Aggravating and Mitigating Role Adjustments Primer §§3B1.1 & 3B1.2

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I. INTRODUCTION

This primer discusses issues related to adjustments pursuant to United States Sentencing Guidelines (USSG) §§3B1.1 and 3B1.2 based on the defendant's aggravating or mitigating role in the offense. This primer addresses procedural questions related to the adjustments, the definitions of terms used in 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 as only a minor or minimal participant in the criminal activity.

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.

USSG §3B1.1. Applying the adjustment turns, first, on the size and scope of the criminal activity, and, second, on the defendant's particular role in that activity. *See* USSG §3B1.1, comment. (backg'd).

The government bears the burden of proving by a preponderance of the evidence that the defendant should receive an aggravating role adjustment. *See, e.g., United States v. Al-Rikabi*, 606 F.3d 11, 14 (1st Cir. 2010); *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."). 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. *See 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.") (internal quotation marks omitted). 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." *United States v. Graciani*, 61 F.3d 70, 75 (1st Cir. 1995) (citations omitted).

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 *at least* five 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.

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 . . . ." USSG §3B1.1, comment. (n.1). 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." *See id.* The defendant, as a criminally responsible person, *is* a participant for purposes of counting the number of participants under §3B1.1. *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").

The guidelines specifically provide that undercover law enforcement officers are not participants because they are not criminally responsible for committing the offense. USSG §3B1.1, comment. (n.1). 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. *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").

Courts "uniformly count" as participants those who "were (i) aware of the criminal objective, and (ii) knowingly offered their assistance." *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). 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*, 354 F.3d 1269 (10th Cir. 2004), 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, in *United States v. Alfonzo-Reyes*, 592 F.3d 280 (1st Cir. 2010), 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. *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.").

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. *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."). For example, in *United States v. King*, 257 F.3d 1013, 1024 (9th Cir. 2001), the court held that the defendant's employees were not "participants" in his mail fraud schemes because they were merely "innocent clerical workers." *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."). In *United States v. Stevenson*, 6 F.3d 1262 (7th Cir. 1993), 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*, 280 F.3d 694 (6th Cir. 2002), 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. *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).

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." *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 distribution conspiracy.").[1] Individuals who are *more than mere end-user purchasers*, such as a buyer who purchases drugs for further distribution or those who assist the transportation of drugs, are "participants" under §3B1.1. *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").

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. "The 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." *United States v. Bingham*, 81 F.3d 617, 629 (6th Cir. 1996). Indeed, a defendant does not need to even know of the other participants for purposes of applying §3B1.1. *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.").

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." USSG §3B1.1, comment. (n.3).

Multiple circuits follow the test articulated by the Second Circuit in *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997), for determining whether the criminal activity was

[1] 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. *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).

"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.'" *Id.* at 803 (quoting *United States v. Tai*, 41 F.3d 1170, 1174 (7th Cir. 1994)). 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." *Carrozzella*, 105 F.3d at 803-04. 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 . . . ." *Id.* at 804. However, the *Carrozzella* court cautioned that the guidelines' 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. *Id.* at 804. At least three other circuits have adopted the *Carrozzella* test. *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).

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.'" *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)). 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." *Dietz*, 950 F.2d at 53. The Tenth Circuit has adopted the First Circuit's test. *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. *See United States v. Fluker,* 698 F.3d 988, 1002 (7th Cir. 2012); *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).

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. *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).

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." *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 a 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).").

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. "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) . . . ." USSG §3B1.1, comment. (intro. commentary). 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.[2]

[2] The determination of the size and scope of the criminal activity can 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

Although the guidelines do not expressly define these terms, the commentary to §3B1.1 provides guidance, and there is an expansive body of case 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 . . . ." *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)). 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. *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)). For that reason,

> At 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.

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)). 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. *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

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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.

Id. at 50-51.

(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).").

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.

USSG §3B1.1, comment. (n.4). 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." *Id.* *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)); *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.").

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 establish 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). *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). However, courts have been careful to note that "[t]he Guidelines do not require that each of the factors be satisfied for § 3B1.1(a) to apply." *United States v. Bernaugh*, 969 F.2d 858, 863 (10th Cir. 1992); *see also 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."). 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). *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.").

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*, 596 F.3d 976 (8th Cir. 2010), 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." *Id.* 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, he received drug orders from customers, and he directed others to package and deliver drugs").[3] In *United States v. Szur*, 289 F.3d 200 (2d Cir. 2002), 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." *Id.* at 218.

