Primer

Aggravating and Mitigating Role Adjustments

Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer provides a general overview of §§3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role), which set forth offense level adjustments based on a defendant's role in the offense. Although the primer identifies some of the key cases and concepts related to these guidelines, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. AGGRAVATING ROLE: §3B1.1

Section 3B1.1 provides for 2-, 3-, and 4-level increases to the offense level if the defendant had an 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 these adjustments turns, first, on the size or scope of the criminal activity ("five or more participants or was otherwise extensive") and, second, on the defendant's particular role in that activity (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] Because the

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1 U.S. Sent'g Comm'n, Guidelines Manual §3B1.1 (Nov. 2025) [hereinafter USSG].

2 *Id.; see* USSG §3B1.1, comment. (backg'd.).

3 *See, e.g.*, United States v. Martinez, 131 F.4th 294, 322 (5th Cir. 2025) (under §3B1.1(a) the "base offense level increases . . . if a preponderance of the evidence shows" defendant meets the requirements for the adjustment); United States v. García-Sierra, 994 F.3d 17, 37 (1st Cir. 2021) ("To properly impose the upward adjustment, the sentencing court must be satisfied that a preponderance of the evidence supports the government's claim" and the government bears the burden); United States v. Lora-Andres, 844 F.3d 781, 785 (8th Cir. 2016) (same)); United States v. Mack, 808 F.3d 1074, 1085 (6th Cir. 2015) (same); *see also* United States v. Rodriguez, 851 F.3d 931, 948 (9th Cir. 2017) (district court not required to submit to the jury the issue of whether a defendant convicted of drug crimes was an organizer or leader before imposing an enhancement, where such adjustment did not affect the statutory maximum or mandatory minimum of defendant's sentence).

determination of a defendant's role in an offense is a factual question, appellate courts review it for clear error.[4]

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."[5] In the absence of such criminal activity, the defendant only may be subject to a 2-level increase pursuant to §3B1.1(c).[6] Accordingly, in applying §3B1.1, the sentencing court must first determine the size and scope of the criminal activity.[7]

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, but need not have been convicted,"[8] or even

[4] United States v. Cuomo, 125 F.4th 354, 370 (2d Cir. 2025) ("[T]he 'sentencing court's findings as to the defendant's role in the offense will be overturned only if they are clearly erroneous.' " (citation omitted)); *see also* United States v. Gomez, 905 F.3d 347, 351 (5th Cir. 2018) ("We review this factual determination [that the defendant was an organizer or leader] for clear error."); 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." (quoting United States v. Martinez, 584 F.3d 1022, 1025 (11th Cir. 2009))); 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. 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[.]" (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."). *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, although factual findings are reviewed for clear error).

[5] USSG §3B1.1(a)–(b); *see also* United States v. Arbour, 559 F.3d 50, 56 (1st Cir. 2009) ("where the defendant is involved in a criminal activity that is 'otherwise extensive,' there is no requirement that the defendant 'lead or organize' " a specific number of other participants" (citation omitted)).

[6] *See, e.g.*, United States v. Bright, 125 F.4th 97, 101 (4th Cir. 2025) ("[T]he correct questions in order to determine whether a three-level increase or a two-level increase is applicable are: 1) 'What was the criminal activity?'; and 2) 'Was the criminal activity 'otherwise extensive?' " (quoting USSG §3B1.1(b)–(c))).

[7] *See, e.g.*, *id.* at 103 ("After determining the scope of the criminal activity . . . the district court should then determine the number of participants in that criminal activity.").

[8] USSG §3B1.1, comment. (n.1); *see also* United States v. Burris, 22 F.4th 781, 787 (8th Cir. 2022) (district court did not err in finding an acquitted co-defendant was a participant); United States v. Ford, 987 F.3d 1210, 1214 (8th Cir. 2021) (district court's finding that defendant's organization included more than five participants was supported by the record); United States v. Guzman, 926 F.3d 991, 1003 (8th Cir. 2019) ("[A]n individual need not be guilty of the precise offense of conviction—or even charged—to be found 'criminally responsible' 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

charged.[9] The defendant is counted as a participant under §3B1.1.[10] The Application Note specifically provides that undercover law enforcement officers are not participants because they are not criminally responsible for committing the offense.[11] 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 working with the government.[12]

Courts "uniformly count as participants" those "who were (i) aware of the criminal objective, and (ii) knowingly offered their assistance."[13] 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. Bennett*, the Eighth Circuit counted as a "participant" a person that was deceased at the time of the defendant's appeal, because that person participated in the criminal activity.[14] Additionally, some

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only as an accessory; but 'mere knowledge of a conspiracy' is insufficient to establish that a person was 'criminally responsible.' " (citation and emphasis omitted)).

9 *See e.g.*, *Guzman*, 926 F.3d at 1003 (citing United States v. Starks, 815 F.3d 438, 441 (8th Cir. 2016)); United States v. De La Torre, 940 F.3d 938, 946 (7th Cir. 2019) ("The participant need not have been charged either, as long as 'the participant *could have* been charged.' " (quoting United States v. Pabey, 664 F.3d 1084, 1097 (7th Cir. 2011))).

10 *See* United States v. Walter-Eze, 869 F.3d 891, 914 (9th Cir. 2017) (defendant "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) (per curiam) (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" and collecting cases).

11 USSG §3B1.1, comment. (n.1); *see, e.g.*, United States v. Pliego-Pineda, 129 F.4th 263, 271 (4th Cir.) (district court erred when it considered a federal employee of the Drug Enforcement Administration to be a participant in a drug distribution conspiracy), *cert. denied*, 145 S. Ct. 2805 (2025).

12 *See* United States v. House, 872 F.3d 748, 752 (6th Cir. 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 and emphasis omitted)); United States v. Lora-Andres, 844 F.3d 781, 786 n.3 (8th Cir. 2016) (informants counted as "participants" because they "were extensive participants . . . long before they began working with law enforcement").

13 United States v. Anthony, 280 F.3d 694, 698 (6th Cir. 2002); *see also* United States v. Acevedo-López, 873 F.3d 330, 336–38 (1st Cir. 2017) ("To be considered a participant, it is only necessary that an individual gives knowing aid in some aspect of the criminal activity"; individual 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"); *Starks*, 815 F.3d at 441 ("[I]ndividuals may be participants even if they do not benefit from commission of the offense."); United States v. Vega, 826 F.3d 514, 539 (D.C. Cir. 2016) (per curiam) ("[A] party who gives *knowing aid in some part* of the criminal enterprise is a 'criminally responsible party.' " (quoting United States v. Bapack, 129 F.3d 1320, 1325 (D.C. Cir. 1997)); 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.' ").

