823 F.3d 519, 522 (9th Cir. 2016) ("To qualify as a minimal participant and obtain the concomitant four-level reduction, the [defendant] would have to prove by a preponderance of the evidence that she was, at most, a peripheral player in the criminal activity.").

[87] *See* United States v. Miranda, 248 F.3d 434, 446–47 (5th Cir. 2001) ("A minor participant adjustment is not appropriate simply because a defendant does less than other participants; in order to qualify as a minor

Finally, at least two courts have developed factors to guide the sentencing court's application of §3B1.2. The Second Circuit has held that in "evaluating a defendant's role," the sentencing court should consider factors such as "the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise."[88] The Third Circuit has concluded that those same factors can be "highly useful in assessing a defendant's relative culpability," at least "where a great deal is known" about the criminal organization.[89] However, as the Third Circuit explained, "these factors may be less useful" when there is "little or no information about the other actors or the scope of the criminal enterprise."[90] The Seventh Circuit has held that in order to determine whether to apply §3B1.2, the courts should look at the defendant's role "in the conspiracy as a whole, including the length of his involvement in it, his relationship with the other participants, his potential financial gain, and his knowledge of the conspiracy."[91]

D. DRUG COURIERS AND MULES

There is a substantial body of case law concerning the application of §3B1.2 to defendants who were couriers and mules in drug trafficking organizations. Defendants have argued that they are automatically entitled to a mitigating role adjustment based solely on their status as couriers or mules. Courts have uniformly rejected such arguments.[92] However, couriers and mules "may receive" an adjustment under §3B1.2, even if they are held accountable only for the amount of drugs they personally transported.[93]

participant, a defendant must have been peripheral to the advancement of the illicit activity."), *overruled in part by* United States v. Walker, 302 F.3d 322 (5th Cir. 2002).

88 United States v. Yu, 285 F.3d 192, 200 (2d Cir. 2002) (internal quotation marks omitted).

89 United States v. Rodriguez, 342 F.3d 296, 299 (3d Cir. 2003).

90 *Rodriguez*, 342 F.3d at 299.

91 United States v. Diaz–Rios, 706 F.3d 795, 799 (7th Cir. 2013).

92 *See, e.g.,* United States v. Rodriguez De Varon, 175 F.3d 930, 943 (11th Cir. 1999) ("We do not create a presumption that drug couriers are never minor or minimal participants, any more than that they are always minor or minimal.").

93 *See* USSG §3B1.2, comment. (n.3(A)) ("[A] defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline."). As part of the 2015 amendment to the Commentary to §3B1.2, the Commission revised the paragraphs that illustrate how mitigating role interacts with relevant conduct principles in §1B1.3 to strike the phrase "not precluded from consideration" and replace it with "may receive." *See* USSG, App. C, Amendment 794 (effective November 1, 2015).

Courts have sometimes inconsistently applied §3B1.2 to defendants who were couriers and mules. Some courts have concluded that couriers and mules may perform functions that are critical to the drug trafficking activity, and thus may be highly culpable participants.[94] Other courts have concluded that couriers may have little culpability in drug trafficking organizations.[95] Ultimately, because the role of a courier or mule may vary from organization to organization, a defendant's culpability and entitlement to a §3B1.2 reduction depends on the facts of the specific case at hand.[96] Courts will deny reductions for couriers and mules upon finding that the defendant was more than a "mere" courier or mule because, for example, the defendant transported a significant quantity of drugs,[97]

[94] *See, e.g.,* United States v. Martinez, 168 F.3d 1043, 1048 (8th Cir. 1999) ("Transportation is a necessary part of illegal drug distribution, and the facts of the case are critical in considering a reduction for minor role."). As noted before, in 2015, the Commission amended Application Note 3(C) to §3B1.2 to, among other things, emphasize that the mere fact that a defendant performed an "essential" or "indispensable" role is not conclusive in determining whether to apply a mitigating role adjustment and that such defendant, if otherwise eligible, may receive a mitigating role adjustment. *See supra* note 83 and accompanying text.

[95] *See* United States v. Rodriguez, 342 F.3d 296, 300 (3d Cir. 2003) ("[D]rug couriers are often small players in the overall drug importation scheme.").

[96] *See* United States v. Saenz, 623 F.3d 461, 467 (7th Cir. 2010) ("[C]ouriers can play integral roles in drug conspiracies. True, but all drug couriers are not alike. Some are sophisticated professionals who exercise significant discretion, others are paid a small amount of money to do a discrete task . . . . [A]ll couriers are not the same . . . ."). *See also* United States v. Rodriguez De Varon, 175 F.3d 930, 945 (11th Cir. 1999) (en banc) ("In the drug courier context, examples of some relevant factual considerations include: amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution.").

[97] *See* United States v. Sandoval-Velazco, 736 F.3d 1104, 1109 (7th Cir. 2013) (affirming denial of reduction because the defendant had "an 'intimate and substantial' relationship with large quantities of drugs for more than a year, despite doing so at the behest of his superiors."); United States v. Rodriguez-Castro, 641 F.3d 1189, 1193 (9th Cir. 2011) (affirming denial of reduction where the offense involve 33.46 kilograms of cocaine, which the parties agreed "was a substantial amount."); United States v. Gonzalez, 534 F.3d 613, 617 (7th Cir. 2008) (affirming denial of reduction where, among other facts, the defendant "was trusted to carry a large quantity of cash, pick up a large quantity of drugs from a dealer by himself, transport the drugs in his own car and store them in his own home."); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) (affirming denial of reduction, in part, because the defendant "went on several drug pick-ups, each of which involved a minimum of a pound of methamphetamine."); United States v. Santos, 357 F.3d 136, 143 (1st Cir. 2004) (affirming denial of 4-level reduction, despite evidence that the defendant transported drugs on only one occasion, in part because "the quantity of drugs involved in this transaction was very large – and the appellant should have known as much."); United States v. Rodriguez De Varon, 175 F.3d 930, 946 (11th Cir. 1999) (en banc) (affirming denial of reduction where, in addition to other facts, the defendant entered the United States "carrying a substantial amount of heroin of high purity."). *But c.f.* United States v. Cruickshank, 837 F.3d 1182 (11th Cir. 2016) (remanding for resentencing holding that court improperly suggested that quantity of cocaine transported on vessel was so large that no participant in scheme could be eligible for such reduction).

acted as a courier or mule on multiple occasions,[98] had a relationship with the drug trafficking organization's leadership,[99] or was well-compensated for transporting the drugs.[100]

[98] *See* Ponce v. United States, 311 F.3d 911, 912–13 (8th Cir. 2002) (affirming denial of reduction where the defendant, in addition to instructing other members of the distribution scheme, transported "4.5 kilograms of methamphetamine, along with various quantities of cocaine and heroin, on at least six separate occasions (supplying a total of 27 kilograms)").

[99] *See* United States v. Garcia, 580 F.3d 528, 539 (7th Cir. 2009) (affirming the district court's denial of a minimal-participant reduction, and observing that the defendant "was fortunate to receive any role reduction at all," where she was close to the drug conspiracy's leadership and transported drugs and money on multiple occasions); United States v. Mendoza, 457 F.3d 726, 730 (7th Cir. 2006) ("One of the factors that sentencing judges should examine while assessing a defendant's role in a criminal enterprise is the defendant's relationship with the enterprise's principal members.").

[100] *See* United States v. Adamson, 608 F.3d 1049, 1054 (8th Cir. 2010) (affirming denial of mitigating role adjustment where the defendant-couriers were "active, necessary, and well-compensated members of this conspiracy"); United States v. Vargas, 560 F.3d 45 (1st Cir. 2009) (affirming denial of mitigating role adjustment where the district court considered, among other facts, "the amount of money paid" to the defendant-courier, which was $3,500 for driving a truck with thirty kilograms of cocaine hidden in a secret compartment).

PRIMER

RELEVANT CONDUCT

March 2018

Prepared by the Office of General Counsel, U.S. Sentencing Commission

***Disclaimer:** This document provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive. The information in this document is not binding upon the Commission, courts, or the parties in any case. Pursuant to Fed. R. App. P. 32.1 (2007), some cases cited in this document are unpublished. Practitioners should be advised that citation of such cases under Rule 32.1 requires that such opinions be issued on or after January 1, 2007, and that they either be "available in a publicly accessible electronic database" or provided in hard copy by the party offering them for citation.*

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INTRODUCTION

This primer addresses some common questions that have arisen in the context of relevant conduct. The answers are drawn from §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) and its commentary, other related portions of the *Guidelines Manual*, and applicable caselaw. This primer is not, however, intended as a comprehensive compilation of all case law addressing these issues. The selected case law focuses on Supreme Court and published circuit precedent, and generally includes only one authority from a given circuit even if the same court has addressed a particular issue more than once. Throughout the primer, examples based on those provided by the commentary to §1B1.3 are set out to accompany the discussion of the topics they illustrate.

Relevant conduct is a principle that impacts nearly every aspect of guidelines application. It reflects the sentencing guidelines' consideration of aspects of the offense and the defendant's conduct beyond the count(s) of conviction alone, while also placing limits, specific to the type of offense, on the range of conduct that is appropriately considered. In addition to a defendant's offense level as determined by Chapter Two, relevant conduct also affects role and multiple count adjustments in Chapter Three, criminal history calculations in Chapter Four, and adjustments for undischarged terms of imprisonment in Chapter Five. *See* USSG §1B1.3(a), (b).

Section §1B1.3 establishes several types of relevant conduct. Relevant conduct considers not only the defendant's own actions and omissions under §1B1.3(a)(1)(A), but, in the case of jointly undertaken criminal activity, the qualifying actions and omissions of others under §1B1.3(a)(1)(B). For certain types of offenses, §1B1.3(a)(2) provides that an expanded range of relevant conduct, including certain actions and omissions that took place on occasions beyond the charged offense, are to be considered. Subsection 1B1.3(a)(3) explains that harm is the appropriate measure of relevant conduct in some circumstances, while §1B1.3(a)(4) clarifies that relevant conduct can also be measured as specifically directed in other guidelines. An extensive set of application notes and background commentary explains the operation of relevant conduct in a variety of situations.

What is relevant conduct?

"Relevant conduct" is **"the range of conduct that is relevant to determining the applicable offense level"** under the *Guidelines Manual*. *See* §1B1.3 comment. (backg'd.). Section 1B1.3 of the *Guidelines Manual* defines relevant conduct and explains the rules for determining what acts or omissions are considered relevant conduct to a given offense type. For a broader discussion of the hybrid "real offense" and "charge offense" sentencing system adopted by the Commission, and the principles undergirding the more specific rules of relevant conduct found in §1B1.3, refer to Chapter One, Part A, Section 4(a) of the *Guidelines Manual*. *See generally Setser v. United States*, 132 S. Ct. 1463, 1475-76 (2012) (Breyer, J., dissenting) (discussing "real offense" sentencing and its "modification" by the guidelines).

What range of conduct is relevant to determining the applicable offense level?

The two main types of relevant conduct are laid out in subsections 1B1.3(a)(1) and (a)(2). Subsection (a)(1) contains the basic rules of relevant conduct applicable to all offenses. That provisions provides that, in every case, relevant conduct includes **actions of the defendant performed in preparation for the offense, during the offense, and after the offense to avoid detection.** Relevant conduct always includes **acts the defendant counseled, commanded, induced, procured, or willfully caused.** In other words, if the defendant directs someone else to do something, the defendant is responsible for that person's actions as if the defendant did the acts him or herself.

In case of such "jointly undertaken criminal activity," the defendant is liable for **all acts and omissions of others that were—(1) within the scope of the jointly undertaken criminal activity, (2) in furtherance of that criminal activity, and (3) reasonably foreseeable in connection with that criminal activity.**

Subsection (a)(2) adopts broader rules for those offense types that typically involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. These broader rules, often referred to as "expanded relevant conduct," apply to offenses such as drug trafficking and fraud, where the guidelines rely on an aggregation of quantity to determine culpability. In such instances, the defendant is liable for **acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction**.

Subsections 1B1.3(a)(3) and (a)(4) set out additional types of relevant conduct that apply less frequently.

What is included in the "standard" relevant conduct definition at 1B1.3(a)(1)?

Subsection 1B1.3(a)(1) is itself broken into **two parts**. The first part, (a)(1)(A), includes as relevant conduct actions or omissions done or caused **by the defendant** in preparation for, during, or, in the course of avoiding detection for the offense of conviction. The second part, (a)(1)(B), applies only when the defendant acted with others as part of a **"jointly undertaken criminal activity."** In such a case, anything done as part of the activity is relevant conduct, if it was within the **"scope"** of the activity, was in **"furtherance"** of the activity, and was **"reasonably foreseeable"** by the defendant. All three criteria must be met for an act or omission to be relevant conduct under (a)(1)(B). As with (a)(1)(A), an act or omission falling under (a)(1)(B) is only relevant conduct if occurred in preparation for, during, or in the course of avoiding detection for the offense of conviction.

Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability.

What is a "jointly undertaken criminal activity"? (1B1.3(a)(1)(B))

A "jointly undertaken criminal activity" is a **criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.**

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

(i) within the scope of the jointly undertaken criminal activity;

(ii) in furtherance of that criminal activity; and

(iii) reasonably foreseeable in connection with that criminal activity.

