

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. Mack*, 808 F.3d 1074, 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[.]'"); *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

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 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.

under §3B1.1(a), where such adjustment did not affect the statutory maximum or mandatory minimum of defendant’s sentence).

⁴ See, e.g., *United 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.”) (quoting *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. Crabtree*, 878 F.3d 1274, 1290 (11th Cir. 2018) (“We review a district court’s determination that a defendant is subject to a Section 3B1.1 role enhancement as an organizer or leader for clear error.”) (citations omitted); *United States v. Gomez*, 905 F.3d 347, 351 (5th Cir. 2018) (same); *United States v. Sharkey*, 895 F.3d 1077, 1081 (per curiam) (“Whether a defendant played a minor role is a question 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

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, 432, n.1 (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.”) (citations omitted); *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, 533 (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. Alfonso-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 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

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. Bennett*, 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.” 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, absent more, are not “participants” in distribution conspiracies.²² 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 §3B1.1.²³ Courts have also held that persons who receive stolen property, but

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).

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, 1133-34 (9th Cir. 2000) (“Where 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.”). 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.”).

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

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 ‘otherwise extensive,’ all persons involved during the course of the entire offense are to be considered.”²⁷

defendant] to market illegal drugs” and thus participants). *See also* United States v. Sykes, 854 F.3d 457, 460 (8th Cir. 2017), *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.”); *Mack*, 808 F.3d at 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.”).

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,

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

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)).

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.”).

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

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 the number of “unwitting” or “unknowing” participants.³⁹ In the Eighth Circuit,

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.”).

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)

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

(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 a 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. 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 applied §3B1.1(c) without making the required factual findings concerning whether the defendant supervised a “criminally responsible” participant). A finding that the defendant exercised responsibility over property, assets, or activities in the criminal activity, instead of over participants, could be a basis for an upward departure. USSG §3B1.1, comment. (n.2); *but see* *United States v. Ochoa-Gomez*, 777 F.3d 278, 282-83 (5th Cir. 2015) (“Our court, sitting *en banc*, has construed *Note 2* to allow application of an *adjustment*, even where a defendant did not exercise control over another participant, if he exercised management responsibility over the property, assets, or activities of a criminal organization.”) (*per curiam*) (*citing* *United States v. Delgado*, 672 F.3d 320, 345 (5th Cir. 2012) (*en banc*)).

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 counts of conviction, but includes all relevant conduct attributable to the defendant under §1B1.3.⁴⁶ The guidelines do not expressly define the terms related to the defendant’s role in the criminal activity, however, the Commentary to §3B1.1 provides guidance, and there is an expansive body of case law interpreting and applying them.

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.”) (citations omitted); *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 USSG §3B1.1.

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 specific acts and participation in the commission of the offense of conviction. For example, in *United States v. Lucena-Rivera*, 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 . . . offense of conviction.

United States v. Lucena-Rivera, 750 F.3d at 43, 50–51 (1st Cir. 2014).

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

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

⁴⁷ United States v. Bahena, 223 F.3d 797, 804 (8th Cir. 2000) (citations omitted).

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.”)

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) (“[T]here can be more than one person who qualifies as a leader or organizer.”); 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).

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 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 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 has 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

⁵² See *supra* note 44. See also *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. Craig*, 808 F.3d 1249, 1259 (10th Cir. 2015) (“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.”) (citations omitted). 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 *Id.*

⁵⁵ See *United States v. Noble*, 246 F.3d 946, 953–54 (7th Cir. 2001); *Bahena*, 223 F.3d at 803-05; *Gomez*, 905 F.3d at 351-52.

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.”).

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 an organizer or leader, the defendant must have exercised a significant degree of control and decision-making authority over the criminal activity.⁵⁸ For example, in *United States v. Szur*,⁵⁹ 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."⁶⁰ In *United*

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) ("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"); *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 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); *United States v. Sunmola*, 887 F.3d 830, 839 (7th Cir. 2018) (same result where "the record indicate[d] a high level of control and authority" by defendant). *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 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.").