14 765 F.3d 887, 898 (8th Cir. 2014) ("[The co-defendant] participated in the scheme, and his subsequent death simply does not alter that fact. Nor does [his] death affect whether [the defendant's] fraudulent scheme was 'otherwise extensive' when perpetrated . . . . ").

courts have concluded that a person who has received a grant of immunity is still properly counted as a "participant."[15]

Conversely, an unwitting person is not a "participant," even if the person assisted the criminal enterprise, because he or she ordinarily bears no criminal responsibility.[16] For example, in *United States v. Anthony*, the Sixth Circuit 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.[17] Likewise, a person's mere knowledge that criminal activity is afoot does not ordinarily make that person a "participant," absent willful participation in the offense.[18]

In the drug-conspiracy context, courts have held that end users of controlled substances, absent more, are not "participants."[19] 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.[20] Courts also have held that persons who receive stolen property, but without knowledge that it was stolen or

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15 *See* 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 [g]uideline, 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); United States v. Jackson, 95 F.3d 500, 511 (7th Cir. 1996))).

16 *See* United States v. Harvey, 532 F.3d 326, 338 (4th Cir. 2008) (" 'Participants' are persons involved in the criminal activity who are criminally responsible, not innocent bystanders used in the furtherance of the illegal activity.").

17 280 F.3d at 698–99; *see also* United States v. Vega, 826 F.3d 514, 539 (D.C. Cir. 2016) (per curiam) ("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*.' " (quoting United States v. McCoy, 242 F.3d 399, 410 (D.C. Cir. 2001))); United States v. Tai, 750 F.3d 309, 318–19 (3d Cir. 2014) (same).

18 *See* United States v. Zuno, 731 F.3d 718, 723 (7th Cir. 2013) (" '[M]ere knowledge of a conspiracy' is insufficient to establish that a person was 'criminally responsible.' " (quoting United States v. Fluker, 698 F.3d 988, 1002 (7th Cir. 2012))).

19 *See* 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.").

20 *See* United States v. Sykes, 854 F.3d 457, 460 (8th Cir. 2017) ("An ongoing supplier relationship . . . is sufficient to support a finding that the supplier was a participant under §3B1.1."); United States v. Mack, 808 F.3d 1074, 1085 (6th Cir. 2015) (affirming finding that individuals were participants in the conspiracy because they went "beyond just simply purchasing drugs" and instead sought to "protect [the defendant] as he operated his organization"); *cf.* United States v. Minter, 80 F.4th 753, 759 (6th Cir. 2023) ("[m]ost of our sister circuits have also held that an arm's length seller-buyer relationship cannot lead to a managerial enhancement under §3B1.1," which requires a finding of "at least some level of managerial control").

without any participation in the theft, are not "participants" supporting application of the aggravating role adjustment.[21]

When determining whether there are "five or more participants" in the criminal activity, the court may consider all participants—not only those who were subordinate to or supervised by the defendant. Indeed, courts have held that a defendant does not need to even know of all other participants.[22]

2. "Otherwise Extensive"

Even if the criminal activity did not involve at least five participants, the defendant nonetheless may be subject to an adjustment pursuant to §3B1.1(a) and (b) if the criminal activity was "otherwise extensive." This inquiry encompasses more than the number of "participants"; rather, "all persons involved during the course of the entire offense are to be considered."[23]

Circuits are split in how they evaluate whether activity was "otherwise extensive." Several circuits follow a test articulated by the Second Circuit in *United States v. Carrozzella*,[24] which determined that the inquiry regarding "otherwise extensive" is based "*primarily* on the number of people involved, criminally and noncriminally, rather than on other possible indices of the extensiveness of the activity."[25] In the court's view, the

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21 *See* 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.").

22 *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.").

23 USSG §3B1.1, comment. (n.3); *see also* United States v. Martinez, 131 F.4th 294, 322 (5th Cir. 2025) ("The unknowing participants, [the clinic's] staff, were essential because without their participation, [the defendant] could not have seen patients and run [the clinic]."); United States v. Kent, 821 F.3d 362, 370 n.8 (2d Cir. 2016) (citing Application 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"); 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," including unknowing participants who contributed to the criminal enterprise. (quoting United States v. Ho, 311 F.3d 589, 611 (5th Cir. 2002))).

24 105 F.3d 796 (2d Cir. 1997), *abrogated in part on other grounds by* United States v. Kennedy, 233 F.3d 157, 160–61 (2d Cir. 2000).

25 *Id.* at 802 (emphasis added) (also noting the background commentary provides §3B1.1 is "based upon the size of a criminal organization . . . and the degree to which the defendant was responsible for committing the offense"); *see also 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 . . . factors other than head counting 'may be properly considered in the "otherwise extensive" determination.' In doing so, however, a district court must ensure that it does not engage in impermissible double counting of offense level adjustments . . . . " (citations omitted)).

"otherwise extensive" language " 'demands a showing that an activity is the *functional equivalent* of an activity involving five or more participants.' "[26] In determining "whether a criminal activity is 'otherwise extensive' as the functional equivalent of one involving five or more knowing participants," 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."[27] 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 a particular crime but are fungible with others generally available to the public," respectively.[28]

At least three other circuits, the Third, Sixth, and District of Columbia Circuits, have adopted the *Carrozzella* test.[29] Although the Fifth Circuit has not adopted the *Carrozzella* test verbatim, it noted that in determining if the offense is "otherwise extensive," the commentary instructs that sentencing courts must "examine [the] number of persons involved in the activity, not the nature of the criminal organization."[30]

Other circuits consider the "totality of the circumstances," looking to all the circumstances of the criminal activity, "including . . . the width, breadth, scope, complexity, and duration of the scheme."[31] The number of persons involved, while not required to be five or more, is also relevant: "[i]n most instances, the greater the number of people

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

[27] *Id*. at 803–04.

[28] *Id.* at 804.

[29] *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' " (quoting United States v. Helbling, 209 F.3d 226, 247–48 (3d Cir. 2000))); *see also* United States v. Myers, 854 F.3d 341, 358 (6th Cir. 2017) ("To determine whether a scheme is 'extensive,' we consider 'whether the combination of knowing and countable non-participants is the functional equivalent of an activity carried out by five criminally responsible participants.' " (citation omitted)); United States v. Wilson, 240 F.3d 39, 47 (D.C. Cir. 2001) (adopting *Carrozzella* approach).