All three prongs of this test must be met. Additionally, the tests must be satisfied based on the individual defendant's actions or omissions, not those of an omniscient observer.

Scope

Determining the **scope** of the jointly undertaken criminal activity is often the most complex of the three inquiries. **Because a count may be worded broadly and include the conduct of many participants over time, the scope of the "jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant.** In fact, relevant conduct liability is frequently less extensive than substantive criminal liability for conspiracy. *See generally United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002) (explaining that a court must make "particularized findings" about both the scope of the agreement and reasonable foreseeability); *United States v. Hunter*, 323 F.3d 1314, 1319-20 (11th Cir. 2003) (explaining that reasonable foreseeability is irrelevant to relevant conduct if the acts in question are not also within the scope of the criminal activity); *see also United States v. Salem*, 597 F.3d 877, 887 (7th Cir. 2010); *United States v. Willis*, 476 F.3d 1121, 1130 (10th Cir. 2007); *United States v. White*, 77 F. App'x 678 (4th Cir. 2003); *United States v. Hammond*, 201 F.3d 346, 351 (5th Cir. 1999); *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995). Additionally, **a defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct. *See, e.g.*, *United States v. Word*, 129 F.3d 1209, 1213 (11th Cir. 1997).**

In determining the scope of a jointly undertaken criminal activity, the court must first examine what the individual defendant agreed to jointly undertake (that is, the scope of the specific conduct and objectives embraced by the defendant's agreement). **The court must make an individualized assessment of the circumstances of the case to determine the scope of the defendant's agreement, both explicit and implicit.** The court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. However, as a bright line rule, a defendant's relevant conduct does not include the conduct of members of a conspiracy

Acts of others that were not within the scope of the defendant's agreement, **even if those acts were known or reasonably foreseeable**, are not relevant conduct under subsection (a)(1)(B). *See United States v. Barona-Bravo*, 684 F. App'x 761 (11th Cir. 2017) (remanding a case for a more detailed consideration of the scope and emphasizing that scope for relevant conduct purposes differs from the scope of a criminal conspiracy). Nor can criminal activity of which a defendant had no notice be within the scope of her agreement, even if that activity was part of the same overall conspiracy and substantially similar to the defendant's own activity. *See, e.g., United States v. Presendieu*, 880 F.3d 1228, 1246 (11th Cir. 2018 (finding that a defendant's "mere awareness" of being part of a larger scheme did not mean that losses independently caused by an actor of whom she was unaware were within the scope of her agreement); *United States v. Metro*, -- F.3d --, 2018 WL 844823, at *7

(3d Cir. Feb. 14, 2018) (in an insider trading prosecution, gains realized by individuals relying on information originally revealed by the defendant were not relevant conduct if their actions were not within the scope of the activity agreed to by the defendant).

> *Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the $800 check).*

That said, an agreement as to scope need not be explicit or detailed as to every aspect of the offense as it occurs, which means a defendant may be held responsible for acts to which acquiescence could be fairly inferred based on willingness to participate in the offense. For example, defendants who agree to participate in a bank robbery or other offenses with an obvious potential for violence are typically held responsible for the violent acts of their co-defendants, even if there is no indication that the defendant explicitly agreed to the violence before the offense took place. *See, e.g.*, *United States v. Cook*, 850 F.3d 328, 333 (7th Cir. 2017) (defendant liable for physical restraint perpetrated by co-defendant); *United States v. Parsons*, 664 F. App'x 187 (3d Cir. 2016) (defendant liable for co-defendant's shooting of a police officer even though he left the scene before it happened); *United States v. Williamson*, 530 F. App'x 402 (6th Cir. 2013) (defendant liable for violence of co-defendant even when he had not agreed on which establishment was to be robbed); *United States v. Vigers*, 220 F. App'x 265 (5th Cir. 2007); *see also United States v. Houston*, 857 F.3d 427 (1st Cir. 2017) (in a sex-trafficking case, defendant was liable for a co-defendant's urging of a minor to engage in prohibited sexual activity). As Application Note 3(D) explains, such liability may exist even if the defendant "cautioned" his co-defendants "not to hurt anyone."

By contrast, a defendant who agrees to participate only in a telemarketing fraud is likely not liable if a co-defendant goes to a victim's house to obtain money at gunpoint, because such conduct is not within the scope of the activity agreed to. Other types of offenses – for example, a bookmaking operation or illegal debt-collection enterprise – may have an intermediate potential for violence; again, an individual assessment is required.

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon

whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (i.e., the one delivery).

In Furtherance of

The second requirement is that acts or omissions be **"in furtherance"** of the jointly undertaken criminal enterprise. Having determined the scope of the "jointly undertaken criminal activity," the court next considers what acts or omission attributable to the defendant furthered the objectives embraced by the defendant's agreement (whether explicit or tacit).

Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

It is also important to note that a defendant may be accountable for particular conduct under both (a)(1) and (a)(2). There is no need to undertake an "in furtherance" inquiry as to a defendant's own acts – the test applies only when considering whether the defendant

may be held accountable for the conduct of others. *See, e.g.*, *United States v. Kregas*, 149 F. App'x 779, 786 (10th Cir. 2005) (finding that because the defendant was convicted of aiding and abetting a fraud, he was liable for the resulting loss under (a)(1)(A), regardless of whether (a)(1)(B)'s requirements were met).

Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.

Reasonably Foreseeable

Finally, the court must determine if the conduct of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was **reasonably foreseeable**. It is important to note that the criminal activity that the defendant agreed to jointly undertake and the reasonably foreseeable conduct of others in furtherance of that criminal activity are not necessarily the same. **Reasonable foreseeability may extend beyond the activity the defendant explicitly agreed to undertake.** As discussed above with respect to scope, a defendant who agreed to commit an offense with an obvious potential for violence will typically be liable for a co-defendant's acts of violence, because such acts, even if not planned, are within the scope of the activity agreed to, are in furtherance of the crime, and reasonably foreseeable.

Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.

As with the "in furtherance of" requirement, the requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

When can the court look outside the offense of conviction to determine the offense level?

As discussed above, the defendant is liable for the actions or omissions done or caused by the defendant, as well as those of others that were within the scope, in furtherance of, and reasonably foreseeable in connection with jointly undertaken criminal activity, if the conduct was in preparation for, during, or, in the course of avoiding detection for the offense of conviction. **A court, however, must also look beyond the conduct that was in preparation for, during, or, in the course of avoiding detection for the offense of conviction in certain circumstances.** This is commonly referred to as **"expanded relevant conduct."**

As set forth in subsection (a)(2) of the relevant conduct guideline, the court must also consider acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction if—(1) the act or omission was done or caused by the defendant or the act or omission was committed by another and was within the scope, in furtherance of, and reasonably foreseeable in connection with defendant's jointly undertaken criminal activity, and (2) the offense of conviction is one "for which §3D1.2(d) would require grouping of multiple counts."

Accordingly, before applying the (a)(2) relevant conduct test, it is necessary to consult §3D1.2(d) to determine if the Chapter Two guideline applicable to the offense is one that must be grouped under that rule. Section 3D1.2(d) contains a table listing the Chapter Two guidelines to which it applies:

- §2A3.5 (*Failure to Register as a Sex Offender*);
- §§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1 (*financial or property offenses*);
- §§2C1.1, 2C1.2, 2C1.8 (*bribery involving public officials; offenses relating to gratuities; campaign finance offenses*);

- §§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13 (*drug trafficking offenses*);
- §§2E4.1, 2E5.1 (*trafficking in contraband tobacco; bribery involving labor organizations*);
- §§2G2.2, 2G3.1 (*possessing, transporting, or receiving child pornography*);
- §2K2.1 (*Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition*);
- §§2L1.1, 2L2.1 (*certain immigration offenses*);
- §2N3.1 (*Tampering With Intent to Injure Business*);
- §2Q2.1 (*Offenses Involving Fish, Wildlife, and Plants*);
- §2R1.1 (*Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors*);
- §§2S1.1, 2S1.3 (*money laundering*);
- §§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1 (*tax offenses*).

Although "grouping" is not required in the case of a single count conviction, §1B1.3(a)(2) merely adopts §3D1.2(d)'s list by reference, and does not require that there be multiple counts in order to apply (a)(2) relevant conduct.

Expanded relevant conduct is most frequently applied in cases sentenced under the drug trafficking (§2D1.1) or fraud (§2B1.1) guidelines.

What is the "same course of conduct or common scheme or plan"?

In assessing relevant conduct for an offense to which (a)(2) applies, the court must consider all the conduct described in (a)(1), and include it not just when it was done in preparation for, during, or in the course of avoiding detection for the offense of conviction, but also if it was done as part of the **"same course of conduct or common scheme or plan"** as the conviction. These two phrases have distinct, albeit related, meanings.

First, for two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as

- common victims,
- common accomplices,
- common purpose, or
- similar modus operandi.

See, e.g., *United States v*. *Valladares*, 544 F.3d 1257, 1268 (11th Cir. 2008) (separate health care fraud scheme involving nearly identical conduct was part of a common scheme or plan).

Courts have held that the "common purpose" connecting relevant conduct to the instant offense need not be criminal in itself. For example, relevant conduct may have been connected to the charged offense by the goal of obtaining funds for an activity not otherwise illegal. *See, e.g.*, *United States v. McConnell*, 273 F. App'x 351, 355 (5th Cir. 2008) (holding that when defendant was convicted of a false-statement offense, an uncharged embezzlement was relevant conduct because the false statement had concealed his whereabouts at a casino where he gambled the embezzlement proceeds, even though gambling in itself is not an illegal purpose).

Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the

- **similarity,**
- **regularity, and**
- **temporal proximity** between the offenses.

When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses is also a relevant consideration (for example, a defendant's failure to file tax returns in three consecutive years would be considered part of the same course of conduct because such returns are only required annually). *See, e.g.*, *United States v. Phillips*, 516 F.3d 479, 483-84 (6th Cir. 2008) (possession of firearms four years prior to the instant offense was part of a common scheme or plan, when the elements of similarity and regularity were strong); *United States v. Jones*, 199 F. App'x 812, 816 (11th Cir. 2006) (fraud committed prior to a previous term of incarceration was in the same course of conduct as the instant offense, given the similarity in *modus operandi*).

Can conduct associated with a prior offense be included as relevant conduct?

It depends on when the defendant was sentenced for the prior offense. Application Note 5(C) explains that offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant offense of conviction is not to be considered part of the same course of conduct or common scheme or plan as the offense of conviction, even if it would otherwise meet the (a)(2) definition.

The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood).

Conduct associated with a sentence imposed *after* a defendant commenced the instant offense may be considered relevant conduct to the instant offense if it qualifies under subsection (a)(2) as conduct outside of the offense of conviction the court must consider ("expanded relevant conduct"). In such a case, Application Note 1 to §4A1.2 directs that the sentence for the relevant conduct is not considered a "prior conviction" that accrues criminal history points.

The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see §4A1.2(a)(1).

In addition, if offense conduct associated with a previously imposed sentence (regardless of when imposed) was expressly charged in the instant offense of conviction, it may be considered relevant conduct under subsection (a)(1), not (a)(2).

What types of relevant conduct do §1B1.3(a)(3) and (a)(4) include?

Subsection (a)(3) expands the definition of relevant conduct to include "harm" that either resulted from or was the object of relevant conduct described in (a)(1) and (a)(2) (if (a)(2) is applicable to the offense). "Harm" includes bodily injury, monetary loss, and property damage. This type of relevant conduct is relevant to offenses punished under guidelines that specifically consider the degree and type of harm sustained or intended. *See, e.g.*,

§2A2.2 (Aggravated Assault); §2B3.1 (Robbery); §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy). Mere risk of harm should be considered only when directed by the applicable Chapter Two guideline. *See, e.g.*, §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides).

Although (a)(3) does not contain any specific limitation on how a defendant's conduct caused the harm, courts have typically adopted a reasonable foreseeability test that takes into account the "inherently dangerous nature" of the offenses covered by this subsection. *See, e.g.*, *United States v. Metzger*, 233 F.3d 1226, 1227-28 (10th Cir. 2000) (holding that injury to a bystander by an off-duty police officer was a reasonably foreseeable consequence of a bank robbery); *United States v. Molina*, 106 F.3d 1118, 1124-25 (2d Cir. 1997) (same when security guard shot bystander to a robbery).

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind, and §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created. Some courts have also found that (a)(4) permits a broadened application of provisions such as §2K2.1(b)(6), which imposes an increase if an illegally possessed firearm was used in connection with "another felony offense." In light of this specific instruction, the other felony offense need not fall under the ordinary types of relevant conduct to trigger the increase. *See, e.g.*, *United States v*. *Mosby*, 543 F.3d 438, 441 (8th Cir. 2008); *United States v. Swearingen*, 204 F. App'x 549, 552 (7th Cir. 2006).

What about guidelines that refer to specific statutes of conviction?

A Chapter Two guideline may expressly direct that a base offense level or specific offense characteristic be applied only if the defendant was convicted of a specified statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "was convicted under 18 U.S.C. § 1956." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense involved conduct described in 18 U.S.C. § 2242").