⁵⁹ 289 F.3d 200 (2d Cir. 2002).

⁶⁰ *Id.* 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).

States v. Bolden,⁶¹ 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.”⁶² Although the Tenth Circuit has clarified that a defendant is not an “organizer or leader” of a drug trafficking scheme solely because he or she bought or sold narcotics, even in large amounts,⁶³ where the evidence shows that the defendant was more than just a mere buyer or seller, a court may consider the quantity of drugs in determining whether to apply the adjustment.⁶⁴

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.”⁶⁵

⁶¹ 596 F.3d 976 (8th Cir. 2010).

⁶² *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.”); *Crabtree*, 878 F.3d at 1290-91 (11th Cir. 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”).

⁶³ 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.”).

⁶⁴ 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).

⁶⁵ *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 *United States v. Solorio*,⁶⁶ 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.⁶⁷ Similarly, in *United States v. Voegtlin*,⁶⁸ 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.”⁶⁹ In *United States v. Griffin*,⁷⁰ 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. In *United States v. Powell*,⁷¹ the defendant was a “supervisor” for purposes

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.”).

⁶⁶ 337 F.3d 580, 601 (6th Cir. 2003).

⁶⁷ 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.”); *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).

⁶⁸ 437 F.3d 741 (8th Cir. 2006).

⁶⁹ *Id.* 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.”).

⁷⁰ 148 F.3d 850, 856 (7th Cir. 1998).

⁷¹ 124 F.3d 655, 667 (5th Cir. 1997).

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.”⁷² Accordingly, §3B1.1(c) is inclusive and calls for the same 2-level adjustment regardless of the specific aggravating role held by the defendant.⁷³ Nonetheless, the Ninth Circuit has declined to apply the 2-level adjustment unless there is an additional showing that the defendant had “control over others.”⁷⁴

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.

⁷² USSG §3B1.1, comment. (backg'd).

⁷³ See, e.g., *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*, 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 the enhancement because defendant “created the fraudulent investment scheme,” recruited investors, and distributed referral fees).

⁷⁴ See *United States v. Pimentel-Lopez*, 859 F.3d 1134, 1143-44 (9th Cir. 2017) (“Even a defendant with an important role in an offense cannot receive an enhancement unless there is also a showing that the defendant had control over others.”) (quoting *United States v. Whitney*, 673 F.3d 965, 975 (9th Cir. 2012)); *United States v. Doe*, 778 F.3d 814, 824–26 (9th Cir. 2015) (“[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) . . . An organizer need not also be a supervisor or a superior in a hierarchy of criminal associates”) (citations omitted).

In cases falling between (a) and (b), decrease by 3 levels.⁷⁵

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.”⁷⁶

The defendant bears the burden of proving by a preponderance of the evidence that he or she is entitled to a mitigating role adjustment.⁷⁷ 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.”⁷⁸

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

⁷⁵ USSG §3B1.2.

⁷⁶ USSG §3B1.2, comment. (n.3(C)).

⁷⁷ 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. Pratt*, 239 F.3d 640, 645 (4th Cir. 2001); *United States v. Carpenter*, 252 F.3d 230, 234 (2d Cir. 2001); *United States v. Mathis*, 738 F.3d 719, 741 (6th Cir. 2013); *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 mitigating 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.”).

⁷⁸ *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). 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).

substantially less culpable than the average participant in the criminal activity.”⁷⁹ The term “participant” as used in §3B1.2 carries the same meaning as “participant” for purposes of §3B1.1.⁸⁰ 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”⁸¹ 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.⁸²

Before 2015, courts disagreed about what determining the “average participant” required. The Seventh and Ninth circuits concluded that the phrase “average participant” 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.⁸³ The Ninth Circuit further clarified that the requisite comparison is to “average participants” and not to “above-average participants.”⁸⁴ The First and Second circuits concluded that the “average

⁷⁹ 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).