[30] United States v. Ho, 311 F.3d 589, 611 (5th Cir. 2002) ("The [sentencing] court erred by interpreting the phrase 'otherwise extensive' . . . to refer to the nature of the criminal organization, as distinguished from the number of participants and persons involved."); *see also* United States v. Tuma, 738 F.3d 681, 694 (5th Cir. 2013) ("The district court properly focused on the number of people involved in the scheme . . . . ").

[31] United States v. Laboy, 351 F.3d 578, 586 (1st Cir. 2003) (citation omitted); *see also* United States v. Harmelech, 927 F.3d 990, 997–98 (7th Cir. 2019) ("A fraudulent scheme is 'otherwise extensive' if the defendant 'made a substantial portion of his income' from the fraud scheme, the scheme 'continued in operation' for an extended period, or the scheme 'used many people,' including unknowing individuals 'to make profit off the scheme.' " (quoting United States v. Sheikh, 367 F.3d 683, 688–89 (7th Cir. 2004))).

involved in the criminal activity, the more extensive the activity is likely to be."[32] The First, Seventh, Eighth, Ninth and Tenth Circuits employ this approach.[33]

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

To apply the 2-level adjustment in §3B1.1(c), the court must conclude that the defendant was involved in a "criminal activity," and either that the activity did not involve "five or more participants" or that it was not "otherwise extensive."[34] 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 necessarily must find that the "criminal activity" involved at least two participants—the defendant and another person—before applying the 2-level adjustment.[35]

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."[36] 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."[37]

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

33 United States v. Belfrey, 928 F.3d 746, 751–52 (8th Cir. 2019); United States v. Figueroa, 682 F.3d 694, 696 (7th Cir. 2012) (collecting cases); *Laboy*, 351 F.3d at 586; United States v. Yarnell, 129 F.3d 1127, 1139 (10th Cir. 1997); 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)).

34 USSG §3B1.1(c).

35 *See* USSG §3B1.1, comment. (n.2); *see also* United States v. Perez-Gorda, 115 F.4th 653, 657 (5th Cir. 2024) (application of §3B1.1(c) was appropriate because the defendant supervised her husband in the criminally fraudulent activity, where the evidence showed she "researched benefits, exercised control over the couple's finances, attended all of [her husband's] medical appointments, and demanded that neighbors, family, and medical providers contact him only through her"); United States v. Naranjo-Rosario, 871 F.3d 86, 98 (1st Cir. 2017) (court must find the "criminal activity involved at least two, but fewer than five, complicit individuals (the defendant included)" to apply §3B1.1(c) (quoting United States v. Al-Rikabi, 606 F.3d 11, 14 (1st Cir. 2010))); United States v. Tanner, 837 F.3d 596, 603 (6th Cir. 2016) ("The primary question . . . is whether the defendant exerted control over at least one individual within a criminal organization.").

36 USSG §3B1.1(a)–(b).

37 *See* United States v. Raia, 993 F.3d 185, 191 (3d Cir. 2021) (plain error to apply §3B1.1(c) "despite the uncontested fact that the voter bribery scheme involved five or more participants": "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" (quoting United States v. Kirkeby, 11 F.3d 777, 778–79 (8th Cir. 1993))); 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.").

B. Role in the Criminal Activity

Application of §3B1.1 requires the court to determine whether the defendant was an organizer, leader, manager, or supervisor in the criminal activity.[38] "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) . . . ."[39] Thus, 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.[40]

The guidelines do not expressly define these 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. For instance, the First Circuit has expressed that, in deciding whether a defendant is a supervisor, it is insufficient "to show that 'the defendant merely controlled, organized or managed criminal *activities*; rather, he must instead control, organize, or manage criminal *actors*,' " and evidence of such "may be wholly circumstantial."[41]

Courts have observed that "the line between being an 'organizer or leader,' on the one hand, and a 'manager or supervisor,' on the other, is not always clear."[42] Nonetheless, the difference between organizers and leaders, and managers and supervisors, turns on the defendant's degree of responsibility in the criminal activity.[43] For that reason, "those who

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38 USSG §3B1.1(a)–(b).

39 USSG Ch.3, Pt.B, intro. comment. *See generally* U.S. SENT'G COMM'N PRIMER ON RELEVANT CONDUCT (2026); *see also* United States v. Bright, 125 F.4th 97, 103 (4th Cir. 2025) (when determining whether to apply §3B1.1, the district court "should have made the 'particularized findings' required" by §1B1.3 "as to the scope of the jointly undertaken criminal activity, whether the acts and omissions of others were in furtherance of that criminal activity, and whether the acts and omissions were reasonably foreseeable").

40 The determination of the size and scope of the criminal activity also should be made based on all the conduct within the scope of §1B1.3, and not solely on the specific acts and participants in the offense of conviction. For example, the First Circuit has used relevant-conduct principles to affirm the district court's conclusion that the criminal activity involved more than five persons. United States v. Lucena-Rivera, 750 F.3d 43, 50–51 (1st Cir. 2014) ("[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) (quoting USSG §1B1.3(a)(1)(A))).

41 United States v. Fígaro-Benjamín, 100 F.4th 294, 306–07 (1st Cir. 2024) (quoting United States v. McKinney, 5 F.4th 104, 109 (1st Cir. 2021)) (§3B1.1 enhancement was appropriate when defendant in a drug smuggling conspiracy, among other evidence, served as captain of a boat transporting drugs and gave instructions to others).

42 United States v. Williams, 605 F.3d 556, 571 (8th Cir. 2010) (quoting United States v. Delpit, 94 F.3d 1134, 1155 (8th Cir. 1996) (alteration omitted)).

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

are more culpable ought to receive the harsher organizer/leader enhancement, while those with lesser culpability and responsibility receive the lesser enhancement imposed on managers/supervisors . . . . And those with the least relative culpability receive no enhancement at all."[44] Conduct within the scope of §3B1.1 overlaps its classifications, so organizers and leaders also qualify as managers and supervisors.[45]

Additionally, more than one person may qualify as an organizer or leader of a criminal activity.[46] To qualify for an adjustment, the defendant need only have organized or led one other participant in the conspiracy.[47] Titles given to members in the criminal

added)); *see also* United States v. Anderson, 988 F.3d 420, 427–48 (7th Cir. 2021) ("The purpose of the enhancement is to divide participants according to their 'relative culpability . . . in the criminal enterprise.' " (citation omitted)).