Unless otherwise specified, an express direction to apply a factor only if the defendant was convicted of a cited statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a

violation of 18 U.S.C. § 1956, but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. *See* §2S1.1, comment. (n.3(C)).

When a guideline directs the calculation of the offense level for an "underlying offense," does that include relevant conduct to the underlying offense?

Yes. For example, courts have held that, in the context of §2S1.1(a)(1), a calculation of the "offense level for the underlying offense" includes all relevant conduct under the Chapter Two guideline for the underlying offense. *See, e.g.*, *United States v. Blackmon*, 557 F.3d 113, 123 (3d Cir. 2009); *United States v. Cruzado-Laureano*, 440 F.3d 44, 48 (1st Cir. 2006); *United States v. Charon*, 442 F.3d 881, 887-88 (5th Cir. 2006).

How is relevant conduct distinguished from a defendant's prior criminal history?

A sentence that was imposed both (1) after the commencement of the instant offense by the defendant (but before sentencing for the instant offense); and (2) for conduct that was relevant conduct to the instant offense is not counted for purposes of criminal history. *See* §4A1.2 (comment.) n.1.

What burden of proof applies to making factual determinations about relevant conduct?

The standard of proof applicable to relevant conduct determinations under the advisory guidelines is a **preponderance of the evidence**. *See, e.g.*, *United States v. Grubbs*, 585 F.3d 793, 803 (4th Cir. 2009); *United States v. Villareal-Amarillas*, 562 F.3d 892, 896 n.3 (8th Cir. 2009); *United States v. Fisher*, 502 F.3d 293, 308 (3d Cir. 2007); *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005). The Fifth Circuit has left the "door open" to requiring a heightened burden of proof in some situations, but has never actually imposed such a requirement, including when relevant conduct determinations increased a defendant's sentencing range tenfold. *See United States v. Simpson*, 741 F.3d 539, 559 (5th Cir. 2014); *see also United States v. Olsen*, 519 F.3d 1096, 1105 (10th Cir. 2008) (same).

The exception to this rule is the Ninth Circuit, which has held that a **clear and convincing** standard of proof is applicable to enhancements that have an "extremely disproportionate" effect on the guidelines range. *See United States v. Staten*, 466 F.3d 708, 717 (9th Cir. 2006) (holding that a 15-level increase under §2D1.1 required clear and convincing proof); *United States v. Harrison-Philpot*, 978 F.2d 1520, 1523 (9th Cir. 1992) (listing six factors relevant to determining whether an increase is extremely disproportionate).

The Ninth Circuit has explained that extremely disproportionate increases in sentencing ranges raise due process concerns requiring a higher burden of proof, although whether an increase is extremely disproportionate depends on the totality of the circumstances rather

than the absolute amount of the increase. *Compare United States v. Zolp*, 479 F.3d 715, 718 (9th Cir. 2007) (clear and convincing standard applied to loss calculations under §2B1.1 in a stock-fraud case) *with United States v. Treadwell*, 593 F.3d 990, 1000-01 (9th Cir. 2010) (preponderance standard applied to findings supporting a 22-level increase in a fraud case, because the evidence used had been presented to the jury, which had convicted the defendant of conspiracy). More recent precedent suggests that the preponderance standard always applies when determining the scope of a conspiracy, even when it affects a quantity calculation. *See United States v. Barragan*, 871 F.3d 689, 718 (9th Cir. 2017).

May a Court Consider Acquitted, Previously Convicted, or Uncharged Conduct When Making Relevant Conduct Determinations?

The guidelines do not directly address "acquitted conduct." However, the Supreme Court has held that there is no constitutional barrier to considering such conduct if it otherwise meets the definition of relevant conduct, and is demonstrated by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156-57 (1997); *see also Edwards v. United States*, 523 U.S. 511 (1998) (defendant's argument that the jury may have convicted him only of a conspiracy involving cocaine powder, and not crack, was irrelevant to the trial court's determination that his offense involved crack cocaine for relevant conduct purposes).

PRIMER

AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS: §3B1.1 & §3B1.2

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I. INTRODUCTION

The purpose of this primer is to provide a general overview of guideline sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role), which provide offense level adjustments based on a defendant's role in the offense. Although this primer identifies some of the issues and cases related to application of these adjustments, it is not intended to be comprehensive or a substitute for independent research.

II. AGGRAVATING ROLE: §3B1.1

Section 3B1.1 provides for 2-, 3-, and 4-level increases to the offense level, depending on the defendant's aggravating role in the offense, as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.[1]

Applying the adjustment turns, first, on the *size and scope of the criminal activity* ("five or more participants or was otherwise extensive"), and, second, on the *defendant's particular role in that activity* (the defendant was an "organizer or leader" or a "manager or supervisor").[2]

The government bears the burden of proving by a preponderance of the evidence that the defendant should receive an aggravating role adjustment.[3] Upon finding that the

[1] USSG §3B1.1.

[2] *See* USSG §3B1.1, comment. (backg'd).

[3] *See, e.g.,* United States v. Lora-Andres, 844 F.3d 781, 785 (8th Cir. 2016) ("The government bears the burden of proving by a preponderance of the evidence that the aggravating role enhancement is warranted"); United States v. Al-Rikabi, 606 F.3d 11, 14 (1st Cir. 2010) (same); United States v. Yeager, 331 F.3d 1216, 1226 (11th Cir. 2003); United States v. Vandeberg, 201 F.3d 805, 811 (6th Cir. 2000); United States v. Cruz Camacho, 137 F.3d 1220, 1224 (10th Cir. 1998). *See also* United States v. Rodriguez, 851 F.3d 931 (9th Cir. 2017) (holding that district court was not required to submit to jury issue of whether a defendant convicted of drug crimes was an organizer or leader before imposing an enhancement under §3B1.1(a), where such

government has met its burden of proving the requisite facts, the district court must apply the appropriate adjustment and has no discretion to decide whether to apply §3B1.1.[4] Because "the determination of a defendant's role in an offense is necessarily fact-specific[,] appellate courts review such determinations only for clear error."[5] Thus, "absent a mistake of law, battles over a defendant's status and over the scope of the criminal enterprise will almost always be won or lost in the district court."[6]

A. SIZE AND SCOPE OF THE CRIMINAL ACTIVITY

To apply a 3- or 4-level adjustment pursuant to §3B1.1(a) or (b), the criminal activity must have involved "five or more participants" or have been "otherwise extensive." In the absence of such a **criminal activity**, the defendant may only be subject to a 2-level increase pursuant to §3B1.1(c). Accordingly, in applying §3B1.1, the sentencing court must first determine the size and scope of the criminal activity.

adjustment did not affect the statutory maximum or mandatory minimum of defendant's sentence).

[4] *See, e.g.,* Unites States v. Christian, 804 F.3d 819, 822 (6th Cir. 2015) ("Once a sentencing court makes a factual finding as to the applicability of a particular adjustment provision, the court has no discretion, but must increase the offense level by the amount called for in the applicable provision.") (*citing* United States v. Feinman, 930 F.2d 495, 500 (6th Cir. 1991)); United States v. Burgos, 324 F.3d 88, 92 (2d Cir. 2003) ("Once this management or supervision is found, the adjustment is mandatory").

[5] United States v. Graciani, 61 F.3d 70, 75 (1st Cir. 1995) (citations omitted). *See also* United States v. Guzman-Reyes, 853 F.3d 260, 265 (5th Cir. 2017) ("Whether a defendant exercised an aggravating role as an organizer, leader, manager, or supervisor for purposes of an adjustment under U.S.S.G. § 3B1.1(c) is a finding of fact reviewed for clear error.") (citations omitted); United States v. Collins, 877 F.3d 362, 363 (7th Cir. 2017) ("We generally review a district court's determinations on the guidelines for aggravating and mitigating roles for clear error," unless the "court acted on the basis of a misunderstanding of the legal standard."); United States v. Wolf, 860 F.3d 175, 196 (4th Cir. 2017) ("We review a district court's findings of fact related to the application of the Sentencing Guidelines for clear error, whether the findings involve the amount of loss[,] the number of victims[,] an aggravated role in the offense[,] or use of sophisticated means.") (citations omitted); United States v. Christian, 804 F.3d 819, 822 (6th Cir. 2015) ("We review a district court's factual findings for clear error, and defer to its legal conclusion that a defendant had a managerial role in criminal activity."); United States v. Drozdowski, 313 F.3d 819, 822 (3d Cir. 2002) (clear error standard applies when finding is "essentially factual"). *But see* United States v. Gasca-Ruiz, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) (emphasizing that district court's application of the guidelines to the facts is reviewed for abuse of discretion).

[6] *Graciani*, 61 F.3d at 75.

1. "Five or More Participants"

Application Note 1 to §3B1.1 defines a *participant* as "a person who is criminally responsible for the commission of the offense . . . ."[7] A person who is not criminally responsible for committing the offense is not a participant; however, §3B1.1 does not require that a criminally responsible person actually be convicted to qualify as a "participant."[8] The defendant, as a criminally responsible person, *is* a participant for purposes of counting the number of participants under §3B1.1.[9]

The guidelines specifically provide that undercover law enforcement officers are not participants because they are not criminally responsible for committing the offense.[10] Unlike undercover officers, however, an informant may be considered a "participant" for any period during which he or she was a member of the conspiracy, before becoming a governmental informant.[11]

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7 USSG §3B1.1, comment. (n.1).

8 *Id. See also* United States v. Brockman, 183 F.3d 891, 899 (8th Cir. 1999) ("Persons who are not indicted or tried, but who are nonetheless criminally responsible for defendant's crime, are 'participants' under § 3B1.1.") (citations omitted). *See also* United States v. Houston, 857 F.3d 427, 433 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 438 (2017) ("A participant is a person who is criminally responsible for the commission of the offense, but need not have been convicted.") (citations omitted); United States v. Starks, 815 F.3d 438, 441 (8th Cir. 2016) ("An individual does not need to be guilty as a principal in the charged offense in order to be 'criminally responsible' for that offense. ... In addition, an individual need not be indicted or tried in order to be a participant under § 3B1.1. . . . "); United States v. Fluker, 698 F.3d 988, 1002 (7th Cir. 2012) ("We have explained that this means a participant "could have been charged," even if only as an accessory; but "mere knowledge of a conspiracy" is insufficient to establish that a person was "criminally responsible.") (citations omitted).

9 *See* United States v. Walter-Eze, 869 F.3d 891, 914 (9th Cir. 2017) (defendant herself "may be included among the participants in the criminal activity for purposes of section 3B1.1(a)") (citations omitted); United States v. Paccione, 202 F.3d 622, 625 (2d Cir. 2000) (holding, consistent with the "apparent consensus among our sister circuits," that "a defendant may be included when determining whether there were five or more participants in the criminal activity in question").

10 USSG §3B1.1, comment. (n.1).

11 *See* United States v. Dyer, 910 F.2d 530 (8th Cir. 1990). *See also* United States v. House, 872 F.3d 748, 752 (6th Cir.), *cert. denied*, 138 S. Ct. 367, 199 L. Ed. 2d 270 (2017) ("Although an informant cannot be held criminally responsible for his investigative work on behalf of the government[,] he can be held responsible for his involvement in the criminal activity before the informant started cooperating with the government.") (citations omitted); United States v. Fells, 920 F.2d 1179, 1182 (4th Cir. 1990) (concluding that a person was not a "participant" because he "was an informant and undercover operative who had not been involved in [the] distribution network and was acting at the direction of the government").

Courts "uniformly count" as participants those who "were (i) aware of the criminal objective, and (ii) knowingly offered their assistance."[12] Consistent with this principle, persons who are not co-conspirators can be "participants" if they aid the defendant with knowledge of the criminal activity. Accordingly, the definition of a "participant" is broader than the scope of conspiratorial liability. For example, in *United States v. Aptt*,[13] the court held that the defendant's high-level employee, who continued to solicit investments despite knowing that the company was operating a Ponzi scheme and made knowingly false representations to potential investors, was a "participant" in the criminal activity. Similarly, in *United States v. Alfonzo-Reyes*,[14] the court held that the defendant's wife was a "participant" in his fraud scheme where she knowingly falsified government loan applications at her husband's direction. Courts will also count as a "participant" a person that is deceased at the time of the defendant's sentencing, if that person participated in the criminal activity.[15] Additionally, some courts have concluded that a person who has received a grant of immunity is still properly counted as a "participant."[16]

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[12] United States v. Anthony, 280 F.3d 694, 698 (6th Cir. 2002); *accord* United States v. Boutte, 13 F.3d 855, 860 (5th Cir. 1994) (concluding that a person "need only have participated knowingly in some part of the criminal enterprise" to be a participant). *See also* United States v. Acevedo-Lopez, 873 F.3d 330, 336–37 (1st Cir. 2017) (holding that "to be considered a participant, it is only necessary that an individual gives knowing aid in some aspect of the criminal activity" and that an individual was properly considered a participant when he "was promised a job, given money, and enjoyed outings paid for with money provided by [defendant] as part of the criminal activity") (citations omitted); United States v. Vega, 826 F.3d 514, 539 (D.C. Cir. 2016) ("[A] party who gives knowing aid in some part of the criminal enterprise is a criminally responsible party.") (citations omitted); United States v. Smith, 719 F.3d 1120, 1126 (9th Cir. 2013) ("Any person who knowingly abets the defendant's conduct qualifies as a 'participant.'"); United States v. Duperval, 777 F.3d 1324, 1336–37 (11th Cir. 2015) (upholding application of a § 3B1.1 enhancement because the participant "knew that the money was the proceeds of an unlawful activity"); United States v. Hall, 101 F.3d 1174, 1178 (7th Cir. 1996) ("[J]ust as a party who knowingly assists a criminal enterprise is criminally responsible under principles of accessory liability, a party who gives knowing aid in some part of the criminal enterprise is a 'criminally responsible' participant under the Guidelines."). *See also Starks*, 815 F.3d at 441 ("[I]ndividuals may be participants even if they do not benefit from commission of the offense.").