⁸⁰ 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.”).

⁸¹ USSG §3B1.2, comment. (n.2).

⁸² See *supra* note 8; *United States v. Groenendal*, 557 F.3d 419, 426-27 (“[Section] 3B1.2 does not require that other participants be charged with the crime . . . [It] can apply . . . even when only one participant is charged in the offense.”) (citations omitted). 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.

⁸³ 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).

⁸⁴ *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

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.⁸⁵

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.⁸⁶ 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.⁸⁷

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

rule enhancements under U.S.S.G. § 3B1.1—doesn’t mean that [the defendant] is substantially less culpable than the average participant.”), *overruled on other grounds by Gasca-Ruiz*, 852 F.3d at 1174.

⁸⁵ 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.”).

⁸⁶ See *supra* note 82. 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); *Quintero-Leyva*, 823 F.3d at 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.”); *But cf. Tang Yuk*, 885 F.3d at 88, n.16 (“[The defendant] is not entitled to the benefit of Amendment 794 . . . on direct appeal.”); *United States v. Harris*, 711 Fed. Appx. 61, 62 (2d Cir. 2018) (summary order) (Amendment 794 not retroactive for purposes of 18 U.S.C. § 3582 relief); *United States v. Cobb*, 248 F. Supp. 3d 637, 640 n.3 (E.D. Pa. 2017) (compiling district court cases interpreting any retroactive application as only applicable to direct appeals rather than collateral attacks)

⁸⁷ USSG §3B1.2, comment. (n.3(A)). See also *United States v. Arias-Mercedes*, 901 F.3d 1, 6 (1st Cir. 2018) (“[Amendment 794] simply eliminated the need to compare a defendant’s conduct with the conduct of hypothetical participants in similar offenses . . . It does not require courts, when weighing mitigating role adjustments, to appraise a defendant’s role in the broader conspiracy as opposed to his role in the specific criminal activity for which he is being held accountable.”); *United States v. Alston*, 899 F.3d 135, 150 (“To the extent the government intends to argue that our interpretation of section 3B1.2 in earlier Guidelines Manuals has survived amendment 794, we must reject that argument.”).

warranted by the actual offense conduct.⁸⁸ 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.⁸⁹ 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.⁹⁰

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."⁹¹ 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

⁸⁸ See USSG §3B1.2, comment. (n. 3(B)).

⁸⁹ *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.").

⁹⁰ 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.").

⁹¹ USSG §3B1.2, comment. (n.4).

minimal participant.”⁹² 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.”⁹³

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.”⁹⁴ 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.⁹⁵

Courts have also interpreted §3B1.2 and its Commentary and 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

⁹² *Id.*

⁹³ USSG §3B1.2, comment. (n.5). *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.”).

⁹⁴ USSG §3B1.2, comment. (n.3(C)).

⁹⁵ *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.

participants” and not merely that other participants in the scheme may have been more culpable.⁹⁶ In the Eighth Circuit, a defendant is not substantially less culpable if he or she was “deeply involved” in the offense, even if he or she was less culpable than the other participants.⁹⁷

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.”⁹⁸ In other words, a defendant must show that he or she “was less culpable than his cohorts,” or a “plainly peripheral player.”⁹⁹ The Fifth Circuit has gone further, concluding that a 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.¹⁰⁰

⁹⁶ United States v. Brown, 250 F.3d 811, 819 (3d Cir. 2001) (citations omitted).

⁹⁷ 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.”); United States v. Gomez-Valle, 828 F.3d 324, 330–31 (“Amendment 794 does not provide an affirmative right to a § 3B1.2 reduction to every actor but the criminal mastermind.”).

⁹⁸ Santos, 357 F.3d at 142. 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.”).