Some circuits have differentiated further between organizer and leader. For example, the Ninth Circuit clarified that "with respect to the distinction between an organizer and a leader under §3B1.1(c) . . . the level of control required to be an organizer is only 'the ability and influence necessary to coordinate the activities of others to achieve the desired result.' " United States v. Vinge, 85 F.4th 1285, 1290 (9th Cir. 2023) (quoting United States v. Doe, 778 F.3d 814, 824 (9th Cir. 2015)); *see also* United States v. Hunsaker, 65 F.4th 1223, 1229 (10th Cir. 2023) ("[W]hile control over subordinates is *required* to find that a defendant played a management, supervision, or leadership role in a criminal activity, we conclude that a sentence enhancement under §3B1.1(c) for a defendant who acts as an organizer does not require the presence of underlings in the endeavor." (quoting United States v. Valdez-Arieta, 127 F.3d 1267, 1272 (10th Cir. 1997))).

[44] United States v. Weaver, 716 F.3d 439, 442 (7th Cir. 2013) (citations omitted); *see also* United States v. Lovies, 16 F.4th 493, 506 (7th Cir. 2021) ("Where there is a dispute about whether the role enhancement applies . . . the court should make a 'commonsense judgment about the defendant's relative culpability given his status in the criminal hierarchy.' " (citation omitted)); 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.").

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

[46] USSG §3B1.1, comment. (n.4) ("There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy."). Nearly every circuit has applied this section as written. *See* United States v. Rivera, 51 F.4th 47, 52 (1st Cir. 2022); United States v. Huerta, 371 F.3d 88, 92 (2d Cir. 2004) (per curiam); United States v. Maes, 961 F.3d 366, 378 (5th Cir. 2020); United States v. Sexton, 894 F.3d 787, 796 (6th Cir. 2018); United States v. Jones, 792 F.3d 831, 836 (7th Cir. 2015); United States v. Louper-Morris, 672 F.3d 539, 565 (8th Cir. 2012); United States v. Rivera, 527 F.3d 891, 910 (9th Cir. 2008); United States v. Gehrmann, 966 F.3d 1074, 1085 (10th Cir. 2020); United States v. Vallejo, 297 F.3d 1154, 1169 (11th Cir. 2002); United States v. Bras, 483 F.3d 103, 113–14 (D.C. Cir. 2007); *see also* United States v. Thung Van Huynh, 884 F.3d 160, 170 n.4 (3d Cir. 2018) (noting based on the commentary, two equally culpable individuals can both qualify as a leader or organizer); United States v. Cameron, 573 F.3d 179, 185 (4th Cir. 2009) (noting "it is true that more than one person may qualify as an organizer or leader of a criminal operation" but holding the defendant in that case did not).

[47] USSG §3B1.1, comment. (n.2); *see also* United States v. Si Lu Tian, 339 F.3d 143, 156 (2d Cir. 2003) ("[T]he Sentencing Guidelines only require that the defendant be an organizer or leader of one or more of those participants for the section 3B1.1(a) enhancement to be appropriate."). The same requirement applies for a "manager" or "supervisor." USSG §3B1.1, comment. (n.2); *see also* United States v. Whitworth, 107 F.4th 817, 823–24 (8th Cir. 2024) (district court did not err in finding that the defendant "supervised

activity, such as "kingpin" or "boss," "are not controlling" in distinguishing leaders and organizers from managers and supervisors.[48] Instead, Application Note 4 provides a non-exhaustive list of factors for courts 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.[49]

To qualify as an organizer or leader, the defendant must have exercised a significant degree of control and decision-making authority.[50] For example, in *United States v. Bolden*, 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

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or managed" one other person); United States v. Lewis, 976 F.3d 787, 798 (8th Cir. 2020) ("A 'defendant may be subject to the enhancement even if he managed or supervised only one participant, limited to a single transaction.' " (quoting United States v. Guzman, 946 F.3d 1004, 1008 (8th Cir. 2020))); United States v. Savage, 885 F.3d 212, 229 (4th Cir. 2018) ("[T]he enhancement is justified if the defendant managed or supervised the activities of at least one other person in a scheme that involved five or more participants." (quoting United States v. Bartley, 230 F.3d 667, 673 (4th Cir. 2000))); United States v. Ranjel, 872 F.3d 815, 820 (7th Cir. 2017) ("The enhancement applies if the defendant managed or supervised 'one or more other participants' in criminal activity that *involved* five or more people."); United States v. Craig, 808 F.3d 1249, 1259 (10th Cir. 2015) ("The [g]uideline 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)).

48 USSG §3B1.1, comment. (n.4); *see also* United States v. Horn, 129 F.4th 1275, 1294 (11th Cir. 2025) ("In considering who is a leader or organizer, titles are not controlling; rather, we consider [certain] factors." (quoting USSG §3B1.1 comment. (n.4))).

49 USSG §3B1.1, comment. (n.4). The Third Circuit held that because "the terms 'organizer' and 'leader' are not genuinely ambiguous . . . . th[is] multi-factor test in the commentary is not controlling." United States v. Adair, 38 F.4th 341, 354 (3d Cir. 2022) (citation omitted)).

50 *See* United States v. Hernández, 964 F.3d 95, 102 (1st Cir. 2020) ("To qualify as an 'organizer,' 'the defendant must 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.' " (citations omitted)); United States v. Esteras, 102 F.4th 98, 110–11 (2d. Cir. 2024) (district court erred in applying a §3B1.1(a) enhancement because defendant did not qualify as "organizer or leader" where evidence showed he "was effectively an independent middleman . . . [who] possessed no 'decision making authority' " (quoting USSG §3B1.1, comment. (n.4))); United States v. McGee, 985 F.3d 559, 562 (7th Cir. 2021) ("Typically, this means that 'the defendant "had some real and direct influence" on other participants in the criminal activity.' " (citation omitted)); *Thung Van Huynh*, 884 F.3d at 171 (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 "[t]he record indicate[d] a high level of control and authority" by defendant). *But see* United States v. Gehrmann, 966 F.3d 1074, 1084 (10th Cir. 2020) ("[N]o [hierarchical] control is necessary to qualify as an organizer.").

drugs[,] . . . supplied drugs for distribution[,]. . . retained a large portion of profit for himself[,] . . . [and] played a role in setting up [drug] transactions."[51]

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."[52] The First Circuit has explained that while the authority possessed by the defendant over other actors may sometimes only be minimal, a defendant can be a manager or supervisor even if he was not "at the top of a criminal scheme."[53] However, where the enhancement is based