[13] 354 F.3d 1269 (10th Cir. 2004).

[14] 592 F.3d 280 (1st Cir. 2010).

[15] *See* United States v. Bennet, 765 F.3d 887, 898 (1st Cir. 2014) ("Clayton participated in the scheme, and his subsequent death simply does not alter that fact. Nor does Clayton's death affect whether [the defendant's] fraudulent scheme was 'otherwise extensive' when perpetrated.").

[16] United States v. Tavares, 705 F.3d 4, 30 (1st Cir. 2013) ("In light of our sister circuit's reasoning and the clear language of the Guideline, we also hold that a "participant" can be an immunized witness against the defendant.") (*citing* United States v. Anderson, 580 F.3d 639, 650 n. 16 (7th Cir. 2009)).

Conversely, an *unwitting person* is not a "participant," even if the person assisted the criminal enterprise, because he or she ordinarily bears no criminal responsibility.[17] For example, in *United States v. King*,[18] the court held that the defendant's employees were not "participants" in his mail fraud schemes because they were merely "innocent clerical workers." In *United States v. Stevenson*,[19] the court held that an unwitting minor whom the defendant used as a messenger in his criminal activity was not a "participant." And in *United States v. Anthony*,[20] the court held that the defendant's attorney was not the necessary "fifth participant" in a scheme to make materially false statements to federal investigators, despite writing the key letter that conveyed his client's false statements to authorities, because he apparently did not know the statements were false. Likewise, a person's mere knowledge that criminal activity is afoot does not ordinarily make that person a "participant," absent some act in furtherance of the activity.[21]

In the drug conspiracy context, courts have held that *end users* of controlled substances are not "participants" in distribution conspiracies. Under these circumstances, "[w]here the customers are solely end users of controlled substances, they do not qualify as participants . . . absent an intent to distribute or dispense the substance. In order to qualify as a participant, a customer must do more than simply purchase small quantities of a drug for his personal use."[22] Individuals who are *more than mere end-user purchasers*, such as a

[17] *See* United States v. Harvey, 532 F.3d 326, 338 (4th Cir. 2008) ("Participants are persons involved in the activity who are criminally responsible, not innocent bystanders used in the furtherance of the illegal activity."). *See also* United States v. Cyphers, 130 F.3d 1361, 1363 (9th Cir. 1997) ("[M]ere unknowing facilitators of crimes will not be considered criminally responsible participants.").

[18] 257 F.3d 1013, 1024 (9th Cir. 2001).

[19] 6 F.3d 1262 (7th Cir. 1993), *abrogated on other grounds by* United States v. Vizcarra, 668 F.3d 516 (7th Cir. 2012). *See also* United States v. Jackson, 865 F.3d 946, 955 (7th Cir. 2017) (holding that minor sex trafficking victim could not be "considered a participant in her own trafficking," and that "a victim may only be considered a 'participant if she coerces or transports or otherwise oversees other victims.") (citations omitted).

[20] 280 F.3d 694 (6th Cir. 2002). *See also Vega*, 826 F.3d at 539 ("An individual is criminally responsible under § 3B1.1 only if he commit[s] all of the elements of a statutory crime with the requisite mens rea.") (citations omitted).

[21] *See* United States v. Maloof, 205 F.3d 819, 830 (5th Cir. 2000) ("A finding that other persons 'knew what was going on' is not a finding that these persons were criminally responsible for commission of an offense. Willful participation is an essential element of the crime of conspiracy; mere knowledge of a conspiracy does not itself make a person a conspirator.") (*citing* United States v. Mann, 161 F.3d 840, 867 (5th Cir. 1998)). *See also* United States v. Zuno, 731 F.3d 718, 723 (7th Cir. 2013) ("Mere knowledge of a conspiracy' is insufficient to establish that a person was 'criminally responsible.") (*citing Fluker*, 698 F.3d at 1002).

[22] United States v. Egge, 223 F.3d 1128, 113334 (9th Cir. 2000). *See also* United States v. Barrie, 267 F.3d 220, 224 (3d Cir. 2001) ("Customers of drug dealers ordinarily cannot be counted as participants in a drug

buyer who purchases drugs for further distribution or those who assist the transportation of drugs, are "participants" under §3B1.1.[23] Courts have also held that persons who receive stolen property, but without knowledge that it was stolen or without any participation in the theft, are not "participants" supporting application of the aggravating role adjustment.[24]

When determining whether there are "five or more participants" in the criminal activity, the court may consider *all* participants, and not only those who were subordinate to or supervised by the defendant. Courts have noted that "[t]he text of the guideline and its commentary does not require that five of the activity's participants be subordinate to the defendant; it merely requires that the activity involve five or more participants."[25] Indeed, a defendant does not need to even know of the other participants for purposes of applying §3B1.1.[26]

2. "Otherwise Extensive"

Even if the criminal activity did not involve at least five participants, the defendant may nonetheless be subject to an adjustment pursuant to §3B1.1(a) and (b) if the criminal activity was "otherwise extensive." Whether the criminal activity was "otherwise extensive" encompasses more than merely the number of "participants" because, as Application Note 3 to §3B1.1 provides, "[i]n assessing whether an organization is

distribution conspiracy.").

[23] *See Fells*, 920 F.2d at 1182 (concluding that individuals to whom the defendant distributed crack cocaine, "who were themselves distributors" were "not end users . . . but were lower level distributors used by [the defendant] to market illegal drugs" and thus participants). *See also* United States v. Sykes, 854 F.3d 457, 460 (8th Cir.), *cert. denied*, 138 S. Ct. 346, 199 L. Ed. 2d 231 (2017), *and cert. denied*, 138 S. Ct. 367, 199 L. Ed. 2d 270 (2017) (adding that "[a]n ongoing supplier relationship, however, is sufficient to support a finding that the supplier was a participant under § 3B1.1."); United States v. Mack, 808 F.3d 1074, 1085 (6th Cir. 2015) (affirming finding that individuals were participants in the conspiracy because they went "beyond just simply purchasing drugs" and instead sought to "protect [the defendant] as he operated his organization").

[24] *See* United States v. Melendez, 41 F.3d 797, 800 (2d Cir. 1994). *See also* United States v. Hussein, 664 F.3d 155, 162 (7th Cir. 2011) ("[S]imply accepting fraud proceeds, stolen goods, or other contraband does not make recipients participants in the underlying scheme that produced the ill-gotten benefits when they are simply customers and not part of the operation."); United States v. Colletti, 984 F.2d 1339, 1346 (3d Cir. 1992).

[25] United States v. Bingham, 81 F.3d 617, 629 (6th Cir. 1996).

[26] *See* United States v. Kirk Tang Yuk, 885 F.3d 57, 83 (2d Cir. 2018) ("[T]he Guidelines require only that the conspiracy actually involve five or more participants, not that the organizer be aware of all participants."); United States v. Haywood, 777 F.3d 430, 434 (7th Cir. 2015) ("[A] defendant can be an organizer or leader without knowing every participant."); United States v. Dota, 33 F.3d 1179, 1189 (9th Cir. 1994) ("Section 3B1.1 does not require that [the defendant] knew of or exercised control over all of the participants.").

'otherwise extensive,' all persons involved during the course of the entire offense are to be considered." [27]

Multiple circuits follow the test articulated by the Second Circuit in *United States v. Carrozzella*,[28] to determine whether the criminal activity was otherwise extensive. *Carrozzella* held that "otherwise extensive" as used in §3B1.1, requires, at a minimum, "'a showing that an activity is the *functional equivalent* of an activity involving five or more participants.'" [29] In making this determination, the sentencing court must consider "(i) the number of knowing participants; (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; [and] (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme." [30] The second and third factors, the court explained, "separate out" the "service providers who facilitate a particular defendant's criminal activities but are not the functional equivalent of knowing participants" and the "[l]awful services that are not peculiarly tailored and necessary to the particular crime but are fungible with others generally available to the public . . . ." [31] The *Carrozzella* court cautioned that the guideline's use of the term "otherwise extensive" entails more than mere "head-counting," and that a sentencing court may conclude that the activity was not otherwise extensive even if it involved some combination of at least five knowing and unknowing participants.[32] At least three other circuits, the Third, Sixth, and District of Columbia circuits, have adopted the *Carrozzella* test.[33]

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[27] USSG §3B1.1, comment. (n.3). *See* United States v. Kent, 821 F.3d 362, 370 (2d Cir. 2016) (citing Note 3 to reject as "unavailing" the defendant's suggestion that there were fewer than four knowing participants "because they were not all working at the same time"). *See also* United States v. Tuma, 738 F.3d 681, 694 (5th Cir. 2013) ("[I]n deciding whether a scheme was otherwise extensive, the district court must take into account all persons involved during the course of the entire offense.") (citations omitted); United States v. Ellis, 951 F.2d 580, 585 (4th Cir. 1991), *abrogated on other grounds by* United States v. Kinter, 235 F.3d 192, 196 (4th Cir. 2000) (same).

[28] 105 F.3d 796 (2d Cir. 1997), *abrogated on other grounds by* United States v. Kennedy, 223 F.3d 157 (2d Cir. 2000).

[29] *Carrozzella*, 105 F.3d at 803 (*quoting* United States v. Tai, 41 F.3d 1170, 1174 (7th Cir. 1994)) (emphasis in original).

[30] *Id*. at 803–04.

[31] *Id.* at 804.

[32] *Id.*; *Kent*, 821 F.3d at 369 ("As we also explained in *Carrozzella*, even though § 3B1.1 adjustments are based primarily on the number of people involved in criminal activity, factors other than head counting may be properly considered in the 'otherwise extensive' determination. In doing so, however, a district court must ensure that it does not engage in impermissible double counting of offense level adjustments.") (citations omitted).

[33] *See* United States v. Thung Van Huynh, 884 F.3d 160, 171 (3d Cir. 2018) (Describing a "three step

The First Circuit has adopted a "totality of the circumstances" test for determining whether a criminal activity was otherwise extensive. Under that test, the court may look to all the circumstances of the criminal activity, "'including . . . the width, breadth, scope, complexity, and duration of the scheme.'"[34] The First Circuit nonetheless views the number of persons involved as relevant, explaining that "[i]n most instances, the greater the number of people involved in the criminal activity, the more extensive the activity is likely to be."[35] The Tenth Circuit has adopted the First Circuit's test, and the Eleventh Circuit made a similar suggestion in an unpublished opinion.[36]

Other circuits have not explicitly adopted either approach. The Fifth Circuit has endorsed the use of the "totality of the evidence,"[37] but also held that district courts "must take into account all persons involved during the course of the entire offense."[38] The Seventh and Ninth Circuits have instructed courts to consider the monetary benefits obtained during the scheme, the length of the scheme, and its "geographic scope," as well as

approach" to determining extensiveness: (1) "a sentencing court must distinguish the scheme's participants, as defined by the commentary to § 3B1.1, from non-participants who were nevertheless involved"; (2) "the court must determine whether the defendant used each non-participant's services with specific criminal intent, and (3) the court must determine the extent to which those services were "peculiar and necessary to the criminal scheme.") (*citing* United States v. Helbling, 209 F.3d 226 (3d Cir. 2000) (quotation marks omitted); United States v. Antico, 275 F.3d 245, 270 (3d Cir. 2001) (adding that "[t]he actions or services of non-participants must all relate to the common criminal activity or scheme—and to the offense charged."). *See also* United States v. Myers, 854 F.3d 341, 358 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 638 (2018) ("To determine whether a scheme is 'extensive,' we consider 'whether the combination of knowing and countable non-participants is the functional equivalent of an activity carried out by five criminally responsible participants.'") (*citing Anthony*, 280 F.3d at 694); United States v. Wilson, 240 F.3d 39 (D.C. Cir. 2001) (adopting the *Carrozzella* approach).

[34] United States v. Laboy, 351 F.3d 578, 586 (1st Cir. 2003) (*quoting* United States v. Dietz, 950 F.2d 50, 53 (1st Cir. 1991)).

[35] *Dietz*, 950 F.2d at 53.

[36] *See* United States v. Yarnell, 129 F.3d 1127, 1139 (10th Cir. 1997). *See also* United States v. Zada, 706 F. App'x 500, 510 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 689 (2018) ("While we have not expressly addressed the circuit split, *Holland* suggests that this circuit uses a broader, totality-of-the-circumstances-based approach.") (*citing* United States v. Holland, 22 F.3d 1040 (11th Cir. 1994)).