⁹⁹ *Id.*

¹⁰⁰ See United States v. Perez-Solis, 709 F.3d 453, 471 (5th Cir. 2013) (“[N]o reduction is available under §3B1.2 unless the participant was peripheral to the advancement of the criminal activity.”) (citations omitted). See also Castro, 843 F.3d at 613-614 (“[I]t is improper for a court to award a [3B1.2] adjustment simply because the defendant does less than the other participants . . . the defendant must do enough less so that [s]he at best was peripheral to the advancement of the illicit 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,” but need not weigh all of the §3B1.2 commentary factors on the record. See

Finally, at least three circuit 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."¹⁰¹ 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.¹⁰² 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."¹⁰³ 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."¹⁰⁴

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."¹⁰⁵ The Eleventh Circuit has instructed district courts to consider "the defendant's role in the relevant conduct for which she has been held accountable at sentencing [and] her role as compared to that of other participants in her

United States v. Bello-Sanchez, 872 F.3d 260, 264 (5th Cir. 2017); United States v. Escobar, 866 F.3d 333, 336 (5th Cir. 2017).

¹⁰¹ United States v. Yu, 285 F.3d 192, 200 (2d Cir. 2002) (internal quotation marks omitted). *See also 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.).

¹⁰² United States v. Rodriguez, 342 F.3d 296, 299 (3d Cir. 2003). *See also* United States v. Self, 681 F.3d 190, 201 (3d Cir. 2012) (citations omitted).

¹⁰³ *Id.*

¹⁰⁴ United States v. Orlando, 819 F.3d 1016, 1025 (7th Cir. 2016) (citations omitted).

¹⁰⁵ *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."). *See also United States v. Campuzano-Benitez et al.*, 910 F.3d 982, 989 (7th Cir. 2018) ("The court should weigh the [§3B1.2] factors to determine if the defendant seeking the reduction is 'substantially less culpable than the average participant in the criminal activity.'" The court also noted that it does not require courts to use those sentencing factors as a "checklist or to spell out their analyses of each factor" on the record.)

relevant conduct,”¹⁰⁶ as well as the “totality of circumstances” and the factors laid out in Amendment 794.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹

Courts take different approaches in applying §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.¹¹⁰ Other courts have concluded that couriers may have little culpability in

¹⁰⁶ *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.”).

¹⁰⁷ *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”); *Cruikshank*, 837 F.3d at 1194 (remanding when sentencing court based denial solely on drug quantity at issue).

¹⁰⁸ 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.”).

¹⁰⁹ 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 Application Note 3(A) to strike the phrase “not precluded from consideration” and replace it with “may receive” to address any “unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.” See USSG App. C, amendment 794.

¹¹⁰ 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

drug trafficking organizations.¹¹¹ 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.¹¹² 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

otherwise eligible, may receive a mitigating role adjustment. *See supra* note 95 and accompanying text.

¹¹¹ *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.”).

¹¹² *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.”); *United States v. Torres-Hernandez*, 843 F.3d 203, 210 (5th Cir. 2016) (“The commentary to § 3B1.2 . . . does not require, as a matter of law, that an adjustment must be made for transporters such as [the defendant]. The commentary and Amendment 794 instead confirm that there are many factors that a sentencing court should consider, and how those factors are weighed remains within the sentencing court’s discretion.”); *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.).

drugs,¹¹³ acted as a courier or mule on multiple occasions,¹¹⁴ had a relationship with the drug trafficking organization’s leadership,¹¹⁵ or was well-compensated for transporting the drugs.¹¹⁶

¹¹³ 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”); *Sandoval-Velazco*, 736 F.3d at 1109 (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 involved 33.46 kilograms of cocaine, which “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 suggested that quantity of cocaine transported on vessel was so large that no participant in scheme could be eligible for such reduction).

¹¹⁴ 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 others, transported “4.5 kilograms of methamphetamine, along with various quantities of cocaine and heroin, on at least six separate occasions”).

¹¹⁵ 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.”).

¹¹⁶ 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 . . . 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”); *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).