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[51] 596 F.3d 976, 984 (8th Cir. 2010); *see also* United States v. Campos, 137 F.4th 840, 851 (D.C. Cir. 2025) (application was appropriate where the defendant organized and controlled the distribution and manufacture of a large amount of drugs, including branding the drugs with her alias and building the methamphetamine laboratory); United States v. Espinoza, 885 F.3d 516, 526 (8th Cir. 2018) (affirming the application of §3B1.1(a) because the defendant "would personally confront [sellers] when they fell behind on their drug debt, evidencing management of the conspiracy's financial operations," and "[a] text-message exchange in which a . . . customer asked an associate to find out what [the defendant] would charge for a particular quantity of methamphetamine purchases was evidence of his price-setting authority"); United States v. Crabtree, 878 F.3d 1274, 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); *see also* United States v. Borders, 829 F.3d 558, 570 (8th Cir. 2016) (the district court did not err in applying §3B1.1(a) where the defendant led "scouting parties" to find vehicles to steal, directed others to remove VIN numbers, stole merchandise, and arranged for the stolen materials to be transported, stored, and purchased).

[52] United States v. Chin, 965 F.3d 41, 55 (1st Cir. 2020) (citation omitted); *see also* United States v. Johnson, 64 F.4th 1348, 1352 (D.C. Cir. 2023) ("A manager or supervisor must 'exercise some control over others.' " (citation omitted)); United States v. Lozano, 921 F.3d 942, 948 (10th Cir. 2019) ("The term 'supervisor' is satisfied upon a showing that the defendant exercised any degree of direction or control over someone subordinate to him." (alterations omitted) (quoting United States v. Backas, 901 F.2d 1528, 1530 (10th Cir. 1990)); United States v. Wolf, 860 F.3d 175, 198 (4th Cir. 2017) ("[T]his court has consulted the dictionary definition of 'manager' to derive its meaning under . . . §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).' " (quoting United States v. Slade, 631 F.3d 185, 190 (4th Cir. 2011))); United States v. Mannings, 850 F.3d 404, 409 (8th Cir. 2017) (per curiam) ("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.' " (citations omitted)); United States v. Henry, 813 F.3d 681, 682–83 (7th Cir. 2016) (concluding that "[i]f you recruit a person, tell him what his job is, specify his wage, and equip him with tools of his trade (the gun in this case), you're his manager" and that as such "an employee doesn't cease to be an employee merely because he's on a long leash"); United States v. Rodriguez, 741 F.3d 908, 912 (8th Cir. 2014) (upholding enhancement where the defendant "directed his coconspirator to transport drugs and drug proceeds," and concluding that "[t]he fact that [the defendant] reported to others in the conspiracy does not negate his role in managing and supervising the activities of a coconspirator"); United States v. Hertular, 562 F.3d 433, 448 (2d Cir. 2009) ("A defendant is properly considered as a manager or supervisor . . . if he 'exercised some degree of control over others involved in the commission of the offense or played a significant role in the decision to recruit or to supervise lower-level participants.' " (citation omitted)). *But see* United States v. House, 883 F.3d 720, 725 (7th Cir. 2018) (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").

[53] United States v. Gonclaves, 123 F.4th 580, 586 (1st Cir. 2024).

on whether the defendant directed the activities of a participant, the proof of authority and control over that participant must include proof that the defendant's order was obeyed.[54]

Because the guidelines do not expressly define "manager or supervisor," the Seventh Circuit has explained that its "primary goal is to make a commonsense judgment about the defendant's relative culpability given his status in the criminal hierarchy."[55] Additionally, in *United States v. Reyes-Ramirez*, the Eighth Circuit affirmed the district court's application of the 3-level adjustment in a drug conspiracy case on grounds that the defendant acted as a supervisor or manager by, among other things, being the "key link" between the source and the distributors.[56]

The Commentary to §3B1.1 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."[57] Accordingly, §3B1.1(c) is inclusive and calls for the same 2-level adjustment regardless of the specific aggravating role held by the defendant.[58] Nonetheless,

54 *Id*. at 588 (remanding where there was nothing in the record to establish that the defendant's instruction was obeyed to prove control or authority over a co-conspirator warranting the enhancement).

55 United States v. Craft, 99 F.4th 407, 414 (7th Cir. 2024) (internal quotations omitted) (quoting United States v. House, 888 F.3d 720, 724 (7th Cir. 2018)).

56 916 F.3d 1146, 1147–48 (8th Cir. 2019) (quoting United States v. Pierce, 907 F.2d 56, 57 (8th Cir. 1990)); *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"); United States v. Ranjel, 872 F.3d 815, 820 (7th Cir. 2017) (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"). *But see Johnson,* 64 F.4th at 1352–53 (reversing enhancement where there was insufficient evidence that the defendant controlled other co-defendants and participants); United States v. Collins, 877 F.3d 362, 367–68 (7th Cir. 2017) ("[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.").

57 USSG §3B1.1, comment. (backg'd.).

58 *See*, *e.g.*, United States v. Grushko, 50 F.4th 1, 16–17 (11th Cir. 2022) (evidence supports 2-level enhancement for both defendants who exerted control and influence over a third participant); 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. 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").

the Ninth Circuit has declined to apply the 2-level adjustment unless there is an additional showing that the defendant had "control over others."[59]

III. MITIGATING ROLE: §3B1.2

Section 3B1.2 provides for 2-, 3-, and 4-level decreases to the offense level if the defendant had a 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.[60]

"The 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."[61] A key issue for a mitigating role adjustment is the defendant's relative culpability. As with aggravating role adjustments, that determination is made "on the basis of all conduct within the scope of §1B1.3."[62]

The defendant bears the burden of proving by a preponderance of the evidence that he or she is entitled to a mitigating role adjustment.[63] The First Circuit has explained that a

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59 *See* United States v. Harris, 999 F.3d 1233, 1236–37 (9th Cir. 2021) ("Our precedent is clear that, without 'control over others,' a suggestion is not leadership, facilitation is not leadership, and playing an important role is not leadership" (quoting United States v. Avila, 95 F.3d 887, 892 (9th Cir. 1996))); *see also* United States v. Kabir, 51 F.4th 820, 826–28 (9th Cir. 2022) (affirming application of enhancement and distinguishing between cases in which defendant only facilitated from those in which the defendant organized); United States v. Pimentel-Lopez, 859 F.3d 1134, 1143–44 (9th Cir. 2017) ("[E]ven 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))).