[37] *See* United States v. Mergerson, 4 F.3d 337, 348 (5th Cir. 1993) (upholding "otherwise extensive" finding based on the "totality of the evidence" when the defendant admitted to controlling the activities of "several" distributors and the offense involved a large amount of high-purity heroin); *Tuma*, 738 F.3d at 694 (*citing* United States v. Ho, 311 F.3d 589, 611 (5th Cir.2002)).

[38] *Ho*, 311 F.3d at 611 (observing that, "in deciding whether a scheme was otherwise extensive, the district court must take into account all persons involved during the course of the entire offense," and holding that the court "erred by interpreting the phrase "otherwise extensive" in § 3B1.1(a) to refer to the nature of the criminal organization, as distinguished from the number of participants and persons involved.").

the number of "unwitting" or "unknowing" participants. [39] In the Eighth Circuit, extensiveness is generally determined by the number of persons involved in the commission of an offense," but "courts also consider the amount of loss caused by the offense."[40] The Fourth Circuit approved of the application of the adjustment when the sentencing court solely considered the number of participants and "outsiders" that provided services to the criminal scheme, but has also cited *Dietz* in an unpublished opinion.[41]

3. "Any Criminal Activity Other than Described in (a) or (b)"

To apply the 2-level adjustment established in §3B1.1(c), the court must conclude that the defendant was involved in a "criminal activity," and conclude either that the activity did not involve "five participants or more" or that it was not "otherwise extensive." Subsection (c) is thus broader than the remainder of §3B1.1. Because §3B1.1(c) requires that the defendant act as an organizer, leader, manager, or supervisor of another participant, however, the court must necessarily find that the "criminal activity" involved at least two participants—the defendant and another person—before applying the 2-level adjustment.[42]

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[39] *See Fluker,* 698 F.3d at 1002 ("In determining whether a scheme is otherwise extensive, we have considered: (1) the monetary benefits obtained during the scheme; (2) the length of time the scheme continued; (3) the number of people utilized to operate the scheme; and (4) the scheme's geographic scope. ... We have also held that a scheme is otherwise extensive if the number of participants plus outsiders who unwittingly advance a conspiracy is greater than five."); United States v. Rose, 20 F.3d 367, 374 (9th Cir.1994) ("Whether criminal activity is 'otherwise extensive' depends on such factors as (i) the number of knowing participants and unwitting outsiders; (ii) the number of victims; and (iii) the amount of money fraudulently obtained or laundered.") (citations omitted); United States v. Farris, 585 F. App'x 934, 936 (9th Cir. 2014) (applying adjustment when defendant "perpetrated an elaborate fraud involving millions of dollars, many employees, and victims across several states.").

[40] United States v. Brockman, 183 F.3d 891, 900 (8th Cir. 1999). *See also* United States v. Lundstrom, 880 F.3d 423, 445 (8th Cir. 2018) ("The fraud scheme was also 'otherwise extensive' in light of the number of innocent participants unwittingly involved in the scheme").

[41] *Ellis*, 951 F.2d at 585 (concluding that scheme was otherwise extensive after ascertaining that it involved four major participants "as well as other lobbyists, legislators and their staff"); United States v. Ruhbayan, 406 F.3d 292, 302–03 (4th Cir. 2005) (distinguishing *Ellis* to clarify that the "objects" of a conspiracy—the jurors who heard perjured statements—were not properly considered participants). *See also* United States v. Beverly, 284 F. App'x 36, 41–42 (4th Cir. 2008) ("In determining whether criminal activity is 'otherwise extensive,' many reviewing courts have examined the "totality of the circumstances, including not only the number of participants but also the width, breadth, scope, complexity, and duration of the scheme.") (*citing Dietz*, 950 F.2d at 53).

[42] *See* USSG §3B1.1, comment. (n.2); United States v. Naranjo-Rosario, 871 F.3d 86, 98 (1st Cir. 2017); United States v. Tanner, 837 F.3d 596, 603 (6th Cir. 2016); United States v. Zitron, 810 F.3d 1253, 1261 (11th Cir. 2016); United States v. Williams, 527 F.3d 1235, 1249 (11th Cir. 2008); United States v. Lewis, 476 F.3d 369, 390 (5th Cir. 2007); United States v. Bethancourt, 65 F.3d 1074, 1081 (3d Cir. 1995). *See also* United States v. Tai, 750 F.3d 309, 318–20 (3d Cir. 2014) (remanding the case for resentencing where the court

The court may not apply §3B1.1(c) if it finds that the defendant held an aggravating role in a criminal activity that involved at least five participants or was otherwise extensive. The mandatory language of §3B1.1 requires the sentencing court in such circumstances to apply either subsection (a) or (b), depending on whether the defendant acted as an "organizer or leader" or "manager or supervisor."[43]

B. ROLE IN THE CRIMINAL ACTIVITY

Proper application of §3B1.1 requires the court to determine whether the defendant was an organizer, leader, manager, or supervisor in the criminal activity.[44] "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct) . . . ."[45] Thus, when determining the applicability of §3B1.1, the court's consideration is not limited to the defendant's participation in the elements of the counts of conviction, but includes all relevant conduct attributable to the defendant under §1B1.3.[46] Although the guidelines do not expressly

applied §3B1.1(c) without making the required factual findings concerning whether the defendant supervised a "criminally responsible" participant).

[43] *See* United States v. Ross, 210 F.3d 916, 925 (8th Cir. 2000) ("In order to impose a two-level enhancement for role in the offense under § 3B1.1(c), the court must first determine that neither § 3B1.1(a) nor § 3B1.1(b) apply."); United States v. Gonzalez-Vazquez, 219 F.3d 37, 44 (1st Cir. 2000) ("[Section] 3B1.1 sets forth a precise adjustment scheme that cannot be modified by the district court . . . . Therefore, a court may not 'forgo the three-level increase called for by U.S.S.G. § 3B1.1(b) and instead impose a two-level increase' when it finds mitigating circumstances.") (*quoting* United States v. Cotto, 979 F.2d 921, 922 (2d Cir. 1992)); United States v. Kirkeby, 11 F.3d 777, 778–79 (8th Cir. 1993) ("A trial court's only options in cases involving a criminal activity with five or more participants are . . . a four-level enhancement under § 3B1.1(a), a three-level enhancement under § 3B1.1(b), or no enhancement at all (if the defendant played no aggravating role in the offense).")

[44] To qualify for the aggravating role adjustment, the defendant must have been the organizer, leader, manager, or supervisor of at least one other participant in the criminal activity. *See* USSG §3B1.1, comment. (n.2). *See also Mack*, 808 F.3d at 1085 ("To justify the imposition of a four-level 'organizer or leader' enhancement under § 3B1.1, the government must show by a preponderance of the evidence that the defendant 'was an organizer or leader of a criminal activity that involved five or more participants[.]'"). However, a finding that the defendant exercised responsibility over property, assets, or activities in the criminal activity, instead of over other participants, could be a basis for an upward departure. USSG §3B1.1, comment. (n.2).

[45] USSG Ch. 3, Pt. B, intro. comment.

[46] The determination of the size and scope of the criminal activity should also be made on the basis of all the conduct within the scope of §1B1.3, and not solely on the specifics acts and participation in the commission of the offense of conviction. For example, in *United States v. Lucena-Rivera*, 750 F.3d 43, 50–51

define the terms related to the defendant's role in the criminal activity, the Commentary to §3B1.1 provides guidance, and there is an expansive body of case law interpreting and applying them.

With respect to the defendant's role in the criminal activity, courts have observed that "[t]he line between being an organizer or leader, on the one hand, and a manager or supervisor, on the other, is not always clear . . . ."[47] Nonetheless, the difference between organizers and leaders, and managers and supervisors, clearly turns on the defendant's degree of responsibility in the criminal activity.[48] For that reason,

> [a]t the crux of this distinction and at the base of the rationale for this enhancement sits the relative culpability of each participant in the criminal enterprise: those who are more culpable ought to receive the harsher organizer/leader enhancement, while those with lesser culpability and responsibility receive the lesser enhancement imposed on managers/supervisors . . . . And those with the least relative culpability receive no enhancement at all.[49]

(1st Cir. 2014), the First Circuit affirmed the district court's conclusion that the criminal activity involved more than five persons, stating:

> [The defendant] does not dispute that more than five individuals were involved in his drug-trafficking operation, but contends that there was no basis to conclude that those individuals were also involved in the money-laundering offense of conviction . . . . [T]he definition of relevant conduct [includes] "all acts and omissions . . . by the defendant . . . that occurred during the commission of the offense of conviction, *in preparation for that offense,* or in the course of attempting to avoid detection or responsibility for that offense" (emphasis added). Here, the drug-trafficking activity was a necessary precursor to the money-laundering offense of conviction.

Lucena-Rivera, 750 F.3d at 50–51.

[47] United States v. Bahena, 223 F.3d 797, 804 (8th Cir. 2000) (*citing* United States v. Delpit, 94 F.3d 1134, 1155 (8th Cir. 1996)).

[48] *See* USSG §3B1.1, comment. (backg'd) ("This section provides a range of adjustments to increase the offense level based upon . . . the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about *relative* responsibility.") (emphasis added).

[49] United States v. Weaver, 716 F.3d 439, 442 (7th Cir. 2013) (citations omitted). *See also* United States v. House, 883 F.3d 720, 724 (7th Cir. 2018) ("[T]he primary goal in applying § 3B1.1 should be to make a "commonsense judgment about the defendant's relative culpability given his status in the criminal hierarchy."); United States v. Payne, 881 F.3d 229, 232 (1st Cir. 2018) ("[T]o say [the defendant] was only [a supervisor] is to imply that someone else was the leader to whom the supervisor reported.")

Given this hierarchy of responsibility, conduct within the scope of §3B1.1 overlaps its classifications, so that organizers and leaders also qualify as managers and supervisors.[50] Also, more than one person may qualify as an organizer or leader of a criminal activity.[51] To qualify for an adjustment, even under subsections (a) and (b), the defendant need only have organized, led, managed, or supervised one participant in the conspiracy.[52] Titles given to members in the criminal activity, such as "kingpin" or "boss," "are not controlling.[53]

To distinguish leaders and organizers from mere managers and supervisors, Application Note 4 provides a non-exhaustive list of factors for the court to consider, including:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.[54]

Courts frequently look to Application Note 4 to determine whether the defendant was an "organizer or leader." If the district court's factual findings corroborate that some

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50 United States v. Quigley, 373 F.3d 133, 139 (D.C. Cir. 2004) ("We read subsection (b) to sweep in lower level managerial and supervisory conduct, and subsection (a) to encompass higher level managerial and supervisory conduct . . . . We are confident that all organizers or leaders of a conspiracy qualify as managers or supervisors under § 3B1.1(b).").

51 USSG §3B1.1, comment. (n.4). *See also* United States v. Bedini, 861 F.3d 10 (2017) ("It is clear that there can be more than one person who qualifies as a leader or organizer.") (citations omitted); United States v. Jones, 792 F.3d 831, 836 (7th Cir. 2015); United States v. Sadler, 750 F.3d 585, 594 (6th Cir. 2014); United States v. Williams, 605 F.3d 556, 570 (8th Cir. 2010) United States v. Garcia, 413 F.3d 201, 224 (2d Cir. 2005); United States v. Vallejo, 297 F.3d 1154, 1169 (11th Cir. 2002); United States v. Rodriguez, 897 F.2d 1324, 1327 (5th Cir.1990).

52 §3B1.1, comment. (n.2); United States v. Anwar, 880 F.3d 958, 972 (8th Cir. 2018) (observing that "[t]he enhancement applies to defendants "even where they manage or supervise only one other participant in the conspiracy" and adding that "the enhancement 'may apply even if the management activity was limited to a single transaction."); United States v. Thompson, 866 F.3d 1149, 1164 (10th Cir. 2017) ("The Guideline requires only a conclusion that the defendant supervised at least one such participant; it does not require the court to identify specific examples."). *See also* United States v. Savage, 885 F.3d 212, 229 (4th Cir. 2018); United States v. Ranjel, 872 F.3d 815, 820 (7th Cir. 2017).

53 USSG §3B1.1, comment. (n.4).

54 USSG §3B1.1, comment. (n.4).

combination of these factors establishes the defendant as an organizer or leader, the court of appeals will likely not disturb the application of §3B1.1(a).[55] Courts have been careful to note that the guidelines do not require that each of the factors have to be present in any one case, and that no single factor is dispositive in determining whether §3B1.1(a) applies.[56] Nonetheless, where the district court's factual findings do not reveal that the defendant was an organizer or leader based on factors such as those enumerated in Application Note 4, it may err by applying the 4-level enhancement pursuant to §3B1.1(a).[57]

To qualify as "organizer or leader," the defendant must have exercised a significant degree of control and decision-making authority over the criminal activity.[58] For example,

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[55] *See* United States v. Noble, 246 F.3d 946, 953–54 (7th Cir. 2001); *Bahena*, 223 F.3d at 80-05.