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." *United States v. Fuller*, 897 F.2d 1217, 1220 (1st Cir. 1990). *See also 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.").

In *United States v. Solorio*, 337 F.3d 580 (6th Cir. 2003), the Sixth Circuit held the district court properly concluded the defendant was a "supervisor" in a "vast drug enterprise"

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[3] 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).

where he recruited and exercised control over just one accomplice by directing that accomplice's drug activities. *Id.* at 601. Similarly, in *United States v. Voegtlin*, 437 F.3d 741 (8th Cir. 2006), 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." *Id.* at 748. In *United States v. Griffin*, 148 F.3d 850 (7th Cir. 1998), the defendant acted as a "manager" of a chop-shop operation where he placed orders for stolen vehicles, gave instructions to thieves as to what kinds of vehicles to steal, gave instructions for dismantling the stolen vehicles, and managed the disposition of stolen car parts. *Id.* at 856. *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). And in *United States v. Powell*, 124 F.3d 655 (5th Cir. 1997), 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. *Id.* at 667.

The guidelines 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." Accordingly, §3B1.1(c) is inclusive and calls for the same 2-level adjustment regardless of the specific aggravating role held by the defendant. *See* USSG §3B1.1, comment. (backg'd).

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.

USSG §3B1.2. 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. *See id.* 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." USSG §3B1.2, comment. (n.3(C)).

The defendant bears the burden of proving by a preponderance of the evidence that he or she is entitled to a mitigating role adjustment. *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). 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." *United States v. Teeter*, 257 F.3d 14, 31 (1st Cir. 2001).

A. "Substantially Less Culpable than the Average Participant"

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." USSG §3B1.2, comment. (n.3(A)). The term "participant" as used in §3B1.2 carries the same meaning as "participant" for purposes of §3B1.1. *See id.* (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."). 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 . . . ." USSG §3B1.2, comment. (n.2). 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.[4]

Courts disagree as to the meaning of "average participant." Some courts have concluded that the "average participant" means only those persons who actually participated in the criminal activity at issue, so that the defendant's relative culpability is determined only by reference to his or her co-participants. *See 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

[4] 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).

hand.");[5] *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."). Other courts have concluded that the "average participant" also includes typical offenders who commit similar crimes. Under this latter approach, courts will ordinarily consider the defendant's culpability relative *both* to his co-participants *and* to the abstract typical offender. *See 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.").

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. *See* USSG §3B1.2, comment. (n.3(B)). 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 own conduct and not the broader conspiracy in which he participated. *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.") 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. *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," Application Notes 4 and 5 explain how to distinguish between "minimal" and

[5] *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).

"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." USSG §3B1.2, comment. (n.4). 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." *Id.* 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, but whose role could not be described as minimal." USSG §3B1.2, comment. (n.5).

C. Interpretive Case Law

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." USSG §3B1.2, comment. (n.3(C)). Given the fact-dependent nature of §3B1.2 role adjustments, clear principles are difficult to develop and apply. Courts, however, have interpreted §3B1.2 and its commentary in order to give additional 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. *United States v. Brown*, 250 F.3d 811, 819 (3d Cir. 2001). 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. *See, e.g., 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))).

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." *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) ("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."). 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. *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 participant, a defendant must have been peripheral to the advancement of the illicit activity.").

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." *United States v. Yu*, 285 F.3d 192, 200 (2d Cir. 2002) (quotation marks omitted). 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. *See United States v. Rodriguez*, 342 F.3d 296, 299 (3d Cir. 2003). 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." *Id.* 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." *United States v. Diaz–Rios*, 706 F.3d 795, 799 (7th Cir. 2013).

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. *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."). However, couriers and mules are not precluded from seeking adjustment under §3B1.2, even if they are held accountable only for the amount of drugs they personally transported. *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 is not precluded from consideration for an adjustment under this guideline.").

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. *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."). Other courts have concluded that couriers may have little culpability in drug trafficking organizations. *See United States v. Rodriguez*, 342 F.3d 296, 300 (3d Cir. 2003) ("[D]rug couriers are often small players in the overall drug important scheme."). 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. *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 . . . ."). 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,[6] acted as a courier or mule on multiple occasions,[7] had a relationship with the drug trafficking

[6] *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.").

[7] *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)").

organization's leadership,[8] or was well-compensated for transporting the drugs.[9] *Accord 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.").

[8] *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 enterprises's principal members.").

[9] *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).