60 USSG §3B1.2.

61 USSG §3B1.2, comment. (n.3(C)); *see also* United States v. Lawson, 128 F.4th 243, 253 (4th Cir. 2025) ("While not dispositive, indispensability [is] a valid and important 'factor to be considered in the broader [§]3B1.2 calculus.' " (citation omitted)); United States v. Walker, 89 F.4th 173, 187 (1st Cir. 2023) ("An evaluation of these factors does not require extensive analysis, . . . but it does require both a judgment about the defendant's own conduct and a comparison to the other participants." (citations omitted)).

62 USSG Ch.3, Pt.B, intro. comment.; *see also* United States v. DA, 132 F.4th 1163, 1174–75 (10th Cir. 2025) (explaining "the Guidelines . . . implicitly establish[] a decision-making order" where the court must "first delimit . . . the 'scope of the jointly undertaken criminal activity' "; next, must "delineate the boundaries of 'relevant conduct' "; and "only then consider the defendant's relative culpability—that is, whether the defendant is substantially less culpable than the average participant").

63 *See, e.g.*, United States v. Wynn, 108 F.4th 73, 80 (2d Cir. 2024) ("Because a mitigating role adjustment under §3B1.2 has the effect of reducing the defendant's otherwise-applicable Guidelines range, it is the defendant who bears the burden of establishing his entitlement to that reduction by a

determination of whether the defendant has met this burden requires a four-part analysis.[64] The court must "identify the universe of participants involved in the relevant criminal activity"; "order each participant along a continuum based on the degree of culpability in the criminal activity"; "identify the average participant across all likely participants in the criminal scheme"; and "compare the defendant's role in the criminal activity to the average participant's role."[65]

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

Application Note 3(A) explains that §3B1.2 operates to provide "a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant *in the criminal activity*."[66] Thus, the relative culpability of the defendant is measured only in comparison to those persons who actually participated in the criminal activity, rather than against other individuals who commit similar crimes.[67] Courts have concluded that a defendant must "prove that he was *less* culpable than his cohorts" and "[m]erely not being more culpable than his cohorts falls short of meeting the standard."[68] However, courts are not required to engage in a

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preponderance of the evidence."); United States v. Sanchez, 989 F.3d 523, 544–45 (7th Cir. 2021); United States v. Nkome, 987 F.3d 1262, 1269 (10th Cir. 2021); United States v. Presendieu, 880 F.3d 1228, 1249 (11th Cir. 2018); United States v. Mathis, 738 F.3d 719, 741 (6th Cir. 2013).

64 United States v. Guía-Sendeme, 134 F.4th 611, 617 (1st Cir. 2025).

65 *Id*. (further noting the final part is a two-part inquiry, where the defendant must demonstrate he is "substantially less culpable than the average participant in the criminal activity" and then must either demonstrate he is "*less culpable than most* other participants in the criminal activity" or "plainly *among the least culpable* of those involved" (citations omitted)).

66 USSG §3B1.2, comment. (n.3(A)) (emphasis added); *see also* United States v. Rainford, 110 F.4th 455, 481 (2d Cir. 2024) ("[T]he relevant inquiry is not whether a conspirator 'played a lesser role than his co-conspirators' but whether a conspirator had a " 'minor' or 'minimal' [role] as compared to the *average participant* in such a crime.' " (citations omitted)).

67 *See* USSG §3B1.2, comment. (n.3(A)); *see also* United States v. Arias-Mercedes, 901 F.3d 1, 6 (1st Cir. 2018) (no "need to compare a defendant's conduct with the conduct of hypothetical participants in similar offenses").

68 United States v. De la Cruz-Gutiérrez, 881 F.3d 221, 226 (1st Cir. 2018); *see also* United States v. Chichande, 113 F.4th 913, 916 (9th Cir. 2024) (explaining the sentencing court must: (1) "identify all participants in the defendant's crime"; (2) "calculate a rough average level of culpability for all the participants, considering the five factors in comment 3(C)"; and (3) "compare the defendant's culpability to that rough average" (citing United States v. Dominguez-Caicedo, 40 F.4th 938, 960 (9th Cir. 2022))); *Nkome*, 987 F.3d at 1277 ("[A] defendant is not entitled to a reduction under [§]3B1.2 simply because he is the least culpable among several participants in a jointly undertaken criminal enterprise." (quoting United States v. Lockhart, 37 F.3d 1451, 1455 (10th Cir. 1994))); United States v. Brown, 929 F.3d 1030, 1041 (8th Cir. 2019) ("[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." (quoting United States v. Bradley, 643 F.3d 1121, 1129 (8th Cir. 2011))); United States v. Gomez-Valle, 828 F.3d 324, 330–31 (5th Cir. 2016) (no "affirmative right to a §3B1.2 reduction to every

"precise, numerical calculation," and instead must only "calculate a rough average level of culpability."[69]

The term "participant" as used in §3B1.2 has the same meaning as "participant" for purposes of §3B1.1.[70] Thus, a defendant may receive a mitigating role adjustment only if the criminal activity involved at least one other "participant." As the Commentary to §3B1.2 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 . . . . "[71] 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.[72]

Application Note 3(B) to §3B1.2 provides that a defendant ordinarily should 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 his actual criminal conduct."[73] Courts also have declined to grant an adjustment in cases in which the defendant's base offense level "does not reflect the conduct of the larger conspiracy," regardless of the offense of conviction.[74]

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actor *but* the criminal mastermind.").

69 *Dominguez-Caicedo*, 40 F.4th at 960.

70 *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."); *see also* United States v. Guía-Sendeme, 134 F.4th 611, 617 (1st Cir. 2025) ("To be considered a participant, there must be sufficient evidence of the person's existence and involvement in the crime[.]").

71 USSG §3B1.2, comment. (n.2).

72 *See supra* note 8 and accompanying text; United States v. Groenendal, 557 F.3d 419, 426–27 (6th Cir. 2009) ("[Section] 3B1.2 does not require that the other 'participants' be charged with the crime . . . . [It] can apply . . . even when only one participant is charged in the offense." (citations omitted)); *see also* United States v. Diaz, 884 F.3d 911, 917 (9th Cir. 2018) (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* United States v. Miller, 283 F.3d 907, 913 (8th Cir. 2002) (conviction for aiding and abetting murder not entitled to role reduction where §2X2.1 "provide[s] that aiders and abetters receive the same offense level as if convicted as a principal"); United States v. Teeter, 257 F.3d 14, 30 (1st Cir. 2001) (defendant convicted of aiding and abetting "must prove her entitlement" to adjustment for minimal or minor role).