[56] *See Payne*, 881 F.3d at 232 ("There need not be evidence of every factor"); United States v. Olejiya, 754 F.3d 986, 990 (D.C. Cir. 2014) ("No single factor is dispositive."); United States v. Robertson, 662 F.3d 871, 877 (7th Cir. 2011) ("[N]o single §3B1.1 factor is essential in determining whether the adjustment applies, and a court need not assign equal weight to each factor."); United States v. Ramirez, 426 F.3d 1344, 1356 (11th Cir. 2005) ("There is no requirement that all of the considerations have to be present in any one case . . . these factors are merely considerations for the sentencing judge."); United States v. Bernaugh, 969 F.2d 858, 863 (10th Cir. 1992) ("The Guidelines do not require that each of the factors be satisfied for § 3B1.1(a) to apply.").

[57] *See*, *e.g.*, United States v. Hammerschmidt, 881 F.3d 633, 638 (8th Cir. 2018) (remanding the case for resentencing because the district court "did not determine whether [the defendant] managed or supervised another participant."); United States v. Marquez, 833 F.3d 1217, 1221 (10th Cir. 2016) ("Even if the record overwhelmingly supports the enhancement, appellate fact-finding cannot substitute for the district court's duty to articulate clearly the reasons for the enhancement.") (citations omitted); United States v. Bonilla-Guizar, 729 F.3d 1179, 1186–87 (9th Cir. 2013) (remanding the case for resentencing stating that "the district court may apply the § 3B1.1 management enhancement only if it finds, based on evidence in the record, that [the defendant] managed at least one other participant in the crime."); United States v. Shengyang Zhou, 717 F.3d 1139, 1150 (10th Cir. 2013) (affirming application of adjustment because, although district court did not "identify[] which of the organizer or leader factors supported its finding[,] the court's findings were specific enough to provide a clear picture."); United States v. Flores-De-Jesus, 569 F.3d 8, 35 (1st Cir. 2009) (evidence was insufficient because it showed that the defendant was "deeply involved in the operation, [but] there was nothing to show that these individuals were his subordinates in the chain of command or that he oversaw their activities."); United States v. Martinez, 584 F.3d 1022,1028 (11th Cir. 2009) (concluding that the district court erred in applying §3B1.1(a) because the supported factual findings "do not establish, standing alone or in concert, any of the seven factors set forth in Comment Four to Section 3B1.1 . . . ."); United States v. Stevens, 985 F.2d 1175, 1184–85 (2d Cir. 1993) ("It did not suffice for the court simply to state that it had 'no doubt' that [the defendant] controlled the operation, without giving some explanation as to the evidentiary basis for its view.").

[58] *Van Huynh*, 884 F.3d at 171 (concluding that the District Court did not clearly err in applying §3B1.1(a) adjustment when the defendant "exercised a significant degree of control over others in the commission of the offense") (citations omitted). *But see House*, 883 F.3d at 725 (stating that "control is simply one measure," and affirming use of §3B1.1(b) enhancement when defendant "devis[ed] the plan, us[ed] his business as the front, provid[ed] the necessary vehicle information, coordinat[ed] with his co-conspirators and the borrowers, and receiv[ed] and distribut[ed] the funds"); *Marquez*, 833 F.3d at 1222–23 (10th Cir. 2016) ("To

in *United States v. Bolden*,[59] the Eighth Circuit affirmed the district court's conclusion that the defendant was an organizer or leader of a drug conspiracy, where the evidence showed that the defendant "recruited members of the conspiracy," "directed those members to distribute drugs," "supplied drugs for distribution," "retained a large portion of profit for himself," and "played a role in setting up [drug] transactions."[60] In *United States v. Szur*,[61] the Second Circuit affirmed the district court's finding that the defendant was the organizer or leader of a financial fraud scheme, where he and another person created the scheme, and the defendant himself received half of the proceeds from the sale of fraudulent stock, recruited others to sell the stock, was the owner of the firm, and was "ultimately responsible for the control of the [firm's] branch offices."[62]

By contrast, to be a manager or supervisor, the defendant need only "have exercised some degree of control over others involved in the commission of the offense or he must

qualify as an organizer no control is necessary. Instead, a defendant may be deemed an organizer under § 3B1.1 for devising a criminal scheme, providing the wherewithal to accomplish the criminal objective, and coordinating and overseeing the implementation of the conspiracy even though the defendant may not have any hierarchical control over the other participants.").

[59] 596 F.3d 976 (8th Cir. 2010).

[60] *Id.* at 984. *See also* United States v. Espinoza, 885 F.3d 516, 526 (8th Cir. 2018) (affirming the application of §3B1.1(a) because the defendant "would personally confront [sellers] when they fell behind on their drug debt, evidencing management of the conspiracy's financial operations," and "a text-message exchange in which a . . . customer asked an associate to find out what [the defendant] would charge for a particular quantity of methamphetamine purchases was evidence of his price-setting authority."); United States v. Crabtree, 878 F.3d 1274 (11th Cir. Jan. 3, 2018) (affirming the application of 4-level organizer adjustment when the defendant "was in a pivotal position of management authority that enabled the fraud to succeed," regardless of the fact that he did not closely manage all operations); United States v. Garcia, 512 F.3d 1004, 1006 (8th Cir. 2008) (affirming the application of §3B1.1(a) where the defendant "recruited others to join the conspiracy . . . received drug orders from customers, and . . . directed others to package and deliver drugs"). In drug trafficking cases, a defendant is not an "organizer or leader" solely because he bought or sold narcotics, even in large amounts. *See Marquez*, 833 F.3d at 1222 ("It is well-established that buyer/seller and wholesaler/retailer relationships cannot provide the basis for a § 3B1.1 enhancement."); United States v. Sayles, 296 F.3d 219, 226–27 (4th Cir. 2002). However, a court may consider the quantity of drugs where the evidence shows that the defendant was more than just a mere buyer or seller. *See* United States v. Ponce, 51 F.3d 820 (9th Cir. 1995); United States v. Iguaran-Palmar, 926 F.2d 7 (1st Cir. 1991); United States v. Garvey, 905 F.2d 1144 (8th Cir. 1990).

[61] 289 F.3d 200 (2d Cir. 2002).

[62] *Szur*, 289 F. 3d at 218. *See also* United States v. Borders, 829 F.3d 558, 570 (8th Cir. 2016) (concluding that the district court did not err in applying §3B1.1(a) where the defendant led scouting parties to find vehicles to steal, directed another participant to remove VIN numbers to prevent police detection, and stole merchandise and arranged for its transportation, storage, and purchase).

have been responsible for organizing others for the purpose of carrying out the crime."[63] In *United States v. Solorio*,[64] the Sixth Circuit held the district court properly concluded the defendant was a "supervisor" in a "vast drug enterprise" where he recruited and exercised control over just one accomplice by directing that accomplice's drug activities.[65] Similarly, in *United States v. Voegtlin*,[66] the Eighth Circuit affirmed the district court's application of the 2-level adjustment on grounds that the defendant acted as a supervisor or manager by

[63] United States v. Fuller, 897 F.2d 1217, 1220 (1st Cir. 1990), *superseded by the 1993 amendment to the Commentary to §3B1.1, USSC App. C, Amendment 500, as recognized in* United States v. Caseslorente, 220 F.3d 727, 734 (6th Cir. 2000). *See also Wolf*, 860 F.3d at 198 ("[T]his court has consulted the dictionary definition of "manager" to derive its meaning under U.S.S.G. § 3B1.1(b): A person whose work or profession is the management of a specified thing (as a business, an institution, or a particular phase or activity within a business or institution[.]"); United States v. Mannings, 850 F.3d 404, 409 (8th Cir. 2017) ("We have defined the terms 'manager' and 'supervisor' quite liberally. … The key factors in determining management or supervisory authority are control over participants and organization of the criminal activity.");United States v. Nerey, 877 F.3d 956, 977 (11th Cir. 2017) (enhancement appropriate when defendant recruited coconspirator and "her involvement in the fraud was foreseeable to him."); United States v. Henry, 813 F.3d 681, 682–83 (7th Cir. 2016) (holding that "[i]f you recruit a person, tell him what his job is, specify his wage, and equip him with tools of his trade (the gun in this case), you're his manager" and that as such "an employee doesn't cease to be an employee merely because he's on a long leash."); United States v. Rodriguez, 741 F.3d 908, 912 (8th Cir. 2014) (upholding enhancement where the defendant "directed his coconspirator to transport drugs and drug proceeds," and concluding that "[t]he fact that [the defendant] reported to others in the conspiracy does not negate his role in managing and supervising the activities of a coconspirator."); United States v. Hertular, 562 F.3d 433, 448 (2d Cir. 2009) ("A defendant is properly considered as a manager or supervisor . . . if he 'exercised some degree of control over others involved in the commission of the offense or played a significant role in the decision to recruit or supervise lower-level participants.'") (citations omitted); United States v. Chau, 293 F.3d 96, 103 (3d Cir. 2002) ("[A] manager or supervisor is one who exercises some degree of control over others involved in the offense.") (internal quotations and alterations omitted); United States v. Backas, 901 F.2d 1528, 1530 (10th Cir. 1990) ("In order to be a supervisor, one needs merely to give some form of direction or supervision to someone subordinate in the criminal activity for which the sentence is given.").

[64] 337 F.3d 580, 601 (6th Cir. 2003).

[65] *See also Wolf,* 860 F.3d at 198 (defendant played managerial role in mortgage fraud scheme because of involvement in "drawing up compensation agreements and deciding on a property's gross price, selecting floor plans, … recruiting new participants in the conspiracy, and controlling which documents would and would not be submitted to the lender.) (citations omitted); United States v. Hawkins, 866 F.3d 344, 348 (5th Cir. 2017) (affirming application of § 3B1.1 when defendant "directed and recruited a number of subordinates, who executed drug deals, picked up payments, acted as enforcers, and transported drugs belonging to her and her co-conspirators"); *Ranjel*, 872 F.3d at 820 (enhancement appropriate when "evidence established that [the defendant] directed one coconspirator to hold drugs, another coconspirator to sell drugs, and a third coconspirator to deliver cocaine to various retailers, collect payment, and deliver the money to him."); United States v. Collins, 715 F.3d 1032, 1039 (7th Cir. 2013) (concluding that the defendant was a "manager or supervisor" when he recruited a participant, fronted him kilos of cocaine, told him how much to sell the product for, and verified his drug dealing procedures).

[66] 437 F.3d 741 (8th Cir. 2006).

"[i]nstructing others to obtain precursors used to produce methamphetamine."[67] In *United States v. Griffin*,[68] the defendant acted as a "manager" of a chop-shop operation where he placed orders for stolen vehicles, gave instructions to others as to what kinds of vehicles to steal, gave instructions for dismantling the stolen vehicles, and managed the disposition of stolen car parts. And in *United States v. Powell*,[69] the defendant was a "supervisor" for purposes of §3B1.1(c) in evading federal fuel taxes where he supervised a single accountant's preparation of fraudulent tax documents.

The guideline commentary notes that, with respect to smaller criminal activities that involve fewer than five participants or are not otherwise extensive, "the distinction between organization and leadership, and that of management or supervision is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility."[70] Accordingly, §3B1.1(c) is inclusive and calls for the same 2-level adjustment regardless of the specific aggravating role held by the defendant. Nonetheless, the Ninth Circuit has declined to apply the 2-level adjustment "merely because a defendant's important role makes him integral to the success of the criminal enterprise' and gives him a 'high degree of culpability."[71]

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67 *Voegtlin*, 437 F.3d at 748. *But see Collins*, 877 F.3d at 367–68 ("[M]erely directing an interested buyer to a dealer is not sufficient for a § 3B1.1 adjustment. … [A] criminal who operates on his own, not as part of any organization, need not receive the enhancement because of an isolated incident like [a] request to [another person] to cover for him on one sale. … One doctor may cover one patient for another, or one lawyer may cover one case for another, without turning one into a supervisor of the other.").

68 148 F.3d 850, 856 (7th Cir. 1998).

69 124 F.3d 655, 667 (5th Cir. 1997).

70 USSG §3B1.1, comment. (backg'd).

71 United States v. Doe, 778 F.3d 814, 824–26 (9th Cir. 2015) (adding that "a defendant who has the organizational authority necessary to coordinate the activities of others to achieve a desired result is an organizer for purposes of the enhancement under § 3B1.1(c) [and] an organizer need not also be a supervisor or a superior in a hierarchy of criminal associates") (citations omitted). *See also* United States v. Atkins, 881 F.3d 621, 628 (8th Cir. 2018) (affirming use of §3B1.1(c) adjustment in wire fraud case because defendant "decided how and when the fraudulent tickets were created, what loads would be duplicated and received, and how much remuneration he would receive."); United States v. Agyekum, 846 F.3d 744, 752–53 (4th Cir.), *cert. denied sub nom*. Kofi Ohene Agyekum v. United States, 137 S. Ct. 2177, 198 L. Ed. 2d 245 (2017) (affirming use of §3B1.1(c) adjustment when defendant directed the activities of pharmacy involved in Oxycodone distribution, "handled all the money" involved, controlled bank accounts, and directed the pharmacist, although she "technically filled the prescriptions."); United States v. Oliver, 873 F.3d 601, 612 (7th Cir. 2017) (noting that "[s]ome hierarchy among those involved in the criminal activity must exist to qualify a defendant for an enhancement under § 3B1.1, and affirming § 3B1.1(c) enhancement because defendant "created the fraudulent investment scheme," recruited investors, and distributed referral fees.).

III. MITIGATING ROLE: §3B1.2

Section 3B1.2 provides for 2-, 3-, and 4-level decreases to the offense level, depending on the defendant's mitigating role in the offense, as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.[72]

Application of §3B1.2 turns primarily on the defendant's particular role in the criminal activity, specifically whether he or she was a "minimal" or "minor" participant. As with §3B1.1, "[t]he determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case."[73]

The defendant bears the burden of proving by a preponderance of the evidence that he or she is entitled to a mitigating role adjustment.[74] As with aggravating role adjustments, the fact-specific nature of mitigating role determinations results in a deferential appellate standard of review. Therefore, "[g]iven the allocation of the burden of proof, a defendant who seeks a downward role-in-the-offense adjustment usually faces an uphill climb in the *nisi prius* court. The deferential standard of review compounds the

[72] USSG §3B1.2.

[73] USSG §3B1.2, comment. (n.3(C)).

[74] *See* United States v. Presendieu, 880 F.3d 1228, 1249 (11th Cir. 2018); United States v. Diaz, 884 F.3d 911, 914 (9th Cir. 2018); United States v. Rowe, 878 F.3d 623, 630 (8th Cir. 2017); United States v. Montes-Fosse, 824 F.3d 168, 172 (1st Cir. 2016); United States v. Salas, 756 F.3d 1196, 1207 (10th Cir. 2014); United States v. Sandoval–Velazco, 736 F.3d 1104, 1107 (7th Cir.2013); United States v. Powell, 680 F.3d 350, 358–59 (4th Cir. 2012); United States v. Carpenter, 252 F.3d 230, 234 (2d Cir. 2001); United States v. Salgado, 250 F.3d 438, 458 (6th Cir. 2001); United States v. Isaza-Zapata, 148 F.3d 236, 240 (3d Cir. 1998). *See also* United States v. Castro, 843 F.3d 608, 613 (5th Cir. 2016) ("[A defendant] is not entitled to a §3B1.2 adjustment just because she played a lesser role than others in the criminal activity. [The defendant] is only entitled to a mitigation role adjustment if she showed by a preponderance of the evidence: (1) the culpability of the average participant in the criminal activity; and (2) that she was substantially less culpable than that participant.").

difficulty, so that a defendant who fails to persuade at that level faces a much steeper slope on appeal."[75]

A. "Substantially Less Culpable than the Average Participant in the Criminal Activity"

Application Note 3(A) explains that §3B1.2 operates to provide "a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity."[76] The term "participant" as used in §3B1.2 carries the same meaning as "participant" for purposes of §3B1.1.[77] Thus, it is clear that the defendant may receive a mitigating role adjustment only if the criminal activity involved at least one other *participant*. As the commentary expressly states: "an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant . . . ."[78] As with aggravating role adjustments, it is not necessary that the other participants actually be convicted for their role in the criminal activity for §3B1.2 to apply.[79]

Before 2015, courts disagreed about what determining the "average participant" required. The Seventh and Ninth circuits concluded that the phrase "average participant"

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[75] United States v. Teeter, 257 F.3d 14, 31 (1st Cir. 2001), *superseded on other grounds by the 2015 amendment to the Commentary to §3B1.2, USSC App. C, Amendment 794, as recognized in* United States v. Quintero-Leyva, 823 F.3d 519, 522 (9th Cir. 2016).

[76] USSG §3B1.2, comment. (n.3(A)). In 2015, the Commission revised the first sentence of Application Note 3(A) to §3B1.2 and inserted after "substantially less culpable than the average participant" the following phrase: "in the criminal activity." *See* USSG, App. C, Amendment 794 (effective November 1, 2015). *See also* United States v. Cortez-Vergara, 873 F.3d 390, 393 (1st Cir. 2017) ("Overcoming an adverse minor role decision is a difficult burden for a defendant to meet on appeal, for the district court's determination is … invariably fact-specific and, thus, appellate review of such a determination is respectful.") (citations omitted).

[77] *See* USSG §3B1.2, comment. (n.1). *See also* USSG §3B1.1, comment. (n.1) ("A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted.").

[78] USSG §3B1.2, comment. (n.2).

[79] *See supra* note 8. *See also Diaz*, 884 F.3d at 917 (noting that a defendant is not required to "identify other participants by name; doing so is only one way a defendant can establish the existence of other participants in a criminal scheme" and observing that "[i]dentifying the locations of other individuals and the roles they actually served may be sufficient for the defendant to meet his burden."). The fact that the defendant himself merely aided or abetted the criminal activity does not automatically entitle him to a mitigating role adjustment under §3B1.2. *See Teeter*, 257 F.3d at 14,

referred only to those persons who actually participated in the criminal activity at issue in the defendant's case, so that the defendant's relative culpability is determined only by reference to his or her co-participants in the case at hand.[80] The Ninth Circuit further clarified that the requisite comparison is to "average participants" and not to "above-average participants."[81] The First and Second circuits concluded that the "average participant" also included typical offenders who commit similar crimes. Under this latter approach, courts would have ordinarily considered the defendant's culpability relative *both* to his co-participants *and* to the abstract typical offender.[82]

In 2015, the Commission amended the Commentary to §3B1.2 to address this circuit conflict and generally adopted the approach of the Seventh and Ninth circuits.[83] Application Note 3(A) now specifies that, when determining mitigating role, the defendant is to be compared with the other participants "in the criminal activity." Thus, the relative culpability of the "average participant" is measured only in comparison to those persons

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[80] *See, e.g.,* United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994) (explaining that "the relevant comparison . . . is to the conduct of co-participants in the case at hand."); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993) ("The controlling standard for an offense level reduction under [§3B1.2] is whether the defendant was substantially less culpable than the conspiracy's other participants."). *See also* United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) ("While a comparison to the conduct of a hypothetical average participant may be appropriate in determining whether a downward adjustment is warranted at all, the relevant comparison in determining which of the § 3B1.2 adjustments to grant a given defendant is to the conduct of co-participants in the case at hand.") (internal quotations omitted).

[81] United States v. Hurtado, 760 F.3d 1065, 1069 (9th Cir. 2014) ("That [the defendant's] supervisors, organizers, recruiters, and leaders may have *above-average* culpability—and thus are subject to aggravating rule enhancements under U.S.S.G. § 3B1.1—doesn't mean that [the defendant] is substantially less culpable than the average participant.").

[82] *See, e.g.,* United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004) ("[A] defendant must prove that he is both less culpable than his cohorts in the particular criminal endeavor and less culpable than the majority of those within the universe of persons participating in similar crimes."); United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) ("A reduction will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime.").

[83] *See supra* note 80. Five circuit courts have reviewed Amendment 794 and concluded that it is a 'clarifying' amendment that should be applied retroactively on appeal. *See* United States v. Sarmiento-Palacios, 885 F.3d 1, 5 (1st Cir. 2018) ("We agree with the Ninth, Sixth, and Eleventh Circuits that Amendment 794's language "indicates that the Commission intended it to be a clarifying amendment.") (citations omitted) (*citing* United States v. Cruickshank, 837 F.3d 1182, 1194 (11th Cir. 2016); United States v. Quintero-Leyva, 823 F.3d 519, 523 (9th Cir. 2016); United States v. Carter, 662 Fed.Appx. 342, 349 (6th Cir. 2016)). *See also* United States v. Sanchez-Villarreal, 857 F.3d 714, 720 (5th Cir. 2017) (concluding that, "on balance," the evidence suggests that "Amendment 794 is clarifying, especially as we also take note of the unanimity of circuit courts that have ruled on the issue and the Government's concession that the amendment is clarifying.").

who actually participated in the criminal activity, rather than against "typical" offenders who commit similar crimes.

Application Note 3(B) to §3B1.2 provides that a defendant should ordinarily not receive a mitigating role adjustment if he or she benefitted from a reduced offense level by virtue of having been convicted of an offense that was "significantly less serious" than warranted by the actual offense conduct.[84] Courts have applied this note, for example, to deny the adjustments where the offense of conviction and the base offense level reflected only the defendant's own conduct and not the broader conspiracy in which the defendant claims to be a minor participant.[85] Courts have also extended this principle to cases in which the defendant's base offense level "does not reflect the conduct of the larger conspiracy," regardless of the offense of conviction.[86]

B. MINIMAL AND MINOR PARTICIPANTS

Upon determining that the defendant was "substantially less culpable than the average participant in the criminal activity," Application Notes 4 and 5 explain how to distinguish between "minimal" and "minor" participants. Application Note 4 provides that

[84] *See* USSG §3B1.2, comment. (n. 3(B)).

[85] United States v. Isaza-Zapata, 148 F.3d 236, 241 (3d Cir. 1998) (citing Note 4 to hold that "where a larger conspiracy in which the defendant was involved is not taken into account in the charged offense that sets the defendant's base offense level, the defendant is not entitled to a reduction for his minor role in that conspiracy," but noting that "if the defendant proves that there were other participants in the relevant conduct, which by definition includes the acts and omissions of others and is not limited to the elements of the offense charged, the potential exists for a role adjustment."). *See also* United States v. Lucht, 18 F.3d 541, 555–56 (8th Cir.1994) ("To take the larger conspiracy into account only for purposes of making a downward adjustment in the base level would produce the absurd result that a defendant involved both as a minor participant in a larger distribution scheme for which she was not convicted, and as a major participant in a smaller scheme for which she was convicted, would receive a shorter sentence than a defendant involved solely in the smaller scheme.").

[86] *See* United States v. Roberts, 223 F.3d 377, 381 (6th Cir. 2000) ("Although this note applies by its terms only to a defendant who has been convicted of a lesser offense, it stands for the principle that when a defendant's base offense level does not reflect the conduct of the larger conspiracy, he should not receive a mitigating role adjustment simply because he was a minor participant in that broader criminal scheme."). *See also* United States v. Kiekow, 872 F.3d 236, 248 (5th Cir. 2017), *cert. denied sub nom*. Pierre v. United States, 138 S. Ct. 1301 (2018) ("[W]hen a sentence is based on activity in which a defendant was actually involved, § 3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal.")(citations omitted); United States v. Durham, 836 F.3d 903, 912 (8th Cir. 2016)(minor role adjustment inapplicable when the court had decreased defendant's base offense level "below what it would have been if she had been held accountable for the actual amount of drugs involved in the conspiracy during the relevant time.").

§3B1.2(a)'s 4-level reduction for *minimal participants "*is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group."[87] The note further provides that "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant."[88] Application Note 5 provides that §3B1.2(b)'s 2-level reduction for *minor participants* applies to defendants who are "less culpable than most other participants in the criminal activity, but whose role could not be described as minimal."[89]

C. FACT-BASED DETERMINATION

Whether the defendant is entitled to a mitigating role adjustment, was a minimal or minor participant, or occupied a role falling between minimal and minor, is "heavily dependent upon the facts of the particular case."[90] Given the fact-dependent nature of §3B1.2 role adjustments, clear principles are difficult to develop and apply. Nonetheless, Application Note 3(C) to §3B1.2 provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The Note directs the court to consider: (1) the degree to which the defendant understood the scope and structure of the criminal activity; (2) the degree to which the defendant participated in planning or organizing the criminal activity; (3) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (4) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; and (5) the degree to which the defendant stood to benefit from the criminal activity. The Commentary also emphasizes that the mere fact that a defendant performed an "essential" or "indispensable" role in the criminal activity is not conclusive in determining whether to apply a mitigating role adjustment and that such defendant, if otherwise eligible, may receive a mitigating role adjustment.[91]

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87 USSG §3B1.2, comment. (n.4).

88 *Id.*

89 USSG §3B1.2, comment. (n.5).

90 USSG §3B1.2, comment. (n.3(C)).

91 *Id*. Application Note 3(C) further provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment.

Courts have also interpreted §3B1.2 and its Commentary to provide further guidance for determining whether to apply a mitigating role adjustment. Some courts have offered variations on Application Note 3(A)'s "substantially less culpable" language. In the Third Circuit, the minor role adjustment only applies if the defendant shows that his or her "involvement, knowledge and culpability were materially less than those of other participants" and not merely that other participants in the scheme may have been more culpable.[92] In the Eighth Circuit, a defendant is not substantially less culpable if he was "deeply involved" in the offense, even if he was less culpable than the other participants.[93]

Other courts have concluded that for purposes of applying the 4-level "minimal" participant adjustment, the defendant must have been only a "peripheral figure" in the criminal activity. Thus, "[t]o qualify as a minimal participant, a defendant must prove that he is among the least culpable of those involved in the criminal activity . . . . In short, a defendant must be a plainly peripheral player to justify his classification as a minimal participant."[94] In other words, a defendant must show that he or she "was less culpable than his cohorts," or a " plainly peripheral player."[95] The Fifth Circuit has gone further, concluding that defendant must demonstrate that he or she played only a peripheral role to receive *any* mitigating role adjustment, even the 2-level minor participant reduction.[96]

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92 United States v. Brown, 250 F.3d 811, 819 (3d Cir. 2001) (citations omitted).