73 USSG §3B1.2, comment. (n.3(B)).

74 *See, e.g.*, 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, e.g.*, United States v. Kiekow, 872 F.3d 236, 248 (5th Cir. 2017) (affirming the district court's denial of a minimal role reduction based on circuit precedent holding that "when a sentence is based on activity in which a defendant was actually involved, §3B1.2 does not require a reduction in the

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."[75] The application 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."[76]

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."[77]

C. Fact-Based Determination

Whether the defendant 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."[78] 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:

> (i) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (iv) 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

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base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal." (quoting United States v. Marmolejo, 106 F.3d 1213, 1217 (5th Cir. 1997))); United States v. Durham, 836 F.3d 903, 912 n.8 (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").

[75] USSG §3B1.2, comment. (n.4).

[76] *Id.*

[77] 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." (citations omitted)).

[78] USSG §3B1.2, comment. (n.3(C)).

> in performing those acts; [and] (v) the degree to which the defendant stood to benefit from the criminal activity.[79]

The application note 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.[80]

Case law interpreting §3B1.2 and its commentary provides further guidance for determining whether to apply a mitigating role adjustment. The First Circuit has 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.[81] 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.[82] The Second Circuit weighs the factors in Application Note 3 to §3B1.2 to determine if a defendant is "substantially less culpable" than the average participant in the scheme, though "a reduction 'will not be available simply because the defendant played a lesser role than his co-conspirators.' "[83] The Ninth Circuit has held that district courts must consider the factors enumerated in the guideline and "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."[84] In the Third Circuit,

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[79] *Id.*

[80] *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. *Id.*

[81] United States v. Espinal-Almeida, 699 F.3d 588, 619 (1st Cir. 2012) (defendant "must be a plainly peripheral player").

[82] *See* United States v. Earnest, 132 F.4th 905, 917 (5th Cir. 2025) (court should not apply the adjustment "simply because a defendant does less than the other participants"; instead the defendant "must do enough less so that he at best was peripheral to the advancement of the illicit activity" (citation omitted)); 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* United States v. Castro, 843 F.3d 608, 613–14 (5th Cir. 2016) ("[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 also has held that district courts may not treat a "defendant's 'integral role' " as a "*per se* bar to mitigating-role adjustment" and "need not weigh each §3B1.2 factor on the record." United States v. Bello-Sanchez, 872 F.3d 260, 264–66 (5th Cir. 2017) (citations omitted).

[83] United States v. Solis, 18 F.4th 395, 402 (2d Cir. 2021) (quoting United States v. Carpenter, 252 F.3d 230, 235 (2d Cir. 2001)); *see also* United States v. Wynn, 108 F.4th 73, 82, 84–85 (2d Cir. 2024) (weighing each factor set forth in Application Note 3(C) to §3B1.2 to consider whether the defendant was "substantially less culpable than the average participant" in the offense).

[84] United States v. Diaz, 884 F.3d 911, 916 (9th Cir. 2018); *see also* United States v. Klensch, 87 F.4th 1159, 1164 (9th Cir. 2023) (outlining three-step process for determining if a defendant is substantially less culpable than the average participant: identify all participating individuals, "calculate a rough average level of culpability for these individuals, taking into consideration the five factors in comment 3(C)," and

courts are instructed to consider, among other factors, "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."[85] The Eleventh Circuit has instructed 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 relevant conduct,' "[86] as well as the "totality of circumstances" and the factors laid out in Application Note 3(C).[87]

D. Drug Couriers and Mules

In 2025, the Commission added a special instruction in §2D1.1(e)(2) to govern the application of §3B1.2 in cases sentenced under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).[88] Under this special instruction, a court should first determine whether an adjustment under §3B1.2 applies by that provision's own terms.[89] The special instruction then directs that "[i]n addition to the circumstances identified in

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"compare the defendant's culpability to that average" (citation omitted)); United States v. Rodriguez, 44 F.4th 1229, 1234 (9th Cir. 2022) ("We recently clarified that the mitigating-role commentary's reference to the 'average participant' refers to 'the mathematical average,' and that to calculate that average " '*all* likely participants in the criminal scheme" must be included.' " (citation omitted)); *see also* United States v. Campuzano-Benitez, 910 F.3d 982, 989 (7th Cir. 2018) ("The court should weigh these [§3B1.2] factors to determine if the defendant seeking the reduction is 'substantially less culpable than the average participant in the criminal activity' " but courts need not spell out their analyses of each factor on the record. (quoting USSG §3B1.2, comment. (n.3(A))).

[85] United States v. Self, 681 F.3d 190, 201 (3d Cir. 2012) (quoting United States v. Headley, 923 F.3d 1079, 1084 (3d Cir. 1991)); *see also* United States v. Rodriguez, 342 F.3d 296, 299, 301 (3d Cir. 2003) (noting that in *Headley*, the court "applied a series of factors to facilitate the minor participant analysis" and instructing "the [c]ourt is not limited to the three *Headley* factors if it can come up with other relevant considerations"); United States v. Brown, 250 F.3d 811, 819 (3d Cir. 2001) ("In addition to the Guidelines, our case law requires that we consider a number of other factors for determining whether a defendant is entitled to a decrease for being a minimal or minor participant in a conspiracy.").

[86] United States v. Presendieu, 880 F.3d 1228, 1249 (11th Cir. 2018) (quoting 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" (citations omitted)).

[87] *See Presendieu*, 880 F.3d at 1250; United States v. Cruickshank, 837 F.3d 1182, 1194–95 (11th Cir. 2016) (remanding when sentencing court based denial solely on drug quantity at issue).

[88] USSG App. C, amend. 833 (effective Nov. 1, 2025). At least one court has held that this amendment constitutes a substantive, rather than clarifying, change. *See* United States v. Martinez, 172 F.4th 1306, 1316 (11th Cir. 2026) (noting the amendment (1) "directly alters the text of the Guidelines rather than merely adding commentary"; (2) "expands the circumstances in which an adjustment under §3B1.2 is warranted in §2D1.1 cases"; (3) was not selected for retroactive application; and (4) abrogates circuit precedent by "mak[ing] the involvement of other participants irrelevant to whether a defendant can receive a role decrease").

[89] USSG §2D1.1(e)(2)(A).