93 *See, e.g.,* United States v. Bradley, 643 F.3d 1121, 1129 (8th Cir. 2011) ("[W]hile relative culpability of conspirators is relevant to the minor participant determination, 'our cases make it clear that merely showing the defendant was less culpable than other participants is not enough to entitle the defendant to the adjustment if the defendant was deeply involved in the offense.' Rather, … [t]he propriety of a downward adjustment is determined by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable and by measuring each participant's individual acts and relative culpability against the elements of the offense. … [A] defendant cannot be considered a minimal participant [where she] had knowledge of the scope and structure of the conspiracy and observed the activities of others in the conspiracy.") (*quoting* United States v. Bush, 352 F.3d 1177, 1182 (8th Cir. 2003)). *See also United States v. De la Cruz-Gutierrez*, 881 F.3d 221, 226 (1st Cir. 2018) ("To be entitled to the role reduction, [the defendant] had to prove that he was less culpable than his cohorts. Merely not being more culpable than his cohorts falls short of meeting the standard."); *Cortez-Vergara*, 873 F.3d at 393 ("A defendant need not be the key figure in a conspiracy in order to be denied a mitigating role-in-the-offense adjustment."); *Gomez-Valle*, 828 F.3d at 330–31 ("Amendment 794 does not provide an affirmative right to a § 3B1.2 reduction to every actor but the criminal mastermind.").

94 United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004). *See also Teeter*, 257 F.3d at 30 ("To qualify as a minimal participant and obtain the concomitant four-level reduction, the [defendant] would have to prove by a preponderance of the evidence that she was, at most, a peripheral player in the criminal activity."); United States v. Espinal-Almeida, 699 F.3d 588, 619 (1st Cir. 2012) (to qualify as a minimal participant, defendant "must be a plainly peripheral player").

95 *Id.*

96 *See* United States v. Perez-Solis, 709 F.3d 453, 471 (5th Cir. 2013) ("[N]o reduction is available under

Finally, at least two courts have developed factors to guide the sentencing court's application of §3B1.2. The Second Circuit has held that in "evaluating a defendant's role," the sentencing court should consider factors such as "the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise."[97] The Third Circuit has concluded that those same factors can be "highly useful in assessing a defendant's relative culpability," at least "where a great deal is known" about the criminal organization.[98] However, as the Third Circuit explained, "these factors may be less useful" when there is "little or no information about the other actors or the scope of the criminal enterprise."[99] The Seventh Circuit has held that in order to determine whether to apply §3B1.2, the courts should look at the defendant's role "in the conspiracy as a whole, including the length of his involvement in it, his relationship with the other participants, his potential financial gain, and his knowledge of the conspiracy."[100]

The Ninth Circuit has held that district courts must consider the factors enumerated in the amended guideline and "must compare the defendant's involvement to that of all likely participants in the criminal scheme for whom there is sufficient evidence of their existence and participation."[101] The Eleventh Circuit has instructed district courts to consider "the defendant's role in the relevant conduct for which she has been held

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§3B1.2 unless the participant was peripheral to the advancement of the criminal activity.") (citations omitted). The Fifth Circuit has also held that district courts may not treat a defendant's integral role as a "per se bar to a mitigating role adjustment," United States v. Bello-Sanchez, 872 F.3d 260, 264 (5th Cir. 2017), but need not weigh all of the §3B1.2 commentary factors on the record, United States v. Escobar, 866 F.3d 333, 336 (5th Cir. 2017). *See generally* United States v. Broussard, 882 F.3d 104, 111 (5th Cir. 2018) ("A minimal participant is someone who lacks knowledge or understanding about the scope or structure of the enterprise; a minor participant is someone who is less culpable than most participants but more culpable than a minimal participant.").

97 United States v. Yu, 285 F.3d 192, 200 (2d Cir. 2002) (internal quotation marks omitted). *See also Kirk Tang Yuk*, 885 F.3d at 89 (affirming denial of mitigating role adjustment when "the record contained sufficient evidence to demonstrate [the defendant]'s knowledge of and participation in the full scope of the conspiracy" and showed that he was "on the same page" as co-conspirators.).

98 United States v. Self, 681 F.3d 190, 201 (3d Cir. 2012) (citations omitted).

99 United States v. Rodriguez, 342 F.3d 296, 299 (3d Cir. 2003).

100 United States v. Orlando, 819 F.3d 1016, 1025 (7th Cir. 2016) (citations omitted).

101 *Diaz*, 884 F.3d at 916 ("Going forward, the assessment of a defendant's eligibility for a minor-role adjustment must include consideration of the factors identified by the Amendment, not merely the benchmarks established by our caselaw that pre-dates Amendment 794's effective date.").

accountable at sentencing [and] her role as compared to that of other participants in her relevant conduct," [102] as well as the "totality of circumstances" and the factors laid out in Amendment 794.[103]

D. DRUG COURIERS AND MULES

There is a substantial body of case law concerning the application of §3B1.2 to defendants who were couriers and mules in drug trafficking organizations. Defendants have argued that they are automatically entitled to a mitigating role adjustment based solely on their status as couriers or mules. Courts have uniformly rejected such arguments.[104] However, couriers and mules "may receive" an adjustment under §3B1.2, even if they are held accountable only for the quantity of drugs they personally transported.[105]

Courts have sometimes inconsistently applied §3B1.2 to defendants who were couriers and mules. Some courts have concluded that couriers and mules may perform functions that are critical to the drug trafficking activity, and thus may be highly culpable participants.[106] Other courts have concluded that couriers may have little culpability in

[102] *Presendieu*, 880 F.3d at 1250 (*citing* United States v. De Varon, 175 F.3d 930, 940 (11th Cir 1999) (en banc)). *See also* United States v. Wright, 862 F.3d 1265, 1278 (11th Cir. 2017) (district court must "determine that the defendant was less culpable than most other participants in her relevant conduct.").

[103] *Presendieu*, 880 F.3d at 1250 (remanding for resentencing when court indicated that the defendant "was not entitled to a minor role reduction solely on the ground that she was being held accountable only for her own actions as opposed to the broader conspiracy," instead of considering other "relevant factors") (citations omitted); *Cruickshank*, 837 F.3d at 1194 (remanding when sentencing court based denial solely on drug quantity at issue).

[104] *See, e.g., Rowe*, 878 F.3d at 630 ("The Eighth Circuit has never found someone's role as a courier in and of itself sufficient to warrant a mitigating role reduction.") (citations omitted); *Bello-Sanchez*, 872 F.3d at 264 ("[T]he mere fact that [the defendant] was but a courier is not dispositive."); *De Varon*, 175 F.3d at 943 ("We do not create a presumption that drug couriers are never minor or minimal participants, any more than that they are always minor or minimal.").

[105] *See* USSG §3B1.2, comment. (n.3(A)) ("[A] defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline."). As part of the 2015 amendment to the Commentary to §3B1.2, the Commission revised the paragraphs that illustrate how mitigating role interacts with relevant conduct principles in §1B1.3 to strike the phrase "not precluded from consideration" and replace it with "may receive." *See* USSG, App. C, Amendment 794 (effective November 1, 2015).

[106] *See, e.g.,* United States v. Martinez, 168 F.3d 1043, 1048 (8th Cir. 1999) ("Transportation is a necessary part of illegal drug distribution, and the facts of the case are critical in considering a reduction for minor

drug trafficking organizations.[107] Ultimately, because the role of a courier or mule may vary from organization to organization, a defendant's culpability and entitlement to a §3B1.2 reduction depends on the facts of the specific case at hand.[108] Courts will deny reductions for couriers and mules upon finding that the defendant was more than a "mere" courier or mule because, for example, the defendant transported a significant quantity of drugs,[109]

role."). As noted before, in 2015, the Commission amended Application Note 3(C) to §3B1.2 to, among other things, emphasize that the mere fact that a defendant performed an "essential" or "indispensable" role is not conclusive in determining whether to apply a mitigating role adjustment and that such defendant, if otherwise eligible, may receive a mitigating role adjustment. *See supra* note 91 and accompanying text.

[107] *See Diaz*, 884 F.3d at 918 (remanding sentence of drug courier because the district court "ignored" the fact that the defendant's "compensation was relatively modest and fixed" and the absence of "evidence that [he] had a proprietary interest in the outcome of the operation or otherwise stood to benefit more than minimally."); *Rodriguez*, 342 F.3d at 300 ("[D]rug couriers are often small players in the overall drug importation scheme.").

[108] *See* United States v. Saenz, 623 F.3d 461, 467 (7th Cir. 2010) ("[C]ouriers can play integral roles in drug conspiracies. True, but all drug couriers are not alike. Some are sophisticated professionals who exercise significant discretion, others are paid a small amount of money to do a discrete task . . . . [A]ll couriers are not the same . . . ."). *See also* United States v. Monzo, 852 F.3d 1343, 1346 (11th Cir. 2017) (listing "relevant facts for the court to consider" in assessing couriers: "the amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution.") (*citing De Varon,* 175 F.3d at 945); United States v. Cartagena, 856 F.3d 1193, 1197 (8th Cir. 2017) (observing that defendants' "roles as couriers do not necessarily entitle them to the minor role adjustment. Transportation is an important component of an illegal drug distribution organization."); *Orlando*, 819 F.3d at 1025 (enhancement appropriate when defendant's "role was not akin to that of some faceless drug courier [because he] had personal connections to organized crime figures, and he leveraged those connections to recruit men to participate in the actual extortions); United States v. Melendez-Rivera, 782 F.3d 26, 29 (1st Cir. 2015) (affirming denial of mitigating role adjustment when defendant "had been present when the plot was hatched[,] delivered the van in which the drugs were to be transported," and "drove the van away" after it was loaded.).

[109] *See* United States v. Perez, 819 F.3d 541, 546 (1st Cir.), *cert. denied*, 137 S. Ct. 111, 196 L. Ed. 2d 90 (2016) (affirming denial of reduction because of the "large quantity of drugs, the trust that the drug owners obviously placed in the [defendant], and [his] expertise in how to handle the boat"); United States v. Pere, 736 F.3d 1104, 1109 (7th Cir. 2013) (affirming denial of reduction because the defendant had "an 'intimate and substantial' relationship with large quantities of drugs for more than a year, despite doing so at the behest of his superiors."); United States v. Rodriguez-Castro, 641 F.3d 1189, 1193 (9th Cir. 2011) (affirming denial of reduction where the offense involve 33.46 kilograms of cocaine, which the parties agreed "was a substantial amount."); United States v. Gonzalez, 534 F.3d 613, 617 (7th Cir. 2008) (affirming denial of reduction where, among other facts, the defendant "was trusted to carry a large quantity of cash, pick up a large quantity of drugs from a dealer by himself, transport the drugs in his own car and store them in his own home."); *Cantrell*, 433 F.3d at 1283 (affirming denial of reduction, in part, because the defendant "went on several drug pick-ups, each of which involved a minimum of a pound of methamphetamine."); *Santos*, 357 F.3d at 143 (affirming denial of 4-level reduction, despite evidence that the defendant transported drugs on only one occasion, in part because "the quantity of drugs involved in this transaction was very large – and the appellant should have known as much."); *De Varon*, 175 F.3d at 946 (affirming denial of reduction where, in addition to other facts, the defendant entered the United States "carrying a substantial amount of heroin of high purity."). *But c.f. Cruickshank*, 837 F.3d at 1182 (remanding for resentencing because court improperly

acted as a courier or mule on multiple occasions,[110] had a relationship with the drug trafficking organization's leadership,[111] or was well-compensated for transporting the drugs.[112]

suggested that quantity of cocaine transported on vessel was so large that no participant in scheme could be eligible for such reduction).

[110] *See* Ponce v. United States, 311 F.3d 911, 912–13 (8th Cir. 2002) (affirming denial of reduction where the defendant, in addition to instructing other members of the distribution scheme, transported "4.5 kilograms of methamphetamine, along with various quantities of cocaine and heroin, on at least six separate occasions (supplying a total of 27 kilograms)").

[111] *See* United States v. Garcia, 580 F.3d 528, 539 (7th Cir. 2009) (affirming the district court's denial of a minimal-participant reduction, and observing that the defendant "was fortunate to receive any role reduction at all," where she was close to the drug conspiracy's leadership and transported drugs and money on multiple occasions); United States v. Mendoza, 457 F.3d 726, 730 (7th Cir. 2006) ("One of the factors that sentencing judges should examine while assessing a defendant's role in a criminal enterprise is the defendant's relationship with the enterprise's principal members.").

[112] *See* United States v. Gomez-Encarnacion, 885 F.3d 52, 67 (1st Cir. 2018) (observing that "[o]ne hundred and five thousand dollars—the sum of the money … found at [the defendant's] residence—is enough to suggest that [he] was well-trusted by the conspirators with responsibility not easily granted to a minor player in the conspiracy.");United States v. Adamson, 608 F.3d 1049, 1054 (8th Cir. 2010) (affirming denial of mitigating role adjustment where the defendant-couriers were "active, necessary, and well-compensated members of this conspiracy"); United States v. Vargas, 560 F.3d 45 (1st Cir. 2009) (affirming denial of mitigating role adjustment where the district court considered, among other facts, "the amount of money paid" to the defendant-courier, which was $3,500 for driving a truck with thirty kilograms of cocaine hidden in a secret compartment).