§3B1.2," an adjustment is "generally warranted if the defendant's primary function in the offense was performing a low-level trafficking function."[90] The provision further explains:

> (i) An adjustment under §3B1.2(a) is generally warranted if the defendant's primary function in the offense was plainly among the lowest level of drug trafficking functions, such as serving as a courier, running errands, sending or receiving phone calls or messages, or acting as a lookout; or
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> (ii) an adjustment under §3B1.2(b) is generally warranted if the defendant's primary function in the offense was performing another low-level trafficking function, such as distributing controlled substances in user-level quantities for little or no monetary compensation or with a primary motivation other than profit (*e.g.*, the defendant was otherwise unlikely to commit such an offense and was motivated by an intimate or familial relationship, or by threats or fear to commit the offense).[91]

For the purposes of this subsection, the provisions of §3B1.2 apply in determining whether a mitigating role adjustment is warranted, "except that the adjustment shall apply regardless of whether the offense involved other participants in addition to the defendant, and regardless of whether the defendant was substantially less culpable than the average participant in the criminal activity."[92] "The extent of the adjustment shall be based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case."[93] The special instruction further directs that the mitigating role provisions at §2D1.1(a)(5) and 2-level reduction at §2D1.1(b)(17) "apply regardless of whether the defendant receives the required adjustment from §3B1.2 . . . by direct application of §3B1.2 or by use of the special instruction in subsection (e)(2)(B)."[94]

Prior to the promulgation of this amendment, a substantial body of case law developed concerning the application of §3B1.2 to defendants who were couriers and mules in drug trafficking organizations. Courts had uniformly rejected the argument that a defendant is automatically entitled to a mitigating role adjustment based solely on their status as a courier or mule.[95] However, couriers and mules could receive adjustments

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90 USSG §2D1.1(e)(2)(B).

91 *Id.*

92 *Id.*

93 *Id.*

94 USSG §2D1.1(e)(2)(C).

95 *See, e.g.*, United States v. Ruiz, 999 F.3d 742, 750 (1st Cir. 2021) ("[T]o the extent that [the defendant] implies drug couriers should automatically receive a mitigating role reduction, we have previously rejected this argument and do so again here."); United States v. Sanchez, 989 F.3d 523, 544 (7th Cir. 2021) (a defendant's "role as a courier does not automatically entitle him to a minor role reduction"); United States v. Nkome, 987 F.3d 1262, 1277 (10th Cir. 2021) ("[W]e have 'consistently' held that courier or mule status does not invariably qualify a defendant for a mitigating-role adjustment." (citation omitted)); United

under §3B1.2 based on the facts of their cases. For example, the Eighth Circuit held that a defendant acting as a courier for a larger drug distribution network could receive an adjustment under §3B1.2, even if convicted of the "sole participant offense" of possession with intent to distribute, where the defendant was able to show the conduct " 'for which [he] would otherwise be [held] accountable involved more than one participant,' " and "that his 'culpability for such conduct was relatively minor compared to that of the other participant or participants.' "[96]

Courts routinely explained that 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 depended on the facts of the specific case at hand.[97] Courts tended to 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

States v. Bello-Sanchez, 872 F.3d 260, 264 (5th Cir. 2017) ("[T]he mere fact that [the defendant] was but a courier is not dispositive."); United States v. Rowe, 878 F.3d 623, 630 (8th Cir. 2017) ("[T]he Eighth Circuit has never found someone's role as a courier in and of itself sufficient to warrant a mitigating role reduction." (alteration in original) (citations omitted)); *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.").

[96] United States v. McWaters, 139 F.4th 727, 729 (8th Cir. 2025) (per curiam) (quoting United States v. Snoddy, 139 F.3d 1224, 1231 (8th Cir. 1998)).

[97] *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."); *see also* United States v. Klensch, 87 F.4th at 1164 (reversing a "district court's singular and cursory explanation for not granting a minor-role reduction" that seemingly relied "on courier conduct as dispositive"); United States v. Cartagena, 856 F.3d 1193, 1197 (8th Cir. 2017) (affirming district court's denial of adjustment to a courier responsible for 3,989 grams of heroin who was "active, necessary and well-compensated" (quoting United States v. Adamson, 608 F.3d 1049, 1054 (8th Cir. 2010))); United States v. Monzo, 852 F.3d 1343, 1346 (11th Cir. 2017) (listing relevant facts 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' " (quoting *De Varon*, 175 F.3d at 945); 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 [to §3B1.2] 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."); United States v. Orlando, 819 F.3d 1016, 1025 (7th Cir. 2016) (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 [others]"); United States v. Meléndez-Rivera, 782 F.3d 26, 28–29 (1st Cir. 2015) (noting generally that determination of role is "invariably fact-specific" and therefore "battles over a defendant's role in the offense 'will almost always be won or lost in the district court' " (citation omitted)).

drugs,[98] acted as a courier or mule on multiple occasions,[99] had a relationship with the organization's leadership,[100] or was well-compensated for transporting the drugs.[101]

[98] *See, e.g.*, United States v. Pérez, 819 F.3d 541, 546 (1st Cir. 2016) ("When two persons undertake to transport by themselves a large quantity of drugs in a long and hazardous voyage at sea, it is not clear error for a sentencing court to . . . refuse to grant any mitigating role adjustment."); United States v. Sandoval-Velazco, 736 F.3d 1104, 1109 (7th Cir. 2013) (a court cannot deny the reduction solely on drug quantity, but the quantity can "give effect to a defendant's role in connection with those drugs"); 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"). *But see* United States v. Cruickshank, 837 F.3d 1182, 1194–95 (11th Cir. 2016) (remanding for resentencing because court improperly suggested that quantity of cocaine transported on vessel was "so large that no participant in the scheme could ever have been eligible" for such reduction).

[99] *See* 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"); Ponce v. United States, 311 F.3d 911, 913–14 (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").

[100] *See Nkome*, 987 F.3d at 1282 (affirming the district court's denial of a mitigating-role adjustment based in part on the fact that the defendant had a child with a higher-up member of the conspiracy, supporting "an inference that she would have shared a reasonable measure of his knowledge of the conspiracy's scope and structure"); 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," when 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.").

[101] *See* United States v. Diaz, 884 F.3d 911, 918 (9th Cir. 2018) (remanding sentence of drug courier because the district court "ignored" the fact that the defendant's "compensation was relatively modest and fixed" and because of the absence of "evidence that [he] had a proprietary interest in the outcome of the operation or otherwise stood to benefit more than minimally"); United States v. Gómez-Encarnación, 885 F.3d 52, 57 (1st Cir. 2018) ("[T]he sum of the money given to [a codefendant] and found at [the defendant's] residence[ ]is enough to suggest that [the defendant] was well-trusted by the conspirators with responsibility not easily granted to a minor player . . . ."); *Cartagena*, 856 F.3d at 1197 (affirming denial of adjustment where the defendant-courier was "active, necessary, and well-compensated").